

*Judgment of the Lords of the Judicial Appeal Committee of the Privy Council on the Appeals of Papayanni and others v. Cail and others, and Papayanni and others v. Owners of the "Marie de Brabant" (ships "Amalia" and "Marie de Brabant"), from the High Court of Admiralty; delivered 23rd July, 1864.*

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Present:

LORD KINGSDOWN.

LORD JUSTICE KNIGHT BRUCE.

THE MASTER OF THE ROLLS.

THIS case arises out of a collision which took place in the Mediterranean between the "Marie de Brabant" and the "Amalia" on the 12th of May, 1863. They were both screw-steamers, the former of 564 tons and the latter of 1,284 tons.

The "Amalia" was coming from Malta on her voyage to Gibraltar and Liverpool. The "Marie de Brabant" had sailed from Antwerp bound to the East, and having called at Gibraltar was proceeding to Malta. There were cross actions in the Admiralty Court, where it was decided that the "Amalia" was solely to blame, from which Judgment the present Appeal was brought.

Two points were urged by the Appellant's Counsel. They contended:—

1. That supposing the evidence to justify the finding that the "Amalia" was alone to blame, it did not make out the case alleged by the Petitioner in her pleadings, and that she was not therefore entitled to recover.

2. That the evidence did not warrant a finding

that the "Amalia" was at all to blame, or at all events that she was solely to blame.

The first objection rested upon this—that the Petition of the "Marie de Brabant" alleged an injury which it was said could have happened only by the "Amalia" starboarding, and that it alleged, in point of fact, that the helm of the "Amalia" was improperly put to starboard, and it was pointed out that the Court below had refused to decide whether the "Amalia" had starboarded or not, and yet had given Judgment against her.

It is of great importance to the due administration of justice that parties who seek relief in the Court of Admiralty should state the injury of which they complain with sufficient clearness and accuracy to enable their adversaries to know the case which they have to meet and to prepare their defence accordingly; and when the Plaintiff's allegations have been such as to mislead his opponent upon this essential matter, it has been held by this Committee that the Plaintiff was not entitled to recover. As to matters which have taken place on board his own ship, he is enabled to speak, and is reasonably required to speak, with precision and certainty; with respect to what has been done on board his adversary's ship, he can in many cases, probably in most cases, speak of what was done only by inference.

In this case the Plaintiff has alleged that the "Amalia" starboarded her helm improperly, but he has also formally alleged that her helm was not duly and properly put to port as it ought to have been. The first charge, if proved, necessarily involves the second, but if the first be not proved, the second remains, and if established in fact, is quite sufficient to sustain the Judgment.

The Defendant has distinct notice of the charges which he has to meet: first, that he starboarded; secondly, that if he did not starboard, at all events he neglected to port as he ought to have done.

We are clearly of opinion that this objection cannot be maintained.

It remains to consider the effect of the evidence. As to what was actually done by the "Marie de Brabant" when she sighted the "Amalia," there is no dispute. Whether what she did was in the circumstances a right thing to do, is a different question. She alleges that she first saw the white light of the

"Amalia" at a distance of four miles and two points on her port bow; that after watching the light, as the bearing continued about the same, she ported her helm in order to give the "Amalia" a wider berth till the light was brought three points on her port-bow, when the helm was steadied; that afterwards the green light of the "Amalia" came in view, and she then put her helm hard a port, but that the "Amalia" ran into her with her stem and starboard bow with such violence as to sink her.

That the "Marie de Brabant" did put her helm to port and afterwards hard a-port, as thus alleged, is not disputed by her opponent. The "Amalia" insists that it was this porting of the "Marie de Brabant" which occasioned the collision, for she alleges that the ships were on such courses that if each had continued without altering her helm they would have passed clear of each other starboard to starboard, but that the "Marie de Brabant," by improperly porting," ran across the bows of the "Amalia" and produced the accident. On her part it is positively denied that she had starboarded her helm, and it is contended that it never became her duty to port.

The first question to be determined is whether, when the ships met each other, the "Amalia" was on the starboard side or on the port side of the "Marie." If she were on the port side and only two points on the port side there can be no doubt that she was justified in porting, and that the effect of it was to enable the two vessels to pass each other port to port, as it was their duty to do, with greater security.

If, on the other hand, they were in such a situation that they might have passed without danger starboard to starboard by merely continuing their courses, then by porting the "Marie" may have run into the danger which otherwise she would have avoided.

Now, upon this point there is great contradiction in the evidence. The Court below has seen and heard the witnesses, and no complaint is made of the manner in which the evidence was summed up, and the case submitted by the learned Judge to the Trinity Masters. The whole Court have come to the conclusion that in the circumstances proved it was

the duty of the "Amalia" to port her helm; that she did not do so until the moment of the collision; and they have therefore in effect decided that the ships met in the positions described by the Respondent and not in those alleged by the Appellant.

Adhering to the rules which we have so often had occasion to state, we cannot disturb this finding unless the Appellant can satisfy us that the true result of the evidence has been mistaken in the Court below.

With this view he relies mainly upon two facts:—

1. That if the ships had met stem on or port side to port side, the "Marie de Brabant" must have seen the red lights of the "Amalia," and that in point of fact she did not see them.

