Statement of the case.

True measure of damages in this case was the loss which the libellant sustained by the sinking of his vessel, which, as the commissioner reported, was five thousand dollars. He lost that amount, and there is no proof in the case that he lost anything more, for which any claim is made in the libel. Stipulation for value filed by the claimants was for that sum, and consequently the libellant is entitled to a decree against the stipulators for that sum, as the value of the vessel and no more, because they never agreed to be bound for any greater sum.

Argument of the libellant is, that he is entitled to interest on that sum as against the stipulators for value, but it is a sufficient answer to the proposition to say that this court has expressly decided otherwise, and we adhere to that decision.*

Separate stipulation was filed for costs, and, of course, the libellant is entitled to full costs in the District and Circuit Courts, unless the amount exceeds the sum specified in the stipulation. He is, also, entitled to a decree of affirmance upon the merits, but without costs in this court, and the decree of the Circuit Court must be modified as to the damages so as to conform to views expressed in this opinion.

THE DECREE AFFIRMED AS MODIFIED.

THE MORNING LIGHT.

1. A vessel astern of another cannot be held in fault for not complying with the rule which obliges the rear vessel to keep out of the way of one ahead, when it is so dark that the latter vessel cannot be seen by the former.
2. As a general rule, there is no obligation on a sailing vessel proceeding on her voyage to shorten sail or lie to because the night is so dark that an approaching vessel cannot be seen.
3. A collision resulting from the darkness of the night, and without the fault of either party, is an "inevitable accident."

APPEAL from the decree in admiralty of the Circuit Court of the United States for the Southern District of New York.

About the 6th of August, 1855, the brigs *Jerry Fowler* and

* Hemmenway *v.* Fisher, 20 Howard, 258.

Statement of the case.

Morning Light, in a dark and rainy night, were pursuing a voyage off the coast of Rhode Island through Buzzard's Bay and Martha's Vineyard, eastward, with the wind from the northeast, the Jerry Fowler being the head vessel and the Morning Light in her rear, both vessels running on their starboard tacks on about a common course. At 4 o'clock in the morning of that day a collision occurred between them, the stem or bows of the Morning Light breaking through the starboard side of the Jerry Fowler near her main rigging, so that the latter vessel, with her cargo, was, by the collision, sunk, and became a total loss.

The Alliance and other insurance companies, who had connectedly underwritten upon the Jerry Fowler in stated proportions, paid the amount of their policies, and unitedly filed their libel in the District Court for the Southern District of New York (Betts, J.), to recover from the Morning Light the sums so paid. The answer set up inevitable accident as a defence.

The Jerry Fowler, at the time of the collision, was either in the act of completing her tack, or had just come round from the larboard to the starboard tack, and come underway on the last tack; the evidence as to her particular position when the two vessels came in contact not being exactly concurrent upon that fact on either side. She was tacked, not because of any actual necessity from the nearness of shoals or dangerous impediments, but because her master thought she had approached so near the Cutterhunk Shoals as to render it proper, in the darkness of the night, to change her course. It proved she was not, in reality, within five or six miles of the supposed reefs.

The wind was about a five or six knot breeze during the greater portion of the night, but it was not steady. There were fogs, and the rain came on in fog showers. Neither vessel had unusual sail up, and both appeared to have been well manned and navigated with care. There was no attempt to prove that the Morning Light had, at any time, shortened sail or lain to.

The witnesses on each vessel asserted that a light was sus-

pended in a place for being easily seen from the other; and on each side it is asserted that neither discovered any light exhibited upon the other vessel. The witnesses on the Morning Light testified to a darkness so extreme as to disable them discerning objects distant less than her length off. Some on the Jerry Fowler state that they saw the other vessel coming upon them half a mile distant. But in their sworn protest, made directly after the accident, they represented the darkness to have been so extreme at the time of the collision as to prevent their seeing objects beyond a slight distance off. The protest, signed and attested by the crew of the Jerry Fowler, was made at Portland, Maine, on the arrival at that port of the Morning Light with those men, within three or four days after the collision; and the representation made by those men at that time of the thickness and darkness of the weather corresponds essentially with the evidence of the crew of the Morning Light on the final hearing.

