PRINCE EDWARD ISLAND ADMIRALTY DISTRICT.

1907
April 18.

MAGDALEN ISLANDS STEAMSHIP COMPANY, LIMITED..... } PLAINTIFF;

AGAINST

THE SHIP *DIANA*.

Maritime law—Shipping—Collision—Vessel "hove-to"—Lookout—Manœuvre to avoid collision—Pleading—Preliminary Act—Evidence—Salvage.

A schooner "hove-to," with her wheel made fast by a becket which could be removed instantly, her lookout and wheelsman properly stationed, and maintaining a steady course, is not, with reference to such circumstances, open to the charge of being negligently navigated.

2. A vessel without a sufficient lookout has the burden cast upon her of proving that such fact did not contribute to the collision.

3. Apart from the regulations, in a case of impending collision it is negligence for a steamship to fail to slacken speed, or to stop, or reverse, if such manœuvre is necessary to avoid collision.

4. Where defendant's preliminary act alleged that at a certain point the bearing of the ship at fault was "a little abaft the starboard beam" of the injured ship, evidence was admitted to show that the line of approach was not more than two points abaft, or was forward of the beam of the injured vessel.

5. The wrong-doer cannot recover salvage remuneration for services rendered to the ship with which he has been in collision.

ACTIONS for damages for collision and for salvage.

The facts are stated in the reasons for judgment.

W. S. Stewart, K.C., and *R. E. Harris, K.C.*, (of the Nova Scotia Bar) for plaintiffs;

F. R. Taylor (of the New Brunswick Bar) *Edward S. Dodge* (of the Massachusetts Bar) for defendants.

SULLIVAN, (C.J.) L.J. now (April 18th, 1907) delivered judgment.

These actions are brought by the Magdalen Islands Steamship Company, Limited, as owners of a steamship

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called the *Amelia*, against a sailing vessel called the *Diana*. One action is for the recovery of damages in respect of a collision which took place between the *Amelia* and the *Diana* on the 26th September, 1906, in the Gulf of St. Lawrence, and the other action is on a claim for salvage remuneration for towing the *Diana* from the place of collision to Souris, in Prince Edward Island. There is a counterclaim in each case on behalf of the *Diana*, for damages occasioned to her in the collision by the *Amelia*. By consent of the parties, the actions were consolidated under an order of the court and were tried as one cause.

The *Amelia* was of the burden of 357 tons gross and 103 tons net, her length over all was 145 feet. She was employed in carrying mails, passengers and freight between Pictou, Nova Scotia, and the Magdalen Islands, calling at Souris in Prince Edward Island. At the time of the collision she had on board as master, Captain Burns, a first mate, Pride, a second mate, two engineers, three firemen, four sailors and a winchman, besides a purser, steward and cook; and she carried five or six passengers. She was at the time a light ship, her whole cargo consisting of a couple of hundred bags of salt.

The *Diana* was a fishing schooner, hailing from Gloucester, Massachusetts. Her burden was 123 tons gross and 89 tons net register. Her length over all was 103 feet 9 inches. Her crew all told comprised 18 men and she was in charge of Captain James McLean. At the time of the collision she was engaged in seining mackerel off the coast of Prince Edward Island.

According to the preliminary act of the plaintiff the collision took place at 2.55 o'clock in the morning, "about 6 miles west, south-west from East Point Light," and according to the preliminary act of the defendant, it took place at 2.45 o'clock in the morning "about 7 miles south, south-west from East Point Light." In support

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of the plaintiff's view as to the place of the collision witnesses from the *Amelia* testified that the course of that steamer from Entry Island Light in the Magdalen Islands, was south west half south until East Point Light bore north west between two or three miles distant; that the course was then changed to west half south and that the pursuance of these courses brought the *Amelia* to the place in which it is alleged for the plaintiffs the collision occurred. The witnesses in support of the view put forward on behalf of the *Diana* as to the place of collision testified partly from bearings alleged to have been taken at the time, and partly from observation and their knowledge of the locality in which they had been fishing. There are elements of uncertainty in the statements of both parties; but a consideration of the courses alleged to have been taken by the *Amelia* and of all the evidence adduced on the point leads me to the conclusion that the collision took place about 5 miles south-west from East Point Light, and about 3 miles from the nearest land. But in the view I take of the case it is not material, even if it were practicable, to arrive at a closer approximation as to the place in which the vessels came in contact.

The parties practically agreed as to the direction and force of the wind, both alleging that it was west, north-west, the plaintiffs stating that it was a moderate breeze, and the defendants that it was about 4 knots an hour. They also substantially agreed that there was no sea. As to the state of the weather it is alleged in the plaintiffs' preliminary act that it was "dark but fine" and in the defendants' preliminary act that it was "clear but slightly overcast, no mist or fog." There was some discrepancy among the plaintiffs' witnesses on this head. Painchaud, a passenger on the *Amelia*, said it was "a little dark," but that he saw the loom of the land, and saw the sails of the *Diana* 50 yards away. All the crew of the *Amelia* said they could not see the land. Theriault,

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the look-out, said he saw the sails of the *Diana* about a minute or a minute and a half before the collision, which according to the rate of speed of the *Amelia* would give the distance as about 900 feet to 1,350 feet, at which he had seen them, while McLean, the wheelman, said it was so dark he could not see from the pilot-house the man on the lookout, a distance of 50 feet.

The witnesses from the *Diana* said that the weather was clear, at times starlight, with some clouds, and that a vessel even without lights could be seen from half a mile to a mile and a half distant. In this they were supported by Captain Gallant and his first officer Skerry of the schooner *James A. Gray*, both of whom testified that they saw the sails of the *Diana* at a distance which they estimated at from a quarter of a mile to a mile. The weight of the evidence on this point satisfies me that it was at least, as some of thewitnesses described it, "a good night for seeing lights."

The course of the *Amelia* was west half south and her speed was between nine and ten knots an hour. The *Diana's* course was north, north-west, and from the time she ceased fishing in the evening until 12 o'clock midnight she was hove-to on the starboard tack, under mainsail, fore-sail, jumbo, and jib, with the jib amidships, the jumbo to windward, the wheel hard down on the starboard tack with a becket on one of its spokes to keep it from moving. From 12 o'clock to the time of the collision she was on the port tack with the same sail, the jumbo on the port side and the helm hard down. The wind moderated about 12 o'clock, and from that hour to the time of the collision the speed of the *Diana* was from half a knot to one knot an hour.

