

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Malcomson and others v. Clayton, ship "Ann," from the High Court of Admiralty; delivered March 7, 1860.*

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Present :

LORD CHELMSFORD.

LORD KINGSDOWN.

SIR EDWARD RYAN.

SIR JOHN TAYLOR COLERIDGE.

THIS is an appeal from a sentence of the Judge of the High Court of Admiralty in a cause of damage, civil and maritime, brought by the owners of the steam-ship "Magnet," against the owners of the schooner "Ann," whereby the Judge pronounced that the Appellants had failed in proof of their libel and against the damage proceeded for.

The "Magnet," a steamer of 371 tons burthen, was bound from a port in Holland to London, laden with cattle. The schooner "Ann," of the burthen of 106 tons, was in ballast, sailing from London to Dunkirk. The collision took place at a little before 6 in the evening of the 6th November, 1859, about the middle of Halfway Reach near a shoal, called Dagenham shoal. The tide was half-ebb, and the width of the navigable channel at that time was about one-third of a mile. The night was clear, and the wind a moderate breeze from the north or north-east. Both vessels had their proper lights: the "Ann," (a sailing vessel,) the two side red and green lights; the "Magnet," (a steamer,) the white light at the mast-head in addition. In this state of things the course of the two vessels was clearly regulated by Sections 296 and 297 of "the Merchant Shipping Act, 1854." The "Magnet"

being a steam-ship, was bound to keep to that side of the fairway or mid-channel which lay on her starboard side, that is, on the north or Essex shore. The "Ann," proceeding in the contrary direction to the "Magnet," ought to have put her helm to port so as to pass on the port side of her, unless the circumstances were such as to render a departure from the rule necessary. The Appellants in the libel state that the collision took place in the following manner: "That the 'Magnet' was kept as close in on the north shore as it was safe and practicable for her to be; that the 'Ann' as she approached the 'Magnet,' instead of either keeping her course or porting, suddenly and improperly starboarded her helm; that the 'Magnet's' engines were stopped and her helm was put and kept hard a-port until she actually took the ground, and that the 'Ann,' still under the influence of her starboard helm, ran stem on into and struck the 'Magnet,' whilst aground, abaft the paddle-box on the port-side;" and the libel alleges, "that the collision was solely imputable to those on board the 'Ann,' by reason of their having most improperly starboarded the helm, and in having struck the 'Magnet' owing thereto." The Respondents in their allegation distinctly deny that the helm of the 'Ann' was (in the words of the libel) "suddenly and improperly starboarded." In endeavouring to ascertain the true state of the facts, their Lordships have to lament the great difficulty which is imposed upon them, as in most cases of collision, of having to decide between the conflicting and contradictory evidence of the parties. This, perhaps, from the nature of these cases, is almost unavoidable. The event generally takes place suddenly and unexpectedly. In the midst of the hurry, confusion, and alarm which it ordinarily occasions, there is no opportunity for calm observation of what is occurring; and when, afterwards, an endeavour is made to recall to the memory the circumstances in their minutest details, the sudden and hasty view of them which alone was possible, together with the natural bias of the human mind to put a favourable construction upon its own acts, combine to present to the parties opposite impressions, which they believe to be recollections of the different occurrences. These observations will tend to remove from the witnesses in most of these

eases the imputation of deliberately giving a false account of what passed before their eyes, but the result is no less embarrassing and perplexing to the Tribunal that has to find its way to the truth through the conflict and contradiction of the evidence.

The most important question to determine in the first place is, on which side of the narrow channel of the Halfway Reach the collision occurred. Here the witnesses on each side are completely at variance. The Appellants' witnesses say that when the "Ann" was first seen, she was two points on the "Magnet's" port-bow; the Respondent's witnesses, on the other hand, state that the "Magnet" was first seen on the "Ann's" starboard-bow, one of them placing her as much as four points on that bow. Dr. Deane endeavoured to reconcile these statements by observing that when the "Magnet" rounded Jennings Point, the whole of the Halfway Reach must have been upon her port-bow, and of course, therefore, the "Ann" also; but the facts of the case will not admit of this ingenious solution of the difficulty.

