

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Stuart and another v. Dewdney and others; ship 'John Bellamy,' from the High Court of Admiralty, delivered 29th November, 1869.*

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Present :

LORD CHELMSFORD.

SIR JAMES W. COLVILLE.

SIR JOSEPH NAPIER.

THEIR Lordships do not think it necessary to hear the Respondents.

Although this case occupied nearly three days in the Court below, and many witnesses were called on both sides, yet the question as to the correctness of the Judgment depends upon a short and simple point, namely, whether at the time of the collision the 'Eureka' was close hauled upon the starboard tack. If that is established, as it is admitted that the 'John Bellamy' was bound by the 12th Article of the Regulations of 1863 to keep out of the way, and as she failed to do so, her owners are liable for the damage occasioned by the collision.

The 'Eureka' is a brigantine of 185 tons, and at the time in question was on a voyage from London to Buenos Ayres. The 'John Bellamy,' a ship of 1274 tons, was bound from London to Bombay. The collision happened in the Atlantic, in latitude  $2^{\circ} 59' N.$  and longitude  $22^{\circ} 50' W.$ , at eleven o'clock on the night of the 26th of October, 1867. The night appears to have been thick and dark. The 'Eureka' had her proper lights exhibited. This is denied on the other side, but it is not disproved by the fact of the 'John Bellamy' not having seen her lights, because that might have been owing either to the want of a proper look-out (which their Lordships will not assume), or to the mistiness of the night.

With regard to the lights of the 'John Bellamy,'

the learned Judge thought, upon a careful examination of the evidence in all its parts and in every detail, that the preponderance and balance of the testimony was that there could not have been any lights burning on board the ship at the time of the collision, and that they must have been lighted afterwards. Their Lordships do not consider it necessary to enter into an examination of the evidence upon this subject (some of it of an extremely questionable character), because it is quite clear that the issue in this case cannot depend upon the determination of this question.

The case of the 'Eureka' is this,—that she was sailing close hauled upon the starboard tack, heading south-east by east, that she saw the 'John Bellamy' on her port bow, and the 'John Bellamy' not giving way came into collision, striking her on the port bow, occasioning such considerable damage that the vessel was afterwards abandoned and became a total loss.

The case of the 'John Bellamy,' on the other hand, is, that the night was very dark (as it is admitted it was), that the 'Eureka' had no lights, that before there was any time for her to act, the stem and starboard bow of the 'Eureka' struck her on the starboard bow, and she denies that the 'Eureka' was heading south-east by east.

On this sole question in the case, the course of the 'Eureka' is sworn to by three witnesses, her captain, her boatswain, and one of the seamen.

With regard to this evidence, it has been said that there really is only one witness who is to be relied upon, in speaking to the course of the 'Eureka,' namely, the boatswain; but their Lordships think that it is impossible not to pay very great attention to the evidence which was given by the captain upon this subject, because he says that when he went below, at a quarter past nine, the course of the 'Eureka' was south-east by east, that she was close hauled upon the starboard tack, and he gave directions that if the course of the vessel was altered he was to be called. Now he was not called; and we must assume that the person who was upon the watch would have obeyed the captain's order if there had been any alteration of the course; therefore it seems to their Lordships that that evidence is of great importance.

The boatswain speaks positively to the course of the vessel being south-east by east, and the seaman to whom allusion has been made, Ridley, says that she was close hauled upon the starboard tack.

Therefore, it appears to their Lordships that there is positive, distinct, and direct evidence that the course of the 'Eureka' at the time of the collision was south-east by east, and that she was close hauled upon the starboard tack.

Of course it is impossible for the 'John Bellamy' to meet this evidence by a positive contradiction, but she endeavours to impeach the testimony on the other side indirectly and from circumstances.

It is said, in the first place, that the 'Eureka' with the wind from the south would not have been steering a south-east by east course on her voyage to Buenos Ayres, that if she had been steering that course, and the 'John Bellamy's' admitted course was west by south-west, she could not have come into collision with her on the port bow, and that the marks of injury on the hull of the 'John Bellamy' and her jib sails show that it must have been the starboard side of the 'Eureka' which came in contact.

In addition to that it was said to-day by Mr. Cohen that the account given by the witnesses as to the mode in which the 'Eureka' went away after the collision shows that their story cannot be true; but their Lordships are not disposed to lay much stress upon the description given of the way in which the vessels parted from each other, because the sudden and dangerous collision would probably deprive the witnesses of that presence of mind which would dispose or even enable them accurately to observe what afterwards occurred.