The vessels came in contact by the stem of the *Amelia* striking the *Diana* on her starboard bow forward of the forerigging opposite the windlass. As a result of the impact a hole was broken in the bow of the

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Diana, her starboard light was crushed in, the glass broken and, according to the evidence for the *Diana*, the light extinguished. The stem of the *Amelia* was also broken and other damage was done to both vessels.

The fault or default attributed to the *Diana* is set forth in the plaintiffs' preliminary act in these words: "That the schooner had no lights, and no attempt was made to make any signal or draw the attention of the steamer *Amelia* to her position, and no attempt was made to avoid the collision; and the said schooner violated the rules and regulations as to her proper navigation."

In opening the case the plaintiffs' counsel specified no fault or default against the *Diana*, and at first the controversy appeared to be whether the side lights, and more especially the starboard light, of the *Diana* were properly placed, and were burning at the time of and immediately prior to the collision. But towards the conclusion of the case, Mr. Harris, the plaintiffs' counsel, stated that his contention was that "in approaching the *Diana* there was no light visible to those on board the *Amelia*, and that that might have been due to the fact that there was no starboard light burning, or to the fact that the *Amelia* was approaching the *Diana* upon such a course—more than two points abaft the beam—as to preclude the *Amelia* from seeing the starboard light, if burning on board the *Diana*." As to the port light, Pride, the mate of the *Amelia*, who examined it after their arrival in Souris, admitted that he saw nothing wrong with it, and it was seen from the *Amelia* burning while the *Diana* was being towed.

Mr. Dodge argued in his closing address for the defendants that the plaintiffs were precluded from setting up the case that the *Diana* was an overtaken vessel because that was not specifically alleged in the plaintiffs' opening nor in any of the proceedings; that the point should have been taken at the earliest possible stage of the case, and

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that the general allegation in the plaintiffs' preliminary act that the *Diana* had no lights was not sufficiently specific to embrace the plaintiffs' contention. But inasmuch as it does not appear that the defendants were in any way mislead by the statement in the plaintiffs' preliminary act, nor by the subsequent proceedings, and as it does not appear that the allegation in the plaintiffs' preliminary act, giving it a reasonable construction, was calculated to mislead, I will not give effect to the defendants' objection, but will proceed to consider the plaintiffs' contention upon its merits. That contention is resolved into two questions:

First. Was the starboard light of the *Diana* burning?

Secondly. If it was burning, was the *Amelia* in the position of an overtaking ship?

It appears by uncontradicted evidence that the *Diana* was sufficiently manned for a vessel of her class; that she had the full watch that is usually carried by Gloucester fishing vessels; that her side lights were in dimensions the largest, and in quality of the best, carried by vessels of her size; that they were properly set in the forerigging, and so fixed as to throw the light from right ahead to two points abaft the beam on either side, and of such a character as to be visible at a distance of at least two miles, thus meeting in all respects the requirements of the rules concerning lights. They were never known to have gone out, nor to have given any trouble in keeping them burning. Blondin, the cook, whose duty it was to attend to the lights, testified that he cleaned, trimmed and filled the lamps on the day preceding the collision, and that they were placed in their proper positions at the usual time that evening; that at 12 o'clock that night he saw them in their proper places, the green light on the starboard side, and the red light on the port side, burning brightly.

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McRae and Steele, who formed the watch on the *Diana* from 2 o'clock in the morning until the time of the collision the former aft at the wheel and the latter on look-out forward of the foremast and aft of the windlass, both testified that they looked at the lights when they went on watch and that they were then burning brightly, unobstructed in any way. When they first saw the light of the *Amelia* at from 15 to 30 minutes after 2 o'clock, they looked at their lights and found them still burning brightly, and again within a few minutes of the collision or as McRae expressed it, "about a minute before the collision, just before she (the *Amelia*) swung down on top of us," they could see by the reflection of the green light on the bulge of the jib that the starboard light of the *Diana* was then burning. The starboard lantern, crushed in, with the glass broken, and containing some oil, was exhibited in court, and according to the evidence it was then in the condition in which it was when taken from its proper position in the rigging of the *Diana* at Souris, after the collision. Some pieces of the broken glass of the lamp were found on the well deck of the *Amelia*. In addition to this testimony there is the corroborative evidence of Captain Gallant of the schooner *James R. Gray*, which was sailing in the vicinity on her way to Pictou, and of Skerry the mate of that schooner, both apparently independent and disinterested witnesses. Shortly after 2 o'clock on the morning of the collision they saw the green side light of a schooner, which the evidence shews was the *Diana*, on their starboard or lee bow and about 2 miles distant. Afterwards they saw the schooner's sails at a distance of from a quarter mile to a mile. They recognized her as an American fishing schooner. Then they saw the mast-head light of a steamer which the evidence proves was the *Amelia*. The steamer was heading upon the schooner, and as their vessel was tacking they continued to see both side lights

of the schooner until they became obstructed from view by the steamer, which was, Captain Gallant said, about 20 minutes to 3 o'clock. Shortly afterwards they saw a search light at the place where apparently the steamer and the schooner came in contact. The evidence shews that a search light was used by the steamer just after the collision. From all this evidence I must take it to be established as an undoubted fact that the *Diana* carried the proper side lights, and that they were burning properly. That fact is proved by affirmative evidence, and negatived by no evidence whatever, except by that of witnesses who only say that they did not see them.

The next question is whether the *Diana* was an overtaken vessel under article 24 of the regulations for preventing collisions at sea, and which under article 10 would be required to shew from her stern a white light, or a flare-up light.

The counsel on both sides were agreed that, taking the course of the steamer as west half-south and the course of the schooner as north north-west, as the evidence shews that it was, with the steamer heading directly for the schooner, the *Amelia* would be approaching the *Diana* at an angle of 1½ points abaft the beam of the *Diana*. But as it appears that the *Amelia* was passing ahead across the course of the *Diana*, the *Diana* being on her port bow, the *Amelia* would necessarily approach nearer abeam than 1½ points. The contention for the defendants is that the *Amelia* approached the *Diana* about abeam, or forward of abeam, and that that is in substantial agreement with the allegation in the plaintiffs' preliminary act that the *Diana* "would be bearing about between west and west south-west from the steamer." The evidence of the *Diana's* watch is in accordance with this view. McRea and Steele said that after viewing and considering the course of the steamer they concluded she would cross the bow of the *Diana*,

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and Steele said he "saw the steamer's light 3 miles away bearing ½ point forward of our beam."

