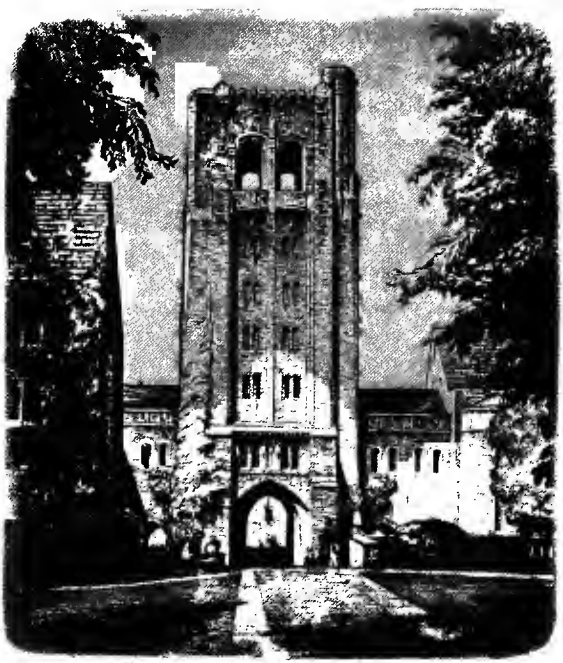

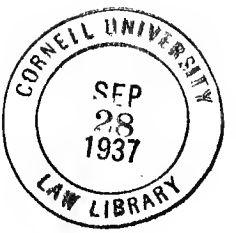

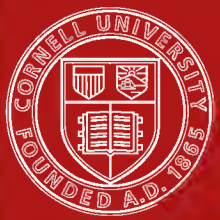

THE ADMIRALTY LAW

OF

COLLISIONS AT SEA.

BY

RICHARD LOWNDES.

LONDON:
STEVENS AND SONS, 26, BELL YARD,
LINCOLN'S INN.
Law Booksellers and Publishers.

1867.

PRINTED BY C. W. STEVENS,
5 GREAT QUEEN STREET, LINCOLN'S INN FIELDS, W.C.

PREFACE.

A BOOK which, in small compass, should set forth the law of collision, in the plainest language, so that, whilst a careful reference at every point to the original authorities should render it serviceable to members of the legal profession, it might at the same time be suitable for the reading of ship-owners, and, at any rate, the more instructed class of ship-captains, could not fail to be useful, if not in diminishing the frequency of collisions, at least as tending to prevent hopeless litigation afterwards. To write such a book was the object I proposed to myself. I am sensible of many deficiencies in the execution, for some of which I may perhaps be allowed to plead want of leisure. Such as it is, I can only hope that this little volume may be found of some service, in the absence of anything better of the same kind.

It may reasonably be expected, without any merit on the Author's part, that such a book, written at the present time, should be pervaded by a uniform spirit of liberal and comprehensive equity. For it must consist mainly of a digest

of the judgments of Sir Stephen Lushington. The thirty years during which that distinguished person has presided over the Court of Admiralty have witnessed a development of maritime commerce absolutely unique in history, and, with it, a correspondingly unique expansion of maritime law. It has been a singular felicity which has given us, during this whole period, a judge endowed with the breadth and flexibility of mind requisite for adapting the law maritime to this extraordinary growth of commerce, and the change of circumstances to which it has given rise.

This book was on the point of publication, when there appeared a volume of Admiralty Decisions, arranged under heads, with the title of "The Rule of the Road," by Mr. William Holt. The additional matter it supplies comes to me, unfortunately, too late to be arranged under its proper heads; and I can, therefore, only set it down in this place as an Addendum.

The countries which have given in their adhesion to the English statutory regulations with regard to steering rules, lights, and fog-signals, are—Austria, the Argentine Republic, Belgium, Brazil, Bremen, Chili, Denmark Proper, the Republic of the Equator, France, Greece, Hamburg, Hanover, the Hawaiian Islands, Hayti, Italy, Lubeck, Mecklenburg-Schwerin, Morocco, the Netherlands, Norway, Oldenburg, Peru, Portugal, Prussia, the Roman States, Russia, Schleswig,

Spain, Sweden, Turkey, the United States, and Uruguay (*a*).

Although Queen's ships do not fall within the terms of these Regulations, it appears that instructions are issued, under the sanction of the Lords of the Admiralty, to those in charge of Her Majesty's vessels, which are precisely in accordance with those regulations. (*b*)

A vessel which overtakes another, and which, by the statutory rules, is bound to keep out of the way of the vessel overtaken, has the option of doing so either by porting or starboarding, according to circumstances (*c*).

To determine the important question whether a vessel is meeting another "end-on, or nearly end-on," or is crossing at an angle, the court held, in two cases, that, before a steamer can be considered as *crossing* the course of another, so as to be excused from porting her helm, there must be a difference of not less than three points in their courses (*d*). This, however, is not to be taken as an inflexible rule of law; for the question, whether two steamers are "meeting end-on, or

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(*a*) Holt, 2. See *post*, chap. 10, p. 186.
(*b*) H. M. S. *Supply*, Holt, 190.
(*c*) *Great Eastern*, Holt, 171; *Evangeline*, Holt, 224.
(*d*) *Stork*, Holt, 153. *Fingal*, Holt, 160.

nearly end-on," so as to involve the risk of collision, must in every instance be a question of fact, depending on the circumstances of the particular case (*a*).

Supposing that a ship, whose duty it is, on being approached by a steamer, to hold on her course, improperly changes it, it still remains the duty of the steamer to avoid her if she can ; failing which, both will be held in fault (*b*).

With regard to lights,—a ship has been held in fault because the in-board screens of her side-lights only projected one foot, so that both red and green lights were visible at the same time, and because her lights were so placed as to be obscured by her rigging (*c*).

A panic amongst the seamen, not unreasonably occasioned by a collision at night, may, it appears, be regarded as an excuse for their not subsequently using all the means which were reasonably within their reach, in order to save their vessel, or diminish to the utmost the damage done by the collision (*d*).

I must likewise express my regret not to have

(*a*) *Stork*, in P. C., Holt, 154.
(*b*) *Oscar*, Holt, 233.
(*c*) *Lady of the Lake*, Holt, 38.
(*d*) *Lotus*, Holt, 183 ; *Lena*, Holt, 216.

sooner seen a pamphlet, just published by Mr. Harper, of Lloyd's, called "The Rule of the Road for Steamers," which contains some important criticism and useful diagrams.

In addition to the regular Admiralty Reports, I have availed myself of the excellent Reports of Admiralty judgments given in Mr. Mitchell's Maritime Register, which appear immediately after the judgments delivered, so that the law of collision may be considered as brought down almost to the present day. I desire also to express my acknowledgments to Mr. William Byrth, of the Middle Temple, for valuable suggestions and assistance.

LIVERPOOL AND LONDON
CHAMBERS,
Liverpool, May 29, 1867.

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THE ADMIRALTY LAW

OF

COLLISIONS AT SEA.

INTRODUCTION.

THE importance of diminishing as much as possible the risk of collision between ships at sea, which involve so much danger to life as well as property, has led, in perhaps every civilised community amongst whom navigation is practised, to the establishing of certain rules for determining the courses to be pursued by ships when they are approaching or passing one another, the watch or look-out to be kept in order to prevent the meeting unawares, the lights to be carried in the dark, and other matters of a like nature. Such rules, to be useful, must be uniform, not varying with the nationality of the ship. Hence, by common consent, there has grown up in the course of time a body of general maritime customs, regulating matters of this kind (*a*). The

(*a*) This customary law may be termed "international" law, not perhaps quite correctly. "General acquiescence by all civilised states is what constitutes international law" (per Dr. Lushington, *Johanna Stoll*, 1 Lush. 308).

rules thus established are enforced, it may be said, in all countries, by inflicting on those who infringe them the obligation to make good the damage occasioned by their wrongdoing to the vessel with which their own has come in contact.

These customary sea rules, and the penalty thus provided for the breach of them, are enforced usually in Courts of Admiralty, or courts having analogous powers. In this country, the proper tribunal for that purpose is the High Court of Admiralty in England and Ireland, and the Court of Session in Scotland.

The Court of Admiralty proceeds upon principles of enlarged equity, holding itself very much emancipated from the technicalities of the common law. Its principles, as will be seen, differ in some respects widely from those adopted in the latter courts. In the interpretation of statutes, the rule is that the Admiralty Court follows the courts of common law; and Dr. Lushington on one occasion said that the court would always decide in consonance with a series of cases adjudged at common law; but would not be bound by one or two cases, especially if they had been doubted by the profession (*a*). The court implicitly obeys a decision of the House of Lords, or the Judicial Committee of the Privy Council; which latter constitutes a Court of Appeal from the Court of Admiralty. With these limitations, however, the Admiralty Court holds itself free to proceed entirely on principles of its own.

(*a*) *Milan*, 1 Lush. 402.

There is a very singular rule, general and of great antiquity, and now firmly settled as the law of the Court of Admiralty on this subject, yet scarcely to be justified on any grounds of natural equity. It is that, when both the colliding vessels are in fault, each is to pay one half of the damages suffered by the other. This rule has been steadily opposed by the Judges of the English common law courts, who hold that a wrongdoer cannot take advantage of the circumstance that the party proceeded against is likewise in fault; but, supposing that his own fault has contributed to the collision, must bear his own loss (*a*). An attempt was made to enforce, to a certain extent, the doctrine of the common law courts by legislation. The Merchant Shipping Act of 1854 (17 & 18 Vict. c. 104), after laying down certain statutory regulations, as to steering, carrying lights, and the like, enacted (s. 298) that in case of collision resulting from the non-observance of such rules, the wrongdoer should not be entitled to recover any damages from the vessel proceeded against. It was found, however, that the ancient customary rule was too strong for this statutory innovation. In the first place, it was determined in the Admiralty Court that this legislation was not binding as against foreign ships run into by either foreign or English ships on the high seas; and then, on principles of reciprocity, that it was not binding on English ships making claims on

(*a*) *Dowell* v. *General Steam Navigation Company*, 5 E. & B. 195.

foreigners for such collisions (*a*). Then it was found that a very inequitable result was produced by the change ; for, when both ships were in fault, one for violating a statutory provision, and the other for breaking a sea rule existing independently of the statute, the latter could recover half damages from the former, while the former had no corresponding claim on her part (*b*). Thus the change of law was made partially inoperative, and its effect was at once to complicate the law, and, in many cases, to work a great injustice. Accordingly, in the Merchant Shipping Amendment Act (25 & 26 Vict. c. 63, s. 29), the clause above referred to was repealed, and the old rule of dividing damages was re-established (*c*). As the Admiralty law now stands, therefore, the rule is this : if the vessel proceeded against is solely in fault (*d*), that vessel is liable in damages to the other ; if both are in

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(*a*) See *post.* c. 10.

(*b*) *Aurora*, 1 Lush. 329.

(*c*) See *Palestine*, 13 W. R. 111.

(*d*) "In fault" here means guilty of a fault which has contributed to the collision. A ship may be in fault otherwise, even in a matter connected with the collision,—as by not rendering assistance to the other vessel to save life after the collision,—and yet, apart from statute law, recover entire damages against the other (*Celt*, 3 Hagg. 321). It is to be noted, however, that, as regards the illustration here given, the Act 25 & 26 Vict. c. 63, provides (s. 33), that in every case of collision between two ships, it shall be the duty of the person in charge of each ship, if and so far as he can do so without danger to his own ship, to render to the other ship, her master, crew, and passengers (if any), such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision ; and, in case he fails to do so, and no reasonable excuse for such failure is shown, the collision shall, in

fault, each party may recover from the other one half of his damages; if neither are in fault, the collision having resulted from inevitable accident, each vessel bears its own loss (*a*).

If the cargo in one ship has been lost or damaged by a collision, the owner of it may recover the full amount of his loss if the other ship has been solely in fault, or one-half if both ships have been in fault: while he is not liable, in the latter case, to contribute anything towards the damages of the other ship, because the master and crew, who are the parties directly in fault, are not his servants, but those of the shipowner (*b*). For the remaining half damage,—or for the whole damage, in case the ship in which his goods are laden is solely in fault, the cargo owner has his remedy at common law against the owner of the ship (*c*).

This liability, to make compensation for damage done by collision resulting from faulty seamanship,

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the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default. The effect of this clause is that, where there has been such neglect to render assistance after a collision, the burden of proof that she was not the ship in fault is thrown upon the vessel so neglecting (*Queen of the Orwell*, 7 L. T. N. S. 839; 8 Mitchell's Register, 240). But to make out that one colliding vessel has neglected to render assistance to the other, it is in general necessary to show that assistance has been applied for, or that the need of it must have been evident (*Mexican*, 9 Mitch. 1647).

(*a*) *Hay* v. *Le Neve*, 2 Shaw's Scotch Appeal Ca. 395; *De Vaux* v. *Salvador*, 4 Ad. & E. 431; *Shee's Abbott*, p. 202; *Monarch*, 3 Hagg. 328 n.; *Woodrop-sims*, 2 Dods. 85.

(*b*) *Milan*, 1 Lush. 398.

(*c*) *Lloyd* v. *General Screw Collier Company*, 12 Weekly Reporter, 882; *Grill* v. *Same*, 14 Weekly Reporter, 893.

is, in the language of the Admiralty Court, regarded as a liability of the ship, as a *res*. The ship in fault is liable to arrest, and either must be bailed or will be sold to satisfy the demand of the party aggrieved. This liability follows the ship even after a transfer, and although no notice of the collision has been given to the purchaser: it not being permitted to the owner to evade his liability for the acts of his servants by a subsequent sale of the ship (*a*). In one case, where an interval of four years had elapsed between the collision and the commencement of proceedings, and in the interim the ship had been sold, it was held that the ship was still liable to arrest, it appearing that the long delay had not arisen from any *laches* on the part of the claimant, but from a difficulty in finding and arresting the ship (*b*). And, although the persons immediately in fault for the collision may not be the servants of the shipowner, as, when the ship has been demised to a charterer with power to appoint his own master and crew, the ship is still liable to arrest for the collision damage (*c*). So, where a yacht had been placed for sale in the hands of a yachting agent, who took charge of her for a certain sum per week, and employed servants of his own to moor her, the yacht was held liable to Admiralty process for a collision caused by the negligence of those servants (*d*).

(*a*) *Bold Buccleugh*, 3 W. Rob. 229.
(*b*) *Europa*, 8 Mitch. 240.
(*c*) *Ticonderoga*, Swab. 217.
(*d*) *Ruby Queen*, 1 Lush. 266.

These decisions, however, must not be considered as affecting the principle, that the primary ground of liability for collision damage is, the liability of a master for the misconduct of his servants while in his employ. This liability extends to acts of negligence and errors of judgment, but not to wilful and criminal misconduct. Hence, where the master of a Liverpool steam tug, having been irritated by some dispute about his demand for towage, wilfully drove his tug violently several times against the quarter of the sloop he had been towing, thereby causing her considerable damage, it was decided in the Admiralty Court that the tug was not liable to arrest on that account (*a*). The same principle was acted upon in a subsequent case, when the master of one vessel wilfully cut another adrift from her moorings, in order to get inside of her (*b*). "In all causes of action," said the learned Judge of the Admiralty Court, "which may arise from circumstances occurring during the ownership of the persons whose ship is proceeded against, I apprehend that no suit could ever be maintained against a ship when the owners were not themselves personally liable, or where their personal liability had not been given up, as in bottomry bonds, by taking a lien on the vessel" (*c*).

Thus, in result, the liability of the ship for collision damage amounts to this,—that the ship,

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(*a*) *Druid*, 1 W. Rob. 391.
(*b*) *Ida*, 1 Lush. 6.
(*c*) *Druid*, 1 W. Rob. 399.

together with her earnings on the voyage, that is, the freight or balance of freight due at the termination of the voyage, supposing the ship to be arrested at that point, constitute a species of pledge or material security for the payment by the shipowner for the damage caused by the misconduct of his servants while in his employ,—a pledge which the shipowner cannot so alienate as to defeat the rights of the injured party. It may be mentioned in this place that cargo on board, belonging to the owner of the ship, is not liable to arrest for collision damage; the *res* subject to such liability being only the ship and freight (*a*).

There is occasionally a difficulty, after a collision at sea, in identifying the ship collided with. Supposing that, by mistake, the wrong ship has been arrested, the Court of Admiralty, making allowance for this difficulty, will not give damages for the improper arrest, unless bad faith or gross negligence be proved (*b*).

Such, then, are the general principles involved in the liability of one ship to another for collision damage. In the following chapters we shall have to consider, in detail, the mode in which these principles are to be worked out in practice: beginning with those regulations which determine the manner in which ships are to be steered or otherwise handled when they are so approaching one another as to be in danger of collision, and the look-out

(*a*) *Victor*, 1 Lush. 76.
(*b*) *Evangelismos*, Swab. 381.

which is to be kept, and the lights which are to be carried, in order that those on board either vessel may have timely warning of the presence of the other: then proceeding to consider those grounds of non-liability which may be classed under the head of inevitable accident, or the directions of a pilot taken on board by compulsion of law: after which will come questions of amount of liability, computation of damages, limitation of liability by statute, and the question to what extent foreign ships, meeting on the high seas, are amenable to the municipal rules laid down in British Acts of Parliament; and, in conclusion, matters of jurisdiction and the form of procedure.

CHAPTER I.

STEERING RULES FOR SAILING VESSELS AT SEA.

The subject to be considered in this and the two following chapters is, in what manner should the course of a ship be directed, upon approaching another ship, for the purpose of avoiding a collision. It will be necessary to examine this question under two main divisions. We must first enquire how the matter stands according to the common law of the sea, independent of British statutory directions; and, secondly, to what extent this common sea law is modified by statute. This division may appear somewhat artificial, but it is unavoidable; because, as will be shewn more at large in its proper place, there are some cases, as, for example, when two ships of different nations meet on the high seas, to which British legislative enactments are inapplicable, the case lying outside of the limits of statutory jurisdiction; whilst in other cases it is essential that the statutes should be observed.

SECT. I.—*The Common Sea Law.*

The Court of Admiralty, exercising jurisdiction over causes of action which arise upon the high seas, and exercising it over, or for the benefit of,

foreign as well as British ships, is, from the nature of the case, obliged in many instances to proceed upon principles of natural equity, which are supposed to be independent of municipal law, and to be held in common by all mankind. There are likewise certain customs, which have grown up insensibly, or have been adopted by a kind of immemorial convention, amongst seafaring men of different countries; such, for example, as the well-known rule that ships which meet one another on the high seas shall keep to the right hand instead of the left; a rule which, it is evident, is in itself purely arbitrary, though it is indispensable, for the avoidance of collisions, that there should be some rule, and that it should be observed by the mariners of all countries without exception. The province of the Court of Admiralty is, as between foreigners on the high seas, to administer and enforce these general customs, and to develope them, in case of need, according to these principles of universal equity. To this body of customary and equitable law, thus independent of local or municipal regulations, is given the title of "The Common Law of the Sea."

Division of the subject.

We are now to consider, then, in what manner, according to this common law, a ship's course is to be directed, when she happens to approach some other vessel, whether at rest or in motion, so that there is a danger of collision. This question may be considered, first, with reference to two vessels which meet where there is ample sea room, and when both are in motion; and here the question may be

subdivided, according as the vessels are ships under sail, steamers going alone, or steamers having ships in tow. After these cases have been disposed of, it will be necessary to examine the case of vessels which meet in rivers or narrow channels, where the course to be adopted may be affected by the exigencies of that particular navigation. Then comes the case where one of the vessels is stationary, or so nearly stationary that for practical purposes she may be regarded as a fixed object, that is to say, when she is at anchor, or hove-to, or in stays. Finally, we shall have to consider the effect of exceptional circumstances, by which the application of the ordinary rules may have to be modified.

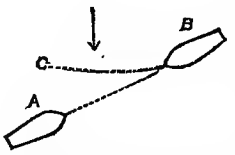
We are to begin, then, with the case of two ships which meet or cross one another's track whilst both are under sail: and, first, with the case in which they meet end-on, that is to say, in courses which are directly or nearly opposite to one another.

Ships meeting end-on pass by porting the helm.

