

Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of The China Navigation Company, Limited, Owners of the SS. "Chinkiang," v. The Commissioners for executing the Office of Lord High Admiral of the United Kingdom; and of The China Navigation Company, Limited, Owners of the SS. "Chinkiang," v. Commander Leatham; from His Britannic Majesty's Supreme Court for China and Corea; delivered the 18th March 1908.

Present at the Hearing:

LORD MACNAGHTEN.

LORD ATKINSON.

SIR ARTHUR WILSON.

SIR GORELL BARNES.

Nautical Assessors.

ADMIRAL RODNEY M. LLOYD, C.B.

COMMANDER W. F. CABORNE, C.B., R.N.R.

[Delivered by Sir Gorell Barnes.]

These are two consolidated Appeals from the Judgment of His Britannic Majesty's Supreme Court for China and Corea at Shanghai. The Appellants are the owners of the SS. "Chinkiang," and the Respondents in the first Appeal are the Commissioners for executing the Office of Lord High Admiral of the United Kingdom, and the Respondent in the second Appeal is Commander Leatham, the commander of His Majesty's Despatch Vessel "Alacrity." The first action was brought by the Commissioners against the China Navigation Company, Limited, owners of the SS. "Chinkiang" (the Appellants) and

the second action was brought by the Appellants against Commander Leatham. The respective Plaintiffs in each action sought to recover damages sustained in a collision between the "Alacrity" and the SS. "Chinkiang," which occurred in the neighbourhood of Shantung Promontory, North China, on the 6th July 1906. The actions were tried together and on the same evidence, and the present Appeals were consolidated by leave. The actions were heard on the 8th, 9th, and 11th August 1906 before F. S. A. Bourne, Esq., Acting Judge of His Majesty's Supreme Court for China and Corea, assisted by one Assessor, and on the 15th August 1906 the learned Judge found the "Chinkiang" solely to blame for the collision, and gave judgment in favour of the Plaintiffs in the first action with costs, and in the second action for Commander Leatham with costs. From these judgments the Appellants appeal, and while admitting that the "Chinkiang" was partly to blame, contend that the judgments ought to be varied, and that the "Alacrity" should be pronounced in part to blame for the collision, and that Commander Leatham should also be held guilty of negligence contributing to the collision.

At the time of the collision the "Chinkiang," a screw steamship of 1,985 tons gross register, fitted with engines of 250 H.P. nominal, was proceeding on a voyage from Chefoo to Swatow, laden with a general cargo, and the "Alacrity," a twin-screw despatch vessel of 1,700 tons register, and fitted with engines of 1,700 I.H.P., was proceeding from Shanghai to Wei-Hai-Wei. The collision took place a few minutes after 11 a.m. on the morning of the 6th July 1906 in a dense fog off the Shantung Promontory, North China. The fog was so dense at the time that the vessels could only be seen from

each other a very short distance, some of the witnesses say at about a cable's distance, though there is evidence that they could only be seen about a ship's length off. The "Chinkiang," shortly before the collision, appears to have been proceeding on a course of S. 78° E. true, and at about 10.50 those on board of her heard a faint sound on the starboard side several times, which the master of the "Chinkiang" stated that he thought at first was the siren on the Promontory Lighthouse. At 11 o'clock the "Chinkiang" appears to have run into a dense fog, having previously had intermittent foggy weather, and thereupon the vessel was slowed and the whistle, which had been previously sounding, was sounded more frequently, and shortly afterwards the "Alacrity" was sighted on the starboard side about a ship's length off. Thereupon the helm was put hard-a-starboard and the engines ordered full speed ahead, and two short blasts of the whistle sounded, but the collision happened, the bowsprit of the "Alacrity" first striking the "Chinkiang" on the starboard side in the fore-rigging. The learned Judge found that those on board the "Chinkiang" ought not to have mistaken the "Alacrity's" sound for the lighthouse signal, that upon hearing the "Alacrity" signal the engines of the "Chinkiang" should have been stopped, and that before entering the fog bank at 11 o'clock the "Chinkiang" was steaming at about 9½ knots an hour, and he held that the "Chinkiang" was clearly to blame for not stopping, and for going at a speed which was not moderate in the fog which prevailed.

The case presented on the part of the Respondents was that the "Alacrity" was going up the coast to make the Shantung Promontory, which she had to clear before turning on a westerly course in order to reach Wei-Hai-Wei;

that having reached the neighbourhood of Shantung about 10 a.m., she steered in for the land at 10.9 a.m. on a west course until 10.45 a.m., at which time her course was altered to N. 20° W., and at 10.50 the engines, which from 10.30 or thereabouts had been working at dead slow, were increased in speed to 50 revolutions per minute, giving the vessel, according to the evidence of Commander Leatham, who was on the deck in command during the material time, a speed of 6.8 knots per hour, though according to the Engineer's log-book her speed would seem to have been from that time about 7.2 knots per hour. The "Alacrity" proceeded thus, sounding her siren, and about 10 minutes before 11 a siren or whistle was heard on the port bow, and was, according to the evidence, heard constantly until it ceased, dying away on the quarter of the "Alacrity."