The evidence of Painchaud, Pride, Theriault and Captain Burns for the plaintiffs tends to shew that the *Amelia* was approaching the *Diana* at about a right angle, which would indicate that the *Amelia* was approaching the *Diana* little, if any, abaft the latter's beam.

Mr. Hyndman, the nautical assessor, has been good enough to furnish me with two diagrams exibiting the position of the *Amelia* and the *Diana* according to their courses as proved, and the rate of speed of the *Amelia*, at a qurter of an hour before the collision, and at one minute before the collision respectively. At a quarter of an hour before the collision the two vessels were about two and a quarter miles apart The *Diana* was half a point on the port bow of the *Amelia* and the *Amelia* was one point abaft the beam of the *Diana*. At one minute before the collision the *Amelia* was about 900 feet from the *Diana* and the *Diana* was two degrees on the *Amelia's* port bow. The *Amelia* was then half a point abaft the beam of the *Diana*.

It was argued for the plaintiffs that the defendants were precluded from showing at the trial that the *Amelia* approached the *Diana* forward of the *Diana's* beam, as in the defendants' preliminary act it is alleged that the bearing of the *Amelia* was "a little abaft the starboard beam" of the *Diana*. I do not agree with that view. The evidence on this point on behalf of the defendants was not offered in contradiction of the defendants' preliminary act, but was intended to show that the *Amelia* did not approach the *Diana* at more than two points abaft the latter's starboard beam, which was the question raised on behalf of the plaintiffs, and any evidence tending to show that the line of approach of the *Amelia* was either not more than two points abaft the *Diana's* beam,

or was forward of her beam, was admissible for such purpose.

In connection with this branch of the case the plaintiffs' counsel argued that a vessel "hove-to" with her helm lashed down is liable to fall off until her sails fill and then come up to the wind until her sails empty, and that she may thus pursue an unsteady course, zig-zagging from one side to the other over a range of four or five points. That, taking the course of the *Amelia* to be west half south and the course of the *Diana* to be north, north-west, that would place the *Amelia* 1½ points abaft the beam of the *Diana*. That proceeding on these courses, if the *Diana* came up more than half a point the *Amelia* would lose her side light, and for at least some period of time the *Diana* would be in the position of an overtaken vessel. Speaking of the occasion in question and of the conditions then existing, the evidence as given by McRae and Steele, who formed the watch of the *Diana*, from 2 o'clock to the time of the collision, is that the *Diana* was pursuing a steady course without any noticeable variation, McRae stating that she might vary a quarter of a point each way. Captain McLean said that when he had occasion to observe the conduct of the *Diana* shortly after 12 o'clock, she was not coming up and falling off that he could notice, and that when he was on deck again about five minutes after 2 o'clock, he looked a couple of minutes and did not see any variation. On the latter occasion he looked at the *Diana's* compass, and saw that her course was north, north-west.

This positive and uncontradicted testimony as to the manner in which the *Diana* was actually proceeding on that occasion, considered apart from answers to questions based upon theories as to what vessels "hove-to" might generally do, or be expected to do, or even as to what the *Diana* might do in conceivably different circumstances, does not enable me to come to the conclusion

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suggested by Mr. Harris, that the *Amelia* was approaching the *Diana* on a course of more than two points abaft the latter's beam; and that the *Amelia* not being so approaching, the *Diana* was not an overtaken vessel under article 24, and not being an overtaken vessel the *Diana* was not required to show from her stern a light under article 10, nor was she under any obligation to show a torch or make any other signal (1).

Mr. Harris further contended that the mere fact of being "hove-to" as the *Diana* was, and continuing in that condition, in the circumstances, constituted negligence on her part. He relied chiefly in support of his argument on the case of *The Transit* (2), decided by a Judge of a district court of the United States, in which a pilot boat which was "hove-to" with her helm lashed, and a schooner with which she collided, were held to be in fault, the pilot boat because she did not keep a steady course. Mr. Harris also sought support from the case of *The Haverton* (3), decided by a judge of the Circuit Court of the Eastern District of the State of Louisiana, in which a pilot boat was held at fault among other things in not taking precautions "by way of unlashing her helm and calling the watch below when it became apparent that the collision was imminent." Even if those cases were binding on this court, which of course they are not, they are distinguishable from the case at bar.

In the *Transit*, as stated by the court, "the pilot-boat was luffing up and then keeping off, her luffing up being to such an extent as to cause her sails to shake, and her falling off being to the extent of two points, and when she fell off and went ahead her course would be for the port quarter of the *Transit*, and when she luffed up she would shoot across the bows of the *Transit*, and this luff-

(1) *The Robert Graham Dun*, 102 Fed. Rep. 652, S. C. on appeal, 107 Fed. Rep. 994; *The Martha E. Wallace*, 148 Fed. Rep. 94.

(2) 3 Benedict, 192.

(3) 31 Fed. Rep. 563.

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ing up and falling off by the pilot-boat was repeated several times and noticed from the *Transit* while the two vessels were approaching each other. Finally when the two vessels were about 80 yards apart the pilot-boat took another luff sharp across the bows of the *Transit*. The Court said: "It was the duty of the pilot-boat to keep her course, but she kept no course whatever."

In the *Haverton*, the pilot-boat had her helm lashed; all hands were below asleep except a boy who was on the watch, and she was proceeding, as the Court said, in "a happy go lucky manner."

The uncontradicted evidence in the case at bar is that the *Diana* was not "coming-to" and "falling-off;" but on the contrary that she maintained a steady course, not varying at any time more than half a point, and that her wheel was made fast by a becket, which could be removed instantly, and that besides the lookout there was a man at the wheel ready to act in any emergency. Moreover, in this case, according to the evidence, it never became apparent that the *Diana* was not observed by the *Amelia*, nor did it become apparent to those on board the *Diana* that a collision was imminent until the vessels were almost in the very act of contact, as the schooner's watch concluded that the steamer would pass clear of the schooner until she suddenly veered down upon her. I have been referred to no case which decides that navigating a vessel "hove-to" with her wheel in a becket, as the *Diana* was, unaccompanied by other conduct or conditions, establishes seamanship of so faulty a character that a vessel so situated, in the event of her collision with another vessel shall be *ipso facto* held to blame. In the cases of the *Transit*, and the *Haverton*, it was held that the conduct of the pilot-boats, which were "hove-to," contributed to the collisions; in the former, because of what the judge designated "wild manœuvring," and in the latter on account of what the court called "the happy go lucky

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manner" in which the pilot-boat was proceeding. No such misconduct has been proved against the *Diana*.