The District Court held that the evidence showed a case of inevitable accident between the two vessels; or if there was, at the time of the collision between the two vessels, any culpable inattention or misconduct which conduced to produce the collision, the fault therein was a common one to both, arising from the obscure state of the weather, the want of extreme vigilance and precaution in making further signals on board both vessels, or even coming to anchor, and the uncertainty from that cause, to each vessel, what was the proper and prudent course for either to pursue in respect to the other vessel or its own individual navigation. That if it was imprudent and hazardous with the Morning Light, having knowledge that the Jerry Fowler was probably ahead in the direction she was steering, to continue a course which might have been concurrent in both vessels during the night, because the darkness had then become so dense and continuous as to prevent her position being seen by the vessel astern of her, it was no less faulty in the Jerry Fowler to put about in that state of darkness, when not impelled to depart from her previous course by any necessity of naviga-

tion, when such evolution might place and leave her in a helpless condition, in the probable path of the approaching vessel, until the latter should be so near her before she could be seen, to disable either one from escaping a collision. That upon the proofs no necessity was shown for the Jerry Fowler to make a tack for her own safety, or as an act of prudence or good seamanship, a distance of five or six miles off the reefs she intended to avoid, and that no higher necessity was shown for the Morning Light to come to in that state of the weather than for the Jerry Fowler to have done so also. That comparing the testimony given by the crew of the Morning Light with the statement in the protest made directly after the occurrence by the crew of the Jerry Fowler, the fair weight of evidence was that all hands aboard each vessel were bewildered and confused by finding themselves in sudden and dangerous proximity to each other in a thick fog, and that the collision consequent thereto was the result of accident common and unavoidable to both. That each party, under the circumstances, was accordingly bound to bear his own loss. The District Court accordingly dismissed the libel.

On appeal to the Circuit Court, the same view was taken of the evidence, and the decree was affirmed. It was from this second decree that the case came here by appeal.

Mr. Benedict, for the appellants; Mr. W. Q. Morton, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

This case is brought here by appeal from a decree of the Circuit Court of the United States for the Southern District of New York, sitting in admiralty.

Appellants were the insurers of the brig Jeremiah Fowler, which was lost on the 24th day of August, 1855, while on a voyage from the port of Philadelphia to the port of Boston. Allegations of the libel are, that she was loaded with coal, and that after she had arrived in Block Island channel, and while she was beating in towards Vineyard Sound, she was negligently and wrongfully run into by the brig Morning

Light and sunk, and that the vessel, together with the cargo, became a total loss. Libellants insured the vessel in the sum of thirteen thousand dollars; and having paid the whole amount, they instituted this suit against the Morning Light to recover the value of the vessel, upon the ground that the vessel of the respondents was in fault, and that the collision was occasioned by the negligence and want of proper care and precaution of those who had the charge and management of her deck at the time the collision occurred. Respondents allege that the Morning Light was bound on a voyage from Philadelphia to Portland, and that she was well manned, tackled, and provided. Collision occurred, as the respondents allege, about four o'clock in the morning; and they also allege, that at the time it occurred it was raining heavily, and that in consequence of a dense fog it was intensely dark.

Parties agree that the collision occurred at the time specified in the answer; and the respondents also allege that the wind, at the time, was from the eastward, say east by north, and that their vessel was heading about north by east. Undoubtedly she was on her starboard tack, closehauled on the wind, and like the vessel of the libellants was beating into Block Island channel. Such was the state of things when, as the respondents allege, the lookout on their vessel first discovered the vessel of the libellants, and the concurrent testimony of those on board their vessel is that the vessel so discovered appeared to be crossing the bows of the Morning Light. When the lookout made that discovery he immediately gave the order to the man at the wheel to put her helm hard up; but the allegation is that the two vessels were so near together that it was not possible to prevent the collision. Appellants also allege that their vessel had a competent lookout properly stationed on her deck, and that the vessel was discovered as soon as it was possible to discern her in the dense fog with which she was surrounded.

