Judgement of the Lords of the Judicial Committee of the Privy Council on the consolidated appeals of The Owners of the British Steamship "Glamorganshire" v. The Master, Owners, and Crew of the American ship "Clarissa B. Carver" and The Owners of the British Steamship "Glamorganshire" v. S. D. Warren and Company (consolidated appeals), from Her Britannic Majesty's Supreme Consular Court for China and Japan at Shanghai; delivered 22nd March 1888.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

IN this case two actions have been brought in Her Majesty's Court of Japan, sitting as an Admiralty Court, against the steamship "Glamorganshire" or her owners. One is by the owners of the American sailing ship "Clarissa B. Carver" for damage done to that ship, and the other by S. D. Warren and Co., who say that they are owners of the cargo on board the "Clarissa B. Carver," for damage done to the cargo. The contention is that the "Glamorganshire" is solely in fault for a collision that took place between the two ships. The "Glamorganshire" contends either that she was not in fault, or that the "Clarissa B. Carver" contributed to the collision. By arrangement between the parties the evidence has been taken in both actions together, and though there are separate judgements given in the actions they were in effect tried together. The same arrangement has been pursued before their

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Lordships. The appeals have been consolidated, the same counsel appeared for the Respondents in the two cases, and their Lordships are dealing with the cases *uno flatu.*

The Court of Japan decided both actions in favour of the Plaintiffs. The Defendants, the owners of the "Glamorganshire," appealed to the Supreme Court for China and Japan, and that court affirmed both the decrees, the decree in the ship case absolutely, and the decree in the cargo case with a modification which will be mentioned presently.

To take first the ship case. There are many questions raised in the actions as to the conduct and handling of the ships, which have been settled by the concurrent decisions of the two courts in a way which the counsel for the "Glamorganshire" have felt that they could not dispute, having regard to the rule which prevails in this tribunal respecting the effect of concurrent decisions on pure questions of fact. But there is one question left on which it is argued that this tribunal should review the decisions of the courts below, though they are in effect concurrent. It is said that there was some variation of the ground taken by the courts below, and that the matter is open to their Lordships now. The contention amounts to this: that the ship "Clarissa B. Carver" committed a breach of the Maritime Regulations, and, having committed that breach, her case falls within the principle which was laid down in the case of the "Fanny M. Carvill," that where there was a breach, the presumption of culpability on the part of the vessel committing it can only be met by proof that the disaster in question could not by any possibility be attributed to the breach. But then in order to attract that principle, and to get the benefit of it, there must first be shown that there was in fact a breach

of the regulations, and that must be proved like any other fact in the case. It is not sufficient to say that from the facts proved there might possibly have been some breach of the regulations. Proof must be given leading up to the conclusion that there was a breach, and then, if that breach could possibly have led to the disaster, the ship must be held to blame on the principle laid down in the "Fanny M. Carvill."

Now the regulation which is said to be infringed is Article 3 (*b*) of Section III. It provides that a steamship shall carry "on the "starboard side a green light so constructed as "to show an uniform and unbroken light over "an arc of the horizon of ten points of the "compass; so fixed as to throw the light from "right ahead to two points abaft the beam on "the starboard side; and of such a character as "to be visible on a dark night with a clear "atmosphere at a distance of at least two miles." By Article 5 that regulation is extended to sailing vessels.

It is said that that regulation has been infringed in two particulars. First, it is said that the light was too dim; that it was not "of such a "character as to be visible on a dark night with "a clear atmosphere at a distance of at least "two miles." Upon that point both courts have elaborately examined the evidence, and they have come to the conclusion that the witnesses on board the "Clarissa B. Carver," who all spoke one way, and who gave clear testimony that there was a bright light which they calculated would be visible at three miles, were to be believed, and that there was no infringement of the regulation upon that point. Their Lordships think it necessary to say nothing further upon that point, excepting that as the evidence has been brought before them, they consider that the courts came to a right conclusion.

But then another point was made. It is said that the light was fixed in the rigging and that that is an improper place to fix the light. The answer is that the regulation does not say it shall not be fixed in the rigging; and not only is it not contrary to the regulation; it is a common practice; and in American ships appears to be a very common practice—it would seem almost to be the common practice. The naval officers who have assisted their Lordships in this case concur with the evidence given on this point.

Then it is alleged that the light was so fixed that the foresail or some portion of the foresail would interfere so as to prevent the lamp showing a uniform and unbroken light over an arc of the horizon of ten points of the compass. It is important to see how that allegation was dealt with in the courts below. Before the court of Japan the same point was raised, and the judge deals with it in this way at page 58, line 37:—"It is said the clew of the foresail, or the "foresail itself, may have obscured it"—that is the lamp—"and, in support of this, a number of "witnesses were called by the steamer to show "what the usual heights of the clew and foot of "the foresail above the rail of a ship are. "Against this evidence of the usual height is "brought the positive testimony of the crew of "the 'Clarissa B. Carver,' who say that the clew "was about six feet, and the foot of the sail eight "or nine feet above the rail." Then he holds that these witnesses are to be believed. It is quite true that in giving his reasons why they should be believed, an inaccurate reference is made to the evidence of two witnesses who have spoken as to the height of the clews of foresails on other ships, but in their Lordships' judgement that inaccuracy is immaterial to the conclusion to be drawn; and it is certainly some proof of the