In the case of the Barque *Birgitte v. Forward* (1) it was contended, as in this case, that a vessel "hove-to" with her helm lashed hard down, as she was continually "coming-to" and "falling-off" the wind, and changing the position of her lights, should be held at fault; but the Court decided that as her conduct did not contribute to the collision, she was not to blame simply because she was "hove-to" with her helm lashed down. The alleged fault of being "hove-to," as the Diana was, does not relate to a statutory rule. It concerns only the ordinary rules of navigation, as to which it must appear not only that there was a fault, but that such fault did in fact contribute to the collision (2).

On this point I submitted to the nautical assessor, as a question of seamanship, whether in his opinion, in the circumstances of this case, the fact that the *Diana* was "hove-to" as described in the evidence, contributed to the collision, and his answer, with which I agree, is in the negative.

A further contention on behalf of the plaintiffs was that in the circumstances the *Diana* should have done something to avert the collision, as provided by the note to article 21, and that she did nothing. Article 21 and the note are as follows:

"When by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed. Note.—When in consequence of thick weather, or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert the collision."

(1) 9 E. C. R. 339.

(2) See the *Emily B Maxwell*, 96 Fed. Rep. 999; the *Columbian* 100 Fed. Rep. 991; the *Nacoochee*, 137 U. S. 330.

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The note is, it appears to me, wholly inapplicable in view of the facts of this case. There were no causes here indicating that the *Amelia* could not have avoided the schooner until she and the *Diana* were in the very agony of collision. It is in evidence that the watch on board the *Diana* had carefully viewed the approach of the *Amelia*, and had concluded that she would pass clear across the bow of the *Diana*, about the length of the steamer ahead of the schooner, until the last moment, when the *Amelia* veered down upon the *Diana*. I am also of opinion that there were no special circumstances existing which, under article 27 or article 29, made a departure from the usual rule necessary. In the case at bar a change of course or other action by the *Diana* would have been of no avail, and might have caused a worse disaster than that which occurred. This is also the opinion of the nautical assessor.

The reason and necessity for adhering to the rule that in such circumstances a sailing vessel should keep her course are thus laid down by Sir James Hannen (afterwards Lord Hannen) in the *Highgate* (1): "A clear rule that a sailing vessel is to keep her course has been laid down and enforced very strictly, it being thought necessary in the interest of life and property to do so. It is therefore only where a clear case of necessity for departing from the rule is made out that the captain of a vessel can excuse himself for not following the rule. * * A steamer is able to manœuvre so as to keep out of the way of another vessel even when very close to her. * * How is a sailing vessel to know that a steamer is not going to cut it fine, or to know in what particular direction she will move at the last moment? The guide of the steamer's action is the presumption that the sailing vessel will keep her course."

(1) 62 L. T. 841.

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The duty of the *Diana* was to keep her course and speed, and the evidence shews that she did so. But her action, even if her course was unsteady, had no influence whatever upon the conduct of the *Amelia* and could have had no tendency to "mislead" or embarrass her, because, according to the evidence of the witnesses on behalf of the plaintiffs, the persons on board the *Amelia* did not see the *Diana* at all until the two vessels were so close together that effective measures to avoid the collision could not be taken. The course of action or the *Diana* did not therefore in any sense contribute to the collision.

Reverting now for a moment to the manner in which the *Amelia* was navigated, the defendants' preliminary act charges the fault or default attributed to her as follows: (1) that she did not keep out of the way of the *Diana;* and (2) that she had no sufficient look out.

The excuse alleged on behalf of the *Amelia* for not keeping out of the way of the *Diana* is that the schooner was not seen by the *Amelia* until it was too late to avert the collision. This excuse involves the sufficiency of the *Amelia's* lookout and necessitates a consideration of the conduct and action of those in charge of the *Amelia* prior to and about the time of the collision.

On the night preceding the collision the captain of the *Amelia* was ill, and for some time until just prior to the collision had been in his stateroom. From two o'clock in the morning until the time of the collision, Pride, the the first mate, was in charge of the watch. McLean, a sailor, was at the wheel, and Theriault, another sailor, was the lookout. Up to the time the sails of the *Diana* were seen, Pride, according to the evidence, "was in and out" of the pilot-house, and it does not appear that he exercised any supervision whatever over the lookout. McLean said that a sufficient lookout could not be kept from the pilot-house where he was at the wheel, so that the whole duty of lookout devolved upon Theriault.

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The conditions for keeping a good lookout on the *Amelia* were not favourable unless the persons forming the look out were placed very near the stem. Owing to the construction and trimming of the steamer there were many obstacles, as detailed in the evidence, calculated to obstruct the view of even a careful and vigilant lookout. The steamer was at the time practically in ballast, and the nose or top of the stem projected high in the air, owing to the weight of the engines and boiler at the stern. The top of the stem was 14½ feet above the water. The starboard light of the *Diana* was only 13 feet above the water, so that the steamer, even if trimmed on an even keel, would have the top of her stem one and a half or two feet higher than the side light of the *Diana*. Around the whole of the top-gallant forecastle deck there was a rail about 2½ feet high, supported by stanchions, with rods, filling in the intervening space. On the top of this deck was the windlass, which was alleged to be about 2½ feet high, about the same number of feet in diameter, and it was about six feet from the stem. Theriault said that while he was lookout he remained abaft the windlass, and that some time after he went on lookout he left the top gallant forecastle deck without the knowledge of the officer of the watch, and went to the well deck, 10 feet below, where he engaged in coiling a hawser. He estimated that he was occupied in coiling the hawser about two minutes. When questioned on cross-examination whether he left the top gallant forecastle deck again after he had coiled the hawser, and before he saw the *Diana's* sails, his first answer was that he had not done so, but he concluded by saying, "I don't remember," and "I think I didn't." Painchaud, the passenger who was moving about the deck, did not know that any one was on the top gallant forecastle deck on look-out until Theriault went aft "to show the sails to the mate;" neither did McLean at the wheel see Theriault

