

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Imperial Royal Privileged Danubian Steam Navigation Company v. the Greek and Oriental Steam Navigation Company (the "Mars" and "Smyrna"), from the Supreme Consular Court at Constantinople; delivered 23rd July, 1864.

Present:

LORD CRANWORTH.

SIR EDWARD RYAN.

SIR JOHN TAYLOR COLERIDGE.

BOTH the parties in this Appeal were owners of steam-vessels navigating the Danube. The name of Appellants' vessel was the "Mars;" that of the Respondents the "Smyrna." On the 6th of November, 1860, the "Mars" was coming empty, or nearly empty, down the river, and the "Smyrna" was ascending it with a cargo, besides two vessels which she had in tow, one an English brig lashed to her port side, the other an Austrian vessel towed astern. At about twelve miles above the Sulina mouth of the Danube, the river in its descent makes a sudden bend or sweep to the right, at nearly a right angle; concave therefore on the left, or, as it is designated, the Russian side of the river, and convex on the right or Turkish side. The reach for some miles above this bend is called the Tavola di Ciamburla, that below it the Tavola di Greco. On the 6th of November, 1860, at about half-past 6 P.M., it being then calm and moonlight, the "Mars" descending the river and the "Smyrna" ascending it, came into violent collision close to the Turkish side in the Tavola di Greco, a little below the point where the river makes its bend. The result was very disastrous. The "Mars" was nearly cut in

two by the stem of the "Smyrna," and she almost immediately sank. On the 23rd of January, 1861, the Appellants presented their petition to the Consular Court at Galatz, alleging that their vessel had been destroyed owing to the fault of the "Smyrna," and praying the Court to condemn the owners of the "Smyrna" to pay them a large sum, exceeding 42,000 Austrian ducats, by way of compensation for the loss they had sustained.

The admission of this petition was opposed by the Respondents; but on hearing arguments on behalf of each party, the Consular Court admitted the Petition, and, on the 17th of September, 1861, declared that the issue to be tried was "whether the collision was caused by the fault or neglect of the 'Smyrna,'" and to this issue the parties agreed. The Court then immediately proceeded to the trial of this issue, which lasted many days, and on the 30th of September, 1861, the Court pronounced its Judgment in favour of the Respondents, "being of opinion and deciding that the collision between the steamers 'Smyrna' and 'Mars' was not caused by the fault or negligence of the 'Smyrna.'"

At the trial the captains and many of the crews of both vessels were examined, as well as several pilots and other persons who were considered qualified to throw light on the subject, and much documentary evidence, including, among other things, the General Treaty of Peace signed at Paris on the 30th of March, 1856, and also certain Provisional Regulations for the Navigation of the Danube between Isatcha and Sulina made by a Commission appointed under the provisions of that Treaty of Peace, for clearing the mouths of the Danube from sand and other impediments.

The Consular Court refused to attribute any binding force to these regulations, and gave its Judgment on the merits of the case as if no such regulations had ever been made.

The Appellants were dissatisfied with this decision, and appealed from it to the Supreme Consular Court at Constantinople, where the case was argued by learned Counsel on both sides. The Appeal failed; the Supreme Consular Court having concurred with the Court at Galatz both as to the invalidity of the new regulations, and as to the merits of the case.

From this latter decision the owners of the "Mars" appealed to Her Majesty, and the Appeal was heard at great length before the Judicial Committee on the 23rd and 24th days of June last, and their Lordships are now prepared to state the conclusions at which they have arrived.

The first point to be considered is whether the Appellants are right in their contention as to the effect of the Regulations made on the 27th of June, 1860, as to the navigation of the Danube between Isatcha and Sulina.

They contend that under the General Treaty of Peace of 1856 these Regulations had the binding force of law on all vessels navigating this part of the Danube.

Whether they are warranted in so contending depends on the effect of the XVth and following Articles of the Treaty of Peace.

The XVth Article begins by putting the Danube; with respect to the rights of persons using it for purposes of navigation, in the same category as that in which the other great European rivers separating or traversing different States were placed by the Congress of Vienna. And then it provides that its navigation shall be subject to no impediment or charge not hereinafter provided for, and that the Regulations of Police and Quarantine to be established for the safety of the States separated or traversed by that river shall be so framed as to facilitate the passage of vessels.

The general objects of the parties to the Treaty of Peace having been thus laid down, the XVIth Article provides that a Commission, in which Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, should each be represented by one Delegate, should be charged to designate and cause to be executed below Isatcha the works necessary to clear the mouths of the Danube, as well as the neighbouring parts of the sea, from sands and other impediments. And power was given to them to establish fixed duties to be levied in order to cover the expenses of the works as well as of the establishments intended to secure and facilitate the navigation at the mouths of the Danube.

