

nocent third parties, by the negligence of the master and crew by whom the ship is navigated, or of the driver, unless he actually assumes control over their actions and thereby occasions mischief. And, therefore, in the case of a collision between two ships causing loss of life where both ships were in fault: Held, that the personal representatives of a passenger or seaman not on duty who was killed could recover damages against the owners of the other ship in an action under Lord Campbell's Act.

This was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lindley and Lopes, L. JJ.) reported in 56 L. T. Rep. (N.S.) 258, and 12 Prob. Div. 58, who had reversed a judgment of Butt, J., reported in 54 L. T. Rep. (N.S.) 449, and 11 Prob. Div. 31, upon a special case.

The action was brought under Lord Campbell's Act (9 & 10 Vict., chap. 93) against the owner of the ship *Bernina* by the personal representatives of two persons who were on board the *Bushire*, a British ship, and were killed in consequence of a collision with the *Bernina*, which was also a British ship. The collision was the fault of both ships, but the deceased persons had nothing to do with the negligence which caused the accident.

The facts, which were not disputed, are fully set out in the reports in the courts below.

Butt, J., held that he was bound by the decision in the case of *Thorogood v. Bryan*, 8 C. B. 115, and gave judgment for the defendants, but his decision was reversed as above mentioned.

The owners of the *Bernina* appealed to the House of Lords.

Lord HERSHELL. My Lords: This appeal arises upon a special case stated in actions in which the respondents are plaintiffs. They are both actions brought under Lord Campbell's Act to recover damages against the appellants for the loss sustained owing to the deaths of the persons of whom the respondents are the personal representatives; and it is alleged that they lost their lives through the negligence of the appellants. The appellants are the owners of the steamship *Bernina*, between which vessel and the steamship *Bushire* a collision took place,

which led to the loss of fifteen persons, who were on board the latter vessel. It is admitted that the collision was caused by the fault or default of the master and crew of both vessels. J. H. Armstrong, whose administratrix one of the respondents is, was a member of the crew of the *Bushire*, but had nothing to do with its careless navigation. M. A. Toeg, of whom the other respondent is administratrix, was a passenger on board the *Bushire*. The question arises, whether under these circumstances the appellants are liable. The appellants having, as they admit, been guilty of negligence from which the respondents have suffered loss, a *prima facie* case of liability is made out against them. How do they defend themselves? They do not allege that those whom the respondents represent were personally guilty of negligence which contributed to the accident. Nor again do they allege that there was contributory negligence on the part of any third person standing in such a legal relation toward the deceased men as to cause the acts of that third person, on principles well settled in our law, to be regarded as their acts as, *e. g.*, the relation of master and servant or employer and agent acting within the scope of his authority. But they rest their defense solely upon the ground that those who were navigating the vessel in which the deceased men were being carried were guilty of negligence, without which the disaster would not have occurred. In support of the proposition that this establishes a defense, they rely upon the case of *Thorogood v. Bryan*, 8 C. B. 115, which undoubtedly does support their contention. The case was decided as long ago as 1849, and has been followed in some other cases; but though it was early subjected to adverse criticism, it has never come for reversion before a court of appeal until the present occasion. The action was brought under Lord Campbell's Act against the owner of an omnibus by which the deceased man was run over and killed. The omnibus in which he had been carried had set him down in the middle of the road instead of drawing up to the curb, and before he could get out of the way he was run over by the defendant's omnibus, which was coming along at