

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Kilgour and others v. Alexander and others (ship "East Lothian"), from the High Court of Admiralty of England; delivered 13th February, 1861.*

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Present :

LORD CHELMSFORD.

LORD KINGSDOWN.

SIR EDWARD RYAN.

IN this case the owners of the "Laurel," a schooner of 63 tons, proceeded against the owners of the "East Lothian," a barque of 388 tons, for damages arising from a collision which took place between the vessels, off the South Foreland, about 8 o'clock P.M. of the 21st October, 1859. There is some little difference in the evidence in certain particulars as to the direction of the wind and the courses of the vessels, but nothing which can be considered to be of importance. The wind is, on one hand, stated to have been north-west by north, on the other, north north-west, a difference only of a point. The courses of the vessels ought to be taken from the persons on board of each of them respectively, as likely to be more correctly known by them than by the other party. Proceeding upon this ground, it appears that the "Laurel" was heading west by south, the "East Lothian" north-east by east half-east. It is agreed on both sides that the "Laurel" was on the starboard tack, and the "East Lothian" on the port tack. The witnesses of the "East Lothian" say, that both vessels had the wind a point free; but taking the direction of the wind, and the course of the "Laurel," from her own witnesses, she must have been only six points from

the wind, and therefore (as they represent her to have been) close-hauled. Upon the statement on behalf of the "East Lothian" of her course and the direction of the wind, she must have been more than a point freer than the "Laurel." However this may have been, the vessels were bound to obey the well-known and long-established rule which regulated their course. The "Laurel" being upon the starboard tack, it was her duty to keep her course; the "East Lothian" being upon the port tack was bound to give way. This would be done on each part by the "Laurel's" porting her helm to such an extent only as to keep her full, and so under command, and by the "East Lothian" putting her helm to port, and passing on the port side of the "Laurel." The vessels being in the relative positions described, and the course which each ought to pursue being clearly defined, they came into collision, the "East Lothian" striking the "Laurel" on the starboard bow, between the cat-head and the bowsprit, and her jib-boom passing over the starboard-bow of the "Laurel" in a slanting direction before the foremast. Under these circumstances, as it was the duty of the "East Lothian" to give way to the "Laurel," the *prima facie* presumption would be that she was to blame, and it would be incumbent upon her to show that she did all that she was required to do, and that the "Laurel" threw herself in her way, and so occasioned the collision. And this she endeavours to do by raising an inference drawn from the nature of the injury, and the place where the "Laurel" was struck, that the "Laurel" must have starboarded her helm, and in that way alone could have presented her starboard side to the blow.

The owners of the "Laurel," after describing in their libel the relative positions of the vessels, allege that "the 'Laurel's' helm had been ported as much as it was possible so as to keep her under command, but that the barque came stem on into her starboard bow." It is clear that the "Laurel" was not bound to state with more precision the mode in which the collision occurred, because if she alleged that she obeyed the rule which governed her course, and then showed that another vessel, bound by the same rule to give way to her, came into and struck her, she substantially charged the blame on the

other vessel. And it was not at all necessary for her to add, as in Article 5, "that the aforesaid collision and the damages and losses consequent thereupon were and are solely attributable to those on board and in charge of the 'East Lothian,' and that no blame whatever in respect thereof is imputable to the master or any one on board the said schooner 'Laurel.'" The owners of the "East Lothian" might, if they had pleased, have contented themselves with a denial of the allegation in Article 5; but in their counter-allegation, in which they describe the navigation of their own vessel, they allege "that the collision was solely and entirely caused by and is attributable to those on board the schooner 'Laurel,' to wit, from their having improperly starboarded their helm, instead of porting the same." In the responsive allegation of the owners of the "Laurel" they deny expressly this allegation, and allege on their part that "the helm of the 'Laurel' was never at any time, whilst she was within the distance of half-a-mile from the 'East Lothian,' put to starboard." The learned Judge of the Court of Admiralty appears to have considered that upon the authority of the case of the "Ann" and "Magnet" the "East Lothian" having in her counter-allegation expressly ascribed the collision to a distinct cause, and to that "solely and entirely," the *onus probandi* lay upon her to prove what she had thus alleged, and that if she did not succeed in doing so her defence altogether failed. It becomes necessary, therefore, to consider to what extent parties must be bound by their pleadings according to the opinions of their Lordships, as expressed in the case of the "Ann" and "Magnet," and in the previous case of the "Tecla Carmen" and "North American." It must be observed that in each of those cases the pleadings by which the parties were held to be bound were those of the party proceeding to recover the damage sustained, in which he gave his own account of the acts which produced the collision, and in each of them the blame imputed to the other party was his having starboarded his helm.

