

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Yeo and Yeo v. Tatem and Braginton (the 'Orient'), from the High Court of Admiralty; delivered June 16th, 1871.*

---

Present:—

SIR JAMES W. COLVILLE.

SIR JOSEPH NAPIER.

LORD JUSTICE JAMES.

LORD JUSTICE MELLISH.

THIS Petition has been filed in the Court of Admiralty by the owners of the brigantine 'Georgiana' against the owners of the 'Orient,' for damage to the 'Georgiana,' alleged to have been done by, and imputable solely to, the acts of the owners of the 'Orient' and their servants. The answer to the Petition sets forth, first, a general denial of the statements in the Petition; and secondly, a special defence "that the cause of action in the Petition mentioned, and also the damage sought to be recovered for in this cause by the Plaintiffs, are respectively the same cause of action, and the same damage in respect of which the Plaintiffs commenced an action in Her Majesty's Court of Common Pleas; and afterwards, and before the institution of this suit, obtained Judgment therein, in which said Judgment the said cause of action became and was merged, and which said Judgment was satisfied before the commencement of this suit." It is admitted in the reply that such action was brought by the Plaintiffs, and Judgment recovered, but it is alleged that it was for trespass and for wrongful detention of their ship, whereas the present suit is instituted for the recovery of compensation for damage inflicted by the 'Georgiana' upon the 'Orient.' It is further relied on that this is a

proceeding *in rem*, of a different nature, and not between the same parties.

Upon this state of the pleadings the case came before the Judge of the Admiralty Court. On behalf of the Defendants, a witness (Mr. Yeo) was examined who was the principal Defendant in the action that was tried in the Court of Common Pleas. Upon his evidence it appeared that the damage that was occasioned by the one ship to the other was the result of what was done under his orders, in the assertion of what he claimed to be his right. This damage was part of the cause of action in the proceedings in the Court of Common Pleas, which were for trespass and damage, and also for wrongful detention of the ship of the Plaintiffs. It was the same damage in substance as is described in the evidence on behalf of the Plaintiffs in this present suit before the Judge of the Admiralty Court. Upon the evidence of Mr. Yeo, it appeared that he was the consignee of the 'Orient' for sale, and that in doing the acts that caused the damage he was acting on his own responsibility in the assertion of a right claimed by himself, and not as servant, or on behalf of the owners. The leading counsel for the Plaintiffs admitted that after this evidence he could not go on with the case. The learned Judge decided that the proceeding in the Admiralty Court could not be maintained, and that the Petition must be dismissed. But he held that as this defence had not been specially set forth in the pleadings, he was bound to dismiss the Petition without giving costs to the Defendants. He also held that in consequence of his being bound to act upon the evidence of Mr. Yeo, he was not bound to take into consideration the second part of the defence, although it was distinctly and properly pleaded, and his judgment upon it was required by the counsel for the Defendants. The result was that he dismissed the Petition without giving to the Defendant any costs of his defence, under the general or special issue.

Now, the first duty with regard to the reception of evidence upon which a Court has to act in a suit, is to see that the fact which the evidence is offered to prove or disprove, has been sufficiently put in issue by the pleadings. Here there is a comprehensive denial of each and all of the material allegations in the Petition. It was a just defence on the part

of the owners of the 'Orient,' who are sought to be made responsible in this proceeding, although not resident in England. They in effect say to the Plaintiffs, 'We require you to establish and prove the essential allegations in your Petition, one of which is, that the damage of which you complain was done by us, or by some one for whose acts we are responsible. If we are (as you allege) legally responsible, you have been legally satisfied by a proceeding at law in an action in which you had the opportunity of making the best case you could as to your claim for this damage.' It appears on the admissions of the Plaintiffs, that before this proceeding was commenced, the sum for which judgment was recovered in the action at law had been paid. If the security for damages adjudged and not paid was insufficient, or if the owners of the ship were responsible but insolvent, the Plaintiff would have had a cumulative remedy by proceeding *in rem* in the Court of Admiralty; but it could only be to realize one compensation for the same cause of action. Where there is a remedy both *in personam* and *in rem*, a person who has resorted to one of the remedies may, if he does not get thereby fully satisfied, resort to the other. Here the Plaintiffs proceeded against the party who was the primary trespasser, and properly responsible. The amount of compensation for the damage which the law had reduced to certainty in the action had been paid; and having been by the law so reduced to certainty, and the amount having been paid before the commencement of this proceeding, there was an end of the matter both in law and justice.

