

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of the "Ben Voirlich" v. the "Maria," from Her Britannic Majesty's Supreme Consular Court at Constantinople; delivered 9th March 1889.*

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Present:

LORD WATSON.

LORD FITZGERALD.

LORD MACNAGHTEN.

SIR WILLIAM GROVE.

[*Delivered by Lord Macnaghten.*]

This case arises out of a collision between the British steamship "Ben Voirlich," 983 tons register, and the "Maria," a Greek schooner of 128 tons register, in which the "Ben Voirlich" suffered some damage and the "Maria" was sunk.

The collision took place in the Grecian Archipelago, about 15 miles west-south-west of Bella Poula light, at about 2.30 a.m. on the 25th of November 1886. The "Ben Voirlich" was on a voyage from Venice to Odessa in water ballast. The "Maria" was coming from Ibraila to Cefalonia with a cargo of wheat. The course of the "Ben Voirlich" was north-east by north half north by compass. The wind, such as it was, was south-east or south-south-east, if that is the meaning of "austro sirocco." According to the evidence of the witnesses for the "Ben Voirlich," the force of the wind was from fresh

to moderate. According to the witnesses on the other side, there was hardly any wind at all, and the schooner had no way on. It was assumed on both sides that the schooner was heading as close to the wind as possible, which would be about south-west half south. The two vessels, therefore, were on almost directly opposite courses.

Each of the two vessels brought an action against the other in the Consular Court at Constantinople. The Court held the "Ben Voirlich" to blame on her own showing, and decided both actions in favour of the "Maria."

The evidence relating to the circumstances under which the collision occurred was taken before the Registrar, so that the learned Judge who decided the case had not the advantage of seeing the witnesses and observing their demeanour.

Though the "Maria" was Plaintiff in the first and principal action, the witnesses for the "Ben Voirlich" were examined first. Their evidence is clear and consistent. If they are to be believed, an explanation is given of a collision which otherwise it is difficult to understand. And if the explanation be accepted it is not easy to see why the "Ben Voirlich" was condemned.

The story told on the part of the "Ben Voirlich" is as follows:—There were four of the crew of the "Ben Voirlich" on deck at the time. The mate was on watch, standing on the bridge. The steersman was beside him at the wheel, which was an open wheel. On the foredeck abaft the fore-castle head was a spare man. The man on the look-out was on the port side of the fore-castle head. The night was dark but clear. Bella Poula light and the lights of some sailing vessels in the distance were plainly visible. Suddenly on the starboard bow a few lengths off there flashed up a bright red light, where no light was

to be seen before. The look-out man sung out, "Red light on the starboard bow." The mate and the steersman saw the red light at the moment they heard his cry. The spare man ran on the forecastle head and saw it too, a big red light on the starboard bow. But it was too dark to see the hull on which the light was shown. The mate instantly ordered the helm hard-a-port, and rang first to stop and then to reverse. The orders were obeyed at once, and the ship came round a point. But in about one minute or one minute and a half from the time the light was first seen the "Ben Voirlich" ran into the "Maria," striking her on the starboard bow at an angle something less than a right angle, and cut her down to the foremast. The "Maria" swung round alongside the steamship and foundered in about 15 minutes. All the crew were rescued. No one on board the "Ben Voirlich" saw a green light on the "Maria," or any light on her but the red light which the look-out man reported.

The captain of the "Ben Voirlich," who was in the chart room, was called by the mate immediately after he had given his orders. He jumped up, and just as he was stepping outside his door the collision occurred. He went on the bridge and took command. He saw by the compass that the ship's head was north-east half north. The telegraph indicated astern. He put it slow ahead to keep the vessels together. When the schooner was alongside he searched twice with his glasses for her green light. But no light was then to be seen.

The case therefore, on the part of the "Ben Voirlich," was that the lights of the "Maria" were not in their proper position, but that a red light was flashed up somewhere on her starboard side, when those on board saw that they were on the point of being run down. That was the

“ Ben Voirlich’s ” case on the evidence and on the pleadings, and it is consistent with the statements contained in the log, and in a protest lodged by the master and crew on their arrival at Odessa.

The evidence on the part of the “ Maria ” was directed to prove that her regulation lights were in order. The crew consisted of six men and a boy. When the lights of the steamer were first sighted, three men and the boy were asleep below. There were two men on deck besides the captain, who is said by one of the witnesses to have been asleep in the stern, but who, according to his own account, saw the white light of the steamship when it first came in sight. The evidence on the part of the “ Maria ” as to her lights was in substance this:—It was the duty of the boy to get the lights ready, and his father used to put them up at dusk. This was done the night before the collision. The boy’s evidence goes no further than this. The father and the two other men who rushed up on deck when they were told that a ship was coming on them all say that the “ Maria’s ” lights were burning, and two of them declare that the first thing they did when they came up was to see if their lights were in order. The man at the wheel says, “ We had our lights from evening.” The man on the look-out says, “ We had lights. “ They were lit from dark, green and red.” The captain says, “ I swear I had my lights. I “ had good lights which always shone brightly, “ and every night we put them up.” There was also some evidence by way of corroboration given by the captain and crew of the “ Ampelos,” a Greek vessel, which had been in company with the “ Maria ” on the previous evening. They saw the “ Maria’s ” lights burning up to 10.30 p.m.

