

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
the Dundee, Perth, and London Shipping
Company, the owners of the steam ship
"Hibernia" v. The owners of the cargo
lately laden on board the late barque
"British Banner"; delivered December 5th,
1874.*

Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS was a suit instituted in the High Court of Admiralty on behalf of the owners of certain cargo which had been shipped on board a barque called the "British Banner," and which cargo was lost, together with the vessel, in consequence of a collision which took place on the 23rd October 1873 between the barque and a steam vessel called the "Hibernia."

It appears that the collision took place about eight o'clock in the evening. The "British Banner" states that her course was N.E. by N. The course of the steamer was S.W.; so that the vessels were in fact going in opposite directions. The allegation in the petition on the part of the Plaintiffs was "The regulation lights of the "British Banner" had been duly exhibited on board her between 5 and 6 p.m. of the same day, and burnt brightly then and thenceforth until within a few minutes from the time of the collision herein-after stated. And the Plaintiffs be-

“ lieve and aver that they continued in their
“ places burning brightly, from the time when
“ they were first exhibited as aforesaid, till the
“ time of the said collision.” Then there follows
a very remarkable statement:—“The Plaintiffs
“ further say, that even if they did not continue
“ so burning, the weather was such that the
“ ‘British Banner’ could be clearly seen for
“ a distance of upwards of a mile.” They do
not state that if the lights did not continue
burning, the cause of their not continuing to
burn was a circumstance over which they
had no control. One of the answers on behalf
of the “Hibernia” was, “The ‘British Ban-
“ ner’ was in fault within the meaning of the
“ 17th clause of the 36th and 37th Victoria,
“ c. 85., for infringing the regulations for
“ preventing collisions at sea by neglecting to
“ carry proper side lights.” There was con-
flicting evidence in the cause as to whether
the lights were or were not burning at the time
of the collision, or at the time when the vessels
came within the distance of sight. The learned
Judge of the Court of Admiralty who tried the
case said that the evidence was embarrassing, but
that he did not consider it necessary to come to
any decided conclusion as to which side the
Court ought to believe with respect to the fact
of the lights being burning *and* extinguished at
the time of the collision. The meaning of that
is, that he thought it unnecessary to decide
whether the allegation of the one side who
said that the lights were burning, or the
allegation on the part of the other that the
lights were extinguished was true. It appears
to their Lordships to be a subject of regret that
the learned Judge who heard the witnesses
and saw their demeanour did not decide the
question of fact, whether at the time of the
collision, or when the vessels first came within

sight, the lights were or were not burning. Their Lordships consider it very important in deciding whether the "Hibernia" was wholly in fault, and the judgment right in that respect to consider whether the lights were or were not burning at the time when the vessels came in sight.

The Merchant Shipping Act of 1862, 25 & 26 Vict. c. 63., enacted, "If in any case of collision
" it appears to the Court before which the case is
" tried that such collision was occasioned by the
" non-observance of any regulation made by or
" in pursuance of this Act, the ship by which
" such regulation has been infringed shall be
" deemed to be in fault, unless it is shown
" to the satisfaction of the Court that the cir-
" cumstances of the case made a departure
" from the regulation necessary." That section applies only to a case in which it appears to the Court before which the case is tried that the collision was occasioned by the non-observance of any regulation. But by a subsequent statute which was passed in the last session, to prevent the necessity of deciding upon conflicting evidence whether the collision was caused by the non-observance of the regulation, it was enacted that, "If in case of collision it is proved to
" the Court before which the case is tried that
" any of the regulations for preventing collision
" contained in or made under the Merchant
" Shipping Act have been infringed," not that the collision has been caused by the infringement, but simply if it shall appear to the Court that the regulation has been infringed, "the ship
" by which such regulation has been infringed
" shall be deemed to be in fault, unless it be
" shown to the satisfaction of the Court that
" the circumstances of the case made a departure
" from the regulation necessary." 36 & 37 Vict. c. 85. s. 17. If it turns out that these lights

were not burning at the time when the vessels came in sight, and there was no excuse for the lights having been extinguished, it appears to their Lordships that the case falls within that section; that the regulation which enacts that the lights shall be carried was infringed and that the barque must be deemed in fault, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the regulation necessary. It is, therefore, necessary to inquire first, whether the regulation was infringed, and if not, whether the Court is satisfied that the circumstances of the case made a departure necessary.

