

that purpose. If he did go for that purpose, the fact that he urinated there, would be unimportant; and that he intended to urinate there when he went would be equally unimportant, if he went to leave his clothes.

To sustain this branch of the defense, the facts, on which it rests should not be left in doubt. The respondent was guilty of plain, if not gross negligence, which tended directly to the accident—negligence which, in the ordinary course of events, would lead to it. When therefore he charges the result to misconduct of the libelant, he should be held to clear proof of his charge. While I abstain from the useless task of discussing the conflicting testimony on this point, I may call attention to the fact that the respondent's witnesses are almost exclusively his employés, or agents (of the ignorant class engaged in such work); that the testimony consists in alleged confessions of the libelant, made immediately after the accident, when he was suffering intense pain, or after being taken to the hospital, and when, as his attendants and nurses say, he was generally insane in consequence of his injuries. That the witnesses should have held such conversations with him as they relate at the times referred to, seems very extraordinary; that he should have been substantially scolded or remonstrated with by them (his fellows) for going where he went, just after the accident, in his then deplorable condition seems incredible; and it is not less so that men who had learned how the accident occurred should have gone to the hospital, and in his condition at the time, sought to have him explain the occurrence. The witness relied upon to prove that he saw the libelant urinating on the deck does not say in terms that he saw it. The language is equivocal. If he meant this, as probably he did, he should have said it; should have been required to say it. But if he had said it, it would simply be saying that while there changing his clothes, he urinated—which as we have seen would be unimportant. This witness, in substance, says he changed his clothes there. In view of the libelant's positive statement, and the testimony of his witnesses on this subject, I cannot, as before stated, regard the allegation as proved.

A decree may be prepared sustaining the libel.

THE GRACE SEYMOUR.

THE EDWIN REED.

FULTON v. THE GRACE SEYMOUR.

HANSCOM v. THE EDWIN REED.

(District Court, S. D. New York. July 19, 1894.)

COLLISION—SAIL VESSELS—RIGHT OF WAY—LOOKOUT—LUFF IN EXTREMIS.

The night was moonlight; the wind, N. N. W. The bark R., deeply laden, headed east, and the schooner S., sailing light, headed each a point free of the wind, and making five to six knots, were approaching one another. Each had seen the other's sails two miles off on the lee bow. The bark's pilot could not see ahead, and the watch noticed no more of the

schooner until her red light was close aboard, though it must have been steadily visible for five to seven minutes. There was evidence that the officer of the watch was busy with other things. Both vessels then ported hard, and the schooner luffed two points, and received a glancing blow. Held, that since the bark was on the port tack, with a free wind, it was her duty to keep out of the way, and that she had failed in this by reason of neglect to keep a proper, continuous lookout.

Libels by Allen Fulton against the schooner Grace Seymour and by Howard H. Hanscom against the bark Edwin Reed. The first dismissed, and a decree allowed on the second.

Wing, Shoudy & Putnam and Mr. Burlingham, for the Edwin Reed.

Owen, Gray & Sturges, for the Grace Seymour.

BROWN, District Judge. The above libels were filed to recover the damages sustained by the bark Edwin Reed and the schooner Grace Seymour through a collision between those vessels which occurred at about 10 p. m. of November 30, 1892, in Long Island Sound about two miles west of Norwalk island.

The night was clear, with moonlight; the wind, about N. N. W., and the sea light. The bark was of 1,164 tons burden, about 240 feet long, deeply loaded, and drew 21 feet. She had been previously heading about N. E. by E. $\frac{1}{4}$ E., and was in charge of a pilot. The Seymour was a three-masted schooner, of about 600 tons burden, 167 feet long, sailing light, drawing but 8 feet of water, and she was heading about west. Each was making from five to six knots per hour. The sails of each were first seen by the other when they were at least two miles apart, and on the lee bow of each. Just before collision each ported hard; the schooner luffed, as I find, about two points before collision, and the bark paid off probably not over half a point; so that at collision the bark's port bow struck the schooner's port side just aft of the fore rigging, by a glancing blow, which raked her fore and aft, and started several knees, timbers, and plank sheer, but without breaking any hole in her side. The bark's port cathead and anchor caught and carried away the schooner's fore rigging and sails, and having got foul carried the schooner astern along with her. The bark had her jibboom broken and sustained some other damages. The schooner being to windward dropped her anchor, and after an hour the bark drifted clear.

