

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Owners of the S.S. "Utopia" v. The Owners and Master of the S.S. "Primula" (consolidated actions), from the Vice-Admiralty Court of Gibraltar; delivered 24th June 1893.

Present:

LORD WATSON.

SIR RICHARD COUCH.

SIR FRANCIS JEUNE.

HON. GEORGE DENMAN.

[*Delivered by Sir Francis Jeune.*]

These are appeals from the decision of the Chief Justice of the Vice-Admiralty Court of Gibraltar, in two consolidated actions, the first being brought by the owners of the steamship "Utopia" against the owners of the steamship "Primula" and freight, the second being brought by the Master of the "Primula" against the "Utopia."

The case arose out of a collision occurring between the "Utopia," which was lying sunk in Gibraltar Bay, and the "Primula" entering that Bay at about 8 p.m. on the 31st March 1891. The "Utopia" had been sunk by collision with Her Majesty's ship "Anson" on the 17th March, at a spot about a quarter of a mile N. by E. of the extremity of the New Mole, and, thereafter, lay with her hull submerged, but her two masts, her yards, and her funnel above water, the masts being immersed only to the extent of about 15 feet, and the funnel proper not at all. From the 17th to the 23rd March

the wreck was lighted by her owners, a light being hoisted at each mast-head. The Acting Captain of the Port of Gibraltar then complained to the manager for the owners of the "Utopia" that the lights were not sufficient, and were not properly looked after, and gave an order to William Adair, a boarding officer, to have a hulk moored in the vicinity of the wreck in order to warn vessels in accordance with the Board of Trade instructions. These instructions are No. 28. of the Board of Trade Regulations, and are as follows: "In England and Ireland
" wherever a light vessel or other craft is
" anchored to mark the position of a wreck the
" top sides will be coloured green, and she will
" be further distinguished by day by three balls
" placed on a yard 20 feet above the sea, two balls
" (vertically) on the side on which navigating
" vessels may safely pass, and one on the other,
" and by night by three fixed white lights
" similarly arranged and with the same meaning.
" These marking vessels when so employed and
" fitted will not show the ordinary riding light."
Mr. Adair in pursuance of this order agreed with the owner of a hulk that she should be placed near the wreck in the position, and exhibiting the lights, described in these instructions. On the 23rd March the hulk was accordingly anchored on the port side of the wreck, with four shackles to south-west, and four to north-east, by the bows on a swivel. In this position the hulk swung with the tide, and when swung stern on was about thirty fathoms from the wreck. It was the duty of those employed to see that when the vessel swung the yard was braced round so as to preserve the position of the lights relatively to the wreck. The expense of this hulk was defrayed by the Port Authorities.

It is not necessary to refer at any length to

the mode of lighting the wreck, or to the way in which the instructions to the owners of the hulk were carried out by the men employed by them for the purpose. Evidence was given on behalf of the "Primula" that only two lights were visible on board of the hulk before the collision, for which some time afterwards three lights were seen to be substituted, and that in consequence those on board of the "Primula" were ignorant that they were approaching the "Utopia" till they saw her masts and funnel, and so came into collision with her.

On the other side was called Manuel Cruz, one of the men on board the hulk, who said that the lamps were of the proper number, and in the proper position. It is clear, however, that the evidence of this witness was not accepted by the learned Judge in the Court below, for he has found that it was probably the case that on the night of the collision the duties of the light-keepers on board of the hulk were very inefficiently performed. Their Lordships see no reason to doubt the correctness of this opinion, and they think it must be taken to be the case that, owing to the neglect on the part of those employed by the Acting Captain of the Port, that is to say, the Port Authority, the position of the wreck was insufficiently indicated, and that in consequence those in charge of the "Primula" were misled and had no notice from lights of the position or existence of the wreck.

The first question which is raised in this appeal is whether the owners of the "Utopia" are liable to the owners of the "Primula" for the damage sustained by the "Primula" in the collision by reason of this insufficient lighting of the "Utopia."

The learned Judge in the Court below has held that the owners of the "Utopia" are liable, because they remained in possession of the wreck,

and on them alone rested the responsibility of taking every means in their power to secure ships entering the harbour from the danger of collision with her.

Their Lordships think that the law applicable to this case may be gathered from three authorities which their Lordships do not regard as being in conflict.

