Judgment of the Lords of the Judicial Committee of the Privy Council on the two Consolidated Appeals of The Australasian Steam Navigation Company, Owners of the S.S. "Birksgate," v. William Howard Smith and Sons, Limited, Owners of the S.S. "Barrabool," from the Supreme Court of New South Wales; delivered 21st May 1889.

Present:

THE EARL OF SELBORNE.
LORD WATSON.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

These are cross actions brought on the common law side of the Supreme Court of New South Wales by the owners of the steamships "Birksgate" and "Barrabool," in respect of a collision between these vessels, which occurred within the limits of the harbour of Port Jackson on the night of the 9th August 1883, occasioning considerable damage to both. It is unfortunate that, although the parties, the questions of fact and law involved, and the evidence available, were the same in each case, yet there were separate trials. The result was that, in the action at the instance of the owners of the "Birksgate," a jury found that the collision was wholly attributable to the fault of the "Barrabool;" and, a month later, another jury, in the counter action at the instance of the owners of the "Barrabool" found that the

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"Birksgate" alone was to blame. The late Chief Justice Martin, who presided at the first trial, and Windeyer, J., who presided at the second, each approved of the verdict obtained before him.

Rules *nisi* for new trials were granted to the Defendants in both cases, and were disposed of by a Court consisting of Faucett, Windeyer, and Innes, J. J. These learned Judges were all agreed that the rule, in the second case, ought to be discharged. As to the first, there was much difference of opinion. Innes, J., seems to have held that each verdict ought to be treated as if the two cases were unconnected with each other, and that both verdicts, though contradictory, ought to be sustained, unless one or other of them was such as a jury could not honestly and reasonably find; and being of opinion that the verdict in favour of the "Birksgate" was not of that character, he held that neither verdict could be set aside. On the other hand, Faucett and Windeyer, J. J., whilst agreeing that the verdict in the first case ought to be set aside, and a new trial allowed, appear to have come to that conclusion upon somewhat different grounds. Faucett, J., considered the rule in the first case, "without reference to the verdict "in the cross action." Windeyer, J., thus states the view which he entertained:—"Where "a single trial has taken place, the rule that "the Court will not interfere unless there are "'sound and sufficient grounds for showing "'that the jury came to an erroneous conclusion, "'or that they came to their conclusion under a "'mistaken direction from the Judge,' as the "Privy Council held in the late case of Brown "*v.* McElhone, is well established. But where, "as in this case, two verdicts have been given, "one of which must be wrong if the other is "right, the Court must have power to say,

"looking at the whole of the facts, where the "truth more probably lies." Following out that view, the learned Judge first examines the evidence led at the trial before himself, and then proceeds to apply the inferences which he derives from it to the evidence adduced at the first trial.

The owners of the "Birksgate" have appealed against both judgments. In the arguments addressed to this Board their Counsel admitted that they could not successfully impeach the verdict in the second case, if it were tested by the usual rules applicable in the case of a single trial. But they maintained that both verdicts ought to be subjected to the same test, and that it was incompetent to ascertain the reasonableness of the findings of the jury in the first case, by evidence which was submitted not to them, but to a different tribunal. They argued that upon the evidence before the first jury their verdict was one which they might honestly and reasonably return, and one which no court of law would disturb if it stood alone; and in these circumstances they submitted that, the two verdicts being equally plausible, justice could best be done by setting both aside, and remitting the cross actions for new trial before the same jury. The argument addressed to us has accordingly been confined to the question, whether the verdict obtained by the Appellants was or was not against the evidence?

