

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Fairfoot and others v. The Owners of the 'Rosita,' The 'ROSITA' and 'ALICE,' from the High Court of Admiralty; delivered the 27th and 28th November, 1868.*

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Present :

LORD CHELMSFORD.

SIR JAMES WILLIAM COLVILLE.

SIR EDWARD VAUGHAN WILLIAMS.

LORD JUSTICE PAGE WOOD.

LORD JUSTICE SELWYN.

THEIR Lordships have been placed in some little difficulty in this case, and they desire to hear one Counsel on a side in the 'Rosita's' suit, upon this ground, that the cause of injury is not properly alleged in the pleadings. There have been recent decisions in which their Lordships have held it to be necessary that a party seeking redress for an injury can only recover *secundum allegata et probata*. In a case in which the circumstances proved did not establish the allegations in the pleadings, although upon the true state of facts the complainant would have been entitled to recover, the learned Judge of the Court of Admiralty having decided against him, upon what their Lordships considered to be an erroneous ground, yet they felt themselves bound to declare that the Judgment ought to be affirmed, not upon the ground on which it was pronounced, but because the case set up by the Appellants had not been proved by the evidence. In the present case, in the third allegation in the answer of the 'Rosita,' it is alleged that the brig 'Alice' had been riding about half a mile to the south-west of the 'Rosita,' and that she came driving down athwart the tide towards the 'Rosita,' and so the injury happened. Now their Lordships are clearly of opinion that it is most

distinctly proved that the 'Alice' was to the south-east, and not to the south-west of the 'Rosita,' and they think it has been shown very clearly that if the 'Alice' had been to the south-west of the 'Rosita,' the collision never could have taken place in the way in which it actually occurred. Under these circumstances, the 'Alice' comes here to meet a different case from that which is alleged on the pleadings of the 'Rosita.' Their Lordships are particularly anxious to hear one Counsel on a side upon the subject of the pleadings; and whether, supposing their Lordships should be of opinion that the 'Alice' was in fault, the 'Rosita' would be entitled to their judgment, inasmuch as she has not stated her case correctly and properly?

(On the following day, Saturday, November 28th, Counsel addressed their Lordships upon the point above referred to, and their Lordships, after deliberation, pronounced the following Judgment:—)

These cases have been argued before their Lordships upon somewhat different grounds from those upon which the argument, and apparently the Judgment, proceeded in the Court below. I say apparently, because it appears that by the correction of an evident mistake in the printed Judgment the foundation of the argument against it will be entirely removed. The mistake arises in the statement of the relative positions of the two vessels just before the collision. There is no doubt that, according to the evidence on both sides, when the 'Rosita' came to an anchor in the Margate Roads on the 4th of February, she was to the north-west of the 'Alice,' and, consequently, the 'Alice' was to the south-east of her. It does not appear, although the distance between the vessels was probably lessened, that their relative position to each other was ever altered. In the answer on the part of the 'Rosita,' and in her Petition in the cross-suit, it is said that the 'Alice' had been riding about half a mile to the south-west of the 'Rosita,' and that she came driving down athwart the tide towards the 'Rosita.' Their Lordships are satisfied that, under the alleged state of circumstances, the vessels could not have come together as they did, viz. the port-quarter of the 'Alice' in contact with the port-bow of the 'Rosita.' It is evident when the learned Judge states that the Trinity Masters think it im-

possible upon the statement that the collision could have taken place as described, and that they are of opinion that the 'Alice' must have been to the south-eastward and not to the north-westward of the 'Rosita' on the morning of the collision,—that the words "north-westward" are a mistake, and that it must be read "to the south-westward," or, at all events, that the negative proposition may be rejected altogether, and the opinion of the Trinity Masters taken, that the 'Alice' must have been to the south-eastward of the 'Rosita.'

The great contest between the parties is which vessel drifted. In the Answer of the 'Alice' to the Petition it is said, "The 'Rosita' was lying "on the port-beam of the 'Alice,' and the crew of "the 'Rosita' were heaving in her chains. Under "the circumstances aforesaid, those on board the "'Alice' observed the 'Rosita' with her port-chain "taut under her bow, and apparently dragging her "anchor, coming down over the tide and before the "wind with her yards square, and stem on towards "the port-quarter of the 'Alice.'" On the other side the 'Rosita' says that it was the 'Alice' that drifted upon her.

Now, there is contradictory evidence upon this subject, each set of witnesses stating the case in favour of the vessel to which they respectively belong. Upon these questions of fact the learned Judge of the Court of Admiralty states, in concurrence with the opinion of the Trinity Masters, that "The 'Rosita' says she was riding with sixty "fathoms of chain on the port-anchor and twenty- "five on the starboard, and another anchor attached "belonging to the 'Shamrock'; and this weight of "anchors renders it extremely improbable that the "'Rosita' could have drifted down on the 'Alice.'" Now, the learned Judge having come to this conclusion upon a question of fact, even if their Lordships doubted whether that conclusion was correct, unless they were perfectly clear that it was wrong, they would be disposed to adopt his decision. But their Lordships are satisfied (and they have the assistance of very able Assessors here who concur in that view) that the fact is as the learned Judge has decided it to be.

