Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Owners of the "Fanny M. Carvill" v. the Owners of the "Peru" and Others, from the High Court of Admiralty—ships "Fanny M. Carvill" and "Peru;" delivered 9th June, 1875.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR HENRY S. KEATING.

THIS is a case of collision between the American barque the "Fanny M. Carvill," and the Swedish barque "Peru." The undisputed facts of the case are that the collision took place about half-past 9 of the evening of the 18th of November, 1874, some fourteen or fifteen miles off Beachy Head; that both vessels were beating down Channel close hauled against a westerly wind, and were crossing so as to involve risk of collision; that the "Fanny M. Carvill" was on the port, and the "Peru" on the starboard tack, and accordingly that it was the duty of the former to get out of the way of the latter, and the duty of the latter to keep her course. Of the case made by the Appellants in order to excuse the failure of the "Fanny M. Carvill" to keep out of the way of the "Peru," and to cast the responsibility of having caused the collision wholly or partially on the latter, the material allegations are that those on board the "Peru" improperly neglected to keep their course, and that the lights of the "Peru" were improperly fixed and screened.

The principal witness in support of this defence was Martin Scheringer, the mate of the "Fanny M.

Carvill," and the officer of the watch at the time of the collision. His testimony is, that when the "Peru" was first sighted he saw her red light; that he knew she must be beating down Channel, close-hauled on the starboard tack, and that it was his duty to keep out of her way; but that before he took, or could take, any means towards that end, she opened her green light, and continued to show both her lights for ten minutes; that, inferring from this that she was bearing away, he kept his own course, after showing a flash light in order to make the other vessel give him a free berth; but that she, after having apparently kept away at least two points, ultimately luffed four points, with her sails aback and shivering, shutting out by the last manœuvre the green light; and this caused the collision.

Their Lordships must remark on this evidence that it is inconsistent with any theory except an actual deviation from her course on the part of the "Peru." If, as is now suggested, the improper length of the screen would account for the fact that the green light was seen by those on board the "Fanny M. Carvill," although the "Peru" may have kept her course, it would not account for what the mate has sworn touching her luffing and the appearances of her sails. It is therefore material to come to a clear conclusion upon the question whether the "Peru" did, in fact, keep her course. That she did so their Lordships have no doubt. The learned Judge of the Court of Admiralty, upon the conflicting evidence before him, has found in terms: "That the 'Peru,' a starboard-tacked vessel, continued on her course without alteration up to the time of the collision; that it is untrue, as stated by the witnesses on the part of the 'Fanny M. Carvill,' that the 'Peru' ever came right up into the wind two and a-half points with her sails flat aback."

There is nothing in the case to induce their Lordships to doubt the correctness of this finding, which is materially confirmed by the fact that, in the first instance, the master of the "Fanny M. Carvill" had so little faith in the account given by his own officer, that he openly threw the blame of the collision upon him, and would, under legal advice, have admitted his liability, had it not been ascertained that the screens of the "Peru's" lights were of less than the prescribed length. And accordingly, the

learned Counsel who argued the Appeal have faintly, if at all, contended that the "Peru" did, in fact, alter her course, and have chiefly directed their arguments to show that the green light was, by means of the defect in the screen, visible to those on board the "Fanny M. Carvill;" was, in fact, seen by them; and, therefore, naturally gave rise to the inference that the "Peru" was bearing away.

To this defence, as to that founded on an actual deviation by the "Peru" from her course, it is essential to establish that the green light was, in fact, seen by those on board the "Fanny M. Carvill" across the bows of the "Peru." Upon this point there is the direct evidence of the mate and look-out man, who, having been disbelieved upon other points, cannot be treated as trustworthy witnesses. Their evidence on this point, however, is in some degree corroborated by that of the Captain, the Surveyors for the Board of Trade, and the other witnesses who were called to prove that the green light might be seen across the bows of the "Peru." On the other hand, there was a considerable body of testimony to the contrary, and the learned Judge of the Admiralty, upon this conflict of evidence, has found as a fact that the green light of the "Peru" was not seen across the bow of the "Peru" by those on board the "Fanny M. Carvill," and, therefore, could not have contributed to the collision. Their Lordships are so far from dissenting from this finding, that they are prepared to go beyond what is directly expressed by it, and to hold upon the evidence before them, and for the reasons next to be stated, that in the circumstances in which these vessels were placed, the green light of the "Peru" *could not by any possibility have been seen* by those on board the "Fanny M. Carvill."

The vessels, though on opposite tacks, were both close-hauled, and may be assumed to have been sailing within six points of the wind, whether the direction of that was west, or two points to the north of west. This being so, their Lordships are of opinion that each must first have seen the other as stated by those on board the "Peru," about two points on her own lee bow. For if the bearing of the "Peru," when first sighted by the "Fanny M. Carvill," was four, or even three points on the lee bow of the latter, as stated by her mate, it is diffi-

cult to see how the two vessels, sailing as they were sailing, and each keeping her course, could ever have come in collision. Now their Lordships are satisfied that the green light of the "Peru" could not have been visible two points over her port bow, if the screen projected, as it is proved to have projected, considerably more than one foot from the position of the light in a direction parallel to the keel. For these reasons, as well as upon the direct evidence in the cause, they have come to the conclusion, in which they are confirmed by their assessors, that the green light of the "Peru" not only was not, but could not by possibility have been seen by those on board the other vessel; and, accordingly, that the defect in her screens neither did, nor could have contributed to the collision. This conclusion was probably intended to be implied, though it is not in terms expressed, in the finding of the Court of Admiralty. These being the facts of the case, it follows that the "Fanny M. Carvill," which failed to keep out of the way of the "Peru," must be pronounced solely to blame for the collision; unless by force of the 17th section of the "Merchant Shipping Act, 1873" (the 36 and 37 Vict., c. 85), as construed in the recent case of the "Hibernia," the "Peru" is to be deemed to be also in fault; although the particular infringement of the sailing rules imputed to her neither did, nor could by possibility have contributed to the accident.