In cases like the present, it appears to their Lordships that the fact of opposite verdicts having been found by two different juries does not devolve upon the Court the duty of exercising the functions of a jury, and of deciding the actions upon their merits. It also appears to them that the declinature of the parties to submit the decision of their counter claims to the same jury, ought not to impose upon the Court the

necessity of issuing two decrees which are absolutely self-contradictory, where that course can be avoided. The parties may, no doubt, acquiesce in both verdicts, and in that case judicial effect must be given to them. But where, as here, new trials are moved for in both actions, the Court has the opportunity of doing complete justice between the parties. When the evidence led in each is so fairly balanced that a jury might reasonably find either way, their Lordships are of opinion that both cases ought to be tried again, not separately, but together. If, on the other hand, the verdict in one action is warranted by the evidence, and in the other is "against evidence," in the ordinary sense of the term, their Lordships see no reason why the one should not be allowed to stand, and the other be set aside. In their opinion, the real question raised by these appeals is, whether the verdict returned at the first trial, was, as the Appellants maintain, such as the jury might reasonably find upon the evidence before them?

In the view which their Lordships take of that question, it is not necessary to enter into minute details. The harbour of Port Jackson is of considerable extent, the distance from its entrance to Sydney being about seven miles. About a mile and a half from the entrance, which is on the east, there is a group of sandbanks called the Sow and Pigs, which divides the waterway into two channels, the East and West, the latter being the more open, and on that account chiefly used by ships entering and leaving the port. The course of an inward bound ship, on entering the west channel, is in a southerly direction until she passes through it, and afterwards reaches Bradley's Point, the end of a long promontory which juts into the harbour from the north. After rounding Bradley's Point her course is nearly due west until she has Fort

Denison upon her port beam. The distance from Bradley's Point to Fort Denison is a little under, and from Bradley's Point to the south end of the west channel a little over a mile. On the night of the 9th August 1883 the "Birksgate" was going out and the "Barrabool" was coming in, and they came into collision, according to the evidence on both sides, rather more than three ship-lengths, or from 250 to 300 yards off Bradley's Point. The "Birksgate" was struck upon her starboard bow, which was turned in the direction of the land, and she was immediately beached upon the west corner of the point.

The account given by the master of the "Birksgate," who was on the bridge, and in charge of her navigation, is as follows. He passed Fort Denison on his starboard side, and kept on a course nearly due east until he cleared Bradley's Point, when he starboarded about four points, and having rounded the Point, steadied on a straight course for the west channel. He then, and not till then, saw the white and green lights of the "Barrabool" upon his starboard bow, at a distance which he judged to be about three quarters of a mile, when he starboarded a little so as to open his green light to her. The vessels continued to approach on these safe courses; but when they came near, the "Barrabool" suddenly ported and came into him, showing her red light just before the collision. That story is in the main corroborated by the other witnesses from the "Birksgate." There is, as might be expected, some difference of opinion among them as to time and distance; but they all agree in saying that a good look-out was kept on board the "Birksgate," and that the collision was occasioned by the "Barrabool's" sudden and improper change of helm. According to the evidence of the "Barrabool" she had passed the west channel, and was within a quarter of a mile or thereabouts

of Bradley's Point, steaming at the rate of ten miles an hour, when the masthead and red lights of the "Birksgate" were seen. She was then slowed to half speed, and her helm put to port, but the "Birksgate" altered her course under a starboard helm, showed her green light, and crossed the bows of the "Barrabool," rendering collision inevitable, although the "Barrabool" on observing her change of helm first slowed her engines, and then turned them full speed astern.

The testimony of the two crews is thus in direct conflict, the evidence of the "Birksgate" being that the vessels were approaching on relatively safe courses, green to green, when the "Barrabool" ported; and that of the "Barrabool" that they were approaching red to red, when the "Birksgate" starboarded and occasioned the collision. In that condition of the evidence their Lordships do not think that they would be justified in interfering with the finding of the jury, if there were no test available for ascertaining which set of witnesses told the truth, other than their demeanour in the witness box. But that does not appear to their Lordships to be the only test of credibility which is supplied by the circumstances of the present case. There are at least two facts established beyond doubt, which, in their opinion, directly refute a material part of the testimony of the Appellants' witnesses, and cast grave suspicion upon the remainder of it.