This Commission, called in the Treaty the European Commission, was to be temporary, the object being that it should endure only so long as

the works with the execution of which it was charged were in progress ; but the XVIIth Article provides for the establishment of another Commission, called the River or Riverain Commission, which was to be permanent ; its duties being, first, to prepare regulations of navigation and river police ; secondly, to remove all impediments which prevented the application to the Danube of the arrangements of the Treaty of Vienna ; thirdly, to order and execute all necessary works through the whole course of the river ; and, fourthly, after the dissolution of the European Commission, to see to the maintaining of the mouths of the Danube in a navigable state. The Commissioners, who were to constitute this permanent Commission, were to consist of Delegates, not like the European Commission, from the great European Powers, but from the States traversed by or bordering on the river along its whole line. Austria, Turkey, Bavaria, and Wurtemberg were each to send one Delegate, and there were to be Commissioners from the three Danubian Principalities, to be approved, however, by the Porte.

The XVIIIth Article, after stating that it was understood that in two years the European Commission would have completed its task, and the River Commission would have finished its duties under the first and second heads mentioned in the XVIIth Article, proceeds to declare that the parties to the Treaty would, after having been informed of that fact, pronounce the dissolution of the European Commission, from which time the permanent River Commission should enjoy the same powers with which the European Commission had been up to that time invested.

It may be collected from the evidence that the European Commission was duly constituted, but there is nothing to show what works it executed under the powers conferred on it by Article XVI of the Treaty.

On the 27th of June, 1860, the European Commission issued a document entitled, according to the English translation of it published afterwards in the "London Gazette" of the 10th of May, 1861, "Provisional Regulations for the Police of the Navigation on the Lower Danube between Isatcha and Sulina," in which part of the river it may be

observed both the Tavola di Ciamburla and the Tavola di Greco are situated. These Regulations were 45 in number, and the 7th is in these words:—

“ Article 7.—When two steam-vessels, or two sailing-vessels, sailing with a favourable wind, meet, whilst proceeding in different directions, the one ascending stream must steer towards the left bank, and the vessel descending towards the right bank. Any captain or master breaking these regulations will be absolutely responsible for all accidents which may result. He is bound, besides, to give the signals prescribed by Articles 8 and 9 following.”

The Appellants contend that this regulation was binding on the “Smyrna;” that in ascending the river she ought therefore to have kept on the left or Russian side of the river; that she did not do so, but, on the contrary, crossed over to the right or Turkish side; and so that the collision was wholly attributable to her neglect in not attending to the new Regulation.

The force of this argument depends on the question whether the European Commission had authority to make this regulation,—and we are clearly of opinion that it had not. No functions were confided to that Commission except those of designating and causing to be executed the works below Isatcha necessary for clearing the mouths of the Danube and the neighbouring parts of the sea, and it is impossible to bring these provisional regulations within the scope of those functions.

It was indeed argued, that the mode in which vessels should navigate the river, where works were in progress, might be very important with reference to the due carrying on of those works, and that the Commissioners must therefore, by necessary implication, be considered to have authority to prescribe such regulations as might assist them in the discharge of their proper duties. It is not necessary to consider how far this argument is sound, for there was no evidence as to any works being in progress to which the regulations promulgated would apply; and indeed, looking to the whole document, it was plainly intended to have reference to the general convenience of vessels navigating the Danube between the sea and Isatcha, and not to any special provisions rendered necessary by works then in progress. It is true that the regulations are

described as "provisional," but that evidently had reference not to any temporary circumstance connected with the clearing of the river's mouth, but to the fact that no such regulations had yet been made by the Riverain Commission. The European Commissioners probably felt that such a code as they promulgated would confer a great benefit on persons navigating the Danube. Whether this were so is a point on which we have no means of forming an opinion. All we can say is, that they certainly had no authority to issue such a code, and the regulations are therefore void.

It was next contended that even if the Commissioners as a body had no power to make these regulations, yet that inasmuch as Turkey was represented in the Commission, the regulation would have validity as emanating from the Sovereign of the State traversed by the river. To this reasoning, however, we cannot accede. Turkey concurred with the other great European Powers in naming Commissioners by whose acts in performing certain defined duties she agreed to be bound, but it is impossible to hold that she is bound by the acts of her Commissioner done beyond the scope of his commission. This is so clear that it becomes unnecessary to consider whether the political relations subsisting between the Danubian Principalities and the Porte do not make it impossible for her, though enjoying a sort of suzerainty, to frame regulations for the navigation of the Danube without their consent. The necessity of such concurrence may perhaps be inferred from the express provision in the Treaty of Peace that no permanent regulations for navigation of the river can be promulgated without the concurrence of Commissioners from the Principalities.