2. That according to the case alleged by the "Marie de Brabant," no collision could possibly have taken place unless the "Amalia" had starboarded, and that it is proved beyond all question that, in fact, she never did starboard.

As to the first point, the statement and the evidence on the part of the "Marie de Brabant" show that no coloured lights were seen from her on board the "Amalia," until just before the collision when her green light was seen, after, as it is alleged, she had starboarded. Now, it is proved that the "Amalia" actually carried lights of unusual size and brightness; whether the vessels met on the one side or the other the coloured lights, it should seem, must have been visible, on one hypothesis the red and the other the green. That they were not seen is not easily explained. Their position with reference to the ship's boats and the bales of cotton does not afford a satisfactory explanation. This would be material if there were reason to suppose that the "Marie" had not kept a good look-out, but we think that this suggestion is displaced by the evidence. For the present purpose, that of deciding on which side the vessels met, it does not seem of so much importance.

2. We come then to the great question as to the starboarding.

In support of the statement that the "Amalia" starboarded there is the evidence of Ferange, the mate of the "Marie," who was the officer on deck

in charge of the ship, of Goethalls, the look-out man, of Leemans, the seaman, of Roggmans, the helmsman, and of Van Dippendael, the master.

These witnesses of course can speak only to the fact that the helm of the "Amalia" was starboarded by describing the course of the "Amalia," and the change which took place in it before she ran into the "Marie." This change, they say, could have been occasioned only by the "Amalia" being placed under a starboard helm.

Against this is to be set the evidence of the witnesses on board of the "Amalia"—Pollard, the mate, Nagle, the boatswain, and one or two others—who concur in stating in effect that the helm of the "Amalia" was not altered until the red light of the "Marie" was seen coming across their bows, when their helm was put hard-a-port. With respect to Pollard we must say that he appears to us to give his evidence in a very unsatisfactory manner, and to have fenced with the questions put to him, or to have been incapable of understanding them. The master of the ship did not come on deck till just before the collision, and this person, the third mate, was the officer in charge of the ship at the time of the collision.

Now in this competition of witnesses there are two circumstances which it appears to us must determine our judgment as to the side on which the truth lies. O'Neill, the man at the wheel on board the "Amalia," was not called. He must have known with certainty whether the helm of the "Amalia" had ever been starboarded or not. He was in Court when the other witnesses were examined, but the Appellant declined to call him. Davison, who is said to have been assisting him, was called, and it is urged that this is the same thing, but it is really a very different thing.

Davison had been sent to assist O'Neill in case assistance was required, but he was not with him at the wheel. He says that he went on the poop, he did not go to the wheel, but to the starboard side of the poop; that while there he first saw a white light, and about eight minutes afterwards a red light; that the boatswain then gave an order to hard a-port; that he hurried to the wheel in order to assist in putting the helm hard a-port, but that the boatswain was there before him, and that the helm

was put hard a-port. That this was done may be very true; but the question is what had been done previously. Now, to this fact the witness cannot speak, and O'Neill could have spoken with perfect knowledge.

No excuse is laid by any evidence for not examining him on the part of the Appellants. Their suggestion that he was a corrupt and adverse witness, without any affidavit or other evidence to support the charge, can be of no avail. If he appeared to be an adverse or unfair witness the Court would have allowed the Appellant's Counsel to treat him as such, and would have given to his testimony such weight, and no more, as it might seem to deserve. All that we can infer from the refusal or neglect to call him is this, that if he had been examined, his evidence would have been prejudicial if not fatal to the Appellants' case, and that for this reason he was not examined.

The other fact which seems to us very instructive is this: a collision might have been produced between the two vessels in either of the two ways suggested by the parties—by the "Marie" suddenly porting and running across the bows of the "Amalia," or by the "Amalia" suddenly starboarding and running into the "Marie." But we think that the direction of the blow would have been different according to the manœuvre by which the collision was occasioned. If it had been occasioned by the porting of the "Marie," we think the blow would have led aft, and if by the starboarding of the "Amalia" that it would have led forward.

Now upon this point there is no contradiction in the evidence. Von Dippendael, the master of the "Marie," says that the blow was in an oblique direction below the mast and the funnel, in a little oblique direction from the mast forward. Leemans says that the "Amalia" came from the stern of the "Marie" towards her stem, and her bowsprit came across the "Marie" from the stern towards the fore part of the ship. Ferange, the mate, says that the blow slanted forwards; that the "Amalia" could not have come perpendicularly upon the "Marie," for then she could not have hit her that sliding blow; and Willman, the look-out man on board of the "Amalia," confirms this, and says that she

struck the "Marie" a slanting blow, slanting from the beam towards the fore-part of the vessel.

This statement is not inconsistent with,—on the contrary it is rather favoured by,—the actual marks on the stem and bows of the "Amalia," according to the certificate of the Surveyor; and the "Marie" having sunk, we have all the evidence on the point which the circumstances admit of.

If it were necessary to decide the question, therefore, we must hold, upon the balance of evidence before us, that the "Amalia" starboarded her helm and thereby occasioned the accident, but it is sufficient for disposing of this case to say that the Appellant has failed to convince us that the Judgment below is erroneous either as to the rules of law which were applied, or as to the effect of the evidence.

We must humbly report to Her Majesty our opinion that the Appeal should be dismissed with costs.

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