Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bland v. *Ross, the ship "Julia," from the High Court of Admiralty of England; delivered on the 13th February,* 1861.

Present:

LORD CHELMSFORD.
LORD KINGSDOWN.
SIR EDWARD RYAN.

THIS is an appeal against a Decree of the Court of Admiralty in an action brought by a steam-tug called the "Secret" against a vessel, the "Julia," which she was engaged to tow. The "Secret" seeks to recover damages for two collisions alleged to have been occasioned by the improper management of the "Julia."

The case is said to be of the first impression, and to involve the decision of nice questions of law, upon some of which complaint is made of the principles laid down by the learned Judge in the Court below in summing up the case to the Trinity Masters.

He is supposed to have held that the employment of the steam-tug at all, under the circumstances, was a wrong act, and that it occasioned the collision; that the responsibility of such employment rested entirely on the master of the "Julia;" and that on this ground, without more, the "Julia" must be condemned.

Their Lordships do not so understand the opinion of the learned Judge, and whatever novelty there may be in the circumstances of the case, they think that the principles on which it must be decided are very familiar to Courts of Justice, and admit of no reasonable doubt.

The tug was hired off Folkestone, and the contract was, that she should take the "Julia" in tow when required, and tow her as far as Gravesend. Their Lordships think it quite immaterial whether this hiring took place on the importunity of the crew of the tug, or on the spontaneous suggestion of the master of the "Julia." When the contract was made, the law would imply an engagement that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board of each; and that neither vessel, by neglect or misconduct, would create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken.

If, in the course of the performance of this contract, any inevitable accident happened to the one without any default on the part of the other, no cause of action could arise. Such an accident would be one of the necessary risks of the engagement to which each party was subject, and could create no liability on the part of the other. If, on the other hand, the wrongful act of either occasioned any damage to the other, such wrongful act would create a responsibility on the party committing it, if the sufferer had not by any misconduct or unskilfulness on her part contributed to the accident.

These are the plain rules of law by which their Lordships think that the case is to be governed. It does not appear to them to fall within the principles laid down in Fowler *v.* Priestly in the Court of Exchequer, which were subsequently acted upon in other cases, and were finally recognized and adopted by the House of Lords in the Scotch cases referred to in the argument.

The questions to be decided are:—

1. Did the accident arise from the misconduct of the ship?

2. Did the tug, by any misconduct on her part, contribute to the accident, or (what is in truth but another form of the same question) could she by using due diligence have avoided it?

3. If both these questions are decided in favour of the tug, can the ship escape the consequences of her misconduct, on the ground that it is to be imputed solely to the pilot, and in no degree to the master or crew?

4. Is the case of the tug, as stated in her libel, consistent with the facts as they appear in the evidence?

Upon the first point, viz., whether the ship was guilty of misconduct, and thereby wholly, or in part, occasioned the accident, their Lordships and the Naval Captains by whom they are assisted, entirely agree with the opinion of the Court below.

The master had taken a licensed pilot on board, and was bound to attend to his directions in the management of the vessel. He had engaged the tug off Folkestone to take the ship in tow when wanted, and to tow her up to Gravesend. It is obvious that this engagement by no means involved the necessity of keeping the ship constantly attached to the tug. In the voyage from Folkestone to Gravesend, where the engagement was to end, the course of the ship would be quite changed; and in rounding the Foreland and afterwards, the wind, which while the ship was going up the Channel was favourable, would, of course, if it continued in the same quarter, have a different bearing.

The tug having been engaged was immediately attached to the ship by a rope, which both the master of the tug and the pilot thought insufficient, but which the master of the ship determined to employ. It soon broke, and the tug dropped astern in order to gather it up, and having done so, came again alongside the ship on her starboard side, for the purpose of having another hawser attached to her.

What passed at this time appears to their Lordships to be of great importance. The wind was aft, blowing with occasional gusts, and the ship under the sail which she carried, and without the aid of steam, was going at the rate of five or six knots an hour. Under these circumstances the pilot was of opinion, and, as far as their Lordships can judge, most reasonably of opinion, that it would not be prudent to attach the tug to the ship; accordingly, when the tug came up for the purpose of throwing aboard the ship the line by which the hawser was to be drawn on board the tug, he motioned her off with his hand. The crew of the tug supposed that the meaning of this action was that the ship was not yet ready with her hawser. Some further movements took place on board the ship, which

were understood by those on board the tug to mean an invitation to throw the line on board, which they accordingly attempted to do, and after one or two failures succeeded in doing. The hawser was then attached by the crew of the ship to the line, and having been drawn on board the tug, was hung on to it in the usual manner.

For the act of thus attaching the ship to the tug, contrary to the advice of the pilot, the Judge in the Court below has held, and, as their Lordships think, properly held, that the master and crew of the "Julia" are exclusively responsible. The tug was to give her services whenever they were required; whether they were to be used or not was a matter for the discretion of those on board the "Julia." But however injudicious the act of so attaching the ship to the tug may have been, still, if there had been no subsequent misconduct on the part of the ship, it might have been argued that the risk, however great, was one incidental to the duty which the tug had undertaken, and that she was not, therefore, entitled to recover compensation for any injuries which, by reason of it, she might sustain.

