

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of the
London and Edinburgh Shipping Company v. the
owners and others of the 'Emily Fanny,' from the
High Court of Admiralty, ship 'Iona;' delivered
on the 8th day of March, 1867.*

Present:

THE MASTER OF THE ROLLS.
SIR JAMES W. COLVILLE.
SIR RICHARD T. KINDERSLEY.

THIS is an Appeal from a Decree of the High Court of Admiralty, pronounced on the 24th July, 1866, in a Cause of Damage brought by the owner and crew of the sailing barge 'Emily Fanny,' (the present Respondents,) against the owners of the screw steamer 'Iona,' arising from a collision which occurred in Blackwall Reach of the river Thames, on the 11th of March, 1866.

At about 8 o'clock in the morning of that day, and therefore in broad daylight, the barge, laden with sand, was coming up the river under sail, and with two men pulling at the oars, and heading nearly north; the steamer (a newly-built iron ship of 648 tons) was going down the river at the rate of six or seven miles an hour. The weather was nearly calm, what little wind there was being (as stated by the Appellants in the Preliminary Act) from the southward and eastward. The state of the tide was "last quarter flood," that is, nearly high water, running up the river at the rate of about a knot an hour. The steamer was in charge of William George Allen, a licensed Trinity House pilot, who was standing on the high bridge, his proper place, whence he gave his directions to the man at the wheel by waving his hand in the usual manner. The master of the steamer, Thomas Raison, was standing on the roof of the midships house, which forms a sort of lower bridge. The boatswain was stationed on the fore-castle to keep a look-out ahead. As the steamer

was rounding Blackwall Point, she came, stem on, against the port side of the barge, which immediately filled and sank. About these facts there is no controversy.

The Respondents instituted proceedings in the High Court of Admiralty against the Appellants in a cause of damage; and by their Petition, after stating the facts, alleged that the collision was entirely attributable to the improper navigation of the steamer, and to the negligence and default of those on board her.

The Appellants, by their answer, alleged that whilst the course of the steamer was being shaped to round Blackwall Point, the barge was seen ahead, and rather on the starboard bow of the steamer, and at the distance of between 200 and 300 yards, apparently proceeding to the northward; that thereupon the helm of the steamer, which was then a-port for the purpose of rounding Blackwall Point, was, by order of the pilot, put hard a-port, with a view to pass under the stern of the barge, but the tide took the steamer and prevented her from answering her helm; and although the engines were, by order of the pilot, eased, stopped, and reversed, a collision could not be prevented, and the steamer, with her stem and port bow struck the barge on her port side, and notwithstanding that a fender was put over the side of the steamer, the barge sank. The answer also asserted that the collision, and the damages and losses consequent thereon, were not caused by or attributable to any improper navigation of the steamer, or to any negligence or default of those, or any of those, on board her, but was the result of inevitable accident. The answer further asserted that if the collision was in any way occasioned by any one on board the steamer, it was solely occasioned by the pilot, and they (the Appellants) were not liable for any damage caused thereby.

The cause came on to be heard on the 24th July last, before the learned Judge of the High Court of Admiralty, assisted by two elder brethren of the Trinity House. Four witnesses were called by the Appellants,—Allen, the pilot; Raison, the master of the steamer; Edgar, the second engineer; and Williamson, the second officer, who was at the wheel, with two other men, when the colli-

sion occurred. They were examined *viva voce* in Court. The Respondents called no witnesses. The learned Judge, having pointed out to his two assessors the questions upon which their opinions were required, and after consultation with them, declared his opinion to be, that there was no proof that a proper look-out was kept on board the steamer; that she ought to have seen the barge earlier, and prevented the collision; and therefore he pronounced against the steamer, and condemned the owners thereof in damages and costs. From that decision the present Appeal is brought by the owners of the steamer.

In arguing this Appeal, the Appellants, by their Counsel, no longer contend that the collision was not occasioned by the negligence or default of any one on board the steamer, but was the result of inevitable accident. That point they abandon; and the only ground upon which they insist that the decision ought to be reversed is, that the collision was, as they allege, occasioned entirely by the default of the pilot, and that therefore the owners of the steamer are exempt from liability. This is the only point which their Lordships have now to consider.

By the Merchant Shipping Act, 17 & 18 Vict. c. civ. s. 388, it is enacted that no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law.

An enactment substantially to the same effect, though expressed in different language, was contained in the Pilotage Act, 6 Geo. IV. c. cxxv. s. 55.

Now, in construing those Acts, it has been established as a principle, that, in order to entitle the owners to the benefit of the exemption from liability thereby provided, they must prove that the damage, for which it is sought to make them liable, was occasioned *exclusively* by the default of the pilot. It is not enough for them to prove that there was fault or negligence in the pilot—they must prove, to the satisfaction of the Court, which has to try the question, that there was no default whatever on the part of the officers and

crew of their vessel, or any of them, which might have been, in any degree, conducive to the damage. This principle was very clearly laid down by Dr. Lushington, in the case of 'The Diana,' 1 W. Rob. 135, which was a case under the earlier of the two statutes. That learned Judge there says:—"To obtain the exemption from responsibility conferred by the Act, I think that the owners of 'The Diana' should prove that the accident arose entirely from the fault of the pilot; that the exception under the Act ought to be construed strictly, and that if the accident was occasioned by the joint misconduct of the pilot and crew, I am bound to hold that the liability still attaches to the owners." The same principle was upheld and acted upon by this Court in the case of 'The Christiana,' 7 Moore, P.C.C. 160, which was also under the statute of Geo. IV; and in the case of 'The Schwalbe,' 11 Moore, P.C.C. 250, under the Act of the Queen; and it has been treated as the established law in several other cases, both in this and in other Courts.