Suit was commenced in the District Court, and after a full hearing, the district judge entered a decree dismissing the libel, upon the ground that the collision was the result of

inevitable accident. Appeal was taken by the libellants to the Circuit Court, and the respective parties were again heard in that court; and, after full consideration, the decree of the District Court was in all things affirmed, and upon the same ground as that assumed in the District Court. Whereupon the libellants appealed to this court, and now seek to reverse the decree, upon the ground that both the courts below were in error.

1. Appellants contend, in the first place, that their vessel was ahead, and that the other vessel, inasmuch as she was coming up, was bound to keep out of the way. Secondly, they contend that the vessel of the respondents was also in fault, because she did not have a competent lookout properly stationed on the vessel. Thirdly, that she was also in fault, because she did not shorten sail and diminish her headway. On the other hand, the defence is placed chiefly upon the ground set up in the answer, that the collision was the result of inevitable accident; but the respondents also contend that the vessel of the libellants was in fault, because she unnecessarily attempted to go about and change her course while she was under the bows of the Morning Light.

Beyond question the vessel of the libellants was ahead at nightfall before the collision occurred, as the evidence shows that she was seen at that time by the master of the Morning Light, and he testifies that she was to the windward, and five or six miles ahead. The evidence also shows that she was at that time heading north-northeast, and the witnesses say that she was apparently sailing faster than the vessel of the respondents, and that both vessels were sailing on the same tack. Suggestion of the respondents is, that she had changed her course during the night, and some time before the collision, and that she was sailing, at the time it occurred, on the larboard or port tack; and it must be admitted that the position of the respective vessels at that time, and the attending circumstances, give some countenance to that theory. But the testimony of the witnesses for the libellants is directly the other way, and as there is nothing in the case of a positive character to contradict their state-

ments, it must be assumed that they are correct, although it is very difficult to see how it happened that the two vessels came together as alleged, unless one of them had changed her course during the night. Theory of the libellants is that their vessel had *just come about* on to the larboard tack, and that her sails had not filled sufficiently to give her headway, and the theory is essential to the libellants' case, because if their vessel was fully under way on that tack, and in a situation to do so, it would have been her duty to port her helm and give way. Suffice it to say, however, the proof is clear that she *was not under headway*, and perhaps the better opinion from the evidence is that she had just come about, as is assumed by the libellants, and not that her sails were merely aback through the fault of the helmsman, as is assumed by the respondents.

II. Assuming the fact to be so, then it follows that the vessel of the libellants was not in fault, and the question of liability must chiefly depend upon the defence set up in the answer, that the collision was the result of inevitable accident. Examples are to be found in the reported cases where collisions have occurred exclusively from natural causes, and without any negligence or fault, either on the part of the owners of the respective vessels, or of those intrusted with their care and management, and where the facts are so, the rule of law is that the loss must rest where it fell, on the principle that no one is responsible for such an accident. Such was the ruling of the court in the case of the steamer Pennsylvania,* and we have no doubt that the ruling was correct. Ruling of the court in the case of the John Frazer† was to the same effect. Remarks of the court in that case were, that the mere fact that one vessel strikes and damages another does not of itself make her liable for the injury; but the collision must in some degree be occasioned by her fault. A ship properly secured may, by the violence of a

* Union Steamship Co. *v.* New York Steamship Co., 24 Howard, 313.

