

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Beal and Edwards v. Marchais and Pineau, and cross Appeal, (The "Bougainville" and the "James C. Stevenson") from the Vice-Admiralty Court of Gibraltar; delivered 24th April 1873.

Present:

SIR JAMES W. COLVILLE.
JUDGE OF THE HIGH COURT OF
ADMIRALTY.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS is an appeal from the decision of the Judge of the Vice-Admiralty Court at Gibraltar in a case of collision between a steamer and a sailing vessel. The collision took place in the Straits of Gibraltar, according to the best conclusion their Lordships can come to from the evidence, somewhere about $8\frac{1}{2}$ miles east of Tarifa. The nature of the damage was this: The sailing vessel ran into the steamer at right angles 10 feet abaft the stem. The consequences of the collision were very serious to both vessels, both being obliged to put into Gibraltar on account of the damage they received. The learned judge of the Court below found, upon the evidence, that both the vessels were to blame, and he made the usual decree. From that decree appeals have been prosecuted to the Judicial Committee of the Privy Council by both parties.

It will be convenient before stating the conclusions at which their Lordships have arrived, to notice in the first instance the case of the steamer who appeared as the first Plaintiff here, and also in the Court below. She was called the "James C. Stevenson." She was a screw steamer of 1,226 tons, and 250 horse-power, and

was sailing from Calcutta with a general cargo for London. She passed through the Suez Canal and arrived at the entrance of the Straits of Gibraltar on the night of the 29th of March. She says, that at forty minutes past eleven on that night, being eight miles from Tarifa light, which bore W. by N., and steering W., and the wind, which was squally, being W. inclining to S., the night being clear but cloudy, (it is not immaterial to observe this,) and proceeding at the rate of $8\frac{1}{2}$ knots an hour; while so proceeding a sail was reported right ahead, distant about three miles, apparently coming end on; but she says no lights were visible. The course which she pursued was immediately to port, and she appears from the evidence to have hard-a-ported almost directly afterwards, by which she fell, before the collision took place, seven points off from her original course. It is important to observe here that there is no dispute at all that those on board the steamer were perfectly aware that the vessel right ahead of them was a sailing ship, and as the learned judge of the Court below remarked, they must have known perfectly well that she was coming directly through the Straits with the wind directly aft. It is also important to observe that the captain of the steamer entirely misapprehended the existing regulation with respect to his duty in such circumstances. He says in his evidence, "I think
" that it was the duty of the other vessel, although
" a sailing vessel and myself a steamer, to have
" ported her helm, because she was running free,
" and it is the rule of the road; and I say that,
" although we were meeting each other stem on.
" It would be quite different if she had been
" close hauled." It is hardly necessary to state that this opinion of the captain of the steamer is directly at variance with the existing regulation of Article 15, viz., that if two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship.

The steamer ascribes this collision to two circumstances; first, to the invisibility (if I may use such an expression) of the lights on board the sailing vessel—it not being disputed that she carried lights—their invisibility resulting from their improper position; and also to the sailing vessel having starboarded instead of keeping her course. That is the case, stated briefly, on behalf of the steamer.

The case on behalf of the sailing vessel may be also stated in a few words. She was a French iron barque of very large tonnage, and was coming from the Cape of Good Hope to Marseilles. She says that on this night, when she was due south of Europa Light, and midway between it and Ceuta Light, she saw the white light of a steamer, which proved to be the "James C. Stevenson," two points on the starboard bow, and distant about three miles. Both vessels agree in putting the distance at which they were mutually discerned at about three miles. She says the wind was W.S.W., one point on the starboard quarter, and her head was E. by N. Then she gives an account of her sails. She says she had her courses, fore and maintopsails, maintop-gallant sails, and two jibs set, the starboard clew of the mainsail being hauled up. She gives the same account of the night that the other vessel does. She says that the white light of the "James C. Stevenson" was discovered at 11.35, and that she was supposed to be steering west; that shortly afterwards the red light of the "James C. Stevenson" was observed, that her course was not discovered by those on board the sailing vessel until the steamer was seen at about 300 yards distant. Then she says that the "Bougainville" had hitherto been kept on her course supposing that the steamer would keep out of her way, but upon the hull of the "James C. Stevenson" being discovered, and it being found that she was coming on at right angles towards the bows of the "Bougainville," and it being then evident that a collision was inevitable, the helm of the "Bougainville" was put hard to starboard, but the

"Bougainville" only fell off one point before the collision.

Now she on her part ascribes the collision to these three circumstances, that is by her pleading and by the argument of her counsel. She says that the collision was caused by the rash and improper conduct of the steamer in not waiting to ascertain what course the sailing vessel was taking; she says that the steamer ought at all events to have reversed her engines, which would have been one mode of preventing the collision; and lastly, the ship says that if the steamer did not choose to wait, she ought in the first instance to have starboarded instead of ported.

In considering this case, it will, I think, be convenient to assume in the first instance that the lights were not visible. On that assumption what, according to the 15th Article was the clear duty of the steamer? It was to get out of the way of the sailing vessel. What getting out of the way is must depend, of course, on the circumstances of each particular case. It may be by porting, it may be by starboarding, it may be by stopping. But according to her own version of the story, the steamer was aware that the sailing vessel was coming directly through the Straits with the wind directly aft, but she says that owing to the absence of her lights she had no indication of what course the sailing vessel was pursuing. That vessel was going at the rate of $8\frac{1}{2}$ or 9 knots an hour, and their joint speed must have been something like 17 or 18 knots. Being, as she says, in uncertainty as to the course the sailing vessel was steering, it was surely not the part of a prudent master immediately to take the active and decided step of porting, at the rate which she was then going, of between eight and nine knots an hour, which would carry her to the opposite coast across the bows of the ship. If she was in doubt as to the course of the vessel approaching her, as she says, stem on, or a little upon her star-

board bow, and as the evidence in their Lordships' opinion seems to prove rather more than that, between one and two points on her starboard bow, surely it was the part of a prudent master to have waited until he could ascertain which course the sailing vessel was pursuing. The 16th Article seems to be precise upon this point. "Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed." There is no reason why she should conceive that the ship was going to the Moorish side of the Strait, although some suggestions were made to that effect.

