1902
July 4.

TORONTO ADMIRALTY DISTRICT.

HENRY WINEMAN, THE YOUNGER...PLAINTIFF;

AGAINST

THE SHIP "*HIAWATHA*."

Collision—Fog—Immoderate speed—Mutual fault—Damages.

In an action for collision where the court found both vessels in fault for moving at an immoderate rate of speed in foggy weather, and that such immoderate speed was the chief if not the sole cause of the collision, the owner of the damaged ship was allowed to recover only half his loss.

ACTION for damages by collision.

The case was tried at the City of Windsor on the 26th and 27th days of February, 1902, before His Honour Joseph E. McDougall, local judge in Admiralty.

The facts of the case are stated in the reasons for judgment.

The argument of counsel was submitted in writing, and filed respectively on behalf of the plaintiff and the ship on the 18th and 24th days of April, 1902.

A. H. Clarke, K.C. for the plaintiff:

The collision between the steamer *Hiawatha* and the sailing vessel *J. F. Card* on the 12th day of May, 1900, about 10 o'clock, p.m., which caused the damages complained of, was attributable to the improper navigation of the steamer and the negligence of those in command of her, and such improper navigation and negligence were fully established by the evidence adduced at the trial.

The steamer was at fault in that she did not, as required by Rule 19, keep out of the way of the sailing vessel and still more at fault in altering her course so as to cross that of the sailing vessel, which was properly keeping her course. The evidence establishes

the fact that had the steamer kept her course the two vessels would, notwithstanding the speed and the fog, have safely passed each other on the starboard side and no collision would have occurred; the plaintiff's witnesses, and some, if not all, of the defendants witnesses agree upon this point. The following rule was laid down by the Privy Council in the case of the *Agra and Elizabeth Jenkins* (1): "If a ship bound to keep her course justifies her departure, she takes upon herself the obligation of showing not only that her departure was at the time it took place necessary in order to avoid immediate danger, but also that the course adopted by her was reasonably calculated to avoid that danger."

A fortiori, a steam vessel which is bound to keep out of the way of a sailing vessel cannot justify her going into its way without the clearest evidence of the necessity of such a course in order to avoid immediate danger, and also that the course adopted was reasonably calculated to avoid that danger.

Under navigation rules which make it the duty of a steam-vessel to keep out of the way of a sailing vessel when they are proceeding in such direction as to involve risk of collision and the duty of the latter to keep her course where a collision occurs between a steam and a sailing vessel and it is shown that the latter kept her course, the presumption arises that the steam-vessel was in fault and such presumption must form the basis of the judgment in a suit for the collision unless it is made clearly to appear that the accident was inevitable. *Squires* v. *Parker* (2)

How then does the *Hiawatha* justify her action in going into the way of the sailing vessel in direct violation of its duty to keep out of the way?

(1) L. R. 1 P. C. 501. (2) 101 Fed. Rep. 843.

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The only justification urged in the statement of defence and in the preliminary act filed on their behalf, as well as by the witnesses for the defence, for the *Hiawatha's* change of course, is that she was misled by a wrong signal from the *J. F. Card*, indicating that the latter was on the starboard tack, namely, a single blast of the fog-horn instead of three blasts which was the proper signal for the sailing vessel sailing as she was with the wind abaft the beam.

We submit that the evidence fails to establish the fact so relied on in justification, viz.: that the fog horn on the *J. F. Card* gave one instead of three blasts.

If it be true that the only signals from the sailing vessel heard on the steamer were one indistinct blast, and shortly afterwards one distinct blast both on their port bow, the steamer must have commenced to swing into the course of the sailing vessel before either of the two blasts was heard, otherwise the sound would have come from their starboard bow. This view contradicts the allegation that the change of course was due to a misunderstanding of the signals from the sailing vessel. The fact as sworn to by the wheelman that the *Hiawatha* was not a good steering ship is a reason that in such a fog the steamer should have proceeded at a much less rate of speed than she was observing at the time of the collision.

Even if the proper signals given by the sailing vessel were not heard or understood by the steamer, no fault in respect thereof can be charged to the sailing vessel. *Robertson* v. *Wigle* (the *St. Magnus*). (1)

The evidence shows recklessness and want of attention in the management of the steamer in the following respects: The outlook for some time prior to the collision heard fog signals of three blasts each, which he supposed were from a steamer going in the same

(1) 16 S. C. R. 720.

direction (but which may have been the *J. F. Card's* signals) and no abatement was made in the speed nor other precaution taken to avoid danger in that quarter, in direct violation of Rule 15, which reads as follows: "Every vessel shall, in thick weather, by reason of fog, mist, falling snow, heavy rain storms, or other causes go at moderate speed. A steam-vessel hearing apparently not more than four points from right ahead the fog signal of another vessel shall at once reduce her speed to bare steerage way and navigate with caution until the vessels shall have passed each other."