† Owners of Brig James Gray *v.* Owners of Ship John Frazer, 21 Howard, 194.

storm, be driven from her moorings and forced against another vessel, in spite of her efforts to avoid it; yet, says the court, she certainly would not be liable for damages which it was not in her power to prevent. So, also, ships at sea may, from storm or darkness of the weather, come in collision with one another without fault on either side; and in that case, say the court, each must bear its own loss, although one is much more injured than the other. Where negligence or fault, however, is shown to have been committed by either party, the rule under consideration can have no application, for if the fault was one committed by the respondent alone, then the libellant is entitled to recover; or if by the libellant alone, then the libel must be dismissed; or if both vessels were in fault, then the damages, under the rule applied in this court, must be apportioned between the offending vessels.

III. Before considering the defence, therefore, it becomes necessary to inquire and determine whether it be true, as is supposed by the libellants, that the vessel of the respondents was in fault. Their theory is that their vessel was ahead, and that the vessel of the respondents was bound to keep out of the way. Granting the fact to be as assumed, still if it was so dark that the vessel ahead could not be seen, the vessel astern cannot be held to be in fault for not complying with that rule, unless she was improperly in that position, or was guilty of some negligence or want of care and precaution.*

Charge of the libellants is, that she had no lookout, and the charge, under the circumstances, is one that deserves to be very carefully considered. Proofs are full to the point, that two of her company, the mate and a seaman, were assigned to that duty; but the question is whether they were properly stationed on the vessel. Burden of the vessel was two hundred and sixty-nine tons, and the ship's company consisted of the master, two mates, the cook, and four men before the mast. According to the evidence, the vessel was

* The Shannon, 1 W. Robinson, 463.

laden with lumber, and her deck load consisted of three tiers of spars about as high as the bulwarks. She had a good light in her forestays eight feet above the main deck, and she had an experienced seaman at the wheel. One lookout was stationed on the larboard side, eight or ten feet forward of the mainmast; and the mate, who was also on the lookout, was on the starboard side, just forward of the foremast; and it should be remembered that the vessel was upon the starboard tack. None of these facts are successfully controverted; but the argument is, that the lookouts were not properly stationed, and it is not to be denied that, in general, some position farther forward would be a better one to secure the object for which lookouts are required.

IV. Reference, however, must in all cases be had to the circumstances, and especially to the course of the respective vessels, and to their bearing in respect to each other. Considering the situation of the vessel of the libellants, assuming it to be such as the libellants suppose, it is by no means certain that the position of the lookout on the larboard side was not as favorable to discover the vessel of the libellants, when *she went into stays and came about* as could have been chosen, and it is quite clear that the position of the mate while his vessel had her starboard tacks aboard was one without objection. They both testify that they were attending to their duty, and there is no ground for doubt that they would have seen the other vessel in season to have avoided the collision, but for the intense darkness of the night.

V. Fault is also imputed to the Morning Light by the libellants, because she did not during the alleged intense darkness "lie to," or shorten sail and check her headway. Steamers navigating in thoroughfares are always required, whenever the darkness is such that it is impossible or difficult to see approaching vessels, "to slow" their engines or even to stop or back, according to the circumstances, and no reason is perceived why the principle of the rule in that behalf may not be applied in a qualified sense to sail vessels where they are navigating in crowded thoroughfares, and when the darkness is so intense that vessels ahead cannot be

seen.* Decisions to that effect may be found, and no doubt they are correct, as for example, it was held in the case of the Virgil,† that the defence of inevitable accident could not be maintained where it appeared that the vessel setting it up was sailing with a strong breeze and under a full press of canvas and with her studding-sails set, although it appeared that it was very dark and hazy at the time of the accident.‡ But such a restriction can hardly be applied to sail vessels proceeding on their voyage in an open sea. On the contrary, the general rule is that they may proceed on their voyage although it is dark, observing all the ordinary rules of navigation, and with such additional care and precaution as experienced and prudent navigators usually employ under similar circumstances. They should never under such circumstances hazard an extraordinary press of sail, and in case of unusual darkness, it may be reasonable to require them when navigating in a narrow pathway, where they are liable to meet other vessels, to shorten sail if the wind and weather will permit.