The rule in this case is, that the vessels are to pass one another so that each shall keep to its own right hand. This result is obtained by putting the helm of each vessel to *port*. It is perhaps necessary to explain to the non-nautical reader that larboard or "port" means left-hand, and "starboard" right, and the effect of putting a ship's tiller to the left, or "porting the helm," is to make the ship turn towards the right. Thus, where there is danger of collision, the first impulse of a sailor, and, in the majority of cases, the proper measure to take is to port the helm. The exceptions to this rule, however, are of considerable importance.

Ship going free makes way for close-hauled ship.

In the first place, when a ship is closehauled, that is to say, sailing as near to the wind as she can, the inconvenience to such a vessel of altering her track is so much greater than when she is sailing before the wind, or, as it is termed, "going free," that, by an ancient general custom, when a ship closehauled is met by a ship going free, the duty of making way so as to avoid a collision is cast exclusively upon the latter. Thus in the accompanying diagram, where the wind is blowing from the North, and the ship A is sailing towards the North-east, "hugging the wind," or "closehauled," or "sailing near the wind," that is to say, keeping a course as Northerly as the filling of her sails will permit, while the ship B is coming down from the North-east, having the wind abaft her beam, the former vessel is at liberty to continue her course without altering her helm, while the latter must put her helm to port, and make room for A by running along the track B C. The reason is that, by porting, A would lose ground which might not be regained for a great length of time, whilst B can quickly return to her original track, having the wind in her favour, or "abaft the beam" (*a*).

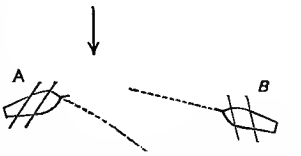


When both are close-hauled, ship on port tack makes way for the other.

When both the ships which meet are closehauled, then that which is on the starboard tack continues

(*a*) *Woodrop-sims*, 2 Dods. 86. It is no excuse for a breach of this rule that the crew of the "free" ship were at the time on the yards, reefing sails (*Hope*, 1 W. Rob. 156).

her course, and that which is on the port tack gives way, still by porting her helm. This rule is not arbitrary, but is founded on the necessity of the case, as will be seen upon explanation. The vessel A is on the port tack, that is, having the wind on her port or left hand side, looking, as the helmsman looks, from the stern forwards. The vessel B is on the starboard tack. It is easy for A to give way by porting her helm, because the effect of doing so is to go off before the wind, that is, to have the wind more in her favour than before, whereas if B were to port her helm, her head would be brought up against the wind, so as to render her unmanageable; for she is supposed to be already sailing as near the wind as is practicable. The duty of giving way, therefore, is in this case imposed exclusively upon A, the vessel on the port tack.



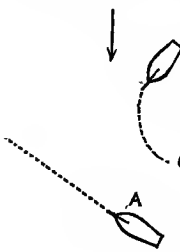
These are the leading principles of the "rule of the road," as applicable to ships under sail when they meet end-on.

Ships crossing at an angle.

When, instead of meeting end-on, they are crossing one another's tracks, as when one is sailing from North to South, and another from East to West, the rule of porting the helm is no longer in all cases applicable. It is impossible for two ships which are both closehauled to approach each other, so as to involve risk of collision, in any direction but the one already pointed out; the course of each ship, relatively to the wind, being determined by the fact that she is closehauled. The only cases we

have here to deal with are, where one is closehauled and the other going free, or where both are going free. In the former of these cases, the duty of making way for the closehauled ship is still cast on the vessel going free, but she is to make way, not necessarily by porting her helm, but by going astern of the closehauled ship. Thus, if A is a ship closehauled on the starboard tack, and B a ship going free, the wind being from the North, B is to make way for A by going astern of her, which, in the case given in the diagram, must be by starboarding her helm, so as to carry her along the track B C.

Free ship is to make way for the other, by going astern.



Summary of rules.

The following, then, are the common law rules of the sea as to steering,—that is to say, these are the rules as they exist independently of statutory enactments.

Rule 1.—When two ships, each having the wind free, meet end-on, or nearly end-on, each is to port the helm (*a*).

Rule 2.—When two ships, one of which is closehauled and the other going free, meet end-on, or nearly end-on, the ship which is going free must make way for the other by porting her helm (*b*).

Rule 3.—When two ships, both closehauled,

(*a*) *Williams* v. *Gutch*, 14 Moore P. C. C. 202; *Victoria*, 9 Mitch. 751.

(*b*) *Woodrop-sims*, 2 Dods. 86; *Speed*, 2 W. Rob. 229.

meet end-on, or nearly end-on, the ship which is on the port tack must make way for the other by porting her helm (*a*).

Rule 4.—When a ship which has the wind free is, not meeting end-on, but crossing the track of a closehauled ship, the former is to give way to the latter by going astern of her (*b*).

These Rules, it will be observed, have two points undetermined, viz.: what should be done by the vessel which is given way to, in the second and third cases; and what is to be done when two vessels, both having the wind free, meet at different angles.

The ship to which the other gives way must generally keep her course.

Generally, a closehauled ship on either tack which meets a ship running free, and a ship closehauled on the starboard tack which meets a vessel closehauled on the opposite tack, may, and indeed ought to, keep her course, so long as the danger of collision lasts, without alteration. The only exceptions that can be allowed to this rule are such as may tend to diminish the danger of collision. Thus, if a ship closehauled on the port tack meets (that is, meets end-on, or nearly end-on) a vessel, as to which it is doubtful whether she is closehauled or running free, the former, it has been decided,

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(*a*) *Shannon*, 2 Hagg. 174; *Baron Holberg*, 3 Hagg. 215; *Alexander Wise*, 2 W. Rob. 65; *Harriet*, 1 W. Rob. 185; *Lady Anne*, 15 Jurist, 18. / L 4 G 20

(*b*) *James Watt*, 2 W. Rob. 279; *Rose*, 2 W. Rob. 1; *Gazelle*, 2 W. Rob. 517; *London Packet*, 2 W. Rob. 216.

ought to port her helm; and, if she does not, will not be held excused from blame, even upon its being proved that the other ship was in fact running free (*a*). On the other hand, if the closehauled ship is on the starboard tack, it would seem that she is always entitled, and perhaps always bound, to hold on her course without alteration (*b*). If, indeed, she is not sailing quite close to the wind, but can go a point or two nearer and still remain under command, then, if she is meeting a ship end-on, her helm ought to be slightly ported, so as to get as near the wind as she properly can;

(*a*) *Ann and Mary*, 2 W. Rob. 189; *Traveller*, 2 W. Rob. 197.

(*b*) Thus, where a ship closehauled on the starboard-tack bore up and wore, she was held to be in fault. "She should," said Sir John Nicholl, "according to the well-known rule, have held on her course" (*Jupiter*, 3 Hagg. 321). The question has frequently been considered in the Admiralty Court, whether a starboard-tack vessel is justified in persistently holding on her course after it is evident that the doing so must lead to a collision. In favour of her doing so are urged the advantages of adhering to fixed rules, and the danger of allowing a departure from them, particularly with regard to ships at sea, on any pretext whatever; while against this view stress is laid on the absurdity of contending that a vessel may be justified in wilfully running into another when she can avoid it. The principle to be extracted from the decisions on this head appears to be, that the starboard-tack vessel which continues in her course is so far *primâ facie* in the right, that the proof lies with the other party to shew that she ought to have deviated from it; and this can only be by shewing beyond doubt that she would have been safe in so deviating, whatever course the other vessel might have taken. It is rarely, if ever, that this can be proved, at any rate when the starboard-tack vessel is required to starboard her helm, or to throw herself in stays (see *Commerce*, 3 W. Rob. 287; *Seringapatam*, cited 11 Jurist, 998; *Test*, 11 Jurist, 998; *Dumfries*, Swab. 63, 126; *Mobile*, Swab. 73, 127; *Hector*, 8 Mitch. 815; *Castilian*, 9 Mitch. 1490).

because, as in this case the other ship, whether free or closehauled, is bound to port likewise, such a measure on the part of the starboard tack ship must always diminish, and cannot augment, the risk of a collision (*a*). If, however, the other ship is approaching, not end-on but at an angle, then, under some circumstances, it would be a fault for the starboard-tack vessel to port; as this might disturb the manœuvres of the other ship, whose duty it is to go astern of her (*b*).

When two vessels under sail, each having the wind free, are crossing each other's track, not meeting end-on, it does not appear that any general rule, founded on the common law of the sea, can be gathered from the Admiralty Court decisions. There is, however, a statutory rule; and it may fairly be presumed that this rule is intended as simply declaratory of existing nautical customs. This rule is found in Article 10 of the Regulations

When two vessels running free cross at an angle.

(*a*) *East Lothian*, 1 Lush. 247. In the case of the *Lady Anne*, two closehauled vessels meeting were very near before they saw each other: the port-tack vessel immediately ported her helm; the starboard-tack vessel did nothing, although she might, by slightly porting, have brought herself somewhat nearer to the wind, and so have avoided the collision; and in this case the starboard-tack vessel was pronounced solely in fault (7 Notes of Cases, 364). This must be considered a somewhat exceptional case; not, indeed, that it contradicts what is stated in the text; but the great body of decisions established that the starboard-tack vessel is almost always in the right, by the common sea-law, if she holds on her course.

(*b*) *Cleadon*, 1 Lush. 162. Where a foreign vessel, closehauled on the starboard-tack, approaches another vessel at night, she is bound to keep her course; porting may, under some circumstances, be an injudicious manœuvre (*Stevens* v. *Gourley*, 14 Moore, P. C. C. 92.)

issued in 1863 by the Board of Trade, in pursuance of the Merchant Shipping Act Amendment Act, 1862; and is as follows:—"When two sailing ships are crossing so as to involve risk of collision, then, if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side; but if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward."

Sect. 2.—*Statutory Regulations.*

In the next place are to be considered those modifications of the common sea law, as affecting the courses to be steered by sailing ships which meet where there is open sea-way (for the subject of river navigation or navigation in narrow channels is to be treated separately), which have been introduced by Act of Parliament.

Extent of statutory jurisdiction.

How far the jurisdiction of Parliament extends, particularly as regards foreign ships meeting on the high seas, is a question which will be made the subject of a separate chapter. It is enough here to say that the statutory Regulations are binding as between British ships everywhere, and as regards foreign ships whenever they encounter each other in British waters, and, in certain cases, even upon the high seas (*a*).

(*a*) It is to be borne in mind throughout that the Merchant

It is probable that the intention of those who framed the statutory Regulations which are now to be considered, was, not to introduce changes in the common law of the sea, but simply to furnish a clear concise declaration of that law. It is always difficult, however, thus to codify a branch of customary law, particularly when that law is in a state of imperfect development, without making some, perhaps unintentional, changes in it; the words used being found to provide for cases not originally contemplated. It will be found that something of this kind has taken place with these regulations.

Rules introduced by the first Merchant Shipping Act.

In the Merchant Shipping Act of 1853 (17 & 18 Vict. c. 104, s. 296), which was the first attempt to codify this branch of the law, it was enacted that "whenever any ship, ... proceeding in one direction, meets another ship . . . proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve any risk of a collision, the helms of both ships shall be put to port, so as pass to the port side of each other; and this rule shall be obeyed by . . . all sailing ships, whether on the port or starboard tack, and whether closehauled or not, unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to the proviso that due regard shall be had to the dangers of navigation, and, as regards

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Shipping Acts, and the regulations founded on them, do not apply to Queen's ships (*The Topaze*, 12 Weekly Reporter, 923).

sailing ships on the starboard tack closehauled, to the keeping such ships under command."

Defects of these rules.

It is unnecessary to point out the obvious defects of this clause, which, indeed, had it been practicable really to carry the clause into operation, must have either revolutionized the law of the sea, or thrown the matter into hopeless confusion. The clause was by degrees rendered innocuous by constructions put upon it in the Admiralty Court, in which a certain necessary violence was done to the plain language of the Act (*a*), and it has since been replaced by a clause better susceptible of being carried into effect.

Present rules.

The Merchant Shipping Amendment Act, 1862, enacted (clause 25), that on and after June 1st, 1863, the Regulations given in table C. of the schedule should have the force of law, but that "Her Majesty may from time to time, on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council, annul or modify any of the said regulations, or make new Regulations in addition thereto or in substitution therefore, and any alterations in or addition to such Regulations made in

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(*a*) For example, though the statute in terms seems to apply to all cases of ships approaching each other from whatever quarter, the Admiralty Court and the Judicial Committee pronounced it solely applicable to vessels meeting end-on (*Inflexible*, Swab. 35; *Independence*, 1 Lush. 277). The direction to port helm, given in the statute, was pronounced inapplicable to vessels closehauled on the starboard-tack (*Halcyon*, 1 Lush. 101). See also, as illustrating the liberal manner in which the statute was construed, the *Mangerton*, Swab. 123, and the *Ericcson*, Swab. 39. The fact is, it was impossible to carry out the statute very literally.

manner aforesaid shall be of the same force as the Regulations in the said schedule." It was further enacted (s. 26), that the Board of Trade should take certain steps for the issuing and publication of the Regulations referred to, and of any alterations or additions that might be made, and for furnishing copies of them to any owner or master of a ship who should apply for them.

The Regulations issued by the Board of Trade, in pursuance of the power thus given, are identical with those contained in Table C. of this Act, and are as follows :—

> "*Art.* 11.—If two sailing ships are meeting end-on, or nearly end-on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other."
>
> "*Art.* 12.—When two sailing ships are crossing so as to involve risk of collision, then, if they have the wind on different sides, the ship with the wind on the port side (*a*), shall keep out of the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on the port side is closehauled, and the other ship free, in which case the latter ship shall keep out of the way; but, if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward

(*a*) *i. e.*, the vessel on the port tack.

shall keep out of the way of the ship which is to leeward."

"*Art.* 17.—Every vessel overtaking any other vessel shall keep out of the way of the said last-mentioned vessel."

"*Art.* 18.—Where by the above Rules one of two ships is to keep out of the way, the other is to keep her course, subject to the qualification contained in the following article."

"*Art.* 19.—In obeying and construing these Rules, due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from the above Rules necessary in order to avoid immediate danger."

Differences between these rules and the common sea law.

These Regulations, it will be seen, do not widely differ from the common law of the sea. Art. 11 seems to impose on closehauled vessels a more absolute obligation to port the helm than that to which they are subject by the common sea law. In the case of the *Surprise*, where a ship closehauled on the starboard tack, meeting another vessel, did not port the helm, but continued her course, and a collision took place, Dr. Lushington, after quoting s. 296 of the Merchant Shipping Act—the Act at that time in force,—and after observing that nothing could be stronger than that enactment, and that although some persons had considered it too strong, still it was the law and must be obeyed,

proceeded to direct the Trinity Masters that, under this section, the only question for them was, whether the ship could with safety have complied with the rule. She might have been excused for noncompliance if porting the helm would have occasioned immediate danger. But, he said, "if you are of opinion that the other vessel was so approaching the *Surprise* that there was a risk of collision, and that there was no danger in porting the helm of the *Surprise*, then I think, according to the statute, the *Surprise* was bound to have ported her helm" (*a*). It is true that this decision is based on the clause which has been repealed, but Art. 11 of the new Regulations appears to be equally peremptory in its terms; and if it is to be construed in the same manner, it appears considerably to abridge the common law right of the ship closehauled on the starboard tack to hold on her course without alteration. It can hardly have been intended, however, that a ship in such a situation should throw herself so far up into the wind as to become unmanageable: this extravagant application of the statutory rule was expressly guarded against in s. 296 of the old Act; and, although in the later Regulations nothing is expressed on this head, yet the general terms of Art. 19 appear sufficient for this purpose. Such a ship, however, must, it would seem (under the statute), always port her helm so as to come as close to the wind as is consistent with being under command.

(*a*) 8 Mitch. 83.

Art. 12 of the Regulations, laying down rules for vessels which cross each other, appears, so far as it goes, to be in conformity with the common sea law. It does not define in what manner one ship is to "keep out of the way" of the other, so that, it may be presumed, the general rule is applicable, that "keeping out of the way" means, for the most part, going astern of the other ship.

Exceptional circumstances.

In conclusion, it is to be pointed out that the steering rules are, by the common sea law, as well as by Art. 19 of the above-mentioned Regulations, subject to the limitation that, in the observance of them, due regard must be had to the dangers of navigation, as well as to any special circumstances which may in particular cases render a departure from the rules necessary for the avoiding of immediate danger.

For example, a ship is not bound to follow the rule, when the doing so would lead to her running aground (*a*). When a collision is inevitable, it is always permitted to starboard the helm, or otherwise depart from the rule, in order to ease the blow or receive it on the strongest part of the ship (*b*). In such a case, as is but reasonable, the *onus pro-*

(*a*) "This is apparent to common sense, as in the case of a vessel going so near to a rock or a shore of sand, that, if she followed the rule, she would inevitably become a wreck: no person would say the rule was to prevail over the still higher consideration of the preservation of property or of human life" (per Dr. Lushington, in *The Friends*, 1 W. Rob. 485.) See also *General Navigation Company* v. *Tonkin*, 4 Moore, P. C. C. 314.

(*b*) *Joseph Somes*, Swab. 188.

bandi rests with the vessel which thus deviates from the rule, to show that it was necessary to do so (*a*).

Altering the helm not always enough.

In speaking, throughout this chapter, of porting or otherwise altering the position of the helm, the thing intended is, of course, that the ship's course should be altered. Under some circumstances, it may be necessary for this purpose that some manœuvres with the sails should be employed to assist the helm; and, if so, the ship would be held in fault should these be neglected. Thus, in one case it was held a ship was in fault because, having missed stays, the crew did not square the mainyard and let her pay off (*b*); and in another, because, though the ship's helm was properly ported, she did not, when lying-to, throw back her headyards (*c*). In the case of the *La Plata*, it was not enough, it was said, that the helm was ported; the ship must answer her helm (*d*).

Time when helm should be altered.

With regard to the time when the helm is to be altered, a medium must be kept between precipitancy and procrastination. When a ship is seen at a considerable distance, time ought first to be taken for perfectly observing her probable course, after which any alteration of the helm which may be requisite should be made in such good time that the vessel may be kept constantly under command (*e*).

(*a*) *Immaganda Sara Clasina*, 7 Notes of Cases, 582.
(*b*) *Kingston-by-Sea*, 3 W. Rob. 158.
(*c*) *James*, Swab. 59.
(*d*) Swab. 223.
(*e*) *Lucerna*, 8 Mitch. 115.

CHAPTER II.

STEERING RULES FOR STEAMERS AND SHIPS IN TOW (AT SEA).

It seems convenient to treat in a separate chapter of the steering rules as affecting steamers or ships in tow of steamers; under which head it will be necessary incidentally to consider the duty of sailing ships when they meet steamers, whether the latter are going alone or have ships in tow.

General principle.

The general principles on this head are, that a steamer going alone, having a locomotive power which is independent of the wind, and consequently being able to leave and return to her course with less inconvenience than a sailing vessel, is to be treated as a ship that has the wind free, and is therefore to make way for a ship closehauled on either tack.

A steamer with a ship in tow is not in the same position, since she cannot shift her course with so much ease. The result of the decisions, which are given in detail below, appears to be that such a vessel is bound to make way for a ship closehauled on the starboard tack; but, when she meets a ship closehauled on the port tack, each vessel is to make way for the other. Whether a towing steamer is bound to make way, or to assist in making way,

for a vessel having the wind free, is a question which has not yet, I believe, been the subject of an express decision in the courts (*a*).

The duty of a steamer, in making way for another vessel, is not confined to the action of her helm. She may be obliged to slow, or stop, or back her engines, according to circumstances.

We may begin with the case of steamers going alone.

Steamer to give way to sailing vessel.

In the oldest case upon the subject, in 1828, the steamer *Shannon*, on the starboard tack, met a ship which was on the port tack, and in the argument it was contended that the duty of making way rested with the latter vessel; but the Trinity Masters said that the direction of the wind was of no very great importance, as the *Shannon*, not receiving her impetus from sails but from steam, should have been under command. Steamboats, they said, from their greater power, ought always to give way. The *Shannon* was accordingly condemned in damages (*b*).

Trinity rules.

In the year 1840, the following Regulation was issued by the Trinity Board, after communication

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(*a*) On this subject of ships in tow, there is, as is pointed out below, a variance between the common law of the sea and the statutory regulations.

