

they did do. They did wear ship,—some of the officers claiming that they came within a half an hour to the place of collision; others, that they were a quarter or a half a mile to the leeward. But it is apparent from the evidence that they could and should have done more to save the crew of the vessel, which they must have known was suddenly sunk. The conduct of the officers was inexcusable, and their account of their doings after the collision is wholly unreliable. The collision took place about 10 in the evening. The officers of the *Dunn* say they lay to an hour or more at or near the place of collision. This statement is not sustained. The steamship *H. F. Dimock*, with freight and passengers, passed over the wreck at 10 minutes past 11, and heard the shrieks of the men then clinging to the rigging, which were sufficiently loud to be heard in the state-rooms of the steamer. The engines of the steamer were reversed, the vessel brought about, and boats lowered, which reached the wreck within 20 or 30 minutes, but the men had disappeared. At this time there was no vessel lying to in that vicinity, and none in sight; and I therefore must find that the account of the officers of the *Dunn* is not reliable in this respect.

On the whole, the *Robert Graham Dunn* must be adjudged in fault, and responsible for the collision; and at the proper time, in view of the limited liability proceedings now pending, a decree will be entered accordingly.

THE RELIEF.

GRADDICK v. THE RELIEF.

(District Court, E. D. South Carolina. August 9, 1894.)

1. COLLISION—TUG AND SAIL—FAILURE TO FILL OUT TACK.

A sloop met by a tug and barge near the shore of a river, and struck shortly after going about, must be *held* in fault for failing to fill out her tack, by two or three lengths, or to luff into the wind until the tug had passed.

2. SAME—DUTY OF TUG—FAILURE TO GIVE ROOM.

Under the rule that the steamer must keep out of the way, a tug meeting a sloop tacking towards the shore must be *held* in fault for passing so close as to involve danger of collision in case the sloop should not beat out her tack to the utmost limit.

This was a libel by Henry T. Graddick against the steam tug *Relief* to recover damages for a collision with the sloop *Shamrock*.

Mitchell & Smith and R. W. Memminger, for libelant.
J. N. Nathans, for respondent.

BRAWLEY, District Judge. This is a libel for a collision which occurred in the Ashley river about noon on April 26, 1894. The sloop *Shamrock*, loaded with gravel, was beating down the Ashley river with a light wind from the southeast, the tide being just past the flow. The steam tug *Relief*, with a large barge in tow, was coming up the river, and sighted the sloop near the west bank, as she was about tacking to the eastward. The collision occurred

near the east bank, and the sloop was sunk. The master of the sloop testifies that he had beaten out his tack to the eastward, and had turned upon his starboard tack, when the barge ran into him. If this testimony is to be taken as true, there can be no doubt as to where the fault lies, for the rules of navigation applicable thereto have been settled by repeated adjudications, and are embodied in the statute law, which prescribes that:

"If two vessels, one of which is a sail vessel and the other a steam vessel, are proceeding in such direction as to involve risk of collision the steam vessel shall keep out of the way of the sail vessel." Rev. St. U. S. § 4233.

As the collision did occur, and as there were no circumstances which rendered it inevitable, it is manifest that there was blame somewhere; and, as is usual, there is conflict of testimony.

The master of the sloop is not supported by any other witness near the scene of the accident, in his version of the story. There were two other men aboard the sloop. Neither of them were examined. It was stated by counsel for the libellant that one of these men could not be found; but one of them was present, and not called. It may not be fair to attach too much significance to this omission, for, having made out a prima facie case against the steam vessel, the libellant could rest, but he does so at his risk. As there is always conflicting testimony in these cases, the court is entitled to hear and see all the witnesses, so that it may, notwithstanding such conflict, reach a conclusion as to how the accident really occurred; and, while it will not be assumed that the other witnesses would have contradicted the master, the omission to produce them leaves him unsupported upon a material point. Such omission, considered in connection with the testimony of the master that he was not called upon to look out for steamers, as it was the steamer's duty to keep out of his way, rests upon an erroneous conception of the law. While it is true that it is the duty of the steam vessel to keep out of the way of the sail vessel, there is a correlative duty on the part of the sail vessel, when approaching a steamer, to keep its course, and a failure so to do must be imputed to it as a fault.

The witnesses for the respondent all say that the master of the sloop changed his course almost immediately after passing the bow of the tug, instead of beating out his tack to the eastward, where he had room enough to do so in safety. The river at this point is about 400 feet wide; the channel lies near the eastern shore; and the Shamrock, having been struck by the bow of the barge on her port side, just aft her shrouds, is sunk in 17 feet of water, near the bank. There is no direct testimony as to the exact distance of the sloop, as she now lies, from the shore. Counsel for libellant state that her stern is about 20 or 25 feet from the shore. The master of the tug testifies that she did not sink at the point where she was struck, but that the barge, in veering around, carried her further in shore.