The first of these cases is that of *Brown v. Mallett* (5 C. B. 599), which was decided on demurrer, and in which, the question being whether, in the absence of an allegation that the possession and control of a vessel after she had foundered was in the Defendants, an obligation to protect other vessels against injury was imposed on them, that question was answered in the negative. It is to be observed that what was laid down was, and was only, that "this duty of using reasonable skill and care for the safety of other vessels is incident to the possession and control of the vessel." The case does not define exactly what is meant by possession and control, nor does it throw light on what constitutes reasonable skill and care in circumstances such as those of this case. In the case of *White v. Crisp* (10 Exch. 312), also decided on demurrer, the pleader alleged a transfer of the vessel, and that the transferees had and exercised, at the time of the happening of the injury, possession, control, management, and direction of the vessel. It was held that they were liable. But the Court in giving judgment defined their understanding of the allegation that the Defendants had and exercised possession, control, management, and direction of the vessel, to be that "the defendants had it in their power, by due care and exertion, to have altogether removed this vessel, or to have shifted at least its position, and so might reasonably have been able to have prevented

“ the injury,” and added that “ if these words do “ not mean this, we think there was no liability “ on the part of the defendants.” It is clear, therefore, from this case, that to the extent to which the owners have properly parted with the control and management of their vessel, their liability ceases.

The case of the “ *Douglas*,” decided in the Court of Appeal (L. R. 7 P. D. 151), is very similar to the present. There the steamship “ Douglas ” was, by the fault of those on board of her, sunk in the Thames. The vessel was never abandoned, but the master and the mate took steps to inform the harbour-master, and the mate was told that the harbour-master undertook to light the wreck. The steamship “ Mary Nixon ” collided with the “ Douglas ” six hours after she sank, and it appears to have been assumed and indeed would seem clear (though it was suggested before their Lordships that there was no negligence in anyone), that the harbour-master might have taken but did not take steps to light the wreck. It was held by Sir Robert Phillimore, on the authority of *White v. Crisp* and *Brown v. Mallett*, that “ the possession management and control of the “ ‘ Douglas ’ was not abandoned by her master “ and crew,” and that the owners were therefore liable. On appeal, this decision was reversed, on the ground that, inasmuch as notice was given to the harbour-master, the Defendants were not guilty of negligence. It may be observed also that, in the opinion of Lord Justice Cotton, the Defendants had in fact for the time abandoned the control of the wreck.

The result of these authorities may be thus expressed. The owner of a ship sunk whether by his default or not (wilful misconduct probably giving rise to different considerations) has not, if he abandon the possession and control of her, any responsibility either to remove her or to

protect other vessels from coming into collision with her. It is equally true that so long as, and so far as, possession, management, and control of the wreck be not abandoned or properly transferred, there remains on the owners an obligation in regard to the protection of other vessels from receiving injury from her. But in order to fix the owners of a wreck with liability two things must be shewn, first, that in regard to the particular matters in respect of which default is alleged, the control of the vessel is in them, that is to say has not been abandoned, or legitimately transferred, and, secondly, that they have in the discharge of their legal duty been guilty of wilful misconduct, or neglect.

In the present case, the "Utopia" was certainly not abandoned by her owners in the sense that they gave up all rights of property and possession in her. On the contrary, they no doubt always intended to raise her if they could, and in fact, either before or soon after the collision with the "Primula," they commenced the construction of a coffer dam, and by its means eventually recovered the vessel.

It is clear, however, that before the collision with the "Primula," the Port Authority of Gibraltar, represented by the Acting Captain of the Port, took from the owners, and itself assumed, the task of protecting other vessels from the wreck by means of the signals which it directed to be employed for the purpose. The owners of the "Utopia" yielded to the action of the Port Authority, and thenceforward stood aloof from the operation of lighting the wreck. In these circumstances, it appears to their Lordships that the control and management of the wreck, so far as related to the protection of other vessels from her, and of her from them, was properly transferred to the Port Authority. Further, their Lordships are unable to see how any part of the conduct of

the owners of the "Utopia" can lay them open to a charge of negligence. Neither in allowing the Port Authority to take on itself the control of the lighting, nor in abstaining from interfering with the subsequent action of the Port Authority in the matter, do their Lordships think that any default can be imputed to them. It would be dangerous if an owner of a wreck were compelled, in order to avoid a personal responsibility, to interfere with the action taken by a public authority constituted for such purposes, to ensure the safety of other vessels navigating those waters.

