

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeals of Inman v.
Reck and others, ships 'City of Antwerp' and
'Friedrich,' from the High Court of Admiralty
of England; delivered 10th February, 1868.*

Present:

LORD WESTBURY.

SIR JAMES WILLIAM COLVILLE.

SIR RICHARD TORIN KINDERSLEY.

THIS case comes before their Lordships in a peculiar form,—a collision having occurred in the Irish Channel between a Bremen sailing-ship of large tonnage and one of the Liverpool American steamers, the result of which was the total loss of the ship and her cargo, and some damage to the steamer. Cross-suits were instituted in the Court of Admiralty by the owners of the steamer and by the owners of the sailing-vessel, which came on to be heard before the Judge of the Admiralty Court, assisted by two of the Elder Brethren of the Trinity House, who gave Judgment that both vessels were to blame, and that the damages sustained ought to be equally divided between them. The result is, that the owners of the steamer will have to pay a very considerable sum of money, amounting probably to £20,000, as one moiety of the value of the 'Friedrich' and her cargo. The sentence therefore is, in effect, a severe Judgment against the owners of the steamship. The case made on behalf of the 'Friedrich' in her petition is distinctly stated, and if it had been believed by the Court below, it would have been impossible to hold that the 'Friedrich' was to blame; but, as it was rejected by the Court below, and the 'Friedrich' has not appealed from the decision declaring that she was in the wrong, it is *res judicata* that the case made by her petition is not substantiated, and that her allegations are not entitled to credit.

We begin, therefore, with this admitted fact, and we have only to inquire whether the steamship is or is not to be held to have been in the

wrong also. There is no statement in the petition of the 'Friedrich' of any ground or reason why, supposing the 'Friedrich' to have acted wrongly, the 'City of Antwerp' ought to be held to have been in the wrong also; and, unfortunately, we are not told in the Judgment upon what ground the Court, after having rejected the case of the 'Friedrich,' held that the 'Antwerp' ought to be condemned to pay this large sum of money.

It is undoubtedly true, in cases of collision between a sailing-ship and a steamer, that, although the sailing-ship may be found to have been guilty of misconduct, or not to have observed the sailing regulations, yet the steamer will be held culpable if it appears that it was in her power to have avoided the collision. It cannot be too much insisted on that it is the duty of a steamer, where there is risk of collision, whatever may be the conduct of the sailing-vessel, to do everything in her power that can be done consistently with her own safety, in order to avoid collision. But, according to the settled rules for the administration of justice, the party against whom judgment is given is entitled to know from the complaint of his adversary what is the default or misconduct imputed to him, that he may have an opportunity of meeting the case by his defence, and also by his evidence. And it is difficult to suppose a greater case of hardship than that a Defendant, after having met and disproved the case made by the Plaintiff, should yet have Judgment pronounced against him upon some ground of complaint which was neither pleaded by his adversary, nor stated in argument during the discussion of the cause, and not even disclosed in the Judgment of the Court. But, inasmuch as this has been done, it is our duty to examine with great care the facts of the case, for the purpose of ascertaining whether the conclusion is just that the steamer, if she had done something which it was plainly in her power to do, might have prevented the collision which occurred.

Taking the undisputed facts of the case, it appears that the 'Friedrich,' at about half-past two o'clock in the morning of the 28th of March last, was shaping her course to Liverpool up St. George's Channel, with her head to the N.E. There was a fresh breeze from the W.N.W., and the 'Friedrich' therefore was

running free. The weather was fine, and the night clear. About half-past two in the morning she first sighted the steamer, which had left Liverpool and was on her way to Queenstown, her course being S.W. half W. The 'Friedrich' was making about nine knots an hour, and the steamer about eleven knots. Taking, therefore, the combined speed of the two vessels, they would pass over a nautical mile in three minutes. Between the 'Friedrich' and the steamer there was a schooner steering the same course as the 'Friedrich,' and which, according to the evidence of the 'Friedrich,' was, when she first sighted the steamer, about 600 yards distant lying on the same course, but a little to windward. When the 'Friedrich' first saw the lights of the steamer she made out the white light and the red light; and it is the case of both vessels that, when first seen by each other, each vessel was about a point or a point and a half on the port side of the other. The 'Friedrich,' being a better sailer, forereached the schooner, passing her on the (schooner's) starboard side, and for that purpose ported about one point. She then luffed up, so as to regain her former course, and laid her head again to the N.E. Her witnesses say that from the time she ported to run to leeward of the schooner and the time of luffing about eight minutes elapsed, and the 'Friedrich' is then described as afterwards sailing on her original course for about a minute longer before she again observed the lights of the steamer.