That being the case, if the 'Rosita' did not drift upon the 'Alice' the case of the 'Alice' fails

altogether, because it is the very foundation of her case that the 'Rosita' moved, that she drifted down upon her, and that the collision was occasioned in that way. Therefore, thus entirely failing in the proof of the averment in her Petition, of course her case must altogether fail; and their Lordships, under the circumstances, will have no difficulty in recommending to Her Majesty that the sentence of the Judge of the Court of Admiralty should be affirmed, and the Appeal of the 'Alice' dismissed with costs.

Turning to the case of the 'Rosita,' and to the objection, which must be considered as a preliminary objection, which is made to the pleadings and to the proof in support of those pleadings, it is objected on the part of the Respondent that the statement of the 'Rosita' that the brig 'Alice' had been riding about half a mile to the south-west of the 'Rosita' is a material allegation, and, being disproved by the evidence, the case of the 'Rosita' must altogether fail. Now, their Lordships are extremely anxious to adhere with as much strictness as possible to the rule which has been laid down in the various cases which have been cited in the course of the argument that a party can only recover *secundum allegata et probata*. But the question in this case is, whether the 'Rosita' has not established every part of the allegation which was material to her cause, and whether the words which are referred to as not having been supported by the evidence were material and necessary to be proved as part of that allegation.

Before the introduction of the new rules the pleadings in the Court of Admiralty were extremely diffuse, of which many of us have had experience, and in framing these rules it was considered important to reduce the length of pleadings, and to bring the parties to a short statement of the facts upon which they respectively founded their cases. Accordingly the 67th of the Rules of 1859 says, "Every pleading shall be divided into short paragraphs numbered consecutively, which shall be called the "articles of the pleadings," and shall contain brief statements of the facts material to the issue." Now the question upon these pleadings of the 'Rosita' is whether the statement that the 'Alice' was riding to the south-west of her is a fact material

to the issue. There can be no doubt whatever that if these vessels had been both in motion, the bearings of the vessels with regard to each other would have been a most material fact to be alleged and proved, because the course to be adopted by the one vessel or the other would, of course, depend entirely upon their relative positions when they came in sight. But this is a case in which both the vessels were at anchor, and the material question is which of the vessels drifted on the other. Now the position of either vessel, with regard to that material fact, does not appear to their Lordships to be an essential element in the statement of the cause of injury, and they have tried that question in various ways. The question was put to Dr. Pritchard, whether, if the statement that the 'Alice' was to the south-west of the 'Rosita' had been entirely omitted from the pleadings, the allegation would have been insufficient; and he answered that in his view it certainly would not. Then, again, supposing this statement had been omitted altogether, could the Respondent have gone to the Court of Admiralty to have the pleadings reformed on the ground of their omission of an essential circumstance in the allegation? There can be no doubt that that course could not have been successfully adopted. That being so, is it not evident that in the case of collision between two vessels originally at anchor, the bearing of the one vessel with respect to the other is not such a material fact as necessary to be stated upon the issue raised between the parties. Therefore, we are not infringing any rule of the Court of Admiralty, or going contrary to any of the decisions upon this subject, by holding that the direction in which the 'Alice' was riding with reference to the 'Rosita' is not a fact material to the issue, and that the objection to the pleadings on this ground fails. It may be said, as it has been said, that the 'Alice' was likely to have been misled by this allegation, because she must have been aware that if the vessels were in the position alleged by the 'Rosita,' it was quite impossible that the accident could have occurred in the way alleged; that is, by the port-quarter of the 'Alice' coming in contact with the port-bow of the 'Rosita.' The parties might, therefore, have come to the Court prepared to meet a totally different case, and with a very different defence from that which it was neces-

sary to oppose to the proof of a different relative position of the two vessels. But with regard to the possibility of any misleading, there could have been none in this case, because it is quite clear that the 'Alice' stated the circumstances according to her own view; and placed the vessels in the exact position in which they were proved to be; therefore, even if the possibility of her being misled could have been an objection to these pleadings, the objection would have failed for want of a foundation. Under these circumstances their Lordships are of opinion that the claim of the 'Rosita' is not prejudiced by the allegation that the 'Alice' was lying to the south-west of her before the collision, and that her case is fully established.

Now a very few words in regard to the mode in which the accident occurred. If the 'Alice' had been to the south-west of the 'Rosita,' it is quite clear that the accident could not have occurred in the way described. But it must be taken as proved that the 'Alice' was to the south-east of the 'Rosita.' Acting under the able assistance of our Nautical Assessors, their Lordships are of opinion that, taking the position of the vessels to have been as described, the 'Alice' lying to the south-east of the 'Rosita,' the wind being to the northward of west, and the tide running in an opposite direction to the wind, the 'Alice' having catted her port-anchor, and the other anchor being out the whole length of the cable, eighty fathoms, the combined action of the wind and the tide would carry the 'Alice' down towards the 'Rosita' with a slackened chain, and that having drifted a cable's length (the distance between the two vessels), she would be checked, and then would drift down with the tide and come into collision with her port-quarter against the port-bow of the 'Rosita.' Thus it is satisfactorily shown that the damage was occasioned by the drifting of the 'Alice,' and happened exactly in the way in which it has been proved to have occurred.

Under these circumstances, therefore, their Lordships will recommend Her Majesty to affirm the sentence of the Judge of the Court of Admiralty in favour of the 'Rosita,' and to dismiss the appeal of the 'Alice' with costs.