In their Lordships' opinion, therefore, the judge came to a perfectly sound conclusion upon this part of the case, that is in holding that upon the steamer's own statement, upon the assumption that the lights were not visible owing to their improper position, nevertheless, she sinned against the rules of navigation laid down for preventing these unfortunate collisions by not slackening her speed, or waiting, or taking any of those precautions which would have enabled her before she took the decided step of porting to ascertain on what side the sailing vessel was going. It is not necessary, in their Lordships' opinion, therefore, to inquire whether it would have been a prudent course on her part, if she elected not to wait, to have starboarded instead of porting, by which manœuvre she cut in between the ship and the lee shore at the rate of seven knots an hour. Their Lordships think that the finding of the learned judge on this part was perfectly correct, and will advise Her Majesty that it be affirmed.

There then remains the other part of the case, upon which the greater part of the argument has been addressed to their Lordships, namely, as to whether, in the circumstances of this case, it must not be holden that the conduct of the sailing ship contributed to this collision?

First, as to the contribution to the collision, which is said to have been made by the absence of the proper lights, that is to say, by the lights not being placed in a position in which they were visible. The law does not require any particular place at which the lights should be affixed; though no doubt it does require that they should be so placed as to be properly visible within the scope of the regulations upon that point; but no particular place is pointed out. The evidence in this case establishes these points with regard to the lights, first, that they were carried, and secondly, that they were proper lights, properly screened; and their Lordships incline to the opinion that it also is proved that they were carried in the place in which they are usually carried by French vessels. There has been considerable discussion upon the evidence as to whether the testimony of the master of the ship be credible with regard to the cutting or arching of the foresail, which, according to his evidence, to which he was not cross-examined, and according to the evidence of another witness, was expressly done for the purpose of rendering these lights visible. The vessel was a very large ship, and she had come all the way from Calcutta, and the presumption is in favour of her statement as to the lights.

It may here be observed that if the allegation were correct on the part of the steamer, that the sailing ship had contravened the rule of navigation in not keeping her course, but in starboarding, it is quite clear that that position is fatal to the other contention that her green light was not visible, because, if the sailing vessel had starboarded earlier than she said she did, unquestionably, by that manœuvre, she must have shown her green light, which it is proved was carried, and which it is proved was of proper quality. She must have shown her green light to the approaching steamer, and have given her that information of which she complains that she was deprived. The learned judge of

the Court below seems, upon the whole, to have come to the conclusion that there was a *deficit probatio*, upon this particular and material point, that it was incumbent upon the sailing vessel to have proved by more conclusive evidence than she adduced, that these lights so placed in the stern of the vessel were visible by the circumstance that the foresail was cut or arched in the manner described. The learned judge seems to have come to the conclusion that there was not sufficient evidence to warrant him in thinking that this point was established, and therefore to have decided on that ground principally that the ship contributed to this collision.

Their Lordships do not think it necessary to express any opinion as to the conclusion at which they might have arrived if this particular matter had come before them as a Court of First Instance, whether they would or would not have been satisfied with the evidence which was produced on behalf of the sailing vessel to the effect already stated, because their Lordships are clearly of opinion, after consulting with their nautical assessors, and after a review of the whole circumstances of this case, that the sailing vessel coming through the Strait with the wind, as described, was perfectly and clearly seen at a distance of three miles as stated by the steamer, but at all events between two and three miles; that upon the assumption that the lights were not visible, it was still the duty of the steamer not to take that decided course which she did take, in perfect ignorance, according to her own statement, as to which way the sailing vessel was proceeding; that it was very imprudent, rash and careless navigation, and was the real cause of this collision; and even assuming that the lights were placed in a wrong position, and therefore were not visible, their Lordships are of opinion, upon the particular circumstances of this case, that it would not be right to come

to the conclusion, that the invisibility of those lights could, in any legal sense of the term, and according to the judgments upon the question of contribution to negligence, properly be said to have contributed to this collision.

Their Lordships have not failed to consider the point which was urged on behalf of the steamer, that the starboarding of the sailing vessel might have contributed to this collision. Their Lordships are clearly of opinion upon the evidence that the starboarding was done at so late a period as to take it completely out of the category of any contribution to the collision; indeed if the starboarding had been at an earlier period it is fatal to the contention of the steamer, that she was not apprised by seeing the green light of the course which the other vessel was pursuing; because the dilemma is obvious: if the starboarding took place at an earlier period, then the green light, which is proved to have been there, must have been seen; if the starboarding took place, as we are inclined to suppose, at a later period, then there was no contribution to the collision by that manœuvre at that late period in the history of the case.

Their Lordships will therefore humbly advise Her Majesty that the decree of the Judge of the Vice Admiralty Court should be varied so as to pronounce that the steamer is alone to blame for this collision. We think that the costs must follow this decision, and that the sailing vessel will be entitled to her costs both here and in the Court below.