

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of John
Harvey and another v. The Owners of the
steamship or vessel "Euxine," from the Vice-
Admiralty Court of Malta; delivered 11th
February 1874.*

Present :

SIR JAMES W. COLVILE.

JUDGE OF THE HIGH COURT OF ADMIRALTY.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS is an appeal from the Vice-Admiralty Court of Malta in a case of collision between two vessels, the one a brig called the "Clymping," an English vessel of about 290 tons register, which was sailing from Alexandria in Egypt, with a cargo of cotton seed, and bound for Cork; and the other, a steam vessel, the "Euxine," of 628 tons, which was going from Marseilles, with a cargo of general merchandise and 18 passengers, and bound for Alexandria. A collision took place on the 2nd June 1870, and, unfortunately, the judgement in the Court below was not delivered until the 13th June 1873. The causes of this delay were various. One of them is known to their Lordships, because in the early stage of the prosecution of this suit, an appeal was brought to this Court on the ground that the suit had been dismissed for technical reasons by the Court below, and their Lordships, being of opinion that it was improperly dismissed, sent the case back to be tried in the Vice-Admiralty Court of Malta. The judgement of their Lordships was given on the 16th November 1871, and the case was

reported in the 8th volume of Moore's Reports, new series. The facts of this case may be shortly stated as follows:—The brig "Clymping" was steering N.W. on this occasion, and the steamship, the "Euxine," was steering E.S.E. Nothing turns upon the quarter from which the wind was blowing, but it was E.N.E. The state of the weather is not unimportant, but it is sufficient to say that it is described in the protest of the Master of the "Euxine" as follows:—"Le temps " était assez clair pour permettre de voir de loin " les navires munis des feux réglementaires." Therefore there is no question at all that if this brig did carry the proper regulation lights on this occasion, those lights ought to have been visible to an advancing steamship, which was bound to discharge the duty the law casts upon her of getting out of the way of the sailing vessel.

Now the main question that was discussed in the Court below, and also before their Lordships here, has been whether the brig did or did not carry those lights. It is, therefore, a question almost entirely of fact, and it is hardly necessary to say that where this is the case their Lordships are always very reluctant to interfere with the decision of the Court below, and very rarely, if ever, will do so unless there is a palpable and plain proof that the Court has miscarried in the judgement at which it has arrived. Now it has been strongly contended before us, both yesterday and to-day, that there was a reason why in the conflicting state of the evidence we should give credence to that produced on behalf of the brig rather than that produced on behalf of the steamship, because it was said that the steamship had, so to speak, stated herself out of Court by the manner in which she had described this collision to have taken place, and, therefore, that starting, as she does, with a story which is

incredible, their Lordships ought to take that into consideration when they come to weigh the general evidence in the case. Now the steamship's story is that she was going ten knots an hour; there is no doubt that the brig was going between three and four knots an hour; that she saw the brig four points on her starboard bow, and that she starboarded her helm so as to go off two or three points. She saw the brig, according to her statement, about a quarter of a mile off or a little more before the collision took place, and the brig ported so as to go off under a port helm two or three points. The collision took place according to the steamship's account, the brig having sunk after the collision, by the port cathead bow of the brig coming into contact with the starboard cathead bow of the steamship; and it is said that this is an impossible account of the collision, and that their Lordships will be so advised by their nautical assessors upon this occasion.

Their Lordships have taken this argument into their full consideration, and they have taken the advice of their nautical assessors, who are of opinion that the argument cannot be sustained; that there was nothing impossible in the statement of the case which has been referred to as made by the steamship, but that on the contrary, granting the facts to be as stated, the collision would have been that which the statement alleges to have happened. Their Lordships, therefore, must approach the consideration of the conflicting evidence on the question of the lights, without any bias at all against the case set up by the steamship.