satisfactory character of the judgement of the court of Japan, that the contention as to the clew of the foresail was abandoned in the Court of Appeal. The Supreme Court in their judgement upon that appeal make these remarks:—"Then as to the
" 'Clarissa B. Carver's' green light having been
" obscured in some way or other, we remark that
" the learned counsel for the Appellants did not
" even attempt to uphold the theory suggested
" in the court below, viz., that the light in
" question might have been obscured by the
" clew or foot of the 'Carver's' foresail, but
" propounded to us an entirely different explana-
" tion, viz., that the light might have been, and
" probably was, obscured by a single or double
" rope, known to sailors as the 'lee foretack.'
" We have taken the opinion of our nautical
" assessors upon the point, and we are advised
" by them that it is in the highest degree impro-
" bable that the 'lee foretack' could in any way
" have obscured the light from the view of those
" on board the 'Glamorganshire.' It appears to
" us to be unnecessary to say anything further
" on this part of the case."

Now the theory which was put forward in the court of Japan and abandoned in the Supreme Court of China and Japan, is put forward again, and it certainly comes here under some disadvantageous circumstances, but their Lordships have paid careful attention to the evidence, and propose to decide the case according to their view of that evidence.

There is nothing in the diagrams which are exhibited, and nothing in the evidence as to the construction of the ship, to show that there was any necessary interference with the light by the clew of the foresail, or any strong probability that the light would be so interfered with. The argument having rather rested on suggestions by counsel of exceptional circumstances (as, for

instance, the yard being tilted, or the sail bellying out in a particular way) which might possibly create an interference by the sail with the light; but there is nothing in the evidence to show that such circumstances ever existed, or induce their Lordships to think that there was any breach of the regulation. The only positive assertion of the witnesses for the Appellants is that the people on board the "Glamorganshire" did not see the light of the "Carver," and therefore they agree that something must have hidden it. But from the direction in which the ships were approaching it seems to their Lordships that even if under any circumstances the clew of the foresail could interfere with the range of the light, it could not have so interfered as to intercept the light from the eyes of the persons who were on board the "Glamorganshire," and having consulted the nautical assessors, they are advised that according to the evidence the case would be so.

Then going to what the other witnesses say, all the principal people on board the "Clarissa B. Carver" have been examined, and the effect of their evidence is this: that the lights were fixed from 3 to 4 feet above the rail of the ship. Upon that point the master of the ship was examined, the pilot, the first mate, the carpenter, three able seamen and a cabin boy, and some say 3 feet, others 3½ feet and 4 feet. A diver was employed by the "Glamorganshire." He went down, and according to his measurement the screen in which the lamp was fixed was 4 feet above the rail. Then comes the question what is the height of the clew above the rail, for if the height of the clew is such as to give the lamp free play below the clew, it is an utter impossibility that the clew should have interfered with the range of the light. As to the height of the clew, the first mate was examined, the carpenter was examined, and the second mate,

who was also the man on watch, and who was sent for by the captain about the time of the collision—a little before—to see whether the light was visible and burning brightly, and who found that it was so. Those persons tell us that the clew of the foresail was from 5½ to 6 feet above the rail. If that be so there was ample space for the light to play between the very lowest elevation of the clew of the foresail and the point above the rail at which it was fixed. Therefore their Lordships come to this conclusion, that even if it could be held that an occasional obscuration of the light by sail under exceptional circumstances was a breach of the regulation, the evidence in this case is to the effect that there never could be any interference at all by the sail with the lamp; that therefore there was no breach of the regulation; that the "Clarissa B. Carver" is not to be held to blame in any way, and that the judgement appealed from is a right judgement.

Now with respect to the cargo action. The objection there is that the Plaintiffs have not proved their title to maintain the action. The evidence given of their title was that of Galtzow, who was the clerk or in the employ of Messrs. Paul Heinemann and Co. His evidence is that the cargo was shipped by Messrs. Paul Heinemann and Co., and shipped by the order of the Plaintiffs; that it was deliverable to Barings; that 22,000 dollars had been borrowed—he does not say by whom—probably by Heinemann and Co. of the Hong Kong bank, and that the bill of lading was endorsed over to the bank. No doubt that does not show a clear title to the money in the Plaintiffs, but it does show that they had an interest in the cargo, and their Lordships hold that that interest is sufficient to enable them to maintain the suit.

The judge of the court of Japan passed a decree that the Plaintiffs do recover from the

Defendants damages to be ascertained on the usual reference to the Registrar. At the same time he offered to the Defendants a modification of that decree to the effect that the money should not be paid until the various claims against it were ascertained. Apparently they refused that modification, and they appealed to the Supreme Court to get the decree reversed. The Supreme Court affirmed the decree on the merits, but at the request of the Appellants appended this modification:—"That the money which may be "awarded under the reference herein be not "paid to the Plaintiffs until it shall have been "satisfactorily established that the payment "will release the owners of the steamship "'Glamorganshire' from all claims on behalf "of any consignees or indorsees of the bills of "lading." That seems to their Lordships to meet exactly the justice of the case. They think that the Plaintiffs have an interest to maintain the suit to recover the money for the benefit of those persons who on the inquiry are proved to be entitled to it, and under circumstances in which the money will not be paid out till the owners of the "Glamorganshire" are completely freed from all claims.

The result is that, in their Lordships' opinion, the appeals fail and should be dismissed and the respective decrees affirmed, and they will humbly advise Her Majesty to that effect. The Appellants must pay the costs of the appeals.