Assuming the accuracy of the account given by the Appellants' witnesses as to the course of their vessel, it is clear that the "Birksgate," until she was brought round on a starboard helm, was heading across the line (whatever that may have been) on which the "Barrabool" was coming towards Bradley's Point; and also, that for nearly a quarter of a mile before she

was brought round, the lights of the "Barrabool" must have been broad upon her port bow, and visible to any one on board of her who chose to look in the direction of the west channel, or the Sow and Pigs. Yet the lights of the "Barrabool" were not observed on board the "Birksgate" until after she was starboarded and steadied, although her witnesses all say that she was keeping a good look-out. It is equally clear that, if an effective look-out was kept on board the "Barrabool," the first light observed must have been that which her witnesses swear that they saw, namely, the red light of the "Birksgate."

In the next place, the testimony of the Appellants' own witnesses fixes the place of the collision very near indeed to the spot where the master alleges that he steadied after starboarding. According to his own account, when he began to starboard he was about five ships-lengths, or 1,250 feet, off Bradley's Point, and at the time of the collision he was about two ships-lengths, or 500 feet, nearer the Point. It is scarcely possible that he could have got his ship into that position without exhibiting his green light to a vessel coming from the west channel; and that being so, he must before the collision have shown the "Barrabool" first his red light and then his green, which is in perfect accordance with the evidence of the Respondents. The master of the "Birksgate" says, no doubt, that at the time of the collision he had "just got "round Bradley's Head;" but he was referred, on cross-examination, to his evidence before the Marine Board, to the effect that he was at that time "about three ship's lengths off Bradley's "Head," and the only explanation given was that he did not remember having said so. The third officer, and an A.B. seaman who was beside the look-out, corroborate the statement

which he made before the Marine Board; and their testimony is borne out by the fact that the "Birksgate," which neither stopped nor reversed, was immediately after the collision run ashore at the west corner of Bradley's Point.

These facts, which do not admit of controversy, show plainly, in the first place, that up to the time when she was headed for the west channel no look-out, or a bad look-out, was kept on board the "Birksgate." In the second place, taking her witnesses' account of the distance between the two vessels when they did see the lights of the "Barrabool," and of the time which elapsed between their seeing these lights and the collision, and considering that the "Birksgate" was steaming at the rate of five to seven miles an hour, it is simply impossible to reconcile their statements with the fact that the collision took place close to Bradley's Point. Counsel for the Appellants made the observation that the estimates of time and distance formed by the Appellants' and Respondents' witnesses did not materially differ, but they omitted to notice the fact that these estimates had not the same *terminus a quo.* The estimates of the "Barrabool" witnesses were made on the footing that they saw the red light of the "Birksgate" (and at the time they could have seen no other) as soon as she drew clear of Bradley's Point, and before she began to round it; whereas the "Birksgate" estimates run from the time when she had steadied on her straight course for the west channel.

In these circumstances their Lordships, who had the assistance of their nautical assessors, have been unable to avoid the conclusion that the testimony given by the Appellants' witnesses is inconsistent with the established facts of the case. There cannot have been a good look-out kept by the "Birksgate," and the collision must have

occurred just at the time and place, when and where, the Appellants' witnesses allege that they began to approach the "Barrabool," then at a considerable distance, on safe courses starboard to starboard. Giving due effect to these facts, which do not admit of dispute, the only reasonable inference derivable from the evidence appears to be this, that, in coming round on a starboard helm, in order to lay her course for the west channel, the "Birksgate" starboarded so far as to bring her nearer to Bradley's Point, and across the bows of the "Barrabool," which, until that time, she had negligently failed to see.

For these reasons their Lordships are of opinion that the weight of evidence is in favour of the conclusion that the "Birksgate" was alone to blame for the collision, and that the verdict in the first action must be set aside. They will therefore humbly advise Her Majesty that the judgments appealed from ought to be affirmed. The Appellants must pay the costs of these appeals.
