

Case No. 17,460.
[4 Ben. 404.]¹

THE WESTPHALIA.

District Court, E. D. New York.

Dec, 1870.

COLLISION IN THE ENGLISH CHANNEL—STEAMER AND SAILING VESSEL—SPEED—FOG SIGNALS—PRESUMPTION.

1. The steamer W. and the brig P. came in collision in the English Channel, in the daytime, in a dense fog. When the fog came on, the lookout on the steamer and the wheelsman were doubled, the passengers were directed to keep quiet, and the whistle was blown every fifteen seconds, and her speed was slowed to a rate of from seven to nine miles an hour. The lookout reported the brig right ahead, about 150 feet off, when the engines of the steamer were stopped and backed, and her wheel hove hard-a-port, but the vessels came together, the steamer striking the brig near the fore-rigging, and sinking her. The brig had a lookout and a man at her wheel. She was barely moving through the water, the wind being very light. Her mate and captain had been in the cabin, working out the ship's position. Shortly after they came on deck, the steamer's whistle was heard, when a fog-horn was blown, answering the blasts of the steamer's whistle, four or five of which were heard before the collision. No fog-horn had been blown on the brig till the whistle was heard, and no horn was heard at all on the steamer. *Held*, that the steamer was in fault, in running at too great a speed.

[Cited in *The City of Panama*, Case No. 2,764; *The Hansa*, Case No. 6,037.]

2. The brig was in fault, in not blowing a horn from the time the fog came on till the steamer's whistle was heard.
3. It could not be inferred, from the fact that no horn was heard by these on the steamer, that it would not have been heard if it had been blown before—the presumption must be that it would have been heard.
4. Both vessels were in fault, and the damages must be divided.

In admiralty.

J. D. Reymert, for libellants.

W. C. Barrett, for claimants.

BENEDICT, District Judge. These are two actions, brought to recover of the steamship *Westphalia* the damages occasioned by the sinking of the Norwegian brig *Procis*, in a collision, which occurred between these two vessels, in the daytime, on the 9th of July, 1870, off the Casketts, in the English Channel. The brig was sailing north by east, close hauled, with a very light breeze, just enough to move her through the water. The *Westphalia* was steering to westward, bound from Havre to New York. The sea was calm. The evidence, on the part of the steamship shows that at 12 o'clock, when the watch changed, and the second officer took his station on the bridge, the weather showed signs of fog, which by one o'clock shut in so thick that objects could not be seen at any considerable distance. The lookout and wheelsman were then doubled, the passengers, of which some one hundred were on deck, were directed to keep quiet, and orders were given to whistle every fifteen seconds. At one o'clock, the captain, having first slowed the

The WESTPHALIA.

speed of the steamer, went on the bridge, and there remained. No vessel was seen or heard by those on the steamship until a few minutes after two, when the lookouts reported a vessel right ahead, which proved to be the brig Procis, then from 150 to 160 feet distant, presenting her starboard side to the steamship, and moving very slowly. The engine of the steamship was at once stopped and reversed, and the wheel hove hard-a-port, but the vessels were in contact before the steamship could be stopped, or her course materially changed. The brig was struck near her fore-rigging, and sank almost immediately. Fortunately, however, all her crew were saved, being picked up in the water by the boats of the steamer. Some eleven witnesses from the steamer have been examined, who substantially concur as to the facts above stated, and all say that no fog-horn was heard, nor was any notice given by the brig, until she was seen right under the steamer's bows, when outcries were heard from her crew.

On the part of the brig, it is shown that she was close hauled, going about half a mile an hour, with all her sails set; that she had a man at the lookout and a man at the wheel; that the mate and captain were in the cabin, engaged in working out the ship's position,

until nearly two p. m., when they came on deck, and shortly after the steamer's whistle was heard, whereupon the mate at once blew the fog-horn, answering the blasts of the steamer's whistle, and also blowing between the whistles, until the steamship came out of the fog close upon them, and almost immediately ran them down.

The faults charged against the steamship are that she was running at too high, speed in such a fog, and that she ported her helm, instead of starboarding, when the brig was seen. On the part of the claimants, it is contended that the steamer was running at a proper speed, with all possible caution; that the brig was seen at the earliest possible moment, and all efforts made to avoid her, but it was then impossible; and that the sole cause of the collision was the omission of those on the brig to notify the steamer of their presence by blowing a fog-horn.