These circumstances are material as tending to show two things:—1st. That there was a very imperfect look-out on the part of the 'Friedrich;' 2nd. That she had got very near the steamer indeed before, as she alleges, she observed the green light of the steamer. The evidence of the second mate of the 'Friedrich' is that he suddenly saw the green light of the steamer, and that the latter vessel was then only a quarter of a mile distant from the 'Friedrich,' on the starboard-bow. The mate says that he then luffed, and put his vessel under a starboard-helm, until she rounded to about five points from her original course, and her head was brought N. by W. But it is clear, upon the evidence, that the steamer never was on the starboard-bow of the 'Friedrich,' and such must have been the opinion of the Court below, for otherwise

it would have been impossible to hold that the 'Friedrich' acted wrongly. With the exception of the fact of the position of the steamer, there is an agreement between the witnesses on both sides as to the distance between the steamer and the 'Friedrich' at the time when the latter began to starboard her helm; for the captain of the steamer says that the 'Friedrich' was distant about a quarter of a mile from the steamer at the time when the 'Friedrich' began to round to under her starboard-helm. The material inquiry then arises whether, in this state of things, it being clear that the steamer was on the port side of the ship, anything was done by the steamer that ought not to have been done, or whether anything was omitted to be done that ought to have been done, and which, if omitted or done, would have prevented the collision. It appears that the steamer made out the 'Friedrich' as soon as she passed the schooner, and that she ported her helm whilst the ship was at least a mile distant, and afterwards, as the 'Friedrich' approached nearer, put her helm hard aport, and that the steamer had, before the collision, gone off under her port-helm five points to the westward; but that the 'Friedrich' rounding to very quickly, under her starboard-helm, brought her head within six points of the head of the steamer. In this state of things, the captain of the 'Friedrich,' for the first time, came on deck from below, and his evidence is material. He tells us that, on his coming on deck, he found the bow of his vessel only half a ship's length from the steamer, and that collision was inevitable; in fact he states that the collision actually took place within four or five seconds after he came on deck. He describes the steamer as lying, at the time when he came on deck, across the bow of the 'Friedrich,' about half a length on one side and half a length on the other side of the bow, so that the stem of the 'Friedrich' was pointing at the midships of the steamer, and that the 'Friedrich' was still luffing, but her sails had begun to shake in the wind. Now, this position of the two ships must have been produced either by the steamer running down from the starboard side of the 'Friedrich,' close under her bows, or by the 'Friedrich' rounding to, under a starboard-helm, until she brought her stem within a few yards of

the steamer's midships on the port side. We are of opinion that the latter was clearly the case, and that the steamer being on the port side of the 'Friedrich,' could not have anticipated or avoided, more than she did, this unexpected, sudden, and erroneous proceeding on the part of the ship. We are pressed by the counsel of the 'Friedrich' to hold that, when the steamer first observed the 'Friedrich' coming round under a starboard-helm, it was the duty of the steamer, by stopping and reversing her engines, to have gone astern out of the way of the 'Friedrich,' and that she did wrong in going ahead. But there is no witness who gives evidence to any such effect, and even if we were to conclude that the stopping, reversing, and getting sternway on so large a steamer as the 'Antwerp,' would not have occupied more than three minutes, yet it seems plain from the evidence, and particularly from the testimony of the captain of the 'Friedrich' himself, that such an attempt would not have prevented the collision. In fact, the act done by the captain of the 'Friedrich,' the instant he came on deck, confirms the conclusion, that the best course for the 'Antwerp' to pursue, was to go ahead as rapidly as she could; for the course taken by the captain was to put down his helm as hard as possible, in order to throw his sails aback, so that he might avoid striking the 'Antwerp' a direct blow with the stem of his vessel, and might weaken the collision by striking her with his starboard-bow; and this he appears to have effected, for it is clear, upon the evidence, that the direction of the blow was from aft to forward on the side of the steamer. It was impossible for the captain of the steamer, when he first observed that the 'Friedrich' was luffing, to know or suppose that she would do anything so unnecessary and foolish as to round to five points under a starboard-helm. She might have luffed one or even two points without danger, and if she had then steadied and kept on her course, she would have passed clear of the steamer; but the evil arose from the 'Friedrich' rounding to five points under a starboard-helm, very quickly, which, as she was so very near the steamer, gave no time for any other course to be adopted than that which was adopted, and which the Liverpool pilot on board, though not

in charge of the steamer, and who is a disinterested and competent witness, states was the only possible thing to be done.

When a steamer is condemned for having omitted to do something which she ought to have done, it seems just to require clear proof of three things,—first, that the thing omitted to be done was clearly within the power of the steamer to do; secondly, that if done, it would, in all probability, have prevented collision; and thirdly, that it was an act which would have occurred to any officer of competent skill and experience in command of the steamer. These conditions do not appear to their Lordships to be fulfilled by those who impute fault to the steamer in this case, and, in fact, all the trustworthy evidence in the cause leads to a contrary conclusion. Our opinion, therefore, is, after the most careful examination of the case, that the collision was due to the want of a proper look-out on the part of the 'Friedrich;' inasmuch as after passing the schooner, the young man, who was the second mate of the 'Friedrich,' and was the officer of the watch on board her, appears not to have observed the lights of the steamer until he was not more than five hundred yards distant from her, and that then, in the anxiety and confusion of the moment, he gave the order to starboard instead of keeping on his course, which, if he had done, would have avoided collision, inasmuch as the steamer had, by keeping her helm hard aport, gone off six points to the westward of the course she was pursuing at the time when she first sighted the sailing-vessel. At that time the course of the 'Friedrich' was N.E., and the course of the steamer being on the port-bow of the 'Friedrich,' was S.W. half W.; but at the time of the collision the steamer's head was lying W.N.W.

Their Lordships do not find it either stated or proved upon the pleadings or the evidence, that anything was done which ought not to have been done by the steamer, or that anything was omitted to have been done by her which it was possible to do, and which, if done, would have prevented the collision. They cannot, therefore, concur with the conclusion of the Court below, and they will feel it their duty humbly to advise Her Majesty that the decree of the Court of Admiralty ought to be reversed.