The statement of the witnesses on board the "Ann" is, that the "Magnet" was seen by them for the first time at about three quarters of a mile off, as she rounded Jennings Point, and that they saw her three lights.

Now, their Lordships have been assisted throughout the case by the judgment of the Nautical Assessors, and, agreeing in their view, they cannot understand how, in the position in mid-channel in which the "Ann" is placed by the evidence, Jennings Point could have hid the "Magnet" from view (as may be easily tested by drawing a line from the different points on the chart which was referred to in the argument); nor, as the turn of half a point will obscure one or other of the side lights of a vessel, how all the three lights of the "Magnet," as she was in the act of rounding Jennings Point, could have been seen at the same time on board the "Ann." It is clear, therefore, that the "Magnet" when first seen by the "Ann" must have been coming nearly stem on, for all her three lights to have been seen together. This being established, the next point to ascertain is, whether the vessels were on the port or the starboard bow of each other. This must be deter-

mined by the place and circumstances of the collision. The Appellants' witnesses say that, it being the duty of the "Magnet" to keep on the north or Essex side of the Channel, she had done so all the way from Greenhithe (one witness says from Gravesend) without any deviation from her course. The Queen's Advocate has gone minutely through the evidence, and has shown (their Lordships think satisfactorily), that this is incorrect; and it only furnishes another proof of the desire which is always manifested in these cases to prove that the parties were free from blame, even upon immaterial points. For it is quite unimportant what the former course of the "Magnet" had been if she was in her proper position at the time of the collision, unless the damage arose from her previous non-observance of the rule. Where, then, was the "Magnet" at the critical time just before the collision? The witnesses say that she was as near the north shore as she could safely get; and that to avoid the "Ann," as she came on towards her, the "Magnet's" helm was ported, so much that she was upon the mud and motionless at the time of the collision. The "Ann's" witnesses rather confirm this statement of the place where the vessels came in contact. Some of them state that the "Ann" was in mid-channel, a little to the northward; but the person in charge of a vessel called the "Bellwether," which was about a cable's length astern of the "Ann," says that his vessel was just to the northward of the mid-channel, about twelve fathoms from the north shore, and the captain of the "Bellwether" states that the "Ann" was from three to four points on her port bow, and, consequently, nearer to the north shore than they were. Now, although it is impossible to believe that the "Bellwether" was so close to the shore as is represented, yet it would be making too large an allowance for inaccuracy to suppose that upon this evidence the "Ann" might not have been upon the north shore at all. The fact of the "Magnet" having grounded is proved on both sides, and the only difference between the witnesses is, whether this happened before or after the collision. But whichever was the case, as the grounding was on the north shore, the side of the channel where the vessels came into collision is equally proved.

The place of collision being thus established, it

remains to be considered how the collision itself occurred. The Appellants' witnesses say that the "Ann" starboarded her helm, and ran into the "Magnet" when she was aground. All the witnesses on board the "Ann" swear that she never starboarded her helm at all, but that her helm was ported. It seems difficult to understand, if the "Magnet" was aground on the north shore at the time of the collision, and the "Ann" was in the position in which her witnesses place her, how she could have reached the "Magnet" without starboarding her helm. And this difficulty induced Dr. Deane to say, that as the "Ann" did not starboard her helm, therefore the collision could not have taken place on the north shore. But this has already been shown to be fully established by the evidence on both sides.

Their Lordships are, however, of opinion, upon a careful consideration of the case, that the helm of the "Ann" was not starboarded, and that the collision did not take place in this manner. They think that the "Magnet" had not rounded Jennings-tree Point, on the south side, just before the collision, and that she was not then passing over to the north side, but that she was, at the period when she was first seen by the "Ann," in her proper course in accordance with the provisions of the Act of Parliament. That the "Ann," being a sailing-vessel, although the regulation of the Act as to keeping one side or the other of the mid-channel did not apply to her; yet as she was on the north side of the channel, it was her duty, upon meeting any vessel on that side, to put her helm to port. This she would probably have done at an earlier period if a good look-out had been kept. But there is reason to believe that there was a neglect on the part of the crew of the "Ann" in this respect. The master was at the helm, which was not his proper place, for his duty was to be directing and ordering everything which was necessary to conduct his vessel in safety, and the part of the crew then on deck appear to have been engaged in clearing the cable, and preparing for the vessel being brought up at Erith. The proper thing to have been done by the "Ann" was, according to the regulation of the Act of Parliament, to have ported her helm; and this, it is said, she did; but it is clear upon the evidence that it was done only just before the

