

THE JOHANNE AUGUSTE.

THE FONTENAYE.

(District Court, S. D. New York. July 23, 1884.)

COLLISION—SAILING VESSELS—NEGLIGENCE OF LOOKOUT—OBSCURATION OF LIGHTS—CHANGE OF COURSE IN KEEPING FULL AND BY.

Where a collision occurred in a foggy or hazy night at sea, between the bark F. going east and sailing free, and the bark J. A. coming west, close-hauled, and sailing full and by, and their courses were nearly opposite, and they collided nearly end on, the F. having seen the other's red light when about one-third of a mile distant, and at once ported, and then saw both lights, and afterwards the green light only, when the J. A. was two or three lengths off; and the J. A. saw no light at all on the F. until about the moment of collision, when the green light was seen: *held*, that the change in the appearance of the J. A.'s lights was caused by her own change of course in following the variations of the wind; that the F.'s green light must have been in view when one-third of a mile off, and failure to see it must be held proof of inattention and neglect of the lookout, his testimony not being had; that if the F.'s green light had been seen, as it ought to have been, the J. A. would have been bound to keep her course strictly, instead of following round with the wind, and hence her change of course was a fault contributing to the collision. *Held, also*, that the red light of the F. ought to have been seen long before the collision, and being eagerly looked for and not visible, and being placed aft near the taffrail, where it was liable to be obscured by the sails, or by the swell of the ship forward, or other obstructions, it must be deemed to have been either obscured or improperly screened, and for this the F. was also held in fault, and the damages were divided.

In Admiralty.

William H. Field, for Munro and the Fontenaye.

Jas. K. Hill, Wing & Shoudy, for Bischoff and the J. Auguste.

Brown, J. The cross-litigations in the above suits were filed to recover the damages respectively sustained by the owners of the barks Fontenaye and Johanne Auguste, through a collision which took place between the barks in the Atlantic ocean, off Nantucket shoals, at about 4 A. M. of September 6, 1881. The Fontenaye claims damages to the amount of \$16,000; and the Johanne Auguste, to the amount of \$10,000. Each alleges that the collision occurred by the fault of the other. The stem and bow of the Fontenaye were carried away in the direction from port to starboard. The Johanne Auguste was struck and damaged in the starboard bow only. These facts are of importance in the conflict of evidence on other points.

The Fontenaye was an iron bark, 180 feet long, 28 feet beam, and of 635 tons register. She left New York early in the morning of September 5, 1881, loaded with a cargo of wheat, and bound for London. During the night following the weather was overcast, dark, and hazy. The witnesses from the Fontenaye say there was some fog, but not enough to require the use of the horn. The other bark's witnesses say that it was dark, but with no fog. The sea was moderate; the wind light, and variable from S. W. to S. S. W. The Fontenaye was

on a course S. E. by S. by the ship's compass; but the deviation on this iron ship, together with the variation, amounted to four points; and her true course is stated to have been E. by S. She was, therefore, sailing free, with the wind two or three points aft of abeam, and was making about six knots per hour. Her colored lights were abaft the mizzen rigging, about six or eight feet only forward of the stern, and were sustained by braces about a foot above the poop rail, and a foot outside of it. The account of the collision given by her witnesses is, in substance, that the lookout, Armstrong, first saw the red light of the *Johanne Auguste* about half a point off his starboard bow, which he immediately reported to the second mate, who was then in charge of the navigation; that the second mate was then standing on the starboard side of the poop, and at the same time saw the red light against the fore rigging, or about half a point on his starboard bow, estimated to be half a mile distant; that he immediately ordered the helm to port, which order was obeyed, and the vessel commenced to luff to the southward; that after giving the order to port he walked back, looked at the compass, looked again at the red light, and saw it bearing a little more forward than before, and nearly right ahead; that he then walked over to the port side, looked at the compass again, and saw the ship coming round to the southward of her course a point or more, then walked from the port quarter, and saw the green light only, a little on the port bow, only about two lengths distant; and that the collision happened a few moments afterwards. The lookout testified that, shortly after reporting the red light, he saw the green and red lights nearly ahead, but a little off the port bow, less than a quarter of a mile distant; that afterwards he saw the green light only, about a point off his port bow, when she was very close; that he then thought there would be a collision, called the watch below, and ran aft. The captain came from below only at the moment of collision. Going immediately forward, he found the starboard bow of the *Johanne Auguste* entangled with his own head-gear on the starboard side, and the stern of the *Johanne Auguste* pointing directly ahead of him. His bowsprit and jib-boom were knocked away and turned over upon the forecastle, and the whole of the head completely knocked off, and the forecastle deck smashed in about 15 feet abaft of the knight-heads, the head-stays carried away, and some of the back-stays, foretop-gallant mast, royal yard, and head-sails carried away. It was about half an hour before the vessels cleared. He afterwards bore for Boston for repairs. On the way he was boarded by a pilot, who testifies that he saw the colored lights of the *Fontenaye* seven miles off.

