

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Owners of the "Pauline Constance Eleonore" and others v. the Hamburg American Steam - Packet Company (ship "Germania"), from the High Court of Admiralty; delivered the 5th of July, 1869.*

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Present:

MASTER OF THE ROLLS.

SIR WILLIAM ERLE.

SIR JOSEPH NAPIER.

THIS is an Appeal from the High Court of Admiralty on behalf of the owner, master, and crew of the barque "Pauline Constance Eleonore" and of the owner of the cargo and private effects contained therein, for the loss sustained by a collision with the steam-ship "Germania" off Dungeness at 10 o'clock on the night of the 16th of April, 1868. The Court of Admiralty has determined that the barque was wholly in the wrong, dismissed the Defendants from the case, and condemned the Plaintiffs in costs. The barque was a Dutch vessel, 579 tons register, proceeding from Java to Amsterdam; she was steering east by north, making about six knots an hour; the wind was moderate from north-north-west. The "Germania" was a screw steamer of 2,800 tons. She was not under sail, and was proceeding from Hamburg, bound to New York. She had a crew of 135 persons, with a large number of passengers.

The "Germania" sighted the barque about two minutes before the collision. She ported her helm, and the barque struck her on the port side midships obliquely, with her stem and port bow. The damage done to the "Germania" was very slight, that done to the barque was very great. The barque obtained assistance from a steam-tug and

two boats' crews, and was only saved from sinking by being run ashore at Hythe. The "Germania" neither afforded nor tendered any assistance, but pursued her course without once abating her speed.

In the Court below it was held that the barque was wholly in the wrong, by reason of her lights being placed in such a situation that they were not seen on board the steam-ship. The Appellants insist that there could have been no sufficient look-out on board the "Germania," and that if there had been, the lights of the barque must have been visible before the collision.

The evidence is distinct that the lights on board the barque were burning bright, and were visible to vessels passing her; this is distinctly proved by Laming, the master of the lugger "Alma," who spoke her at half-past 9 p.m., before the collision, as well as by Middleton and the crew on board the vessel: we agree with the Judge of the Admiralty Court that this fact is clearly proved. The lamps, however, were placed in the mizen rigging, but from their position and the peculiar form of the barque, a vessel coming end on would be unable to see them; this is established by the Report of the Trinity Masters, who went down to the dock where she was lying to examine her, and who reported that, at a distance of more than 350 feet, with masts in line from a window elevated at least 40 feet, although the side lights were in their places, they were not visible. Their Lordships are not quite satisfied with this Report; they think that the examination, in order to be perfectly fair, ought to have been at night; and they regret that the Trinity Masters did not also, by going one or two points to one side, have ascertained whether the light on that side was visible. This is the more material because the two vessels were not coming end on,—the "Germania" was steering due west, the barque was steering east-by-north. It is quite certain that, assuming the lights to be burning, they would, even as placed, be visible from a vessel steering four or five points on either side of the exactly opposite course which the barque was taking. The exact deviation at which the lights would be visible is not to be ascertained from the Report of the Trinity Master. Their Lordships consider this an omission which is to be regretted; they, however,

concur with the learned Judge in the opinion expressed by him, that the lights of the barque, though burning, were not so placed as they ought to have been, to have enabled a vessel coming end on to see them, and that consequently the barque must be considered to have by this defect to some extent occasioned the collision. The evidence of what occurred on board the "Germania," so far as their Lordships consider it necessary to refer to it, is to this effect:—

The look-out on board the "Germania" consisted of this, viz.: "one on the look-out at the bowsprit, another one on the look-out on the bridge," p. 43. The chief officer, and also the pilot, but who had not charge of the vessel, were also on the bridge. Their Lordships are informed by the Naval Assessors who assist them that it is the usual practice in King's ships to have never less than two look-outs at the bowsprit, and their Lordships are not satisfied with the sufficiency of the reason alleged for having only one of these look-outs in the present case.

The evidence of the chief officer is to this effect. The first report was from the look-out man, who reported ship right a-head, the officer of the watch saw something a-head, and ported the helm directly. He says that the time taken was about a minute from the time when he first saw her to the time when the collision took place.