Now the evidence was taken in the Court below, perhaps necessarily, in a manner which is not very satisfactory, partly upon commission, partly upon evidence *vivá voce*, and partly upon interrogatories, and even when the witnesses were

examined *vivâ voce* upon interrogatories which were prepared to be addressed to witnesses examined on the Commission. It should be observed that there is no dispute as to what evidence is admissible in this case, it having been agreed by the parties in the Court below and before their Lordships that all the evidence contained in the papers now before us should be admitted without contradiction. The first evidence in the case is unquestionably the evidence of the protest made by the master, some of the crew, and some of the passengers on board the "Euxine," the French steamer. The date of that evidence was the 3rd June 1870. The next evidence in the case was the evidence of the protest of the brig which was made upon the 5th June in the same year, or shortly after that time. It has been strongly contended that in the language of the protest made by the captain of the French steamship in this case it was admitted that the side lights of the brig were seen at some time or other, not indeed until after the collision, but at some time or other before the vessel sank. The vessel seems to have sunk in about three quarters of an hour after the collision took place, and it may be observed here that about 20 minutes appear to have elapsed between the arrival of the first boat of the brig and the return of that boat to the steamer. The words which have been principally insisted upon as proving that the vessel did carry at some time or another before she sunk these side lights, were these:—"Qu'après l'abordage le brick était sans feux et que nous ne les avons vu allumés que bien longtemps après," and it has been urged that the use of the word "feux" is in the plural, and that there can be no question at all that when it is said the brig was seen without lights, and that they were not lighted for some long time afterwards, that

by those lights were meant the side lights; and such in their Lordships opinion would be the natural construction of the protest considered by itself. On the other hand, in the protest which was made on behalf of the brig, it is asserted in the usual way that she carried her regular lights.

Certain interrogatories were also framed upon the protest of the French captain, and one of these interrogatories is, "Is it not the fact that the lights of the 'Clymping' were lighted and exhibited after the two vessels had come into collision?" And it was contended that this interrogatory proceeded upon the assumption of the fact that the lights were exhibited at some time or another before the vessel sank. Their Lordships have given due weight to the argument addressed to them on this important point. On the other hand, their Lordships have had to consider the general evidence affirmative and negative which has been adduced upon both sides at a later period of the case, as late as 1872; and the first subject to which their Lordships' attention has been specially directed, is that which, in all these cases, must make a great impression on the Court which has to adjudicate upon them, namely, what was the conduct of the parties at the time of and immediately after the collision. Now the captain of the brig, in his evidence, states that the lights were up and burning, and that they were in the screens in the fore-rigging. He also gives an account of the collision and how it took place. He says,—“She struck us with her stem on our port bow, just abaft the cathead. It was a heavy blow. Our vessel's deck was all stove right in when I went forward to look at it. As the ships cleared forward, our port quarter came alongside by about the fore part of his house on the starboard side, and our crew then all jumped on board except

“ me and a boy.” It is important to notice this passage in the evidence of the captain, because, in their Lordships’ opinion, it establishes the possibility of the vessel being in that situation after the collision in which from the bridge of the steamship it could be seen whether the brig did or did not carry lights. It should be observed, before passing from the evidence of the captain, that he says when he went on board the steamship he almost immediately went below. Just before the collision he had been in his cabin in bed. He came on deck with nothing but his shirt and drawers on; he saw the steamship about a point on his port bow, about a quarter of a mile off; and then he says that the collision took place. The outside was all broken away, and he went for the red light to go down and see what was done in the forecastle. When he got to the red light he thought he could see better with the green, which is rather extraordinary, because it has been always understood that the red is the brighter light of the two. “And in crossing the decks (he says) I put my head down the forecastle and heard the water and the sailors’ chests washing about. I then went to look and see that the green light was all right, and I saw it burning brightly then.” Now here the evidence stops. Why he did not take out either of those lights in order to see the damage does not appear. It could hardly be that the water was running in with such violence as to prevent him doing so, because he spent twenty minutes on board his vessel before he went into the boat which conveyed him to the steamship. Therefore having seen the red light, and thinking he could see better with the green, it does not appear that he took out either light, but he went down to his cabin, and there it must be presumed that

he had a light, for he came back with some of his clothes and effects and went into the boat which conveyed him to the steamship. It is clear that during this 20 minutes he had ample opportunity to bring up one or both side lights, if they were not in their places at the time of the collision; and his own account of what he did during this period is not satisfactory. When he came on board the steamship he does not appear to have pointed out to those on board that vessel that the vessel which they had run into was carrying her lights, nor does it appear that he uttered any remonstrance of any sort or kind. He gives this reason. He says, "When I arrived on board the steamer I did not point out to any of her officers that our side lights were burning. I did not know which were officers then." He went below immediately, and never appears to have made any remonstrance.