But what are the facts with respect to the conduct of the "Julia," as they stand upon her own evidence? In the state of the wind, the danger of the "Julia" running over the tug depended partly on the sail which the "Julia" carried, and partly on the mode in which she was steered. Both these matters were to be regulated by the pilot; yet it appears distinctly by the evidence of the pilot, who is the witness of the Appellants, that he had objected to the tug being attached to the ship; that she was so attached without his knowledge; and that the fact was never communicated to him, and he was ignorant of it till the collision took place. How then was it possible that he should order the movements of the ship with reference to this most important circumstance? or how can the master of the "Julia" be excused on the ground of having obeyed, even if he had obeyed the orders of the pilot, given under such circumstances?

The tug having made fast the hawser the second time, proceeded a-head, keeping her helm a-port so as to keep a little to the starboard side, and out of the direct line of the "Julia's" course. In this state of things it was the duty of the "Julia"

to keep her helm a-starboard, and not to carry so much sail as to incur the risk of running over the tug. The pilot, however, was in ignorance that any such dangers were to be guarded against, or that any such precaution was required, and a strong gust of wind carried the ship with her starboard bow against the port sponsons of the tug, and the first collision was thus occasioned.

Their Lordships have not the least doubt that the "Julia" was in fault.

2. The next question is whether the tug in any way contributed to the accident.

It is said that she is to blame in two respects :— first, that she did not put on sufficient steam to keep her a-head of the "Julia;" and secondly, that when the danger was imminent, she did not slip the hawser, and turn aside out of the way of the ship.

In support of the first charge reliance is placed on the evidence that the master of the tug desired the engineer "to go easily" with his engines; but it is clear that this direction was given only when the hawser was first attached to the tug, and it appears to have been proper, in order to avoid a sudden jerk in drawing the hawser taut, by which it might have been broken a second time; but as soon as the master found that the "Julia" was gaining on the tug, he ordered all the steam to be put on, which, in fact, had been done before the order was given. In this respect their Lordships are satisfied that no blame is to be imputed to the tug.

With respect to the second objection—that the tug ought to have slipped the hawser, and have got out of the way, and the allegation that by slipping the hawser she might have escaped, there is perhaps more difficulty. But their Lordships are not satisfied that slipping the hawser at the last moment would have enabled her to get out of the way; and they think that the reason assigned for not doing so at an earlier period is sufficient. The fact that the ship was gaining upon the tug was open to the observation of those on board the "Julia." The tug assumed that they would observe it, and would do their duty by shortening sail. That they did not do so is accounted for by the circumstance that the pilot had been kept in ignorance that the ship was in tow. This objection,

however, depends almost entirely upon nautical considerations; and if it be a matter of some doubt, it is to be remembered that the Court is called upon to reverse a decision which, after full consideration, was arrived at by the Trinity Masters, and approved of by the Judge. The very question whether the tug had done all in her power to avoid the collision was distinctly put by the latter to the former, and answered by them in the affirmative.

The Court below had the advantage which their Lordships have not had, of seeing the principal witness—the pilot, and hearing his examination, and of judging how far his evidence was to be depended upon.

They who require this Board, under such circumstances, to reverse a decision of the Court below, upon a point of this description, undertake a task of great and almost insuperable difficulty. In all cases, as we have frequently observed, we must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong. And when a controversy arises upon facts of the nature of that now in question, there are some peculiarities in the jurisdiction which we are now exercising deserving of attention.

In a Court of Law, if the Judges are dissatisfied with a verdict as against the weight of evidence, they can send the case before another Jury. In the Court of Chancery, when the Court of Appeal reverses the judgment of the inferior Court on the result of evidence, the Judges of the Appellate Court are as capable as the Judge below (and, indeed, are presumed to be more capable) of forming an opinion for themselves, as to the proof of facts and as to the inferences to be drawn from them.

But in these cases of appeal from the Admiralty Court, when the question is one of seamanship, where it is necessary to determine, not only what was done or omitted, but what would be the effect of what was done or omitted, and how far, under the circumstances, the course pursued was proper or improper, their Lordships can have but slender means of forming an opinion for themselves, and certainly cannot have better means of forming an opinion than the Judge of the Admiralty Court.

They do not speak with reference to the distinguished person who now fills, and has so long filled, that office, though it would be impossible to imagine a stronger example of the truth of the remark; but any Judge who sits from day to day on such cases must necessarily acquire a knowledge and experience to which ordinary members of this Board cannot pretend. They must in such cases act entirely upon the advice of the Nautical Assessors, who form no part of the Court, whose opinion they can regard only as they might regard the advice of any nautical men out of Court. If they reverse in such cases, they must upon the authority of their Assessors overrule the judgment of the Trinity Masters, who form a part of the Court below, and they must do this without any certain means of knowing the comparative weight which is due to the two authorities, and without hearing what reasons might be assigned by the Trinity Masters, if they were present to justify the conclusion at which they have arrived.