The *Johanne Auguste* was a wooden-built bark, 200 feet long, 32 feet beam, and of 918 tons register, bound from Bremen to Philadelphia, loaded with a cargo of general merchandise. Her witnesses testify that the sea was smooth, the wind variable from S. W. to S. W. by S., and the night very dark. Most of them say it was hazy, and all

of them say there was no fog; that the first officer took charge of the navigation at 4 o'clock, a few minutes before the collision, when the captain went below; that the ship was upon her port tack, sailing close-hauled, and by the wind, which was shifting, so that her course varied from about W. $\frac{1}{2}$ N. to W. by N. $\frac{1}{2}$ N., (magnetic,) and making about five knots an hour; that her colored lights were forward, about three feet above the rail of the top-gallant fore-castle. The testimony of the lookout was not obtained, but it is admitted that no efforts were spared to procure him; and the same admission was also made in regard to the absence of the man at the wheel of the Fontenaye.

The first officer of the Johanne Auguste testifies that his attention was first called to the Fontenaye by his lookout, who reported, "Ship right ahead," to which he answered, "All right;" that he was then standing on the port side of the poop-deck, between the mizzen-mast and the skylight; that he walked a few feet forward, and heard the lookout sing out again, but did not hear distinctly what he said, and that he replied, "All right," went to the pilot-house, looked under the sail, and could see nothing; that he then ran to the cabin, got a night-glass, and ran forward as fast as he could, and, when going up the steps to the fore-castle, he asked the lookout, Anderson, if he could see any light, to which he said, "No;" that he then went to the capstan, where Anderson pointed out the vessel, which he could see, but that no light was visible; that with the use of the glass he could see nothing more; that the ship was then seen about three-quarters of a point off his starboard bow; that he supposed from seeing no lights that he was following the other vessel; that he watched her about half a minute, and, seeing that he was gaining upon her, ordered his helm hard a-port, and ordered one of his men to go aft and repeat the order; that after standing a minute or a minute and a half by the capstan, he suddenly saw the green light almost ahead, about a quarter of a point off his starboard bow, when he immediately gave the order hard a-starboard, that another man observed and spoke of the green light at the same time, and that the collision took place some 10 or 15 seconds afterwards, the jib-boom of the Fontenaye ranging from the starboard bow; that no red light on the Fontenaye was seen; that they were entangled about 25 minutes, having met nearly end on; that the Johanne Auguste was struck upon her starboard bow, a few feet only from the stem; and that at the time of collision her sails were full, and that she was heading W. by N. The variation at the place of collision was three-fourths of a point west. The man at the wheel testified that the wind was S. W. by S., but variable; that his orders were to sail by the wind, and that he kept the vessel heading about W. $\frac{1}{2}$ N., by compass; that the sails were full, sometimes a little shaky; that he heard the hail from the lookout, and saw the mate run forward, as he testified; that he was soon after ordered to port the helm; that he put the helm hard a-port, looked at the compass, and saw that he was then heading W. by N.;

that right away he had the order, "hard a-starboard," which he obeyed; and that as soon as this last order could be obeyed the collision came,—a very hard blow; that he again looked at the compass, and that the vessel was then heading W. by N., with the sails full; that he thought it was from a minute and a half to two minutes between the orders hard a-port and hard a-starboard; that the vessel had not altered her course under the starboard helm, as the collision took place immediately; and that just after the *Fontenaye* struck she lay with her bows on his starboard, and the stern on his port side. These statements of the wheelsman as to compass courses cannot be accepted as strictly accurate, since they allow nothing for the variations of the wind, which he was ordered to follow, and nothing for any change, even under his port helm, which must have canted his vessel at least somewhat to the northward; and he makes his course W. by N. at the moment of collision as well as when he ported, though the intervening starboard helm made no change. Such variations must be allowed from the courses which he states as the other proofs require.

In other respects the two accounts, in their general features, are not so irreconcilable as they at first appear. Each, with the exception above stated, is consistent with itself, and agrees so perfectly with the orders which would naturally be given, upon the facts as testified to, and which unquestionably were given at the time for the navigation of each vessel, that both must be accepted as correct, so far as it is possible to harmonize them, in the absence of anything to throw discredit upon either. With some modifications of the mere estimates of the times and distances stated, and some additional slight changes, the two accounts will be found to harmonize, and to confirm each other in all their essential features. At the same time they disclose faults in each vessel.