Three classes of witnesses have testified,—the master of the sloop, the master and crew of the tug, and certain disinterested onlookers. On the vital question as to whether the sloop had filled out her tack to the eastward, the master of the sloop stands uncor-

roborated, save by the testimony of two witnesses who were on the western bank. They are disinterested, but their testimony upon this point is of little value, because, from their position and distance from the scene, it is impossible that they should know accurately whether the sloop had room, while the testimony of the master and crew of the tug is supported by a disinterested witness,—a gentleman of high character and intelligence,—who happened to be on the tug that day. He was in the pilot house. His attention was closely fixed upon the sloop, and his testimony is positive and direct that the sloop was two or three boat lengths from the shore when she tacked, and that if she had filled out her tack to the eastward, instead of changing her course in face of the approaching steamer, she would have avoided the collision. All of the witnesses for the respondent concur in the statement that there was room for the sloop to beat out her tack to the eastward, and that the sudden change of course caused the collision. When it is considered that the shore at this point is in no sense a dangerous one, that it is bordered by a marsh which at high tide might have had water sufficient to float the sloop, and that no great peril would have ensued even if the sloop had gone ashore at that point, it is impossible to escape the conclusion that the sloop was badly handled, and that the peril might have been avoided altogether, or minimized, if the master of the sloop had not lost his head. If he had held his course but a very short time longer, or had luffed up into the wind, either of which was available by competent management, he would have avoided the collision, and his failure to do so must be imputed to him as negligence.

But this conclusion does not relieve the tug from all blame, and she cannot escape condemnation. It was the primary duty of the tug and tow to keep out of the way. From the time the sloop was sighted, it was the duty of the steamer to watch her progress and direction, and to adopt such timely measures of precaution as would necessarily have avoided the collision. The fact that they did collide shows that there was a danger to be guarded against, and it does not satisfactorily appear that the master of the tug took such account of all the circumstances of the situation as prudence obviously demanded. He testifies that he blew two whistles to indicate that he was going to pass to the stern of the Shamrock. Yet he did not change his course. The man at the wheel testifies that his wheel was amidships until just before the collision, when he put it hard down. Although the channel was near the east bank, there was, in the then state of the tide, plenty of water in the river; and he could have borne away, or slacked his speed, stopped, and reversed. He took no such timely precautions until it was too late. When there was abundant room to keep properly out of the way, it cannot be held to be prudent or justifiable navigation to take such a course as would bring him into dangerous proximity to the sloop. Although it is held that the sloop did not run out her tack as near to the shore as she possibly might have gone, she did not come far short of it; and although the master of the sloop might, by good seamanship, have escaped collision by letting her sheets go, and

shaking in the wind, yet some allowance must be made for the confusion incident to such dangerous proximity, and the master of the tug cannot be absolved from the charge of obvious imprudence in failing to keep a reasonably safe margin between himself and the sloop. Holding, therefore, that the close line which the steamer was making upon the sloop's course was not a reasonable and substantial compliance with her maritime obligation to keep out of the way, she must also be held in fault.

Let the damages and costs, therefore, be divided.

KILLIEN v. HYDE et al.

(District Court, S. D. New York. August 25, 1894.)

1. COLLISION—FERRYBOAT AND TUG—CONTRIBUTORY NEGLIGENCE.

A fireman of a tug which, because of a collision, had so careened as to be in apparent danger of capsizing, who jumps into the water under the belief that the boat is about to upset, is not guilty of negligence.

2. SAME—OVERTAKING VESSEL—MID RIVER—STATE STATUTES.

A ferryboat and tug were going down the East river. The tide was strong flood. The ferryboat was to port of the tug, and about 200 feet astern, when both stopped to allow a crossing steamer to pass. When they went ahead the ferryboat sheered out towards the middle of the river, but soon placed her wheel to port, to turn her head down the river, which brought her course to starboard. When the tug reached Corlear's Hook, she felt the force of the flood tide, and was turned to port, towards the ferryboat, which was then about 100 feet to port of her, and shortly after the collision occurred, about 300 feet from the New York shore. *Held*, that both vessels were at fault,—the tug, for not sufficiently porting her wheel when approaching the hook so as to counteract the cross-tidal current; and the ferryboat, because she did not keep as much away from the tug as reasonable prudence demanded, she being the overtaking boat, and nothing preventing her going in midstream, as required by statute.

3. SHIPPING—INJURY TO SEAMAN—NEGLIGENCE—FELLOW-SERVANTS.

Where the owner of a tug, who is also captain and pilot, and in charge thereof, temporarily places at the wheel, when the boat is in a difficult situation, an unlicensed person, not of the experience required, and by reason of his want of skill a collision occurs, causing the death of a fireman of the tug, the owner is liable.

Libel by Mary Killien, administratrix of Martin Killien, against the owners of two vessels, alleging negligent collision by which intestate lost his life.

E. N. & T. M. Taft, for libelant.

Alexander & Ash, for respondent Hyde.

Wm. J. Kelly, for Long Island R. Co

BROWN, District Judge. The above libel was filed by Mary Killien, as administratrix of Martin Killien, her husband, to recover damages under the statute of this state, for the death of the deceased, a fireman on the tugboat William H. Walker, on the afternoon of June 13, 1893, through an alleged negligent collision between the Walker, owned by the respondent Hyde, and the ferry-