When the indistinct blast was heard some seconds before the collision, it was not reported by the lookout to the captain, and although the captain says he asked the lookout about it, the lookout says the captain moved back from the high canvas over the cabin, so he could not see him although from the height of canvas it was necessary in order to see an approaching vessel to look over the side.

No effort was made on hearing the signal to slacken the speed, stop or reverse, though the steamer was by Rule 21 expressly desired to do so.

The captain kept no proper lookout, he says the sailing vessel was not more than 100 feet away when he first saw her. If watching he should have seen her earlier, both he and Meade said a vessel could be seen the length of the ship (235 feet), or further, if there were lights. Captain Brown was able to see the green light and the loom of the *Hiawatha* before she changed her course, and there seems no reason why the green light and the loom of the sailing vessel should not have been seen at the same time, as the *J. F. Card's* lights were, according to the evidence, burning brightly.

The *Hiawatha* was going at an immoderate rate of speed and though no collision would have happened

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notwithstanding the speed, had she not changed her course, it was of the greatest consequence when she seeks to justify such change of course. The evidence of Engineer Butler shows that she was going from 7·5 to 7.7 miles per hour.

The following cases are cited with reference to 'moderate speed:' The *Zambesi* (1); the *Heather Bell* and the *Fastnet* (2); the *Campania* (3); the *Columbia* (4); the *Newport News* (5).

The failure of the *Hiawatha* to assist the sailing vessel when disabled is evidence that the collision was caused by the former's wrongful act. *Howell's Admiraly Practice* (6); *Esquimalt and Nanaimo Railway Co.* v. *The Cutch* (7).

Although the evidence is conflicting, we submit the natural probabilities support the story told by the plaintiff's witnesses. The story of those for the defence who say that nothing was seen or heard of the *J. .F Card* for fifteen or twenty minutes after the collision, that then they came in some mysterious way side by side, that even then Capt. Brown was not aware his ship was leaking, that no bell was sounded or other signal given on the *J. F. Card* notwithstanding her disabled condition in a thick fog expecting that at least the *Hiawatha* was near her, seems incredible. The steamer did not help the *J. F. Card* nor make any enquiry about her for nearly an hour after the first conversation, when the fact of her leaking was not yet known.

Capt. Ivers said in substance that the companies owning ships expected them to make time and did not give them credit for delays, and it was not therefore customary to strictly follow the rules of navi-

(1) 3 Ex. C. R. 67.
(2) 3 Ex. C. R. 40.
(3) [1901] P. D. 289.
(4) 104 Fed. Rep. 105.
(5) 105 Fed. Rep. 389.
(6) P. 251.
(7) 3 Ex. C. R. 262.

gation. This disregard of rules encouraged by the owners is, we submit, responsible for the collision in question in this action.

The defendants contend that the *J. F. Card* was running at too great speed in a fog, and that a good lookout was not kept on board the *J. F. Card.* The evidence did not bear out these facts, as the *Hiawatha* was sighted by the lookout on the *J. F. Card* sometime before the *J. F. Card* was sighted by the lookout on the *Hiawatha.*

As to speed we submit (*a*) that the speed of the *J. F. Card* was less than the speed of the *Hiawatha*, and therefore it is not for the latter to complain. (*b*) The speed of the *J. F. Card* was not the cause of, nor did it contribute to, the collision. (*c*) More latitude as to speed should be allowed to a sailing vessel than to a steamer for the reason, among others, that she cannot increase her speed to get out of the way as quickly as a steamer. In this particular case it was necessary in order to obtain steerage way to spread the top-sails which involved the spreading of the main sails as well. The *Zadok* (1); the *Elysia* (2); the *N. Strong* (3) and other cases cited in the *Chattahoochee* (4); *Marsden on Collisions* (5).

At the trial for the first time a fault was attributed to the *J. F. Card* principally by the experts, which apparently never occurred to the captain or the crew of the *Hiawatha* who gave the instructions for the statement of defence and preliminary act, viz.: That the *J. F. Card* could have avoided the collision after seeing the *Hiawatha* change her course by starboarding her helm and luffing up to the wind.

(1) L. R. 9 P. D. 117.
(2) 4 Asp. Mar. L. C. N.S. 510.
(3) [1892] P. D. 105.
(4) 173 U. S. 540.
(5) 3rd ed. p. 404.

