

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Honourable Algernon Egerton, Owner of the steam vessel the "Earl of Ellesmere," v. The Owners of the steam vessel the "Despatch" ("The Despatch"), from the High Court of Admiralty of England; delivered December 6th, 1873.*

Present:

SIR JAMES W. COLVILE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS was a cause of collision appealed from the High Court of Admiralty, arising out of a collision which took place between two steam tugs in the River Mersey. The owners of the steam tug the "Earl of Ellesmere" charge the owners of the tug "Despatch" with having negligently caused that collision. It took place between eleven and twelve o'clock at night; the night was fine, and the "Earl of Ellesmere" was crossing the Mersey from Liverpool to the Cheshire side, and was angling seaward about north-west. The other tug, the "Despatch," had taken in tow and lashed alongside of her a cargo hulk called the "Bosphorus," which had been discharging her cargo into a vessel called the "City of Brussels," lying at anchor in the river. It seems that as the "Earl of Ellesmere" was crossing the river, the "Despatch," with the "Bosphorus" alongside, started from the side of the "City of Brussels." The tide was running up the river at the rate of about three knots

or three and a half knots an hour. The speed of the "Earl of Ellesmere" was five knots, and the speed of the other vessel, the "Despatch," was—as she was going against the tide—about a knot or little more than a knot. Now, the charge—at all events the principal charge—which was made against the "Despatch" was that she had started with the "Bosphorus, the "Bosphorus" having a white light at her masthead and no side lights;—that she started with lights which were proper lights whilst she was stationary, but which were improper when she was in motion. That was the substance of the charge laid in the petition, and which was attempted to be supported by the evidence given in the case. The paragraph of the petition which alone contains the charge, so far as the statement of facts is concerned, is this:—"At this time the 'Despatch' was near to the star-board side of the steamship 'City of Brussels,' of the Inman line, which was lying at anchor in the river. Between the 'City of Brussels' and the 'Despatch' was seen a white masthead light, which afterwards proved to be the masthead light of the 'Bosphorus.' No light, other than the masthead light, was carried by the 'Bosphorus,' and those on board the 'Earl of Ellesmere' did not know, and had not the means of knowing, that the 'Bosphorus' was in motion or under weigh." The learned Judge who heard the evidence makes this comment upon that allegation, and upon the evidence given in support of it:—"That is the allegation, the principal allegation of the petition and of the witnesses called on behalf of the Plaintiff to-day. The master, not once or twice, but throughout the whole of his evidence asserted that the collision was entirely due to the absence of these lights, that if he had known the other vessel was in motion or

“ under weigh there would have been no risk of collision at all. He would have ported, I suppose, a little, or executed some manœuvre by which the collision would have been avoided.”

At the end of the evidence for the Plaintiff some conversation took place between the Court and the counsel, from which it is clearly to be implied that the question of lights was considered to be the issue in the case, and the only evidence which the Court intimated it would be necessary for the Defendant to give, was upon the question of these lights.

The manner in which the case was put by the master plainly leads to the conclusion that that was the issue the parties had come to try. The master attributes the accident to the state of the lights, which misled him, as he says, into the belief that the “Bosphorus” was a stationary ship, and he says, if he had known that she had been a moving ship, he should have taken a course—not suggesting that she should have taken any other course than she did,—but he would have taken a course which would have avoided her by porting his helm. He thus admits, as strongly as language can do, that the charge of negligence which he brought against the other vessel was not that she did not execute any proper manœuvre to keep out of his way, but that there being an improper light at the head of the “Bosphorus,” and no side lights, he was misled into a wrong manœuvre by the exhibition of these lights.

It is found by the learned Judge, and it is admitted that this finding cannot be impeached today, that the “Despatch” and the “Bosphorus” had the proper lights; the necessary conclusion therefore is that the people on board the “Earl of Ellesmere” were not keeping a proper look-out, and were attempting to account for a collision caused by their own negligence, by a misstatement



as to the lights on board the "Despatch." In that view of the case no question really ought to arise upon the construction of the 14th article. This article contains a rule which is, as all the rules are, most important to be observed in circumstances where it applies; but in every case it is necessary to consider whether, although the ships be crossing ships, they are crossing so as to involve risk of collision, and also to enter into the inquiry whether, if that be so, there are other circumstances in the case which would make the 19th article operative, and where the strict rule laid down by the 14th article ought not to be observed.

It seems to their Lordships that that inquiry was not gone into in the Court below, for the reason that, after the evidence of the master, it would have been difficult to suggest that the collision happened from anything that could be imputed to the "Despatch" as negligent in not obeying the 14th article. The master does not suggest that the "Despatch" should have altered her course; on the contrary, he says, if he had not been misled by the lights, he should have altered his own by porting his helm, which he ought not to have done, but have kept his course, if he thought the vessels were crossing under circumstances which made the 14th article applicable to them. Their Lordships think it is most important in these cases to confine parties to the substantial issues they have raised and fought in the Court below. Their Lordships would be reluctant to conclude the parties merely because of some too limited expression in the pleading, or some error which had been made in the conduct of the cause below, but in this case they cannot avoid seeing that the substantial issue was put upon the question of the lights which this vessel carried, and that, according to the result of the finding as to these lights, neg-

ligence was attributable to the one side or to the other.

Their Lordships think that, substantially, the judgment of the Court below is right, that there was negligence on the part of those on board the "Earl of Ellesmere," and no proof that there was any negligence on the part of those on board the "Despatch." They will therefore humbly advise Her Majesty to affirm the judgment of the Court below with costs.