Counsel for the *Johanne Auguste* contends that her green light, and not her red light, was first seen by those on the *Fontenaye*, and that the two witnesses who testify to seeing the red light either misstate the fact or mistook the light. But it is incredible that the mate of the *Fontenaye*, if he really saw the green light, should have at once ordered his helm hard a-port, as he certainly did, so as to make directly for an obvious collision. Seeing the red light, as he and the lookout testify they did, porting was the natural and obvious course. Neither can any mistake of the green light for the red be considered as having the slightest probability in this case; for the successive changes which were seen—first the red light, then both lights, and then the green light alone—forbid any such hypothesis. These changes of the *Johanne Auguste*'s lights in the order stated, I regard, therefore, as fixed facts. They could not have been produced by the *Fontenaye*'s change of course, for she was veering to the southward, under her hard a-port wheel; and any change thereby produced in the appearance of the other's lights, if any, would have been a change

in the opposite order of succession. The change of lights was therefore produced by the *Johanne Auguste's* change of course to the southward. There is nothing in the testimony of her witnesses which renders such a change improbable. They all agree that she was sailing close-hauled *by the wind*, and that the wind was variable. The captain states her course to have been from W. $\frac{1}{2}$ N. to W. by N. $\frac{1}{2}$ N., (magnetic,) or, allowing three-fourths of a point for variation, from W. $\frac{1}{4}$ S. to W. $\frac{3}{4}$ N., following the variations of the wind. A change of one point by the *Johanne Auguste*, in following the wind to the southward under a starboard wheel, from the time her red light was first seen, will fully account for the successive changes in her lights, as seen on the *Fontenaye*; and I have no doubt that change was made, and that it caused the change of lights as testified to. The wheelsman of the *Johanne Auguste* denies any change of course from the time he took the helm up to the hard a-port wheel; but he agrees with all the other witnesses that he was sailing by the wind, and that the wind was variable. His testimony cannot be understood to mean that he did not make such changes as would keep her full and by. In that connection that would not be called a change of course. His course was full and by. But if he means that no change at all, even to keep her full, was made during that time, then I cannot credit his statement; both because it is improbable in itself, and because it is overborne by the certainty that the *Johanne Auguste* did change her heading enough to exhibit the changes in her lights, as before stated. A change of about one point was probably made between the time when the red light was seen and when the *Fontenaye* was seen looming up so near them, when the order was given to port the helm. At that time the wheelsman says he looked at the compass, and it was W. by N., *i. e.*, W. $\frac{1}{4}$ N., true. This was probably about the time when her green light was seen by the *Fontenaye*, when only two or three lengths distant. Both the statement of the libel and of the answer of the *Johanne Auguste*, and the testimony of the mate, show that the *Fontenaye* was then very near; she "appeared high up in the water," and the few things done hurriedly by the captain, after the order to hard a-port, show that the time before the collision was undoubtedly less than a minute. The black mass of the *Fontenaye*, moreover, could not have become visible till some considerable time after the red light of the *Johanne Auguste* was seen, and it was during this interval that the change of course, in hauling, perhaps a point, to southward, was probably made. If this was a change of one point to W. $\frac{1}{4}$ N., that would make her previous heading, when the red light was seen, W. by N. $\frac{1}{4}$ N., or only half a point further north than the captain's statement of the variation. Whether this change of course was or was not a fault, depends upon whether the *Johanne Auguste* had notice of the *Fontenaye's* approach. If she had seen, or ought to have seen, the *Fontenaye's* lights, or either of them, then, being close-hauled, she was bound by the rules

