

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the North German Lloyd Steam-ship Company v. Elder and others (steam-ship "Schwalbe"), from the High Court of Admiralty of England; delivered 13th February, 1861.*

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Present :

LORD CHELMSFORD.

LORD KINGSDOWN.

SIR EDWARD RYAN.

IN this case the owners of the brig "Crown" proceeded in the High Court of Admiralty against the owners of the steam-vessel "Schwalbe" to recover for the total loss of their vessel, which was sunk by a collision between the two vessels in a reach of the River Thames called the West Swin, between 5 and 6 o'clock in the evening of the 9th of January, 1859.

The "Crown," a collier brig, was proceeding down the river in ballast. The "Schwalbe," a steamer belonging to Bremen, was upon her voyage to London with a cargo and passengers. The evening was fine and clear. Both vessels had their proper lights. The parties agree as to the wind being W.S.W., and as to the courses of the respective vessels. The "Crown's" course was N.E., that of the "Schwalbe" S.W., being in an exactly opposite direction to each other.

In this state of things the libel on behalf of the owners of the "Crown" alleges that one of the crew perceived the three lights of a steamer a little on the port-bow; that when the two vessels had approached to about three-quarters of a mile of each other, they perceived that the steamer had ported her helm, as

her green light was gradually lost sight of, whereupon the "Crown" ported her helm; and that when the two vessels had approached to within half a mile of each other, and would have easily passed clear, the green light of the steamer again came in view; that the helm of the "Crown" was then put hard a-port and the steamer was hailed to port her helm and stop her engines; that no notice was taken of such hailing, and that shortly after the steamer ran stem on into the port side of the brig, cutting her down to the water's edge, and sinking her immediately. And the 5th Article of the libel alleges that the collision and loss of the "Crown" were occasioned solely by the improper conduct and negligence of those on board the "Schwalbe," more especially in starboarding their helm and not keeping a good look-out and going clear of the "Crown," and that no blame is attributable to the "Crown" or to any one on board of her.

The allegation on the part of the owners of the "Schwalbe" denies the article of the libel which charges that her helm was ported and then starboarded whilst approaching the "Crown," and in contradiction thereto alleges that the helm of the "Schwalbe" was not starboarded and then ported, but ported only; and after denying that the blame of the collision is imputable to the "Schwalbe," and stating that it is attributable solely to the master and crew of the brig, it alleges that if any blame is imputable to any person on board the "Schwalbe," it is imputable solely to the pilot, Samuel Fleming, then in sole charge of her, all whose orders and directions in regard to the navigation of the steamship at the time of the collision were promptly and implicitly obeyed and carried out by the master and crew.

Upon these contradictory allegations, and upon evidence equally contradictory and conflicting, their Lordships have to determine whether the learned Judge of the Court of Admiralty arrived at the proper conclusion in finding that the "Schwalbe" was alone to blame for the collision, and that the pilot was not the person solely to blame, but that the collision also arose from "something either having been done, or omitted to be done, or done negligently, on board the 'Schwalbe.'"

When the two vessels first appeared in sight of

each other, the "Schwalbe," according to the evidence of her captain, was "proceeding along the edge of the Maplin Sand, pretty close to it." The "Crown," and another collier brig (the "Ceres"), were advancing on parallel courses from fifty to sixty fathoms apart from each other. The witnesses from the "Schwalbe" state that the "Crown" was first seen about a point on her starboard bow, and the "Ceres" about a point on her port-bow. In this state of things there can be little doubt that the safe, as well as the correct, course, for the "Schwalbe" to pursue was to port her helm, and to pass the "Crown" on the port side. Instead of doing this, she incurred the hazard of attempting to pass between two vessels approaching her at so short a distance from each other as to range only a point on each side of her bows. Her object in adopting this course may probably be accounted for by the evidence of Fleming, the pilot, who says, "the Maplin Sand was as near as was safe on their starboard side." If, therefore, the "Schwalbe" had ported her helm, it must have brought her nearer than was safe to that sand. Under these circumstances, a course would naturally be preferred which would require a starboard helm instead of the opposite one. And as upon their own showing, the "Crown," when first seen, was only a point on their starboard bow, it can hardly be supposed that in the "Schwalbe's" intended course between the brigs, she would not have given the "Crown" a wider berth, which could be done only by starboarding her helm. The pilot (Fleming) indeed says, that "upon entering the south-west reach of the West Swin he necessarily starboarded the helm to take the proper course up the reach, but that at that time he was more than a mile distant from the 'Crown' and the 'Ceres,' whose respective lights came in sight just as he had steadied his helm."

In judging of the probability of the respective statements, it must always be borne in mind that the "Schwalbe" could not port her helm when the brigs were first seen, because she was as near the Maplin Sand as it was safe for her to go; that her course was directed between the two brigs, although the pilot says they were in "the immediate vicinity of the Maplin Sand, and somewhat close thereto, in

order to give a wide berth to the light colliers going down," which would be effected by passing them well on their port side; and that the original fault was in the "Schwalbe's" endeavour to pass between two vessels in close proximity to each other. It is probable that if this attempt had not been made, the "Schwalbe" would have gone clear of the "Crown;" for by the evidence of the master of the collier brig "Bounty," which was a quarter of a mile directly a-head of the "Crown," the "Schwalbe" passed her safely on the port side, and "shortly afterwards he heard a hailing, and upon looking astern he saw that the 'Schwalbe' had altered her course, and was as nearly as possible with her port broadside towards the 'Bounty,' going stem on towards the 'Crown's' port side."

The "Schwalbe" could only have been brought into this position after passing the "Bounty" on the port side, by starboarding her helm; and if this witness is to be believed—and there is no ground for discrediting him—the case of the "Crown" that the "Schwalbe" was originally on her port side, and that the collision occurred in consequence of her afterwards starboarding, appears to be completely established.

Opposed to this case there is the positive evidence of the captain, some of the crew, and the pilot of the "Schwalbe," that the helm was never starboarded, which is met by the equally positive evidence of Jobling, a seaman on board the "Crown," that when he got into the steamer after the collision, he ran instantly aft, and there saw "that the wheel was hard a-starboard, and that the helmsman was still holding it hard a-starboard."

These contradictory statements are not to be reconciled by the slip made by the pilot, as described by the captain of the "Schwalbe," in first giving the order "starboard," "but after the word had hardly escaped him, in the same breath calling 'No! port!'" because the first order appears not to have been passed, but only the order to hard a-port, in which position the helmsman describes the helm to have been at the moment of collision.

Amidst such doubtful and conflicting evidence, their Lordships would not be disposed to disturb the judgment of the learned Judge of the Court of Admiralty, even if the counsel for the Appellants