Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Anderson v. *Hoen and others* (*Her Majesty's ship "Flying Fish"*), *from the High Court of Admiralty; delivered the 8th March*, 1865.

Present:

LORD CHELMSFORD.
LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.

IN this Appeal no question has been raised as to the Appellant's liability for damages arising from the collision, which was the subject of the action, but he objects to the Decree of the Judge of the Court of Admiralty, so far as it renders him liable to a portion of the damages, which he contends was the result, not of the collision itself, but of the absence of nautical skill on the part of the captain of the Respondents' vessel in making no effort to rescue her from the peril in which she was placed by the immediate consequence of the collision, and of his want of prudence and judgment in refusing assistance which was offered to him, and which if it had been accepted would probably have prevented all the damage which afterwards ensued.

The collision happened about twenty minutes past 9, P.M., 30th November, 1861, in the English Channel, off Hastings, by Her Majesty's gun-boat "Flying Fish," of which the Appellant was Commander, running with her stem and port bow into the port quarter of the Respondents' vessel, the "Willem Eduard." It is admitted that the blame of this collision must be attributed solely to the Appellant. The effect of the blow received by the "Willem Eduard" was that a hole was made in her stern about five or six feet above the water line, and the steering gear was disabled. The master believing

that the vessel was making water, and was in danger of sinking, rigged a temporary steering apparatus, and stood in for the land, which he reached at about midnight of the same day, and ran her ashore three miles from Rye Harbour. The tide was then about half ebb. The night was dark, the wind being W.S.W., and the weather cloudy and squally. The coast guard, who were on duty at a station near Rye, being desirous of rendering assistance, and the surf on the beach being heavy, carried their boat and launched it abreast of the vessel, and got aboard of her about 2 o'clock in the morning. Attersoll, the chief boatman, in the presence of Tremble, a commissioned boatman of the coast guard, told the captain of the "Willem Eduard" that he was three miles from Rye Harbour, that where his vessel was lying was sand and no rocks, and that if he would give him charge of her he had no doubt that he could get her safe into Rye Harbour. But the captain refused this offer, stating, "It would be of no use trying." Attersoll then asked to be allowed to get out an anchor, but the captain said "No." He then inquired what he intended to do; the captain replied, "It is no use, the wind will be from the south-west, and the ship will go to pieces." Attersoll, after waiting some time longer to see if the captain would allow him to do his best to get the vessel into a place of safety, at about 3 o'clock got over the side of the vessel, and walked ashore, the tide having ebbed and left her high and dry. After Attersoll quitted the vessel, Tremble, who stayed behind, pointed out to the captain that the wind was two points off the land, and that they could get the vessel off, she being three miles to windward of the harbour, but "he still refused to let them try."

Attersoll returned to the vessel at 4 o'clock, when he and Tremble procured a light and walked round the vessel, which was still dry, and all the damage they could discover was on her stern and quarter, about five or six feet above the water line, and they asked the captain to give them some canvass and nails for the purpose of nailing the canvass over the damaged part, which he refused to do. When Attersoll got on board again, he asked the captain what he intended doing, and he answered, "The vessel will go to pieces." And upon Tremble

proposing to get her port anchor out, he replied angrily, "No anchor—no good." At 5 o'clock the tide began to flow, when Mr. Groom, the Receiver of Wreck for the port of Rye, and Mr. Buck, the Chief Officer of the Coastguard Station, went alongside the vessel, and repeatedly urged the captain to accept the services of the coast guard men, but he still refused all offers of assistance. At 5 o'clock the captain and the crew left the vessel, the men carrying their clothes and chests with them, and the captain taking away his chronometer. As the tide rose the vessel floated, and a little before 7 o'clock, the port wing of the foresail and gaff of the fore-trysail not being properly brailed up the wind caught these sails, and carried the vessel on to the beach. As she was driving in to the beach, the mainmast went overboard. At 7 o'clock, after the vessel was on the beach, there having been no one on board from 5 to 7 o'clock, and nothing having been done during that time, the captain said the coast guard might try their best, and he gave charge of the vessel to them, but it was then too late for any effectual services to be rendered.

