

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Owners of the "Marpesia" v. The Owners of the "America" (the "Marpesia") from the High Court of Admiralty; delivered 14th February 1872.*

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Present :

SIR JAMES W. COLVILLE.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS is a case of collision brought by the owners of the barque "America" against the owners of the ship "Marpesia," the "America" having been run down by the "Marpesia" in St. George's Channel on the 21st of May 1870. The points raised by the appeal lie in an extremely narrow compass. It is admitted on all hands that the collision took place in daylight, about 10 o'clock in the morning, but in a very thick fog in which the vessels could only discern each other at a very short distance.

It is found by the learned Judge of the Admiralty that the distance at which they could have been visible to each other was not more than from 250 to 300 yards.

It is now admitted on the side of the "Marpesia" that no blame is attributable to the "America;" and it would further appear that neither in the Court below nor now is it seriously contended that the "Marpesia" was in fault in any of the particulars which are specially stated in the Petition of the "America," unless it be in one to be afterwards considered. It is no longer contended that she was proceeding at an improper rate of speed considering the state of the weather. It is no longer contended that a good look-out was not kept on board that vessel; nor is it now contended that her helm

was improperly starboarded, or that she made default in not keeping out of the way of the "America" as she was bound to do.

The only point which is now made by Mr. Milward is, that it cannot be said that those on board the "Marpesia" did not make default in not porting the helm of their vessel within the proper sense to be attached to those words.

The clear and admitted facts of the case seem to be these: The vessels were proceeding one down the Irish Channel and the other up the Irish Channel in a thick fog. They could not have seen each other at a distance of more than 300 yards. Their Lordships are rather disposed upon the evidence to say that 300 yards is an extreme limit, and that the distance within which each was visible to the other was probably nearer 200 yards. The combined speed of the vessels would seem upon the evidence to have been about 8 knots an hour, and the result of this state of things is that not more than a minute, if so much as a minute, must have been the time which elapsed between the sighting of the two vessels by each other and the actual collision.

It is further admitted that the two vessels were proceeding in such a manner as that, under the sailing rules, each would be bound to port its helm; that they were in fact approaching each other stem on.

It is also established by the evidence, that immediately before the "Marpesia," which had been close hauled on the port tack, sighted the "America" she was proceeding to tack. It may be a question how far she had gone in that manœuvre, but she had put down her helm, and had come up two or three points, and was in the act of altering her rigging in order to complete the operation of tacking. When, however, the two vessels sighted each other, her helm was shifted, and put, as they were bound to put it, hard-a-port.

In that state of things, what is attributed to the "Marpesia" by the Judgment, and substan-

tially the only fault that has now been imputed to her at the Bar, is that she did not do something more than port her helm; that she did not take steps, which it is assumed she might have taken, in order to put the foresails into such a position that the full pressure of the wind whilst she was under the port helm would come upon them; and also to ease the pressure of the wind upon the after sails of the vessel; the result of which operation would have been, that she would have paid off more rapidly under the port helm than she did; and in that way, as it is contended, might have gone clear of the "America."

The finding of the learned Judge in the Court below on this point is in these words:—"Now she  
 " ported her helm, but I am instructed by the elder  
 " brethren that if she had accompanied that ma-  
 " nœuvre by hauling aft the head sheets again,  
 " and letting go all the lee braces (and it is to be  
 " observed that all her hands were on deck at  
 " the time), in all probability she would have  
 " avoided the collision, and at all events have  
 " placed herself in a position of having done all  
 " in her power to prevent the accident. Not  
 " having done so, I must hold that she failed to  
 " execute the proper manœuvres, which after  
 " sighting the 'America' it was competent for  
 " her to have executed, and therefore that she is  
 " to blame for this collision."

It is to be observed that the Judge does not in terms find that the collision would have been avoided, if she had done that which it is stated she omitted to do. His finding is only that in all probability she would have avoided the collision, and that at all events she would have been in a position, in which her owners might have said more unanswerably that she had done all in her power to prevent the accident.

As far as their Lordships can see, the negligence thus imputed was not made a point in the cause, until the learned Judge, acting upon the advice of the elder brethren, gave his judgment. The omission is not expressly alleged in

the pleadings as a culpable omission on the part of the "Marpesia." Mr. Milward contends that it is included in the allegation that she did not port her helm, because he says that if she had done what she omitted to do to her sails, she would have answered the port helm more effectually. But it appears to their Lordships that, if that was the case intended to be made, the pleading ought to have stated it, and not having stated it was likely to mislead the parties and prevent their coming to meet that case.

Nor do their Lordships find that the point was really raised by the cross-examination. There was, no doubt, a good deal of cross-examination of the captain and one of the other witnesses as to the discrepancies between the evidence they gave at the trial, and the statements in the log as to what had been done with the cross-jack yards and other parts of the rigging; but it seems to their Lordships that that cross-examination was directed rather to show that the ship was not, as had been stated in the log, and in the case originally put forward by the captain, almost at rest as if she had been at anchor, and that the operation of the tacking had gone so far that she might be said to be technically "in stays," and therefore not under control; and, consequently, that the cross-examination was directed to show that there was a greater speed upon her than was admitted. The only place in which their Lordships can find that the point was directly raised in the evidence, was in the examination by the Court, not of the captain, but of the mate at page 39 of the case, and there, no doubt, the Court asks the question, "Were the head-sheets let go?" The answer is, "Eased off." That would only go to show what was the state of the vessel at the time. The Court then goes on to ask, "And when were they hauled back again?" The answer is, "Never hauled back at all, not until we struck." If that omission were intended at the time to be treated as culpable negligence, one would have expected

that the examination would have been continued in order to give the parties an opportunity of explaining the fact. But as far as their Lordships can see, it was mainly on these questions and answers that the elder brethren suggested, and the learned Judge found that there had been a culpable omission on the part of the "Marpesia."