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We submit that this fault not being in the record cannot be relied upon, and without prejudice to this objection, further submit that the hypothesis upon which this conclusion is based is not certain enough to enable any expert, however skilful, who was not present at the collision, to speak with any reasonable certainty.

We submit that the course taken by the captain of the *J. F. Card* was the proper one as he was present and knew from existing circumstances what was best to be done. He acted according to his best judgment in the agony of collision and cannot therefore be held guilty of contributory negligence even if he did not do the very wisest thing, as is contended by the defendants.

This rule is laid down in *The Cuba* v. *McMillan* (1), viz, that excusable manoeuvres executed in agony of collision brought about by another vessel cannot be imputed as contributory negligence on the part of the vessel collided with.

The following rule applied in the *Columbian* (2), is also applicable here " Where a steamer was confessedly and grossly in fault for a collision with a schooner by reason of her excessive speed in a fog at a place where she had reason to apprehend danger any doubts as to the fault in the schooner contributing to her injury will be resolved in her favour."

The *Isaac H. Tillyer* (3), also has this head note, " Testimony from a steamer clearly in fault for a collision with a sailing vessel, that the latter was guilty of contributing fault by changing her course, will be viewed with suspicion; and when the evidence from the sailing vessel is to the contrary and accords with the probabilities it will be accepted in preference."

(1) 26 S. C. R. 651. (2) 100 Fed. Rep. 991.
(3) 101 Fed. Rep. 478.

The plaintiff therefore claims to recover damages.

W. D. Macpherson for the defendants:—

We are struck at once in considering the evidence with the fact that the schooner knew of the presence of the steamer and sighted her lights and saw her, as they say. They change her course, rendering a collision inevitable, before the steamer had sighted the schooner or knew of her presence. Then why did the steamer's people not see the schooner earlier? We say it was because the schooner did not display the light required by Rule 12 of the Rules of Navigation and that she did not do so, we say, is the fault to which the collision must be attributed.

The steamer is entitled by law to presume that any schooner in these waters that night was being navigated in compliance with the law, and the law of the United States of America which is the only law applicable to the determination of the rights of the parties in this case, is succinctly set forth in the evidence of Mr. Oaks called by the defendants as an expert. Although it is argued that the *Hiawatha* in running at a speed of seven miles per hour, or thereabouts, was violating Rule 15, in so far as that speed is not moderate speed within the meaning of that rule; yet who can say that the collision would not have occurred if the *Hiawatha* had been running at moderate speed within the meaning of the rule? It is, therefore, clear that the schooner by not showing the torch knowingly permitted the steamer to get within a couple of hundred feet of her (equal in point of time to ten seconds), that the steamer could not stop her way in that space of time and then it was too late for the collision to be avoided. Is it conceivable that the steamer would not have avoided the schooner if she had known of her presence there, or had seen any possible way by which it might have been avoided?

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The evidence is clear that the steamer was manned with a capable crew; that the look-out was at his post, bright, alert, active and intelligent, indeed his evidence proved that he was the right man in the right place. The captain and second mate were on top of the pilot house, the wheelman was at his post, numerous other craft were in the vicinity, some going one way and some the other, and here was this schooner running free with every sail set and without displaying any torch. If she had shown her lighted torch when she first picked up the steamer's light two minutes before the collision, the steamer would have had about 2,400 feet notice of her presence or hereabouts; those on the schooner say that from the time her lights hove in sight, up to the moment of the collision they heard no signals of her whistle. As a fact the whistle which Brown says he heard four or five minutes before her lights were picked up was being continuously sounded, and it is inconceivable that her blasts were not heard by those on the schooner, particularly as the distance between the ships was momentarily rapidly decreasing; and it rests with the court to say whether the witnesses for the plaintiff in so deposing are untruthful and unreliable, or whether, in their desperate excitement, they did not notice or remember the signal blast, for the fact cannot be controverted for a moment that the steamer gave three loud blasts of her whistle at intervals of every minute for a long time prior, and at even shorter intervals up almost, to the very instant of the collision.

The essential point to be determined is which vessel is in fault and contributed to or caused the accident. The first fact to be found in this connection is that the schooner displayed no lighted torch; secondly, the steamer had a competent look-out; and thirdly, as he

swears he did not see the signal lights till the ships were within 200 feet of each other, then, according to the law of America, it will be held that the reason the signal lights were not seen was because, on account of the schooner's course, one was invisible and the other obscured by her jibs, and her list to starboard or from some other cause rendering it invisible to the steamer.