to keep her course, and not to change, even to keep close to the wind. The testimony on both sides, however, leaves no possible doubt that the Johanne Auguste, when her red light was first seen, was to windward of the Fontenaye's course at that time, whatever that exact course was. It is on this point that I must find the facts essentially different from what the counsel of the Johanne Auguste claims. Not only do the Fontenaye's witnesses say that the red light was seen a little on their starboard bow, but the place of collision was only reached by the Fontenaye under a hard a-port wheel, which changed her course nearly two points, and hence carried her a distance squarely to windward, equal to about one-fifth of the curve traversed; and the witnesses on the Johanne Auguste also testify that the Fontenaye, when first seen, was about a point on their starboard bow, *i. e.*, to leeward; and, finally, the direction of the colliding blow shows the same thing. It is manifest, therefore, that the Fontenaye's green light was exposed to the view of the Johanne Auguste at the time the latter's red light was seen, and so remained until shut in by her change of course under her hard a-port wheel, in her endeavor to get out of the way. The green light was burning; it was a brilliant light; there were no sails on the starboard side to obscure it; and that it was not obscured, nor so placed as not to show on her starboard side, is proved by the fact that it was seen afterwards, just before the collision, and apparently a little sooner than it ought to have been seen, if it was in its exactly proper position. There seems to me but one possible explanation of the failure of the lookout of the Johanne Auguste to see this green light; and that is, inattention and neglect of his duty during the few moments when this light was certainly in view. The reasons for not producing the lookout as a witness, though satisfactory, do not make up for the want of his testimony to exculpate him, if possible, from what must appear to have been clear neglect in not observing the Fontenaye's green light. *The Star of Scotia*, 2 FED. REP. 578. Had it been seen and reported as it ought to have been, the Johanne Auguste would have been bound to keep on her course as it then was, and she would doubtless have done so, instead of following around to the southward with the wind; and the collision would have been thereby avoided. Her counsel charges inattention on the part of the lookout of the Fontenaye in not seeing the lights sooner. But if the weather was not so thick as to prevent the red light's being seen any sooner than it was seen by the lookout of the Fontenaye, then, since the Johanne Auguste must have been to windward of the Fontenaye's course for at least some little time previous, the remissness of the lookout of the Johanne Auguste would, in that case, be only the more flagrant, in not seeing the green light of the Fontenaye, which would have been all the longer exposed to view. The Johanne Auguste must be judged according to what she ought to have seen. Her change of course, after the Fontenaye's green light ought to have been observed, must therefore be adjudged

a fault contributing to the collision, for which she must be held liable.

2. There is no less doubt that the red light of the Fontenaye ought to have been seen very shortly after she ported. When the Johanne Auguste's red light was seen, the two vessels were very nearly ahead of each other; the Johanne Auguste being a little to windward of the other's course—a hundred feet, perhaps—and being then headed so as to cross that course a little ahead of the Fontenaye, and so as to make an angle of perhaps a third of a point with the line of her course, just sufficient to expose the Johanne Auguste's red light only at that time. Upon porting, the Fontenaye's red light should very soon have come into view, and so remained till the collision. It was not seen at all. After the collision it was inquired for, and in reply the men on the Fontenaye pointed it out, still burning. Though only the mate testifies that it could not be seen before the collision, I cannot doubt the correctness of his narrative in this particular. The lights were eagerly looked for; none were seen. He ran forward; still none could be seen, and the red light was not seen till some of her men came aboard of the Fontenaye. There was no such inattention or negligence on the Johanne Auguste, when the red light ought to have been seen, as can serve to explain the failure to see the red light. The only alternative is that it was either obscured or improperly screened; it is immaterial which. *The Tirzah*, 4 Prob. Div. 33. The sails were upon the port side, and might have obscured it. The position of the lights so near the taffrail, with the swell of the ship's side in front, exposed them to peculiar danger of being obscured. If the screen were adjusted parallel with the poop rail, that also would have thrown the line of obscuration somewhat to port instead of directly ahead; sufficient, probably, to have prevented the red light's being seen by a vessel so nearly ahead as the Johanne Auguste was during all this time. It is impossible, and it is unnecessary, to determine in what particular way, or from what cause, the red light of the Fontenaye was obscured. I am satisfied it was obscured. Had it been seen when it ought to have been seen, I cannot doubt that the Johanne Auguste, by porting earlier than she did, might have escaped the collision, and would have done so. The Fontenaye must be held responsible for any obscuration of her light, especially when placed in the extreme after-part of the ship, where there is such increased danger of obstruction, (*The Tirzah, supra*;) and it results that both vessels must be held in fault and the damages divided.

The above considerations satisfy my own mind as to the proper determination of the case, without commenting on the differences in the testimony concerning the condition of the weather; and the above result would not be changed whether the weather was foggy or not. The fact, however, that neither lookout saw any light sooner, is, I think, more rationally explained by supposing that the weather was somewhat foggy, as the witnesses of the Fontenaye testify, or very hazy, as most of those from the Johanne Auguste say; rather than

that both lookouts were inattentive and negligent for a considerable period before the red light was seen. I am satisfied that the weather must have been such as greatly to obstruct seeing lights at a distance, and that the vessels, when the red light was seen, were even less than half a mile apart. This, I think, is to be conclusively inferred from the fact that the Fontenaye, though going at the rate of about six knots, had time to luff only about two points under an immediate hard a-port helm. One-sixth of a mile would be a large allowance of sailing distance in which to accomplish so small a change of course; and as the Johanne Auguste was going at the rate of five knots, she would make about 830 feet in the same time; giving less than one-third of a mile as the probable distance between them. It is noticeable that the witnesses of the Fontenaye are unwilling to swear positively to even as much change as two points. If the lights might have been seen at a much greater distance, then both lookouts were equally negligent; and if the lights could not be seen more than one-third of a mile off, then, under the rules, both ought, I think, to have used their fog-horns; and in either case the result would be the same, as I have determined on other grounds.

