

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Morton and others v. Hutchinson and others (the "Frankland" and "Kestrel"), from the High Court of Admiralty of England; delivered 6th December 1872.*

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Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS is a case of collision between two steamers, the Kestrel and the Frankland, somewhere off the coast of Norfolk. The judgment of the Admiralty Court found that both were to blame. From this judgment the Frankland appeals, but the Kestrel has not adhered to the Appeal.

The main facts—which appear not to be in dispute—are these: The Kestrel was steering about north-north-west, the Frankland in a precisely opposite direction, south-south-east. The weather was calm, there being scarcely any wind. There was a dense fog, and the tide was flowing southward about two knots an hour.

It has been contended that the judgment of the Court below is vitiated by an erroneous finding on a question of fact as to the speed at which the Kestrel was going, and on the other side it has been said that the Court was wrong in estimating the speed of the Frankland. Their Lordships, after carefully considering the evidence, are of opinion that, whatever opinion they might have been disposed to form as a Court of first instance, there was sufficient evidence in the case upon which the Judge of

the Court of Admiralty, who had the advantage, which their Lordships have not, of hearing the witnesses, might reasonably find as he has done; namely, that the speed of both vessels was from two to two and a half knots through the water.

It has been, indeed, suggested that the learned Judge left out of consideration a difference, well known to nautical persons, between the rate of a vessel going through the water and the rate of that vessel going over what is called the ground; but their Lordships see no reason to suppose that the learned Judge can have overlooked a distinction which appears so clear and obvious.

The finding of the Court upon the question of negligence is in these terms: "Both vessels were going, in truth, in the most absolute uncertainty as to the proceedings of the other; and in such a state of circumstances I have had to ask myself this question,—Could anything have been done to avoid this collision which was not done? And the opinion of the Court, fortified by that of its nautical assessors, is that upon hearing the whistles of each other so near and approaching each other, each vessel ought not only to have stopped but to have reversed until its way was stopped, when it could have hailed and ascertained with certainty which way the head of the other vessel was, and which way she was proceeding, and by that means the collision would or might have been avoided. And this being the opinion of the Court it will enforce the application of Article 16 of the Regulations for Preventing Collisions at Sea, which it is always the object of this Court to see carried into due and proper execution, for the due and proper execution of that rule would tend very much to prevent both loss of life and property, of which there are so many melancholy instances every week in this Court." Their Lordships entirely concur with the learned Judge of the Court of Admiralty as to the importance of enforcing this rule. The rule is: "Every steamship, when approaching

“ another ship so as to involve risk of collision, “ shall slacken her speed, or, if necessary, stop “ and reverse; and every steamship shall, in a “ fog, go at a moderate speed.” As far as the latter part of the rule is concerned, both vessels would appear to have obeyed it. The question is as to the application of the first part of the rule.

The Kestrel not having adhered to the Appeal must be assumed to have been in fault; and their Lordships do not think it necessary to determine the precise extent to which she was in fault. It has indeed been argued that part of her fault was in porting her helm. Their Lordships do not think it necessary to decide whether or not she was in fault in so doing, but the inclination of their opinion is that the porting of her helm under such circumstances cannot be properly considered as negligence on her part.

The only question in the cause is whether or not there is sufficient evidence to justify the finding of the Court of Admiralty that there was negligence on the part of the Frankland materially contributing to the accident?

It has been argued that the effect of the decision is that every steamship in a fog hearing the whistle of another steamship approaching her, ought immediately, without reference to the distance at which the ships may appear to be from each other, or to any other circumstances, to reverse her engines. But their Lordships do not understand the Court of Admiralty to have laid down any such general proposition. They understand the finding to have been confined to the circumstances of the case, and those circumstances they understand, in the opinion of the Court, to have been these, as far as the Frankland is concerned: That she was navigating in a fog at a moderate speed, that she heard a whistle sounded many times, indicating that a steamer was approaching her and had come very near to her—so near indeed that if the vessels had then stopped they would have been within hailing

distance—that at that point of time it was necessary for the captain of the Frankland, under the terms of the rule, not only to stop the motion of the engines but to reverse them, so as to stop the motion of his vessel, and that he ought not to have waited until the vessels sighted each other, when such a manœuvre would have been too late.

That being the view which their Lordships take of the decision of the Court of Admiralty, they are of opinion that it is right; and for these reasons they will humbly advise Her Majesty that that judgment be affirmed, and this Appeal dismissed, with costs.