(*b*) *Shannon*, 2 Hagg. 174. By the common law of the sea, a vessel which has the wind free is to give way to one closehauled, and a steamer is to be treated as a vessel which has the wind free. This applies to the ships of all countries (*Eclipse*, 1 Lush. 423). By the common law of the sea, when two steamers meet end-on, each is to port helm (*Black Diamond*, 8 Mitch. 1488).

with the Lords Commissioners of the Admiralty :— After setting forth the necessity of having some rule as to steamers, and stating that the recognised rule for sailing vessels was, as has already been stated, the Regulation continues :—

> " And as steam vessels may be considered in the light of vessels navigating with a fair wind, and should give way to sailing vessels in a wind on either tack, it becomes only necessary to provide a rule for their observance when meeting other steamers or sailing vessels going large."

For this purpose, therefore, they promulgate the following

Rule.

> " When steam vessels on different courses must unavoidably or necessarily cross so near that by continuing their respective courses there would be a risk of coming in collision, each vessel shall put her helm to port, so as always to pass on the larboard side of each other."

There is also a rule for the steering of steam vessels when passing each other in narrow channels—a subject which is reserved for the following chapter.

This rule of binding authority.

The first case in which the above rule was brought under the consideration of the Admiralty Court was that of the *Duke of Sussex*. Two steamers were approaching each other end-on ; the *Lightning*

ported—the *Duke of Sussex* starboarded her helm; a collision ensued. In the argument, the Trinity House Regulation was cited to prove that the *Duke of Sussex* was in the wrong. Dr. Lushington observed:—"The rule in question emanates from the Trinity House; and although it cannot be said to constitute a law *per se*, it is nevertheless a rule to be observed, and it is important that it should be distinctly understood that, in all future cases of this kind, the court will consider this rule of binding authority upon the owners of steam vessels; and if the owners of such vessels shall think fit not to comply with it, in so doing they will be guilty of unseamanlike conduct, and their owners will be responsible for the consequences that may result from their disobedience to it." The rule was intended to apply, continued the learned Judge, not merely where a collision would be a matter of certainty if the helms were not ported, but wherever there would be a reasonable probability of it. The court accordingly gave judgment against the *Duke of Sussex* (*a*).

Steamer to give way by going astern of ship.

The schooner *Perseverance*, beating up the Thames off the Nore in the night-time, and close-hauled on the starboard tack, perceived the steamer *James Watt* approaching her down the Reach, and steaming at from eight to ten knots per hour. The schooner continued her course and hailed the steamer to starboard her helm so as to go astern of her; but the steamer ported her helm, which

(*a*) *Duke of Sussex*, 1 W. Rob. 275.

brought her across the schooner's bows, and a collision ensued. Here the steamer was pronounced solely in fault. On behalf of the steamer, it was contended that the schooner ought, on seeing the steamer, to have put about; and it was clearly established that she had ample time to do so. But Dr. Lushington pronounced that she was perfectly right in continuing her course. "I conceive," said the learned Judge, "that very great inconvenience would arise, if vessels of her description, beating up the river, and being closehauled, should put about the moment a steamer is seen, and before it can be ascertained what course the steamer is likely to take." Again, it was urged on behalf of the steamer, that although, if it had been daylight, her proper course would confessedly have been to go astern of the schooner, yet, being in doubt, by reason of the darkness, as to the course which the latter vessel might be pursuing, since her light only was seen, the proper course for the steamer to pursue was to port her helm in compliance with the Trinity House rule. To this argument Dr. Lushington replied that, if the schooner's course was doubtful, the steamer's engines ought to have been eased and her course slackened until she had ascertained the schooner's actual position, after which her helm should have been altered according to circumstances (*a*).

In case of doubt, engine to be slackened.

The same decision was come to in a very similar case, that of the *Gazelle*. This steamer, on a dark

(*a*) *James Watt*, 2 W. Rob. 270.

misty night, saw the light of a sailing vessel on the larboard bow. The steamer's helm was immediately ported, and she shortly after ran into the vessel, which was a collier closehauled. Dr. Lushington, after pointing out that it was certainly the steamer's duty, under these circumstances, to give way, added :—"The simple question is this,—what is the meaning of the term 'give way?' I know of no rule that 'giving way' means putting the helm to port under all circumstances. On the contrary, I apprehend, and in many cases I have stated it, that it means, according to the circumstances, porting or starboarding the helm, as the exigency might require." He therefore put the question to the Trinity Masters, whether, under the circumstances, upon seeing the light, the master of the steamer should have eased his engines, stopped his engines, starboarded his helm, or ported his helm. With regard to the conduct of the closehauled vessel, she had put her helm to starboard, but it appeared doubtful whether this proceeding had affected her course so as to contribute to the collision; and with regard to this, the learned Judge told the Trinity Masters that unless such starboarding had contributed to the collision, they were to dismiss it from their minds. The Trinity Masters found that the *Gazelle* did not take the proper measures to avoid the collision, and absolved the sailing vessel from blame (*a*).

Definition of "giving way."

The Trinity Rules, above referred to, profess to

Rules laid down by first Merchant Shipping Act.

(*a*) *Gazelle*, 10 Jur. 1065.

be simply declaratory of existing nautical customs, and have no authority independent of those customs. In 1854, however, an attempt was made to legislate, in a manner somewhat at variance with custom. The clause in the Merchant Shipping Act, so far as it refers to vessels proceeding under steam in an open seaway, is as follows:—

> "Whenever any ship, whether a steam or sailing ship, proceeding in one direction, meets another ship, whether a steam or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve any risk of a collision, the helms of both ships shall be put to port, so as to pass on the port side of each other; unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger; and subject also to the proviso that due regard shall be had to the dangers of navigation" (s. 296).

These now superseded.

As was said in the preceding chapter, this clause being now superseded by a later statute, it is unnecessary to enter with any minuteness into the decisions which were founded upon it. The manner in which some of those decisions have narrowed the application of the clause, so far as sailing ships are concerned, has been pointed out.

In judging of the course to be pursued,

Another important modification of the strict grammatical meaning of the clause was introduced

account is to be taken of the likelihood that the other vessel will port helm.

in the cases of the *Mangerton* and the *Admiral Boxer*. The clause, it will be observed, is limited to the case in which the vessels are approaching in such a manner as that, if both were to continue their respective courses, there would be a danger of collision. These decisions establish that, in judging of this danger, account is to be taken by those who direct the helm in one vessel, of the probability that the other vessel will, on seeing the former approaching, put the helm to port, in obedience to the statute. That is to say, if the vessels are meeting at night, or when for any reason there is an uncertainty as to the position or course of either vessel, each is to act on the presumption that the other will not continue her course, but port the helm. Thus, in the *Mangerton's* case, a ship which was running free was held to be in fault because, seeing a steamer's green or starboard light three or four points on her starboard bow, she held on her course, the master believing that, if the steamer did likewise, the vessels would have gone clear. He ought, it was said, to have expected that the steamer, on seeing his light, would have followed the rule and have ported; and should therefore have ported his own helm. "Both parties are bound to act on the presumption that the statute will be obeyed by the other; the confusion otherwise would be endless" (*a*).

(*a*) *Mangerton* (Swab. 124); and see *Admiral Boxer* (Swab. 194). The cases of the *Cleopatra* (Swab. 135), and the *Sylph* (Swab. 236), illustrate the manner in which the steering of steamers at night

Present statutory rules.

We come now to the latest Regulations, which, so far as statutory Regulations have jurisdiction, supersede all other rules upon this subject. These are the Regulations issued in 1863, by the Board of Trade, in conformity with the terms of the Merchant Shipping Amendment Act; and are as follows:—

Art. 13.—"If two ships under steam are meeting end-on, or nearly end-on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of each other.

Art. 14.—"If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.

Art. 15.—"If two ships, one of which is a sailing ship, and the other a steam ship, are proceeding in such directions as to involve risk of collision, the steam ship shall keep out of the way of the sailing ship.

Art. 16.—"Every steam ship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam ship shall, when in a fog, go at a moderate speed.

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is to be regulated by the position of the red and green lights of the vessels they see; but, in using these cases as authorities, it is to be borne in mind that they come under the statute now repealed (see c. 5, on "Lights," s. 4).

Art. 17.—"Every vessel overtaking any other vessel shall keep out of the way of the said last-mentioned vessel.

Art. 18.—"Where by the above rules one of two ships is to keep out of the way, the other shall keep her course, subject to the qualifications contained in the following article.

Art. 19.—"In obeying and construing these rules, due regard must be had to all dangers of navigation; and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary in order to avoid immediate danger."

"Keeping out of the way," in Art. 14, must be done either by starboarding or porting, according to circumstances (*a*).

Steamers having ships in tow,

The above cited decisions have reference to the steering of steamers going alone: we are in the next place to consider the duties of steamers having vessels in tow.

are not always to be regarded as free.

The earliest case bearing on this subject is that of the *Kingston-by-Sea* (*b*). "It has been urged," said Dr. Lushington, "that a steamer is always to be considered as having the wind free, whether she has another vessel in tow or not. To this proposition I cannot accede. It is true, a steamer is considered always to have the wind free; but it

(*a*) *Cognac*, 10 Mitch. 367. (*b*) 3 W. Rob. 152.

does not, in my opinion, follow that a steamer having a merchant vessel in tow is always free. That will depend, I conceive, upon the state of the wind and weather, the direction in which the steamer is towing, and the nature of the impediments that she may meet with in her course."

These expressions were adopted by the Judicial Committee of Privy Council, in the case of the *Independence*, as accurately stating the law on this point (*a*).

The next case upon the subject is that of the *Cleadon*. A steamer, having the ship *Cleadon* in tow, had crossed the bows of the ship *A. H. Stevens*, which was closehauled on the starboard tack. The *Cleadon* had not crossed her bows; but it was found by the Trinity Masters that she was in such a position that, if both vessels had continued their respective courses, they would have cleared each other. The tug, and of course the *Cleadon*, continued her course without alteration; but the *A. H. Stevens* ported her helm, and ran into the *Cleadon*. The Court held that the *A. H. Stevens* was solely in fault; and this was affirmed in Privy Council. In giving judgment in the latter Court, Lord Chelmsford said:—"The *Cleadon* being in tow of the steam-tug, it is admitted in the case that she and the tug must be considered to be one vessel, the motive power being in the tug, the governing power in the vessel that was towed. It was her duty, being in fact a steamer, to get out of the

Ship towed and tug treated as one vessel.

(*a*) 1 Lush. 278.

way of another vessel that she was meeting; and this more especially became incumbent upon her, from the situation in which she was placed; because, as it appears, there is nothing which can indicate to any other vessel that a vessel is being towed, and of course, under such circumstances, the combined vessels being a very long body, and a vessel meeting them taking for granted, by seeing the lights, that they are independent vessels, they ought to be more careful, under such circumstances, to give a wide berth to any vessel that they are meeting."

The facts of the case, however, rendered it unnecessary to apply the principle here laid down; it appearing that, under the actual circumstances, the *Cleadon* and her tug were justified in holding on their course. The *A. H. Stevens* must, in the opinion of their lordships, have known that the *Cleadon* was in tow of the steamer, and consequently could do nothing but follow her; and for this reason they held that the *A. H. Stevens* did wrong in porting her helm (*a*).

When ship in tow meets ship close-hauled on port tack, both ought to give way.

In the case of the *Independence*, it was expressly decided that a steamer having a vessel in tow is not under the same absolute obligation to make way for a sailing vessel, as a steamer going alone.

The schooner *Arthur Gordon*, heading about N.N.W., was closehauled on the port tack: the steamer *Independence*, having in tow a large vessel called the *J. K. L.*, was steaming about W.N.W.

(*a*) *Cleadon*, 1 Lush. 158.

Each vessel sighted the other, in the first instance, at a long distance, bearing upon the beam, the steamer being on the lee beam of the *Arthur Gordon*. Each vessel held on her course until a collision was inevitable; they came into contact, and both vessels almost immediately sunk.

In the Admiralty Court, Dr. Lushington, after pointing out that the two vessels were not meeting, but crossing each other's tracks, and that consequently the then existing Regulations (those of the Act of 1854) did not apply, but the case must be determined independently of statute, proceeded to say that, as the sailing ship was closehauled, it must be admitted without question that, if the steamer had had no vessel in tow, it would have been her duty to have made way. Whether the same obligation was imposed, in broad daylight, upon a steamer which was engaged in towing, was a question, he said, for the Trinity Masters to determine. He pointed out to them, however, that the reason why a steamer was bound to make way for a sailing ship was, the comparative ease with which a steamer could quit and return to her course; and that, while a steamer, steaming alone, could do anything, a steamer which had a vessel in tow could not always have the same facility of movement as if unincumbered. The Trinity Masters, nevertheless, appear to have held that the tug ought to have given way; and the *Independence* was pronounced solely in fault.

From this judgment an appeal was carried to the Privy Council.

In giving judgment, Lord Kingsdown said :— "It was urged in support of the decree, that a steamtug with a ship in tow is in no degree in a different situation from a steamer unincumbered, and that, as such a steamer would have been bound to give way to a ship closehauled, the steamtug in this case was equally bound to do so. Their lordships are not prepared to adopt that principle, and they agree with Dr. Lushington, that there is a very material distinction between the two cases. A steamer unincumbered is nearly independent of the wind. She can turn out of her course, and turn into it again, with little difficulty or inconvenience. She can slacken or increase her speed, stop or reverse her engines, and can move in one direction or the other with the utmost facility. She is, therefore, with reason, considered bound to give way to a sailing vessel closehauled, which is less subject to control and less manageable. But a steamer with a ship in tow is in a very different situation. She is not, in anything like the same degree, the mistress of her own motions; she is under the control of, and has to consider, the ship to which she is attached, and of which, as their lordships observed in the case of the *Cleadon*, 'she may for many purposes be considered as a part, the motive power being in the steamer, and the governing power being in the ship towed." She cannot, by stopping or reversing her engines, at once stop or back the ship which is following her. By slipping aside out of the way of an approaching vessel, she cannot at once, and with

the same rapidity, draw out of the way the ship to which she is attached, it may be by a hawser of considerable length ; and the very movement which sends the tug out of danger, may bring the ship to which she attached into it. Even if the danger of collision be avoided, it may be much less inconvenient for a ship closehauled to change her course, than for a tug with a ship attached to her to do so. Their lordships, therefore, are of opinion that it is not sufficient, to throw the blame exclusively upon the *Independence*, to urge that she, as a steamer, was bound to make way for a vessel closehauled, and that she neglected to do so." The learned Judge, after saying that in the opinion of their lordships. the law on this subject was accurately laid down by Dr. Lushington, in the case of the *Kingston-by-Sea*, above cited, and after a critical examination of the *Cleadon's* case, proceeded to say that, in the opinion of their nautical assessors, the *Arthur Gordon* might, without difficulty, and with very little loss of time, have avoided the *Independence* ; that the steamer had a right to rely on her doing so ; and consequently that the *Arthur Gordon* was solely in fault. Their lordships, however, were not prepared to go so far. In their opinion the steamer also, by a slight deviation from her course, might have avoided the collision. That she did not do so, was on the evidence the result of an insufficient look-out having been kept. The *Arthur Gordon*, they held, occasioned the collision ; but there was on board the *Independence* such a

want of reasonable care and skill as contributed to the accident. Both vessels, therefore, were pronounced in fault (*a*).

Effect of statutory rules on the above decisions.

It is necessary to point out that all the decisions above cited were made previously to the Merchant Shipping Amendment Act, and to the issuing of the Board of Trade Regulations in conformity thereto. The results of those decisions may, to a certain extent, be affected by Articles 15 and 18 of these Regulations (see above), which direct that whenever a steam ship (drawing no distinction, apparently, between steamers going alone and steamers having vessels in two) is proceeding in such a direction as to involve risk of collision with a sailing ship, the former shall keep out of the way of the latter, and the latter shall keep her course. In this respect, therefore, there seems to be a difference between the common law of the sea and the statutory Regulations (*b*).

(*a*) *Independence*, 1 Lush. 270.

On the relative position of the tug and ship towed.

(*b*) The relative position in law of a steam tug and the vessel she is towing, though a subject not properly within the scope of this treatise, seems to require some brief notice in this place.

The tug is the servant of the ship towed; hence, if the tug does wrong, and a collision ensues, the owner of the ship towed is answerable in the first instance, but may recover damages against the owner of the tug, as well for injury done to his own ship as for the sum he has been obliged to pay to the other (*Kingston-by-Sea*, 3 W. Rob. 153; *Gipsey King*, 2 W. Rob. 543; *Night-Watch*, 8 Mitch. 911). The tug is not liable if the collision arises from improper orders given by the pilot of the ship towed, it being generally the duty of the pilot to direct the tug's course by orders given from on board the ship (*Duke of Sussex*, 1 W. Rob. 272); but, where no directions are given, the tug is responsible for proper steering

Steamer in certain cases must slow, stop, or reverse her engines.

Before closing this chapter, it may be well to point out that it is not sufficient in all cases for a steamer to put her helm in the right direction: her engines must be slowed, stopped, or reversed, if necessary, according to circumstances. In this respect the common law of the sea and the statutory Regulations are equally explicit. Thus, in the case of the *Despatch*, the Trinity Masters held that it was the duty of that steamer, on first observing the other vessel, to have eased and stopped her engines; and the steamer was pronounced in fault (*a*). And Art. 16 of the Regulations (see above) directs that "every steam ship, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse." Here it is to be observed, that the duty of slackening her speed is imposed in all cases, while that of stopping and reversing is limited

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(*Secret*, 8 Mitch. 116). The proper time for making fast the tug to the steamer is to be determined, not by the master of the tug, but by the pilot or captain of the ship, so that if an error has been committed in this matter, the tug is not liable (*Julia*, 1 Lush. 231). The owner of a tug may lawfully stipulate beforehand, by printed notice, that he will not be liable for improper acts of his crew (*Symonds* v. *Pain*, 6 Mitch. 433). The tug, if improperly run into and damaged by the ship she is steering, has a right of action against her (*Julia*, 1 Lush. 231; *Night-Watch*, 8 Jurist, N. S. 1161). It is to be observed that the jurisdiction of the Court of Admiralty, as between a tug and the ship she is towing, must be founded on a collision; hence, where the ship towed sued the tug for damage done by a grounding caused by improper towing, the Admiralty Court refused to entertain the suit (*Robert Pow*, 8 Mitch. 943).

(*a*) *Despatch*, Swab. 140.

to the case of necessity. Whether the Court of Admiralty would interpret this clause so literally as to hold that, whenever a steamer is approaching another vessel in such a direction that, without an alteration in her course, a collision must ensue, the steamer is bound to slacken her speed, even in cases where a simple alteration of her helm would suffice to clear the other vessel, must be considered as somewhat questionable.

CHAPTER III.

STEERING RULES IN NARROW CHANNELS, AND OTHER CASES.

In the two preceding chapters have been considered the rules for steering when two vessels meet, having ample sea-room, and when both are in motion. We are now to deal with the cases of vessels which meet in a narrow channel, or river, or when one of them is at anchor or lying-to. Under this head it will be proper to examine how far a vessel which is in stays, in the act of tacking, is to be regarded as in a similar position to one at anchor; also, what precautions are to be observed in launching a ship, and by vessels which are crossing the track where a launch is to take place.

Extinct statutory rules for narrow channels.

With regard to vessels in a narrow channel, there is now no statutory regulation; but, in order to understand the following decisions, it must be mentioned that the Trinity House Regulation, issued in 1840, was as follows:—"A steam vessel passing another in a narrow channel must always leave the vessel she is passing on the larboard hand." This rule remained in force until 1853, when it was superseded by s. 297 of the Merchant Shipping Act, which is as follows:—"Every steam-ship when navigating any narrow channel, shall, whenever it

is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such steam-ship." This section was repealed in Table A. of the Appendix to the Merchant Shipping Act Amendment Act of 1862, 25 and 26 Vict. c. 63; and in the Board of Trade Regulations, issued in conformity with the latter Act, there is no regulation specially applicable to narrow channels; so that at present the case is not provided for by statute. It may, however, be instructive to review the decisions founded on this extinct legislation.

Local customs cannot justify departure from the rule.