When the vessel was seen about half-past 9 she was lying broadside on to the land, full of water, and the sea breaking over her. She afterwards went to pieces on the beach, and the greater part of her cargo was destroyed. The total value of the ship and cargo was 10,910*l.* 11*s.* 8*d.* The net proceeds of the sale of the wreck and cargo was 2,623*l.* 13*s.* 2*d.* Upon the hearing of the cause the learned Judge, assisted by two of the Elder Brethren of the Trinity House, pronounced for the damage sued for, and referred the question of amount to the Registrar, assisted by Merchants, to report upon. The Respondents, before the Registrar and Merchants, claimed compensation for a total loss, amounting to 8,286*l.* 18*s.* 6*d.*, after giving credit for the net proceeds of the sale of the wreck, and of the cargo recovered. The Appellants denied their liability for the damage consequent upon the refusal of the master to accept the services of the coast guard. No affidavits were used by the Respondents, nor were any witnesses produced by them before the Registrar and Merchants; but they relied entirely upon the written evidence filed in the cause. On the part of the Appellant six wit-

nesses were examined, all of whom had been present when the services of the coast guard were tendered and refused, and they were cross-examined on behalf of the Respondents. The Registrar reported that he was of opinion, for the reasons which he set forth in an exhibit to his Report, that there was due to the Respondents in respect of the damage proceeded for the sum of 1,110*l.*, together with interest thereon at 4 per cent. The reasons for this opinion were stated to be that the master showed both a great want of ordinary nautical skill in not taking any measures to save the vessel before the tide rose, and gross neglect of duty in not accepting the services of the coast guard men; that therefore the damages to which, in the opinion of the Registrar and Merchants, the Respondents were entitled were, 1st, the cost of the repairs to the vessel at the port to which she might have been taken, including the discharge and reloading of the cargo, and the demurrage and port charges, which they estimated at the sum of 610*l.*; and 2ndly, a reasonable sum for the services of the coast guard, and of the steam-tug in rescuing her from the shore, and taking her to a port of safety; and as the whole value of the ship and cargo was estimated by the owners at 10,910*l.*, they thought that 500*l.* would have been a proper remuneration to the salvors for their services.

This Report was objected to on the part of the Respondents, and they filed a Petition praying the Judge to refer it back to the Registrar for amendment, and the Appellant filed an Answer praying the Judge to confirm the Report. At the hearing of this Petition the Respondents proposed to produce witnesses who had not been examined before the Registrar and merchants. This was objected to on the part of the Appellant, but the learned Judge overruled the objection, and five new witnesses were produced by the Respondents. One witness who had been examined before the Registrar and merchants was produced and examined by the Appellant.

The Judge by Order referred back the Report to the Registrar, assisted by merchants, for amendment, condemned the Respondents in the costs incurred at the reference before the Registrar and merchants, but made no order as to the costs incurred by the objection to the Report. The learned Judge was of

opinion "that the Appellant had not substantiated his allegation, that a large part of the damage was not to be attributed to the collision, but was solely occasioned by the master's refusal to accept assistance. That to establish that defence, it ought to have been shown, not only that the master did refuse assistance as a matter of fact, but that such refusal arose from gross want of nautical knowledge, or *crassa negligentia*. That the true issue in the case was not whether the assistance of the Coast-guard or others, and the laying out of the anchor, might have been successful, but it was, whether there was such reasonable doubt on the part of the master who refused the adoption of such measure, that he was justified in declining to run the risk; or, putting it in other words, whether looking to the condition of the ship, the cargo, the weather, and the locality, he was guilty of gross nautical ignorance or gross negligence." The learned Judge stated that "had the case come before the Court solely upon the evidence produced before the Registrar and merchants, he thought it most probable, indeed he entertained little doubt, that the Court would have come to the same conclusions, as to matters of fact, as they did." But after adverting to the evidence of the witnesses produced by the Respondents on the hearing of their Petition, he added, "with this evidence before me is it possible for me to come to the conclusion that the master was guilty of gross nautical ignorance, or of gross negligence?" and he concluded by expressing his opinion that, as "against a wrong-doer, which, in legal estimation, the "Flying Fish" must be taken to have been, it could not be maintained that there was no reasonable doubt as to the course to be pursued."