From the time the schooner heard the fog signal of the *Hiawatha* she was within the obligation of Rule 12. (The *Algiers* (1); the *Rhode Island* (2); the *Hercules* (3); the *Potsville* (4); the *Saratoga* (5).

The fact that the side lights of the sailing vessel were discovered from the steamship as early as a torch could have been, will not relieve the sailing vessel from the charge of negligence in failing to exhibit the torch. (The *Pennsylvania* (6).

The object of having a flare-up light or torch exhibited is to attract the attention of the other vessel, and when there is a possibility that the display of a flare up torch would have avoided a collision, a vessel is at fault for not complying with the statute.

And the burden of proof to show that such omission did not contribute to the collision is on the vessel failing to comply with the statutory requirements. (The *Frank P. Lee* (7); the *Samuel H. Crawford* (8); the *Excelsior* (9); the *City of Savannah* (10).

Where negligence is proven on the part of a colliding vessel, the court will not impute negligence to the other because it failed to see a light that was exhibited

(1) 28 Fed. Rep. 242.
(2) 17 Fed. Rep. 554.
(3) 17 Fed. Rep. 606.
(4) 24 Fed. Rep. 655.
(5) 37 Fed. Rep. 119.
(6) 12 Fed. Rep. 914.
(7) 30 Fed. Rep. 277.
(8) 6 Fed. Rep. 906.
(9) 12 Fed. Rep. 195.
(10) 41 Fed. Rep. 891.

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on the delinquent vessel. (The *Algiers* (1); the *Monmouthshire* (2); and the *Westfield* (3).

The above statements of law are equally applicable to the fog-signals said to have been given by the schooner; they were not heard on the steamer. An indistinct noise of some kind was heard about forty or fifty seconds before the collision, and one blast of a vessel's fog-horn about six or seven seconds before the collision. The reason the other blasts as given were not heard was because of the jibs on the schooner.

Experience shows that sound in a fog is easily deflected by such a cause as the jibs, and no doubt the sound in this case had a tendency to be smothered in the jibs upwards and backwards towards the foremast instead of forward, towards the steamer. The defendants, therefore, ask the court to hold as a fact that the horn blasts of the schooner were not sufficiently well given to be heard on the steamer till the distinct blast spoken of was actually heard some six or seven seconds before the collision.

The court will not excuse the schooner for not showing the torch on the plea that even if shown it might not have been seen; see Rule 28. (The *Negaunee* (4); the *Beryl* (5).

The steamer did all in her power to avoid the collision after the schooner was seen and is absolved in law from any blame. She was not at any time within the obligation of Rule 19 and the latter part of Rule 15, because when she became informed of the schooner's proximity the circumstances were special and Rule 27 became applicable. (The *Umbria* (6); the *Cayuga* (7).

(1) 28 Fed. Rep. 240.
(2) 44 Fed. Rep. 697.
(3) 36 Fed. Rep. 366.
(4) 20 Fed. Rep. 918.
(5) 9 P. D. 137.
(6) 166 U. S. 404.
(7) 14 Wall. 270.

As to the plaintiff's argument that the only signal from the schooner heard on the steamer was one indistinct blast, and shortly after, one distinct blast both on their port bow—the steamer must have commenced to swing into the course of the sailing vessel before either of the two blasts was heard, otherwise the sound would have come from her starboard bow—the trouble with this argument is that it assumes a premise contrary to the fact and in consequence the conclusion cannot follow. The *Hiawatha* was at no time on a parallel course, and therefore would at no time get the schooner's signal over her starboard bow. We still claim that the probabilities are that the schooner was not giving the proper signals, otherwise they would have been heard.

No duty devolved upon the steamer until she knew of the presence of the schooner, which the schooner might have signified by showing her lighted torch, and those on the steamer did not hear even the indistinct noise until within a few seconds of the collision, and it is not admitted now, nor was it by the witnesses at the trial, that the first indistinct noise heard was in fact "the fog-signal of another vessel"; and the attention of the court is drawn to the fact that on the construction of this rule it is essential that the steamer shall in fact hear the fog-signal of another vessel.

When the distinct blast of the schooner's horn was heard on the steamer, the captain gave the order to "hard aport" the wheel and signalled the engineer to stop the engine. All the expert evidence at the trial was to the effect that what he did was proper under the circumstances.

Then as to Rule 21, how can it be argued that the steamer could have done more than she did, or that anything else would have been of the slightest avail to prevent the collision? Her way could not be

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stopped even appreciably within a minute, and that means twelve hundred feet.