The question has been raised on several occasions, how far local customs prevailing in particular rivers can be pleaded in contravention to the Trinity House Rules or the Statute. In the case of the *Duke of Sussex*, it was alleged that in the Halfway Reach, in the Thames, near Woolwich, the tide sets so strongly towards the north shore that there was a custom for steamers going down the river with the tide, to keep towards the Essex shore as much as possible, and for vessels coming up to take the Kentish or south side of the river. Two steamers met in this reach "end-on": one, the *Lightning*, ported her helm, and of course went to the unusual side of the river; the other starboarded, and defended herself on the ground of the custom. The Court decided that the latter vessel was solely in fault, for not having followed the Trinity House rule. The so-called custom, Dr. Lushington said, only amounted to this, that according to common sense, the one vessel steered her course where the tide was strongest in

her favour, the other where the adverse tide was weakest. "But," he continued, "supposing the custom to exist as stated, it can only be acknowledged where there is an open way for each vessel to pass without any risk of a collision. In the present case the two vessels were meeting end-on; in which case I distinctly lay it down as my opinion that the rule was to be observed, and the custom, if any such custom exist at all, be superseded" (*a*).

In the case of the *Friends*, the custom in the river Thames was stated to be, that vessels going with the tide kept the middle of the stream, in order to have the advantage of the tide's full force, while vessels going against it would keep as near as might be to one or other of the shores; and, when so coming up the river in Halfway Reach, would keep the south or Kentish side, so as to avoid as much as possible the strength of the tide. The steamer *Menai* was proceeding up Halfway Reach, against an ebb tide: the schooner *Friends* was coming down the river, sailing free: the two met nearly end-on. The schooner ported her helm: the steamer, adhering to the supposed custom, starboarded, so as to keep still closer to the Kentish shore, and indeed kept so close that she ran aground upon it. In giving judgment, Dr. Lushington commented on the Trinity House rule; pointing out that it did not profess to enact the law, but simply to declare what was the existing law of the sea; that it did not in express terms

(*a*) *Duke of Sussex*, 1 W. Rob. 274; see also the *Gazelle*, 1 W. Rob. 471.

provide for the present case, since it only spoke of a steamer "passing another," *i. e.*, another steamer: but that by implication the Rules disposed of the question, since they declared that a steamer was to be regarded as a vessel going free, and that vessels going free were to pass each other on the larboard hand. The learned Judge then left it to the Trinity Masters to say whether the alleged custom in the Thames, and the convenience of it for vessels navigating that river, furnished a satisfactory exception to the application of the Trinity House Rules upon the present occasion; adding, that if there were to be any exception, it ought to be as distinct and definite as the rule itself, so as to avoid the dangers resulting from uncertainty. The Trinity Masters pronounced that the steamer was solely in fault, and she was condemned in damages (*a*).

Exceptions must be as distinct and definite as the rule.

We come now to the enactment in the Merchant Shipping Act. The first reported case bearing upon it (*b*) is that of the *Unity*, in 1856. Here it was stated that the custom clearly prevailed in the river Tyne, that tugs going up that river with vessels in tow should keep to the south side, and steamers coming down should keep to the north. Dr. Lushington assumed that the river was, properly speaking, a "narrow channel." In that case, he

(*a*) *The Friends*, 1842, 1 W. Rob. 478.

(*b*) It seems unnecessary to complicate the subject by referring in detail to decisions based on still older legislation,—*e. g.* the Acts 9 & 10 Vict. c. 100, and 14 & 15 Vict. c. 79, which were extinguished by the Merchant Shipping Act (see *The Nimrod*, 15 Jurist, 1201; *The Leith*, 7 Notes of Cases, 139).

said, the alleged custom was a clear violation of the Act of Parliament, unless there were some local peculiarities, of which he knew nothing; and that, if the custom as stated in the evidence were a custom at all, it was not a custom recognized in law. With reference to the words in the clause, "whenever safe and practicable," the meaning of them he apprehended to be that, where there was no local impediment of any kind, no difficulty arising from the peculiar formation of the channel itself, no storm, no wind, or anything of that kind occurring, then the obligation continued of keeping to the starboard side, and no consideration of convenience, no opportunity of accelerating the speed, could justify a disobedience of the statute (*a*). The same principle was laid down in the case of the *Hand of Providence*. Mere reasons of convenience or expediency, as, that the water is deeper, or that the tide flows stronger on one side of the channel than on the other, would be no excuse for a deviation from the directions of the Act: though it would be otherwise if it could be shown that there was some permanent local peculiarity, such as a rock, which would render obedience to the statute dangerous; or an accidental impediment, as a wreck; or if the state of the weather were such as to render it dangerous to attempt it. But no

Exceptional cases.

(*a*) *The Unity*, Swab. 101. In this case, the steamer coming down the river, and seeing one light on the starboard-bow and another on the port-bow, was held in fault for attempting to pass between; she should have ported.

custom, no rule, it was laid down, could prevail to justify any deviation from the Act (*a*). In the case of the *Panther*, in 1862, it was suggested that, since there was a local custom opposed to the Act, it would be dangerous to obey the Act, because other ships would violate it. "That will never do," said Dr. Lushington, "we can never say that a violation of a statute is a justification for a future violation" (*b*).

What is a narrow channel.

We are, in the next place, to consider what constitutes a narrow channel, within the meaning of the Act. The river Mersey, off the Crosby light-ship, was treated as a narrow channel, in the case of the *Admiral Boxer*, in 1857, though the question whether it was properly so treated does not appear to have been mooted (*c*). The Crosby light-ship is, in fact, not in the river Mersey, properly so called, but in the channel outside the Mersey. In the subsequent case of the *Mœander*, it was determined that the Queen's Channel, near the Bell Buoy, outside the river Mersey, was not a narrow channel. "My notion of a narrow channel," said Dr. Lushington, "is this, where a channel is bounded on either side by land, so that it is impossible, under the circumstances, that you can navigate at any great width between the two banks"—that is, a narrow channel. "If you should be of opinion," he said to the Trinity Masters, "that the channel had

(*a*) Swab. 107.
(*b*) 7 Mitch. 238.
(*c*) Swab. 194.

ended, that is to say, that the place of collision was in the open sea, where there is a wide depth of water—an expanse of water on both sides—where ships may safely navigate, then I should come to the conclusion that it is not a narrow channel within the meaning of the statute." And he intimated that so long as the channel was marked out by buoys, and no further, it might be considered as a narrow channel. Dr. Lushington's decision on this point was affirmed in Privy Council (*a*).

Of steamers having ships in tow.

It seems questionable whether the obligation to keep to the starboard side of the fairway is as rigorously applicable to steamers which have vessels in tow as to steamers going alone. In the case of the *La Plata*, that vessel, a large and long ship, was going down the Thames in tow of a steam-tug, and was on her right side, *i.e.*, on the south or starboard side of the river, when she met the brig *Helene*, also in tow of a steamer, and also on the South side of the river. The *Helene's* helm was ported, and she answered her helm; it was alleged that the helm of the *La Plata* was ported, but it certainly appeared that her course was not changed, and a collision ensued. The case for the *Helene* was rested on the *La Plata's* not having ported, or not soon enough; that of the *La Plata* on the *Helene's* being on the wrong side of the channel. Dr. Lushington pronounced in favour of the *Helene*. "The rule laid down in the Act," said the learned Judge, "must be modified with respect to both vessels,

(*a*) *The Mœander*, 11 Weekly Reporter, 542.

because I am clearly of opinion, however strictly you may apply the rule to two steamers navigating alone, the one going down on the south side, and the other coming up on the north, yet, in the case of a vessel in tow of another, some allowance must be made, and some deductions taken from that extreme strictness which applies to a vessel steaming by itself." Then, with regard to the *La Plata*, it was not enough, he said, that the helm should be ported; the ship must also have answered her helm: and, if it were contended that there was a difficulty on account of the state of the tide, which was just on the turn, this must be answered by saying that, if a vessel going down the river in tow of a steamer starts before high water, and if the being towed against the tide occasions an increased risk of collision with other vessels, the ship which proceeds in this unusual manner must bear the consequences (*a*). This decision, however, was reversed in Privy Council, but so as to leave it doubtful whether the principle laid down in it, that a steamer with a ship in tow is not under the same obligation to keep her own side as a steamer going alone, was or was not accepted as law. The question was, said Sir W. Maule, in giving judgment, whether those who managed the *La Plata* had been shown to have been guilty of any wrong navigation, or any default or negligence which occasioned that accident. The collision happened, it appeared, just about high water, when it could not be known which way the

(*a*) Swab. 220.

tide might be running at the moment in any particular part of the river. That being so, it might be an accident for which nobody was to blame, but whether it was so or not, was a matter depending upon nautical considerations. Their nautical assessors had told them they thought the *La Plata* had done all she could; that her helm had been put to port; that, from her length, she would not answer her helm so quickly as the *Helene*, but she was on her right side of the river, and was as close over as she could get without fouling the craft at anchor on the south shore; that the *Helene* was not on her proper side of the fairway; and that, had a good look-out been kept on board, she must have seen the *La Plata* earlier than she did. These reasons appeared to their Lordships perfectly satisfactory, and they, therefore, pronounced that the *La Plata* was not in fault (*a*). It will be observed, from this summary of the judgment, that no opinion was pronounced as to whether the *Helene* was in fault, nor any reference made, except very indirectly, to the general principle laid down by Dr. Lushington.

Cases not under the jurisdiction of the statute.

The above-cited decisions have in each case had reference to such vessels as came within the jurisdiction of the English statute. In those which follow, the vessels, being foreign, were subject to no other rules than those of the general sea law.

Foreign ship is bound by the customs of an English river.

In the case of the *Fyenoord*, it was decided that a foreign steamer navigating the Thames, whether

(*a*) Swab. 298.

or not coming within the terms of the Merchant Shipping Act, is bound by the custom of the river Thames, founded on that Act, to keep to the starboard side of the channel. "We must presume," said the Court, "that a customary course of navigation has emanated from the statute, and that this was known to those on board the *Fyenoord*." In this case, and that of the *Seine*, it was determined that a foreign steamer, coming up the Thames, has no right to cross to the wrong side of the river in order to comply with a Custom House regulation, by which a station on the south side of the river at Gravesend had been appointed, where all steamers from foreign ports were to take in their Custom House officers. It had been directed by statute (*a*), that every ship, in proceeding to her place of mooring or unlading, should bring to at stations appointed for the purpose by the Commissioners of Customs. The place to which these vessels had crossed was the station so appointed. It was alleged to be dangerous in stormy weather, as well as inconvenient for the Customs officers, were they required to cross the river. There was also a custom, though not a uniform one, to cross the river to the station. These reasons, however, were rejected by Dr. Lushington as insufficient. There was not, he said, a uniform custom to clear on the south side, consequently no custom in law. It was no excuse to say that in stormy weather it might be dangerous to cross the Thames, for on this occasion it was not

(*a*) 8 & 9 Vict. c. 86, s. 12.

stormy. Even granting it had been dangerous to them, still the dangers arising from a departure from the rule of navigation would have to be considered on the other side. The vessels, therefore, were in each instance held in fault for having crossed to the wrong side of the river (*a*).

Rule for steering in rivers with strong currents.

In the following decision an important rule was laid down for the navigation of rivers with strong currents; and this is the more valuable, in the present absence of statutory regulations, as having been decided purely on general principles. The steamer *Smyrna* was going up the Danube, towing one vessel astern and another lashed alongside, when she met the steamer *Mars* coming nearly empty down the river. The place where they met was near a bend in the river, where the current sets very strongly towards the concave or Russian side. The *Mars* came down on that side, and the *Smyrna* was coming up on the same side, and before anything could be done a violent collision took place. The question arose, which of the two steamers was on her right side. On behalf of the *Smyrna* it was urged, that by a regulation issued by the European Commissioners appointed at the close of the Russian war to regulate the navigation of the Danube, vessels going up the river were to keep to the Russian side. But the Privy Council determined that in issuing this regulation the Commissioners had exceeded the powers given them by the treaty,

(*a*) *The Fyenoord*, Swab. 377; *The Seine*, Swab. 413.

and that the question could only be determined upon the general principles of the sea law. Several Danube pilots, and a naval officer, who had been for two years on the Danube station, had given it as their opinion that a steamer ascending the river at night, and being about to meet a steamer descending the stream at the bend in question, ought to place herself on the right or Turkish side. The Naval Assessors of the Privy Council confirmed this, and added that no regulations ought to be made which should lay down a contrary rule. "The reason for this," said the Court in giving judgment, "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 stronger. 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 *Smyrna*, therefore, was pronounced in fault (*a*).

Of ships run into while at anchor.

The next subject for consideration is the case where one of the colliding ships is at anchor. Here, supposing that a proper light has been exhibited by the ship at anchor, the presumption of law is that the vessel which runs into her is in fault,

(*a*) *The Smyrna*, 9 Mitch. 978.

and the burden of exculpating herself rests with the latter (*a*).

The ship running into one at anchor is *primâ facie* in fault,

Thus, in the case of the *Percival Forster*, Dr. Lushington said:—"She had anchored in a place respecting which no fault could be found, that is, she had a right to be anchored where she was. The result of that is, that if any vessel in motion comes into collision with her while at anchor, the burden of proof lies on the vessel so coming into collision, to show either that the collision was inevitable from circumstances, or that the vessel at anchor was to blame. The justice of this, which is a rule of law, is obvious, because a ship lying at anchor has very little means of avoiding a collision; to a certain extent she may possibly manœuvre, but to a small extent; whereas the vessel driving up with the tide, whether under steam or sail, has much greater means of doing whatever may be necessary" (*b*).

even when ship is anchored in an improper place.

Even though the ship should have been anchored in an improper place, the same rule, it appears, must hold good; for even then it is the duty of the vessel in motion to keep out of the way of her if she can. "This is not only the doctrine of the maritime law, but it is also the doctrine of the common law with respect to carriages on the high road. Supposing a carriage be standing still, and be on the wrong side

(*a*) How the case would stand, if the vessel at anchor had no light hoisted at a time or place at which, by custom or positive law, there ought to have been one, will be considered in the subsequent chapter on Lights.

(*b*) 7 Mitch. 1456.

of the road, it would be no justification for another carriage, which might be on the right side of the road, to run into that carriage, if the driver could avoid it without risk to himself" (*a*).

Case of a vessel hove-to.

When a vessel is hove-to, that is to say, is kept almost stationary, so far as the wind is concerned, by the position of her sails, one sail being kept backed while another is filled, so that they neutralize one another, and the only movement of the ship is a drifting in the tide, is a vessel so situated to be treated as a vessel at anchor?

On this question we have the two following decisions:—Two vessels were lying-to in a tideway on opposite tacks; the tide drifted one against the other; nothing was done on either side; and both were held in fault; the one on the port tack for not having ported her helm in time, and the other for not having thrown back her headyards when the collision was probable. From this decision it appears that, as between two vessels which are both lying-to, each is bound to take measures for avoiding a collision, in the same manner as if both were "under way" (*b*).

A fishing smack, whilst hove-to, engaged in transferring her fish by boats to other smacks, was run into by a vessel under way. It was alleged on the one side that the smack was lying dead in the water, and on the other that she was not properly

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(*a*) *The Batavier*, 2 W. Rob. 407.

(*b*) *The James*, Swab. 55. See also S. C. in P. C., which, however, only tends to confirm the principle (Swab. 60).

lying-to, but might easily have filled her head sails and gathered way so as to avoid the collision. Dr. Lushington said:—"It seems consistent with probability that, as the cutter (smack) was employed in putting fish on board a number of vessels, she should be hove-to in order to facilitate that occupation, and not be sailing; and if hove-to, it would be the duty of vessels coming up to treat her as a vessel at anchor, and not run into her. It is difficult to say that vessels must always treat this cutter as lying-to, and, therefore, she must take care, the same as other vessels, that she does nothing to bring about a collision." Whether the smack was or was not actually lying-to at the time, was a question, the learned Judge proceeded to say, entirely for the Trinity Masters. They appear to have considered that she was not, since both vessels were pronounced in fault (*a*).

From these decisions, and from the reasonableness of the case, it may apparently be concluded that a ship which is under way, on either tack, ought to avoid a vessel which is lying-to on either tack, and that the vessel which is lying-to has the right to retain that position. On the other hand, when two vessels, both lying-to, are in danger of drifting against one another, that which is on the port tack should take measures to avoid the other. In any case a vessel which claims the right to do nothing on the ground of her being hove-to, is bound to

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(*a*) *The Transit*, 9 Mitch. 750.

prove distinctly the fact of her being hove-to, and that so completely as to be "dead in the water."

Vessel in stays is like one at anchor.

A vessel which, at the time when she is approached by another vessel, is in stays, in the act of tacking, is for the time in the position of a ship at anchor; the duty of avoiding a collision rests entirely with the other vessel. "A vessel alleging that she is in stays," said Dr. Lushington, "is bound, in the first instance, to prove that such was the fact, that she was actually in stays at the time of the collision. This proved, the burden of the proof then shifts; for a vessel in stays is almost in the same predicament as a vessel at anchor; and the other side must then show that the vessel proceeding was improperly put in stays, and so brought the accident upon herself, or that the collision was an inevitable accident caused by the condition of the weather or other unavoidable circumstances" (*a*).

Before a ship is thrown into stays, due precaution should be taken to avoid the risk of collision. A ship must not unnecessarily be thrown into stays at the moment when another vessel is seen approaching her. If a collision takes place with a ship in stays, the question will be asked whether the officer in command of the ship looked carefully round, before putting her in stays, to see that no vessel was approaching dangerously near (*b*).

(*a*) *The Sea Nymph*, 1 Lush. 23.
(*b*) 1 Lush. 24.

Of ships being launched.

The only case that remains to be considered in this chapter is that of a ship-launch; what precautions are to be observed, on the one side, by those who are launching a ship, and on the other by ships which are crossing the track of an intended launch. On this head we have the following decisions:—

Notice of launch must be given.

"The first rule in all cases of the kind," says Dr. Lushington, "is, that reasonable notice of the intended launch should be given before the launch takes place. What such reasonable notice is, must depend upon local considerations, as, for instance, the breadth of the river, the number of vessels passing up and down, and other circumstances of the like kind. It is, however, perfectly obvious that such notice must not be a mere general notice that a launch is about to take place on a particular day; it must be sufficiently specific with respect to time to prevent vessels navigating in the river from incurring unknowingly the risk of loss or injury. In addition to the general precaution to which I have just adverted, the law further requires, on the part of the persons about to launch a vessel, the greatest care and vigilance to prevent the launch from coming into collision with any other vessel. For this purpose, it is especially necessary that a good look-out should be kept at the time and immediately before the launch takes place" (*a*).

Other vessels must keep out of the way.

On the other hand, a vessel which is crossing the

(*c*) 2 W. Rob. 423, 424.

course of an intended launch, at a time when the launch may reasonably be expected to take place shortly, is bound, even at the cost of some inconvenience and delay to herself, to keep as far out of the track of the launch as is practicable and safe (*a*).

These principles were laid down in the case of the *Blenheim*. This vessel was about to be launched from a building-yard in the river Tyne; flags had been hoisted, which were understood to indicate that the launch was to take place that day; and it was the known custom in that river for all launches to take place at the time of slack water. No signal, however, appears to have been given by the firing of a gun or otherwise, nor had any notice been issued, announcing the precise time of the launch. The steamer *Velocity* was coming down the river, towards the yard, and was not keeping so near the north or opposite shore as she might have done. Shortly before she came opposite to the yard, the steamer was stopped, to take a pilot on board. Those in charge of the ship on the ways appear to have supposed that the steamer was stopped to see the launch, or to wait until it had taken place, and the launch was accordingly suffered to proceed. Meanwhile, the steamer having got her pilot went ahead again; the ship went off the ways; and the two vessels came into collision.

In determining, under these circumstances, which of the two vessels was in fault, Dr. Lushington,

(*a*) 2 W. Rob. 426.

after laying down the principles as above quoted, pointed out to the Trinity Masters that the questions for them to consider were, whether the notice of the launch was sufficiently specific as to time, whether a sufficient look-out had been kept on the ways, and whether the steamer had kept sufficiently far to the northward. The Trinity Masters pronounced that, under the circumstances, there had been a sufficient notice of the intended launch, that the stopping of the steamer justified those on the ways in thinking she was going to wait until the launch was over, and that the steamer ought to have gone more to the north. Accordingly, the steamer was held solely in fault (*a*).

