herself against the steamer by the force of the wind and sea, rather than by any movement of the steamer. We do not find that there was any action on the part of those in charge of the steamer that resulted in the injury to the schooner, or that they could possibly have done anything to prevent or mitigate the loss does not appear. The steamer was the first vessel properly in the channel, and the schooner the overtaking vessel trying to get past. It will necessarily follow, therefore, that the decree of the court below must be reversed, but, in the taxation of costs, we do not consider that there should be taxed as legitimate costs in the case the taking and embodying in the record the vast amount of irrelevant and immaterial matter of examination and cross-examination of witnesses, swelling the record to nearly 200 printed pages, for which we cannot apportion the responsibility. It is therefore ordered that the case be remanded to the court below, with instructions to dismiss the libel, and tax the costs equally against the parties.

THE CITY OF ST. AUGUSTINE.

THE NORMAN.

HENDERSON *et al.* *v.* THE CITY OF ST. AUGUSTINE.

ST. AUGUSTINE S. S. Co. *v.* HENDERSON *et al.*

(*District Court, S. D. New York.* July 12, 1892.)

COLLISION—STEAM AND SAIL—FAILURE TO ALLOW SUFFICIENT MARGIN FOR SAFETY.

The steamer City of St. A., bound S. W. ¾ W., saw the green light of the schooner Norman a little on her starboard bow. The red light of the schooner afterwards became visible to the steamer, which thereupon altered her course to starboard so as to bring the red light on her port bow. Afterwards the schooner's green light appeared again, and the steamer starboarded further, but collided with the sailing vessel. Her excuse was that the sailing vessel had not held her course. On conflicting evidence, and regarding the schooner's narrative as better confirmed by the circumstantial proof, the court found that, with the exception of a slight change *in extremis*, the course of the schooner had not been altered, and that the fault which brought about the collision was that the steamer did not make allowance for the usual and necessary variation in the course of the schooner, or her changes of lights through leeway and the crossing of her lights, and, consequently, did not allow a sufficient margin for passing the schooner, which she was bound to avoid. *Held*, that the steamer was alone liable for the collision.

In Admiralty. Cross libels for collision.
Wing, Shoudy & Putnam, for Henderson and others.
Wilcox, Adams & Green, for the City of St. Augustine.

BROWN, District Judge. At about half past 1 o'clock in the morning of November 25, 1891, the schooner Norman of 367 tons, loaded with a cargo of lumber, bound from Savannah to Baltimore, and then heading about northeast, came in collision off the coast of North Caro-

lina with the steamer City of St. Augustine, of 390 tons, bound southward upon a course S. W. ¼ W. The stem of the City of St. Augustine first struck the end of the schooner's jibboom, or bowsprit, which being broken at the knightheads and carried away, their bows came in collision. The schooner was so damaged that she filled, but did not sink, and she was towed to Washington. The steamer sustained some injuries, and the above libel and cross libel were filed to recover the respective damages.

The night was dark but clear, with starlight; the wind was moderate, about north northwest; the lights of both vessels were properly set and burning. The steamer was going from eight to nine knots; the schooner, from four to five knots. When the vessels were from half a mile to a mile apart, the green light of each was seen by the other a little on the starboard bow of each. It is evident, therefore, that the schooner was at that time to the westward of the line of the steamer's course, which was then also directed astern of the schooner; otherwise the steamer's red light must have been visible. But the schooner was making, doubtless, a half point leeway, so that her actual course was very nearly opposite to that of the steamer. It was the duty of the steamer to keep out of the way of the sailing vessel. The excuse of the steamer for not doing so is that the schooner did not keep her course; but that after having first turned to the eastward sufficiently to show her red light to the steamer, (upon seeing which the steamer changed her course a point and a half to the westward, so as to bring the schooner's red light well upon the steamer's port bow,) the schooner again changed her course to the westward so as again to show her green light; whereupon the steamer put her course still more to the westward, until at collision she was heading about due west; and that the collision happened solely in consequence of the improper changes of course by the schooner. Such changes are denied by the schooner's witnesses.