Before a steamer can be convicted of fault for not keeping away, it must appear that those in charge of her have, or should have, information of something to keep away from. Aside from the incredible testimony of Brown there is no evidence to support the claim that had the *Hiawatha* kept her course she would have passed clear. On the contrary, the proof is explicit and positive that it was the manœuvre of the *Hiawatha* alone that saved the *J. F. Card* from being sunk.

The *Hiawatha* was going at an immoderate speed and for the American law on this point we refer to the *Chattahoochee* (1).

The first part of Rule 15 as to the general speed of ships in a fog applies equally to sailing vessels and steamers. *The Rhode Island* (2); also the *Johns Hopkins* (3); the *Wyanoke* (4); the *Harold* (5).

Then as to the speed of the schooner. This can only be arrived at approximately because it depends upon the wind, her cargo, the sail she was carrying, etc. The notarial protest states they were making about six and a half miles an hour. At the trial a very determined effort was made to reduce this to six miles an hour. It is inconceivable that she was not going faster as the lake was smooth, she had all her sails set and at least a ten mile an hour breeze to carry her along. Doubtless she was making seven or eight miles an hour, but we have the admission of six and a half. We submit that six and a half miles an hour, under the conditions of fog and darkness detailed in this case, is not moderate speed. Among the cases

(1) 173 U. S. Rep. 540 *et seq.*, particularly p. 548.
(2) 17 Fed. Rep. 554.
(3) 13 Fed. Rep. 185.
(4) 40 Fed. Rep. 702.
(5) 84 Fed. Rep. 698.

referred to by Mr. Justice Brown in his judgment in the *Chattahooche* case are the following: The *Virgil* (1); the *Victoria* (2); the *Itinerant* (3); the *Johns Hopkins* (4); the *Wyanoke* (5); the *Attila* (6); the *Zadok* (7); the *Beta* (8).

Therefore even though the court should be of the opinion that seven miles would be moderate, and that five miles or some less speed would have been moderate, yet the speed of the *Hiawatha* in this case for want of knowledge of the schooner's whereabouts on account of the non-display of the torch cannot be said to have been a contributing factor to the collision.

The precautions required by Rules 27 and 28 must be taken in time. (See *Marsden on Collisions* (9). It is quite clear that the reason the *Hiawatha* changed her course was, in the first instance, on account of hearing some noise which if it were a signal from the vessels fog-horn was a signal that a vessel was on the starboard tack; and on this basis her change of course, by porting her wheel some, was both proper and justifiable; and in the second instance, because for want of a torch, she did not know exactly where the vessel was, but could only navigate by the sound. As to the change of her course by the *Hiawatha* under the circumstances the law is stated by Mr. Justice Brown in the *Umbria* case (10).

But as it was in the power of the schooner to have avoided the collision according to the circumstances and according to the law she is solely responsible for not having done so.

The wheel of the schooner should have been put hard down. It is agreed that had the schooner put her

(1) 2 W. Rob. 201.
(2) 3 W. Rob. 49.
(3) 2 W. Rob. 236.
(4) 13 Fed. Rep. 185.
(5) 40 Fed. Rep. 702.
(6) Cook's Rep. 196.
(7) L. R. 9 P. D. 114.
(8) L. R. 9 P. D. 134.
(9) 4th ed. p. 384.
(10) 166 U. S. at pp. 410-411.

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wheel hard down, and at the same time manœuvred her sails properly, the collision might have been averted. The difficulty is that the master of the schooner who was her look-out at the time did not read the lights of the *Hiawatha.* Something more is required of a lookout than the mere seeing of lights. He must interpret their meaning, and his boat must be navigated accordingly.

The schooner, being within the obligation of the first part of Rule 15, and equally with the *Hiawatha* within that of Rules 27 and 28, should have done something to avert the collision. (The *General* (1)).

The duties of approaching vessels are reciprocal under American law. (The *Sunnyside* (2); the *Patria* (3); the *Pilot* (4)).

The law is to the same effect in Canada. (The schooner *Reliance* v. *The Conwell* (5). See also the *New York* (6); *Marsden on Collisions* (7).

Immoderate speed is the only possible fault that can be charged to the *Hiawatha* within the proof; and if a fault it can be fairly held no more than a remote cause and not a proximate cause. In any event it should be held no more a contributing cause than the speed of the schooner.

