is distinctly to the effect that the Alaska could have been stopped in going one-third of a mile. This seems to me so improbable, though barely possible, that I have not given any weight to this testimony, and have made no reference to it in holding the Alaska responsible; nor have I given any weight to the failure of the Castalia to luff, say half a minute before the collision, as it was clearly her duty to do. At that time the Alaska was seen swinging to the southward under her starboard helm, and her intention to go ahead of the brig was then irrevocably fixed and was evident to the brig. The captain of the brig thought even then that there would be no collision. The Alaska escaped the brig up to about 60 feet of her stern. During this short interval of time the brig could not by luffing have changed her course more than one or two points; this clearly would not have made a sufficient change in her position to avoid the collision, though it might have somewhat eased the blow. On the grounds previously stated, however, each vessel must be held in fault; and the libelant is therefore entitled to a decree for one half his damages, with costs. If the sum is not agreed upon, a reference may be taken to compute the amount.

THE AMBOY.

THE TRANSFER NO. 2.

(*District Court, S. D. New York.* November 28, 1884.)

COLLISION—DEFECTIVE LIGHTS—LOOKOUT—CONFLICTING EVIDENCE.

Where a collision occurred between the steam-boats A. and T. No. 2, in the East river, near Blackwell's island, the former going up and the latter down, and the pilot of the latter, seeing the A.'s white lights, but no colored light, supposed the A. was going the same way with him, and starboarded so as to pass to the left, and thereby came in collision, *held*, upon much contradictory evidence in regard to the A.'s colored lights, that, though burning, they were defective, so as not to be visible at the distance they ought to have been visible. It appearing, also, that T. No. 2 had no lookout except the pilot, and that with a suitable watch the mistake as to the direction of the A. would have been discovered in time to avoid her, though her colored lights were not seen, *held*, that the other tug was also in fault. In great conflict of evidence as to lights being visible, the contemporaneous evidence, afforded by the acts of those in charge of vessels, who, looking for colored lights, can see none, and maneuver their vessels accordingly, is entitled to great weight.

In Admiralty.

J. A. Hyland, for libelant.

Wilcox, Adams & Macklin, for the Amboy.

Benedict, Taft & Benedict, for the Transfer No. 2.

BROWN, J. The collision in this case, in some of its aspects, resembles that of *Briggs* v. *Day*, 21 FED. REP. 727. In this case, as in that, the pilot of Transfer No. 2, which was coming down the East

river, claims to have been misled as to the direction of the Amboy—which was going up the river—in consequence of seeing the latter's white lights nearly directly ahead, no colored lights being visible, and for this reason he supposed that the Amboy was going down the river, like himself. Nothing can be more contradictory or embarrassing than the evidence in this case upon the question whether the Amboy's colored lights were visible as they ought to have been. I am unwilling to hold so many witnesses on either side guilty of a direct fabrication of testimony. The most probable solution that will avoid that result, as regards the witnesses on the one side or the other, is the supposition that the colored lights, though burning, had become dim, or the glasses obscured, so that the lights could not be seen at the required distance. I think the colored lights were burning; but one of the Amboy's witnesses said the lights sometimes become dim by morning; and there is too much concurrence of testimony that these colored lights could not be seen at the requisite distance, and where they ought to have been seen, and too many different hypotheses are required to explain the failure of so many different persons, under different circumstances, to see the Amboy's colored lights,—if they were in fact visible,—to render probable any other cause than that which I have stated. The purpose of lights is to be seen. If they do not fulfill that office to ordinary observation, the vessel must be held in fault; and when several witnesses concur in testifying that the lights could not be seen in a situation where they ought to have been seen, and, more especially, where it appears that the persons in charge of another vessel maneuvered their own vessel in reference to the other, and that upon looking specially for colored lights could not see any, and actually navigated their own vessel in a way that would have been highly improbable had the colored lights been visible,—the inference seems irresistible, and this court has often held, that there must have been some defect in the lights that ought to have been seen, but were not seen. *The State of Alabama*, 17 FED. REP. 847; *The Alaska, ante*, 548; *The Johanne Auguste*, 21 FED. REP. 134, 140; *The Narragansett*, 20 Blatchf. 87; S. C. 11 FED. REP. 918; *The Sam Weller*, 5 Ben. 293.