The bark contends that the collision was caused by the schooner's luff; the schooner contends that the luff was in extremis, to ease the blow, and that the bark was solely in fault, in not keeping out of the way.

The pilot testifies that the bark was not sailing close-hauled, and the other evidence satisfies me that she was one point free. I think the schooner also had the wind one point free. This, however, is immaterial; because the bark, being on the port tack and also having a free wind, was bound by the rules to keep out of the way of the schooner, which was on the starboard tack, and was bound to keep her course.

I am persuaded from a careful consideration of all the testimony, that the sole blame for this collision rests with the bark, by reason of her failure to keep a proper, continuous lookout; and by reason of the preoccupation of the first mate, who was the officer in charge of the deck, with the duty of superintending the seamen on the fore-castle in heaving on the windlass, and taking care of the bars, ropes, etc., on the fore-castle; so that the necessary attention was not given to the schooner, or to the navigation of the bark, so as to enable her to perform her duty to avoid the schooner. The bark was so high forward that the pilot and seaman at the wheel could see nothing ahead; and though one or more reports of the schooner were made by the lookout on the bark, the first mate, who was forward, did not give even a look at the schooner until the last moments, at or near the time when she luffed to avoid immediate collision. The lookout also, after first seeing and reporting the schooner's sails bearing a little on the bark's starboard (lee) bow, and not long afterwards reporting what he thought was a dim green light on the same bearing, paid no further attention to the schooner until her red light was seen to be very near, about the time she luffed; the bark's wheel was then ordered, and put, hard-a-port, but too late to avoid collision.

In the meantime, the bark had been showing to the schooner, whose officers and men were attentively observing her movements, first, her green light, then the red only, then the green, then the red, and last, when very near, the green again. These lights were always seen about a point on the schooner's port (lee) bow, as the witnesses testify, and without much change of bearing. Even if the schooner's green light was seen at all, which I greatly doubt from the courses of the two vessels, there must, nevertheless, have been a very considerable interval of from five to seven minutes at least during which her red light was steadily visible to the bark, i. e. showing twice on the bark's starboard bow, and twice a little on her port bow (in consequence, no doubt, of the bark's own changes), during all which time this red light of the schooner was not seen by the bark at all, because no continued attention was paid to the schooner; and it was not seen until the vessels were close aboard, within two or three lengths at furthest, too late for any effectual maneuvers.

The situation was one that made careful observation by the bark necessary. The schooner, from the time at least that she was a mile and a half away, was showing her red light, and showing it mostly to the bark's green light. The headings of the two vessels differed only $2\frac{1}{4}$ points from opposite; while the combined leeway of the two amounted probably to at least $1\frac{1}{2}$ points, the bark's leeway being probably about $\frac{1}{3}$ that of the schooner; so that their actual courses, from the first, differed from opposite by less than a point. Each was thus all the time heading to windward of the other, except when the bark yawed enough (say about one point) to show her red light. The fact that there was no substantial change in the bearing of the lights, as the vessels came nearer to each other, would have made it obvious to the bark, had any con-

tinuous watch of the schooner been kept up, that decided and timely maneuvers were necessary on her part in order to perform her duty to keep out of the schooner's way. Through the bark's inattention, nothing was done by her until too late. The fault of the bark is plain and inexcusable.

I see no sufficient ground for holding the schooner chargeable with legal fault, even if her final luff was a mistake, which is by no means certain. The bark's evidence on that point is entitled to very little weight, as after the first light seen by her there was no observation of the schooner till collision was imminent. The bark's exhibition of her red light twice, was indicative of her intent to go to leeward. It was not until the bark's last change to green, when quite near, and when she seemed coming straight upon the schooner's course after two contradictory changes, that the schooner luffed. The situation was threatening in the extreme. It was brought about by the gross fault of the bark, continued down to within a few moments of collision,—faults that baffled all calculation by the schooner as to the bark's intent; so that even if the schooner's luff was a mistake, the bark would be precluded from taking advantage of it, as it was done in extremis. *The Elizabeth Jones*, 112 U. S. 514, 5 Sup. Ct. 468.

