

Judgment of the Lords of the Judicial Committee of the Privy Council in the case of The Owners of 'The Fenham' v. Wake and others (ship 'Fenham'), from the High Court of Admiralty; delivered the 22nd June, 1870.

Present:—

THE MASTER OF THE ROLLS.
SIR JAMES W. COLVILLE.
SIR JOSEPH NAPIER.

THE collision in this case is shown by the evidence to have occurred about five o'clock in the afternoon of Saturday, the 13th of November, 1869, off Whitby, on the coast of Yorkshire, between the 'Sea Venture,' a brig of 220 tons register, and the 'Fenham,' an iron screw steamship, of 567 tons register.

The statement of the Appellants is, that when about four and a half miles from Whitby, heading N. $\frac{1}{2}$ W., the 'Fenham' was going at the rate of five or six knots an hour, that she had her three Admiralty Regulation lights duly exhibited and burning brightly, and a good look-out was being kept. They say that the 'Sea Venture' was first seen at a distance of about a quarter of a mile off the starboard bow, and they say that, as no lights were visible on the 'Sea Venture,' the persons on board the 'Fenham' concluded that the 'Sea Venture' was moving in the same direction as themselves; "but when the 'Fenham' approached the said brig, "she was seen to be standing in on the starboard "tack, and thereupon the master of the 'Fenham' "at once ordered the engines to be reversed full "speed, and the helm to be put hard a-starboard, "as the only possible means of avoiding a collision. "The 'Sea Venture,' however, instead of keeping "on her course, put her helm hard-a-port, and "thereupon the 'Fenham' ran stem on into the port "side of the brig about amidships." They also say that the 'Sea Venture' had not her Regulation lights duly exhibited.

On the other hand, the Respondents say that the 'Sea Venture' was proceeding under close-reefed topsails and fore-topmast staysail close hauled on the starboard tack, at the rate of about two knots an hour, steering about S.W. by S. in for the land to smoother water, with the intention of bringing up in Scarborough Wake. They say that a good look-out was kept, and that her Admiralty Port Regulation lamp was duly exhibited and burning brightly, and her starboard Regulation lamp was then about to be exhibited; that at this time the 'Fenham' was observed at the distance of a mile and a half to be bearing about S.S.E. from her; that the 'Sea Venture' then kept on her course close hauled to the wind on the starboard tack, in the expectation that the 'Fenham,' which was under steam, would keep out of her way; that instead of doing so, the 'Fenham' approached the 'Sea Venture;' the helm of the 'Sea Venture' was put hard-a-port, but the 'Fenham' then ran into the 'Sea Venture' on her port side about the fore-rigging.

There is one fact of great importance clearly established in this case, which is, that the brig showed no lights at all, or, at least, if she did show a light, it was not till the collision was imminent; and therefore, in effect, for any practical purpose, she showed no lights. In that state of circumstances this is the usual rule,—that the omission to exhibit the proper lights in some cases is immaterial, if it is clearly shown that the absence of such lights was not the cause of the collision, or did not, in any respect, conduce to it, and their Lordships assent to that view of the case; but, at the same time, it is of the greatest possible importance, having regard to the Admiralty Regulations and to the necessity of enforcing obedience to them, to lay down this rule,—that if it is proved that any vessel has not shown lights, the burden lies on her to show that the non-compliance with the Regulations was not the cause of the collision.

Their Lordships not only think that the brig has not shown that, but on a fair review of the case their Lordships are unable to come to the conclusion to which the Trinity Masters in the Court below arrived. It is to be observed also that the learned Judge of the Admiralty Court

dissented from the opinion of the Trinity Masters, though, at the same time, he considered himself bound to act upon their opinion.

This is clearly proved, that the steamer saw, looming in the dark, two vessels at about the same time in the evening. Their Lordships are informed by the Nautical Gentlemen who assist them in this matter, that the mere fact of seeing a vessel looming in the dark would not, if she exhibited no lights, point out which way the vessel was going until she was sufficiently near to enable the set of her sails to be seen; that when the set of the sails is seen, the course of the vessel can be ascertained; but that the vessel herself may be seen before the set of her sails can be ascertained. Their Lordships consider this to be the rule, not only that vessels must obey the Admiralty Regulations, but that they are bound to obey them in due time. Their Lordships consider that if the brig in this case had shown her proper lights, they would have been visible to the steamer, and that if she had seen the red light when the brig was first visible, the steamer would have known what to do, and might have avoided the collision; but it appears that she saw nothing of the sort.

The Trinity Masters seem to have been of opinion, that if the 'Fenham' had starboarded at the time when this vessel, the 'Sea Venture,' was at the distance which she says she was, the collision would not have happened, but she would have gone clear of her. Their Lordships do not see anything in the evidence to justify that conclusion, nor are they of opinion that the steamer was bound to assume that the brig had disobeyed the Admiralty Regulations. It is to be observed that seamen, no doubt, would tell more accurately the distance of the one vessel from the other than persons unaccustomed to the sea; but it is to be remembered that this occurred on a dusky evening, about three-quarters of an hour after the sun had gone down, when night was closing in rapidly, and when there were no stars visible. In this state of circumstances, their Lordships cannot rely upon the accuracy of the estimate of the persons on board the brig, when they state the distance at which they were from the steamer. The more so,

as their interest obviously is to make the distance as great as possible.

The Elder Brethren of the Trinity Corporation have stated that in their opinion "upon her own evidence, other portions of which it is unnecessary to refer to, she, that is, the steamer, must have seen the other vessel at a greater distance than she admits." Their Lordships find themselves unable to concur with this view, which, also, is not that adopted by the Nautical Assessors; on the contrary, they think it clear, that directly those on board the steamer did ascertain where the other vessel was, and the course she was on, the helm was put hard-a-starboard, and the engines were reversed. Their Lordships think that the grounds of the decision to which the Trinity Masters came are too slight to rely upon, and they are unable, assisted by their Nautical Assessors, to arrive at the same conclusion. Their Lordships think that the real cause of the collision was the omission of the 'Sea Venture' to comply with the Admiralty Regulations, and that the brig was solely to blame for the calamity that occurred. The consequence is, that, in the opinion of their Lordships, the Judgment must be reversed, and the owners of the steamer must have their costs in the Court below as well as here; and they will humbly advise Her Majesty accordingly.