

Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Emery and others v. Cichero, Ships "Bunin" and "Arklow," from the Vice-Admiralty Court of New Brunswick; delivered, November 21st, 1883.

Present:

LORD FITZGERALD.

SIR BARNES PEACOCK.

SIR ROBERT P. COLLIER.

SIR JAMES HANNEN.

SIR ARTHUR HOBHOUSE.

THE case presented on behalf of the "Bunin," the complaining vessel below, was as follows: That on the 30th March 1881, as she was proceeding on a voyage from Havre to Baltimore, at 2 o'clock in the morning, the weather being dark but clear and the wind from the north-west, she was steering a course south-west by west half-west close hauled on the starboard tack; that her lights were properly burning; and that she was proceeding at the rate of $6\frac{1}{2}$ knots an hour when the red light of a ship, which proved to be the "Arklow," was seen on the starboard bow. That she, the "Bunin," kept her course; but that the "Arklow," by some unaccountable mismanagement, as it is stated, ran into the "Bunin," striking her about the fore rigging on the starboard side with her stern.

On the other hand, for the "Arklow" it was alleged that she was steering a course east by south half-south, the wind being in the north, when a vessel was seen a point and a half on her port bow showing no lights whatever; that she was thought to be going the same way as the

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"Arklow," but that, after examination through the glass, and watching her for some appreciable time, it was discovered that she was approaching the "Arklow" under a starboard helm; that then the "Arklow's" helm was put hard aport and her after sails taken off.

In confirmation of the statement that there were no lights visible upon the "Bunin," it is alleged and stated by several witnesses that a green light was seen moving upon the "Bunin" just before the collision; and in confirmation of the statement that the "Bunin" did not keep her course but approached under a starboard helm, it is stated that her spanker jibed from port to starboard—it is said, indeed, just before the collision.

Now, in the circumstances alleged on the one side and on the other, it was undoubtedly the duty of the "Bunin" to keep her course, and it was primarily the duty of the "Arklow" to keep clear; but the "Arklow" alleges, by way of excusing herself for not having kept clear, that there was no light visible on the "Bunin," and that it was therefore impossible to know in what direction she was sailing, and therefore impossible to take measures for the purpose of preventing the collision with her.

The first question of importance in the case is whether or not the lights of the "Bunin" were burning for any serviceable purpose. On this point the learned Judge in the Court below, after consulting the assessors, says: "I consider the point whether the 'Bunin' carried proper lights left in so much doubt by the conflict of evidence, that I am of opinion that the lights of the 'Bunin' were not fairly visible to the 'Arklow';" and then he goes on to deal with the case upon that footing. The peculiar language which is used by the learned Judge about their not being fairly visible may possibly have

reference to the evidence which has been given that a green light was seen, not in its proper place, but moving on the "Bunin," immediately before the collision. Their Lordships agree in the view which was taken by the learned Judge below upon this point that the lights of the "Bunin" were not in such a position as to be visible to those on board the "Arklow," and that those on board the "Bunin" are responsible for that departure from the proper rules of navigation.

Their Lordships arrive at this conclusion upon an examination of the evidence on the one side and on the other. It is very much to be regretted that the Court below was obliged to rely solely upon affidavits which, from their language and general contents, it is pretty plain were drawn by somebody with a view to the supposed facts of the case, and were then laid before the witnesses for the purpose of getting their evidence, and leaving them, as it were, to take exception to anything which they found in those statements. Thus, all the witnesses but one on behalf of the "Bunin" say, in general terms, that lights were burning according to the regulation, but there is only one of them who speaks to the fact of his having actually seen that the lights were burning at the time of the collision, and that is the witness Lazzarini, whose duty it appears to have been to light and trim the lamps, which he says he had done at 8 o'clock. He does, indeed, say that when he was called on deck by hearing that something wrong had happened he did see that the lights were burning. On the other hand, the witnesses for the "Arklow" all agree that there was no light visible on the "Bunin"; and they make that statement with certain particularity which impresses their Lordships in favour of their statements as against the general statements, with the exception men-

tioned, of those on board the "Bunin." For instance, it is stated that, the vessel having been reported by the look-out man, and the mate and another of the crew who was with him having seen the vessel looming in the distance, the mate fetched the captain's glasses for the purpose of examining it more carefully. That is a particularity which cannot be disregarded, except on the supposition that the mate and the witness who confirms him are deliberately stating that which they must know to be false, and going much further than a mere assertion that they were doing their duty. In addition to that, there are several witnesses who say that they saw a green light moving on the vessel immediately before the collision, as though the green light had, either for the purpose of being trimmed or from some other accident, not been in its place, but that when the vessel was found to be approaching another the green light was being moved from one place to another.