Their Lordships do not desire to indicate any doubt whether the Port Authority of Gibraltar had legally power to deal with the protection of sunken vessels, but they do not think it necessary to inquire into the precise legal foundation of such power. The action taken by the Port Authority was certainly within the apparent scope of its powers, and it would be impossible to hold that the captain, or owners, of a vessel entering a port were bound under pain of being held liable for the acts of the Port Authority to inquire into the sources of its legal power before rendering obedience or deference to it.

It was suggested in argument that, as the action against the "Utopia" is an action *in rem*, the ship may be held liable though there be no liability in the owners. Such contention appears to their Lordships to be contrary to principles of maritime law now well recognized. No doubt at the time of action brought, a ship may be made liable in an action *in rem*, though its then owners are not, because, by reason of the negligence of the owners, or their servants, causing a collision, a maritime lien on their vessel may have been established, and that lien binds the vessel in the hands of subsequent owners. But the foundation of the lien is the

negligence of the owners or their servants at the time of the collision, and if that be not proved no lien comes into existence, and the ship is no more liable than any other property which the owners at the time of collision may have possessed. In the recent case of the "*Castlegate*" in the House of Lords (1893 App. Cases, 52), language used by the present Master of the Rolls in the case of the "*Parlement-Belge*" (L. R. 5 P. D., 218), which expresses the above view, was quoted with an approval which their Lordships desire to repeat.

The second question in this case relates to the conduct of the "*Primula*." The learned Judge in the Court below, guided in part by the expert evidence called before him, has held that the Captain of the "*Primula*," by putting his engines full speed ahead and his helm hard a starboard contributed to the collision. The account given by the Master of the "*Primula*" of the circumstances and of his action is as follows:—"Passing
 " New Mole Head saw vessel with two lights on
 " our port bow nearly ahead. Took them for
 " ship's anchor lights. Took it to be one on each
 " masthead. Came on, sometimes stopped and
 " sometimes moving engines to steer. Nothing
 " reported to me passing New Mole Head.
 " Look-out man hailed there was something on
 " starboard bow about five minutes before colli-
 " sion. Engines not moving then. Ship drifting.
 " I observed funnel, mast and yard above water on
 " starboard bow, about 50 yards away. No lights
 " on them 2 points on starboard bow (funnel). Put
 " engine full speed ahead for five or six turns,
 " and put helm hard a-starboard. If I had
 " ported I should have gone amidships. Should
 " not have cleared her. After the turns I
 " stopped engines. If I had gone astern I should
 " have struck steamer amidships just the same.
 " Could not go astern as there was another

“ steamer astern of me also coming in. I think “ stem of ‘ Utopia ’ was visible above water, “ but that night could see nothing but masts “ and funnel. There was nothing whatever to “ indicate her position.” The accuracy of this statement appears to have been doubted by the learned Chief Justice on one point only, that relating to the ship alleged to be following the “ Primula.” Having regard to the facts that the express statement of the Master of the “ Primula ” on this point is corroborated by his crew, is contradicted only by the occupant of the hulk whose statement as to the lights cannot be accepted, and was not challenged in cross-examination, at a time when it would have been possible to have sought for further corroborative evidence, their Lordships are not prepared to reject the clear assertion of the Master of the “ Primula ” that there was a vessel close astern of him which impeded his going astern. It may be added that the learned Judge has found, in their Lordships’ opinion, correctly that the tide was half ebb and the wind northerly.

The question is one of seamanship, and it is, in their Lordships’ opinion, a question of seamanship in circumstances of instant peril. They think that the Master of the “ Primula ” is entitled to pray in aid this latter circumstance in the consideration of his conduct, on the principles approved by the Court of Appeal in the case of the *Bywell Castle* (L. R. 4 P. D., 219).

Their Lordships do not think it necessary to examine the expert evidence in the Court below, inasmuch as they have the assistance of skilled assessors. Taking the facts and circumstances to be as above stated, they have requested their assessors to advise them whether the Captain of the “ Primula,” in pursuing the course he adopted, acted with that care and skill which

might reasonably be expected of a competent navigator, and they are advised, without hesitation, that he did so act. This advice their Lordships think it right to adopt.

Their Lordships therefore think that the appeal of both parties should be allowed, that the decree of the Court below should be reversed and both actions dismissed, and that each party should bear their own costs of this appeal and in the Court below. They will humbly advise Her Majesty accordingly.
