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China Navigation Co., Ltd. (Great Britain) v. United States (Newchwang case)

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For these reasons

This Tribunal decides that the claims be dismissed.

CHINA NAVIGATION CO., LTD. (GREAT BRITAIN) *v.* UNITED STATES

(Newchwang *case. December 9, 1921. Pages 414-420.*)

COLLISION OF VESSELS ON YANGTSE RIVER.—DECISION OF MUNICIPAL COURT: *RES JUDICATA.* Collision on May 11, 1902, on Yangtse River between steamship *Newchwang*, owned by China Navigation Co., Ltd., a British corporation, and United States Government collier *Saturn*. Dismissal on January 16, 1903, of action for damages brought by United States against company in British Supreme Court of China and Corea in Admiralty at Shanghai. British plea that dismissal settled United States' liability. Whatever be the value of plea of *res judicata* before international tribunal of arbitration, doctrine does not apply since no identity of questions at issue. Shanghai Court, moreover, refused company's application for leave to enter counter-claim.

EVIDENCE: EVIDENTIAL VALUE OF MUNICIPAL COURT DECISION, BURDEN OF PROOF.—ADMISSION OF LIABILITY. Findings of Shanghai Court as to facts are evidence of conclusions reached by competent municipal tribunal. It must be remembered, however, that before Court burden of proof on *Saturn*, while before this tribunal on *Newchwang*, and also that fresh evidence has been put before tribunal. Letter carrying private recommendation by Secretary of the Navy to Chairman of Committee on Claims of House of Representatives, never officially published, cannot be regarded as admission of liability, nor can bills introduced into United States Senate and providing for reference of claim to Court of Claims, but never voted upon in the Senate or favorably reported upon by Committee on Claims.

NEGLIGENCE, FAULT, NAVIGATION.—INTERNATIONAL AND AMERICAN RULES OF THE ROAD: APPLICABILITY ON HIGH SEAS. *Held* that *Saturn* was negligent in not keeping a good lookout and in manœuvring wrongly. On the high seas American Rules do not, but International Rules of the Road do, apply to foreign vessels. *Newchwang's* manœuvring when collision inevitable merely a desperate attempt to minimize its effect and not a fault.

DAMAGES: INDIRECT DAMAGES, WELL-KNOWN PRINCIPLE OF THE LAW OF DAMAGES, LOST PROFITS, LOSS OF USE, DEMURRAGE. Claim for legal expenses entailed by action brought by United States before Shanghai Court disallowed: such expenses are indirect damages, and according to well-known principle of the law of damages *causa proxima non remota inspicitur*. No sufficient evidence of alleged loss of profits. Compensation for deprivation of use to be computed according to ordinary rule of demurrage at 4d per ton gross tonnage.

INTEREST: PRESENTATION OF CLAIM. Tribunal unable to decide on interest, since not clear whether claim officially presented.

Cross-references: Am. J. Int. Law, vol. 16 (1922), pp. 323-328; Annual Digest, 1919-1922, pp. 188, 373-374.

Bibliography: Nielsen, pp. 411-413; Annual Digest, 1919-1922, p. 374.

This is a claim presented by His Majesty's Government for the sum of £ 4.271. 4s. 8d. with interest from August 27, 1902 (the date on which the claim was first brought to the notice of the United States Government) for damage sustained by the China Navigation Co., Ltd., a British corporation, as the result of a collision which occurred on May 11, 1902, off the southern mouth of the Yangtse River between the British steamship *Newchwang*, owned by the said company, and the *Saturn*, a naval collier, owned and operated by the United States Government.

There is no contest about the ownership of either the *Newchwang* or the *Saturn*, the British nationality of the claimant, or the fact of the collision.

On July 11, 1902, an action for damages was brought by the United States Government against the China Navigation Co., Ltd., in His Britannic Majesty's Supreme Court of China and Corea in Admiralty. On August 16, 1902, an application for leave to enter a counter-claim was filed by the China Navigation Co., Ltd., but on August 20, 1902, an order was made refusing this application for lack of jurisdiction. On January 16, 1903, both parties being represented, the Court decided the case upon its merits, and delivered a judgment as follows:

"This Court doth decree and order that the S. S. *Newchwang* being in no way to blame for the collision referred to in the Plaintiff's petition this suit be dismissed with costs to be taxed" (British memorial, p. 51).

The British Government contend that by reason of this judgment the liability of the United States for the damage and loss suffered by the China Navigation Co., in consequence of the collision is covered by the principle of *res judicata* and, therefore, not open to dispute.

It is unnecessary here to discuss the value of a plea of *res judicata* before an international tribunal of arbitration. It is a well-established rule of law that the doctrine of *res judicata* applies only where there is identity of the parties and of the question at issue. The only matter before His Britannic Majesty's Supreme Court was the liability of the China Navigation Co., Ltd., as owners of the *Newchwang*, whereas the question submitted to this Tribunal is the liability of the United States Government as owners of the *Saturn*. Whatever, therefore, be the connection in fact between the two questions, they are not identical. Further, it is impossible to say that the question of the liability of the United States is concluded by the decision of His Britannic Majesty's Court, when that Court, on the contrary, held that it had no jurisdiction to deal with that question.