We do not dispute the proposition that such a code of navigation rules as was embraced in these Regulations might, even though not emanating from any competent authority, by long usage or well-recognized practice obtain the force of law. But there was certainly no such usage or practice at the time when this collision occurred.

On these grounds we are of opinion that this case must be decided on the laws and practice of navigation on the Danube as they existed before the publication of these Regulations ; and it is unnecessary

for us to consider whether there had or had not been such a publication of them as was required in order to give them validity if there had been authority in the European Commission to make them.

Looking then to the case, independently of the new regulations, and recollecting that the question is whether the collision occurred through the fault or negligence of the "Smyrna," the first question is, in what position ought she to have placed herself when she first became aware that she was meeting the descending steamer?

The current at the part of the river between the two reaches is described on all hands as setting strongly towards the Russian or concave bend of the river, and not only the numerous pilots called by the Respondents, but also the English naval officer, Lieutenant Crozier, who had been for two years on the Danube station, state it to be their opinion, that that a steamer ascending the stream at night, and being about to meet a steamer descending the river at the bend in question, ought to place herself on the right or Turkish side.

The reason for this is obvious. The descending vessel will of course be moving with great velocity, and must almost of necessity be carried, more or less, into the concave bend of the stream, where the current is much stronger than on the opposite or Turkish side. Prudence, therefore, must dictate what the great bulk of the evidence shows to have been the practice, namely, that in such circumstances the ascending vessel ought to place herself out of the strength of the current, in order to allow full swing to the descending vessel, which must necessarily be hurried along by its force.

The naval officers whose assistance we had as Assessors, informed us that, independently of any special regulations, this would obviously be the course which ought to be pursued. Indeed, they thought that no regulations for the general navigation could properly be so construed as to oblige an ascending vessel, at night, to prosecute her course on the left bank, at the bend of the river near which the collision occurred. Common prudence would require her to place herself out of the strength of the current.

This brings us to consider what, in fact, was the

position of the "Smyrna" at and immediately before the collision.

On this point there is a conflict of evidence. The captain of the "Mars" deposed that his vessel was descending on the right or Turkish side of the river, and that the "Smyrna" was ascending the river on the left or Russian side, and that whilst the "Mars" was thus keeping the Turkish side, the "Smyrna" crossed over from the opposite side, and while she was across the stream, with her bows pointed towards the Turkish beach, ran into the "Mars" at full speed, striking her at the fore part of the port paddle-box.

This was the account of the relative position of the vessels given by the master of the "Mars;" but the evidence of the master of the "Smyrna" was very different. He says that he was ascending the river on the Russian side, but that seeing across the land the "Mars" descending, being then about a mile and a-half or two miles off, he, after consulting his pilot, crossed over to the Turkish side, and was proceeding up the stream in a line parallel to and distant about two ship's breadths from the bank when he saw the "Mars" round the point close over on the Russian side; that she then crossed over to the Turkish side, and so came into a position in which the "Smyrna" unavoidably came into collision with her, catching her at the port paddle-box.

If this latter account of the accident be the true one, it is impossible to say that the Plaintiff has made out what, according to the issue on which both parties had agreed, he had undertaken to prove, namely, that the collision was caused by the fault or negligence of the "Smyrna." She was (according to this evidence) steaming up on the side of the river on which the evidence satisfies us she ought at that point to have been when meeting a descending vessel.

The question therefore is, which of these two accounts of the accident is entitled to credit. Two successive Courts, after long and elaborate arguments, have decided in favour of the Respondents, the Judge of one of these Courts having had the advantage of seeing and hearing the witnesses themselves. It would, therefore, be a strong thing to

reverse such Judgments on the facts of the case. It would be improper to do so unless it could very clearly be seen that a wrong result had been arrived at.

So far, however, is this from being the case, that the weight of evidence seems to their Lordships to preponderate greatly in favour of the Respondents. The account which the Respondent's witnesses gave as to the lights of the "Mars," which they saw from time to time, is in exact conformity with what they must have seen if their account of the collision is true.

Hughes, the master, and Creak, the second officer of the "Smyrna," both say that at the moment when the "Mars" rounded the point they saw her mast-head light and her green light; that they then suddenly saw all three lights, the red, the green, and the white, and in a few seconds shut in the green. This is exactly what would have happened if the "Smyrna" was, as these witnesses swear she was, ascending the river on the Turkish side; and if the "Mars," descending at a rapid rate, swung round the point up to the concave bend on the Russian side, and from thence crossed over to the Turkish side.