Now with reference to the question as to whether the lights were burning, the evidence of the chief mate of the "British Banner" is important. At page 8, line 11 of the Record, the question is put to him, "Q. Now had or had not your regulation lights been put out that evening? A. They had been put out. Q. By 'put out' you do not mean 'blown out,' but put in their proper positions? A. Yes. Q. What time were they put out? A. A little before six. Q. Had you given instructions with regard to them? A. Yes, I superintended the lighting of them myself, and saw that they were properly trimmed? Q. Who trimmed them? A. The steward. Q. I believe the steward was drowned in the collision? A. He is drowned. Q. Did you yourself do anything to them before they were put out? A. I lighted the lamps. Q. Did you manipulate them in any way? A. I screwed them down to the proper focus. I was with them before. I was afraid to trust him, and did it myself. Q. You knew what trim they required? A. Yes. Q. What did you burn in them? A. Paraffin oil. Q. Were they old or new lights? A. New lights. Q. When you say 'new,' how

“ long had they been in the ship? *A.* Six
 “ months. *Q.* Had they been passed by the
 “ Board of Trade Surveyor? *A.* In July, in the
 “ Hull Docks at Shields. *Q.* How long would
 “ these lights in the ordinary course of things
 “ burn without trimming? *A.* From six at
 “ night to four in the morning.” So that,
 according to his account, without fresh trim-
 ming, the lights which were put up at six ought
 to have been burning till four o’clock in the
 morning. “ *Q.* That is 10 hours? *A.* 10
 “ hours. *Q.* You say you saw them up a little
 “ before six; did you see them again at all
 “ before the collision? *A.* Between 5 and 10
 “ minutes before 8; I could not say exactly,
 “ but as near as possible 5 minutes before 8.
 “ *Q.* How long was that before the collision?
 “ *A.* About 10 minutes, perhaps not so much.
 “ *Q.* Where did you see them from? *A.* I
 “ went forward to examine them. *Q.* How
 “ were they burning? *A.* Brightly. *Q.* I
 “ believe you did not see them again? *A.* I did
 “ not see them again. *Q.* Are you certain that
 “ 10 minutes before the collision they were burn-
 “ ing? *A.* Well, I am quite certain they
 “ were.” Then he is asked, “ Had you any
 “ other lights at all—I do not mean coloured?
 “ *A.* Yes, we had relieving lamps on board.
 “ *Q.* What were they for? *A.* They were for
 “ putting out if the others wanted to be taken
 “ in for trimming. *Q.* And were they always
 “ kept trimmed? *A.* Always ready. *Q.* Were
 “ they ready this night? *A.* They were ready
 “ that same night.” Then at page 11 he is
 cross-examined. “ *Q.* You say the steward
 “ was the man who trimmed the lamps on this
 “ occasion? *A.* He trimmed them.” Now it
 is to be remarked that this steward was a man
 whom he could not trust, he had stated so in
 the previous part of his evidence. The man

whom he could not trust is stated to have trimmed them. "Q. He had charge of the lamps? A. No. Q. Who had on board the ship? A. When we were going down I had charge of them. Q. You were going up? A. We were going down the river; the steward was a stranger on board. He was a black, and I took full charge of them by the captain's order. Q. You did not trim them? A. I did not trim them but lighted them. Q. Who would have charge of the lamps? A. I had. Q. What was the steward's name? A. Joe; I think he was an old man."

It appears then that these lamps were lighted at six o'clock, and this witness says in his evidence he saw them not later than 10 minutes before the accident happened. If they had gone out during that space of 10 minutes, and before the time when the vessel came in sight of the "Hibernia," it becomes necessary to consider whether they were extinguished by unavoidable circumstances, or under circumstances over which the owners of the vessel had no control. Now, the evidence of the master, the mate, the second mate, and all the evidence on the part of the "Hibernia" was that when they first saw this vessel at a distance they saw no lights, that there were no lights burning at that time. The master and mate of the "Thames" were also called as witnesses in the cause. They were independent witnesses, and they were not asked with respect to the lights as to whether they saw them or not.

