

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Moss and others v. The African Steam Ship Company, ship 'CALABAR,' from the High Court of Admiralty of England; delivered 30th November, 1868.*

Present :

LORD CHELMSFORD.

SIR JAMES WILLIAM COLVILLE.

LORD JUSTICE PAGE WOOD.

LORD JUSTICE SELWYN.

It must be assumed, for the purpose of this Appeal, and their Lordships see no reason to doubt the fact, that the 'Calabar' was solely to blame for the collision in question. It is, however, an admitted fact in the case that she was then in charge of a licensed pilot, it being compulsory upon the master to take a pilot in the River Mersey. The question, therefore, is reduced simply to that which has been so often agitated here and in the Court of Admiralty, whether the master and crew of the 'Calabar' have sufficiently relieved themselves of the obligation which the law casts upon them, of showing that the accident was due solely to the neglect of the pilot, and that there was no neglect on their part which contributed or conduced to that accident. It is unnecessary to go into the cases on this subject. They were recently considered in the case of the 'Iona' at this Board, and to the law as then stated, their Lordships wish to adhere.

Now what is the fault which the Judgment below imputes to the 'Calabar'? It is that the vessel was proceeding at a far greater speed than was consistent with safety, considering the circumstances and the position of the vessel. Their Lordships think that that conclusion was right; they certainly see no ground for disturbing the Judgment on that point, supposing it were open to the other party to

do so. There was, no doubt, conflicting evidence as to the rate of speed, but the evidence on the part of the master and crew of the 'Rosetta' was confirmed by the evidence of three independent witnesses. But on this part of the case it is only material for the present purpose to remark, that the fault thus found is *prima facie* the fault of the Pilot. For it was the duty of the Pilot, in giving directions for the navigation of the vessel, to determine the rate of speed at which she should proceed. We have then to consider whether the evidence to which our attention has been drawn by the able arguments at the bar, discloses any neglect of duty on the part of the master or crew of the 'Calabar,' of which their Lordships can fairly predicate that it was negligence which contributed or conduced to the accident. In dealing with that question, we must assume that all those circumstances, from which we are asked to infer neglect on the part of the crew, were fully considered by the learned Judge of the Court below, and that, although he has not entered at length into his reasons for coming to that conclusion, he did in fact come to the conclusion, that the master and crew were not shown to have been guilty of any negligence which would affect the owners of the 'Calabar' with liability.

The argument at the bar has proceeded upon three grounds. It was argued first, that there was not that look-out which there ought to have been on board the 'Calabar.' It was said, in particular, that if the persons charged with that duty had exercised a proper degree of diligence they would have seen that this vessel, the 'Rosetta,' was coming out of the dock when they were crossing the river, and would have given notice in time to enable the Pilot to manœuvre the 'Calabar,' so as to avoid the accident. Mr. Lushington has also imputed another act of negligence to the look-out; but the grounds upon which their Lordships proceed upon that point will apply to both instances of imputed negligence. Their Lordships have consulted the sailing-masters by whom they are assisted, and have come to the conclusion that the observation of this particular vessel was hardly within the peculiar or proper duty of the look-out men. They are stationed to see what vessels or obstacles are in the Channel; and their attention

is directed rather to such objects than to what is taking place on the shore. We are not prepared to impute negligence to the look-out, properly so called, because it is not shown that the existence of this vessel in the basin, with its blue-peter flying, was made known by them to the pilot on the bridge before the time at which he and the Master are proved to have observed it. We therefore think that the first ground taken fails to establish negligence conducive to the accident against the Master or crew of the 'Calabar.'

The third point taken (and I will take it before the second) was, that if this vessel were really of so eccentric a character as to steer in the manner to which I shall afterwards advert, that was a circumstance which should have been made known to the pilot. Now we are not prepared to affirm that there was any extraordinary eccentricity in the vessel; and, as far as the evidence goes, it seems reasonable to presume that the communication as to the nature of the screw, which the Captain of the 'Rosetta' says is a thing generally told to a pilot when he takes charge of a screw-steamer, was made to this pilot. In one part of his evidence I think the Pilot himself says that he knew what the nature of the screw was.

We come now to the second point taken, being that which was chiefly insisted upon by Mr. Butt, and was argued by him with great force and ability. It is this:—the witnesses for the 'Calabar' depose that the order given by the Pilot immediately, or shortly before the collision, was to put the helm hard a-starboard. It is, nevertheless, clear upon the evidence that, at the time when that order is said to have been given and executed, the head of the vessel paid off to starboard, as if she had been under a port helm; and from this fact the Appellant would have their Lordships infer that the men at the wheel did not, in fact, obey the Pilot's order, but ported when they should have starboarded the helm. The witnesses for the 'Calabar' have sought to establish that this motion of the vessel on a starboard helm was due to the reversal of the engines, and the consequent action of the screw.

This explanation appears to their Lordships to be very unsatisfactory, because we must take it on the evidence that there was a considerable way

upon this vessel; and, in that case, there seems to be no reason for supposing that the reverse action of the screw would prevent the vessel from answering her helm in the ordinary way, so long as there was way upon her. We have, however, the advantage of being assisted by nautical assessors who have fully considered the evidence and the facts, and it seems to them and to their Lordships that the motion of the vessel may be accounted for consistently with the evidence in another way. If the fact were incapable of explanation except upon the hypothesis suggested by the Appellants, we should be driven to the painful necessity of supposing that the evidence given on the part of the 'Calabar' is altogether and wilfully false, and that either the order which the Pilot swears he gave, and the other witnesses swear he gave, was not given, or that that order was deliberately disobeyed. That it should have been disobeyed—that the men at the wheel should have done the opposite of what they were told to do—is *primâ facie* extremely improbable. The following view of the case appears to their Lordships, upon the information which they have received from their assessors, to be far more probable.

There is some evidence that the vessel, when she was passing along this wall, was at one period under a port-helm. She was going faster than she ought to have gone. She must have been, in their Lordships' view, very near the mouth of the basin when the order to hard-a-starboard was given. And if, as was suggested in the argument, she was then seeking to run past the mouth of the basin, she was probably more under the influence of a port-helm than the Pilot admits her to have been. Their Lordships are informed that in such circumstances some time would elapse before the helm, when shifted, would act on a vessel of that size, and that, therefore, it is not impossible that her head may have gone off in the way in which it is sworn to have gone off by almost all the witnesses, although the order hard-a-starboard was given and obeyed. In that state of things the Pilot would be solely responsible for the improper navigation of the ship. Their Lordships, therefore, are unable to come to a contrary conclusion to that to which the learned Judge in the Court below came to, or to

hold that the case of contributory negligence on the part of the crew has been made out ; and, seeing no sufficient reason for disturbing the Judgment of the Court below, they must follow the ordinary course, and humbly advise Her Majesty that that Judgment be affirmed, and the Appeal dismissed with costs.

Their Lordships desire me to add that, although that point may not be considered to have been fully argued before them, they have, as at present advised, a very strong opinion that it would not have been open to the Respondents, who have not adhered to this Appeal, to raise the question whether the 'Calabar' was free from fault, or whether both vessels were in fault.