Upon the hearing of the Appeal from this Judgment, two points were insisted upon by the Counsel for the Appellant: 1st. That the learned Judge ought not to have received fresh evidence upon the objection to the Registrar's Report; and, 2ndly. That such evidence was not sufficient to lead to a decision contrary to such Report. As to the admission of additional evidence the Counsel for the Appellant did not attempt to maintain that the learned Judge had no power to admit such evidence, but they contended that he thereby exercised his judicial discretion improperly. And they referred to former expres-

sions of opinion of the same learned Judge strongly condemnatory of the course of withholding evidence at the reference, and making a new case before the Court, particularly in the cases of the "Sir George Seymour" (1 Spinks' Admiralty Reports, p. 67), and the "Glenmanna" (1 Lushington's Reports, p. 122). They also insisted that the new Rules made in pursuance of the Acts of the 3 & 4 Vict., caps. 65 and 66, and 17 & 18 Vict., cap. 78, which came into operation on the 1st January, 1860, had introduced a new practice with respect to references before the Registrar, had armed him with more authority in conducting the inquiry, and had enabled the Judge to know the oral evidence taken before the Registrar by a transcript of the shorthand writer's notes, and therefore had considerably limited the discretion previously exercised as to admitting additional witnesses. Their Lordships do not think that these rules have at all the effect of restraining the power of the Judge, or of fettering his discretion as to the admissibility of fresh witnesses upon these occasions, a discretion which it is unnecessary to say must always be exercised with great caution, and with a careful regard to the peculiar circumstances of each case.

With respect to the value of the evidence produced before the learned Judge upon the hearing of the objection to the Registrar's Report, it must be observed that not one of the five witnesses who were called saw the "Willem Eduard" until she was on the beach, and at a time when it is admitted by all the Respondents' witnesses that it was too late to do anything to save her. Although, therefore, they are witnesses of perfect respectability and of competent experience, and although they express themselves with great confidence as to the impracticability of saving the vessel in the place where she first grounded, yet it is impossible to give as much weight to their conjectures (for they amount to nothing more), as to the evidence of the Appellant's witnesses, persons also of skill and experience, who saw the vessel where she was first lying, and who formed their judgment of the measures to be adopted upon the spot, and with the best opportunity of judging whether they were likely to be successful.

Taking, however, the whole of the evidence on

both sides into consideration, can it be said that the conduct of the captain of the "Willem Eduard," after he had run his vessel on shore in consequence of the collision, did not exhibit a want of nautical skill, and a gross neglect of duty? The learned Judge thought that in order to exonerate the Appellant from liability to the subsequent damage to the vessel it was necessary to show that the master was guilty of "gross nautical ignorance, or of gross negligence."

It appears to their Lordships that the principle upon which the owners of a vessel are to be exempted from liability for the acts or omissions of their master is not here laid down with perfect accuracy. The blame imputed to the master of the Respondents' vessel in this case is, that he made no effort to save her, and that he refused all offers of assistance which were made to him; and the proper question seems to be, whether in so acting he did, in the words of Baron Parke (in Tindal *v.* Bell, 11 M. and W., 232), "what a reasonable man would do under similar circumstances, where he had no other judgment but his own to resort to;" or in the words of the learned Judge of the Court of Admiralty himself, in the case of the "Linda" (1 Swab. 306), upon a question of abandonment, "whether the master had wilfully abandoned the vessel when he might have saved her, or had abandoned her through a want of *ordinary* nautical skill and resolution." It is to be observed that this was not the case of a sudden emergency, leaving no time for deliberation, when great allowances should be made for any error in judgment which may occur. In this case there was no danger to life, nor any immediate apprehension of the loss of the vessel, and the captain had some hours to decide what course was best to be adopted. The learned Judge was of opinion that "as against a wrongdoer, which," he says, "in legal estimation the 'Flying Fish' must be taken to have been, it cannot be maintained that there was no reasonable doubt as to the course to be pursued." But treating the "Flying Fish" as a wrongdoer is really begging the whole question. For the collision, and for all the consequences of that collision, the Appellant is responsible. But if the subsequent damage resulted from the acts or omissions of the captain of the "Willem Eduard,"

for that portion of the damage the Appellant is not only not a wrongdoer, but he is not even to be regarded as the doer of the act which occasioned it. It is quite true, as the learned Judge has said, that "if there was a reasonable doubt on the part of the master whether the measure proposed, or any other measure, would have been successful, he was justified in declining to run the risk, and would not be guilty of nautical ignorance or gross negligence." But the master appears to have exercised no judgment at all in the matter, but at once to have abandoned himself to despair, and to have regarded all efforts to save the vessel as hopeless. He seems from the first to have formed an erroneous notion of the extent of the injury she had sustained from the collision. He says that he ran her aground because after she had been struck by the "Flying Fish," he found she was making water very fast, and was in danger of foundering. And yet Attersoll, the coast-guard man, says that when he was on board, two hours after she was aground, he asked the master "if she made any water," and he answered, "No." And Tremble, another of the coast-guard men, says that the master told him she was not leaking. To reconcile these different statements, the Counsel for the Respondents allege that though the vessel made water while they were running to the shore after the collision, yet when the vessel was high and dry on the sand the water ran out of her. But this explanation can hardly be accepted, because if she was so shaken by the collision as the suggestion assumes, the vessel would have made water again while she was drifting to the beach ; and yet after she arrived at the beach the well was sounded and there was no water in her, and the lee bilge (that is, the bilge on the side that was lying over), was examined, and no water was found there.