Another launching case, also on the Tyne, is that of the *Vianna*. It appeared that, in launching ships at the Narrows, on that river, there was no fixed and invariable custom, but it was said to be a proper precaution, frequently resorted to, to hoist a flag half-an-hour before launching, and to procure the attendance of the harbour master, to keep the river clear. Neither of these measures had been taken in the launch of the *Vianna*, though there were flags to show that she was to be launched that tide. In giving judgment, Dr. Lushington said :— "I adhere to the principles I laid down in the *Blenheim*. As a general rule, the thoroughfare of the river must be kept open, and free from danger for all ships passing to and fro. If a ship is to be launched, causing thereby the temporary hindrance

(*a*) *The Blenheim*, 2 W. Rob. 421.

of a common right, the party launching must give adequate notice; and the *onus probandi* that proper notice was given is upon him. As to what is adequate notice:—If one custom is universally observed, it is sufficient to show that that custom was followed; because, even supposing that the custom did not prescribe all that might be desired, no one is bound to do more than the custom of the place requires. If there is no fixed custom, reasonable notice must be given, notice of a reasonable kind, and in a reasonable time." The learned Judge proceeded to point out that, there being here no fixed custom either way, it was reasonable, more particularly on account of the narrowness of the river at that place, that there should be, not merely a general notice that the launch was to take place that tide, but also a specific notice, shortly beforehand, to show the precise time of its taking place; and that it was also reasonable either to have had the harbour master in attendance, or boats at least to give timely warning to vessels. For the neglect of these precautions, the *Vianna* was pronounced in fault. The vessel she came into contact with was likewise held in fault, for want of due look-out; it having been proved that those on board had not even noticed that there were flags flying on board the launch (*a*).

In the case of the United States, which also was a launch in the river Tyne, the ship launched was held in fault, simply on the ground that, although

(*a*) *The Vianna*, Swab. 405.

she had been decorated with flags to indicate that she was to be launched that day, and although she was launched at the proper time, viz., at the top of high water, yet she was let go without waiting for a signal from the harbour master, which it had been arranged that he was to give. "In the unsettled and varying practice as to the sort of signal to be given," said Lord Chelmsford, in giving judgment, "it seems almost necessary that some arrangement should be made as to what should be the signal in each particular occasion." The vessel which had come across her track was held likewise in fault; so that the damages were divided (*a*).

(*a*) *The United States*, 10 Mitch. 242.

CHAPTER IV.

WANT OF LOOK-OUT, AND OTHER FAULTS.

NEXT to improper steering, the principal instances of faulty navigation, which may render a ship liable for collision damages, are—want of look-out, going too fast in a fog or through a crowded roadstead, and anchoring or mooring in an improper place. These will form the subject of the present chapter; reserving for separate consideration, in the chapter which is to follow, the regulations concerning ships' lights and fog signals.

Want of look-out.

I. On the subject of look-out, we have the following decisions:—

The ship *Mellona* was making her way through the Cockle Gat, on a dark hazy night, with frequent snow squalls. The look-out consisted of the master and one seaman; the master had gone below to look at his chart, when another vessel, which had not been observed in the darkness, ran into the *Mellona*. The question was raised in the Admiralty Court, whether the look-out on board the *Mellona* was sufficient. It was for the Trinity Masters, said Dr. Lushington, to advise him whether, considering the state of the night, and the proximity of other vessels, such a look-out was a sufficient and

proper look-out. "It is no excuse to urge," he continued, "that, from the intensity of the darkness, no vigilance, however great, could have enabled the *Mellona* to have descried the *George* in time to have avoided the collision. In proportion to the greatness of the necessity, the greater ought to be the care and vigilance employed; and I cannot but think that, under all the circumstances of the case, if the master of the *Mellona* found it necessary to go below for the purpose of consulting his chart, he was bound to have called up another of the crew to supply his place on deck." The Trinity Masters took the same view, and the *Mellona* was pronounced in fault for insufficiency of look-out (*a*).

What is a proper look-out.

It is of course a matter of importance, not only that there should be a man or men on deck for the purpose of looking out, but that these should be stationed at the proper places. In the case of paddle steamers plying in a river or crowded roadstead, such as the river Mersey, the proper place for a look-out man, it appears, is the bridge between the paddle boxes, from which elevation he can obtain a clearer view of approaching vessels, and can more rapidly communicate with the steersman (*b*).

Look-out less essential for ship closehauled on starboard tack.

As the immediate purpose of a look-out is to give timely notice with a view to the alteration of the ship's course, a look-out would seem to be less essential in the case of those vessels which, being closehauled on the starboard tack, are entitled to

(*a*) *The Mellona*, 3 W. Rob. 7.
(*b*) *The Wirrall*, 3 W. Rob. 56.

hold on their course without alteration, from whatever direction they may be approached. In a case in which Dr. Lushington observed in his judgment that "it appeared that there was not any particular look-out on board" a vessel thus circumstanced, the Trinity Masters nevertheless found the other vessel solely in fault (*a*). In another case, a sailing vessel was drifting up the river Thames, and no proper look-out was being kept: she was run into by a steamer, which ought to have avoided her. Here, notwithstanding the want of look-out, the steamer was pronounced solely in fault. "We think it right to say," said Dr. Lushington, "that there was a want of a proper look-out on board the *Jane and Ellen*, but that that want of a proper look-out did not contribute to this collision" (*b*).

All these cases fall within the general principle that, to render a ship liable for collision damage, it is not enough that there shall have been a fault; that fault must have contributed to the collision. Applying this principle to the case of a vessel close-hauled on the starboard tack, it is not easy to see how, under ordinary circumstances, the want of a look-out on board can "contribute to the collision."

Going too fast in a fog.

II. Another fault of navigation consists in proceeding at an excessive speed, in a crowded road-

(*a*) *The Progress*, 7 Mitch. 433.
(*b*) *The Emma*, 10 Mitch. 399.

stead or during a fog, so as unduly to increase the risk of collision.

Case of steamers in frequented channels.

In the case of the *Perth*, a steamer going in a fog through a place much frequented by coasters, and going at the rate of twelve knots an hour, was held in fault, partly on account of her excessive speed (the Trinity Masters said she ought to have been reduced to half-speed); and partly because her engines were not stopped when shouting was heard from the other vessel (*a*). In the case of the *Rose*, where a steamer was coming down the Bristol Channel, during hazy weather, at the rate of ten or eleven knots, Dr. Lushington said that, if she had come into contact with another vessel without either seeing each other, he should have pronounced the steamer in fault. It might be a matter of convenience, he observed, that steam vessels should proceed with great rapidity, but the law would not justify them in proceeding with such rapidity if the property and lives of other persons were thereby endangered. The same rule had been applied by Lord Ellenborough, in a case where the driver of a mail coach, having run over and killed a man, excused his rapid driving on the plea that by contract with the post-office he was compelled to go at the rate of nine miles an hour. To this Lord Ellenborough said that no contract with any public office, no consideration of public convenience, could justify the

(*a*) 3 Hagg. 417.

endangering the lives of his Majesty's subjects. The principle so laid down applied to the case of vessels navigating the seas (*a*). In another case, a steamer was condemned for proceeding through a part of the sea much frequented by colliers, in a dark and rainy night, at from nine to ten knots an hour (*b*). The following are cases in which steamers were condemned for going too fast; the *Iron Duke* (*c*), for going from ten to twelve knots an hour, in a dark night, in a frequented channel off Point Lynas; the *Despatch* (*d*), for coming up the Horse Channel at ten knots in a dark night. The having a Government contract to go at so many miles an hour is no excuse, as against other vessels, for using undue speed (*e*). A steamer which in a dark night is rounding-to in order to come to anchor, should do so cautiously, and easing her speed (*f*). And a rate of speed, which may not in itself be improper, may become so if it is continued after another vessel is sighted, in such a position as to involve risk of collision. Thus the steamer *Eclipse* was held in fault because, after coming in sight of a vessel, too late perhaps to have avoided her, her engines were kept going at full speed (*g*). In the case of the *Birkenhead*,

Mail contract is no excuse.

(*a*) 2 W. Rob. 3.
(*b*) *The Gazelle*, 2 W. Rob. 519.
(*c*) 2 W. Rob. 384.
(*d*) Swab. 139.
(*e*) *The Vivid*, Swab. 92.
(*f*) *The Ceres*, Swab. 250.
(*g*) *Eclipse*, 1 Lush. 423.

a Queen's ship was condemned for not slowing or stopping her engines, in a case of doubt, in order to ascertain the true position of the other vessel (*a*).

Case of steamer on the high seas.

These decisions are in cases where the steamer is in a river or frequented channel. From the following case it appears that even on the high seas a steamer is not at liberty to proceed with very great rapidity during a fog, at any rate without taking some adequate precautions to prevent accidents. The steamer *Europa*, plying between Liverpool and Halifax, was running through a dense fog at the rate of twelve and a half knots an hour; she was in the same parallel of latitude with Cape Clear, and about seven hundred miles distant from it; that is, in the track for outward and homeward bound vessels trading with American ports, so that there might be more than ordinary probability of meeting vessels. A collision took place, and she sunk a sailing vessel. It appeared that no fog-horn was sounded, nor bell rung, on board the steamer; that there was only one man at the wheel, and that there was no person stationed on deck to convey orders to the engine room. Judgment was given against the steamer. If a steamer goes so fast as twelve and a half knots in a dense fog, even on the high seas, every possible precaution should be taken, said Dr. Lushington, to prevent collision. The law did not require the utmost caution that could be used; it was not so extravagant as to require more than

(*a*) 3 W. Rob. 79. See also the *James Watt*, 2 W. Rob. 277.

reasonable and customary caution; but in the present instance the look-out, and the arrangement for promptly stopping the engines or shifting the wheel, were not sufficient for a vessel going at such a speed in a fog (*a*).

Case of sailing vessels.

The same principles are of course applicable to sailing vessels. The ship *Virgil* was condemned in damages for sailing on a dark and foggy night with her topmast studding sails set (*b*). In another similar case, the vessel so sailing was only held excused on the ground that there were vessels in her wake, and to avoid being overtaken by them it was thought prudent to carry a press of canvas on her (*c*). The brig *Victoria* was held in fault, for running at six knots an hour at night, through a crowded anchorage ground in the Thames (*d*); and the *Pepperell*, for going at six knots and a half through a crowded fishing ground (*e*).

(*a*) *The Europa*, 14 Jurist, 627.

(*b*) 2 W. Rob. 201.

(*c*) *The Ebenezer*, 2 W. Rob. 212.

(*d*) 3 W. Rob. 56.

(*e*) 1 Swab. 12. The case of the *Itinerant* furnishes a seeming exception to the general current of the decisions, as above recorded; an exception which must be applied with great caution. The ship *Itinerant* was sailing in a very dense fog with her studding sails set; a collision ensued; and it was contended that she was in fault for not having shortened her speed. Dr. Lushington, in giving judgment, observed that it was unquestionably the duty of every master of a ship, whether in an intense fog or great darkness, to put his vessel under command, so as to secure the best chance of avoiding accidents, even at the expense of retarding his voyage; that, for this purpose, it might in many cases be his duty to take in his studding-sails,

Moving at all may be a fault.

Moving at all in a fog may in some cases be moving too fast, and so a fault. In the case of the *Girolamo*, where a dense fog came on soon after the vessel had passed Blackwall, Sir John Nicholl said, it seemed to be admitted that if the fog had come on before the *Girolamo* had left the docks, she ought not to have set out, and, if so, it was her duty, when such a fog did not come on, to have brought up. He held even that the master ought to have interposed when the pilot in charge of her would have gone on, and have insisted on bringing her to anchor (*a*). Although this last part of the decision, as will be seen, has since been overruled, yet in other respects this decision has recently been cited, not without approbation, by Dr. Lushington. In the case of the *Wild Rose*, a ferry steamer had left Seacombe Slip, in order to cross to Liverpool, at a time when the weather was tolerably clear, but a very dense fog came on before she got half-way across, and she came into collision with a

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but that on this head no general rule could be laid down. In the present instance the opinion of the court was that it might have been prudent for the *Itinerant* to have taken in her studding-sails; but the Court and the Trinity Masters were also of opinion that the fog was so dense that the accident would have occurred, even although this precaution had been adopted. The claim against the *Itinerant* was acordingly dismissed (*The Itinerant*, 2 W. Rob. 236).

The masters of ships cannot safely be advised on the strength of this decision, that they may take less precaution in a very dense fog than in one which is not so dense. In fact, it is difficult to reconcile this decision with the remarks of Dr. Lushington in the case of the *Mellona*, cited in the beginning of the present chapter.

(*a*) 3 Hagg. 174.

vessel in the river. It appeared that the steamer was going at half-speed, with her steam whistle sounding, a good look-out, and all proper precautions; and she was pronounced not to be in fault. In giving judgment, however, Dr. Lushington made the following observations:—"In the course of the argument it was hinted, though not argued, that the fog might have been so dense that it was incumbent upon the steamer not to have proceeded upon her usual occupation, because of the dangers which might result from her doing so. Had the circumstances given in evidence made out such a case, it would have been the duty of the Court to have taken cognizance of it, and to have governed its judgment according as it was proved or not proved. I wish now, as this is a matter of great importance, to make reference to the question whether steamers are at liberty to follow their avocations in a thick fog, when following that avocation might produce consequences damaging to property or to life." The learned Judge then referred to the case of the *Girolamo*, and said: "Perhaps I may not go quite the whole length which the learned Judge went on that occasion, but the general principle I do adopt, namely, that if there be an opportunity of stopping, instead of attempting to follow a course which would produce injury possibly to life and certainly to property, then, notwithstanding what may be the convenience of the parties, notwithstanding the urgency of the passengers, it is the duty of the persons who have the control of that steamer or other vessel to hold their hand.

But it is not necessary that I should decide that question now. At the time when the steamer set off upon this trip, it appears that it was somewhat clear, and that almost immediately afterwards a dense fog came on; and the question would be a complicated one, whether she was under a necessity to have gone back again under those circumstances, or whether she was at liberty to have completed her voyage." From the result, it appears that the Court, assisted by the Trinity Masters, took the latter view (*a*).

Anchoring improperly.

III. The third instance of faulty navigation consists in anchoring or mooring a ship in an improper manner. A ship which anchors too near another ship, so as to give her what is called "a foul berth," or which neglects to drop a second anchor when she ought to do so, and then in a gale drifts foul of the other vessel, will be held answerable in damages (*b*). In a case where a collision ensued from the parting of a steamer's cable during bad weather, the steamer was held in fault for having brought to, with a single anchor, so near a ship riding in the Mersey that the slightest accident must lead to a collision (*c*). In another case, a ship was condemned for having been placed aground in a tidal harbour, so near to another that, when the

(*a*) *The Wild Rose*, tried Nov. 16, 1866. See also the *Borussia*, Swab. 94, where a ship was pronounced in fault, simply for moving from dock to dock, on a dark foggy night.]

(*b*) *The Volcano*, 2 W. Rob. 340.

(*c*) *The Egyptian*, 8 Mitch. 496.

vessels heeled over, which they did at the fall of the tide, they came into contact and damaged each other (*a*).

A ship, navigated in a peculiar manner, which has the effect of incapacitating her for the time from moving out of the way so as to avoid collision, *e. g.*, which is being dredged down a river, does so at her own risk, and will be held answerable for the damage done by a collision resulting from such incapacity (*b*). Dredging down a river.

(*a*) *The Lidskjalf*, Swab. 118.
(*b*) *The Hope*, 2 W. Rob. 8.

CHAPTER V.

LIGHTS AND FOG-SIGNALS.

Another fault, conducive to collisions, is the neglect to carry or exhibit a light, or to blow a horn or use some other signal during a fog. It has been thought in this country that the customary sea-law is not sufficiently stringent on this head; to remedy which, Regulations have been issued under the authority of Acts of Parliament. As these Regulations, however, are not universally obligatory upon foreign ships, and consequently cannot in all cases be appealed to on behalf of foreign ships as against those of this country, it is necessary to examine the common sea-law apart from Regulations, and it may be convenient to take this branch of the subject first.

Rules of common sea-law.

Apart from statutory or other municipal Regulations, it appears that there is no obligation on a ship which is in motion to carry a light at her masthead, or any other light, even whilst navigating a frequented channel, such as the entrance of the Mersey, off Point Lynas (*a*). There is a rule that,

Ships in motion not bound to carry lights.

(*a*) *The Rose*, 2 W. R. 4; *The Iron Duke*, 2 W. R. 382; *The Benares*, 7 Notes of Cases, 542.

if a vessel wants a pilot, she shews a light, and the pilot should also shew a light (*a*). A ship which is lying-to is to be treated, with reference to lights, as a vessel under sail (*b*). But, though not bound to carry a light, a ship that is in motion is bound, on the approach of another vessel, to *shew* some sufficient light, in time to give the other ship an opportunity of avoiding her (*c*). This obligation applies to the case of a ship closehauled on the starboard tack, which, though entitled to hold on her course, is bound to give such warning of her presence to other vessels (*d*). The ordinary mode of shewing a light under such circumstances is, by holding a lantern over the bulwarks, and shewing or "flashing" it in such a manner as to attract the attention of the other vessel, and to make it clear that it does not come from a lighthouse or other fixed light.

But must show a light when nearing other vessels.

Even in the case of ships lying at anchor, it does not appear that there is, apart from statute, a universal obligation to have a masthead light hoisted at night. Thus, where a ship was lying at night off the South Foreland, the Trinity Masters pronounced that she was not bound, whilst so lying, to have a light fixed; and that, as she exhibited a light as soon as the other vessel was seen, no blame attached to

Ships at anchor not always bound to carry a light.

(*a*) 2 W. R. 385.

(*b*) *City of London*, Swab. 249.

(*c*) See *The Juliana*, Swab. 21; *The Olivia*, 6 Law Times, N. S. 398.

(*d*) *The Eclipse*, 1 Lush. 422.

her (*a*). In the case of the *Victoria*, Dr. Lushington said, that there was no general obligation upon vessels at anchor at night to carry or exhibit a light, but that circumstances might exist which would render it obligatory on such a vessel to exhibit a light for her own safety, and for the safety of other vessels. In the case before him, as the ship was at anchor in a track much frequented by other vessels (she was off the Middle Light in the South-west Reach in the Thames), the Trinity Masters were of opinion that, looking to the period of the year, the state of the night, and the number of vessels likely to be in the neighbourhood of her, it was her duty, under such a combination of circumstances, to have had a visible light burning. No light was hoisted, nor was one even exhibited, and the vessel was accordingly pronounced in fault (*b*).

Exceptions.

Statutory Regulations.

We come now to the statutory Regulations. In the year 1848, directions were issued by the Lords Commissioners of the Admiralty, ordering that Her Majesty's steam ships, and recommending that all other steamers navigating the coasts and channels of this country, should between sunset and sunrise carry three lights, viz., a bright white light at the foremast head, a green light on the starboard bow, and a red light on the port bow. By this combina-

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(*a*) *The Lochlibo*, 3 W. Rob. 331.

(*b*) *The Victoria*, 3 W. Rob. 56. A Dutch ship, at anchor in a fair way, is bound to shew a light, notwithstanding the Dutch law to the contrary (*The William Hutt*, 4 Mitch. 718).

tion of lights it was intended to exhibit to other vessels not merely the situation of the steamer, but also the course she was pursuing. In 1851, by the Act 14 & 15 Vict. c. 79, power was given to the Lords of the Admiralty to issue regulations which should be of binding authority. Accordingly, in 1852, a set of Admiralty Regulations were issued, directing that all British seagoing steam vessels, wherever they might be, should at night, whilst in motion, carry the three lights as above described, and whilst at anchor, a common bright light; and that sailing vessels, whilst in motion, should, upon being approached by or approaching any other vessel, show a bright light in such a position as could be best seen by such other vessel, and in sufficient time to avoid collision; and, whilst at anchor, should, like steamers, exhibit a constant bright light at the masthead. These Regulations continued in force until 1858: they were then revoked, and a new set of Admiralty Rules were issued. These leave the lights of steamers as they were, but with the additional direction that a steam vessel under sail only should not carry her masthead lights. With regard to sailing vessels, it was directed that, when under way or being towed, they should carry green and red lights on either bow, similar to those of a steamer, but no masthead light, this latter being accordingly made the distinguishing mark of a steamer. Sailing pilot vessels were to carry only a white light at the masthead, and to exhibit a flare-up light every fifteen minutes. In other respects the rules of 1852 were left un-

altered. So matters remained until the Shipping Act Amendment Act of 1862, which led to the framing of a new set of rules, issued under the authority of the Board of Trade. These being the Rules now in force (since June 1st, 1863), they are set forth *verbatim*, as follows :—

Preliminary.

