

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Malcomson v. Meeson (ship "Malvina"), from the High Court of Admiralty of England ; delivered 13th April, 1863.*

---

Present :

SIR EDWARD RYAN.

THE MASTER OF THE ROLLS.

SIR JOHN TAYLOR COLERIDGE.

IN this case the "Malvina," a screw steamer of between 300 and 400 tons burthen, at about half-past 7 o'clock on the evening of the 6th of December, 1861, struck the "Mystery," a barge laden with sugar in Blackwall Reach, and sank her.

The proceedings are instituted by the owner of the "Mystery" against the owners of the "Malvina," on the ground that the collision was occasioned solely by the default of those on board the "Malvina," for the purpose of obtaining payment of the damages sustained by reason thereof. It was determined by the High Court of Admiralty that the steamer was solely to blame for the collision, that the pilot was to blame, and that those who navigated the steamer were also to blame. In the course of the argument two questions were raised, one of law and one of fact. The point of law, raised by the Appellants, was that the Court of Admiralty had no jurisdiction to take cognizance of such a case ; but the learned Judge of that Court overruled this objection and held that the 7th section of the 24th of Vict., c. 10, which gives the High Court of Admiralty jurisdiction over any claim for damage done by any ship, put an end to the difficulties which might have arisen from the words of the statute of the Act 15 Rich. II, cap. 5. Their Lordships concurred

[170]

in this view at the hearing of this case and did not call on the Counsel for the Respondents to argue the point, being then, as they now are, clearly of opinion that the words of the 7th section of the 24th Vict., do by express words confer the jurisdiction on the High Court of Admiralty, and that it was the intention of the Legislature, to be gathered from the words and the whole scope of the Statute, to give the utmost extent of jurisdiction to that Court in cases of collision.

The question of fact is whether the steamer was to blame for this collision, and this question divides itself into two branches: first, whether the pilot was to blame, and secondly, whether there was any negligence on the part of those who navigated the steamer contributing to produce the collision.

The facts, as they are either admitted or are established by the evidence without contradiction, are that the "Malvina," bound from Belfast to London, arrived off Gravesend on the 6th of December, 1861, about 4 o'clock in the afternoon, where James Voss, a duly licensed pilot, boarded her and took charge of the ship; that she arrived in Blackwall Reach about half-past 7 o'clock. The tide was half ebb and running from three and a half to four knots an hour. The night was a fine clear night. At this time there were four barges coming down the river: the "William," with a lighterman named Cossington on board, was ahead of the others; and nearly in the mid-stream, about 100 or 150 yards behind him, were two mud barges and the "Mystery," all nearly abreast, coming down with the ebb tide at the rate of from three and a half to four knots per hour; and some way behind the barges a brig was coming down the river. The steamer had all her proper lights burning clearly, she passed to the southward, that is, on the Kent side of the river, the barge "William," with Cossington on board of her, as he says, "as nigh as could be a touching." About 100 or 150 yards behind were the three barges; one mud barge was to the northward; next to her, about ten or twelve feet off, was another mud barge, aboard of which was the witness Henderson; and next to this mud barge on the south, that is, towards the Kent shore, was the "Mystery," aboard of which were King and the witness Clay. The steamer attempted to

pass between the "Mystery" and the barge which was in the centre. She grazed the mud barge, which touched her about six feet from the bow, and slid alongside of her, and she struck the "Mystery" on the starboard bow just before the starboard bollard, and cut her, according to the evidence of Whitlock, the builder, almost down to the water's edge, in a direction "from forward towards aft part inclined towards the stern." She sank immediately. One of the men aboard her, the witness Charles Clay, got on an oar and was afterwards picked up by a boat from the brig; the other man, King, was drowned.

The first question that arises in this state of facts is, was the pilot to blame for this collision? The proper place to which he ought to have taken the steamer, in compliance with the Merchant Shipping Act, was the starboard side of the mid-channel of the river. Their Lordships consider it to be clearly established that the "Malvina" was not in this position, but that she was to the south or port side of the mid-channel of the river. The evidence of the three witnesses, Clay, Cossington, and Henderson, all concur in this; and, upon their own evidence, the Appellants are in this dilemma in this part of the case. If the "Malvina" was on the starboard or north side of the mid-channel when she met the three barges, and ran into and sank that one of them which was most to the south, no excuse or explanation can be given why she did not go to southward of the "Mystery," as on that assumption she would have been going only into the mid-channel of the river to do so. If, on the other hand, she could not go to the southward of the "Mystery" by reason of the risk of running a-ground, then it is obvious that she must have been to the southward of the mid-channel of the river, and not in her proper place. One of the witnesses, Cossington, says that he thinks she could not have gone to the southward without running the risk of running a-ground; and the pilot himself positively states that he could not have gone to southward of the "Mystery" "without getting on to the shore;" and another of the witnesses states that the spot where the barge was sunk was not more than 50 yards from the Kentish shore. Not only, therefore, is the testimony, in their Lordships' opinion, conclusive that she was to the south side of mid-channel, but, as the learned

Judge of the Court below observes, no distinct denial of that particular fact is to be found in the pleadings of the Defendants, although it was expressly averred in the 7th Article of the Petition of the Plaintiffs.

