

*Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of the China Merchants' Steam Navigation Company v. Walter Lloyd Bignold, and cross Appeal from the Supreme Consular Court of China and Japan; delivered 10th May, 1882.*

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Present:

SIR ROBERT J. PHILLIMORE.

SIR BARNES PEACOCK.

SIR ROBERT P. COLLIER.

SIR ARTHUR HOBHOUSE.

THIS is a case of a collision between the "Hochung," a steamer belonging to the China Merchants' Steam Navigation Company, and Her Majesty's Gunboat "Lapwing," which happened on the 17th of April 1881, about 10.30 p.m., 12 miles off Ooksen Island, on the coast of China. The weather seems to have been calm; there was very little wind. Cross suits have been instituted by the Steam Navigation Company and by the lieutenant of the "Lapwing," who has been substituted for the commander, who is unfortunately dead.

The cases of the two vessels may be very shortly stated. They were steering in almost opposite courses, so as to be nearly meeting vessels, there being but a point or a point and a half's difference between their courses. The "Lapwing" represents herself to have been steering S.W. by W.  $\frac{1}{2}$  W.; the "Hochung," N.E. by E.  $\frac{1}{2}$  E. The case of the "Hochung" is in substance this: That she first saw, at a distance of 2 or 3 miles, the "Lapwing" as a dark object in the water, having no

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lights of any description, on her starboard bow, and that the "Lapwing" continued on her starboard bow; and that being so, the "Hochung," supposing that the "Lapwing" was going to pass to starboard, starboarded her helm, and by that means turned to the northward; and that the collision occurred in consequence of the "Lapwing" porting her helm and thus meeting the "Hochung."

The case of the "Lapwing" is, that the two vessels were nearly meeting each other, their courses being divergent by only a point or a point and a half, and that they were port bow to port bow; that the commander of the "Lapwing" kept his course for a considerable time, when he ported his helm, in order to give the "Hochung" a wider berth; that the "Hochung," instead of continuing her course or porting (in either of which cases there would have been no collision), starboarded her helm, and thereby came right across his bows; and this caused the collision.

These are, in substance, the cases of the two vessels. There is also an allegation, on the part of the "Hochung," that the "Lapwing" had no proper lights according to the regulations, and there is a denial of this on the part of the "Lapwing." The learned Judge found both vessels to blame. He adopted the version of the "Lapwing" as to the relative position of the vessels, and as to the duty of each to steer her course under the circumstances, and he found that the "Hochung" was to blame in that respect. He also found the allegation that proper lights had not been exhibited by the "Lapwing" proved. He therefore found both vessels to be in fault. Their Lordships are sensible of the advantage which the Court below has of hearing and seeing the witnesses, and are not disposed to reverse decisions come to

upon oral evidence unless there is very strong reason to suppose that the Court below has come to a wrong conclusion. Their Lordships see no reason to suppose that the Court has come to a wrong conclusion on either of the points which have been indicated.

With respect to the positions and courses of the vessels, their Lordships observe that not only is there a conflict between the witnesses called on behalf of the respective vessels, but that some of the witnesses who are called by the "Hochung," who were on board the "Lapwing," and who are disposed to give evidence in favour of the "Hochung," corroborate the statements of the crew and officers of the "Lapwing" with respect to the courses of the two vessels. It is impossible for their Lordships, acting upon their general rules, to reverse a decision supported by such evidence.

With respect to the question of lights, it was admitted by an officer of the "Lapwing" that the principal light—the masthead light of the "Lapwing"—had been hauled down some three or four minutes (it might have been more) before the collision, and was not hoisted up again at the time of the collision; and this is confirmatory of the statement of the captain and crew of the "Hochung" that no light was visible on board the "Lapwing."

There is also some evidence (whether the learned Judge attached great importance to it or not does not distinctly appear) that her port side light was burning somewhat dimly, so that probably it could not be seen at so great a distance as it ought to have been, although unquestionably it was seen some time before the collision.

Their Lordships therefore think that the finding of the learned Judge upon the second point, namely, that the "Lapwing" failed to comply with

the regulations with respect to exhibiting lights, was proved.

The question then arises, whether, this being so, the learned Judge was right in dismissing both suits; and it becomes necessary to refer to the law bearing upon this subject.