Upon the proofs, I consider it clear that the steamship was not in fault for porting when she did, instead of starboarding, but that she was in fault for running at a speed of nine or ten knots an hour in a dense fog. There is some evidence tending to show that the speed of the steamer, before she was slowed by the captain, was thirteen miles an hour over the ground, but that she had a tide with her running some three knots, making her speed through the water ten knots, which was reduced three knots when she was slowed; and in this way it is claimed that her speed through the water was only seven knots. The more reliable evidence is, however, to the effect that she was running from eight to ten knots an hour through the water, when the brig was seen. The log showed the speed through the water, and the man who hove it says she was running ten knots. The captain says, "At that time, she was running about eight to nine miles, I believe" and I notice that the log-book, which would show the marking of the log, although called for, is not produced, nor is the engineer called as a witness, or his absence accounted for. Such a rate of speed in such a fog is unlawful; indeed, a speed of seven knots could not be justified.

I have not overlooked the testimony which has been introduced to show that this steamer, which was sailing to the west, the tide, as she claims, running with her three miles an hour, at a distance of ten miles or more off the Casketts, in the English Channel, and which stopped for half an hour to pick up the crew of the brig, was compelled, in order to keep her course, to maintain a speed of seven or eight knots, under all circumstances, owing, as it is said, to the strong currents of the locality; but this testimony has failed to convince me that such is the fact. I know that the steamer would answer her helm more quickly, when going at eight or ten knots, than at six, but she could not stop so quickly. In such a dense fog, she was bound to be going as slow as was possible for her to go, consistent with steerage way, in order to enable her to stop in proper-time. This I am satisfied she was not doing, and, for the omission, I hold her in fault.

The WESTPHALIA.

There remains to consider the fault charged upon the brig, that she omitted to blow her fog horn. It cannot be doubted, upon the evidence, that no horn was heard by those upon the steamer. The precautions taken on the steamer indicate a state of watchfulness, and render it difficult to understand how a horn could fail to have been heard, if blown; while, on the other hand, to hold that a horn was not blown, is to disregard the positive evidence of six different witnesses from the brig, who testify affirmatively to the fact that their horn was blown. Moreover, the brig had a man on the lookout, and a man at the wheel. She was in a dangerous locality, enveloped in a dense fog, and, under such circumstances, it seems hardly possible that a steamer's whistle would not have attracted their attention, if it did not even occasion alarm. The master and mate were also on deck part of the time of the fog, and all say that the whistle did attract their attention, and that it was at once replied to by the horn. To omit that signal would be to greatly increase their peril, and no reason can be assigned for such an omission. It seems impossible, therefore, upon the evidence, to hold that the horn was not blown, when the whistle was heard. But it is admitted that the horn was not blown until the whistle was heard, which was some time after the fog set in, and when the steamer was quite near. The evidence for the brig, that the whistle was heard from three to five times only, shows this. The evidence of the number of times the horn was blown tends to show the same thing. According to the account given by the libellants themselves, therefore, the steamship was running within hearing distance of the brig, for some minutes before the horn was blown, the fog then being very thick. To omit sounding the horn until they heard something, when in such a fog, and in that locality, was great neglect. The horn should have been continually sounded from the moment the fog set in. It is true that when the horn was sounded, it was not heard on the steamer, owing, it may perhaps be, to some passing current of air which carried the sound away; but it cannot be inferred from that circumstance, that, if blown when the steamer first came within hearing distance, it would not then have been heard. The presumption must be that it would have been heard at that time. My conclusion, therefore, is, that this is a case of fault in both of the colliding vessels. The fault on the part of the steamer being that of running at too high speed in a thick fog; on the part of the brig, that of omitting to blow the horn from the time the fog set in, instead of from the time of hearing the steamer's whistle at no very great distance. I cannot dismiss the case without remarking, in addition, that if the not very unreasonable

supposition be made, that the witnesses for the brig, in their zeal for their own vessel and their own case, have been led to overestimate and overstate the time which elapsed between hearing the whistle and the collision, the failure of those on the steamer to hear the horn would be explained. Under such a hypothesis, the case would show the master and mate remaining in the cabin, while the vessel was in a thick fog, and coming out at the last moment only to find the steamer upon them. The horn blown at that time would naturally be unnoticed on the steamer, in the excitement attendant upon the discovery of the brig close under their bows. But this hypothesis would impute to the lookout and man at the wheel of the brig, who were both on deck from the commencement of the fog, such an extraordinary neglect of duty, such disregard of their own personal safety even, and would be so greatly opposed to the whole tenor of the evidence given for the brig, that I hesitate to adopt it as the explanation of the case, but rest my decision upon the other ground above stated. This being a case of mutual fault, the damages will, of course, be apportioned. Let decrees be entered accordingly, and references ordered, to ascertain the amount due the libellants.

¹ [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]