To explain a little further my view of the mode in which the collision took place, I may add that in constructing a diagram to represent the position and probable courses of the vessels I should make the Fontenaye, when the red light was seen, heading E. by S., (true;) put the Johanne Auguste about one-third of a mile ahead of her, and about 100 feet to windward, and heading W. by N. $\frac{1}{2}$ N., (true.) The point of collision would fall about 200 feet to the windward, and about 1,100 feet ahead, of the Fontenaye's first position. At that point the Fontenaye would be heading S. E. by E., and the Johanne Auguste W. $\frac{1}{2}$ N.; the latter having, meantime, swung first to W. $\frac{1}{4}$ N., when more than half the interval had been passed, and then ported, and again starboarded, bringing her at the collision to W. $\frac{1}{2}$ N. This makes the general courses of the Johanne Auguste, during this period, about half a point, or more at times, to the northward of those stated by the wheelsman. But his statements cannot all be accurate. The course of the Fontenaye, however, may at this time have been somewhat more to the northward than her true course of E. by S. The mate allows a variation of half a point. If such a variation to the northward, *i. e.*, E. $\frac{1}{2}$ S., be taken for the Fontenaye's course at the time when the red light was first seen, then a corresponding change of half a point to the southward in the diagram of the Johanne Auguste's courses would bring the courses of the latter into close correspondence with the testimony of the Johanne Auguste's witnesses, and the result would be the same. Some slight variations must be made in the courses stated by the witnesses, to the extent of one-half or three-quarters of a point; it is immaterial on which side they are placed, or whether they are distributed between the two.

THE LUCY D.

(District Court, S. D. New York. July 14, 1884.)

1. COLLISION—TOW—RIVER NAVIGATION.

In passing an established harbor, like Elizabethport, New Jersey, on the border of a narrow stream, tugs with large tows, which require the use of nearly the whole channel, are bound to take extraordinary precautions in giving notice of their approach, and to give, if needed, effective aid to vessels unwarily coming to anchor in places of danger; and such vessels, on receiving actual notice of approaching danger from such tows, which are in the habit of passing, are also bound to take immediate measures to get out of harm's way.

2. SAME—VESSEL AT ANCHOR—FAULT.

Where one of a fleet of 21 canal-boats came in collision at Elizabethport, New Jersey, at about 2 A. M., with a schooner which arrived there and came to anchor about 10 P. M., about 100 feet off the dock, in a place dangerous from such passing tows, *held*, both in fault.

In Admiralty.

E. D. McCarthy, for the libelant and the Wilbur.

Owen & Gray, for the schooner.

BROWN, J. The libelant, who is the owner of the canal-boat Monitor, sues to recover for his damages occasioned by a collision with the schooner Lucy D., at about 2 o'clock in the morning of December 22, 1882, while the schooner was at anchor at Elizabethport. The Monitor was one of a fleet of 21 boats coming up to New York with the flood-tide, in tow of the steam-tug Wilbur, and was the outer boat of the fourth tier on the port side of the tow. Under the new supreme court rule in admiralty, No. 59, upon the application of the defendant vessel, the steam-tug Wilbur has also been made a party defendant. See 15 FED. REP. 162.

The Lucy D. sailed down to Elizabethport and arrived there at about 10 o'clock P. M., and came to anchor either off pig-iron dock, or two or three piers above, and from 100 to 200 feet out in the stream. The entire channel there is but 600 or 700 feet wide, and tows have been accustomed to come up with the flood-tide. Just below the pig-iron dock is a considerable bend in the stream, so that the flood-tide sets tows coming up stream towards the pig-iron dock, thence for a short distance parallel with the stream, and then a little towards the opposite shore. At the strength of the flood the current runs about three knots. In coming round this bend, a tug with a tow upon a hawser, like the present, must go ahead at full speed, or the tow will run upon the docks or become unmanageable. There can be no question, from the evidence, that the navigation of such tows through this narrow stream is attended with more or less of danger to vessels at anchor at Elizabethport. The danger diminishes, however, the further vessels are anchored above the pig-iron dock, as the channel becomes wider above, and the flood-tide is deflected somewhat to the opposite shore. Notwithstanding the custom for tugs with large