The 17th & 18th Victoria, chapter 104, section 298, commonly called the Merchant Shipping Act, enacts as follows—"If in any case of collision it appears to the Court before which the case is tried that such collision was occasioned by the non-observance of any rule for the exhibition of lights or the use of fog-signals, issued in pursuance of the powers herein-before contained, or of the foregoing rule as to the passing of steam and sailing ships, or of the foregoing rule as to a steamship keeping to that side of a narrow channel which lies on the starboard side, the owner of the ship by which such rule has been infringed shall not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary." This enactment for a certain time altered the rule of the Court of Admiralty, that where it appears that both parties in cross suits are to blame, the damage shall be apportioned between them. But the rule was restored by the 25th & 26th Victoria, chapter 63, which repealed the section last quoted, and enacted (section 29) that, "If in any case of collision it appears to the Court before which the case is tried that such collision was occasioned by the non-observance of any regulation made by or in pursuance of this Act, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is

“ shown to the satisfaction of the Court that the  
 “ circumstances of the case made a departure  
 “ from the regulation necessary.” In the absence  
 therefore of any enactment to the effect that the  
 Plaintiff shall not be entitled to recover any  
 recompense, the ordinary rule of the Admiralty  
 became again applicable to cases of collision  
 where both parties were to blame. A more recent  
 Statute, the 36th & 37th Victoria, further enacts  
 that—“ If in any case of collision it is proved to  
 “ the Court before which the case is tried that  
 “ any of the regulations for preventing collision  
 “ contained in or made under the Merchant  
 “ Shipping Acts, 1854 to 1873, has been infringed,  
 “ the ship by which such regulation has been  
 “ infringed shall be deemed to be in fault, unless  
 “ it is shown to the satisfaction of the Court  
 “ that the circumstances of the case made  
 “ departure from the regulation necessary.”  
 This enactment renders it unnecessary for the  
 Plaintiff to prove that the collision was  
 occasioned by the non-observance of the regula-  
 tions; he proves default on the part of the  
 Defendant by merely showing the regulations  
 have been infringed.

This latter section has received interpretation  
 from this Board in several cases. It may be  
 enough to refer to the case of the “ Hibernia ”  
 (reported in the 2nd volume of Aspinall's Cases  
 of Maritime Law, N.S., p. 454). In this case,  
 decided on the terms of the last Statute, it was  
 held that a ship not exhibiting proper lights was  
 in fault, even if the want of lights did not con-  
 tribute to the collision. This case may be con-  
 sidered as having been qualified to a certain  
 extent by a subsequent case,—the “ Fanny M.  
 Carvill,” (Aspinall's Cases of Maritime Law, N.S.,  
 vol. 2, p. 569)—in which this Board, affirming a  
 decision of Sir Robert Phillimore, expressed itself



in these terms: "There remain, however, two  
" other possible constructions. The first is, that  
" on proof of an infringement of any of the  
" regulations for preventing collisions, there  
" arises, subject only to the qualification con-  
" tained in the final clause of the section, an  
" absolute presumption of culpability against the  
" vessel guilty of such infringement, to which  
" the Court is bound to give effect, whatever  
" the nature of the infringement may be. The  
" other, is that the infringement must be one  
" having some possible connection with the  
" collision; or, in other words, that the pre-  
" sumption of culpability may be met by proof  
" that the infringement could not by any possi-  
" bility have contributed to the collision." And  
the same doctrine has been laid down by  
Sir Robert Phillimore in very much the same  
terms in a subsequent case of the "Englishman"  
(3 Prob. Div., p. 18).

Applying the law as thus laid down, it appears  
to their Lordships in this case, that at all events  
it has not been shown that the non-compliance by  
the "Lapwing" with the regulations in respect to  
lights could not have contributed to the collision.  
On the contrary, they are inclined to think that,  
in all probability, it did materially contribute to  
the collision. That being so, the ordinary rule  
of the Admiralty Court applies as to the division  
of damage. It has been suggested by one of the  
learned Counsel for the Respondents that the  
learned Judge was right in dismissing both suits,  
or at all events in dismissing the suit of the  
"Hochung," on the ground that the proof was  
not *secundum allegata et probata*; but it appears  
to their Lordships that there is a sufficient  
allegation on the part of the "Hochung" that the  
"Lapwing" infringed the regulations with respect  
to lights; and, putting aside all the rest of their

allegations, that would entitle the owners of that vessel to recover upon the proof of the infringement of the regulation with respect to lights.

The allegations of the "Lapwing" of improper navigation by the "Hochung" are also sufficient, and established. That being so, the ordinary rule of the Court of Admiralty applies; and therefore it will be necessary that the judgment should be varied by directing that, instead of the two petitions being dismissed, the damages should be divided between the parties according to the Admiralty rule, which is that each party shall obtain from the other half of the damage which he has suffered.

Their Lordships will, therefore, advise Her Majesty to vary the judgment in the manner which has been above intimated. There will be no costs on either side.