The vessel therefore was clearly not in a state in which all attempts to save her were hopeless, and this must be taken into account in considering whether the master really exercised his judgment at all in the matter. Offers of assistance were made to him as early as 2 in the morning ; he said it was of no use, ".the wind will be from the south-west and the vessel will go to pieces." He was asked at 4 o'clock for a piece of canvas to nail over the hole

above the water-line; he refused to give it. At 5 o'clock offers of assistance were repeatedly made to him, which he as repeatedly refused. All this time he appears not to have been doing, or attempting or suggesting, anything to save the vessel, and at 5 o'clock he and the crew abandoned her without leaving a soul on board, and some of the sails not properly brailed up, and thus, when the vessel floated, the wind catching these sails carried her in 300 or 400 yards, and she again grounded on the beach. These circumstances furnish a strong ground for believing that if the offered assistance had been accepted it might have been successful. There were two modes suggested by which attempts to save the vessel, or at all events the cargo, might have been made: one by carrying out anchors and holding the vessel till she floated and then, with the assistance of a tug, carrying her into Rye harbour; the other, as suggested by one of the witnesses for the Respondents, to have forced her further on the shore. Whether either of these modes would have been successful it is impossible to do more than conjecture, though the witnesses for the Appellant speak very confidently of their expectation of success in their proposed experiment. But, however this may be, the master of the "Willem Eduard" never seems to have considered even for a moment any plan suggested to him, nor to have turned his own mind to the thought of how the vessel might be saved, but at once resigning himself to his fate he abandoned her to the mercy of the winds and waves, by which she was helplessly carried to her destruction. Under these circumstances it is impossible for their Lordships to arrive at the conclusion that the master exercised any judgment at all upon the possibility of saving his vessel. It appears that he attempted nothing because he had persuaded himself that nothing could be done, and that he rejected all offers of assistance, not after weighing the measures proposed, but because he had hastily determined that the state of his vessel would make every effort to save her unavailing. Their Lordships therefore agree in the conclusion to which the Registrar and merchants arrived, as to the master having shown want of ordinary nautical skill and neglect of duty, and they think that the witnesses produced before the Judge by the Respondents did not alter the

case, and that the learned Judge ought to have confirmed the report so far as it limited the damages to the immediate consequences of the collision. But they agree with the learned Judge in his objection to the conjectural estimate of the measure of damages made by the Registrar and merchants. They ought not to have formed any judgment as to the reduced damages except upon the evidence of witnesses. By which of the parties these witnesses should have been produced was made a question in the course of the argument. It seems clear that the Respondents could not have been expected to be prepared with proof of this description upon the reference. They claimed the entire value of the vessel and cargo *minus* the amount of the proceeds of what had been sold, and they could not know that the Registrar and merchants would reject that claim before their report was made. On the other hand, the Appellant contended that the Respondents were not entitled to damages beyond those which could be attributed solely to the collision, and the proof of the amount of those limited damages would seem more properly to have been a part of their case. But no evidence at all having been given, their Lordships think that the Registrar should have reported to the Judge his opinion that the Appellant was responsible only for the damages directly occasioned by the collision, and not for any which happened after the refusal of the master of the Respondents' vessel to accept the assistance which was offered to him, and that as to the amount of those limited damages no evidence had been given. If the Judge had adopted the view of the Registrar he would have confirmed the report but referred the matter back to the Registrar to ascertain the damages upon that footing, and then the onus of proving the amount to which the Respondents would be entitled upon this restricted view of their claim would have fallen upon them.

Their Lordships upon the whole of the case will humbly advise Her Majesty that the Decree appealed from should be reversed except so far as it condemned the Respondents in the costs incurred on the reference before the Registrar and merchants; that the cause be retained, and that it be referred back to the Registrar, assisted by merchants, to ascertain the amount of the damages to which the

Respondents are entitled down to the time when the master of the "Willem Eduard" first refused the assistance which was offered to him, and that there should be no costs of the Appeal on either side.