

Wednesday, December 5.

SECOND DIVISION.

[Lord M'Laren, Ordinary.]

MACLAREN AND OTHERS v. THE COMPAGNIE FRANCAISE DE NAVIGATION À VAPEUR, *et e contra*.

Shipping Law—Liability for Collision—Negligence—Onus of Proof.

Where in an action arising out of a collision at sea it was proved that on board one of the vessels everything was in good order at the time of the collision, while on board the other vessel the crew were, till within a few minutes of the collision, engaged in a tedious operation, which diverted their attention from the navigation of the vessel, and the captain had left the deck and gone below in a drunken condition—held that the *onus* of disproving the fault leading to the collision rested on those in charge of the latter vessel, and (on the evidence) that that *onus* had not been discharged.

These were cross actions at the instance of William Maclaren and others, the owners of the steamship "Thames," against the Compagnie Francaise de Navigation à Vapeur, Marseilles, who were owners of the steamship "Lutetia," and by that company, as owners of the "Lutetia," against Maclaren and others as owners of the "Thames." The actions arose out of a collision near Oran on the night of 17th November 1881 between the "Thames" and the "Lutetia." In each case the damages were laid at £5000. The owners of the "Thames" averred that the collision had occurred through the fault of the "Lutetia," and the owners of that vessel denied fault, and alleged the fault to be that of the "Thames."

The actions were conjoined, and a proof was led as to the circumstances which gave rise to the collision. It appeared that the "Thames" had left Oran on her passage to Valencia, and was steering nearly N.N.E. towards the Spanish coast, while the "Lutetia" had come from Marseilles, and was bound for Oran, her course being S.S.W. The vessels came in sight of each other after 8 p.m. in the month of November on a clear night. At the time of the collision the master of the "Thames" was in the cabin, and the vessel was in command of the first mate, who stated—and he was supported by the crew on the point—when he came in sight of the "Lutetia," he saw, or thought he saw, her red light, indicating to him that she was coming to his port side, and he accordingly turned his ship's head two points to starboard, or towards shore. The evidence of the captain of the "Lutetia," on the other hand—who was a skilful sailor, and had frequently made the voyage before this occasion, and who was also supported by his crew—was to the effect that he saw, or thought he saw, the green light of the "Thames," indicating that she lay to starboard of him, and he altered his course half a point to starboard, or inshore. Both vessels being thus steering almost towards the same point, the collision occurred. The crew of the "Lutetia"

deponed that the captain of the "Thames" was drunk when the collision occurred. This was denied by those on board the "Thames." It appeared that the "Thames" left Oran with her anchors dragging, and so badly were they fouled that the vessel had to be stopped altogether after she had left the harbour in order to get them on board in ship-shape order. The crew were engaged in this operation till within a few minutes of the collision, and the captain had gone below before the operation was completed. As soon as the collision took place he jumped on board the French vessel in his shirt and trousers, and the French crew deponed that he was drunk, and very much excited. On board the French ship, on the other hand, it appeared that everything was in good order.

The Lord Ordinary (M'LAREN) pronounced this interlocutor:—"Finds that the collision libelled was due to the fault of the steamship 'Lutetia:' Therefore in the action at the instance of the owners of the 'Lutetia' against the owners of the 'Thames,' assolizes the owners of the 'Thames,' and in the action at the instance of the owners of the 'Thames,' finds them entitled to damages; and in respect of the joint-minute remits to William Richards, average adjuster, London, to assess the said damages; finds the owners of the 'Thames' entitled to expenses in both actions, &c.

Opinion.— The rules of navigation applicable to the case appear to be these:—

"1. If two steamers are approaching each other in parallel courses, each is to keep its course and to pass the other, whether to starboard or to port, as the case may be.

"2. If two steamers are approaching each other end on, each is to put its head to starboard, so that they may pass port side to port side, or red light to red light.

"3. If two steamers are approaching each other at any angle, the vessel which has the other on its starboard side is to keep out of the way, and the other vessel may keep its course.

"In the present case the vessels were steering in parallel courses, or very nearly so (N.N.E. and S.S.W.). Neither party has any interest in misrepresenting its course, because as they sighted each other at a distance of two miles there was ample time for either to get out of the way. There may have been a difference of half a point, which I disregard as falling within the limits of error of steering or error of compasses. I do not think there can be material error as to the courses on which the vessels were being steered. This accordingly is the fundamental fact of the case. These ships' courses were parallel to one another, and were approximately parallel to the adjoining line of coast. If each vessel had held on its course the probability is that they would have cleared each other. This is the opinion of the witnesses who were asked the question, and it is in accordance with the probabilities of the case.

"There is an unfortunate conflict of evidence as to which of the vessels lay to seaward of the other. The vessels being, as I have said, on approximately parallel courses, if it was the fact that the 'Lutetia' was to seaward of the 'Thames,' each vessel would see the red or port light of the other, and might have passed port to port. If the 'Thames' was to the west or seaward of the other vessel, then their starboard or green lights would

be mutually visible, and they might have passed starboard to starboard.