The words of the statute are, "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 collisions contained in, or made under, the Merchant Shipping Acts, 1854 to 1873, have 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 a departure from the regulations necessary."

The alleged infringement is of that part of Article 3 of the Sailing Rules which prescribes that "the green and red side lights shall be fitted with inboard screens, projecting at least 3 feet forward from the light, so as to prevent these lights from being seen across the bow." The screen of the "Peru" is shown to have been nearly a foot (about 11 inches) short of the prescribed length. It must

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be assumed that those under whose advice the rule was framed considered that a length of 3 feet was necessary in order to prevent the light from being seen, under any circumstances whatever, across the bow. And there is evidence in the cause, independent of that of the discredited witnesses, to show that, under some circumstances, the green light might be perceptible across the bow. Their Lordships, therefore, notwithstanding their conviction that the green light could not have been seen more than a very few degrees (if at all) across the bow of the "Peru," will assume that there was an infringement of the regulation within the meaning of the Statute. And it has certainly not been shown that the circumstances of the case made a departure from the regulation necessary.

In construing the clause in question, it is to be observed that the Act of 1873 did not repeal, nor was it a substitute for, the Merchant Shipping Acts of 1854 and 1862. On the contrary, its 2nd section declares that it is to be construed as one with them. Now, the 298th section of the Act of 1854, and the 29th section of the Act of 1862, provides each that in certain cases of infringement of the sailing regulations those guilty of the infringement shall incur certain consequences. But each contains the qualification that the collision shall appear to the Court to have been occasioned by the non-observance of the regulation infringed. When, therefore, in the 17th section of the Act of 1873 the Legislature omitted this qualification, it must be presumed to have done so designedly, and, at all events, to have intended that it should no longer be incumbent on the opposite party to prove that the non-observance of the regulations in fact contributed to the collision. Nor does it appear to their Lordships that the 17th section of the Act of 1873 can be taken merely to shift the burthen of proof by raising a presumption of culpability, to be rebutted by proof that the non-observance of the rule did not in fact contribute to the collision, because the preceding (the 16th) section clearly shows that where the Legislature intended only to raise a presumption capable of being rebutted by such proof it used apt words to express that intention.

Their Lordships therefore conceive that, whatever be the true construction of the enactment in ques-

tion that which would take the case out of its operation by mere proof that the infringement of the regulation did not, in point of fact, contribute to the collision, is inadmissible. They conceive that the Legislature intended at least to obviate the necessity for the determination of this question of fact (often a very nice one) upon conflicting evidence.

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 contained 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 presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision.

The former of these constructions, though possibly the more consistent with the literal meaning of the words of the section, seems to their Lordships to be the less reasonable of the two. It not only leads to the extravagant consequences pointed out by the learned Judge of the Admiralty Court; it implies an intention which, without the plainest language, can hardly be imputed to the Legislature. For it is one thing to say that when the circumstances show that the infringement of the regulations might have contributed to the collision, the Court shall conclusively infer that it did so. It is another, and very different thing to say, that the Court shall draw the same inference, when the circumstances show that the infringement, from its nature, could not possibly have contributed to the collision. In the latter case the Legislature would entirely alter the nature of the shipowner's liability. As the law stood, he was civilly liable in damages for the consequences of his act or omission. The new law, so far as it enacts that the consequences which might have flowed from that act or omission, shall be presumed to have flowed from it, does not affect the nature of that civil liability. But on the supposed construction it would virtually substitute

for a civil liability which the shipowner could not have incurred, a penalty for the infringement of the regulations irrespective of the nature or possible consequences of that infringement; a penalty, moreover, of uncertain application since it is dependent on a collision, and varying in severity with the injury done by the collision. It would, in effect, make the vessel guilty of the infringement, a sort of outlaw of the seas, by depriving her of the right to recover, under any circumstances, more than half the damages to which, by the general law maritime, she might become entitled. Again, it can hardly be denied, though the words perhaps admit of such a contention, that the infringement proved must be one existing at the time of the collision. And if this be so, it seems but reasonable to infer that it must also be one that has some possible connection with the accident. Their Lordships are of opinion that the second construction, which is not absolutely inconsistent with the phraseology of the enactment, and is by far the more reasonable of the two, ought to be adopted. It gives effect to the statute by excluding proof that an infringement, which might have contributed to a collision, did not in fact do so; and by throwing on the party guilty of the infringement the burthen of showing that it could not possibly have done so.

Applying this construction of the Statute to the facts found, their Lordships are of opinion that if, in this case, both vessels had been British ships, the "Peru" could not have been pronounced in fault. This conclusion renders it unnecessary to consider whether this particular clause in the Statute is applicable to foreign vessels,—whether, in other words, it falls within the principle enforced in the "Amalia" (Brown and Lush, p. 150) or that enforced in the "Saxonia" (1 Lush, p. 410).

That this question, which is not free from difficulty, will have to be determined, at no distant date, is highly probable. But their Lordships abstain the more willingly from considering it at present, because it was not very fully argued before them.

Their Lordships will humbly advise Her Majesty to affirm the Judgment of the Court of Admiralty, and to dismiss this Appeal with costs.

PRINTED AT THE FOREIGN OFFICE BY T. HARRISON.—11/6/73.