collision happened. And the witnesses prove that if her helm had been ported earlier, no collision could have taken place. The "Ann," therefore, had not observed the rule prescribed by the Act of Parliament, and the damage which occurred must be deemed to have been occasioned by her wilful default.

Their Lordships, upon a careful view of the whole case, have arrived at a clear opinion that the "Magnet" was not to blame; that she was in her proper course, and that the damage was occasioned entirely by the "Ann" having kept the course which she was taking without alteration, until the last moment, when a collision being inevitable she put her helm a-port. They would, therefore, have nothing more to do than to recommend a reversal of the sentence which has been pronounced upon the ground of the "Magnet" being solely to blame, if it were not for the distinct issue which has been raised upon the pleadings between the parties as to the mode in which the collision took place. The Appellants put their case in the libel entirely upon the ground of the "Ann" having suddenly and improperly starboarded her helm. They say the damage was solely imputable to this act, and they do not pretend, if they fail in proof of this allegation, that they have any other case to establish. The Respondents take issue upon this fact, and it is one of the questions put by the learned Judge of the Court of Admiralty to the Trinity Masters. Now their Lordships have already expressed their opinion that the "Ann" did not starboard her helm at all, but that the collision occurred by her having kept her course without any alteration of her helm, until it was too late, and that then the helm was not starboarded, but ported. Now it is a rule, and a most important rule, to be observed in all Courts that a party complaining of an injury, and suing for redress, must recove only *secundum allegata et probata*. There is no hardship or injustice in adhering strictly to this rule against the complainant, for he knows the nature of the wrong for which he seeks a remedy, and can easily state it with precision and accuracy. But great inconvenience would follow to the opposite party unless this strictness was required, because he might constantly be exposed to the disadvantage of having prepared himself to meet one state of facts, and of finding himself suddenly and unexpectedly

confronted by a totally different one. The great object of all Courts where trials of fact take place ought to be to bring the parties to a distinct agreement as to what is in contest between them, and this object would be entirely frustrated if it were competent to a party to place his right to redress on one ground, and then to abandon it at the trial for another, although the latter ground would originally have given him a right to recover against the other party. Their Lordships have, in a recent case before them, held that parties are bound by the statements which they make in their pleadings in the Court of Admiralty. In the case of the "Tecla Carmen" and the "North American," in which the judgment was delivered on the 8th of December, 1858, the Court below had found that both parties were to blame, and had given sentence accordingly. Their Lordships were strongly inclined to think that the "North American" was alone in fault, but upon a different state of facts than that which had been alleged on behalf of the "Tecla Carmen," and they therefore affirmed the sentence, being of opinion "that it would not be consistent with the safe administration of justice to alter the judgment upon grounds quite inconsistent with the case made by the Appellant, both in his allegations, and in his evidence, and at the bar." The present case will furnish an additional example of the necessity of correctness and accuracy of statement in the pleadings in the Court of Admiralty. The Appellants were, in the judgment of their Lordships, entitled, upon the true facts of the case, to succeed against the Respondents; but they have, unfortunately, undertaken to prove that the injury resulted from an entirely different state of facts: they have, of course, wholly failed in doing so, and then the rigid but wholesome rule steps in, and compels their Lordships to declare, not that the judgment ought to be affirmed upon the ground on which it was pronounced, but that it *must* be affirmed because the case which has been set up by the Appellants has not been proved by the evidence.

Their Lordships therefore will humbly recommend to Her Majesty to affirm the sentence appealed from, but without costs.

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