

McKENNAN, C. J. The law of jettison and general average is so accurately and concisely stated, in the opinion of the learned judge of the district court, that it need not be restated here, and its decisive applicability to the present case in support of the libel requires no additional argument to demonstrate.

On a voyage of the *Margarethe Blanca* from Pillau to Philadelphia a violent storm occurred, by which the vessel's jib-boom and foremast head were snapped, and her maintop-gallant mast was carried away. All the spars, with their sails and yards, fell over the side of the vessel, to leeward, in the water, and were there held together by their rigging, and to the vessel by the running and standing rigging. The spars pounded heavily against the ship in the sea-way, and the jib-boom chafed and plunged into and against her bows. The vessel and her cargo were thus in imminent danger of shipwreck; and to avert it, and save the ship and cargo, the master cut away the disabled spars, sails, and rigging, and they were cast adrift and lost.

There was, then, the co-existence of the essential elements of a good claim to general average—imminent peril, involving alike the vessel, cargo, and crew; and a voluntary jettison of part of the spars, sails, and rigging, to avoid this peril. But it is earnestly urged that the jettisoned material was “wreck,” and hence was not voluntarily sacrificed, and is not a legitimate subject of compensation by general average. In the sense of displacement, and hence of present unadaptedness to a serviceable use, it is properly so described. But it was not useless because it was irrecoverably lost. It remained attached to the vessel by rigging, which was new, strong, and unbroken. If the storm had abated it could certainly have been preserved. If the storm continued and the vessel survived, the weight of the proof is that the jettisoned spars, sails, and rigging would probably have been saved also. But the storm had rendered it, for the time being, useless, and it was a cause of additional and increasing peril to the vessel and cargo. With a probability of its eventual salvage in common with the ship, to avoid the danger impending over both it was cut away and sent adrift. Under these circumstances the property was not valueless; and although its subsequent loss may have been inevitable, this did not divest the casting away of it of its voluntary character.

As was said by Mr. Justice Grier in *Barnard v. Adams* 10 How. 305:

"And when it is said of the *factus* that it is sacrificed for the benefit of the whole, it means no more than that it is selected to undergo the peril in place of the whole, and for the benefit of the whole. It is made (if we may use another theological phrase) the 'scapegoat' for the remainder of the joint property exposed to common destruction. The *factus* is said to be sacrificed, not because its chance of escape was separate, but because of its selection to suffer, be it more or less, instead of the whole, whose chances of safety, as a whole, had become desperate. The imminent destruction of the whole has been evaded as a whole, and part saved by transferring the whole peril to another part. * * * The loss or damage arising from its assuming the peril that the ship may escape, may truly be said to be the real 'sacrifice,' in the popular use of the phrase. Its value is not measured by its hopes of safety, for, by the hypothesis, it had none; but its right to contribution is founded on its voluntary assumption to run all the risk, or bear the brunt, that the remainder may be saved from the common peril."

Participating, then, with the ship and cargo in a peril which seemed to render the loss of all inevitable, the disabled rigging was cast away to save the remainder, and was thus "sacrificed" in the proper sense of a lawful jettison, and its loss must be compensated by general average. The decree of the district court is therefore affirmed, and a decree will be entered for the sum claimed in the libel, with interest and costs.

See *The Margarethe Blanca*, 12 FED. REP. 728.

THE ROMAN.*

(Circuit Court, E. D. Pennsylvania. October 27, 1882.)

1. ADMIRALTY—COLLISION—FAILURE TO SHOW TORCH—CONCURRENT NEGLIGENCE—BURDEN OF PROOF.

Where a sailing vessel fails to show the prescribed torch upon the approach of a steamer, and a collision occurs which presumably would have been avoided had the torch been shown, the burden of proving concurrent negligence on the part of the steamer is on the sailing vessel, and such concurrent negligence will not be held upon uncertain proof or doubtful conclusions.

2. SAME.

Where the evidence is conflicting as to the exhibit of a light, and if the witnesses for the sailing vessel were believed the course of the steamer could only be accounted for on the hypothesis of criminal negligence, such a conclusion will not be adopted.

3. SAME—EVIDENCE OF STATEMENTS OF CREW.

No weight is to be attached to evidence that a statement was made by one of the steamer's crew that he saw the light in time to have avoided the collision.
The Roman, 12 FED. REP. 219, reversed.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

Appeal from a decree of the district court. The facts and the opinion of the district court are fully reported in 12 FED. REP. 219.

Henry G. Ward and *Morton P. Henry* for appellants.

John A. Toomey and *Henry R. Edmunds* for appellee.

McKENNAN, C. J. In the district court the schooner was adjudged to be in fault in omitting to exhibit the light required by the rules of navigation, and that adjudication is but faintly, if at all, contested here. Half damages were decreed against the steamer, on the ground that a globe light was swung from the stern of the schooner towards the steamer, which the latter ought to have seen, and thus have avoided the collision.

The side regulation lights on the schooner were confessedly invisible to the steamer, and the only warning she could have of the proximity of the schooner was the swinging of the globe light. That such a light was exhibited we regard as sufficiently proved, but whether in time to enable the steamer to adapt her movements to the emergency, is matter of very serious doubt. The schooner's witnesses, who were on her deck, testify that it was seasonably exhibited; while the captain, mate, wheelsman, and lookout on the steamer, who were on deck and affirm that they were observant, deny that they saw any light. It was the especial duty of the lookout to exercise constant vigilance, and it is not an unreasonable presumption that he was not unfaithful to his obligation. If the steamer was approaching the schooner dead astern, and the globe light was not shown until just before the steamer's helm was put a-port, the strong probability is that none of the persons on her deck could see the light over her bow. If it was exhibited eight or ten minutes before the collision, and as the schooner's witnesses testify, so that it must be inferred that the steamer saw it, her conduct can only be accounted for on the hypothesis of criminal recklessness or negligence, because a slight and perfectly practicable deflection from her course would have carried her safely astern of the schooner. This conclusion ought not to be adopted except under the pressure of preponderating proof; and especially as the motive of pecuniary interest, and of the safety of the vessel and of those on board of her, bears strongly against it.

In this connection we have not attached any weight to the testimony touching a declaration or statement by some one of the steamer's crew that he saw the globe light in time to avoid the collision, because we regard it as, at least, of questionable competency, (*The Seaton*, 2 W. Rob. 391; *The Empire State*, 1 Ben. 64; *Railroad Co. v. Brooks*, 57 Pa. St. 339; *Packet Co. v. Clough*, 20 Wall 528,) and