"Now, according to the evidence of the officer in command of the 'Thames,' when he came in sight of the 'Lutetia' he saw, or thought he saw, her red light, indicating to him that she was coming towards his port side, and he accordingly turned his ship's head two points to starboard, or towards the shore, meaning to increase the lateral distance between the vessels.

"The evidence of the master of the 'Lutetia' is to the effect that he saw, or thought he saw, the green light of the 'Thames,' indicating that the 'Thames' lay to starboard of him, and he altered his course half a point to starboard, or in-shore, meaning in like manner to increase the lateral distance between the vessels. I cannot doubt that both vessels acted in good faith and in the design of clearing each other, because it is impossible to suppose that either of them would deliberately run towards shore across the bow of the other, and in such a manner as to risk a collision. One or other of them was probably under a mistake as to the colour of the light seen; but as each is supported by his men on this point, I am unable to say on which side the mistake occurred. It is just possible, seeing that the vessels were approaching each other in the direct line, that some momentary irregularity of steering may at one instant have rendered the red light visible to the one vessel, and its green light, during another momentary interval, to the other vessel. Be that as it may, it is proved, as far as anything can be proved, that both vessels altered their course to the eastward, the one by half a point, the other by two points, so that their courses would cross each other obliquely at an angle of at least two and a half points. In this, so far as I can see, neither vessel was to blame. The vessels were visible to each other by night at the distance of two miles, and there was no immediate danger of a collision. The question of fault really arises when the vessels came within such a distance as to make it necessary to take measures for avoiding a collision.

"Now, whatever may be the truth as to the particular lights seen when the vessels sighted each other, if it be true that their courses were altered, as I have stated, the 'Lutetia' proceeding S.S.W. half S., and the 'Thames' proceeding N.E., or N.E. half E., and the two vessels approaching each other at an angle of at least two and a half points, it follows that the courses of the vessels were no longer parallel, but were tending to cross each other in a south-easterly direction, or towards the land; and looking in that direction, it is clear that the 'Lutetia' had the 'Thames' on her starboard side. The 'Lutetia' was therefore the vessel which according to the rules of navigation was bound to keep out of the way of the other. The vessels being in the position I have described, I think the red or port light of the 'Thames' must have been visible to the 'Lutetia' as soon as the courses of the vessels were altered; and the 'Lutetia' being thus apprised that she had made a mistake, ought immediately to have put her head to starboard and passed to seaward of the 'Thames.' Her people say that they did not see the red light of the 'Thames' until they were so near that a collision was inevitable. But I think they ought to have seen it at an earlier period. According to the evidence of both parties, the vessels

changed their courses at a distance of two miles, or at least a quarter of an hour's journey; and while, I daresay, the master of the 'Lutetia' was honestly under the impression that the green light of the 'Thames' was towards him until near the moment of the collision, I think he was mistaken in that impression, and that if he had looked attentively he would have noticed that the 'Thames' was presenting her red light towards him in sufficient time to enable him to avoid a collision. In not noticing that fact in time I think he is chargeable with negligence causing the collision.

"I have now to consider whether the 'Thames' is chargeable with negligence. After the 'Thames' had altered her course two points towards shore, the boatswain and mate observed with alarm that the 'Lutetia' was bearing right upon them, instead of keeping out to sea. What were they to do? They did not think it safe to put the 'Thames' further round to starboard for fear of running her on shore, and it would not have been consistent with the rules of navigation to turn her head to port away from the shore, because the 'Lutetia' was on the port side of the 'Thames,' and according to these rules, the vessel which has the other on the port side when these vessels are crossing is to keep her course. I am, therefore, of opinion that the 'Thames' was steered throughout in accordance with the rules of good seamanship. A point is made by the owners of the 'Lutetia' as to the disappearance of the master of the 'Thames,' and his alleged intoxication. The master is proved to have been in the cabin at and for some time before the collision, and after the collision he behaved in an excited and unseemly manner. If he was intoxicated, his presence on deck would have been useless, and it does not appear that the interests of the owners have suffered in any way by his absence. The 'Thames' was for the time being navigated by the first mate, a competent officer, holding a master's certificate, and who, if my opinion on the main question be well founded, did all that was incumbent on the officer in command of the vessel. I therefore find that the collision was caused by the fault of the 'Lutetia.'

The owners of the "Lutetia" reclaimed, and argued—Even assuming that there was an absolute inconsistency in the evidence as to the sighting of the respective vessels' lights, the proof disclosed that whereas the "Lutetia" was sailing with everything in proper order, the crew of the "Thames" were, till within a few minutes of the collision, engaged in a tedious operation requiring all their attention. During that operation the captain had left his post and gone below, there being no unavoidable necessity for his doing so. In these circumstances there was a probability that the error lay with that vessel, and the *onus* of disproving negligence lay on it, and that *onus* had not been discharged. There was, too, an additional element in the case against the "Thames," in the fact that the captain was drunk at the time of the collision—*Ever v. Board of Trade*, June 1, 1880, 7 R. 835, and the "*Glan-nibanta*," May 29, 1876, L.R. 1 Prob. Div. 283.

The respondent supported the judgment of the Lord Ordinary.