Rules now in force.

"*Art.* 1.—In the following Rules, every steam ship which is under sail and not under steam is to be considered a sailing ship, and every steam ship which is under steam, whether under sail or not, is to be considered a ship under steam.

Rules concerning Lights.

Lights.

Art. 2.—The lights mentioned in the following Articles, numbered 3, 4, 5, 6, 7, 8, and 9, and no others, shall be carried in all weathers, from sunset to sunrise.

Lights for steam ships.

Art. 3.—Seagoing steam ships when under weigh shall carry

(*a*) *At the Foremasthead*, a bright *white* light, so fixed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the ship, viz., from right ahead to two points abaft the beam on either side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles.

(*b*) *On the Starboard side*, a *green* light, so constructed as to throw a 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.

(*c*) *On the Port side*, a *red* light, so constructed as to throw a 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 port 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.

(*d*) The said green and red side lights shall be fitted with inboard screens, projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

Lights for steam tugs.

Art. 4.—Steam ships, when towing other ships, shall carry two bright white masthead lights vertically, in addition to their side lights, so as to distinguish them from other steam ships. Each of these masthead lights shall be of the same construction and character as the masthead lights which other steam ships are required to carry.

Lights for sailing ships.

Art. 5.—Sailing ships under weigh, or being

towed, shall carry the same lights as steam ships under weigh, with the exception of the white masthead lights, which they shall never carry.

Exceptional lights for small sailing vessels.

Art. 6.—Whenever, as in the case of small vessels during bad weather, the green and red lights cannot be fixed, these lights shall be kept on deck, on their respective sides of the vessel, ready for instant exhibition; and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side.

To make the use of these portable lights more certain and easy, the lanterns containing them shall each be painted outside with the colour of the light they respectively contain, and shall be provided with suitable screens.

Lights for ships at anchor.

Art. 7.—Ships, whether steam ships or sailing ships, when at anchor in roadsteads or fairways, shall exhibit, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light, in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform and unbroken light, visible all round the horizon, and at a distance of at least one mile.

Lights for pilot vessels.

Art. 8.—Sailing pilot vessels shall not carry

the lights required for other sailing vessels, but shall carry a white light at the mast-head, visible all round the horizon, and shall also exhibit a flare-up light every fifteen minutes.

Lights for fishing vessels and boats.

Art. 9.—Open fishing-boats and other open boats shall not be required to carry the side lights required for other vessels; but shall, if they do not carry such lights, carry a lantern having a green slide on the one side and a red slide on the other side; and on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side, nor the red light on the starboard side.

Fishing vessels and open boats when at anchor, or attached to their nets and stationary, shall exhibit a bright white light.

Fishing vessels and open boats shall, however, not be prevented from using a flare-up in addition, if considered expedient."

The decisions bearing on these Regulations may be classed under the following heads:—1st. Those which explain the meaning of the terms used: 2nd. Those which refer to the *onus probandi*: 3rd. Those which deal with the reasons which may excuse the not showing a light: 4th. Those which illustrate the manner in which the position of a light seen is to regulate the steering of the ship from which it is seen.

1st. Cases explaining terms :—

Cases explaining terms.

The term "sea-going ships" has been decided not to apply to fishing vessels. These are merely bound to exhibit a light upon the approach of another vessel, as required by the common law of the sea (*a*). Nor, in the case of a steamer which habitually plies in a river, as a ferry boat, but occasionally goes out to sea, does the term apply to her so long as she is in the river. "I think it makes no difference," said Dr. Lushington, "that there may be times and seasons when she goes out to sea and may be required to carry the three lights" (*b*).

What are "sea-going ships."

What is the proper position of the lights.

Some questions have arisen as to the proper position of the red and green lights. The statute directs that they shall be fixed "on the starboard side" and "on the port side" of the vessel respectively. This expression does not mean that the lights are to be actually placed on the ship's side. "My understanding of the directions as to the lights," said Dr. Lushington, "is, not that there is any positive order that they shall be fixed on the starboard side, speaking of the side alone, but that the green light shall be on the right hand, and the red on the port hand, or left side of the vessel" (*c*).

A contral three-coloured light is not enough.

On the other hand, it appears that there must be

(*a*) *The Olivia*, 6 L. T. N. S. 398. Queen's ships, it may be here mentioned, are not bound by the statute, yet must show a reasonably sufficient light (*The Leda*, 7 Mitch. p. 1519).

It has been held a fault to sail so close to another ship that your light is obscured by her sails (*The Zollverein*, Swab. 96).

(*b*) *The Tynemouth*, 9 Mitch. 114.)

(*c*) *The City of Carlisle*, 8 Mitch. 943.

two separate lights, one placed on one side, and the other on the other side of the vessel. It is not enough, as was at one time supposed, to have a single three-coloured lamp hung at the bowsprit end, and so constructed as to cast a green light on the starboard side, a red light on the port side, and a white light when seen end-on (*a*). The lights must be so erected as to be fairly visible from on board other vessels (*b*).

Onus probandi as to carrying of lights.

2nd. The cases which bear upon the question of *onus probandi*, with reference to the carrying of lights, are the following :—

Rests with vessel denying the absence of lights.

In every case of collision at night, if it is alleged in the pleadings that the collision was occasioned by the absence of a sufficient statutory light on board one of the colliding ships, the burden of proof that there were such lights rests with that vessel. "Beyond all doubt," said Dr. Lushington, in the case of the *City of Carlisle*, cited above, "the burden of proof is upon those who allege that they carried the lights. There is no doubt about it in law, nor is there a doubt about it in common sense ; because, of course, those who are on board the vessel must be able to give the best evidence as to what was the state of things on board that vessel, and those who never saw it until they came into collision can give no evidence at all, except that they did not see it" (*c*).

(*a*) *The Mangerton*, Swab. 124; *The Urania*, Swab. 255

(*b*) *The City of Carlisle*, 8 Mitch. 943.

(*c*) 8 Mitch. 943.

Or with vessel alleging that the absence of lights was immaterial.

Further, if it is set up as a defence, on the part of a vessel which had not a light, that the absence of that light did not contribute to the collision, it rests with that vessel to establish that position by proof. Where there has been a breach of the rules, the *primâ facie* presumption is that the collision was occasioned thereby; and the onus is cast on those who have been guilty of such breach of rebutting this presumption, and showing that the breach did not, in fact, occasion the ensuing damage (*a*).

In the case of the *Flavia Gioja*, in 1858, a ship which had not a light when she should have had one, was held not thereby prevented from recovering collision damage, it being distinctly proved that the absence of the light in no way contributed to collision; the ship having, in fact, been distinctly seen from the other vessel at a distance sufficient, had proper measures been taken on board the latter vessel, to have prevented a collision. It was in argument pressed upon the Court, "with a pertinacity," said Dr. Lushington, "savouring of desperation," that the circumstance of not carrying a light should operate as an estoppel against any claim on the part of the *Flavia Gioja;* but this contention was not admitted (*b*).

(*a*) *The Palestine*, 13 Weekly Rep. 111.

(*b*) 3 Mitch. 757. See also, to the same effect, the cases of *The Vivid*, Swab. 89, and *The Juliana*, Swab. 22. The testing question is, Had the light been there, would the collision have occurred? (Swab. 22.)

In the case of *Morrison* v. *General Steam Navigation Company*, it was laid down by the Court of Exchequer that the question in cases of collision must always be, whether the parties had contributed to the collision by their own carelessness; that no change had been effected in the law in this respect by the Admiralty Regulations, and consequently that, if it could be clearly established that a vessel having no light had been run into by another vessel from sheer carelessness and negligence in not keeping a good look-out, the injured party could recover. It would of course be otherwise if the absence of the light had contributed to the collision (*a*).

Excuses for not carrying a light.

3rd. The following decisions may be classified under the head of excuses for not carrying a light:

The moon is no excuse.

The presence of the moon is no excuse. "It is not to be said," said Dr. Lushington, "because it was a bright night that it was not necessary to obey the Act of Parliament." It would, of course, be necessary to show that the absence of the light was a cause conducing to the collision; and in the case referred to this was proved. It was stated in evidence that when the moon is shining at the back of a vessel's sails, she can be seen by the moonlight a great way off; but if the moon is shining in the front of her sails she can be seen

(*a*) 17 Jurist, 507. See also, to the same effect, *The Panther*, 17 Jurist, 1037; *Dowell* v. *General Steam Navigation Company*, 1 Jurist, N. S. 800.

no distance; and that, under such circumstances, her hull would be seen before her sails (*a*).

Difficulty of fixing lights, owing to a gale.

In the case of the *Calla*, it was pleaded that, owing to the heavy gale and a strong sea which was frequently breaking over the vessel, it was found to be impracticable to keep her green and red lights fixed as appointed by the Admiralty Regulation, but that they were kept lighted on deck and were exhibited on the approach of the other vessel. The learned Judge, in summing up to the Trinity Masters, said that the *Calla*, not having carried her coloured lights fixed in the ordinary manner required by the Admiralty Rules, was bound to make out a sufficient justification; and that, if they were of opinion that no circumstances were proved sufficient to justify the non-observance of the rule, and that the collision was in any degree occasioned by the lights not being exhibited as required, the *Calla* would be to blame for the collision. The Trinity Masters found that the *Calla* had not proved that it was impracticable to carry her coloured lights fixed, and that the collision was caused by her default in not exhibiting her light in proper time; and she was accordingly condemned in damages (*b*).

When lights carried away by a sea, must at once be replaced.

A vessel whose regulation light had been carried away in tempestuous weather, was held in fault for a collision occasioned by the absence of such lights,

(*a*) *The City of London*, Swab. 248; affirmed in P. C., Swab. 300.

(*b*) *The Calla*, Swab. 465. See also, to the same effect, *The Livingstone*, Swab. 519.

because the master had neglected to replace them, although he had an opportunity of doing so, as the vessel had been at anchor for more than a week at the Downs, and had communication with the shore (*a*).

In another case, where the lamps had been disabled in severe weather, so that there were no regulation lights on board, a ship was condemned in damages for not having shown some kind of light upon the approach of the other vessel (*b*). Must at least *show* a light.

A striking example of the strictness with which the Admiralty Court insists on the observance of the Statutory Regulations is furnished by the case of the *George Arkle;* where a ship, drifting helpless, disabled, running out to sea after an accident, was pronounced in fault for not having the regulation lights set when a collision took place. Whilst at anchor in Winterton Roads, this vessel had been run into by the ship *Charlemagne*, had lost her cutwater and bowsprit; which, with the head gear, were hanging under her bows; and, having parted from both her anchors, was of necessity run out to sea to weather the gale which was blowing. Sails were hoisted, but they were immediately blown away, and the ship drove before the wind unmanageable, partly from want of the head-stays, and partly because of the wreck which was hanging under her bows. In this distressed condition, the crew appear to have forgotten to put up the regu- Illustration of above rule.

(*a*) *The Robert Ingram*, 1 Lush. 327.
(*b*) *The Eclipse*, 1 Lush. 422.

lation lights. After a time she struck upon a bank and beat over it, her wheel chains broke, and she became totally unmanageable, and drifted foul of two vessels at anchor. It was contended, in argument, that the helpless condition of the vessel furnished an excuse for the absence of the lights; in fact that, under the circumstances, the *George Arkle* could not be considered as a vessel under way. In the Admiralty Court, however, the *George Arkle* was pronounced solely in fault, on the ground that she was bound to have carried the coloured lights, and that the want of them contributed to occasion the collision. This decision was affirmed in the Privy Council. The unmanageable condition of the vessel, it was said in the judgment, was immaterial; for it was proved that the *Violet*, one of the vessels run into, might and probably would have avoided the collision, if any coloured light had been exhibited on board the *George Arkle* (*a*).

Of the manner in which the position of lights seen must affect the steering.

4th. The last point to be considered in connexion with the subject of lights, is, the manner in which they indicate to the vessel which sees them the position and description of the vessel that carries them; and, as a consequence of this, the manner in which the seeing of a light is to determine the steering of the vessel from which it is seen.

The following diagrams, in illustration of this, have been appended by the Board of Trade to their published Regulations:—

(*a*) 1 Lush. 383.

"When both red and green lights are seen :
A sees a red and green light ahead ; A knows a vessel is approaching her on a course directly opposite to her own, as B.

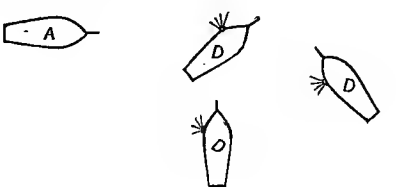
Diagrams given by the Board of Trade.

If A sees a white masthead light above the other two, she knows that B is a steam vessel.

When the red, and not the green light is seen :
A sees a red light ahead or on the bow ; A knows that either,

1, a vessel is approaching her on her port bow, as B,

Or 2, a vessel is crossing in some direction to port, as D D D.



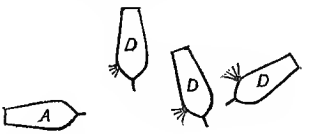
If A sees a white masthead light above the red light, A knows that the vessel is a steam vessel, and is either approaching her in the same direction, as B, or is crossing to port in some direction, as D D D.

When the green, and not the red light is seen:

A sees a green light ahead or on the bow; A knows that either

1, a vessel is approaching her on her starboard bow, as B,

Or, 2, a vessel is crossing in some direction to starboard, as D D D.



If A sees a white masthead light above the green light, A knows that the vessel is a steam vessel, and is either approaching her in the same direction as B, or is crossing to starboard in some direction, as D D D.

With reference to this branch of the subject, there are the following decisions:—

In the case of the *Ceres*, a barge, seeing a steamer's red light broad on her port bow, was held justified in showing no light; as the vessels could not, from the position of the red light, be at that time "approaching" one another (*a*).

Mistake resulting from the accidental extinction of one light.

When the position of two vessels is such that if A's green light were seen, B ought to starboard, but otherwise to port, B will be held right in

(*a*) Swab. 250.

porting in case A's green light has been accidentally extinguished. Thus, where the steamer *Rob Roy* saw only a white masthead light on the starboard bow, and thereupon her helm was ported, which in the opinion of the Trinity Masters was the right course for her to take on seeing such a light alone, the steamer was not held to be answerable in damages, it appearing that, in fact, the light so seen belonged to a steamer, whose green light ought also to have been seen from the *Rob Roy*, had it not by accident been extinguished just previously. It is obvious, from what has been said, that, when a steamer's green and masthead lights are seen on the starboard bow, the proper course is, not to port, but to starboard the helm (*a*).

When green light seen on starboard bow, more than one point abeam, dangerous to port.

When a green light is seen on the starboard bow, it is dangerous to port if the light is more than a point abeam; since, as the ship must be crossing to starboard, in one of the directions shown in the last diagram, the effect of porting would be to bring the other ship across her track. Dr. Lushington said, "supposing two vessels are approaching each other in a direct line, so that you see the red and green lights, then I apprehend it is quite clear the rule (of porting the helm) ought to prevail; and it is possible the rule ought to prevail where you see a vessel carrying the green light a single point on your starboard bow; but then it

(*a*) *The Rob Roy*, 3 W. Rob. 190.

becomes very dangerous in case it should be carried to any further extremity" (*a*).

The Regulations, as illustrated by the decisions here given, appear amply sufficient for the purpose of indicating the manner in which the steering of a ship should be regulated by the position of a ship's lights seen at night in the open sea.

Fog-signals.

Concerning fog-signals, the regulations are as follows:—

> "*Art.* 10.—Whenever there is fog, whether by day or night, the fog-signals described below shall be carried and used, and shall be sounded at least every five minutes; viz.:—
>
> "(*a*) Steam ships under weigh shall use a steam whistle placed before the funnel, not less than eight feet from the deck:
>
> "(*b*) Sailing ships under weigh shall use a fog-horn:
>
> "(*c*) Steam ships and sailing ships when not under weigh shall use a bell."

The Regulations do not attempt to define—it would indeed have been impracticable to do so—what degree of density in the atmosphere shall con-

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(*a*) *The Mœander*, 2 Weekly Reporter, 543. See also the *Cleopatra*, Swab. 135, and the *Sylph*, Swab. 236, to much the same effect. In the former case, the green light was seen two points abeam, and the vessel was held by the Trinity Masters to be justified in porting: in the latter, it was three or four points abeam, and the ship was condemned for doing so.

stitute such "fog" as to necessitate the use of these signals. It seems reasonable to suppose that, in a crowded roadstead or other situation where the risk of collision is greater than ordinary, a slighter degree of thickness of the air should bring the fog signals into use, than under other circumstances.

In the case of the *Wild Rose*, the ship *Independence* was lying at anchor in the river Mersey, and did not ring a bell during weather which was described by witnesses on one side as "misty, but not foggy," and on the other as "a dense fog." In giving judgment, Dr. Lushington said, "that, on the morning when the collision took place, there was that which any reasonable man would have termed a fog existing at some time or other in the river Mersey, there cannot be a doubt. You have the entries from three of the landing places, and you have the fact that the steamers which crossed backwards and forwards, all of them used the whistle; that I therefore assume to be a proved circumstance in this case" (*a*).

(*a*) *Wild Rose*, tried Nov. 16, 1865.

CHAPTER VI.

INEVITABLE ACCIDENT.

ACCIDENTAL collisions, for which neither vessel is responsible to the other, ought, one should think, to be extremely rare; since, to constitute such a collision, it must appear that each vessel has done all that was requisite to give to the other timely warning of her approach, each must have kept a sufficient look-out, neither must have been moving at an improper speed, and each, on seeing the other, must have taken the proper steps in order to avert a collision. With such a combination of precautions, it is difficult to see how a collision should be possible. There are, however, one or two instances of collisions really accidental in this sense.

Definition.

The following definitions of an accidental collision have been given in the Admiralty Court. "In my apprehension," said Dr. Lushington, in the case of the *Virgil*, "an inevitable accident in point of law is, that which the party charged with the offence could not possibly have prevented by the exercise of ordinary care, caution, and maritime skill" (*a*). In the subsequent case of the *Lochlibo*, the same

(*a*) 2 W. Rob. 205.

principle was laid down in almost the same words. "By inevitable accident, I must be understood as meaning, a collision which occurs when both parties have endeavoured by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident" (*a*). Again, in the case of the *W. V. Moses*, the same learned Judge defined inevitable accident to be "that accident, that calamity, which occurs without there being any practicable means of preventing its taking place; it is that accident which takes place when everything has been done which ordinary skill, care, and ability could do to prevent accident" (*b*).

Examples of such "inevitable accidents" are as follows:—

Shifting of lights from rounding-to, to come to anchor.

When a steamer was rounding-to in order to come to an anchor, and the other vessel, either not seeing her lights or baffled by their change of position, and in consequence unable to make out her course, it being an extremely dark night, steered as if the steamer were coming towards her, the collision which ensued was held to be the result of inevitable accident (*c*).

Sudden change of position by a vessel near.

The fact that a third vessel near the colliding ships has unexpectedly thrown herself in stays, so as to confuse and complicate the manœuvring, and thus occasion the collision, may, it would

(*a*) 3 W. Rob. 318.
(*b*) 6 Mitch. 1553.
(*c*) *Shannon*, 1 W. Rob. 463.

seem, cause the collision to be regarded as accidental (*a*).

Jamming of cable at moment of letting go.

The jamming of a cable in letting it go, whence a collision ensued, was held sufficient to excuse the ship on the ground of accident. It was considered, both in the Admiralty Court and in Privy Council on appeal, that there was no want of foresight or precaution on the part of the master in any particular, and that the jamming of the cable must be attributed to pure accident (*b*).

Missing stays.

That there has been an accident, is not enough, if, notwithstanding it, there was time enough to have remedied its effects before the collision, had proper measures been taken. Thus, where a vessel had missed stays in a squall, this was held not to be a sufficient excuse for the collision which ensued, because it appeared that, after missing, there was time to have paid-off before the wind by squaring the mainyard (*c*).

Fog suddenly coming on.