It was strongly pressed upon their Lordships, in the case of the "Ann," that to hold parties to be strictly bound by the description which they give of the manner in which the acts of the opposite party occasioned the collision, might lead to great

injustice, as it might be impossible, in many cases, to ascertain from the one vessel what was the course of proceeding in the other. This objection, however, scarcely applies to such a fact as whether a vessel ported or starboarded her helm, which must generally be known by the turning of the head of the vessel in one or the other direction, and can be perceived equally well by the vessel meeting as by those on board who give the order or see the helm shifted. Occasionally, indeed, a sudden gust of wind, or some other cause, may drive the head of the vessel round so as to present the appearance of her helm having been altered to produce the effect. But these instances are extremely rare, and as it is always quite sufficient for a party who complains of an injury to his vessel, occasioned by the improper course of another vessel, to describe that course, without undertaking to attribute it to any particular cause, the possibility of exceptional cases arising, in which a party may be misled by appearances into an erroneous statement of the acts which produced the injury, appears to their Lordships to afford no reason for their departing from the strict but salutary rule which was adopted by them in the cases referred to. But the reason of the rule altogether fails in its application to the defence of the vessel proceeded against. An erroneous allegation of the mode in which the injury occurred, made by way of answer to a libel, does not narrow the issue down to the particular fact alleged, so as to entitle the complaining party to recover, if the proof of it should fail. He must rely upon the establishment of his own case, and not upon the failure of his adversary; and must succeed upon the truth of his own allegation, or not at all. Although, therefore, the "East Lothian" has distinctly asserted that the collision was solely and entirely caused by the "Laurel" having improperly starboarded her helm; yet if it had been clearly shown that the collision occurred in a totally different manner, unless the allegation on the part of the "Laurel" that the injury was attributable to those on board the "East Lothian" was supported by the facts proved, the case of the "Laurel" would not be established, and therefore the defence of the "East Lothian" would prevail. Upon the pleadings in this case, the only point to be determined is whether the "Laurel" has proved the truth of her own

allegation that the "East Lothian" was to blame for the collision in question.

Both parties appear to have directed their evidence principally to the question whether the "Laurel" did, or did not, starboard her helm. Undoubtedly if it had been proved that she had done so, she would have been clearly in the wrong. But her witnesses swear positively that their helm was not starboarded; not one of the witnesses of the "East Lothian" will venture to state that it was; and the learned Judge of the Court of Admiralty expressed an opinion, in which their Lordships entirely concur, that "if the case rested here, the starboarding is not established by the evidence." But then the learned Judge pointed out to the Trinity Masters, his Assessors, "the fact of the mode of collision by the barque going into the starboard side of the schooner, and told them it was for them to determine whether that did not inferentially and necessarily lead them to conclude that the schooner must have starboarded her helm." After consultation with them, he delivered their opinion that "the schooner starboarded her helm, and so occasioned the collision." If their Lordships had not, in common with the Court of Admiralty, the advantage of nautical skill and experience to aid them in their decision of these cases, they would probably have felt themselves bound to adhere to the judgment of that Court. But their nautical advisers are of opinion that the fact that the "Laurel" received the blow on the starboard side does not necessarily prove that she must have starboarded her helm.

In this conflict of scientific opinion, their Lordships feel that the question must be left open to the testimony of the witnesses, and that the positive evidence of the "Laurel's" witnesses, scarcely met by even negative evidence on the other side, leads irresistibly to the conclusion that the assertion of the "Laurel's" helm having been starboarded is disproved. This, however, will not of necessity decide the case in favour of the "Laurel," for she must still be required to show that the collision occurred by the fault of the "East Lothian."

The questions then suggested by the learned Judge to the Trinity Masters in the Court of Admiralty arise: Can the collision be accounted for by the "East Lothian" not giving way, as alleged on

the part of the "Laurel?" and, Can the nature of the blow and the point of contact of the vessels be reconciled with this view of the case? Aided by the judgment of their experienced Assessors, their Lordships have come to a conclusion on both these points in favour of the "Laurel." It is clear upon the evidence that the two vessels when first seen were approaching nearly stem on to each other. It is only necessary to refer to the evidence of the master of the "East Lothian," to show that the "Laurel" was quite close to her when first seen, and therefore to lead to the belief that the look-out on board the "East Lothian" was not what it ought to have been. If, then, at this moment, the "East Lothian" was rather on the starboard bow of the "Laurel," as stated by the "Laurel's" witnesses, and came close upon her before there was time to get out of her way, the collision would have taken place exactly in the manner described in the libel. It must be borne in mind that the "East Lothian" considered it essential to her case to establish that the "Laurel" had starboarded, and suggested no other mode by which the vessels could have come in contact. It must be taken to be proved that the "Laurel" did not starboard her helm, but kept her course; and it having been the duty of the "East Lothian" to give way to the "Laurel," and a failure to obey the rule having been shown to be capable of occasioning the contact with the "Laurel" in the exact point where it occurred, all other causes of the collision having been negatived, the only remaining conclusion is, that the "East Lothian" is alone to blame, and that their Lordships must recommend to Her Majesty that the Decree of the learned Judge of the Court of Admiralty should be reversed, and sentence be pronounced for damages against the "East Lothian," with costs both in the Court below and upon this appeal.

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