The weight of the evidence in this case shows, that the wind during the greater portion of the night was perhaps a five or six knot breeze, but it is highly probable that it was much lighter during the fog showers and the period of the extreme darkness which immediately preceded the collision. Neither vessel had any studding-sails, nor any greater press of canvas than is usual in such a voyage, nor is it by any means certain that either had any more sail set than was reasonably necessary to keep the full control and proper management of the vessel. They both had competent officers on deck, good lights in the rigging, and as we think sufficient look-outs, and it appears that neither was guilty of any negligence or unskilfulness.

Some of the witnesses for the libellants deny that the night was as dark as is represented by the witnesses examined by the respondents, but those denials came chiefly

* The Rose, 7 Jurist, 381. † Id. 1174.

‡ The Virgil, 2 W. Robinson, 202.

from those who signed the protest shortly after the disaster, which in substance and effect confirms the respondents' witnesses, and fully justifies the finding in that behalf in the court below. Reasonable doubt cannot be entertained that it was intensely dark at the time of the collision. Both the courts below were of that opinion, and we fully concur in that view of the case, and think it sufficient under the circumstances to express that concurrence without reproducing the evidence.

VI. Reported cases where it has been held that collisions occurring in consequence of the darkness of the night, and without fault on the part of either party, are to be regarded as inevitable accidents are numerous, and inasmuch as there is no conflict in the adjudications, it is not thought necessary to do much more than to refer to some of the leading cases upon the subject.* Where the loss is occasioned by a storm or any other *vis major*, the rule as established in this court is that each party must bear his own loss, and the same rule prevails in most other jurisdictions.† Different definitions are given of what is called an inevitable accident, on account of the different circumstances attending the collision to which the rule is to be applied.

Such disasters sometimes occur when the respective vessels are each seen by the other. Under those circumstances, it is correct to say that inevitable accident, as applied to such a case, must be understood to mean a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident.‡ When applied to a collision, occasioned by the darkness of the night, perhaps a more general definition is allowable. Inevitable accident, says Dr. Lushington, in the case of *The Europa*,§ must be considered as a relative term, and must

* Stainbach et al. *v.* Rae et al., 14 Howard, 538.

† 1 Parsons' Merc. Law, 187; Woodrop Sims, 2 Dodson, 85; The Itinerant, 2 W. Robinson, 243.

‡ The Locklibo, 3 W. Robinson, 318; The Pennsylvania, 24 Howard, 313.

§ 2 English Law & Equity, 559.

be construed not absolutely but reasonably with regard to the circumstances of each particular case. Viewed in that light, inevitable accident may be regarded as an occurrence which the party charged with the collision could not possibly prevent by the exercise of ordinary care, caution, and maritime skill.* Regarding these cases as sufficient to show that a collision resulting from the darkness of the night and without the fault of either party, is properly to be regarded as an inevitable accident, we forbear to pursue the investigation, and wish only to add that we have no doubt the case was correctly decided in the Circuit Court.

The decree of the Circuit Court is therefore,

AFFIRMED WITH COSTS.

GORDON *v.* UNITED STATES.

No appeal lies to this court from the Court of Claims.

GORDON, administrator of Fisher, presented a petition in the Court of Claims of the United States, for damages done to him by troops of our Government, in the war of 1812 with Great Britain. The Court of Claims decided against him, and he appealed to this court. The case was argued in favor of the right of appeal by *Messrs. Goodrich and Winter Davis;* no counsel appearing on the other side. A majority of the court, however,† finding itself constrained to the conclusion that, under the Constitution, no appellate jurisdiction over the Court of Claims could be exercised by this court, and intimating that the reasons which necessitated this view might be announced hereafter—the term being now at its close—the cause was simply

DISMISSED FOR WANT OF JURISDICTION.

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* The Virgil, 1 W. Robinson, 205; The Juliet Erskine, 6 Notes of Cases, 634; The Shannon, 1 W. Robinson, 463; Same Case, 7 Jurist, 380.

† Miller and Field, JJ., dissenting.