In this conflict of evidence, if their Lordships had nothing to guide them but the depositions

before the Registrar, it would be difficult to resist the conclusion that the "Maria" was to blame. Her case is that, owing to the absence of wind, it was not practicable to alter her heading, and that the "Ben Voirlich" came straight on from the point where she was first seen. There is no question as to the course of the "Ben Voirlich," no dispute as to the place where the "Maria" was struck, or as to the direction of the blow. It would have been impossible for the crew of the "Ben Voirlich" coming in the direction in which she came to have seen the red light of the "Maria" if it had been in its proper position. That they did see a red light on the "Maria" cannot be doubted. The story told by the four men on the deck of the "Ben Voirlich" carries conviction with it, and it is confirmed in a remarkable way by the line of cross-examination adopted by the Counsel for the "Maria." It was not suggested that a red light was not seen. The cross-examination was directed to establish the fact that a red light was reported no less than three times before the mate paid attention to the report. Witness after witness was asked whether a red light was not reported three times, and whether the witness had not said so. The case at that time obviously was that the collision was owing to the deafness of the mate, who seems to have been rather hard of hearing. But there was no question as to the colour of the light that was seen. It was common ground then that the colour was red.

The evidence on the part of the "Maria" as to her lights is open to some observation. The evidence as to the lighting of the lamps, and the evidence of their having been seen by the "Ampelos" at 10.30 on the 24th of November may be put aside. Both these statements may be perfectly true, but they do not prove that the lights were burning at 2.30 a.m. on the

following morning. It is not improbable that the starboard light may have gone out, and that the red light may have been brought over to the starboard side when those on deck were doing all they could think of to attract the attention of a steamer steadily bearing down upon them. It is certainly a singular fact, and in keeping with the line of cross-examination of the "Ben Voirlich's" witnesses, that no evidence was offered to prove that either of the men on watch or the captain looked to see if the lights were in order. One would have thought that it would have been the first thing which would have occurred to them when they saw their danger. As regards their lights, they seem to be speaking to the usual practice on board their ship rather than to a particular fact specially noted at the critical time. On the other hand, two of the men roused from sleep by the cry that a steamer was coming on them do say that the first thing they did was to see if their lights were in order. No doubt as they came up from the forecastle and ran to the stern for safety, they had an opportunity of observing the condition of their lights. And they may have had the curiosity or the forethought to do so. Their account is at variance with the account of the "Ben Voirlich's" witnesses. But it is at least possible that they may have caught sight of the red light, and that in the terror and confusion of the moment they failed to observe that it was not in its proper place, and that the green light was not burning. Under the circumstances their recollection at such a moment and on such a point is hardly to be trusted.

The case, however, does not rest solely on the evidence before the Registrar. There are two additional circumstances which tell very strongly against the "Maria." In the first place, there are no less than three distinct statements in the

petition of the "Maria" which are disproved by the evidence on her behalf. The petition alleges that the light of the "Ben Voirlich" was first seen on the port bow of the "Maria." In the evidence it was sworn that it was first seen on the right side of the "Maria's" stem. The petition alleges that the red light of the steamer came into view before the collision. The evidence is that it was not seen till afterwards. The petition alleges that every precaution was taken to attract the attention of those on board the "Ben Voirlich" by "loud cries and shrieks and sounding of bell." The evidence is that they had bells, but that they did not strike them. It has frequently been held that in cases of this sort the petitioner or claimant can only succeed *secundum allegata et probata*, and that it is necessary and right to hold parties to their original statements. It is impossible to reconcile the statements in the petition on these three points with the statements in the evidence. The divergence tends to throw considerable doubt upon the evidence, because it shows that at the date of the petition the petitioners had not made up their minds on some important details of the story they were going to tell.

The other circumstance is still more serious. On the 8th December 1886, the day before the evidence on the part of the "Ben Voirlich" was taken, the captain of the "Maria" called with another man at the office of the agents for the owners of the "Ben Voirlich." He came of his own accord. The agents knew nothing of him. He shut the door, and said to Mr. Gilchrist, the principal in the firm, a gentleman familiar with Greek, that he had a proposal to make, that if Mr. Gilchrist would pay him a sum of money he would exonerate the English steamer. Mr. Gilchrist asked him how he could do so. He said he would confess he had no lights up. On the

next day he overtook Mr. Gilchrist going from Court, and said he wanted to speak to him again. He went to the office with Mr. Gilchrist. The captain of the "Ben Voirlich" was there, and the offer was repeated. The captain of the "Maria" was examined as to this offer by the Counsel on both sides. He shuffled with the questions that were put to him in such a way as to make it impossible to place any reliance on his testimony. Mr. Gilchrist was examined in Court at the trial. There can be no doubt that his evidence is perfectly trustworthy. The only way in which the learned Counsel for the "Maria" attempted to meet this evidence was by calling the transaction a proposal for a compromise.

In the result their Lordships have no hesitation in accepting the evidence on the part of the "Ben Voirlich" in preference to that on behalf of the "Maria."

Their Lordships have been advised by their nautical assessors that, assuming the evidence on the part of the "Ben Voirlich" to be true, the mate of the "Ben Voirlich" was not to blame for porting when the red light of the "Maria" appeared, that being a more prudent course under the circumstances than starboarding with the view of endeavouring to cross the bows of the "Maria." In this opinion their Lordships concur.

Their Lordships, therefore, have come to the conclusion that the "Maria" was solely to blame for the collision.

With regard to the judgement of the Consular Court, it is sufficient to observe that, owing probably to the view taken by the naval assessors, the Court was not careful to consider the evidence which their Lordships have been compelled to review.

Their Lordships will humbly advise Her



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**Majesty that the judgement of the Consular Court ought to be reversed.**

In the principal action of the "Maria" against the "Ben Voirlich" the petition must be dismissed, with costs.

In the cross action the verdict must be entered for the "Ben Voirlich." And there must be the usual reference as to damages.

The Respondent, the master of the "Maria," must pay the costs of this appeal.

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