It may, however, be that the state of the river, or some other causes over which the persons who navigated the "Malvina" had no control, prevented the pilot from keeping her in the course directed by the Statute. Their Lordships have examined the evidence carefully, but in vain, for the purpose of ascertaining whether anything of this sort can be found. Nothing of any precise or tangible character is even averred for that purpose. The pilot says that he could not have gone to northward because "there were several brigs lying in the roadstead just at the spot;" but this is mere vague assertion,—it is not proved that there was one, and the fact is expressly contradicted by the evidence of the lightermen, who say that the river was clear to the northward. The evidence of the pilot is also unsatisfactory in other respects, and scarcely so trustworthy as the rest of the testimony; in one point he is clearly wrong; all the other witnesses put the spot where the collision took place as opposite the Sea Witch public-house, but the pilot places it opposite the Thames Police Station, a considerable distance farther down the river, and nearer to Blackwall, and he marked a cross accordingly in the chart in that spot for the purpose of pointing out the place.

The brig that was running down the river was some little distance behind, as is proved by the circumstance that she put out a boat which took up the witness Clay. The witness Cossington expressly says that there was nothing to prevent the steamer from going to the northward; that both he and all the men on board the barges called out to the steamer to port her helm and go to the northward. The burden of proof lies on the steamer to show distinctly what obstacles there were to prevent her from going to the northward. She fails in doing this, and merely brings forward vague assertions, which are contradicted by distinct and unequivocal evidence. Their Lordships, therefore, are of opinion that the steamer did not obey the directions of the Merchant Shipping Act by keeping to the starboard side of the mid-channel, and that

Judge of the Court below observes, no distinct denial of that particular fact is to be found in the pleadings of the Defendants, although it was expressly averred in the 7th Article of the Petition of the Plaintiffs.

It may, however, be that the state of the river, or some other causes over which the persons who navigated the "Malvina" had no control, prevented the pilot from keeping her in the course directed by the Statute. Their Lordships have examined the evidence carefully, but in vain, for the purpose of ascertaining whether anything of this sort can be found. Nothing of any precise or tangible character is even averred for that purpose. The pilot says that he could not have gone to northward because "there were several brigs lying in the roadstead just at the spot;" but this is mere vague assertion,—it is not proved that there was one, and the fact is expressly contradicted by the evidence of the lightermen, who say that the river was clear to the northward. The evidence of the pilot is also unsatisfactory in other respects, and scarcely so trustworthy as the rest of the testimony; in one point he is clearly wrong; all the other witnesses put the spot where the collision took place as opposite the Sea Witch public-house, but the pilot places it opposite the Thames Police Station, a considerable distance farther down the river, and nearer to Blackwall, and he marked a cross accordingly in the chart in that spot for the purpose of pointing out the place.

The brig that was running down the river was some little distance behind, as is proved by the circumstance that she put out a boat which took up the witness Clay. The witness Cossington expressly says that there was nothing to prevent the steamer from going to the northward; that both he and all the men on board the barges called out to the steamer to port her helm and go to the northward. The burden of proof lies on the steamer to show distinctly what obstacles there were to prevent her from going to the northward. She fails in doing this, and merely brings forward vague assertions, which are contradicted by distinct and unequivocal evidence. Their Lordships, therefore, are of opinion that the steamer did not obey the directions of the Merchant Shipping Act by keeping to the starboard side of the mid-channel, and that

there existed no obstacle or impediment to justify her in so doing, and consequently that the pilot was to blame for the collision which took place.

There is also another circumstance which tells unfavourably for the Appellants on this part of the case : the three witnesses for the Respondents say that the steamer was going a good pace, and that she was going fast. This is contradicted on the part of the Appellants, who say that she was merely going two miles over the ground ; but as this is a matter which ought not to be allowed to rest on opinion or estimate, and which could only accurately be proved by the Appellants, their Lordships regret that the engineer of the steam-vessel was not called to state the exact speed at which she was going : he no doubt could have told how many revolutions in a minute the engines were making ; and it is to be observed that the vessel must have come into collision with the barge with great force to inflict the blow described in the evidence of the builder.

