

THE FREDDIE L. PORTER.

(Circuit Court, D. Maine. ———. 1881)

1. COLLISION—BURDEN OF PROOF.

In case of a collision between a sloop close-hauled and a schooner sailing directly before the wind, the burden is on the schooner to account for it consistently with her innocence.

2. EVIDENCE—ABSENCE OF WITNESSES.

The absence of important witnesses, whose presence might have been secured by the exercise of reasonable diligence, is open to remark.

3. DAMAGES—NET FREIGHT.

Where a vessel, chartered by a parol contract for a definite time, is sunk in a collision caused by the fault of the other colliding vessel, and becomes a total loss, the net freight for the unexpired time of the charter may be assessed as damages.

In Admiralty.

Washington Gilbert, for libellants.

Webb & Haskell, for claimants.

LOWELL, C. J. The decision of this case in the district court is reported in 5 FED. REP. 822, and 4 FED. REP. 89. The Hope, a small sloop loaded very deep with stone, was proceeding from Cape Ann to Boston on a fine moonlight night, and was close hauled on the starboard tack, when she was struck on the starboard quarter by the stem or bow of the large three-masted schooner Freddie L. Porter, bound from Boston to the Kennebec for a cargo of ice, and sailing with the wind aft. The burden is on the schooner to account for the collision consistently with her innocence; and the defence is that the sloop suddenly tacked under the bows of the schooner immediately before the collision.

The mate of the Porter was on deck, forward, assisting the lookout, and there was a man at the wheel. Only the officer is brought forward as a witness. The libellants comment very severely on the absence of the other two. It seems that they deserted on the arrival of the vessel at her port of loading; but it would seem that, by reasonable diligence at that time, they might have been found. The libel was served only four days after the damage was done, and the absence of these men is open to remark.

The mate testifies that, being forward on the lookout, he saw both lights of the sloop ahead at a distance estimated at one-eighth or one-sixteenth of a mile; that he ordered his own helm hard a-port, and the order was obeyed, and the change of course brought the port light of the sloop three points on his port bow and shut out the green light;

then he ordered the wheel to be steadied, and went aft to loose the tackle of the main boom. Before he had reached his destination he turned and saw only the green light of the sloop, by which he found that she had tacked and was running across his bow; then he ordered his wheel to be ported again, and the answer was that it was hard a-port; then the collision took place. The two witnesses for the sloop say that the last tack was made about 20 minutes before the collision.

The mate's story cannot be accurate. His vessel was sailing directly before the wind; the sloop was five points off, and therefore he could not see both her lights "ahead," unless when she was coming into the wind to tack. If he saw them under those circumstances, he must admit that he had time to clear the sloop, for it was the first time he had seen her, and he was bound to see her in season; and he should have put his helm to starboard. I do not mean that he did see a tack at that time. From his evidence alone, if it were uncontradicted, I should say that he or his lookout had failed to see the sloop seasonably, and I have little doubt that the collision was caused by exactly that oversight. At all events, I agree with Judge Fox that the claimants have failed to sustain the burden of proof.

I have examined the evidence as to the loss of the sloop. The master of the schooner was of opinion that she was not much injured; but his wish was father to the thought. He took no pains to verify it. After the suit is brought, it is rather late to begin to array circumstances and inferences upon a matter that could easily have been made certain at the time of the loss. I find the preponderance of the evidence to be that the sloop was sunk and totally lost.

The question of damages for freight is more difficult. The vessel was chartered by a parol contract, which bound the charterer to furnish her with employment for the season, in daily or frequent trips from Cape Ann or Quincy to Boston, at a certain price, by the ton, for stone carried. It was a single and entire contract, which much resembled an ordinary time charter. The district court assessed the net freight for the unexpired time of the charter. Upon the analogy of the insurable character of the freight under such a contract, and of the authorities cited by Judge Fox in 4 FED. REP. 822, though I think the decision may be an advance upon any which has been made, I do not think it is opposed to any principle, and affirm it as reasonable and just. Decree affirmed.

THE STEAM-SHIP ODER.

(District Court, E. D. New York. July 20, 1881.)

1. COLLISION—NEGLIGENCE.

A collision occurred in mid-ocean, to the eastward of the Grand Banks, in about latitude 40 degrees, 1 minute, north; longitude 38 degrees, 9 minutes, west. Both vessels were bound to New York. One, a bark, was sailing at a speed of four or five knots an hour, close-hauled upon the wind, on a course north, one-half west; the other, a steam-ship, was steaming at a speed of between 11 and 12 knots an hour, on a course west by north, half west. A light west by north breeze was blowing. Held, that, as there is no question in the case as to the existence of a green light displayed from the starboard side of the bark, nor as to the brightness of the night being sufficient to render such light visible in time to avoid the collision, and as the question whether the steamer was approaching the bark from aft in a course that rendered it impossible for her to see the green light of the bark sooner than she did must be answered in the negative, the inference is irresistible that the cause of the collision was the failure on the part of the steam-ship to keep a proper lookout.

2. LIGHTED TORCH—REV. ST. § 4234.

No fault can be found with the bark for not displaying a torch over her stern towards the steamer seen approaching, if the display of an additional light from the bark would have been of no avail for want of a proper lookout on the steamer.

3. WITNESS.

A mistake in regard to time and distance, in cases of this description, does not necessarily discredit a witness.

Hill, Wing & Shoudy, for libellant.

Shipman, Barlow & Larocque, for claimant.

BENEDICT, D. J. This action is brought to recover the sum of \$22,500, as damages for the sinking of the Norwegian bark *Collector* by the steam-ship *Oder*, on the night of June 7, 1879. The place of the collision was mid-ocean, to the eastward of the Grand Banks, in about latitude 40 degrees, 1 minute, north; longitude 38 degrees, 9 minutes, west. Both the vessels were bound to New York. The bark was sailing at the speed of four or five knots an hour, close-hauled upon the wind, with the proper lights burning brightly. The *Oder*, according to her answer, was steaming at a speed of between 11 and 12 knots an hour, on a course west by north, half west. A light west by north breeze was blowing, the sea was not heavy, and the night, from 12 o'clock until the collision, which occurred at 32 minutes past midnight, was overcast, and the stars obscured, and streaks of light haze alternated with clear air.

On the part of the bark it is contended that the steamer was sailing without a proper lookout, and for that reason she did not discover the bark until the vessels were near each other, and made no proper effort to avoid the bark.