The schooner being within the operation of Rules 12, 27 and 28, was in fault (1) For not displaying a lighted torch: (2) For holding her speed after seeing the mast-head lights of the steamer: (3). If she could not then stop her speed she was in fault because her speed was too fast in a fog: (4) In not knowing that the steamer was on a course intersecting her own: (5) In not taking a course to starboard: (6) Having neglected taking a course to starboard when she should

(1) 82 Fed. Rep. 830.
(2) 91 U. S., 208.
(3) 92 Fed. Rep. 411.
(4) 20 Fed. Rep. 860.
(5) 31 S. C. R. 653.
(6) 53 Fed. Rep. 553.
(7) (4 ed.) p. 472.

and safely could, she was in fault for not putting her wheel hard down when she says the steamer sheered to starboard: (7) After hearing the fog-signal of the steamer she was in fault for not having more men on deck.

If the schooner had displayed no lights and had blown no fog-signal the steamer could not be held the cause of the collision, and within the law of the cases cited the burden is on the schooner to show that her failure to exhibit a torch was not the proximate and sole cause of the collision. She has not even attempted to do this.

The case presented, therefore, is that of a steamer and a sailing vessel prosecuting, at night through a surface fog and a common thoroughfare, at substantially the same speed, intersecting courses, the sailing vessel informed of the steamer's approach for a period of ten minutes, and seeing her mast-head lights for seven or eight minutes, hearing no signal, displaying no torch, taking in no sail and holding her course and speed. The steamer faultlessly ignorant of the approach of the sailing vessel until the sound of some noise over her port bow, about forty seconds away, and between the interval between then and the collision porting her wheel some, and getting a distinct one blast signal from the same direction, six or eight seconds before the collision "hard aporting" her wheel when the coloured lights of the said vessel appeared. A head on collision by the sailing vessel with the port side of the steamer. The proposition under the circumstances that the steamer could do nothing but "port" and "hard aport," while the sailing vessel should have put her wheel hard down, is established by the great weight of testimony.

A. H. Clarke, *K.C.* replied:

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Reasons for Judgment.

MACDOUGALL, L. J., now (July 4th, 1902,) delivered judgment.

This is an action brought by the owner of the schooner *J. F. Card* to recover damages for a collision which occurred between the *J. F. Card* and the steamship *Hiawatha* on the night of the 12th of May, 1900, in Lake Huron, about ten or twelve miles south easterly from Thunder Bay light. Both vessels are of American Register, and the place of collision was in American waters. The *J. F. Card* was a two masted schooner, 137 feet long, 25½ foot beam; she was loaded with coal and bound for Beaver's Island, St. James, a port on Lake Michigan.

The *Hiawatha* was a steam vessel of 1,390 tons register, 234 feet long by 38 feet beam, and was on her way down Lake Huron, loaded with iron ore, bound for Sandusky, in Lake Erie.

The weather was very thick and foggy, a ten or twelve mile breeze was blowing about due south; and the schooner, with all her canvas set, was sailing on the starboard tack on a course N.N.W. making about six and a half miles an hour. The *Hiawatha*, her engine moving 68 to 70 turns to the minute, was going through the water at the rate of between seven and a half and seven and three-quarter miles an hour. Her master, in his evidence, thought seven miles an hour was her speed, but from the evidence of the engineer I find it exceeded seven miles an hour but was under eight miles an hour. The steamer's course, according to the wheelman, was S. quarter E. There was no sea to speak of. The fog was thick and close to the water, but about mast-head high was lighter, and the moon and stars could be seen from the deck of the schooner; but neither vessel could see the hull of another ahead at a greater distance probably than two or three hundred feet. The evidence of the witnesses on the schooner puts this distance a little greater.

The master says he saw the range lights of the steamer at a distance of about seven or eight hundred feet, and some of his crew, (one, the man on the lookout) thought from 500 to 1,000 feet; another witness thought the high range light of an approaching vessel might have been seen a couple of thousand feet, but that the hull or signal lights could not be made out nearly so far. On the other hand the wheelman on the steamer described the fog as much thicker and stated that at ten or ten thirty p.m. (the time of the collision) he could hardly make out from the wheelhouse the boiler house of his steamer aft; and says he could not see ahead of him more than the length of the steamer, (234 feet). He added, it was about as thick a fog as he had ever seen on Lake Huron.

The schooner carried no light on her mast, but carried her red and green signal lights, placed forward on the fore rigging at a height between seven and a half and eight feet above the deck. The *Hiawatha* carried her range and signal lights in their usual positions.

The *J. F. Card* had been sounding fog-signals with a fog-horn at regular intervals. The pattern of her fog-horn was that in ordinary use by sailing vessels. The steamer was also giving regular fog-signals with her steam whistle. Both vessels were on a part of the lake much frequented by steam and sailing vessels, though the former were more numerous and more likely to be encountered than sailing vessels. The master and look-out on the *Hiawatha* had heard many steamer fog-signals in their immediate neighbourhood for some time prior to the collision with the *J. F. Card*.