A question is made as to what the effect of the general traverse is as to costs of the defence admissible under it, when proved; whether the Judge was bound to decide the other issue raised by the special defence, which became material only so far as related to the costs on that issue; and whether the Judgment, as involving costs only, was subject to an appeal. Their Lordships do not mean to question or recede from the decisions that have been pronounced about not allowing an appeal for costs, but where there has been a mistake upon some matter of law that governs or affects costs—some matter that involves the due application of

principles of law—the party prejudiced is entitled to have the benefit of correction by appeal. At Common Law, where there are several issues raised by the pleadings, it may be that some are found to be quite immaterial, and the Judge at the trial has the power of discharging the Jury from finding a verdict on such; but as to those that involve a substantial question of costs, the party interested has a right to have the proper findings entered on the record, in order to secure the costs to which he is lawfully entitled on such issues. (*R. v. Johnson*, 6 Cl. & Fin. 60.)

The Plaintiffs are here proceeding against parties who are resident in a foreign country, and they seek to make their claim available against the vessel of the Defendants, who have a right to call upon the Plaintiffs to prove the allegations in their Petition. It seems to their Lordships to be the effect of the general traverse and denial, that it puts in issue the material allegations in the Petition of the Plaintiffs, and requires them to prove their case as alleged. According to the general rule of law, as stated by Serjeant Williams (2 Saund. 158, *a. n. 3*), whatever facts a Plaintiff or Prosecutor is bound to prove on the general issue pleaded, the Defendant may controvert the truth of, by opposite evidence. Here a material allegation is that the damage to the ship of the Plaintiffs was done by the owners of the 'Orient' or their servants, and therefore it was open to the Defendants under the general traverse to controvert the truth of this allegation, which the Plaintiffs were, on the other hand, called on to sustain.

The law of the Court of Admiralty is laid down in the case of the 'East Lothian,' followed and further explained by the Judgment delivered by Lord Kingsdown, in the case of the 'Minnehaha.' In the case of the 'East Lothian,' where the Defendant in answer to the Petition stated a particular defence, in addition to the denial of the Plaintiff's case, it was held that he was not bound to prove his special defence as pleaded, but that he was at liberty to avail himself of the failure of the Plaintiff to make out the case alleged in the Petition. The distinction is taken and explained between the case on the part of the Plaintiff and that on the part of the Defendant. The Plaintiff is bound to state dis-

tinently what his *gravamen* is, and the Defendant has a right to call on him to prove it as it has been stated. If the Plaintiff fail in this, the Defendant may say—that is in itself a good defence for me, albeit that I am unable to prove the special defence which I have put forward.

In the Judgment delivered by Lord Chelmsford, after having pointed out that the Defendant might have contented himself with a denial of the Plaintiff's allegation (14 Moore, P. C. C. p. 181), his Lordship says, "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." (14 Moore, P. C. C. 183.) It is said that in a suit in the Court of Admiralty, if the defence be not distinctly pleaded, the Plaintiff might be taken by surprise. Now there was no difficulty as to this in the present suit. It was open to the Plaintiffs, if they had grounds sufficient, to have applied to the Court to alter or amend or set aside the general traverse as embarrassing. By the 77th rule of 1859 every pleading shall stand admitted, if within four days from the filing, the adverse Proctor does not file a notice of motion objecting to the admissibility thereof. No such notice was filed, and no application was made by the Plaintiffs, and therefore it must be taken that they consented to go to trial on the pleadings as they stood. It does not appear that in fact there was any ground of surprise. On the contrary, the learned Judge in his Judgment points out that he was himself obliged to take judicial cognizance from the report of the proceedings in the action at law (which was put in evidence) that the Plaintiffs could not have been ignorant that Mr. Yeo was only an agent of the owners of the 'Orient' for the purposes of sale. There was no case then for the exercise of equitable interference, because there was no danger of doing any injustice to the Plaintiffs, by adhering to the general rule of law, as to the sufficiency of the general traverse to put in issue every material allegation of