Commander Leatham, in his evidence so far as material, further proceeds to say, as follows:—

"I heard a second steamer fog signal also on port
 " bow—not loud—some distance off; I should have
 " judged it to be two or three miles off; certainly
 " not close. I heard it perhaps five or six times.
 " I did not think it was approaching. I judged it
 " to be a steamship going same way we were. I
 " heard no other till 'Chinkiang's' whistle was close
 " upon us. The whistle, which proved to be the
 " 'Chinkiang,' suddenly sounded close to out of fog
 " a little more than a minute before the collision. I
 " know it was very close. I did not associate that
 " loud whistle with the whistle I had heard before on
 " port bow. There had been a long interval. I did not
 " at that moment see the vessel that blew that loud
 " blast. Immediately I heard that whistle I stopped
 " engines. . . . That order to stop was carried
 " out at once. About half a minute after hearing
 " whistle I saw bow wave of 'Chinkiang.' Loud
 " whistle came as a surprise to me. I saw bow
 " wave on my port bow. About five points from
 " right ahead—immediately after seeing bow wave—
 " I saw the steamer. As I saw she was going at

" a high rate of speed and crossing my bow, I went
 " full speed astern with both engines. I was then
 " going very slow, as I had previously stopped, and
 " had very little way on at the time
 " of collision very little way, say 2 knots, reducing
 " all the time, because full speed astern. When I
 " first saw 'Chinkiang' I judged she was going fast.
 " I first saw her about a cable off. There
 " was nothing to lead me to believe that I ought to
 " stop engines before I did until I heard the loud
 " whistle I referred to before."

Navigating Lieutenant Harman's evidence,
 as far as it is necessary to refer to it, was as
 follows:—

" About ten minutes to 11 we heard siren on
 " port bow. The siren got louder, and passed us
 " on port side between ourselves and promontory.
 " About three minutes to 11 I heard another siren,
 " very faint, on port bow. I heard it about five times
 " at intervals of about a minute, and the sound did
 " not get any louder. There was nearly an interval
 " of about five or six minutes, when I could hear
 " siren faintly on the port bow; 11.9 I suddenly heard
 " a siren very close to us on port side, and very loud.
 " Before we heard that loud siren we had
 " no indication that a steamship was close to us. I
 " did not associate any of sounds I heard on port
 " bow with the loud whistle. The whistle
 " on port bow very faint, and about same, as if going
 " the same way. We heard that whistle five or six
 " times inclusive. Period from first to last whistle
 " about five minutes. Period not more than seven
 " minutes. During that five to seven minutes were
 " proceeded at least five to six knots. Sound did
 " not increase in volume. I thought she had got
 " out of signal distance."

This evidence sufficiently indicates the case
 made on behalf of the "Alacrity," which was
 to the effect that she was going at a moderate
 rate of speed before hearing any sound from
 the "Chinkiang," and that, in the circumstances
 detailed in the evidence of Commander Leatham,
 he was not to blame for not having ordered the
 engines to be stopped on hearing the first signals
 from the "Chinkiang."

The learned Judge on the first point, and acting upon the advice of his Assessor, held that the speed of the "Alacrity" was not excessive. On the second point the learned Judge expresses himself thus :

"But I have put Commander Leatham's and Lieutenant Harman's evidence on this point to the Assessor, and he thinks it quite likely, considering the distance between the two ships, and the fog, that these five whistles might have produced on the minds of capable and careful navigators the impression that the 'Chinkiang' was going the same way as the 'Alacrity.' I think then, although not without some doubt, looking to the imperative terms of the second clause of Article 16, that I ought not to find the 'Alacrity' to blame on this score, especially since this particular point was not much illustrated in evidence or argument."

Their Lordships are unable to agree with the learned Judge upon either of the points aforesaid, upon which he found in favour of the "Alacrity." Article 16 of the King's Regulations, which is in terms the same as Article 16 of the Regulations under the Merchant Shipping Act, 1894, is as follows :—

"Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

Their Lordships do not consider it necessary to review the cases which were quoted in argument before them in connection with the question of moderate speed. They are clearly of opinion that, having regard to the weather and the circumstances of this case, the "Alacrity" was not proceeding at a moderate speed, and that her excessive speed was a contributing cause to the

collision in question. It is remarkable to notice that when the "Alacrity" was being headed in towards the land to make her position, her speed was reduced to dead slow, and there seems to have been no reason whatever why that speed should not have been maintained afterwards when she was set on her course, having regard to the state of the weather which then prevailed.