Both the *J. F. Card* and the *Hiawatha* had men on the lookout. Just prior to the collision the master and look-out on the *J. F. Card* sighted both of the range lights of the *Hiawatha*, a point or a point and a

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half on their starboard bow. These lights were clear, and the steamer was apparently on a course which would have cleared the *J. F. Card.* In a very short interval the *Hiawatha's* green light also appeared but the range lights began to close, showing that the steamer was changing her course. The master of the *J. F. Card* states that he had heard the fog-signal from a steamer ahead of him some three or four minutes before he picked up the range lights of the *Hiawatha*. He swears he heard no signal from a steamer after that up to the time of the collision. After hearing the fog-whistle he kept the schooner on her course, sounding his fog-horn. A moment or two before the collision the *Hiawatha's* green light was shut out and her red light appeared; this indicated that the steamer was crossing his bow. He estimates that the *Hiawatha* was three or four hundred feet away when he first saw her green light; he thinks the collision took place within two minutes after he first saw the range lights on the steamer. The master of the *Hiawatha* states that the steamer was less than a hundred feet from the schooner when he first saw her; that just before seeing her he had given orders to the wheelman to put his wheel "hard aport" because he had heard a single blast signal ahead (this by the later events must have been from the *J. F. Card* before she loomed up); at the same instant he saw the schooner, and saw her red light and knew he was close upon her. The captain of the schooner, the moment he saw the red light of the steamer, and an instant before the collision, called to his wheelman to put his wheel "hard aport" for the purpose, as he states, of easing the shock of the collision which he saw was inevitable. On the *Hiawatha*, according to the wheelman, some six or seven seconds before the collision the master had ordered him to "port" a little and, two or three seconds

after the first order, to put his wheel "hard aport". The wheelman thought that the *Hiawatha* had swung perhaps a point or a point and a quarter between the two orders. When the master of the *Hiawatha* sighted the schooner he signalled his engines to stop, but did not reverse as there was no time to do so before the vessels came together.

The vessels collided, and the *J. F. Card* was seriously injured but did not sink; her jib-boom was left on the *Hiawatha's* deck, her bowsprit was broken off, part of her foremast went by the board and her stem scraped along the *Hiawatha's* port side. The contact swung her stern around to such an extent that when the vessels cleared the schooner was pointed west. The *Hiawatha* was not injured to any great extent, but her steam whistle had been carried away by the jib-boom of the schooner.

A good deal of argument was expended on the discrepancies in the time estimates made by the different witnesses. Some of the crew on the *J. F. Card* estimated the time between sighting the *Hiawatha* and the collision, all the way from two minutes to six or seven minutes. The captain of the *J. F. Card* thought perhaps two minutes only elapsed between first seeing the range lights of the *Hiawatha* and the collision, and the time between hearing the only fog-whistle he did hear and the collision would perhaps be not more than six or seven minutes. Now, let me point out that in no case can these time estimates be even approximately correct; according to the evidence of both sets of witnesses the vessels, prior to the collision, were approaching each other at the rate of fourteen miles an hour; the speed of the *J. F. Card* was six and a half miles or better, and the *Hiawatha* from seven to seven and a half miles an hour. This means that they were diminishing the space between

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them at the rate of 1,230 feet per minute. The master of the *J. F. Card* says that, using his best judgment, the *Hiawatha's* range lights were seen when that vessel was seven or eight hundred feet away; another witness estimates the distance between 500 and 1,000 feet, which would mean 750 feet. A third witness estimates somewhat more liberally and thinks the *Hiawatha* was perhaps 2,000 feet away. The *Hiawatha's* master and wheelman put the extreme distance from which they could see a vessel's hull or signal lights, say, 250 or 300 feet, or the range lights on a mast a little farther. Call this increased distance double that at which they could see the hull, or say 600 feet. Contrasting this with the speed it means that when the vessels were 600 to 800 feet from each other it would take but thirty or forty seconds to come together; or if a thousand feet, fifty seconds; or 1,200 feet, one minute. This shows that the estimates as to time must be discarded; they are the inaccurate conclusions of men who are not accustomed to measure the lapse of time by a watch. We have the speed of the vessels given; and from 800 to 1,000 feet space represents the greatest distance at which the high range lights could probably be seen from either vessel in the fog which prevailed; probably less than that, a third, or from 250 to 300 feet, would be the greatest distance at which either could see the signal lights or the hull of the other. The portion of the lake they were traversing was the regular track of a large number of vessels under sail and steam, bound from Lake Michigan and the Upper Lakes to Lake Erie or from Lake Erie to Lake Michigan and the Upper Lakes. The master of the *Hiawatha*, his wheelman and look-out, admit that they had heard a number of fog-signals from other vessels in their immediate vicinity for some hours before the collision