Another point was made this morning also by Mr. Cohen, as to the bowsprit being knocked back on the starboard side. It does not appear to their Lordships that the captain does say that the bowsprit was knocked back on the starboard side, but he says that the head-gear was carried away and was knocked back on the starboard side; for at page 56 this is the evidence:—“(Q.) You say your bowsprit-jibboom, all the head-gear, too, was carried away, of course, in this collision? (A.) It was all knocked in on deck. (Q.) Knocked right back? (A.) Back on the starboard side.”

Now Mr. Cohen endeavoured to show that upon their theory of the 'Eureka's' starboard-bow striking the 'John Bellamy,' the bowsprit would be driven to starboard. It should be remembered that it is the heel of the bowsprit and not the bowsprit itself. On the opposing theory that the port-bow of the 'Eureka' came in contact with the 'John Bellamy' there is no difficulty in supposing that the bowsprit would be driven to starboard, and that seems unquestionably to their Lordships more likely to be the mode in which the portion of the bowsprit was driven in that direction. Then as to the course of the 'Eureka' not being a proper one on her voyage to Buenos Ayres, it was suggested that at the part of the Atlantic where she was there is a prevailing wind which would have enabled her to lay her course nearer towards the proper direction of her voyage, and they lay some stress upon the evidence of the captain, that he was waiting before he changed his tack to see whether there would be a change of wind.

Their Lordships are advised by their nautical assessors that in the part of the Atlantic where the vessels were, it may be expected that the wind would be variable, and would be shifting to different points of the compass; and that there is nothing in the fact of the 'Eureka' having been waiting, as it were, to shape her future course according to the varying direction of the wind. And their Lordships consider it highly improbable that the 'Eureka' sailing on the starboard tack, with the wind to the south, should not have been close hauled. In putting the vessel upon that tack, the master was deviating from his true course to Buenos Ayres; and whatever his reason for going upon that tack might have been, he would be careful to render the deviation as slight as possible by keeping close to the wind.

As to the indications of the way in which the two vessels came together, by the marks upon, or the injury done to either of them, the counsel appeared to place but little reliance upon a piece of wood produced being part of the starboard-rail of the 'Eureka,' as sworn to by surveyors and shipwrights in opposition to the evidence of the builder, that it was part of her port-head rail.

It appears to their Lordships that this question may be dismissed without further examination.

But it was contended that the indentations near the starboard bow of the 'John Bellamy,' and towards the middle of her hull, and the rents in the jib-sails showed that the 'Eureka' must have come with her stem and starboard bow on the bow of the 'John Bellamy,' tearing the sails with her upper yards; and after carrying away the jibboom, making the indentation forward with her bowsprit, and then swinging round and producing the other indentation by further contact.

The models which have been produced were before the learned Judge of the Court of Admiralty and the elder brethren, and arguments were addressed to them similar to those which their Lordships have heard; and they thought that no inference could be drawn from the marks on the hull of the 'John Bellamy,' or from her torn sails, against the 'Eureka's' course being south-east by east.

Now this is a question entirely of fact; and if their Lordships had had the misfortune to differ from the learned Judge, they would have hesitated to reverse his decision upon a question of this description, unless they had felt perfectly convinced that he must have come to a wrong conclusion. But the advice which their Lordships have received is quite in unison with the view taken by the Court below.

Our Assessors think that with the course of the 'Eureka' south-east by east, and that of the 'John Bellamy' west south-west, there is no difficulty in supposing that the two vessels came in contact with each other, so as that the stem and port-bow of the 'Eureka' should impinge on the 'John Bellamy,' and her bowsprit leave the mark which appeared in the 'John Bellamy's' starboard bow; that the 'Eureka' being the lighter vessel would bound off, and drifting astern, or left astern of the 'John Bellamy' by her advance, might in this change of position come again in contact, and in passing leave the second mark in the 'John Bellamy's' side.

With regard to the injury to the sails of the 'John Bellamy,' they do not think it at all unlikely to have resulted from the mode of contact which they have supposed. There being in the opinion of their Lordships nothing to displace the positive evidence of the 'Eureka' being close hauled upon the starboard bow, they will recommend to Her Majesty to affirm the Decree appealed from, and to dismiss the Appeal with costs.