Article 16 is a most important article, and one which ought to be most carefully adhered to in order to avert the danger of collision in thick weather, and although the "Alacrity" possessed considerable power of control and manœuvring, having regard to her high engine power, and making allowance for any consideration which should be given to the capability of such a vessel to reduce her speed with great promptitude, their Lordships cannot consider that the speed which was upon the vessel in this case was such as to comply with the terms of the 16th Article.

With regard to the second point, Counsel for the Respondents on the Appeals raised a point which does not seem to have been made in the Court below, viz. : that the signals which were heard on board the "Alacrity" after those of the vessel which passed down the port side of the "Alacrity," were not signals from the "Chinkiang," and they suggested that they were probably the signals of another vessel, the "Wuhu," which had left Chefoo with the "Chinkiang" and passed her. It seems, however, to have been assumed in the Court below that the second set of signals which were heard from the "Alacrity" were signals made by the "Chinkiang." This was certainly taken to be the case by the learned Judge and his Assessor. There was no evidence that any other vessel was in the neighbourhood except the "Wuhu," and that, it seems reasonably clear, was the vessel which had passed down the port

side of the "Alacrity." This new point seems to have been now made on the Appeal in the hope of getting rid of the difficulty which must necessarily be felt with regard to the fact that the engines of the "Alacrity" were not stopped when the signals made by the "Chinkiang" were first in fact heard. The case really made below was that, from the sound of those signals, those on board the "Alacrity" were entitled to assume that the "Chinkiang" was going the same way as the "Alacrity," which it was suggested might be assumed from the fact that, although the whistles were first heard several times, there was an apparent cessation of their sound for, what Commander Leatham described as, a long interval.

From Lieutenant Harman's evidence, as worded in the printed Record and quoted above, it seems doubtful whether that wording indicates that he also spoke to an interval after the first sounds of the whistle were heard, though the learned Judge took him to have intended to convey that there was an interval of five or six minutes, and it may be that this is the correct reading of his evidence. But even assuming that to be so, and that his evidence is in complete accord with that of Commander Leatham, the finding of the learned Judge is not that those on board the "Alacrity" were justified in assuming that the "Chinkiang" was going the same way as the "Alacrity"; it merely conveys the view of the Assessor that he thought it quite likely, considering the distance between the two ships and the fog, that the five whistles might have produced that impression on the minds of capable and careful navigators.

Their Lordships are of opinion that in not stopping the engines of the "Alacrity" after hearing the first whistle of the "Chinkiang," Commander Leatham committed a breach of the

second paragraph of Article 16 in the circumstances detailed by himself in his evidence. It is notorious that it is a matter of the very greatest difficulty to make out the direction and distance of a whistle heard in a fog, and that it is almost impossible to rely with certainty on being able to determine the precise bearing and distance of a fog signal when it is heard, and it is clear that in the present case the indications given by the "Chinkiang" to the "Alacrity" were not such as to show to those on board the "Alacrity" unequivocally and distinctly what was the position of the "Chinkiang," and that the Commander of the "Alacrity" was not justified, from what he heard, in assuming that the "Chinkiang" was going the same way as the "Alacrity." The engines of the "Alacrity" ought to have been stopped until it could be, with certainty, ascertained what the position of the "Chinkiang" was, and what she was doing.

Both in respect of the excessive speed and for not stopping the engines when the fog signal of the "Chinkiang" was first heard the "Alacrity" must be held to blame, and Commander Leatham to have been guilty of negligence, and their Lordships are clearly of opinion that that negligence contributed to the collision.

Their Lordships desire to state that the advice which they have received from the Assessors who have assisted them upon the Appeals is entirely in accordance with the conclusions at which their Lordships have arrived.

Their Lordships will, therefore, humbly advise His Majesty that the Orders of the Court below should be discharged, and that, in the first action, both vessels should be pronounced to have been in fault, and that a moiety only of the damage proceeded for by the Plaintiffs therein ought to be borne by the owners of the SS. "Chinkiang," and that they be condemned in a moiety of the

Plaintiffs' claim in respect of the said damage, with a reference to the Registrar of the said Court, assisted by merchants, to assess the same, and that, in the second action, it should be pronounced that the collision was occasioned by the fault or default of the owners, master, and crew of the "Chinkiang," or some or one of them, and by the fault or default of Commander Leatham, and that a moiety only of the damage proceeded for by the Plaintiffs therein ought to be borne by the said Commander Leatham, and that he be condemned in a moiety of the Plaintiffs' claim in respect of such damage, with a reference to the Registrar of the said Court, assisted by merchants, to assess the same, and that the costs in the Court below of the said actions be borne by the respective parties who incurred the same. The Respondents must pay the cost of the Appeals.