had occurred. Under these conditions I must hold that the speed of the *Hiawatha* at seven or seven and a half miles an hour, and that of the *J. F. Card* at six and a half miles an hour, were immoderate under the rules of navigation applicable to these waters. The expert witnesses called by the defendant, Captains Ivors, Doner and Donelly, all agree that the speed of the *J. F. Card* was immoderate, but on cross-examination they admit that if the fog was as thick as it was stated the speed of the *Hiawatha* was also greater than it ought to have been. They say that three or four miles an hour would not have been immoderate for the *J. F. Card*, and three or four miles an hour for the *Hiawatha*. Both vessels were therefore in fault for moving at too rapid a rate of speed in the fog. It was the duty of the *J. F. Card*, as a sailing vessel, when approached by a steamer to keep on her course (1); it was equally the duty of the *Hiawatha* to keep clear of the schooner.—(2) These rules, of course, presuppose that the vessels see each other; any departure from these rules by either vessel, after sighting the other, would be held to be a fault on the part of the vessel breaking the rules, and would prevent her recovering damages resulting from the collision, providing always that the other vessel's conduct had been free from blame. A vessel going at too great a rate of speed on a dark night or in foggy weather cannot be heard to say that a collision was the result of inevitable accident. (The *Juliet Erskine* (3). With such conditions of weather and light it was the duty of all vessels proceeding to adopt a rate of speed which would enable them upon meeting or sighting another vessel to avoid a collision; if a steamer, by stopping and reversing her engine (the *Smyrna* (4);

(1) American Rule 20.
(2) Rule 19.
(3) 6 Not. of Cases, 633.
(4) 2 Mar. Law Cas. O. S. 93.

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if a sailing vessel, by shortening sail or letting go sheets and braces and so manœuvering her sails as to assist the helm at the first moment the approaching ship was seen (the *Zadoc* (1). If the speed of either vessel in a fog exceed what the court on the evidence deems moderate, within the rule, then the vessel offending will not be allowed to recover damages occasioned by the collision even though she may do her utmost upon discovering the ship to avoid a collision. (*The Samphire* v. *The Fanny Beck* (2). If both vessels are in fault by reason of approaching each other at too high a rate of speed, then in such a case the damages will be divided.

Upon the evidence in this case I find that both the *Hiawatha* and the *J. F. Card* were proceeding in a fog at an immoderate rate of speed, and that such immoderate rate of speed was the chief, if not the sole, cause of collision. The rate was so immoderate and the fog so thick that it prevented either vessel, in the brief space of time which elapsed after sighting the other, from taking any effective steps to avoid the other. The evidence establishes to my satisfaction that prior to the collision both vessels had proper signal lights burning, look-outs in proper positions, and were sounding fog-signals at intervals. It is claimed that the *J. F. Card* should have displayed a torch when she heard the fog-signals from the *Hiawatha*. If the master and and crew of the *J. F. Card* are to be believed the only fog-signal they heard from the *Hiawatha* was some five or six minutes before actual collision. This would mean at a time when the vessels were more than a mile apart (5 x 1200 = 6000 ft.; 6 x 1200 = 7200 ft.); and although such a precaution as burning a torch would have been a wise one, the high rate of speed of each vessel minimized the value of such a signal.

(1) L. R. 9 P. D. 114 & 117. (2) Holt, 193.

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Lord Blackburn in the case of the *Cayzer* v. *Carron Co.* (1), thus discusses the rule of the division of the loss where both vessels are in fault. "Until the case of *Hay* v. *LeNeve* (2) there was a question in the Admiralty Court whether you were not to apportion it (the loss) according to the degree in which they (the two ships) were to blame. But now it is, I think, quite settled, and there is no dispute about it, that the rule of the Admiralty is that if there is blame causing the accident on both sides, they are to divide the loss equally, just as the rule of law is that if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls."

As a consequence of the foregoing conclusions, upon the evidence I find the plaintiff is entitled to recover half of his loss only. There is no cross action or counterclaim made by the *Hiawatha*, so that upon the ascertainment and assessment of the plaintiff's damages he will be entitled to a judgment against the *Hiawatha* and her bail for one half thereof.

If the amount of such damages is not agreed upon between the parties an appointment can be taken out to hear the evidence to enable the same to be determined by the court.

Judgment accordingly.

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(1) 9 App. Cas. 873. (2) 2 Shaw (Sco. App.) 395.