The evidence of the pilot, who was on the bridge at the time, is to be taken with great allowance, as it appears that he had on the previous day met with an accident which had affected his head, and had evidently for the time to some extent impaired his memory; accordingly, his evidence is contradictory, and by no means so distinct as to these matters as that of the chief officer. In the first place, he had not noticed anyone on the bridge besides the chief officer and himself. In the next, place he states that the "Germania" was steering west-by-north, or west-half-north, which, if correct, would make a greater deviation from coming end on. He fixes the time at two minutes, or a minute and a-half, p. 58, from the time when the vessel was first seen to the time of the collision. He states that he saw the barque before any one else, and then contradicts that statement. In fact, their Lordships are of opinion

that, under the circumstances of this case, his evidence must be, when it contradicts the evidence of the chief officer, to a great extent disregarded.

The evidence of Jenson, the look-out man, does not entirely agree with that of the chief officer. The chief officer states, that the look-out man cried, "a ship right a-head;" he is cross-examined as to whether he did not say "a light right a-head;" he does not remember to have heard it. The look-out man says, he cried out after, "the ship right a-head,—she shows no light."

Gilling, who was on the bridge at the time of the collision, on the port side, heard the look-out man twice reports the barque as "a sail right a-head," but says nothing about the word "lights" being used.

Lohse, the sail-maker, confirms the look-out man that he said "she shows no light." It is not necessary to go through the rest of the evidence on the part of the "Germania," which all goes to the question of whether the barque did or did not carry lights, because their Lordships consider that question quite settled; that the barque did carry lights, and that they were not seen on board the "Germania" till after the collision, when the red light was seen. This the witnesses on board the "Germania" state they saw moving, but which their Lordships believe to have been an error on the part of the witnesses, and that what they saw was the red light of the barque on port side.

The night was dark and hazy, and the "Germania" in a channel crowded with vessels was proceeding at 11 knots an hour, the vessels were approaching at the rate of about 20 miles an hour, that is a mile in every three minutes. Their Lordships are of opinion that if a steam-ship proceeds at such a rate at such a time, and in such a place, she incurs the responsibility of the damage which is necessarily occasioned by her being unable to obey the directions, which is her first duty, viz., that it is for the steam-boat to get out of the way of the sailing-vessel. How far the lights on board the barque could have been discerned on a dark hazy night, when the fog was clearing off, their Lordships have not the means of ascertaining; but according to the evidence on board the barque, the lights of the "Ger-

mania" were not discerned before she was as near as 2 or 2½ miles. The "Germania" seems to have treated the whole matter with the most perfect indifference; she neither slackened her speed, nor took any other step in the matter, except to port her helm. She made no inquiry as to the state of the other vessel, but ran on her course without affording the slightest assistance to a vessel obviously very seriously injured by the collision which had just taken place. With respect to English vessels it is enacted by the 33rd sect. of 25 and 26 Vict. c. 63, that in any case of collision between two ships it shall be the duty of the person in charge of each ship, and, so far as he can do so without danger to his own ship and crew, to render to the other ship such assistance as may be practicable, and in case he fails to do so, and no reasonable excuse for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act or default. In this case no reasonable excuse for such failure is shown, and although it is proved that the collision was owing in part to the position of the lights on board the barque, and though it is true that this section does not apply to foreign ships, their Lordships cannot but consider that it is a matter to be gravely reprehended, and that it ought not to be passed over in silence, although it cannot form the ground of their Lordships' decision. Whether the persons in charge of the "Germania" supposed that by proceeding at once on their voyage they could escape all consequences, it is impossible to surmise; but the first duty of any vessel that by collision injures another, is to await to ascertain the extent of that injury, and to tender what assistance it may be able to protect life and property.

Their Lordships, therefore, find it impossible to exonerate the "Germania" from all participation in the cause of the collision, and shall humbly advise Her Majesty that the barque shall recover a moiety of her damages and losses against the "Germania," and that each party must bear their own costs.