In these circumstances it is for this Tribunal to decide whether the United States Government is liable to pay compensation for the said collision. For this purpose it is authorized by article 5 of the Pecuniary Claims Convention to consider such evidence and information as may be furnished by either Government.

Although the decision of His Majesty's Supreme Court is not in any sense *res judicata* in this case, and although the findings of the Court as to the facts upon which liability depends are not binding upon this Tribunal, yet they are evidence of the conclusions reached by a competent municipal tribunal. But, in considering these conclusions, and the evidence upon which they were based, it must be remembered, first, that there the burden of proof was on the *Saturn*, while before this Tribunal it is on the *Newchwang;* and secondly, that evidence has been put before this Tribunal which was not before that Court. In behalf of the United States, the most important fresh evidence is the report of the proceedings of the United States Naval Board of Investigation, dated May 23, 1902, within two weeks after the collision, which laid the blame for the collision on the *Newchwang*. The only evidence presented on the part of Great Britain which was not before the trial court, consists: *(a)* of certain bills introduced into the

United States Senate providing for the reference of this claim to the Court of Claims, to determine, subject to certain conditions, whether any damages should be paid, and *(b)* a copy of a letter dated January 30, 1907, addressed by the Secretary of the Navy to the Chairman of the Committee on Claims of the House of Representatives. His Majesty's Government contend that this letter contains an admission of liability which estops the United States from denying responsibility. It appears, however, from a statement made by the Counsel for Great Britain on the oral argument, that this letter was merely a personal or private recommendation to the Chairman of the Committee on Claims, and has never been officially published, and for this reason in the opinion of the Tribunal it can not be regarded as an admission of liability on the part of the United States. As to the bills, it was also stated in the oral argument that none of them were voted upon in the Senate, nor were they even favorably reported upon by the Committee on Claims, to which they were referred.

Dealing now with the merits:

I. *As to the facts:*

It is admitted on both sides that the night was clear and the water smooth and that there was plenty of sea room; it is shown that the regulation lights were burning brightly and the regular watches kept; the force of the tide is not in dispute, and under all these circumstances it is difficult to understand how, with the exercise of ordinary care and skill, the collision occurred.

Notwithstanding a considerable conflict of evidence, and a wide variance between the Preliminary Acts of the two ships and the oral evidence of those on board them, the following facts are clearly established.

On May 11, 1902, at about 11 p.m., the British S. S. *Newchwang*, 894 tons gross tonnage, was proceeding up the Chinese coast from Amoy to Shanghai and had passed through Steep Island Pass, steering north 2° west magnetic. Her speed was 10-12 knots. She sighted at a distance of six miles and about two points on her *port* bow the masthead light of another steamer, which afterwards proved to be the *Saturn*. She held on her course.

At the same time, the United States collier *Saturn*, bound from Shanghai to Cavite, Philippine Islands, had passed Bonham Straits and Elgar Island; her speed was 10-12 knots and she was steering south 3/4 east. She reported no light at all at the time when she herself was sighted by the *Newchwang*.

However, about 20 minutes later the *Saturn* passed another steamer, the *Hoihow*, which was going north in front of and in the same course as the *Newchwang*. The *Saturn* ported her helm and came to starboard in accordance with the Rules of the Road, but so tardily that the captain of the *Hoihow* testified that the two vessels passed at two ships' length apart.

After so passing the *Hoihow*, the *Saturn* resumed her course and it was only then that she sighted the masthead light of the *Newchwang*. At that time the two vessels were less than one and a half miles apart. In the oral argument, not only was it admitted but stress was laid upon the fact that from the time the *Saturn* passed the *Hoihow* at 11.14 p.m., only six minutes elapsed before the collision; that the *Saturn* saw the masthead light of the *Newchwang* at 11.16 p.m., and her red light at 11.17.43 p.m., and that the collision occurred at 11.20 p.m., so that the *Saturn* saw the masthead light of the *Newchwang* only four minutes and her sidelight only two minutes before the collision. The combined speed of the vessels at the time was about 22 knots.

At that moment as soon as she saw the side light on the *Newchang* the *Saturn* ported her helm, as she had done a few minutes before, when she met the *Hoihow*.

The fact that the *Saturn* crossed the *Newchwang* in this way has been contested.

But it seems to the correct inference from the statement in the Preliminary Act of the *Saturn* that when first seen, two minutes, that is, after passing the *Hoihow*, the *Newchwang* bore 3/4 of a point off the *Saturn's* starboard bow—from the admission by Counsel for the United States in the course of the oral argument that it was the duty of the *Saturn* to keep out of the way of the *Newchwang*, from the evidence of her captain ("I sighted light on starboard bow 1/2 to 3/4 of a point"), and also from the captain's admission that after passing the *Hoihow*, he resumed his course, which was south by 3/4 east and then saw the *Newchwang*'s red light. This would have been impossible unless he had crossed her bow from starboard to port. On the other hand the consistent evidence of those on the *Newchwang* is to the effect that they first saw the green light of the *Saturn* on their starboard bow, the *Newchwang's* course then being north 2° west magnetic, and that subsequent to that the *Newchwang* starboarded to clear a junk and did not go back on her course, so that she was getting further away from the *Saturn*.