In consequence of one of the arguments at the Bar, it seems desirable to say something as to the burthen imposed upon a vessel that seeks to excuse itself for a collision on the ground of inevitable accident.

Mr. Milward suggested that there is some difference of practice between the Court of Admiralty and the Courts of Common Law in that matter. Their Lordships, however, cannot find that there is any such difference. They take the law as they find it laid down by Dr. Lushington in two cases.

In the case of the "Bolina," which is reported in 3 Notes of Cases, page 208, Dr. Lushington says:—"With regard to inevitable accident, the onus lies on those who bring a complaint against a vessel, and who seek to be indemnified. On them is the onus of proving that the blame does attach upon the vessel proceeded against, the onus of proving inevitable accident does not necessarily attach to that vessel; it is only necessary when you show a *prima facie* case of negligence and want of due seamanship."

Again in the case of the "Virgil," which is in 2 W. Robinson, page 205, the same learned Judge gives this definition of inevitable accident. "In my apprehension, an inevitable accident in point of law is this; viz., that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. If a vessel charged with having occasioned a collision, should be sailing at the rate of eight or nine miles an hour, when she ought to have pro-

“ceeded only at the speed of three or four, it  
“will be no valid excuse for the master to aver  
“that he could not prevent the accident at the  
“moment it occurred; if he could have used  
“measures of precaution that would have ren-  
“dered the accident less probable.”

Here we have to satisfy ourselves that something was done or omitted to be done, which a person exercising ordinary care and caution and maritime skill in the circumstances either would not have done or would not have left undone, as the case may be. Their Lordships, considering the admitted time which elapsed after the two vessels had sighted each other to have been not more than a minute, and the state in which the “Marpesia” was, in attempting to go about, have failed to come to the conclusion that the captain was to blame for having omitted to do that which the judgment seems to find that he might have done. It is a question entirely of navigation, and therefore it is one upon which they have felt at liberty to consult the gentlemen who assist them; and they have been confirmed in the opinion, which they would have formed themselves from all the circumstances of the case, it being the opinion of those gentlemen that the time was so short that the omission to do that which has been said ought to have been done with the rigging and the sails cannot be imputed as negligence or anything approaching to negligence in the master of “Marpesia.” It may be observed that this view of the case is in some measure confirmed by a statement of the master of the “America,” who, in his examination before the Receiver of Wreck, said “There was no time to alter sails on either  
“vessel, and the only precautions were confined  
“to the helm.”

Their Lordships having, for these reasons, come to the conclusion that the collision in this case was one of those unfortunate accidents in navigation which no ordinary care, caution, or maritime skill could have prevented, are com-

pelled to dissent from the finding of the learned Judge of the Admiralty that the "Marpesia" was solely to blame. They will therefore humbly recommend Her Majesty to allow the Appeal, to reverse the Judgment of the Court below, and to dismiss the suit.

Their Lordships will consider the subject of costs.

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On the following day their Lordships added:—  
 With regard to the question of costs which was reserved yesterday, their Lordships have considered that matter. They find that in the case of the "London," Browning and Lushington, p. 82, Dr. Lushington stated,—“In this case  
 “ the Court has found that the collision was  
 “ an inevitable accident, and pronounced against  
 “ the damages; and the only question now is  
 “ whether the Plaintiff ought to be condemned  
 “ in costs. I quite agree with Mr. Brett that on  
 “ principle costs ought to follow the event;”  
 (that is also their Lordships view); “but if  
 “ there is any set rule of practice, it is necessary  
 “ to abide by that. I have caused inquiry to  
 “ be made, and I find that in these cases of  
 “ inevitable accident the usual practice, the  
 “ general rule I may call it, has been to make  
 “ no order as to costs, as I had occasion to state  
 “ in the ‘Itinerant.’ But looking to all the  
 “ cases, it is clear that the Court still holds,  
 “ and will on occasion exercise, a discretionary  
 “ power to condemn in costs. Thus in the  
 “ ‘Thornley,’ I ordered the Plaintiff to pay costs,  
 “ saying that he had no sufficient ground for  
 “ bringing his action. I deem myself, therefore,  
 “ free to consider the circumstances of the case,  
 “ and I must say that, considering the collision  
 “ took place on a most tempestuous night, a  
 “ night in which in this one place eight vessels  
 “ were wrecked, the Plaintiff had good reason to  
 “ think the collision was a mere accident which  
 “ could not have been avoided, and that he was  
 “ unduly rash in bringing his action.”

Their Lordships therefore conceive that the general rule of the Court of Admiralty is in these cases to make no order as to costs, and that in order to justify an exception to that rule it must be shown that the action was brought unreasonably and without sufficient *prima facie* grounds. In the present case they cannot say that there were not such grounds. The case is one in which the unsuccessful party might fairly suppose there was ground to impute blame to the other, and seek to have that question tried. Therefore there will be no costs in the Court below; and as the party came here to support the decree which he had obtained, there will be no order as to the costs of this Appeal. The order, therefore, which their Lordships will recommend Her Majesty to make is that the Appeal be allowed, that the judgment of the Court of Admiralty be reversed, and that in lieu thereof a judgment be made declaring that the collision was the result of inevitable accident, and ordering that the suit be dismissed without costs, and that each party do bear their own costs of this Appeal.