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until the latter went aft. When Theriault reported "sails ahead," Pride at the pilot house asked him which way the vessel was going. He answered that he did not know, he could see no lights. Theriault then went aft over the flying bridge on the starboard side, crossed over the deck in front of the pilot-house from starboard to port, and found Pride outside the pilot-house, on, as he said, the port side. Pride and McLean, however, said that Pride was on the starboard side. Theriault said he went aft "to show the mate where the sails were." Pride then started to go forward, to see for himself. Theriault proceeded ahead of him, crossed the deck again in front of pilot-house from port to starboard and passed forward over the flying bridge. He went forward to a place on the rail on the port side of the steamer, and on reaching that place he saw the cabin lights of the *Diana* shewing out through the skylight, or through the after companion-way, and he stated that the schooner was then "not more than a length off." He then shouted to Pride that he saw a white light and that he thought the vessel was at anchor. In the meantime Pride had gone forward over the flying bridge to the after part of the top gallant forecastle deck, from which place he saw the jib and foresail of the *Diana*, but he did not see the lights from her cabin. He then, and not till then, shouted to McLean to "starboard the wheel," thinking that he could go under the stern of the schooner, and then he went aft to the pilot-house. On reaching the pilot-house he turned round and saw the lights from the cabin of the *Diana*; then he and the wheelman began to turn the wheel down to "port." Soon after the lookout had first reported sails, Painchaud saw them and called out: "It is a vessel, I see the sails." He was standing on the port side of the steamer, and he said she was then pointing between the *Diana's* foremast and mainmast. About this time Captain Burns came up from his stateroom, which was on the deck, 10 feet below the pilot-house deck. He came up a stairway

which contained many steps, and went on deck on the port side, went forward to the port door of the pilot-house, asked the mate about the position of the wheel, was told that it was "port," ordered "it hard aport," went up the steps to the bridge on top of the pilot-house, crossed over to the telegraph and rang it to the engine room to reverse the engine "full speed astern." He stood there ringing the order repeatedly. It does not appear that the engines moved astern before the blow of the collision was felt in the engine room by the engineer.

I have recited this evidence in detail, somewhat tedious detail, because it is the account as given by themselves of the conduct of the lookout, and of the other persons who acted on board the *Amelia*, on the occasion in question. I will now consider it with regard to the law bearing upon the questions raised; and, first, respecting the look-out. Several cases have been cited to me on the question of look-out, and both sides have referred to and relied upon the case of the *Ottawa* (1). That case is typical of the other cases on the subject and I accept it as containing a concise yet comprehensive statement of the law. In it the law is thus laid down by the Supreme Court of the United States: "Steamers are required to have constant and vigilant lookouts stationed in proper places on the vessel and charged with the duty for which lookouts are required. They must be actually employed in the performance of the duty to which they are assigned. They must be persons of suitable experience, properly stationed on the vessel, and actually and vigilantly employed in the performance of that duty. Proper lookouts are competent persons, other than the master and helmsman, properly stationed for that purpose on the forward part of the vessel; and the pilot-house in the night-time, especially if it is very dark, and the view is obstructed, is not the proper place. Look-outs stationed in position where the view

(1) 3 Wall. 268.

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forward or on the side to which they are assigned, is obstructed, either by the lights, sails, rigging or spars of the vessel, do not constitute a compliance with the requirements of the law; and in general, elevated positions such as hurricane decks, are not so favourable situations as those more usually selected on the forward part of the vessel near the stem. Persons stationed on the forward deck are nearer the water line and consequently are less likely to overlook small vessels deeply laden, and more readily ascertain their exact course and movement."

The evidence that I have recited shews that Theriault was not stationed as near the stem of the steamer as he might have been, and that there were obstructions in the way, and other difficulties owing to the construction and trimming of the vessel that might well have prevented his seeing the *Diana's* lights. Besides, it appears from his own evidence that he did not give his constant and undivided attention to his duties as lookout. He admitted that he was absent for some time, during which period there was no look-out; and when asked whether he had been absent again before he saw the *Diana's* sails, the final result of his evidence was, as he expressed it himself, "I don't remember," and "I think I didn't." Although in his direct examination he said he kept a good lookout, he appeared in cross-examination to be somewhat in doubt as to whether or not he was absent again between the occasion of his coiling the hawser and his seeing the *Diana's* sails. His evidence therefore falls short of distinct and positive testimony that he kept a good lookout. If he had kept a good lookout, even if the *Diana* had no lights, he ought to have seen her sails, light coloured as they were, at a distance of from a quarter of a mile to a mile off, as did Captain Gallant and Skerry; and if he had seen the sails at that distance there need not have been a collision. The plaintiffs counsel admitted that even if the *Diana* had been "coming-up" and "falling-off" to an extent that

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would place the steamer occasionally more than two points abaft the *Diana's* beam, if would be only at intermittent periods that her lights would be shut out from the steamer's view; and it is evident that even in that event they would be visible at intervals, constituting about half the time. The diagram drawn by the nautical assessor shews that a quarter of an hour before the collision, when the vessels were two and a quarter miles apart, the *Amelia* was only one point abaft the *Diana's* beam, and that one minute before the collision, when about 900 feet apart, the *Amelia* was only half a point abaft the *Diana's* beam. Yet the evidence for the plaintiffs is that at no time were the side lights of the *Diana* seen by those on board the steamer. The *Amelia* struck the *Diana* well forward of the *Diana's* starboard light, and even then, according to the evidence, those on board the steamer did not see the starboard light of the schooner. There is evidence that there were night-glasses on the steamer, but it does not appear to have occurred to the mind of anyone on board her to use them, although the steamer was going at her full speed over a locality which the evidence shews was much frequented by fishing craft.

It appears to me that the *Amelia* was inadequately manned. McLean, who was at the wheel, was in my opinion too young and inexperienced for his task. He gave his age as nineteen years, and in appearance he was a mere lad. Theriault was, it appears to me, also too young and inexperienced for the duty which he was supposed to perform as lookout. It is true that he gave his age as twenty-one years, but he presented a much more boyish appearance than that age would indicate. His experience on a steamer was of less than one month's duration, and in that period he seems to have been employed at various duties from which he would derive no knowledge tending to qualify him as an efficient lookout. Applying the reasonable rules stated in the *Ottawa* (1)

(1) 3 Wall. 268.