As soon as the *Saturn* sighted the side lights of the *Newchwang*, i.e., two minutes before the collision, and came to starboard she blew her whistle and reversed her engines. But the collision was already inevitable.

On her side the *Newchwang* tried to minimize the collision by coming to port, but that proved to be useless, and the two ships struck at about right angles.

II. *As to the liability:*

It is clear that a good lookout was not kept on board the *Saturn*, from the fact that though more than 20 minutes before the collision she was sighted by the *Newchwang*, at about six miles distance, she herself did not report the *Newchwang* until four minutes before the collision, when the two ships were only one and a half miles apart—and from the fact that she did not report any light of the other steamer, the *Hoihow*, which was passed a few minutes before the collision.

If a good lookout had been kept, the *Saturn* would have sighted the *Hoihow* and, behind her, the *Newchwang*, and after passing the *Hoihow* she would have kept clear of the second steamer. Instead of that, the *Saturn*, not having reported the *Hoihow*, passed her under circumstances of some peril and, having passed her, resumed her course, so that she came upon the *Newchwang* under similar but more dangerous conditions, too late for either ship to avoid an accident.

Accordingly the *Saturn* must be held to be to blame: first, for having neglected to keep a good lookout; secondly, for having resumed her course after passing the *Hoihow*, when she ought to have known that another steamer was following; and thirdly, for having manœuvred too late and render the collision unavoidable

As to the *Newchwang*, the United States Naval Inquiry blamed that ship, first, for not having answered the Saturn's starboarding whistle. But according to the Rules of the Road no answering whistle ought to have been given by the *Newchwang* unless she was going to alter her course. It is true that this is not the American rule, but on the high seas the American rule does not apply to a foreign vessel; secondly, for not having stopped and reversed her engines; but evidence has shown that she did; thirdly, for having her red light burning dimly; but the evidence has shown that it was burning brightly; fourthly, at all events for not entering into conversation before the collision, and for striking at nearly right angles; but the *Newchwang's* manœuvre at that moment was a desperate endeavor to minimize, if possible, the effect of a collision which had been rendered unavoidably by the inexplicable action of the *Saturn*.

The *Newchwang* appears to have kept a proper lookout. When she sighted the *Saturn* on her port bow, she had only to keep her course in order to pass

port to port according to the Rules; and her maœuvring when the collision was inevitable was merely as has been said a desparate attempt to minimize its effect and can not be imputed to her as a fault.

III. *As to the amount of liability:*

The British Government claims not only the amount of the damage suffered by the *Newchwang* and the cost of her repair, but also the various expenses entailed by the action brought by the United States before the Shanghai Court.

It may be that the item for legal expenses might have been claimed in an appeal from the Shanghai decision. But this Tribunal has not to deal with such appeal, and has no authority either to reverse or affirm that decision or to deal with damages arising out of the action brought by the United States. It is true that such expenses are damages indirectly consequent to the collision; but it is a well known principle of the law of damages that *causa proxima non remota inspicitur*.

As to the amount directly arising from the collision, the British Government claim for £ 1,612 as loss of profit and expenses during the time of repair. But no sufficient evidence is adduced to prove the loss alleged and the compensation for the deprivation of use must be computed according to the ordinary rule of demurrage at 4d per ton gross tonnage, that will be for 894 tons, the *Newchwang's* gross tonnage, a sum of £ 774. 16s. for 52 days. According to the account of Farnham, Boyd & Co., Ltd., for executing repairs, the amount of those repairs was Taels 19,251.10, i.e., £ 2,401. 7s. 6d.

As to the interest, it appears in the evidence that a communication was made to the Department of State by the British Embassy at Washington in relation to this matter (British memorial, p. 61), but as a copy of that communication has not been produced the Tribunal is not in a position to say whether or not it was an official presentation of this claim, or to ascertain the date of the communication, and consequently the Tribunal is unable to decide on the question of interest.

For these reasons

The Tribunal decides that the United States Government shall pay to the British Government the sum of three thousand one hundred and seventy-six pounds, three shillings and six pence, (£ 3,176. 3s. 6d.) on behalf of the China Navigation Company, Limited, owner of the S. S. *Newchwang*.

OWNERS, OFFICERS AND MEN OF THE *WANDERER* (GREAT BRITAIN) *v.* UNITED STATES

(December 9, 1921. Pages 459-471.)

SEIZURE OF VESSEL IN ST. PAUL (KODIAK [1] ISLAND).—CONVENTIONAL PROTECTED ZONE OF FUR-SEALING.— DELIVERY OF BRITISH VESSEL TO BRITISH AUTHORITIES.—RELEASE BY BRITISH ADMINISTRATIVE DECISION. British vessel *Wanderer*, taken by United States revenue cutter *Concord* on high seas, towed to St. Paul (Kodiak Island), where on June 10, 1894, declared seized by United States naval authorities for possession of unsealed arms and ammuni-

[1] The spelling Kadiak used in the decision has become obsolete [Note by the Secretariat].