At advising—

LORD JUSTICE-CLERK — This is a perplexing case, and I have considered it to the utmost of

my attention. The Lord Ordinary, who heard the evidence, has gone into it very carefully, and I hesitate to differ from him in his verdict on the facts brought out. But the interests here are important, and undoubtedly there is on the evidence, which is very full, an absolute conflict on the question on which the whole case turns. It seems that the French vessel left Marseilles for Oran, and on the other hand the "Thames" was clearing out of Oran to Valencia, and I think we may hold it as proved that the course of each vessel was exactly the converse of the other, so that unquestionably if that course had been continued the vessels would have come close together, but would have cleared each other in passing. They did come close together, and the owners of the "Thames," who are the pursuers in the first action, say that after sighting the "Lutetia" they was her intention to pass to starboard of them—saw a red light exhibited, which showed that it that the French master suddenly starboarded his helm, and the collision then took place. On the other hand, the French witnesses agree in saying that the only light shown was a green or starboard light, and that while it was intended to pass the "Thames" on the starboard side, the latter vessel suddenly went across the bows of the "Lutetia," too late to avoid the collision. The whole question then depends on the question as to what light was in point of fact shown, the men on board the "Thames" deposing, as I have said, that the only light they saw was a red one, while, on the other hand, the crew of the "Lutetia" are equally clear in deposing that the "Thames" only showed a green one until the vessels were within 200 yards of each other. We have then the troublesome task of giving judgment on the conflict of evidence on this point. The Lord Ordinary, while he does not accuse the crew of the "Lutetia" of wilful misstatements, thinks they must have made some mistake, and that it would rather appear that they ought to have seen the red light of the "Thames" in sufficient time to prevent the collision. On the other hand, this view is at variance with the depositions of the French crew. Is there any preponderating evidence on either side, or is there an equality in the evidence of both? I am of opinion that the parties are not on equal terms here, and that there is a clear balance of evidence in favour of the French crew, for their opportunities of observation were better than those on board the British ship. The French vessel was well manned, in good order, and commanded by a skilled navigator who was in the habit of sailing this particular voyage, and could not possibly on a clear night, such as the one in question, have mistaken a green for a red light. I cannot say as much for the "Thames." She had started with her anchors dragging, and they were fouled to such an extent that she had to stop altogether after she had left the harbour in order to get them on board again. In the second place, the captain, though the crew was short-handed for the work, left his post on deck and went below, knowing that the vessel was being navigated under difficulties, and did not wait to see the anchors put right. That is a serious matter where it turns out that a collision takes place, and a captain not on duty in such circumstances is certainly to blame unless it can be shown that his duty has been discharged by some-

one else equally capable. In the third place, I cannot help coming to the conclusion that the captain was not in a condition to discharge his duty. The evidence on this point is, I think, complete, and the master of the "Lutetia" speaks in forcible terms as to the captain of the "Thames" having leapt on board the "Lutetia" after the collision in a drunken condition. My whole ground of judgment, then, in the case is, that I find in it those elements which entitle me to believe one set of witnesses and to doubt another. I do not say that the British crew are guilty of wilful misstatement, but their attention was distracted from their ordinary duties by the extra work they had to perform, and the position of affairs on board their ship. On the whole matter, then, I do not think it necessary to say more. In my opinion the French captain and his crew have entirely vindicated their conduct in the matter.

LOORDS YOUNG, CRAIGHILL, and RUTHERFURD CLARK concurred.

The Court pronounced the following interlocutor:—

"Recal the interlocutor [of 20th July]: Find that the collision labelled was due to the fault of the s.s. 'Thames': Therefore in the action at the instance of William Edward Maclaren and others, owners of the 'Thames,' against the said Compagnie Francaise de Navigation à Vapeur, owners of the 'Lutetia,' and others, assoilzie the defenders from the conclusions of the summons; and in the action at the instance of the owners of the 'Lutetia' and others foresaid, against the owners of the 'Thames' foresaid, find the pursuers entitled to damages; and remit to William Richards, average adjuster, London, to assess the same and to report: Find that the owners of the 'Lutetia' and Cyprien Fabre & Company are entitled to expenses in both actions and in the conjoined actions," &c.

Counsel for Reclaimers, Owners of "Lutetia"—
Trayner—Dickson. Agents—Melville & Lindesay, W.S.

Counsel for Respondents, Owners of "Thames"
—J. P. B. Robertson—Jameson. Agents—J. & J. Ross, W.S.

Friday, December 7.

FIRST DIVISION.

[Lord Fraser, Ordinary.

M'GAAN v. FRENCH AND OTHERS (M'GAAN'S TRUSTEES).

Succession—Executor—Constitution.

An executor is entitled in settling with an alleged creditor of the deceased to require the creditor to constitute the debt at his own expense.

J. C. M'Gaan, as executor-dative of the late W. M'Gaan, sued John French and others (marriage-contract trustees of W. M'Gaan and his wife) for £41, 2s. 7d. as a balance due to the deceased (who as the survivor of the spouses was entitled to a liferent of the income of the funds in the trust) after giving credit for various sums. The