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to the present case, it appears to me that the allegation contained in the defendants' preliminary act, namely that the *Amelia* had no sufficient lookout, is fully established.

The absence of an efficient lookout has been held to be *prima facie* fault on the part of a steamer in collision; *Genessee Chief* v. *Fitzhugh* (1); Steamboat *New York* v. *Rea* (2); *Cape Breton* v. *Richelieu and Ontario Navigation Co.* (3).

A vessel without a sufficient lookout has the burden cast upon her of proving that the absence of such lookout did not contribute to the collision (4).

"Every doubt as to the performance of the duty (of lookout), and the effect of non-performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary," per Swayne J., in *The Ariadne* (5); See also *The Oregon* (6); *The Lyndhurst* (7).

In this case under the law as thus stated, the burden was cast upon the plaintiffs of proving that the absence of a sufficient look-out did not contribute to the collision: that burden has not been removed by any evidence adduced on behalf of the *Amelia*: I must therefore hold that the absence of such lookout did contribute to the collision.

It was contended on behalf of the defendants that besides violating article 20, which required the steamer to keep out of the way of the sailing vessel, the *Amelia* also violated article 23, which is that "every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

(1) 12 Howard 443.
(2) 18 Howard 223.
(3) 36 S. C. R. 564.
(4) The *Great Republic* 23 Wallace 20; the *Pilot Boy*, 115 Fed. Rep. 873.
(5) 13 Wall. 475.
(6) 158 U. S. 186.
(7) 92 Fed. R. 681.

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When Theriault saw and reported the *Diana's* sails he and Pride should have remained at their posts, each attending to his own duties, instead of losing precious time in conversing and in traversing the steamer backwards and forwards over a distance of from 50 to 60 feet, looking for lights. If they had remained at their posts, and if Pride had acted promptly even from the inside of the pilot-house the collision might have been avoided In the pilot-house there were no means of communicating with the engineer, nor of operating the steam steering gear, there was only the hand wheel. The *Amelia* was constructed with an upper bridge on top of the pilot-house, and upon that bridge were the engine telegraph and the steam steering wheel. It can hardly be doubted that the *Amelia* was designed to be commanded from the bridge on top of the pilot-house and not from the inside of the pilot-house. If Pride had been upon the upper bridge and had acted quickly, it is hardly open to doubt that he could with the aid of the steam steering gear have steered the *Amelia* clear of the *Diana* by going either to starboard or to port. As it was, notwithstanding the inexcusable delay and confusion which occurred before any decisive action was taken, and then by changing from "hard a starboard" to "hard a port," and ultimately, after Captain Burns had reached the upper bridge and had taken charge of the steamsteering gear, to "full speed astern," the *Amelia*, according to evidence given in her behalf, was brought from a position heading for a place between the masts to a position in which she struck the *Diana* well forward of the foremast on the starboard bow. Had she swung a few feet further she would have avoided the schooner altogether.

When the sails of the *Diana* were first seen from the *Amelia* it was evident that there was "risk of collision." The "necessity" defined by Lord Watson in *The Ceto* (1),

(1) 14 App. Cas. at p. 686,

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then existed. It had then, or should have then, "become apparent to the eye that if they continued to approach they would in all likelihood either shave close or collide."

Theriault said that about a minute or a minute and a half elapsed from the time he reported the sails of the *Diana* until the collision, but judging from what took place on board the steamer as detailed in evidence, I should conclude that the time was longer than a minute and a half. The steamer was passing through the water at a speed of about 900 feet a minute, and even if the time was only a minute and a half the vessels would be between 1,300 and 1,400 feet apart when the Diana's sails were first observed. In the *Emmy Haase* (1), where somewhat similar evidence regarding time was given, Butt, J., in giving judgment, said: "we are unable to accept the story that half a minute only elapsed between the time when the red light of the *Mulgrave* was seen and the time of the collision. We think the time must have been longer, and therefore the *Emmy Haase* is to blame for not stopping and reversing before she did." And then he said, "I may add that compliance with the rule at the very moment when danger becomes apparent is not necessary, for a man must have time to consider whether he should reverse or not. The Court is not bound to hold that a man should exercise his judgment instantaneously; a short, but a very short, time must be allowed for this purpose."

Now, allowing "a short, but a very short, time," to the officer in charge of the *Amelia* to consider whether he should reverse or not—although in his case it does not appear that any of the time consumed was devoted to that purpose—it seems to me that there were both time and space sufficient to have enabled the officer in charge of the steamer, by promptly and properly acting, so to manoeuvre his ship as to avoid the collision.

(1) 9 P. D. 81.

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Instead of that he did what Lord Bramwell condemned in *The Ceto*, (1) "he speculated instead of making sure by stopping and reversing." See also *The State of California*. (2)

The nautical assessor whose opinion, as a question of seamanship, I asked as to what could have been accomplished in the circumstances by a competent seaman in command of the *Amelia* to avert the collision, assures me that he is convinced that had Pride, the mate of the *Amelia*, been in his proper place as officer of the watch, on the bridge near the telegraph, when the report "sails ahead" was made by Theriault, the lookout, and had then telegraphed to reverse the engines, no collision would have taken place. The nautical assessor further says that the report "sails ahead" and not "lights ahead" should have shewn the mate, and ought to have shewn any competent seaman, that his position was one of great peril, which necessitated the immediate reversing of the engines.

I further asked the nautical assessor whether in his opinion there was anything, other than stopping and reversing his engines, that the officer in command of the *Amelia* could have done to avoid the collision, and he confidently tells me that he is firmly of opinion that had the mate of the *Amelia* kept his helm "hard a starboard," the steamer would have gone astern of the *Diana*, and there would have been no collision, and he further says that his opinion is that if the helm of the *Amelia* had been properly put "hard a port" and kept there, there would have been no collision. I entirely agree with the answers of the nautical assessor to the questions submitted to him, and in so far as these answers are based upon elements of fact they are fully warranted by the evidence adduced.

(1) 14 App. Cas. 689. (2) 49 Fed. Rep. 172.

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But Mr. Harris argued on behalf of the plaintiffs that the provisions of article 23 were not available to the defendants because the breach of that article is not specially charged as such in the defendants' preliminary act. It is charged in the defendants' preliminary act in general terms, that the *Amelia* did not keep out of the way of the *Diana*, and article 23 only directs how that shall be done on approaching the other vessel, namely, if necessary, by slackening her speed, or by stopping or reversing. It is simply a mode of keeping out of the way, and is, it appears to me, included in the allegation in the defendants' preliminary act. In *The Bougainville* (1), keeping out of the way is thus defined by the court: "What getting out of the way is must depend, of course, on the circumstances of each particular case. It may be by porting, it may be by starboarding, it may be by stopping."

