

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Dryden v. Allix, from the High Court of Admiralty of England (ship "Moderation"): delivered the 12th December, 1863.*

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Present :

LORD CHELMSFORD.

LORD KINGSDOWN.

SIR JOHN T. COLERIDGE.

IN this Appeal in a suit for recovery of damages in respect of a collision brought by the owner of the schooner "Deesse" against the owner of the barque "Moderation," the Appellant, the owner of the "Moderation," offered two grounds of objection to the Judgment against him—

1st. That the learned Judge of the Court of Admiralty declined to decide a question essential to the proper determination of the suit; and

2ndly. That his Judgment proceeded upon a ground which was not raised upon the pleadings.

The Appellant's case is that, just before the collision, the vessels were sailing in opposite directions, in such a relative position that the rule prescribed by the 296th section of the Merchant Shipping Act applied, and both vessels were bound to put their helms to port, "unless the circumstances of the case were such as to render a departure from the rule necessary." That the Respondent does not allege the existence of any such circumstances, but attempts to excuse his non-compliance with the rule by reason of the "Moderation" not having any lights exhibited, in consequence of which it could not be known which way she was proceeding. That

the question whether the "Moderation" carried lights or not at the time of the collision was therefore the vital question in the cause which the Judge was bound to decide one way or the other. In one sense it is undoubtedly true that the question of lights would be an essential one to determine. For if the "Deesse" was bound to have ported her helm, and could only excuse herself for not doing so by the absence of lights on the "Moderation," the finding that the "Moderation" had lights would, of course, have been decisive of the case against the "Deesse." But, on the other hand, if the "Deesse" was not bound to have ported her helm the case would not have turned upon the question of lights, although the "Deesse" might have attempted to excuse herself for a supposed error by the assertion of a fact which was not proved. In any view of the case the question of lights was certainly an important one, and evidence was properly adduced upon it on both sides. The Appellant insists that his evidence being affirmative, ought to be more regarded than that of the Respondent, which is only negative. But negative evidence sometimes approaches very nearly to that of a positive character, as in the present case, where the witnesses were on board the "Moderation" after the collision, when the lights were said to have been burning, and state that they saw none. In the Appellant's affirmative evidence, the helmsman ought not to be reckoned, because, although he states positively enough that he saw the lights, and it was suggested that though the lights themselves might be screened from his view where he stood at the helm, yet that he might see them reflected upon the atmosphere, their Lordships are told by their nautical advisers that this is not at all probable. The learned Judge of the Court of Admiralty might well be warranted therefore in preferring the negative evidence of the Respondent to the single affirmative witness of the Appellant. But it is objected that the learned Judge improperly shifted the onus of proof, and threw upon the Appellant the duty of proving that the "Moderation" carried lights, instead of requiring the Respondent to prove that she had no lights. This, however, seems to be inaccurate. In his summing up the learned Judge distinctly told his assessors that it lay upon the "Deesse" to show the reason

which rendered it impracticable for her to obey the directions of the Statute; the only reason alleged being the absence of lights on the "Moderation." When the learned Judge, therefore, after the whole of the evidence had been considered, used the words, "We are of opinion that the burthen of proving that the 'Moderation' carried lights was upon her," he must have meant that the negative evidence of the Respondent had thrown upon the Appellant the necessity of offering affirmative proof, and that he had not satisfactorily discharged himself of the obligation. This view of the meaning of the learned Judge will serve to dispose of the objection of his not having decided the question of lights, because it necessarily involves an opinion upon the point. But the learned Judge was not bound to determine the question of lights at all, if in his judgment the case could be decided without any reference to it. And such was his opinion, for he considered that the "Moderation" was solely to blame, because she was not justified in porting her helm at so late a period after seeing the green light of the "Deesse." To this, however, the Appellant objects that such a case as this is never suggested by the Respondent upon his Petition. But their Lordships think that there is no ground for this objection. The Respondent in the 3rd Article of his Petition says that the "Moderation" was first seen upon the "Dessee's" starboard bow (which of course was that upon which the "Deesse's" green light would be seen from the "Moderation"), and that the "Moderation" afterwards, under a port helm, ran into and struck her on her starboard bow. This is not like a case where the injury is alleged to have taken place in a manner totally different from that which is afterwards proved; for here the manner in which the collision was produced is described, not specifically indeed, but in general terms, and it was substantially proved.

The turning-point in this case is the question upon which side the vessels were first seen from each other. The evidence of the Respondent is very strong to show that the "Moderation" was first seen on the starboard side of the "Deesse." On the part of the Appellant one witness states that they first saw the red and not the green light of the "Deesse" from the "Moderation," but in

this he is at variance with the Appellant's own preliminary act, which states that both the red and the green lights of the "Deesse" were first seen. Their Lordships are satisfied upon the evidence that the "Moderation" must have seen the green light of the "Deesse" in the first instance and before she ported; and if so, the whole case may be disposed of upon a very short ground. Whether the "Deesse" had seen the course of the "Moderation" or not, or, in other words, whether the "Moderation" carried lights or not, it was the duty of the "Deesse," seeing the "Moderation" on her starboard bow, not to port her helm, but to keep her course, which she did; she was therefore (apart altogether from the question of lights) entirely right. The "Moderation" seeing the "Deesse" on her starboard bow ought not to have ported, and is therefore alone to blame, and their Lordships will recommend to Her Majesty that the Judgment be affirmed, with costs.

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