Without discussing the details of the evidence, all of which I have carefully considered, I must find that as the pilot of the Amboy saw the three white lights more than a half mile distant, looked carefully for colored lights without discovering any, and navigated his vessel accordingly, going to the left, and that without signals, both highly improbable if any colored lights had been visible, but natural, if he supposed he was overtaking the Amboy; and as this evidence is supported by much other evidence in the case, it must be accepted as proof of defects in the Amboy's colored lights. For this reason I must hold the Amboy in fault. Transfer No. 2 must also be held in fault, as in the case of *Day* v. *The H. W. Hills*, 21 FED. REP. 727. (1) She had no proper lookout besides the pilot, (*The Ant*, 10 FED.

REP. 294.) Though the pilot, on looking carefully for colored lights, could see none, yet an ordinary and constant watch of the Amboy's course by a proper lookout from the time the Amboy's white lights were seen, could not, I think, have failed to apprise No. 2 that the Amboy was coming up stream in ample time to have avoided her. The absence of the lookout was therefore material. Transfer No. 2 was also in fault (2) for not seasonably stopping and backing after she had sufficient opportunity to see that the Amboy was not going the same way, though her colored lights were not seen. The strong reflector on the Amboy's bow ought not to have been mistaken for a stern light, which is occasionally carried, but is not required. The Amboy's one whistle was not answered promptly, and the reason assigned by the pilot of Transfer No. 2 for not answering, viz., that he could not tell which way the Amboy was going, was of itself a sufficient reason for his stopping at once. This one whistle was not given immediately before No. 2's alarm whistles were given, but some time previous. The Amboy approached very near to Blackwell's island, and I can see no excuse for Transfer No. 2 in following her up in that direction until a collision happened very near the shore. I am satisfied that there were circumstances sufficient to put No. 2 on timely guard; and that, had due caution and due judgment been exercised, with a proper lookout on No. 2 in regard to the movements of the Amboy, even though the latter's colored lights were not visible, and had her own engines been reversed when she ought to have perceived that the Amboy was going the same way with her, the collision would have been avoided.

A decree must therefore be entered against both vessels, with costs, and an order of reference taken to compute the damages.

THE SALLIE P. LINDERMAN.

(*District Court, D. New Jersey.* April 30, 1883.)

1. ADMIRALTY PRACTICE—TAXATION OF COSTS—DEPOSITIONS.
   Where, after issue joined by the pleadings, the case is referred to a commissioner, under admiralty rule 19, to take testimony, and the depositions are returned to the court, and used by the court as evidence in deciding the cause, the clerk may tax as costs to the proctor of the prevailing party $2.50 for each one.
2. SAME—WITNESS FEES—"ACTUAL PAYMENT."
   The affidavit of a proctor that certain expenses have been actually incurred, is not a sufficient voucher to authorize the clerk to tax such expenses as witness fees, and if the opposing proctor object to such proof, the receipt of the witness, or the affidavit of the proctor that he has "actually paid" the fees, should be required.

In Admiralty. On exceptions to taxation of costs.

J. A. Hyland, for libelant.

E. D. McCarthy, for respondent.

NIXON, J. The clerk has taxed the costs in the above case, and to his taxation the proctor of the claimant has filed two exceptions:

(1) Because the clerk allowed $2.50 each for 21 depositions, taken on the reference, amounting to $52.50. Section 824 of the Revised Statutes allows to proctors $2.50 for each deposition taken and admitted in evidence in a cause. What is a deposition? Although sometimes used as synonymous with "affidavit" or "oath," in its strict and appropriate sense it is limited to the written testimony of a witness given in the course of a judicial proceeding, either at law or in equity. *State* v. *Dayton*, 3 Zab. 54. "In jurisprudence," says Abbott, (1 Law Dict. 367,) "the principal use of the term is to signify the testimony of a witness, when given in answer to interrogatories propounded by a person authorized for the purpose, and officially taken down in writing." In this district it is the practice in admiralty cases, after issue joined by the pleadings, to refer the case to a commissioner to take the testimony. See rule 19 in admiralty. The depositions are returned to the court, and are admitted in evidence by the judge in deciding the cause. Twenty-one such depositions were taken and returned in the present case, and were the sole evidence used in its decision. Being taken and admitted in evidence in the cause, the clerk has properly taxed, as costs to the proctor of the prevailing party, $2.50 for each one. *Troy Factory* v. *Corning*, 7 Blatchf. 16; *Jerman* v. *Stewart*, 12 FED. REP. 278. This objection is overruled.