Besides some evident mistakes by the witnesses on both sides, there is a substantial conflict in the testimony in regard to the navigation, the lights visible, and the changes of course, which cannot be wholly reconciled as the testimony stands. The apparent conflict, however, will be greatly diminished by making allowance for the following considerations: (1) A difference of from half a point to a point between the mean heading of the schooner, which, I have no doubt, was about northeast, and her actual course so much more to the eastward, through leeway; (2) the crossing of the schooner's lights probably at least a quarter of a point on each side; (3) the yawing of the schooner probably from a quarter of a point to half a point on each side of her mean course; (4) a considerable excess in the steamer's estimate of the time and distance before collision when the schooner's red light was first seen. Her witnesses estimate the distance at half a mile; probably it was not one third of that distance.

In behalf of the steamer it is sought to discredit the witnesses for the schooner, to the effect that no change was made in their course, by arguments concerning the navigation based upon the steamer's testimony

and estimates with regard to the bearing of the lights, their changes, and distance. There is really nothing to substantiate the correctness of these estimates, and without them such arguments have little force. Amid such uncertainties in the testimony and estimates, the greatest weight must be given to facts that rest upon more certain testimony, or are more satisfactorily established.

The witnesses for the steamer testify that the angle of collision was nearly a right angle, and considerable stress is laid on this testimony. If this is correct, inasmuch as the steamer changed at most but 3½ points to the westward, it follows that the schooner, besides coming back from her previous supposed change, must have changed some 3½ points further to the westward also. The only deviations which the witnesses for the schooner admit are, the unavoidable yawing each way of perhaps one fourth of a point from their mean course, and when the steamer was very near, an order to put the wheel hard aport, in order to avoid, as far as possible, the impending collision, which they say occurred before the wheel was hard over.

The angle of collision is often valuable in determining doubts, when the angle is agreed upon, or otherwise definitely established. *The Roanoke*, 45 Fed. Rep. 905; *The Joseph Stickney*, 50 Fed. Rep. 624, (May 14, 1892.) But where the collision is in the nighttime, and the angle is a subject of dispute, not much weight can be given to the mere estimates of either side on this point. *The Havilah*, 33 Fed. Rep. 875, 881, affirmed 1 U. S. App. 138, 1 C. C. A. 519, 50 Fed. Rep. 331; *La Champagne*, 43 Fed. Rep. 444, 447.

In the present case there are several circumstances which so strongly corroborate the schooner's witnesses as to her course, that I am persuaded that their account in this particular is substantially correct, and that the steamer's witnesses are mistaken in supposing the angle of collision to have been nearly a right angle.

1. Next to the blow upon the stem of the steamer, her chief injury was about 14 feet abaft the stem on the port side. As the steamer was going about twice the speed of the schooner, it is impossible, after the schooner's bowsprit, 15 feet long, had been broken off near her stem by the running of its end against the stem of the steamer, that any part of the schooner could have reached the steamer in time to inflict such a blow as the steamer shows only 14 feet abaft the stem, had the steamer been crossing the course of the schooner at nearly a right angle, or at a greater angle than about three points. The schooner's heading must have been much checked by the first blow.

2. The injuries to the schooner consisted in the driving over of her port bow, her port cathead timber, and her deck, from port to starboard, showing a heavy blow on the port bow at some little distance abaft her stem. Had the collision been nearly at right angles, the direction of the damage to the schooner, considering the steamer's great comparative speed, would have been from starboard to port.

3. The damage to the steamer some 14 feet abaft her stem on the port side is such as would naturally have been received from the port cathead

of the schooner upon a collision of the bows at an angle of two or three points. The cathead, about 12 feet from the stem, projected about 18 inches, and by the blow of collision it was driven in, with the deck, two feet to starboard, and the inboard end of the cathead beam was split. These circumstances cannot be accounted for upon the steamer's theory of a right-angled blow. They accord entirely with the story of the schooner, and show that at collision the difference from opposite courses did not probably exceed two or three points. As the steamer changed her course at most only about 3¼ points to the westward, the schooner's change must have been less than a point to the eastward, and this agrees with the schooner's testimony that her wheel was ordered hard aport when the steamer was very near.

4. The schooner could not have changed two or three points to the westward without her sails shaking in the wind, whereas at collision they were full.

5. The evidence shows that the schooner scraped along the port side of the steamer, carrying away the mizzen lanyard and a spar rigged out there, her quarter being 30 or 40 feet away.

All those circumstances are consistent and are incompatible with any material change of course, and confirm, therefore, the testimony of the schooner's witnesses. I credit this narrative rather than that of the steamer, because it is better sustained by the circumstantial proof.