the Plaintiffs. In the Judgment in the 'Minnehaha,' where the question was whether negligence could be relied on as a defence where it had not been specially pleaded—Lord Kingsdown says, "It is then contended by the Appellants that "as to negligence or error in judgment there "is no case brought forward by the answer, and "that the Court is precluded from inquiry into "that matter. We are not prepared to go that "length. The claimants must prove their own "case, they must show that the ship being in "danger, from no fault of theirs, they performed "services which were not covered by their towage "contract, and did all they could to prevent the "danger." (15 Moore's P. C. C. p. 158.) He afterwards says, "Though we think that the Appellants "must make out their own case, and that the objections to which we have referred are open to "the Respondents, still in judging of the effects of "the evidence we must have regard to the degree "of notice which was given by the Respondents to "the Appellants of the nature of the objections on "which it was intended to rely. Certainly the "defence here is so framed that although it puts in "issue all the facts alleged by the Appellants, it "does not give them notice of any particular point "to which their evidence should be especially "directed" (p. 130). The general traverse was taken to be legally sufficient to put in issue the allegations that were material to the Plaintiff's case, but subject to such equitable treatment as would give no undue advantage to the Defendant from not having put forward his defence specially. Here the essential defect in their case was known to the Plaintiffs, before the suit was commenced; the defence as pleaded required them to prove their case; they made no application to the Court to amend or set aside the general traverse, or for leave to discontinue the suit, but when the evidence of Mr. Yeo was given they admitted that their proceeding against the Defendants could not be maintained. The Court certainly was not bound to interfere in order to assist a proceeding which was admitted to be unfounded; and this must be taken to have been known to the Plaintiffs and their advisers, before this suit was commenced. It was an abuse and perversion of the procedure of the

Court of Admiralty for the unjust and illegal purpose of trying to augment the compensation, which had been legally assessed and paid to the Plaintiffs—in respect moreover of acts done, for which these Defendants were not responsible in any Court. As to the general traverse, it was legally sufficient to put the Plaintiffs upon strict proof of their case, and to admit the Defendants to controvert any of the material allegations in the Petition. If these were put in issue in a form that was embarrassing, the remedy was by a motion to the Court. If the form was inadmissible and insufficient, the evidence of Mr. Yeo as to his limited agency ought to have been objected to on the part of the Plaintiffs; the learned Judge ought to have been called on not to receive it; or when it was found what the effect of it was, he should have been requested to strike it out of his notes as inadmissible. A Judge is not at liberty to act upon evidence that he does not hold to be admissible on some one of the issues raised by the pleadings. Indeed, the learned Judge of the Court of Admiralty said that he “must not reject the evidence, but must apply it to the general averments and denial.” How could this be allowed unless these averments and denial were legally sufficient? He was not required by the Plaintiffs to exercise an equitable control, or to make any order alleged to be material to the assertion of the Plaintiffs’ rights. The leading counsel for the Plaintiffs not having objected to the admissibility of the evidence of Mr. Yeo, and having admitted that it could not be controverted, upon that issue and upon the very right of the case there was an end of the Plaintiffs’ suit, which ought never to have been commenced. But, although there was so far an end of the case, it did not follow that the other defence that was raised was not also to be decided as required on behalf of the Defendants as material to them, at least in respect of costs.

Their Lordships, therefore, are of opinion that the defence admitted under the general traverse, and established by Mr. Yeo’s evidence, should have been followed by the legal result as to costs; and as to the other defence, that it ought also to have been decided in favour of the Defendants, with a like result as to costs. It is only necessary to look into the pleadings and proceedings in the action,

and at the way in which the learned Lord Chief Justice of the Common Pleas left the case to the Jury, to see that, in point of law, the claim for damage to the Plaintiffs' ship was substantially comprehended, and compensation was adjudged in that action. This has been paid, and the present suit should not have been instituted. Their Lordships, therefore, will humbly recommend Her Majesty that this Appeal be allowed, and that the Judgment that has been pronounced by the learned Judge of the Admiralty be varied, by directing that the Suit be dismissed with costs: the Appellants to have their costs of this Appeal.