(2) The second exception has reference to the taxing of $40.50 for fees paid to witnesses. The ground of the objection is that the affidavit of the proctor does not state that they have been paid, but only "actually incurred." I do not remember any law which requires an affidavit that the fees have been paid. Section 984, Rev. St., provides that before taxation proof shall be made to the clerk that the services charged for have been actually and necessarily performed; but that is a different matter,—such affidavit was made in the above case. Under the tenth general rule of this court, "all bills of costs and charges to be paid under any order or decree of the court shall be taxed and filed with the clerk before payment thereof, and shall contain proper and genuine vouchers for all charges other than to any officer of the court. The taxation of the witness fees was proper, if the clerk has such vouchers. But I do not think he is authorized to receive the affidavit of the proctor that the expenses have been "actually incurred," as a sufficient voucher. Under the provisions of this rule, if the proctor on the other side object to such proof, the receipt of the witness, or the affidavit of the proctor that he has "actually paid" the fees, should be required.

Under the circumstances time will be allowed for the clerk to notify the proctor of the defect of proof, and if it is not supplied within a reasonable time the item must be struck out.

THE ISMAELE.[1]

ALLEGRO *v.* LEBER.[1]

(*Circuit Court, E. D. New York.* June 25, 1884.)

BILL OF LADING—CARGO NOT DELIVERED—BURDEN OF PROOF—EVIDENCE.

The conclusion of the district court in the same cases (see *The Ismaele*, 14 FED. REP. 491) was not affected by further testimony, taken in the circuit court, of persons who took part in weighing the cargo. There being no direct evidence of a felonious abstraction of cargo, and the testimony on the part of the vessel being explicit that all the cargo received on board was delivered except such as passed off through the pumps, the court had no hesitation in rejecting the former view, and the decrees of the district court were affirmed.

The Ismaele, 14 FED. REP. 491, affirmed.

Admiralty Appeal.

Sidney Chubb, for the consignee.

Ullo & Davison, for the vessel and the master.

BLATCHFORD, Justice. The views and conclusions of the district judge in his opinion delivered in these cases, on the evidence as it then stood, were unquestionably correct. He observed that there was no legal proof of the actual weight of the sulphur shipped; that the persons who did the weighing, and whose names were disclosed, were not examined; that this omission, under the circumstances, was one that could not be overlooked, and that it left the testimony respecting the weight of the sulphur shipped incomplete, and insufficient to overthrow the testimony, in behalf of the bark, that all the sulphur shipped was delivered in New York. Since the appeal was taken the libelant has taken the testimony, on commission, of three persons who took part in weighing the sulphur. One of them was at the time between 15 and 16 years old. The others were of full age. No one connected with the vessel was present at the weighing on shore, and there was no weighing on board of the vessel. The sulphur was in bulk, and after the weighing was carried by hand to boats and dumped into them, and carried in them to the vessel, which was anchored two miles off, and was lifted from the boats and dumped into the hold of the vessel. The testimony on the part of the vessel is explicit that all the sulphur received on board was delivered here, except such as passed off through the pumps. Under these circumstances, the weight delivered being less than the asserted weight on shore, and a finding that some of the sulphur was abstracted feloniously, without the slightest direct evidence of that fact, involving the finding that a crime was committed; and a finding that the vessel delivered all that it received, less what was lost through the pumps, involving only an error in the weighing, there can be no hesitation in the judicial mind in rejecting the former view.

In the first suit there must be a decree for the libelant for the £10

[1] Reported by R. D. & Wyllys Benedict, of the New York bar