

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Hamburg American Steam-packet Company v. North of Scotland Banking Company, from the High Court of Admiralty of England (the "Saxonia" and the "Eclipse"); delivered February 13, 1862.*

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Present :

LORD KINGSDOWN.

SIR EDWARD RYAN.

MASTER OF THE ROLLS.

SIR JOHN T. COLERIDGE.

IN this case cross-causes have been instituted, each party attributing the collision which took place between these vessels to the fault in the management of the other.

The facts are shortly these. The collision occurred on the 29th of December, 1860, in the Solent, off the shore of the Isle of Wight, three or four miles to the eastward of Yarmouth, about 10 o'clock at night.

The "Saxonia" is a steam-ship belonging to the Free Hanseatic City of Hamburg, of 2,200 tons burthen, with engines of 500 horse-power. She was bound from New York to London, calling at Cowes to land passengers. She had a pilot on board, and was proceeding up the Solent, keeping on the star-board side of the mid-channel.

The "Eclipse" is a barque of 254 tons burthen. She was bound from Auckland, in New Zealand, to London. The wind was from south-south-east to south-east. She was beating up the Channel. The tide was the latter part of the flood, within half-an-hour of high water. She was on the port tack, close hauled, barely stemming the tide, and heading south-

west and by south. The moon was about forty-three hours past the full; but the night was cloudy and dark. The "Saxonia" was seen on board the "Eclipse" when they were about three miles apart. When the vessels became so near that the collision was imminent, the "Saxonia" ported her helm, the "Eclipse" at the same time starboarded her helm, and struck the "Saxonia" as she crossed her bows three times, by which considerable damage was done to both vessels.

These facts are not in dispute, and are the common case on both sides. There are other circumstances which must be referred to respecting which there is some contrariety of evidence. We consider, however, the following facts to be established by the evidence before us. The "Eclipse" exhibited a flare-up light when the vessels were approaching, but not in our opinion until the collision was either inevitable, or almost so. The evidence of Elliot, the mate of the "Eclipse," and of Salmon, a mariner on board of her, show that the moment the flare-up light was exhibited, the "Saxonia" altered her course by porting her helm. We are also of opinion that the "Eclipse" was not seen by the persons on board the "Saxonia" until the collision was so imminent that if she continued at the speed at which she was then proceeding it was inevitable. We are of opinion that the failure to discover the "Eclipse" sooner than when she was first seen on board the "Saxonia," was owing to the circumstance that the "Eclipse" failed to exhibit any proper light on her starboard side. The evidence on behalf of the "Eclipse" states that the green light on the starboard side was burning dimly, that the glass of it had been cracked, and that the spray had several times got into the lantern. The evidence on the side of the "Saxonia" denies the existence of any light at all on the starboard side, with the exception of Wilstermann, who saw the green light only when the "Eclipse" got quite close, and just before she struck. On the full consideration of the evidence, we agree with the Judge of the Court of Admiralty in believing that the real state of the case was that the green light on the starboard side was burning, but exceedingly dimly, and that it was not discernible at any distance from the vessel herself, and that it was never visible on board the

“Saxonia” until the collision actually took place, or until it was inevitable.

In this state of circumstances in the Court of Admiralty the Judge, assisted by the Elder Brethren of the Trinity Corporation, pronounced that the collision in question was occasioned by the default of the master and crew of both vessels, and that the damage arising therefrom ought to be borne equally by the owners of both vessels. From this decision both parties appeal. The “Saxonia” insisting that the “Eclipse” was in default; first, for not having exhibited the regulation light; secondly, for not having exhibited any light at all until too late; and thirdly, for having starboarded her helm instead of porting it.

On behalf of the “Eclipse” it is contended, that the Merchant Shipping Act (17 and 18 Vict., cap. 104, secs. 296, 297) has no reference to this case, which applies only when both vessels are British, and that she was not bound to exhibit any green light or to port her helm, and that the collision is solely attributable to the “Saxonia,” whose duty it was, being a steam-vessel, and therefore going free, to make way for a sailing-vessel close-hauled on the port tack.

On the other hand it is contended, that if the Merchant Shipping Act does not affect foreign vessels on the high seas, it does apply to all vessels navigating tidal rivers or estuaries, within the limits of a county, and that the Solent must be considered to fall within that description.