The question, therefore, which their Lordships have to determine, is simply this:—Is it proved to their satisfaction that there was no default in any of the crew of the steamer, which may have conduced to the collision? And, upon this question, their Lordships having fully considered the evidence, entirely concur in the opinion of the learned Judge of the Court below, that it is *not* so proved; for it is not proved that a good look out was kept on board the steamer.

The importance of alleging and proving that a good look out was kept, was of course felt by the Appellants; and, accordingly, in the second article of their Answer to the Petition in the Court below, they expressly allege that "a good and vigilant look out was being kept from on board her." Now, what evidence do they adduce in support of that allegation? They prove that the boatswain was stationed on the fore-castle to keep a look out; but they prove no more. Now, what was the duty of the man thus stationed on the look out? Surely his duty was to keep a vigilant look out, and, when he saw any craft ahead, to report to the pilot. There was nothing to prevent the barge being seen from the steamer some time before they were within

three hundred yards of each other, when the pilot first saw her. Although the Appellants, in the Preliminary Act, allege that the weather was hazy (contrary to the allegation of the Respondents that it was clear), there is no evidence of the presence of any haze. Nor is it suggested that there were any other vessels in the way, or any other obstruction to a wide and distant view. Indeed, it is plain from a comparison of the evidence of the pilot and of the master, that the barge was actually seen by at least one individual on board the steamer (namely, the master) before the pilot saw her; for the pilot says that, for the purpose of rounding the point, and before he saw the barge, he had given an order to "slow" the engines, and had waved to port the helm, and that he afterwards saw the barge, distant about three hundred yards, and then waved to put the helm hard a-port; and the master says, that at the time when the pilot gave the first order to "slow," and the first order to port, he (the master) had already seen the barge, and that in fact he saw her as the steamer was passing the factory before she came to Blackwall Point; thus clearly showing that the master saw the barge before the pilot did. And if the master could see her, the boatswain on the fore-castle might have seen her, and ought to have seen her, and would have seen her if he had been keeping a vigilant look out. Whether the man saw the barge or not, or whether he was or was not keeping any look out at all, does not appear; but it is not suggested that he made any report whatever. The learned Counsel for the Appellants was therefore driven to the necessity of arguing that it was the pilot's duty to keep a look out, which his elevated position on the high bridge well enabled him to do; and that it was unnecessary for the man stationed on the look out to make any report, or indeed to keep a look out at all. This argument cannot be admitted. Its admission would produce very mischievous consequences, and very much increase the risk of navigation. No doubt the pilot *may*, and probably in most cases *does*, see a craft ahead as soon as any one else on board; but his attention is necessarily directed, from time to time, to other matters relating to the navigation of the vessel under his charge, besides keeping a look out; and on that

account, it *may* happen that he does not see an object ahead so soon as he ought to have been aware of it, in order to enable him to take measures to avoid it. Hence arises the necessity for having a man stationed on the fore-castle, with the special and sole duty of keeping a vigilant look out, a necessity fully recognized on the part of those on board the steamer, by their stationing the boatswain on the fore-castle for that special purpose. And it is impossible to hold that the man so stationed was justified in neglecting to keep a look out, on the ground that it is the duty of the pilot to keep a look out.

The only remaining question is, whether the failure of the look out man to perform his duty did not conduce, or may not have conduced (for that is sufficient for the present purpose) to bring about the collision. Allen, the pilot, in his examination, says, that when he first saw the barge, she was distant about 300 yards. At the rate at which the steamer was going, 6 or 7 miles an hour (say $6\frac{1}{2}$ miles an hour), it would take only about a minute and a half to go over that space. He says, that as soon as he saw the barge he ordered the helm (which was already a-port to round the point) to be put hard a-port, which was immediately done; that the steamer at first answered to the helm, and payed off to starboard; but that when she came to the tide (which, it is obvious, from the very sharp and sudden bend of the river at that place, would be running somewhat across the channel of the river from the southern towards the northern shore), the tide took her on the starboard bow, and she ceased to obey the helm, and in consequence thereof, she ran into the barge. The master's evidence corroborates this representation of the pilot. No doubt the pilot ought (as it was argued for the Appellants) to have known that, in the then state of the tide, and at that part of the river, such would be the effect of the tide on the starboard bow. But there seems no reason for supposing that he did not know it; indeed, it does not require the knowledge or experience of a pilot to know, from the remarkable bend of the river round Blackwall Point, that such must be the effect of the tide in its then state. Now if the pilot had been earlier

made aware of the position of the barge, he might have sooner put the helm hard a-port so as to avoid a collision, and we are bound to assume that he would have done so. As it was, he was not made aware of the position of the barge till he saw her only about 300 yards distant, when it was too late to prevent the collision. Thus the neglect of duty on the part of the look out man, not only might have been conducive to the disaster, but was in all probability the ultimate cause of it.

Upon the whole case, their Lordships are of opinion that there was neglect of duty on the part of the look out man; that this neglect of duty conduced to the collision; and that it was such default on the part of the crew of the steamer as to disentitle the owners to the benefit of that exemption from responsibility which the statute provides. They will, therefore, humbly advise Her Majesty to affirm the decision of the Court below, and to dismiss this appeal with costs.