John Littlefield, one of the crew of the barque, was also called as a witness, and he proved distinctly, if his evidence is to be believed, that the lights were not burning at the time when the vessels came in sight. He was asked, "Going on deck, did you observe anything yourself? A. I walked straight away

“ forward on the starboard side, and when I got
 “ forward I heard a man, called ‘Curly’ by nick-
 “ name, say, ‘Why, this port-light’s out!’ When
 “ I heard him say that, as I was on the star-
 “ board side, I looked over the rail in this
 “ position, and looked aft, and I said, ‘Why,
 “ ‘the starboard light is out too!’ Then I heard
 “ ‘Curly’ say, ‘One of you take this lamp from
 “ ‘me, and I will hand it down to you.’ I said,
 “ ‘I will take this here lamp down,’ that was
 “ the starboard lamp. As I was going to take
 “ the starboard lamp down, I see the man who had
 “ been on the look-out from six to eight with it in
 “ his right hand. Q. By the Court, Who was that?
 “ A. The man that had been on the look-out from
 “ six to eight. Q. Took it down? A. Had it in
 “ his right hand, and his left hand hold of the lan-
 “ yards of the rigging—starboard rigging. From
 “ there I slewed round and went across to the fore-
 “ hatch, and as I was stepping off the fore-hatch
 “ I looked forward and see the steamboat’s three
 “ lights.” So that at that time, when he saw the
 steamer’s lights, he has proved as a fact that the
 lights were not burning on board the “British Ban-
 ner.” It is said that this witness is not to be
 believed. Their Lordships see no reason to dis-
 credit his evidence. There seems to be no reason
 why he should have invented this story. Then
 it is said that he came for the purpose of proving
 the case of the “Hibernia,” and that he went
 on to say he saw the sails of the barque flap-
 ping, which is not the case, and that he is not
 to be believed. It should be remarked that the
 chief mate was asked whether he did not remem-
 ber having a conversation with this man, John
 Littlefield, after he was picked up and taken
 on board the steamer. He was asked, “Q. Do
 “ you remember having a conversation with John
 “ Littlefield on board the steamer? A. I merely
 “ said to him, ‘Say nothing here,’ as they would

“ be asking him questions, but to wait till he got
 “ to London.” He said he told him this because
 he was stiff when he got on board; but why his
 being stiff and cold should be a reason for his
 not answering any questions, or his being likely
 to answer them in the wrong way, or not ac-
 cording to truth, with reference to whether the
 lamps were lighted or not, their Lordships are
 unable to see. “Q. You mean when he was
 “ picked up out of the water? A. Yes. Q.
 “ That was after the collision? A. After the
 “ collision. Q. Do you remember asking John
 “ Littlefield whether he was stiff or not; whether
 “ he said anything about the lights on board
 “ the steamer? A. I said so to him because
 “ the captain of the boat asked me about them,
 “ and I thought he might say something to him,
 “ and I warned him and said, ‘ Be careful what
 “ ‘ you say until you get to London,’ and I said
 “ no more to him.” It seems certainly reasonable
 to suppose that he was speaking to John Little-
 field, and cautioning him against giving any
 answer with reference to the lights, because he
 himself was aware that the lights were not burn-
 ing at the time of the collision. He was asked,
 “ Did he tell you that he had relieved the look-
 “ out, and unshipped the port light to have it
 “ retrimmed?” to which he answered, “ That I
 “ do not know.”

Their Lordships have come to the conclusion
 upon the whole of this evidence that the lights
 were not burning at the time when the vessel
 first came in sight of the “ Hibernia.”

Then comes the question, what was the cause
 of the lights not burning? It is unnecessary for
 their Lordships to come to any definite conclusion
 as to what was the cause of their not burning,
 because the Act of Parliament requires it to be
 proved to the satisfaction of the Court that the
 circumstances of the case made departure from

the regulation necessary. The *onus* lies upon those who aver that the "British Banner" was not in fault to satisfy the Court that the circumstances under which the lights went out rendered a departure from the regulation necessary. No evidence upon that point was given, and, if one may conjecture upon the subject, there seems to be very little doubt but that the lights went out, because there was not sufficient oil to supply them. It appears that they had been burning the night before, that they ought to have been trimmed by the steward, Joe, a black man, new on board, in whom they had no confidence. All that the mate can say as to their having sufficient oil is from turning them down, as he says, to the proper focus. He did not examine the reservoir of the lamps to see whether there was sufficient oil in them.