Now the boatswain, who was of the name of Burt, was examined at considerable length. He gave evidence as to the lights being up and burning in their proper place, and then he says that he saw the lights being put up, a red light on port, and the green on starboard, put up by a seaman, whose name he does not recollect. As to the lights being extinguished by the collision, he said the screen of the port light was scanted or canted a little by the steamer. He says that the lights remained burning, and went down with the ship. On being asked if he pointed out to the officers of the "Euxine," or any of them, that the side lights of the "Clymping" were burning, he answers, "I did not, because the people of the steamer were all looking at the lights." And here it should be observed that there is a considerable discrepancy in the evidence produced on behalf of the brig on some important points, as to the time and the place when the lights

were put up ; and it appears that it was not the duty of anybody in particular to put them up.

We have now to consider the conduct of the captain of the steamship, the vessel accused of being the cause of this collision. It appears, without entering into details, in substance to be this, that as soon as these persons came on board, and very soon after the collision, he invited a certain number of the passengers to go upon the bridge, and he pointed out to them that there were no lights burning on board the brig. That he did so is unquestionable, not only because it is supported by sufficient substantive evidence, but on account of the evidence of the boatswain of the brig, who gives as his reason that he did not point out that the lights were burning, because the people of the steamship were all looking at the lights.

This leads us to consider what has been called the independent evidence in this case, and that evidence consists of two witnesses produced on behalf of the brig, persons who were on board the steamship, and certain other persons produced on behalf of the steamship, passengers who were called up in the way above mentioned upon the deck by the captain. Now the independent evidence on behalf of the brig, consisting of those two persons, really, when it is examined into, amounts to little more than this: that they did before the vessel sank see a light on board the brig, they say in the centre or middle of the brig, and they are very uncertain as to what colour that light was, one thinking it green, another thinking it red, and another being uncertain as to whether it was not a white light. This evidence is extremely weak. Now upon the other side the independent evidence is very strong, and is furnished by a great many witnesses, but there is one testimony to which it may be advisable specially to refer. There

was a gentleman of the name of Bandeuf, a merchant at Marseilles, who appears to have had no interest whatever in the result of this suit. He was one of the passengers, and he says—“The ‘Clymping’ had no regulations lights burning, as I myself saw as soon as I got on deck. I can add that I went up on to the bridge with some of the passengers, and that the captain begged us to bear witness that there were no lights on the English vessel.”

Now there are in this case certain contradictions and inconsistencies of the witnesses, as always are to be found in cases of this description; but in their Lordships’ opinion the affirmative evidence as to the fact of the lights being carried is very weak and discordant, while the negative evidence is on the contrary very strong and harmonious. Looking, therefore, to the whole of the evidence in this case, and remembering the principle to which I have adverted, on which this Court acts when it is sitting as a Court of Appeal upon a question of fact, their Lordships do not find any sufficient reason to alter or disturb the sentence of the Vice-Admiralty Court of Malta.

It is perhaps proper also to notice one more point, the brig ported very shortly before the collision, and their Lordships thought it right to take the advice of the nautical assessors upon this occasion whether that was or was not a right manœuvre on her part, or whether the collision would have been avoided if she had not executed it. Their Lordships are advised that it was a wrong manœuvre, and that in all probability if the vessel had not ported there would have been no collision. This is a point however which has not been argued at the bar, and it is not the foundation of their Lordships’ judgement in any way in this case, because that judgement rests upon the foundation already stated,

namely, that sufficient reason is not shown to reverse or vary the judgement of the Court below upon the question of fact whether this vessel did or did not carry proper side lights before the happening of the collision.

For these reasons their Lordships think it their duty humbly to advise Her Majesty to affirm the sentence of the Court below, and to dismiss this Appeal, with costs.