*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Dean and others* v. *Mark and another (ship "Constitution"), from the High Court of Admiralty; delivered 23rd July,* 1864.

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Present:

LORD KINGSDOWN.
LORD JUSTICE KNIGHT BRUCE.
SIR EDWARD RYAN.

THE first point to be considered in this case is whether the questions of law which arose in it were properly decided by the learned Judge, and the questions of fact upon which the decision depends were accurately stated in his summing-up to the Trinity Masters.

Upon this subject we entertain no doubt whatever. We agree with the learned Judge that in the courses in which these vessels met, the 11th of the New Navigation Rules has no application, and that the 12th Rule must determine the rights of the parties. The vessels were not meeting end-on, or nearly end-on, and the only question is,—which was bound to get out of the way. Now the rule prescribes that when two sailing-vessels are crossing so as to involve risk of collision, then if they have the wind on opposite sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on the port side is close-hauled, and the other ship free, in which case the latter ship shall keep out of the way.

In this case there is no doubt that the ships were crossing; that they had the wind on opposite sides, the "Constitution" on the starboard side and the

"George Dean" on the port side. It was therefore the duty of the "George Dean" to get out of the way unless the "Constitution" had the wind free. This is stated by the learned Judge to the Trinity Masters to be the only question in the case, and we entirely agree with him. .

In dealing with the effect of the evidence on this question we are involved in the greatest difficulty. It depends partly upon the credit due to the witnesses, of which we have but imperfect means of judging, and partly on the inferences which persons of nautical skill, of which we are necessarily destitute, may draw from facts which are established. The Court below saw the witnesses; the Trinity Masters, of whom one was Admiral Collinson, a seaman of the greatest distinction, personally examined the witnesses, and would be far better able to understand them, and to judge of the probability or improbability of their story than it is possible for us to do even with the assistance which we receive from the able naval officers who are ordered to attend the Committee in these cases.

It was argued by Mr. Brett that an appeal in the Judicial Committee is not like an application to a Court of Law for a new trial, where, if there be evidence to warrant the verdict, the Court will often not disturb the finding of the jury (to whom the decision of the fact belongs) though it may not entirely approve of it; that here we are sitting not only as Judges but as a jury, from which it was inferred that in order to affirm we ought to be satisfied that the finding is that at which we should have arrived if the matter were *res integra*.

We do not agree to that principle. We laid down in the case of the "Julia" (14 Moore, P.C. 235), in the year 1861, the rules by which we must be guided. The practice of the Court of Admiralty does not allow of new trials, and considering that from the pursuits and habits of life of seamen on whose testimony the questions of fact usually depend, it would generally be impossible in such cases to collect them again for a second trial, as well as for other reasons, we think the rule a wise one. We must either affirm or alter a sentence on appeal, and those who call upon us to alter it must impress us with a reasonable conviction that it is wrong. We certainly are unable to arrive at that conviction in the

present case. The evidence is entirely contradictory upon many points, but in some, where the contradiction is the strongest, there seem to us to be reasons for thinking that the error is rather on the side of the Appellants than of the Respondents.

For instance, one important question is, whether the "Constitution" was steering more or less in a southerly direction. Abernethy, the master of the "George Dean," says that the "Constitution" was steering east-south-east, and had the wind free. On cross-examination it appears that his reason for saying this is, that this was the course to Liverpool from the point were she was at the time of the collision, but the course for Point Lynas he says would be south-east-by-east, and we think it clearly proved that she was steering to Point Lynas in order to take a pilot to Liverpool and not direct to Liverpool.

The other witnesses on board the "George Dean" who speak to the course of the "Constitution," do not seem to us, as far as we are capable of judging, to assign very clear reasons for their statements. Mc Nay, the master of the "Constitution," says distinctly that she was steering from south-east to south-east-by-south, the wind not being steady; that she was standing close by the wind with her yards sharp up; that her course was such (which necessarily means so much south) that he did not know whether he should weather Point Lynas.

It was strongly urged that the sails which the "Constitution" was carrying proved that she could not be close-hauled, but this was a point which excited the attention of the Trinity Masters in the Court below, and Admiral Collinson put questions on the subject to the witnesses on behalf of the "Constitution," and as he concurred in the Judgment must have been satisfied on the point. That the yards were braced-up close was sworn positively by Mc Nay, the master, and by Gray the mate, who, on cross-examination, said, "the yards were sharp up as close as ever we could get them. I had two pulls at the braces to get them up as close as I could."

Some observations were made by the Appellant's Counsel on the state of the log of the "Constitution" in which an erasure appeared to have been made, and an alteration introduced as to the course which the ship was steering at the time of the

collision. It was pointed out at the trial to the mate by whom the log had been kept, and who gave his explanation of the circumstance. At first sight it appeared to be suspicious, but all suspicion seems to us to be removed by the fact that the entry is by no means favourable to the case of the Respondents, and that if an entry were to be fabricated, it would have been quite as easy to make it "South-east by south" as "South-east by east."

Upon the whole, though we think the case one of much doubt, we cannot be satisfied that the decision below is erroneous. We must humbly report to Her Majesty our opinion that it ought to be affirmed, but without costs.