

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Marshall and Co. v. Moran and Co. (ship 'Ocean Wave'), from the Admiralty Court; delivered June 21, 1870.*

Present:—

THE MASTER OF THE ROLLS.

SIR JAMES W. COLVILLE.

SIR JOSEPH NAPIER.

THIS Appeal has been very ably argued, but their Lordships are of opinion that no sufficient grounds have been laid before them for disturbing the Judgment of the Court below.

They are anxious to state that in coming to this conclusion they do not mean to depart in any the slightest degree from the principles established by the 'Christiana' and the other cases in which it has been ruled that the owners of a vessel who claim the statutory exemption which the law gives at present, when ships are compelled to take a licensed pilot on board, must show that the neglect which has caused the accident was solely that of the pilot. Nor do their Lordships mean in any degree to affirm the proposition that if negligence in the selection of the tug 'Liverpool' had in this case been shown to be wholly or in part the cause of the accident, the pilot, and not the master and owners, would be responsible for that improper selection. But the reasons why they have come to the conclusion that this Judgment ought to be affirmed, are simply these:—they are of opinion that it is not shown upon the evidence that if this ship, and the steamer 'Liverpool,' which had her in tow, had been properly handled, she might not have been safely brought into dock. Upon the evidence it would appear that the 'Liverpool' had been frequently employed in towing vessels of even greater burthen than the 'Ocean Wave.' It is said, no doubt, that this was in fine weather, and there

is some evidence that the weather on the occasion in question was squally. It appears, however, to their Lordships that the evidence as to the weather is not such as to show that the master was really guilty of any negligence in attempting to have his vessel taken into dock in tow of the 'Liverpool,' and in that opinion they are confirmed by the nautical gentlemen who assist them.

No doubt, in this case, as in every other in which the party sets up an alternative case, the evidence as to the precise character of the negligence does not come out so strongly as it might have done if the parties had come into Court prepared to admit negligence, and to prove that it was solely that of the pilot. They set up the case of inevitable accident; that case fails, and the evidence upon which it fails discloses a case of negligence on the part of somebody. It then becomes the duty of the Court, which holds that some negligence has been established, to pronounce, upon the particular evidence before it, whose negligence it was, whether it was negligence for which the pilot was solely responsible, or whether it was negligence for which the master and owners were also responsible.

In the present case it seems to their Lordships, and in that opinion they are confirmed by their Assessors, that, if it be admitted that had these vessels been properly handled, the ship might have been got safely into dock, the negligence that occasioned the accident must be held to be that of the pilot. After the ship was under weigh he clearly was in command. There are two conclusions which may be drawn from the evidence: one, that he did not attempt to turn the ship in proper time, and that he approached too near to the 'James Foster, Junior;' the other, that, though he might have turned if he had properly manœuvred his ship at that spot, he did not make use of the proper manœuvres. Although their Lordships do not mean for one moment to say that for the absolute insufficiency of the tug he would have been responsible, yet it was clearly his duty, knowing, as he must have known, better even than the captain, what the powers of the 'Liverpool' were, to take his measures and to execute his manœuvres with reference to her motive power. Their Lordships are of opinion that he might safely have attempted to

turn the vessel earlier than he did. They are also informed by the Nautical Assessors that if, when he attempted to turn the vessel at the spot at which the attempt was in fact made, he had put some head-sail upon the ship, she would have turned within that space, and that the accident might, in that case, have been avoided. That is a point which, whether taken or not in the Court below, appears to our Nautical Assessors to be very important; and, if they are correct in thinking that the head-gear of the vessel might have been so employed, the omission to take that precaution was clearly an omission of duty on the part of the pilot, and not one on the part of the master or crew. The act omitted was involved in the navigation of the ship. On the other hand, if there was any sufficient reason why the head-gear of the ship could not be so used, there seems to their Lordships to be no reason for dissenting from the conclusion of the Court below, and that the attempt to turn the vessel ought to have been made at an earlier period, in which case the tug would in all probability have succeeded in getting her round.

A great part of the argument on the part of the Appellants has proceeded upon a critical examination of the language of the Judgment in the Court below; but to their Lordships it appears that, if the Judgment be really closely looked at, it does not in any degree differ from theirs; that the learned Judge below did not really mean to attribute to the Trinity Masters any functions, which do not properly belong to them, and that when he speaks of the inadequacy of the tug, he only means her inadequacy to execute the manœuvre at the particular time and under the particular circumstances in which the pilot attempted to execute it. Consequently, their Lordships are of opinion that there is nothing in the Judgment of the Court below to lead to the conclusion that it proceeds on the ground that the original fault was in the selection of the tug,—and that that was an act for which the pilot was to be held solely responsible. They believe that the fault which the Judgment meant to impute to the pilot was an improper handling of the two vessels, the towing vessel and the one in tow, having regard to the motive power of the 'Liverpool,' the state of

the tide, the wind, and the other circumstances of the navigation.

Their Lordships are not insensible to the great hardship which is occasioned to persons in the position of the owners of the 'James Foster, Junior,' who, by reason of the present state of the law, lose their remedy against the owners, and have only a remedy, which is of course of very little value, against the pilot; but with that their Lordships have no concern. It is for the Legislature to determine whether the law should be altered or not—upon which of two innocent persons the loss in such cases should fall, whether upon those who are compelled to take a pilot whom they have no power of selecting, or upon those who are injured by the ship which has that pilot on board. The law, as it now stands, has determined that in such cases the owners of the vessel which does the damage are exempt from their *prima facie* liability. Their Lordships can only give effect to the law by a fair application of it to the facts proved before them; and they are of opinion that this is a case in which the owners are entitled to exemption.

Their Lordships, therefore, must humbly recommend Her Majesty that this Appeal be dismissed with costs.