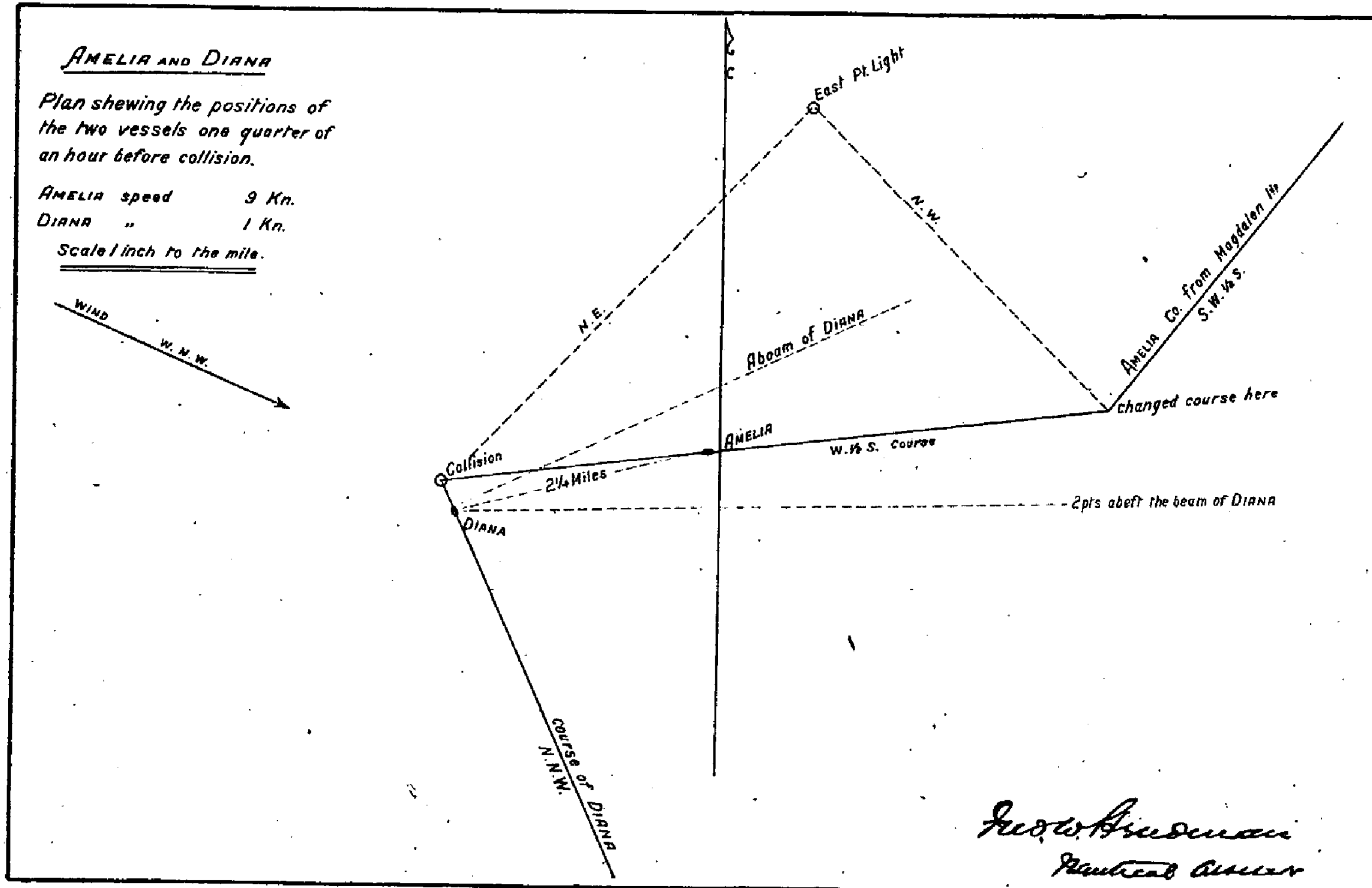
Apart, however, from the regulations, it would be negligence in a steamship which failed to slacken her speed, or to stop, or reverse, if such manoeuvre were "necessary" to avoid collision; and article 23 appears to be little more than a declaration of the law in this respect (2).