An intense fog, suddenly coming on, or coming on under circumstances which justify the ships which collide in continuing their respective courses, may excuse both, if it is so dense that all due precautions are insufficient to prevent a collision. Thus in the case of the *Itinerant*, where that vessel was sailing in a dense fog with her studding-sails set, and urged in her excuse that she was obliged to carry a press of sail to make way against the tide

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(*a*) See the *Mobile*, Swab. 73.
(*b*) *Peerless*, 1 Lush. 111.
(*c*) *Kingston-by-Sea*, 3 W. Rob. 156.

and to avoid being run into by vessels in her wake, the Court were of opinion that it might have been prudent for her to have taken in her studding-sails, but that she was nevertheless not answerable in damages, because they were further of opinion that the collision was not occasioned by the omission of the *Itinerant* so to do, the weather being such that the accident would have occurred, even though this precaution had been adopted (*a*).

(*a*) *Itinerant*, 2 W. Rob. 243. See ante, 73.

CHAPTER VII.

OF THE NON-LIABILITY FOR THE ACTS OF A COMPULSORY PILOT.

Ship not liable for faults of compulsory pilot.

THE principle on which a shipowner is made liable for damages done to another ship by improper navigation on the part of the captain or crew, is, that a master is responsible for the misconduct of the servants in his employ. A pilot who is taken on board by compulsion of law, and who is consequently not appointed, nor can be dismissed, by the shipowner, is not considered as his servant, in such a sense as to make the shipowner responsible for the pilot's misconduct.

Older decisions on this subject.

It is only by degrees that this principle has come to be recognised by the Admiralty Court. In the earliest reported case on this subject, it was held by Lord Stowell that a foreign shipowner could not claim exemption from liability for a collision, where his ship was in fault, on the plea that the collision was the result of orders given by a regular pilot. "The owners," said the learned Judge, "are responsible for the acts of the pilot, and they must be left to recover the amount as well as they can from him" (*a*). In the case of the *Christiana*, there was

(*a*) *Neptune the Second*, in 1814, 1 Dods. 467.

cited in argument a clause of the General Pilot Act (6 Geo. IV., c. 125, s. 25), which enacted that "no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever, from or by reason or means of any neglect, default, incompetency or incapacity of any licensed pilot acting in the charge of any such ship or vessel under or in pursuance of any of the provisions of this Act." In the decision of this case, Sir Christopher Robinson held himself to be bound by this clause in the case of a foreign as well as of an English ship (*a*). But, in the subsequent case of the *Girolamo*, the same learned Judge considerably narrowed the effect of the Pilot Act, by laying down the positions, that this statute could not affect the jurisdiction of the Court of Admiralty in cases of collisions with foreign ships upon the high seas (*b*); that the clauses in the Act exempting "owners" from liability might be read as merely taking away their personal liability, leaving the remedy *in rem* intact; and that the taking of a pilot could not be considered compulsory, when there was no penalty attached to a refusal to take him, beyond the liability to pay the regular charge for pilotage, whether a pilot were employed or no (*c*). On all these points, as will be seen, the decision in this

(*a*) *Christiana*, 2 Hagg. 185.

(*b*) This has since been overruled, on the ground that whoever seeks a remedy must seek it according to the *lex fori* (*Vernon*, 1 W. Rob. 319.)

(*c*) *Girolamo*, 3 Hagg. 169.

case has since been overruled. In the cases, however, of the *Baron Holberg* (*a*) and the *Carolus* (*b*), it was again held, still by Sir C. Robinson, that the provisions of the Pilot Act could not affect the position of foreign shipowners in the Admiralty Court.

Old decisions overruled.

The law on this subject was first (so far as the Court of Admiralty is concerned) placed on its present basis by Dr. Lushington, in the important decision of the *Maria's* case, in the year 1839. In this judgment, after a critical review of the previous cases, and particularly of two apparently conflicting decisions in the Common Law Courts (*c*), the

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(*a*) 3 Hagg. 244.

(*b*) 3 Hagg. 343 n.

(*c*) In *Carruthers* v. *Sydebotham*, 4 M. & S. 77, where the question was one of insurance, Lord Ellenborough had said, "If the master cannot navigate without a pilot except under a penalty, is he not under the compulsion of law to take a pilot? And, if so, is it just that he should be answerable for the misconduct of a person whose appointment the provisions of the law had taken out of his hands, placing the ship in the hands and under the conduct of the pilot?" The other decision referred to was that of *The Attorney-General* v. *Case*, 3 Price, 302, where a ship, riding at anchor in the river Mersey, and having a pilot on board, drifted, and, through the improper conduct of the pilot, came into collision with other ships in the river. Here the ship was held liable for the damages. Had she been at the time proceeding to sea, under the charge of a pilot taken by compulsion of law, then, said Thomson, C. B., "it might have been a fair question, whether the owner would have been liable; though there have been cases which show that though a pilot may be on board, the master is, in some instances, deemed responsible notwithstanding." But here the taking of a pilot, while the ship was at anchor in the Mersey, was a voluntary measure, and the pilot was therefore to be regarded as the servant of the shipowner.

learned Judge came to the conclusion that, on grounds of natural equity, independently of the provisions of the Pilot Act, the owner of a ship should not be held liable in damages for a collision occasioned by the fault of a pilot compulsorily taken on board. "If," he said, "the taking a pilot on board was compulsory, and the collision was occasioned by the fault of that pilot, I shall hold the owners of the *Maria* exempt from responsibility, upon general principle, without reference to Acts of Parliament; for, in that case, the pilot was not their servant, and the maxim '*qui facit per alium facit per se*,' does not apply. If, on the contrary, the taking a pilot was voluntary, then he was the servant of the owners, and the owners are responsible, unless the General Pilot Act, which takes away responsibility, applies to a foreign vessel so circumstanced, and to cases where it is optional to take a pilot or not." The learned Judge then proceeded to give his reasons for coming to the conclusion that, in the case before him, the taking of a pilot was compulsory, and accordingly dismissing the owners of the *Maria* from the suit. "The opinion I have thus formed in this case," he added, "is founded upon the general principle of reason and justice, that no one should be chargeable with the act of another who is not an agent of his own election and choice, and I further think that it would be contrary to all sense of equity, to say to the owners of a foreign vessel, you shall take a pilot of our selection, of our appointment: be he drunk or sober, negligent or careful, skilful or ignorant, you shall be responsible

for his conduct, unless you choose to submit to the penalty, and penalty it is, of paying the pilotage for nothing" (*a*).

The principle thus laid down by Dr. Lushington afterwards received the sanction of the English Legislature, in the following clause in the Merchant Shipping Act:—"No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law" (*b*).

The exemption thus given by statute is to be construed strictly; the pilot must be "acting in charge of the ship," if his act is to relieve the ship from liability (*c*).

The statute, however, is merely declaratory of a principle based, as has been said, upon natural equity. Consequently, whether or no the words of the statute are sufficiently extensive to apply to foreign ships colliding on the high seas, such vessels are on general principles entitled to this exemption (*d*).

To excuse the ship, the fault must be that of the pilot alone.

In order to excuse the ship, the fault which has occasioned the collision must have been the act of

(*a*) *Maria*, 1 W. Rob. 95.
(*b*) 17 & 18 Vict. c. 104, s. 388.
(*c*) *General De Caen*, Swab. 10.
(*d*) *Johanna Stoll*, 1 Lush. 312.

the pilot alone (*a*). If the accident were occasioned by the joint misconduct of the pilot and crew, the ship would be held liable (*b*). The pilot must be actually in charge of the deck at the time of the collision. Thus, in a case where the pilot had gone below, leaving the charge of the deck to the second mate, and before he came up again a collision took place, the ship was held liable, and it was held to be immaterial in this respect whether or no the pilot were to blame for thus temporarily leaving his post (*c*). If the fault consists in improper steering, then, as this is peculiarly the pilot's province, the only chance of making the ship liable would be, it should seem, to show, either that the look-out was insufficient, or that the crew did not obey the pilot's orders (*d*). Steering orders, given by the pilot, and repeated by the master to the helmsman, are the pilot's acts (*e*). It is not enough, however, to prove that the pilot was in charge, and then ask the court to presume that any order as to the helm must have been given by him: it must be distinctly proved that it was the pilot who gave the order which led to the collision (*f*). If the collision has arisen from the want of a sufficient look-

And of the pilot while in charge of the deck.

And this must be proved.

Mere presence of pilot will not excuse.

(*a*) *Girolamo*, 3 Hagg. 175.

(*b*) *Diana*, 1 W. Rob. 135.

(*c*) *Mobile*, Swab. 71. Affirmed in P. C., Swab. 128.

(*d*) *Batavier*, 2 W. Rob. 409.

(*e*) *Admiral Boxer*, Swab. 196.

(*f*) *Schwalbe*, 1 Lush. 240. In all cases where "pilot" is set up as the defence, the burthen of proof that the collision resulted from the faulty conduct of the pilot, and of him alone, rests with the defendant (*Atlas*, 2 W. Rob. 504).

out, the presence of a pilot will not excuse the ship (*a*).

The pilot responsible for bringing ship to, and getting her under weigh.

Everything connected with the bringing of the ship to anchor, and getting her under weigh, falls within the duties of the pilot. Thus, in the *Agricola's* case, it was held that, to determine when and how to drop the anchor, is in the province of the pilot (*b*): in another case, that the pilot alone was to decide as to the propriety of bringing a ship to anchor, and, therefore, whether to run into an anchorage ground on a dark night or to remain outside (*c*): in another, that the catting of the anchor, so as to have it in readiness for letting go upon occasion, belonged to the pilot's duty (*d*): in another, that the mode of getting the ship under weigh was to be determined by the pilot (*e*). If, however, the collision have arisen because the sailors have been too slow in obeying the pilot's orders to let go the anchor (*f*), or because the anchor was too light to hold the ship as it ought to have done (*g*), the ship will be held liable.

But pilot not responsible when fault lay in coming out of dock at all.

In one case, where a ship was improperly moved from dock to dock on a dark night, when it was impracticable for the pilot to control the movements

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(*a*) *Eolides*, 3 Hagg. 367; *Diana*, 1 W. Rob. 135; *George*, 2 W. Rob. 389.

(*b*) 2 W. Rob. 14.

(*c*) *George*, 2 W. Rob. 388.

(*d*) *Gipsey King*, 2 W. Rob. 547.

(*e*) *Peerless*, 1 Lush. 31.

(*f*) *Atlas*, 2 W. Rob. 506.

(*g*) *Massachusetts*, 1 W. Rob. 371.

of the tug, the presence of a pilot was held to be no excuse. The fault here consisted, not in anything done or omitted by the pilot, but in permitting the ship to be moved at all (*a*).

Pilot not responsible for ships being in proper trim.

To see that the vessel is in proper trim for navigation, is not the pilot's duty, but that of the master or owner of the ship. It suffices, however, if the ship is in ordinary safe trim; it is not necessary that her trim should be the best possible (*b*).

Master, not pilot, to decide as to taking steam.

Generally speaking, it is the master's duty, and not that of the pilot, to determine whether or no to take the assistance of a steam tug (*c*). Hence, the presence of a pilot was held to be no excuse, where the fault consisted in engaging insufficient steam power for docking a large ship (*d*). This is the rule under ordinary circumstances, when a tug is employed merely for accelerating speed. It may be different in cases where a ship is in distress, and it is a critical question whether to employ a tug or not; "those are cases," says Dr. Lushington, "in which the master ought to attend to the pilot's voice;" on account, evidently, of the pilot's superior local knowledge (*e*).

Master responsible for not sending down topgallant yards.

Where it was found as a fact that it was bad seamanship, when a vessel was lying at anchor in

(*a*) *Borussia*, Swab. 95.
(*b*) *Argo*, Swab. 464.
(*c*) *Julia*, 1 Lush. 226.
(*d*) *Carrier Dove*, 8 Mitch. 368.
(*e*) *Julia*, 1 Lush. 226.

the Downs during a gale of wind, not to send down her topgallant yards, and that this omission had contributed to the collision, the question was raised, whether this was a fault of the pilot only, so as to excuse the owner, or of the pilot and master jointly, for which he would be liable; and the Committee of Privy Council pronounced in favour of the latter view. "The pilot," said Parke, B., in giving judgment, "has the sole direction of the vessel in those respects where his local knowledge is presumably required. The direction, the course, and the manœuvres of the vessel, when sailing, belong to him. It is also his sole duty to select the proper anchorage place and mode of anchoring and preparing to anchor. The step of sending down the topgallant yards being one which every master, according to the ordinary course of navigation, ought to have taken in every open roadstead, where many vessels are lying, and in blowing weather, that duty was not exclusively the pilot's, but that of the master also. If the pilot had given express orders to the master not to send down the topgallant masts, we do not say that the owners might not have been excused from responsibility for the consequences of that omission" (*a*).

Pilot directing ship from on board her tug, treated as in charge of ship.

Under this head it is only necessary to add that a pilot, who is on board a steam tug, directing the course of the vessel towed by orders given through a speaking trumpet, is equally to be considered the

(*a*) *Hammond* v. *Rogers*, 7 Notes of Cases, 41.

pilot in charge of the ship, as if he were on board the ship herself (*a*).

Cases in which master is bound to take control out of the pilot's hands.

There may be occasions on which it becomes the duty of the captain wholly to take the control of the ship out of the pilot's hands. If, for example, the pilot is drunk (*b*), or goes to sleep, or plainly shows himself to be incompetent (*c*), the captain must take the charge himself. Where a pilot had abdicated his duty, by going to sleep, after hiring a waterman to do his work, and, owing to the waterman's fault, the ship came into collision with another vessel, the ship was held liable. The master ought, it was held, to have taken command, as if the pilot had been drunk (*d*).

In the case of the *Girolamo*, it was held by Sir John Nicoll, that if a vessel improperly goes on when the fog is so dense that she ought to have been brought to an anchor, and a collision takes place in consequence, it is no excuse to say that she was in charge of a pilot, for that the master ought to have interfered. "It seems to be nearly admitted," said the learned Judge, "that, if the vessel had set off in this fog, blame would have been imputable to the master (*e*). If so, was he not blameable for going on in the fog? Had he not a right

(*a*) *Gipsey King*, 2 W. Rob. 542.
(*b*) *Argo*, Swab. 464.
(*c*) *Lochlibo*, 3 W. Rob. 321.
(*d*) *Lady Havelock*, 10 Mitch. 147.
(*e*) See the *Borussia*, *ante*, p. 109.

to resume his authority? Did he not owe it to his owners to insist on bringing the vessel up? Was he not bound at least to remonstrate with the pilot, and to represent the danger of proceeding? Yet he did not in the least interfere." The ship was accordingly held liable (*a*).

Master not to interpose but in case of absolute necessity.

Later decisions have considerably weakened the authority of this case. In the case of the *Maria*, where the alleged fault consisted in not slackening the pace of that vessel, Dr. Lushington held that this was a matter for which the pilot alone was responsible, and that the captain was not called upon to interfere. "It would be a most dangerous doctrine," said the learned Judge, "to hold, except under most extraordinary circumstances, that the master could be justified in interfering with the pilot in his proper vocation. If the two authorities could so clash, the danger would be materially augmented, and the interests of the owners, which are now protected both by the general principles of law and specific enactments from liability for the acts of the pilot, would be most severely prejudiced" (*b*). In the case of the *Lochlibo*, it was held that the captain of a ship is not bound, and indeed ought not, to interfere with the pilot as to going on or not going on when the night is dark and hazy (*c*). By interfering, Dr. Lushington pointed out that he meant simply, the giving orders to the

(*a*) 3 Hagg. 176.
(*b*) 1 W. Rob. 110.
(*c*) 3 W. Rob. 321.

crew contradictory to those given by the pilot: there would be no undue interference, he said, in consulting the pilot, or suggesting that the measures pursued were not proper, and advising others. Improper interference, in the former sense, would make the ship liable; not so the mere offering of suggestions (*a*).

But may always offer suggestions.

If a ship is taken by the pilot up the wrong side of a river, the master is not bound to interfere. "I have said on many occasions," said Dr. Lushington, "and my ruling has been confirmed by the Judicial Committee in the case of *Hammond* v. *Rogers* (*b*), that a master has no right to interfere with the pilot, except in cases of the pilot's intoxication or manifest incapacity, or in cases of danger which the pilot does not foresee, or in cases of great necessity. The master of the *Argo* says, 'It is not my province to take notice of the course of the ship, or on what shore she is navigating. She may be taken here or taken there, while she is in charge of the pilot, without my knowing the cause; there may be reasons under water why the pilot does it. All my duty is, to take care that all the pilot's orders are promptly and properly obeyed;' and I think he says so rightly. The navigation of the ship is taken out of the hands of the master and transferred to the pilot. I am of opinion that the master was not bound to interfere to prevent his

(*a*) *Ib.* 330.
(*b*) 7 Moore, P. C. 171.

vessel being taken by the pilot to the north side of the mid-channel (*a*).

What pilots are compulsory.

It remains to be considered what pilots are to be considered as being so taken under compulsion of law, as that shipowners are not to be held responsible for their faults.

A pilot who must be paid for, whether employed or not, is compulsory.

The principle is now firmly established that, whenever a shipowner is compellable to pay for pilotage, although he be at liberty either to employ the pilot or no, this compulsion is equivalent to a penalty for not taking a pilot, and the pilot so taken is to be considered as compulsory (*b*). The effect of this principle is very well illustrated by the two decisions of the *Attorney-General* v. *Case* and the *Johanna Stoll*, which define the position of a pilot employed in the river Mersey. By the terms of the Liverpool Pilot Act, when a vessel has been piloted into Liverpool Harbour and brought to anchor in the Mersey, the master may dismiss the pilot, but if he pleases to keep him, the pilot is

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(*a*) *Argo*, Swab. 464. See also, to the same effect, *Peerless*, 1 Lush. 32.

(*b*) The compulsion here spoken of must be a compulsion on the owners, not merely on the pilot. Thus, in the case of a ship going out of Cork Harbour, where it appeared that by the provisions of the local act there was no penalty on the ship or captain for taking an unlicensed pilot, or sailing without any, but that there was a penalty on any person acting as a pilot if unlicensed; it was held that such a licensed pilot at Cork was not compulsorily taken so as to exempt the ship (*Eden*, 2 W. Rob. 446; *Maria*, 1 W. Rob. 101; *Agricola*, 2 W. Rob. 15).

bound to stay, and is to receive five shillings a day while the vessel lies there at anchor; but, when the ship is to be moved into dock, the pilot is to dock her without extra charge (*a*). Under this Act, it has been determined that a pilot, kept on board while the ship is riding at anchor in the Mersey, is not a compulsory pilot so as to exempt the ship (*b*): but, on the other hand, that a pilot engaged in docking the ship is thus compulsory (*c*). The ground of the distinction appears to be, that, as there is one fixed charge for piloting a ship into Liverpool, without any extra charge for docking, that rate must be taken as representing the cost of the entire service, including the docking; and, as the full rate is payable, whether a pilot be employed to dock the ship or no, the effect is that the ship is made to pay for a pilotage in docking, whether a pilot be required or not.

General legislation.

So far as general legislation is concerned, the subject of pilotage is now regulated exclusively (with one exception, which is pointed out below), by the two Merchant Shipping Acts, 17 & 18 Vict. c. 104, part 5, and 25 & 26 Vict. c. 63, ss. 39—42. These direct that every pilotage authority, that is to say, the Trinity House as regards the port of London, the English Channel, and the Trinity House outports districts, and every corporation or

(*a*) For the exact terms of the Liverpool Pilot Act, see *post* p. 128.

(*b*) *Attorney-General* v. *Case*, 3 Price, 303.