We have thought it right to make these observations in order that the vexation and expense of hopeless appeals may, as far as possible, be avoided, by parties being made aware of the difficulties which the Appellants must have to encounter when the merits depend upon the differing opinions of nautical men. The importance of these considerations is the greater by reason of the extraordinary increase which has taken place, and is still continuing, in the number of collision cases brought before the Court of Admiralty. According to a Return with which we have been furnished by Mr. Rothery, it appears that, in the first twenty years of the present century, the number of such cases was 112; in the second twenty, 153; and in the last twenty, and up to the 15th of December of last year, 2,216—the number in 1860 considerably exceeding those of any previous year.

Their Lordships are of opinion, that the Judgment of the Court below, "that the 'Julia' was alone to blame for the collision, and that the 'Secret' did everything which it was her duty to do in order to avoid it," must be supported.

There remain the third and fourth questions, whether the blame is to be attributed exclusively to the pilot, and whether the case proved by the

"Secret" in her evidence is the case stated in her libel.

3. The third question may be considered as disposed of by what we have already said; but all doubt upon it, if there were any, will be removed by the evidence which we have to consider on the fourth question.

4. The statement in the libel is, that the "Secret" had her helm hard a-port; that, as the "Julia" gained upon her, she hailed the ship to put her helm a-starboard; that the pilot gave orders accordingly, "but that the master ordered the helm to be put hard a-port, which was done; and that the effect was, that the bow of the 'Julia' came to leeward, and the 'Julia' with her starboard-bow came into collision with the port-sponson of the 'Secret' abaft her paddle-box." It alleges that the collision and the damages consequent thereon were occasioned solely by those on board the "Julia" in improperly porting her helm instead of keeping it to starboard.

The allegation of the "Julia" is, that her helm before and at the time of the collision was kept hard a-starboard, and was never put a-port at all, and it insists that the first collision was occasioned exclusively by the tug having by some mismanagement (it is not explained by what mismanagement) got athwart the bows of the ship.

Now, it is to be observed in the first place, that in the position in which the vessels were, the accident could hardly have happened unless either the "Secret" had starboarded, or the "Julia" had ported her helm. But not only is it extremely improbable that the "Secret" should have so exposed herself wantonly to destruction, but it is positively sworn by the master of the tug that the helm was kept hard a-port. This statement is confirmed by the mate, who was at the wheel, and by the second mate, and, as regards the orders given by the master, by a seaman who heard them, and no statement to the contrary is contained in the allegation of the "Julia." This fact, therefore, must be considered as established, and if so, it almost draws after it, as a necessary inference, the conclusion that the "Julia" ported, and that this was the cause of the collision, as stated by all the witnesses on board the tug.

It does not, however, rest here. A witness is

produced who was on board the "Julia," and he says expressly that the pilot had ordered the man at the helm to keep it well a-starboard, but that afterwards the master suddenly came up and ordered the helm hard a-port, and that within a minute and a-half afterwards the collision took place.

This, of course, entirely confirms the story of the "Secret," and, if it be true, removes all doubt as to the misconduct of the master, and as to his disobedience of the orders of the pilot.

It is said, however, that this account is not to be believed, and that it is contradicted by those on board the "Julia." Now the crew of the "Julia" were about twenty in number, and of these only two are examined on her behalf. Neither of these men was an officer of the ship, and neither was at the helm at the time in question. One, Connar, was the carpenter, and the other was an able seaman. The first says he does not know how the helm was put; and the other says he thinks, from the direction of the ship, that the helm was a-starboard, and that it was not put a-port, but he is not positive. The absence of so many witnesses who would have been able to speak positively to this point, and who are not called, must weigh heavily against the Appellant. The captain, indeed, is said to be dead, but the absence of the mate, of the man at the helm, and others who might have known the fact, is unaccounted for. This deficiency is, however, said to be supplied by the pilot, but his evidence, when it comes to be examined, really amounts to nothing. He says that he ordered the helm to be put hard a-starboard just before the collision, that it was done, and that he ran forward to see the effect of it. This is consistent with the statement of the "Secret." The question is whether, after the pilot had given orders to starboard, those orders were not countermanded by the captain, and whether the helm was not put to port. Upon this all that the pilot says is, that "whether the man at the helm afterwards put it to port, or steadied it, he does not know; that it might have been done, and he not know it; he could not swear that it was; he should not expect that it was."

Upon this evidence their Lordships cannot doubt that the statement in the libel as to the cause of the first accident is supported.

As to the second collision, it is admitted by the Appellant that if the "Julia" is responsible for the first she must also be responsible for the second. Their Lordships are of opinion that she is responsible for the second, even if, with respect to the first, the case were not sufficiently established against her.

The evidence as to the second, in the view which their Lordships have taken, is important only as showing the disgraceful want of discipline which prevailed on board the "Julia"—the ill-feeling which existed between the captain and his officers and crew, and which may account in some measure for what it would otherwise be difficult to conceive, the gross misconduct and neglect of all proper precautions established against the "Julia."

Upon the whole their Lordships have no hesitation in advising Her Majesty to affirm the sentence complained of, with costs.