It may further be observed that the evidence given by the Captain of the "Mars," as to what he saw of the lights of the "Smyrna" is scarcely to be reconciled with the facts of the collision as put forward by the Appellants. He says that before the collision they lost sight of the red light of the "Smyrna." This could hardly have happened if the "Smyrna" had been, as the Captain says she was, across the stream, with her bows pointed to the Turkish bank. But, on the other hand, if the "Smyrna" was ascending the river parallel and close to the Turkish bank, then it might well be that just before the collision took place, the red light of the "Smyrna" would be shut out from the "Mars." Their Lordships do not forget that the evidence of Abramovich the pilot and of Busdan the steersman of the "Mars" on this point is at variance with that of the Captain. They say that they continued to see all the three lights up to the moment of the collision. This discrepancy shows at all events, without imputing to the wit-

nesses dishonesty, that they cannot be implicitly relied on for their accuracy. On one important point at least they are not agreed. And it is more probable that in the confusion and terror of the collision these two witnesses should have forgotten or failed to observe a change in the lights of the "Smyrna" than that the Captain should have imagined that he discovered such a change if no such change occurred.

The Judge of the Supreme Consular Court at Constantinople points out several discrepancies in the testimony of the witnesses called on behalf of the "Mars." The Captain says, and several of the crew confirm him, that he called out to the "Smyrna" to keep to his right ("Tenetevi alla dritta—alla dritta"). But one of the seamen, Haiduco, deposes that the words uttered by the Captain, were not "alla dritta," but "alla sinistra," and that he understood them to be addressed to the "Smyrna" by the way in which the Captain waved his hand. There are other minor discrepancies pointed out in the Judgment.

Their Lordships, however, are not inclined to attach much weight to them. It is possible they may be the result of a want of truth in the witnesses. It is at least as possible that they may arise from imperfect observation and recollection of what took place at a moment of great peril and confusion. But what their Lordships have to consider is whether the evidence adduced by the Appellants is such as to establish what they were bound to make out, namely, that the collision was occasioned by the fault or negligence of the "Smyrna." To do this it was incumbent on them to show that the testimony given on behalf of the owners of the "Mars" was more trustworthy than that given on behalf of the "Smyrna." This they have failed to do. What might have been the result if they had satisfied their Lordships that the new regulations put forth by the European Commission in 1860 afforded the rules of navigation by which this case ought to be decided, it is unnecessary to say. Even then the naval gentlemen who assisted their Lordships were strongly inclined to think the course pursued by the "Smyrna" was the proper course. But as we have already given our opinion that those new

regulations had no binding force, their Lordships can only look to the same arguments and considerations on which the Consular Court at Galatz, and the Supreme Consular Court at Constantinople, rested their Judgments. With the conclusions at which those Courts arrived their Lordships concur, and they must therefore advise Her Majesty that this Appeal should be dismissed, with costs.

THE FIRST PART OF THE HISTORY OF THE
REIGN OF CHARLES THE FIRST
BY JOHN BURNET
OF THE UNIVERSITY OF OXFORD
M.D.C.LXXII.

Printed by I. B. for W. B. at the
University Press, Oxford.

THE SECOND PART OF THE HISTORY OF THE
REIGN OF CHARLES THE FIRST
BY JOHN BURNET
OF THE UNIVERSITY OF OXFORD
M.D.C.LXXII.

Printed by I. B. for W. B. at the
University Press, Oxford.

THE THIRD PART OF THE HISTORY OF THE
REIGN OF CHARLES THE FIRST
BY JOHN BURNET
OF THE UNIVERSITY OF OXFORD
M.D.C.LXXII.

Printed by I. B. for W. B. at the
University Press, Oxford.

THE FOURTH PART OF THE HISTORY OF THE
REIGN OF CHARLES THE FIRST
BY JOHN BURNET
OF THE UNIVERSITY OF OXFORD
M.D.C.LXXII.

Printed by I. B. for W. B. at the
University Press, Oxford.

THE FIFTH PART OF THE HISTORY OF THE
REIGN OF CHARLES THE FIRST
BY JOHN BURNET
OF THE UNIVERSITY OF OXFORD
M.D.C.LXXII.

Printed by I. B. for W. B. at the
University Press, Oxford.

THE SIXTH PART OF THE HISTORY OF THE
REIGN OF CHARLES THE FIRST
BY JOHN BURNET
OF THE UNIVERSITY OF OXFORD
M.D.C.LXXII.

Printed by I. B. for W. B. at the
University Press, Oxford.