Their Lordships, therefore, come to the conclusion that the lights of the "Bunin" were not properly burning. But the learned Judge below says that this question of the lights is immaterial when it appears that their absence did not cause the collision. On this part of the case their Lordships are unable to concur with the judgement of the learned Judge below. The principle in cases of this kind, where there has been a departure from an important rule of navigation, is this, that if the absence of due observance of the rule can by any possibility have contributed to the accident, then that the party in default cannot be excused. On this point their Lordships can entertain no doubt that the absence of proper lights must have occasioned an entire change in the course of events which followed upon the "Bunin" being visible to the "Arklow." Without those lights the statement

made by the witnesses on board the "Arklow" commends itself at once to credence that they did not know in what direction this vessel was going, and that it took an appreciable time before a judgement could be formed upon that subject, during the whole of which time it must have remained a matter of pure chance whether it would be right to take one manœuvre or another. Their Lordships are, therefore, of opinion that the "Bunin" was clearly to blame, and that she was to blame in a matter which makes her responsible.

The only question that remains, therefore, is whether or not it has been shown that the "Arklow" was also to blame. It lies on the "Bunin," which is shown to have been in default, to establish, to the satisfaction of the tribunal that has to determine it, that the "Arklow" was in fault. Now, on this part of the case it is to be observed that the time which has to be dealt with is very short. The vessels were approaching at a speed which would bring them together at the rate of a mile in five minutes. Reference has been made to the marginal note upon the diagram furnished by the "Arklow," in which it said that when first seen the "Bunin" was about six cables' distance, which would be a distance of 1,200 yards. One of the witnesses for the "Arklow" says that the "Bunin" was seen about four minutes before the collision. It is obvious that these statements as to time and distance cannot be dealt with as exact computations, but only indicate the rough conjectures which the witnesses were able to make at the time. But it is obvious that some space of time must have been occupied in fetching the glasses, which would diminish the period of time with which we are dealing. Secondly, it is stated, and no reason to doubt it is suggested, that the helm of the "Arklow" had been ported before the collision; that is to say,

that a step had been taken for the purpose of avoiding the approaching danger; and Nilson, one of the witnesses, says that the "Arklow" had under her port helm come round two points, and that this had been done when it was seen that the "Bunin" was approaching under a starboard helm. It is clear, therefore, that we have but a very short space of time indeed during which the hesitation on the part of those on the "Arklow" was manifested as to what course they should take. Considering the difficulty occasioned by the absence of lights on board the "Bunin," which prevented the possibility of seeing what course she was steering, their Lordships are of opinion that it has not been established that there was negligence on the part of those on board the "Arklow" in not sooner porting the helm, as it is clear she had to some extent done before the collision.

Another point has been discussed, which was not dealt with in the Court below, and that is whether or not the "Bunin" kept her course. Her witnesses allege that she did keep her course. On the part of the "Arklow" it is alleged that she came round under a starboard helm, and so came down upon the "Arklow." In support of that statement it is alleged that she jibed; and it has been argued that credence ought not to be given to that statement because it is said the "Arklow" had gone off only to the extent of half a point, while it is represented that the "Bunin" had got round a great number of points,—the exact number it is not necessary to specify, but so as to bring her head pointing south before it would be possible that she would jibe. It is to be observed, however, that the two periods of time that were referred to by Mr. Hall are not properly to be compared, because the evidence on the part of the "Arklow" is that it was discovered that the "Bunin" was, to

use the expression of the witnesses, coming down upon them under a starboard helm, and that it was apparently which showed the direction which the "Bunin" was taking, and it was then, after that had been seen, that the helm of the "Arklow" was ported. There was, therefore, some time before the porting of the helm during which the starboarding of the helm of the "Bunin" had taken place. But, further than this, it is to be observed that where a collision of this kind occurs the exact succession or concurrence of events is not accurately noted by the witnesses, and it may well be that the jibing of the spanker, which is referred to by the witnesses as taking place immediately before the collision, may in fact have taken place at the time of the collision, and in consequence of the collision by the head of the "Bunin" being driven sharply round.

On the whole, their Lordships are of opinion that it has been established that the "Bunin" was to blame, and that it has not been established that the "Arklow" was to blame; and their Lordships will, therefore, humbly advise Her Majesty that the decision of the Court below should be reversed, with costs.