Their Lordships, on the whole of the evidence, are of opinion that the "British Banner" was not carrying her regulation lights at the time when the vessels first came in sight, and they are not satisfied that the want of those lights was occasioned by circumstances over which the crew of the "British Banner" had no control; and that it was not from an unavoidable accident. The case therefore falls within the statute, and their Lordships consider that they are bound to pronounce that the "British Banner" was in fault.

But the statute does not say, that under those circumstances the defaulting ship shall be considered the vessel wholly in fault, and it becomes necessary to consider whether the "Hibernia" in any way contributed to the collision. Now the learned Judge who heard the witnesses arrived at the conclusion, with the assistance of the Elder Brethren of the Trinity House, that the "Hibernia" was wholly in fault. He says, "In our judgment the 'British Banner,'

“ even if she had not lights, was seen at a sufficient distance, and in circumstances which ought to have led the ‘Hibernia’ to execute the proper manœuvre for getting out of her way, instead of which she ported her helm and brought about the collision.” It is important, then, to consider whether the learned Judge was wrong in arriving at the conclusion that the “Hibernia” was in fault. Now, so far from thinking that he was wrong, their Lordships are entirely of that opinion. According to the evidence of independent witnesses, the master and the chief mate of the “Thames,” the “Hibernia” passed them, and after they got clear from the smoke of the “Hibernia” they saw the “British Banner,” and they could make out through their glasses that she was approaching them, that she was coming in an opposite direction. Now if they, notwithstanding the darkness of the night, could see that the “British Banner” was coming in that direction, their Lordships think that if the “Hibernia,” which at that time had approached nearer to the barque, had kept a proper look-out she must have seen that the other vessel was coming in an opposite direction in sufficient time to enable them to keep out of her way. They say they had a right to assume, not seeing the vessel’s lights, that she was going in the same direction as themselves, in which case they would not have seen the lights even if they had been burning. But their Lordships are of opinion that, by the use of their glasses, they might have made out in sufficient time that the vessel was an approaching vessel, and not one going in the same direction as themselves. According to their evidence, they did not discover, until the vessel came within 150 feet, that is within 50 yards, of them, whether she was an approaching vessel or not. If such

were the case their Lordships are of opinion that there could not have been a proper look out on board. The evidence of the master, James Finlay, is this: He says he took charge of the ship at the Ship Wash Light at 10 minutes to 8 o'clock. He was asked, "How long was it before the collision you went on deck?" *A.* About 15 seconds before the collision happened. *Q.* Were you about going on deck before you heard any orders given? *A.* I was about going on deck, I was opening my room door and I heard 'port!' My house is in front of the poop, and I heard 'port!' and 'hard aport!' as I went forward, and the collision just happened as I went on the bridge. *Q.* When you opened your room door you heard 'port!'? *A.* Yes, heard 'port!' when I got on the top of the poop, on the top of the ladder I heard 'hard aport!'" Then he was asked, "You heard 'port!' and then by the time you got to the ladder you heard 'hard a-port!'" *A.* Yes. *Q.* You did not see anything of the barque just before the collision? *A.* No. *Q.* Who had charge of the deck? *A.* The chief officer. *Q.* Did you stop your engines? *A.* When I went on the bridge, I see the vessel, and I said 'God help, that vessel sinks,' and she (meaning the 'Hibernia') was stopped." The engineer says the vessel was stopped about two seconds only before the collision took place. It appears that the blow was such that the "British Banner" was sunk almost immediately.

It appears to their Lordships, upon the whole of the evidence, that the learned Judge came to a right conclusion upon the evidence, that the "Hibernia" was in fault. Their Lordships are of opinion that the want of the regulation lights on board the "British Banner" contributed to

the accident; and that at all events the "British Banner" must, under the provisions of the 36 & 37 Vict. c. 85. s. 17., be deemed to be in fault.

Under these circumstances their Lordships will feel it their duty to recommend to Her Majesty that the judgment of the Court below be reversed, and that it be pronounced that both vessels were in fault, and that each party do pay his own costs in the Court below, and the costs of this Appeal.