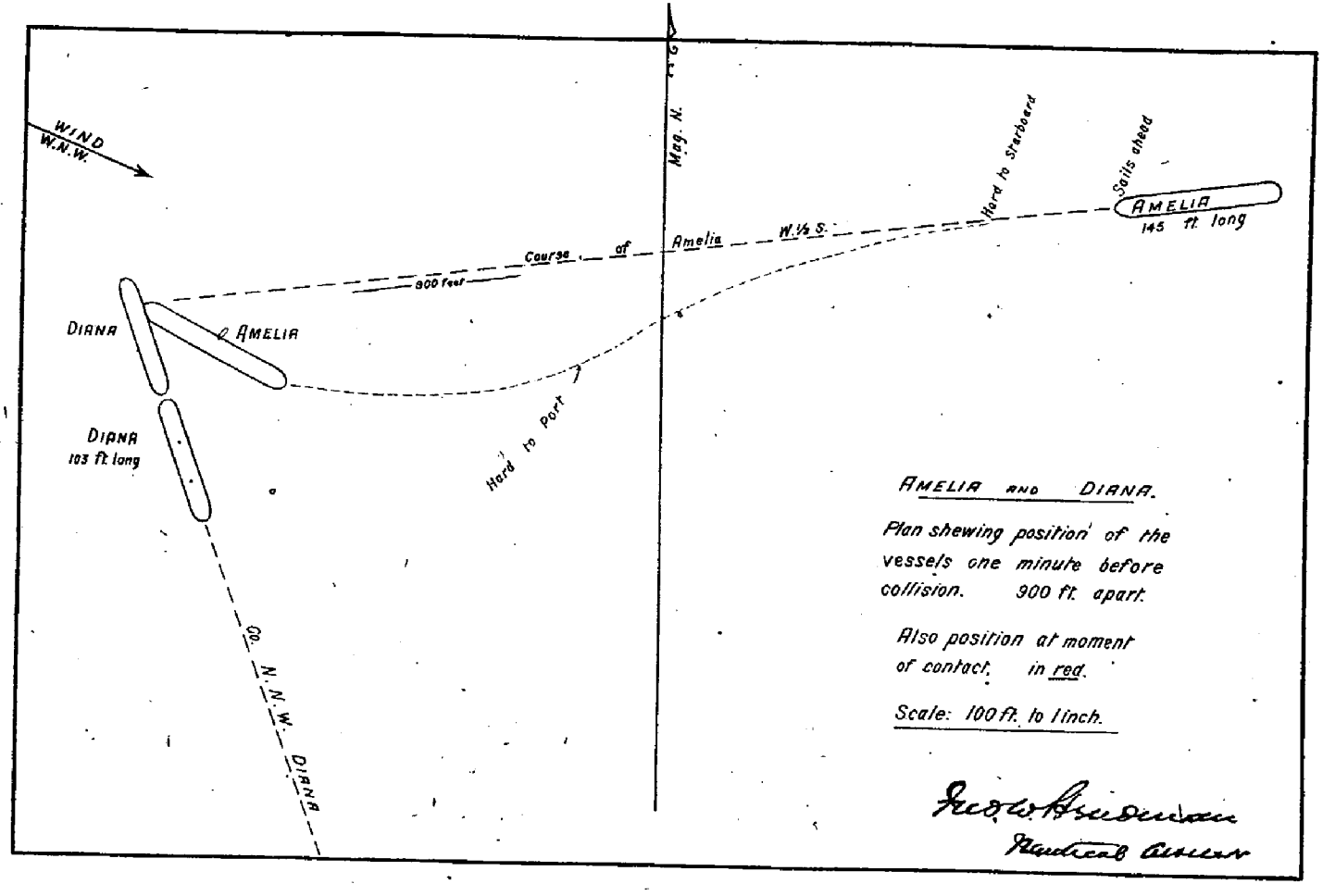
The plaintiffs can only be relieved from liability under article 20. and under the law as declared in article 23, by showing that the collision was caused by inevitable accident or by the culpable negligence of the *Diana*, neither of which propositions has the plaintiffs proved. The law on this point is thus stated by the court in the case of *The Carroll* (3): "The steamer was required to keep out of the way, slack her speed, or if necessary, stop or reverse * * * As the steamer did not keep out of the way, and as the collision did occur, the steamer is

(1) L. R. 5 P. C. 316.

(2) Marsden on Collisions at Sea, 5th ed. p. 416; and see *The Birkenhead*, 3 W. Rob. 75. See also, per Lord Halsbury, L.C., in *The Ceto*, 14 App. Cas. at p. 673; and per Lord Bramwell, *ibid*, p. 689.

(3) 8 Wallace, 302.


AMELIA AND DIANA
Plan shewing the positions of the two vessels one quarter of an hour before collision.
AMELIA speed 9 Kn.
DIANA " 1 Kn.
Scale 1 inch to the mile.
WIND W. N. W.
East Pt. Light
N.E.
N.W.
Abeam of DIANA
AMELIA Co. from Magdalen Is. S.W. ½ S.
changed course here
AMELIA
W. ½ S. Course
Collision
2¼ Miles
2pts abaft the beam of DIANA
DIANA
Course of DIANA N.N.W.


WIND
W.N.W.
Mag. N.
Hard to Starboard
Sails ahead
AMELIA
145 ft. long
Course of Amelia W.½S.
900 feet
DIANA
AMELIA
DIANA
103 ft. long
Hard to Port
Co. N.N.W. DIANA
AMELIA AND DIANA.
Plan shewing position of the vessels one minute before collision. 900 ft. apart.
Also position at moment of contact. in red.
Scale: 100 ft. to 1 inch.
Geo. W. Anderson
Nautical Assessor

primâ facie liable, and can only relieve herself by showing that the accident was inevitable, or was caused by the culpable negligence of the schooner." See also *The Nacoochee* (1); *The Oregon* (2.)

The *Amelia* did not keep out of the way of the *Diana*, and as the collision occurred through the negligence of those in charge of the *Amelia* in failing to take the necessary measures to avoid it, the plaintiffs are liable for the steamer's non-compliance with article 20, and with the law as declared in article 23.

It was finally contended by Mr. Dodge that in any event the faults of the steamer *Amelia* were so gross that the rule adopted by the Supreme Court of the United States should be followed and applied to her. That rule is thus stated in *The City of New York* (3): "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favour."

Again in *The Umbria* (4), the rule is thus set forth: "Indeed so gross was the fault of the *Umbria* in this connection, that we should unhesitatingly apply the rule laid down in *The City of New York* (5), and *The Ludvig Holberg* (6), that any doubt regarding the management of the other vessel, or the contribution of her faults, if any, to the collision should be resolved in her favour."

And later in *The Victory and the Plymothian* (7), Chief Justice Fuller propounds the rule thus: "As between the vessels, the fault of the *Victory* being obvious

(1) 137 U. S. 330.
(2) 18 Howard, 570.
(3) 147 U. S. 72.
(4) 166 U. S. 404.
(5) 147 U. S. 72.
(6) 157 U. S. 60.
(7) 168 U. S. 410.

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and inexcusable, the evidence to establish fault on the part of the *Plymothian* must be clear and convincing in order to make a case for apportionment."

As I have already fully reviewed and considered the faults and defaults of the steamer *Amelia*, it is unnecessary to recur to them under this head.

I have given to this case the fullest possible consideration, and the conclusion at which I have arrived is that the steamship *Amelia* is alone to blame for the collision.

The only remaining question is concerning the plaintiffs' claim for salvage remuneration. One of the consequences of negligence causing collision is that the wrongdoer cannot recover salvage remuneration for services rendered to the ship with which he has been in collision. (1) I, therefore, allow no salvage remuneration.

The result is that finding as I do the steamship *Amelia* alone to blame for the collision, I condemn the plaintiffs in damages to the defendants with costs, and decree accordingly. The amount of such damages will be assessed in the usual way by the Registrar, assisted by one or two merchants.

Judgment accordingly.

(1) Cargo ex *Capella* L. R. 1 A. & E. 356; the *Ettrick*, 6 P. D. 127; the *Glenaber* L. R. 3 A. & E. 534; Marsden on Collisions at Sea, 5th ed. p. 280.