The bark contends that the schooner luffed four points. This is improbable. Her wheelman says he noticed the compass just at collision, and that the change was but two points, her heading being then W. N. W. The blow was certainly a glancing one, and it seems improbable that the angle of collision was as much even as four points; if so much as that, the great weight and force of the bark would, I think, have broken a hole in the schooner's hull, instead of raking along her side; and if the angle of collision did not exceed four points, supposing the bark to have paid off only a half point before collision, which is as much as her testimony will admit, the schooner could not have headed at collision north of W. N. W. She was liable to make so much leeway, being light (one to one-half point says the master) that I credit the positive testimony that her previous heading was west. Her luff, therefore, was not over two points; and a luff of only two points would make very little change in her actual position, as a drawing of the curve will show,—a difference, I think, insufficient, as the schooner's witnesses testify, to have avoided the collision. Considering the bark's gross fault, the schooner cannot be held unless her fault is clear; and this is not made out. *The City of New York*, 147 U. S. 72, 85, 13 Sup. Ct. 211.

The libel against the *Seymour* is, therefore, dismissed, with costs, and a decree allowed against the *E. Reed*, with costs.

THE ROBERT GRAHAM DUNN.

GRANT v. THE ROBERT GRAHAM DUNN.

(District Court, D. New Hampshire. April 2, 1894.)

No. 222.

1. COLLISION—SAILING VESSELS—HOLDING COURSE—LOOKOUTS.

A vessel sailing free is bound to keep out of the way of one sailing close-hauled, and if she fails to change her course, or, after changing it, fails, through the inexcusable absence of her lookout, to maintain it steadily, and thus causes a collision, she is liable.

2. SAME—ABSENCE OF LIGHT.

The alleged absence of a green light is immaterial, when, from the situation, its presence could not have averted, or its absence contributed to, the collision.

This was a libel by Isaac N. Grant against the schooner Robert Graham Dunn to recover damages for a collision by which the schooner Captain John was sunk.

Benjamin Thompson, for libelant.
Carver & Blodgett, for claimant.

ALDRICH, District Judge. The Captain John, a two-masted schooner, sailed from Roundout, in the district of New York, September 16, 1893, Boston-bound. September 20th, the Robert Graham Dunn, a three-masted schooner, left Portland harbor for Newport News; and about 10 o'clock of the same evening, through the fault of the Dunn, the two vessels were in collision off Chatham bar, the bluff of the starboard bow of the Dunn striking the starboard bow of the Captain John, carrying away her jib boom, disabling her foremast, and cramping her boat, resulting in the total loss of the Captain John and cargo, together with her crew. The Dunn was running light and free at the log rate of about eight knots,—her rate over the ground being accelerated three knots by the action of the tide,—when the red light of the two-masted schooner, which was the Captain John, was sighted about a mile away. At this time her light bore about a half a point on the lee side or port bow of the Dunn. The sails of the two-master were plainly seen, and she was closehauled, with the wind N. by W. or N. N. W. The breeze was quite strong, and she was heading N. E. or N. E. by N. The tide was running westerly, or towards the shoals, and she was about holding her own. Under such circumstances the Captain John had the right of way, and it was plainly the duty of the Dunn to keep clear; and, as there was plenty of sea room, with reasonable care the collision could have been avoided.

The contention of the Dunn is that, recognizing such duty to keep clear, she luffed a point or a point and a half for the purpose of passing under the stern of the two-master. It is probable, if this be true, that if the two vessels had held their courses the Dunn would have passed at least an eighth of a mile to the windward of the Captain John; and it would follow, therefore, that the vessels were in collision by reason of the failure of one vessel or the other to