

Judgment of the Lords of the Judicial Committee of the Privy Council upon the appeal of The Owners of the steamship "Cyphrenes," her cargo and freight, v. the steamship "La Flandre," from the Supreme Court of Newfoundland, delivered 20th March 1896.

Present :

LORD WATSON.

LORD DAVEY.

SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

Shortly after 6 a.m. of the 30th December 1893, two steamships upon opposite courses, when nearly a mile apart, sighted each other in the open Atlantic, somewhere about longitude 45° 30' north, and latitude 49° west. One of them, the "Cyphrenes," of 1,309 tons register burthen and 250 horse-power, was bound with a cargo from Savannah to Liverpool, and was steering E. $\frac{1}{4}$ N. The other, the "La Flandre," an oil tank ship of 1,510 tons register and 200 horse-power, was on a voyage in water ballast from Antwerp to New York, her course being W.S.W. Both ships were making full speed, that of the "Cyphrenes" being 9, and that of the "La Flandre" 7 knots per hour. Within five or six minutes from the time when their lights became mutually visible, the vessels came into collision, the "Cyphrenes" first striking the port side of the "La Flandre" with her stem at an angle of 6° or 7°, and then coming twice into contact with the same side of the "La Flandre" before passing her stern. The

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morning was dark, with drizzling rain; but the atmosphere was free from fog, and it is not disputed by either vessel that, from the time when they became visible to each other until the moment of collision, she continued to see the lights of the other ship.

Beyond the facts which have just been narrated, the parties are not agreed. The statements made in their preliminary acts and written pleadings, as well as in the evidence given by their officers and crew who were on duty, are in absolute contradiction, which cannot be explained away upon the benevolent theory that the witnesses from the two ships may possibly have put a wrong construction upon what they observed from different points of view. They differ irreconcilably, as to the relative positions and bearings of the two vessels at the time when their lights came within range; as to the manœuvres executed by each of them between that time and their actual collision; and as to their respective rates of speed at the time when the collision took place.

Starting from the points at which they first became visible to each other, the conflicting accounts given by the two ships and those on board of them, are as follows:—

According to the "Cyphrenes," the green light of the "La Flandre" when first seen was $3\frac{1}{4}$ points upon her starboard bow, which made it the plain duty of both ships to maintain their respective courses, and not to approach nearer to each other. The "Cyphrenes" kept her course, and for some time afterwards the ships continued green to green, when the "La Flandre" shut in her green and exhibited her red light, thus indicating that she meant to cross the bows of the "Cyphrenes." Seeing that the "La Flandre's" change of course involved imminent risk, the helm of the "Cyphrenes" was at once

put hard-a-port, and her engines turned full speed astern. Shortly afterwards the collision took place, the headway of the "Cyphrenes" being nearly off her, whilst the "La Flandre" was still making from 4 to 6 knots.

According to the "La Flandre," when the mast-head and red lights of the "Cyphrenes" were first observed, they were right ahead of her, and her course was at once directed to starboard. Her port helm had just begun to act, and the ship was sheering off to starboard, when the red light of the "Cyphrenes" was shut in and her green light appeared. The "La Flandre" continued upon her altered course, keeping her helm hard-a-port. On seeing the green light of the other ship she gave three successive blasts with her steam whistle, indicating that she was going to starboard; but no notice was taken of these signals by the "Cyphrenes," which continued to approach her green to red. When the "Cyphrenes" came so near as to involve risk of collision, the engines of the "La Flandre" were stopped and reversed; and her way had been reduced to 1 or $1\frac{1}{4}$ knots, when the "Cyphrenes" ran into her at full speed.

The "Cyphrenes" was wrecked by the collision, and was set on fire by her crew, in order to prevent her doing damage to other vessels. They took refuge on board the "La Flandre," which had also sustained injury, and put into St. John's, Newfoundland, for repairs. The present action was instituted there by the owners of the "Cyphrenes," her cargo and freight, upon the allegation that the "La Flandre" was alone to blame for the collision. The "La Flandre" defended and counterclaimed, on the footing that the collision was entirely due to the fault of the "Cyphrenes." Had there been no independent data by reference to which the conflicting testimony of the witnesses from the

two ships could be tested, or a reasonable inference drawn as to the fault of one or other of them, the result would have been, that, each party having failed to prove the other's fault, it would have been necessary to dismiss both the action and the counterclaim. But there is one circumstance, established beyond reasonable doubt, which, in their Lordships' opinion, is not only sufficient to justify the conclusion that, at the time of the collision, the "Cyphrenes" was navigated in violation of the 18th Article of the Regulations, but to attach grave suspicion to the testimony given by at least two of her leading witnesses in regard to the manœuvring of the vessels.