The schooner's slight change under a port wheel *in extremis* a few moments before collision, was not a fault, nor did it contribute to the collision. Without attempting to determine precisely the minute points concerning the steamer's navigation, I am satisfied the real fault that brought about the collision was, that having the schooner's green light nearly straight ahead as reported by the lookout, and being herself all the time to the eastward of the schooner's actual course, the steamer did not in her maneuvers allow a sufficient margin for passing the schooner, nor for the usual and necessary variation in her course, or changes of lights, through yawing, leeway, and the crossing of lights; and that consequently she did not at first keep away sufficiently to port; nor afterwards, when the schooner's red light appeared, which, in my judgment, was when the vessels were less than 1,000 feet apart, did she seasonably or sufficiently go to starboard. *The Beta*, 40 Fed. Rep. 899. *The Roanoke*, 45 Fed. Rep. 905. The red light probably came in view at the extreme swing of the schooner to starboard in yawing, whereupon she resumed the opposite swing to port. It is quite possible, also, that the steamer's heading west was not reached until after collision, aided, as it must have been, by the blow from the schooner upon the stem and bow of the steamer. It is evident from the testimony that the order to go west was almost at the moment of collision; and the previous changes of 2¼ points could have been easily made by this small steamer in going a distance of 400 feet, with but a small offing to the westward, not sufficient to clear the schooner.

Decrees may be entered in favor of the schooner as against the steamer, with costs.

TOD *et al.* v. KENTUCKY UNION RY. CO. *et al.*, (ROSSER *et al.*, Interveners.)

(Circuit Court of Appeals, Sixth Circuit. October 4, 1892.)

Nos. 22, 29.

1. MECHANICS' LIENS—LABOR CONTRACTORS—KENTUCKY STATUTES.
Contractors supplying laborers and teams for the construction and repair of a railroad, being paid for the same by the day, and either party having the right to stop work at the end of any day, are not "laborers" or "employes" within the terms of Act Ky. March 20, 1876, which, among other things, gives a lien for work done and materials furnished in keeping the road a going concern, but must rely on the contractors' act of March 27, 1888, which gives a lien in favor of persons "furnishing labor or materials for the construction or improvement" of any railroad, canal, or other public improvement.

2. SAME—MATERIAL MEN.
Where supplies, suitable either for the construction of the unfinished part of a railroad or the carrying on of the finished part, are furnished without any contract as to how they shall be used, the material man has a lien under the act of 1876 for the part actually used in operating the railroad, and another lien under the contractors' act for the part actually used for construction and repairs; but where he has lost the lien under the latter act because of a failure to file his statement within 60 days, the burden of proof is on him to show what part of the supplies was actually used for the operation of the road.

3. MORTGAGES—FORECLOSURE—INTERVENERS—PERSONAL JUDGMENTS.
Where the mortgagees of an insolvent railway apply for the appointment of a receiver and the sale of the property, and material men intervene by petition, claiming a superior lien, the failure to give the claimants personal judgments for their respective debts against the railway is not erroneous.

Appeals from the Circuit Court of the United States for the District of Kentucky.

In Equity. Bill by J. Kennedy Tod & Co., the Central Trust Company of New York, and the Columbia Finance & Trust Company against the Kentucky Union Railway Company and others for the appointment of a receiver, foreclosure of mortgages, and sale of the property. Rosser & Coleman intervened by petition, claiming a superior lien as laborers and material men. A demurrer to the petition was sustained. Thereupon the petitioners appealed, their cause being numbered 22. W. & A. C. Semple, Fairbank, Morse & Co., and Andrew Cowan & Co. appeal from a decree confirming the master's report, which disallowed most of the appellants' claims, and overruling exceptions thereto, their cause being numbered 29. Affirmed in both cases.

Stone & Sudduth, *Dodd & Dodd*, *A. Barnett*, and *Thos. C. Bell*, for appellants.

Humphrey & Davie and *St. John Boyle*, for appellees.

Before BROWN, Circuit Justice, and JACKSON and TAFT, Circuit Judges.

JACKSON, Circuit Judge. The questions presented for decision in these cases relate to the respective rights and priorities of different lien claimants upon the property of the Kentucky Union Railway Company, which was chartered under the laws of Kentucky to construct, own, and operate a designated line of railway in said state, about 100 miles in