In our opinion the statute cannot be considered to have any local application to the Solent, and to affect foreign as well as British vessels navigating within the limits of that channel; and that even if the statute were binding on all vessels navigating within a tidal river, which, however, the case of the “Fyenoord” discountenances, we think that it could not be locally binding within the water of the Isle of Wight and the main land, and that the circumstance that the Isle of Wight is by local and territorial designation to be deemed a portion of the county of Southampton does not in any degree affect this question.

We are of opinion that this collision must be considered to have taken place on the high seas, in a place where a foreign vessel has a right of

sailing without being bound by any of the provisions of the statutes enacted to govern British ships.

This being so, it follows that the Merchant Shipping Act has no application to this case, as it has been fully determined that where a British and a foreign ship meet on the high seas the statute is not binding on either. The principle, therefore, by which this case must be decided must be found in the ordinary rules of the sea. That being established, there are two rules affecting sailing vessels of all countries, which, in our opinion, decide this case.

The first of these rules is, that a vessel which has the wind free is bound to give way to a vessel close-hauled, and that a steam-ship is to be treated as a vessel which has the wind free. This was the case of the "Saxonia;" she was therefore bound to give way to the "Eclipse," and the "Eclipse" had a full right to expect her to do this, and was not bound in any respect to alter her course.

But the second rule which we consider affects this case is, that though the close-hauled vessel is not bound to give way, she is, nevertheless, bound to show some proper and sufficient light, in sufficient time to enable the steam-ship, or other vessel whose duty it is to give way, to avoid any collision. No blame can attach to a vessel for running foul of another vessel if it has been impossible to distinguish it until the collision was inevitable. This is not a question of green or red light, but of any light at all. A vessel at anchor, or a fishing boat, is bound by the general rules of the sea to exhibit a light so as to afford to the vessels whose duty it is to avoid her, the means of doing so. In our opinion, on the result of the evidence, this was not done by the "Eclipse." The evidence establishes that although the moon, which was not quite two days past the full, was risen, still, that owing to the clouds and snow, the night was dark; this is distinctly mentioned in the protest of the "Saxonia;" and in the protest of the "Eclipse" it is stated that the night was cloudy at times; the darkness of the night at this time is confirmed by the evidence. We think there is evidence to show that a sufficiently good look-out was kept on board the "Saxonia," and that if proper light had been exhibited on board the "Eclipse," it would have been

seen on board the "Saxonia" in sufficient time to have enabled it to avoid any collision. It cannot be admitted as any excuse for this omission that several hours previously, and owing to severe weather, the glass had got broken, and the light extinguished, or so dimmed as to be indiscernible at any distance; and we concur in the opinion of the learned Judge of the Admiralty Court that she cannot recover against another vessel if in consequence of that misfortune the other vessel could not see her. If the matter rested here, it would follow that the "Eclipse" was solely to blame for the collision which took place, but this is not our opinion. We think that the "Saxonia" was also to blame for the collision which occurred, and if she had done all that could have been done, the collision might probably have been avoided. When the "Eclipse" was first discovered by those on board the "Saxonia," and even after the flare-up light had been exhibited on board the "Eclipse," the "Saxonia" continued at full speed, proceeding at the rate of nine knots through the water until the collision took place. It was the duty of the "Saxonia" to give way, and to do whatever was possible on her part to avoid any collision. We think that as soon as she discovered the "Eclipse," and when, according to the evidence given on her behalf, the "Saxonia" was unable to discover what the "Eclipse" was doing, the "Saxonia" should have eased and stopped her engines, and should have ascertained in what way she might best have avoided running foul of the other vessel, and which, according to the evidence, might probably have been accomplished.

We are, therefore, of opinion, that both vessels are to blame for this collision, and that the decision of the Court below is correct in both cases, and that both Appeals must be dismissed with costs, and we shall advise Her Majesty accordingly.

*The "Saxonia" and the "Eclipse"*

*March 5, 1862*

Upon representation by the Registrar in Admiralty Appeals on behalf of the Proctors, their Lordships this day directed that these two Appeals should not be dismissed with costs, but dismissed each party paying his own costs, their Lordships' Report not having yet been submitted to Her Majesty for approval.

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