The next question which their Lordships have had to consider is, whether any blame is also to be imputed to those who navigated the "Malvina." This depends in a great measure on the look-out that was kept on board the "Malvina." The mate is not examined ; he was absent. Their Lordships concur with the learned Judge of the Court of Admiralty in considering that, under the circumstances, this ought not to prejudice the case of the Appellants. This point, therefore, rests entirely on the evidence of the pilot and of Fagan, the quartermaster of the "Malvina." Fagan says that he and the mate were both on the fore-castle-head keeping a look-out, and that as soon as he saw the barges he reported them to the pilot. But it is clear that the pilot saw the barges first, for he expressly says he asked the mate if there was not something ahead, and that the mate looked and said, "Yes, there's barges," and Fagan does not say that he saw them before the mate ; and in another place the pilot expressly says, "I asked the mate first. I said, 'There's something a little above, a barge or two ;' and he said, 'A whole lot of craft.'" It is therefore clearly established that the look-out men did not see the barges first, or did not report them ; it seems also that this was not owing to the circumstance that the pilot was in a better position for seeing, for he inquired from the mate what there

was above, and the mate answered him by stating that it was a lot of craft, apparently showing that from his position he could discern them better than the pilot. Another circumstance in the evidence leads strongly to the conclusion that no sufficient look-out was kept on board the "Malvina." This question was put to the pilot. "Do you remember seeing any barge before you came to this you are now describing?" that is, the "Mystery" and the two mud barges; to which his answer is, "No, ne'er a one." And yet Cossington, in the barge "William," was 100 or 150 yards a-head of them, and passed so close to the steamer as to be almost touching her—"as nigh as could be a-touching" is the expression he uses—and yet no report of this barge was made by the look-out men, nor was it seen by the pilot; yet it must have been just a-head of them, and only escaped being run into by the exertions of the witness Cossington, who also says that he could not see any one at the bow, though he saw two persons on the bridge, and though the steamer had only a rail, and not a bulwark on the forecastle. Their Lordships think that if the barge "William," which the witness Cossington was navigating, had been seen and reported to the pilot while the steamer was 200 or 250 yards distant from her, which, according to the evidence relating to other barges, their Lordships think might and ought to have been done, then that in that case the "Malvina" might easily have passed to the northward, and have avoided the whole cluster of barges. Considering all these circumstances, their Lordships have felt themselves compelled to come to the conclusion that the look-out men were remiss, and not as attentive and careful in ascertaining or reporting what vessels were a-head of the steamer as is proper and essential in all places, but more especially in a river so crowded with craft as the Thames, and that their remissness in this respect contributed to cause the collision.

The only remaining point on which it is proper to make any observation is, whether the men in the "Mystery" could have done anything effectual to avoid the collision which they omitted to do. The evidence on this subject on both sides seems to make out clearly that they could not. What the pilot desired them to do, as he states in the evidence, would only have

made the collision more inevitable, if indeed that were possible. In the examination-in-chief, he says he wanted the barge to straighten her head; but in the cross-examination, he stated that he wanted the men on board the "Mystery" to pull from the starboard bollard, which would have laid her still more across the stream than she was then lying: for, as it was, it appears by the evidence of the builder David Whitlock that she was struck by the steamer on the starboard bow about a foot above the starboard bollard. But the facts, which are incontestably proved, show the impossibility of the men on board the "Mystery" doing anything to prevent the collision. They were first seen, according to the pilot's account, about a quarter of a mile off; the steamer was going about two miles over the ground, the barges were coming down at four: they were, therefore, approaching at the rate of six miles an hour. The collision, therefore, would have taken place, at this rate of calculation, in about two minutes and a-half from the time when they were first seen. A barge is moved with difficulty, and the men were, as appears from the evidence, in complete suspense as to the course the steamer was going to take. All the men in all the barges shouted out to the steamer to port her helm, and go to northward. The impossibility of the steamer going between the barges, as she endeavoured to do, is shown by this: that when she struck the starboard bow of the "Mystery" with her stem, she at the same time grazed the mud barge next to the northward with her starboard side about six feet from the bow. It is obvious, therefore, that the distance between the two barges could not have exceeded six or seven feet, and it is through this space that a steamer said to be twenty-four feet broad is attempted to be made to pass. Their Lordships, on the whole of the case, concur entirely with the Court below. They think that there was culpable negligence both on the part of the pilot and of the persons who navigated the steamer; and they will humbly advise Her Majesty that this Appeal be dismissed, with costs.

---