The "La Flandre" was docked at St. John's, and there is in evidence a minute account of the injuries which she was found, on a survey, to have sustained from the collision. It appears that, on the first contact of the vessels, the stem of the "Cyphrenes" ran nine feet into the strongest part of the "La Flandre's" port side, cutting it open from the toprail to below the bilge. She then recoiled clear, and twice struck the same side of the "La Flandre" farther aft, on each occasion with diminished force, and thereafter passed her stern, being still under way. From the relative positions which the two ships admittedly occupied at the time, it is clear that the force and penetration of her first blow was due to the *momentum* of the "Cyphrenes," which depended upon her rate of speed. Their Lordships have been advised by their assessors that, having regard to the character of the injuries inflicted by her stem, the "Cyphrenes" must, at the time of collision, have been steaming ahead at nearly if not fully 9 knots per hour; and that her engines cannot have been previously stopped and reversed, as stated by her second officer and second engineer. In that opinion their Lord-

ships agree, and they are therefore unable to find that the "Cyphrenes" was free from blame.

That conclusion not only involves the liability of the "Cyphrenes"; it also raises very serious considerations as to the degree of credit to be given to her witnesses' account of her manœuvres, between the time of her first sighting the "La Flandre" and the collision. Her second officer, who had the sole charge of her navigation during that critical period, states, that as soon as he saw the red light of the "La Flandre,"—which, he says, was about four minutes before the collision,—he telegraphed full speed astern, that the order was obeyed, and that her engines kept going astern until the collision. He is corroborated in that statement by the second engineer, who was alone in charge of the engine-room. Their Lordships find it impossible to accept these statements, because they are contradicted by real and therefore reliable evidence. It is just possible that the second officer of the "Cyphrenes" may have given the proper order; if so, he was clearly mistaken in supposing that his order was obeyed. On the other hand, it is equally clear, that the second engineer, if he received the order, failed to comply with it; and that circumstance gives rise to somewhat more than a conjecture that his failure must have been due to the fact, said to have been explained by him to some of the witnesses for the "La Flandre," that, at the time when he received the order, he was not standing by the engines, but was otherwise engaged.

It was maintained for the "Cyphrenes," that the "La Flandre" ought to be held responsible, (1) because the collision was occasioned by her faulty manœuvre in attempting to cross the bows of the "Cyphrenes" whilst both ships were on safe courses, and (2) because she failed to obey

the 18th Regulation, by stopping and reversing her engines when the risk of collision became apparent. As to the first of these reasons, their Lordships are not satisfied that the account given by the "Cyphrenes'" witnesses of the manœuvring of the two ships is sufficient to disprove the very different story told by the witnesses from the "La Flandre." The latter is so far corroborated, and the former to the same extent discredited, by the evidence deducible from the condition of the "La Flandre's" hull after the collision. At that time their Lordships think it is proved that the speed of the "La Flandre" had been slowed down to about $1\frac{1}{2}$ knots, whereas, according to the evidence of the "Cyphrenes," she was going ahead at the rate of 4 to 6 knots. They do not regard the evidence of the "La Flandre" as in all respects satisfactory. In particular, they have difficulty in understanding why her captain, immediately on sighting the red light of the "Cyphrenes" ahead of him, at the distance of a mile, should have steered hard-a-port, without waiting to ascertain the bearings of the "Cyphrenes." But they cannot affirm that his then sheering to starboard necessarily contributed to the collision; and after he had elected to take that course, and the green light of the "Cyphrenes" appeared, they cannot say that he did wrong keeping his course, it being obvious that starboarding his helm, at that time, might have occasioned risk of collision.

Their Lordships find it impossible to sustain the second reason urged by the Appellants for condemning the "La Flandre." She was not charged by them, either in their Preliminary Act, or in their writ, with failure to reverse within due time. The only complaint made was, that she had wrongly altered her helm, at a time when both vessels were green to green, and therefore on safe courses. The new argument

was obviously an after-thought, and it was rested upon some statements which occur in the evidence of the navigating officers of the "La Flandre." Giving fair effect to their evidence, it appears to their Lordships to prove that these officers did duly comply with the 18th Regulation, and the real evidence tends to show that they had, before the collision, reduced the speed of their vessel so far that a collision might have been altogether avoided, or its results rendered comparatively harmless, if the "Cyphrenes" had done the same. Even if the evidence on that point had been *prima facie* adverse to the "La Flandre," their Lordships conceive that it would have been their duty to refuse effect to the Appellants' new plea, in accordance with the principles laid down by the House of Lords in *The Tasmania* (15 Ap. Ca. 223), and by this Board in *The Pleiades* (1891, Ap. Ca. 259).

Their Lordships have, for these reasons, come to substantially the same conclusion with the learned Chief Justice of the Supreme Court of Newfoundland. They will humbly advise Her Majesty to affirm the judgment appealed from, and to dismiss the appeal. The costs of this appeal must be borne by the Appellants.