(*c*) *Johanna Stoll*, 1 Lush. 310.

body to whom similar powers have been given by local Acts of Parliament, retain all powers and jurisdiction which it lawfully possessed at the time of passing of the former Act, so far as the same are consistent with the provisions of that Act; but that no law relating to such authority, or to the pilots licensed by it, and no act done by such authority, shall, if inconsistent with any provision of that Act, be of any force whatever (*a*). The same Act further provides (*b*) that every such authority shall have power, by bye-law made with the consent of Her Majesty in Council, to exempt the masters of any ships, or of any classes of ships, from being compelled to employ qualified pilots, and to annex any terms or conditions to such exemption, and to revise and extend any existing exemptions. It gives power to such authorities (*c*) to settle the rates of pilotage, and to arrange the limits of pilotage districts. It lays down regulations (*d*) by conforming to which the master or mate of any vessel may obtain a pilotage certificate which shall empower him to act as the pilot of his own ship, or of any other ship named in the certificate, within the limits therein defined. And it enacts (*e*) that,—"subject to any alteration to be made by any Pilotage Authority, in pursuance of

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(*a*) Section 331.
(*b*) Section 332.
(*c*) Section 333, clauses 5 and 6.
(*d*) Sections 340—344.
(*e*) Section 353.

the power hereinbefore given, the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory immediately before the time when this Act comes into operation; and all exemptions from compulsory pilotage then existing within such districts shall also continue in force; and every master of any unexempted ship navigating within any such district, who, after a qualified pilot has offered to take charge of such ship or has made a signal for that purpose, either himself pilots such ship without possessing a pilotage certificate enabling him to do so, or employs or continues to employ an unqualified person to pilot her, and every master of any exempted ship navigating within any such district, who, after a qualified pilot has offered to take charge of such ship or has made a signal for that purpose, employs or continues to employ an unqualified pilot to pilot her, shall for every such offence incur a penalty of double the amount of pilotage demandable for the conduct of such ship." Section 354 places a limit upon the discretionary power otherwise given to Pilotage Authorities with regard to the granting of exemptions from compulsory pilotage, by enacting that when passengers are carried in any vessel between places in the United Kingdom, the Channel Islands, the Isle of Man, or any place so situate, such vessel must, when navigating within the limits of any pilotage district, employ a licensed pilot, unless the master or mate have a pilotage certificate, under a penalty not exceeding one hundred pounds. And, in conclusion, there is

the clause already set forth (*a*), which directs that "no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law."

By the latter of the Acts referred to, power is given to the Board of Trade to regulate, in various ways, the powers previously given to the several local Pilotage Authorities above referred to; and there is the following general exemption from compulsory pilotage: (*b*)—"The masters and owners of ships passing through the limits of any pilotage district in the United Kingdom, on their voyages between two places both situate out of such districts, shall be exempted from any obligation to employ a pilot within such district, or to pay pilotage rates when not employing a pilot within such district; provided that the exemption contained in this section shall not apply to ships loading or discharging at any place situate within such district, or at any place situate above such district on the same river or its tributaries."

Vessels merely passing through a pilotage district not bound to employ pilot.

The effect of this legislation, as bearing on the present subject, may be summed up thus:—The compulsoriness of the employment of a pilot must be ascertained by referring to the powers given by local Acts of Parliament to the Pilotage Authorities

(*a*) Section 388.
(*b*) Section 41.

of the particular district, and to the bye-laws or other regulations issued by such authorities. At the same time, it is to be borne in mind, that no such regulations are of any legal validity, so far as they may be inconsistent with the provisions of the Merchant Shipping Acts; as, for example, if they should grant exemptions from compulsory pilotage for vessels carrying passengers between ports in the United Kingdom, without requiring either the master or mate of such vessels to have a pilotage certificate; or, if they should profess to exempt the owner of a ship from liability for the act of a pilot, without making the employment of such pilot compulsory on him.

Exceptions for compulsory pilotage.

It is necessary to point out, however, that although the General Pilot Act of George IV. has been wholly repealed, yet, under s. 353 of the Merchant Shipping Act of 1854, all exemptions from compulsory pilotage existing in 1854, and, consequently, those created by the General Pilot Act, still continue in force. That Act, in addition to certain exemptions in favour of vessels in the Baltic trade —colliers, coasters, and small vessels of less than 60 tons burden—enacts that "the master of any ship or vessel whatever, whilst the same is within the limits of the port or place to which she belongs, the same not being a port or place in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots," may lawfully pilot his own ship, provided he does so without the assistance of an unlicensed pilot,

without being subject to any penalty for so doing (*a*).

The effect of this clause came under consideration in the case of the *Stettin*. This was a steamer owned in London, which had run into a vessel at anchor off the Regent's Canal Stairs, within that port. It was proved that the collision was occasioned by the fault of the *Stettin's* pilot, and the

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(*a*) "Provided always, and be it further enacted, that, for and notwithstanding everything in this Act contained, the master of any collier, or of any ship or vessel trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader inwards from the ports between Boulogne inclusive and the Baltic (all such ships and vessels having British registers, and coming up either (sic) by the North Channel, but not otherwise), or of any Irish trader using the navigation of the rivers Thames or Medway, or of any ship or vessel employed in the regular coasting trade of the kingdom, or of any ship or vessel wholly laden with stone from Guernsey, Jersey, Alderney, Sark, or Man, and being the production thereof, or of any ship or vessel not exceeding the burthen of sixty tons British register, except as hereinafter provided, *or of any other ship or vessel whatever, whilst the same is in the limit of the port or place to which she belongs*, the same not being a port or place in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots, shall and may, lawfully and without being subject to any of the penalties by this Act imposed, conduct or pilot his own ship or vessel, when and so long as he shall conduct or pilot the same without the aid or assistance of any unlicensed pilot or other person or persons than the ordinary crew of the said ship or vessel" (6 Geo. IV. c. 125, s. 59). By Order of Council of the 18th February, 1854, the privilege given by the above clause to constant traders inwards from the ports between Boulogne and the Baltic, if coming up by the North Channel, was extended so as to include the outward as well as inward voyages of such vessels, and whether they came by the North or the South Channels (1 Lush. 177).

question therefore arose whether he was a compulsory pilot or not. Dr. Lushington held that, although by the terms of the Merchant Shipping Act, taken by themselves, such a steamer would not be exempt from the compulsion of taking a pilot, yet that she was so exempted under the above clause of the General Pilot Act, and that the clause was kept alive by the words in s. 353 of the former Act, as pointed out above (*a*).

Pilotage certificates for captains.

It appears, however, that exemptions from compulsory pilotage, given in the General Pilot Act, will not be recognised if in direct contravention of s. 354 of the Merchant Shipping Act, which enacts that, in the case of vessels carrying passengers between places in the United Kingdom, a pilot shall always be taken, unless the master or mate has a regular pilotage certificate. The *Temora* was an Irish steamer, a regular trader to the Baltic, carrying passengers, which came into collision in the river Thames through the fault of her pilot. It was contended that the employment of a pilot in her case was voluntary, because the General Pilot Act permitted the master of any Irish trader using the navigation of the rivers Thames and Medway to pilot his own ship. But Dr. Lushington said, "Assuming that a vessel circumstanced as the *Temora* was exempted from compulsory pilotage before the passing of the Merchant Shipping Act, 1854, I am of opinion that the 354th section ex-

(*a*) See *Earl of Auckland*, 1 Lush. 178 & 387 ; *Stettin*, 7 Mitch., 819.

pressly imposes upon such a ship the duty of taking a pilot, and renders the employment of him compulsory" (*a*).

Special local legislation.

Having thus set forth the general law on this subject, we may proceed to consider the decisions which illustrate the effect of local legislation concerning pilotage, with reference to the ports of London, Liverpool, Hull, and Newcastle.

1. London.

The "Pilotage Authority" for the port of London consists of the sub-commissioners appointed by the Trinity House. These have power to appoint and license pilots for the following districts:—1st. "The London District," comprising the waters of the Thames and Medway as high as London Bridge and Rochester Bridge respectively, and also the seas and channels leading thereto or therefrom as far as Orfordness to the north, and Dungeness to the south; 2nd. "The English Channel District," comprising the seas between Dungeness and the Isle of Wight; and 3rd. "The Trinity House Outport District," comprising any pilotage district,

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(*a*) *Temora*, 1 Lush. 17. A pilotage certificate is invalid, it appears, unless the true owner's name is in it: thus, where the master of a steamer held a certificate empowering him to pilot "any ship being the property of Mr. Henry Carey," and it appeared that Mr. Carey was only the broker and manager of the ship, which was owned by other persons, such certificate was held invalid, and the steamer in consequence not exempt from the compulsion of employing a pilot (*Earl of Auckland*, 1 Lush. 181). It is not enough that a pilotage certificate has been drawn up, and is lying in the office of the Trinity House, waiting for the master: he must, to satisfy the requirements of the Act, have it actually in his possession ready to produce (*Killarney*, 1 Lush. 210.)

for the appointment of pilots within which no particular provision is made by any Act of Parliament or charter (*a*). To these may be added any pilotage district, the Pilotage Authority for which may have been suspended or caused to cease by an Order in Council, on account of neglect of its statutory duties (*b*). There is a proviso in the Act, that the Trinity House shall not have power to license the same pilot to conduct ships both above and below Gravesend (*c*).

With respect to the compulsion of taking pilots, it appears that, within the "London District" and the "Trinity House Outport District," the employment of pilots is compulsory, and every master of a ship navigating within those districts who shall either employ an unqualified pilot, or shall himself pilot his ship without holding a regular pilotage certificate, may incur a penalty of £5 for every 50 tons burden of the ship (*d*). As regards the "Channel District," to which this clause does not apply, it is provided that the Trinity House shall take steps to secure the attendance of a sufficient number of qualified pilots between the South Foreland and Dungeness; and that the master of every vessel coming up channel for London, or any other port in the Thames or Medway, and not provided with a pilotage certificate, shall make the usual

(*a*) 17 & 18 Vict. c. 104, s. 370.
(*b*) Section 338.
(*c*) Section 370.
(*d*) Section 376.

signal for a pilot when off Dungeness, and keep it flying until a pilot shall board her; shall heave to or shorten sail, as may be requisite, in order to take a pilot on board, so soon as any licensed pilot shall have approached within half a mile of her; and shall give the charge of piloting his ship to the first licensed pilot who shall board her; and this under a penalty not exceeding double pilotage (*a*).

By section 379, the following ships, when not carrying passengers, are exempted from compulsory pilotage in the London District, and in the Trinity House Outport District, viz:—

1. Ships employed in the coasting trade of the United Kingdom.
2. Ships of not more than 60 tons burden.
3. Ships trading to Boulogne, or to any place in Europe north of Boulogne.
4. Ships from Guernsey, Jersey, Alderney, Sark, or Man, which are wholly laden with stone, being the produce of those islands.
5. Ships navigating within the limits of the port to which they belong.
6. Ships passing through the limits of any pilotage district on their voyage between two places, both situate out of such limits, and not being bound to any place within such limits, nor anchoring therein.

Bearing upon these regulations, there have been the following decisions in the Admiralty Court:—

(*a*) Sections 377, 378.

The *Earl of Auckland* was a steamer engaged in trade between London and Rotterdam, and licensed to carry passengers. On the 1st of December, 1859, being in the river Thames, on a voyage from Rotterdam to London, and having on board one passenger, she came into collision with a vessel called the *Betsy*. The Court, with the advice of the Trinity Masters, held that the blame of the collision was solely attributable to the default of a licensed pilot who was in charge of the steamer. The question, therefore, whether the steamer was liable in damages, depended on whether it was compulsory on the ship by law to carry a pilot. The proof of this rested with the owners of the steamer. The ground on which it was alleged that the taking of the pilot was not compulsory, was the provision in the General Pilot Act already referred to(*a*), as extended by the Order in Council, viz., that any constant trader to or from a port between Boulogne and the Baltic, if a British vessel, was exempt from carrying a pilot. To this it was objected that the Pilot Act had been repealed, and a different set of Regulations substituted by the Merchant Shipping Act. This objection was overruled by the Court, who pronounced, as has been seen, that all exemptions from compulsory piloting existing at the time of the Act's passing, and this among the rest, were continued in force by s. 353 of the Act. It was also objected that,

(*a*) *Ante*, 111, n.

by an Order in Council of the 16th of July, 1857, founded on the authority given by s. 332 (*a*) of the Merchant Shipping Act, it had been directed that vessels of this kind, carrying passengers, were to be excused from taking pilots, provided the master or mate had a regular pilotage certificate, which the *Earl of Auckland* had not. This objection also was overruled by the Court, on the ground that, whereas s. 332 simply gave power, by Order in Council, either to grant an exemption from compulsory pilotage, in which case conditions might be annexed to such exemption, or "to revise and extend existing exemptions;" this was not the granting of a new exemption, for by the Pilot Act such vessels were already exempted, nor was it the "revising and extending" of an existing exemption, for it was a restriction. The pilot, therefore, was in this case pronounced not compulsory, and the ship was liable (*b*).

In the case of vessels not carrying passengers, s. 339 has the effect of exempting from compulsory pilotage all vessels "trading to any place in Europe north of Boulogne;" and this has been held to cover inward as well as outward voyages, and not to be confined to the case of vessels habitually trading with such ports, but to cover a single voyage (*c*).

2. Liverpool.

With regard, in the next place, to the port of Liverpool, the Pilotage Authority, under the Act

(*a*) *Ante*, 108.
(*b*) *Earl of Auckland*, 1 Lush. 164. Affirmed in P. C., 1 Lush. 387.
(*c*) *Wesley*, 1 Lush. 268.

20 & 21 Vict. c. 162, s. 118, is the Pilotage Committee appointed by the Mersey Docks and Harbour Board. Every person piloting any vessel into or out of the port of Liverpool must have been duly licensed by this Committee, or is subject to a penalty not exceeding £20 (*a*). The limits of compulsory pilotage, inwards and outwards, are defined by ss. 127 and 128. "Every pilot taking upon himself the charge of any vessel shall, if so required by the master thereof, pilot such vessel, if sailing out of the port of Liverpool through the Queen's Channel, so far to the westward as the buoy commonly called or known by the name of the Formby North-west Buoy, or Fairway Buoy of the Queen's Channel; and, if sailing through the Rock Channel, pilot the same so far to the westward as the North-west Buoy of Hoyle;" under the penalties, in case of refusal, of forfeiting his pilotage, and, if the Board see fit, being deprived of his license (*b*). "The pilot in charge of any inward-bound vessel shall cause the same (if need be) to be properly moored at anchor in the river Mersey, and shall pilot the same into some one of the wet docks within the port of Liverpool, whether belonging to the Board or not, without making any additional charge for so doing, unless his attendance shall be required on board such vessel while at anchor in the river Mersey, and before going into dock, in which case he shall be entitled to five

(*a*) Section 123.
(*b*) Section 127.

shillings a day for such attendance" (*a*). It is directed (*b*) that the master of every inward-bound vessel liable to pay pilotage rates shall, on coming within the pilot stations as fixed by the bye-laws, display and keep flying the usual signal for a pilot to come on board, and if any pilot shall come within a reasonable distance the master shall render all necessary assistance, so far as may be consistent with the safety of the vessel, to enable such pilot to come on board; and (*c*) that, "in case the master of any inward bound vessel, other than a coasting vessel in ballast, or under the burthen of 100 tons, shall refuse to take on board or to employ a pilot, such pilot having offered his services for that purpose, such master shall pay to such pilot, or, if more than one, then to the first of such pilots who shall have offered his services, the full pilotage rates which would have been payable to him if he had actually piloted such vessel into the port of Liverpool." Another clause (*d*) provides for the case of outward-bound vessels which may be driven back by storm or otherwise before their pilots have left them, and are piloted back to Liverpool; directing that, in such case, the pilot should receive "a reasonable compensation in addition to the usual rates of pilotage," such compensation to be fixed by the Board, but not to exceed one-half of the ordi-

(*a*) Section 128.
(*b*) Section 129.
(*c*) Section 130.
(*d*) Section 136.

nary rate for outward pilotage. If a vessel puts back to Liverpool after she has parted with her outward pilot, then, although he may not have piloted her so far as is required by the Act, full outward and full inward pilotage shall be paid (*a*). There is a further direction (*b*) with regard to the employment of pilots whilst a vessel is riding at anchor, viz.,—"If the master of any vessel shall require the attendance of a pilot on board any vessel during her riding at anchor, or being in Hoylake, or in the river Mersey, the pilot so employed shall be paid for every day or portion of a day he shall so attend the sum of five shillings and no more, provided that the pilot who shall have the charge of any vessel shall be paid for every day of his attendance whilst in the river; but no such charge shall be made for the day on which such vessel, being outward bound, shall leave the river Mersey to commence her voyage, or, being inward bound, shall enter the river Mersey." In the next section it is provided that if any outward-bound vessel, excepting a coasting vessel in ballast, or under 100 tons, shall refuse to take a pilot when going to sea, she shall be liable to pay full pilotage rates as if she had one (*c*). By clause 141 it is provided that "nothing in this Act contained shall extend to prevent the master of any coasting vessel in ballast, or under the burthen of

(*a*) Section 137.
(*b*) Section 138.
(*c*) Section 139.

100 tons, from piloting his vessel into or out of the port of Liverpool, or to hinder any person from assisting any vessel in distress, or to subject any such person to any of the penalties of this Act." These seem to be the only clauses in the Act which bear upon the subject of compulsory pilotage.

It has been decided that the exemption of "coasters in ballast" in clause 141, does not apply to vessels which may come in ballast from London to Liverpool, at the termination of a voyage with cargo from abroad, but is limited to vessels habitually or generally employed in the coasting trade; the principle upon which such vessels are exempted being, that their masters, from their occupation and experience, are supposed to be so familiarly acquainted with the English coasts that a pilot might be a superfluity (*a*).

It has been decided, as already pointed out, that under the terms of this statute the employment of a pilot while a ship is riding at anchor in the Mersey is not compulsory, but a pilot docking the ship is a compulsory pilot (*b*).

In the case of the *Johanna Stoll*, where the vessel

(*a*) *Agricola*, 2 W. Rob. 17; *Sea Queen*, 8 Mitch. 910.

(*b*) *Ante*, 115. In the case of a vessel which should come into collision while leaving the dock where she was loaded, in order to come to anchor in the river, previously to her sailing on a voyage, the question, whether the pilot on board were a compulsory pilot, would probably turn on whether the vessel left the dock with the intention of proceeding to sea at that time, and under the charge of that pilot, or whether she left with the intention of coming to anchor, not being then in a state of readiness for sailing.

proceeded against was a foreign ship, and it was found that the collision resulted from the fault of a pilot engaged to conduct her into the port of Liverpool, it was contended that such a pilot was not compulsorily taken, because he was originally taken on board the ship at a distance of more than three miles from the British coast, and therefore beyond the authority of the British legislature. Dr. Lushington, in a very elaborate judgment, negatived this contention. The English legislature, he said, has the right to affix conditions to the admission of foreign ships within its ports; it has the right to say, then, that no such ship shall enter the port of Liverpool without bringing with her a pilot taken from a distance beyond that port, just as it might insist on the bringing of a clean bill of health from abroad. The enactment, in short, "is not to be taken simply by itself, as prescribing something to be done out of British waters, but must be construed in conjunction with the circumstance of the ship's entry into the port of Liverpool"(*a*).

3. Hull.

As regards Hull, and other ports within the Humber and its tributories, the authority given by old charters and by Act of Parliament to the Trinity House of Kingston-upon-Hull is set forth very fully in Mr. V. Lushington's report of the *Killarney's* case. By a charter granted in the 23rd year of Queen Elizabeth, and again in the 13th of Charles II., to the "Guild or Brotherhood of Masters and

(*a*) 1 Lush. 302—308.

Pilot Seamen" of that Trinity House, power is given them to license pilots, and to hinder unlicensed persons from acting as pilots, directing that "whosoever hereafter shall take upon him the charge as master or pilot from the said port of Kingston-upon-Hull, or the limits thereof, to cross the seas, or to pass from Humber beyond Flamborough Head or Winterton Nip, before he is examined or allowed as above," such offender may be punished by imprisonment or fine. These charters, it will be observed, refer only to the case of pilotage outwards from the Humber, making no reference to vessels inward bound. The powers of the Hull Trinity House were extended by the Act 39 & 40 Geo. III. c. 10, which gives power to the Wardens, &c., to license pilots "for the conducting of ships and vessels *into and out of* the port of Kingston-upon-Hull aforesaid, and upon any part of the river Humber below the said port, and so far out at sea as to bring the Northness of Dimlington on the coast of Holderness to bear or be seen a sufficient distance clear or open of the land to the southward thereof, so as to pass clear of the New Sand;" and it inflicts a fine on any unqualified person who shall act as a pilot within the limits thus designated. With reference to the extent of the "port of Kingston-upon-Hull," referred to in this statute, it appears that this term has two significations, a narrower one, which is confined to the port of Hull proper, and a larger one, which comprises Goole and other ports or places situate on the river Humber, or any of the rivers or streams flowing into the same, and

the roadsteads in the Humber. It has been decided that the term, as used in the charters and in the older statute above set forth, is to be understood in the larger of these significations (*a*). The above-mentioned Act, however, has been superseded by the present Hull Pilotage Act, 2 & 3 Will. IV. c. 105, which defines the words "the port of Kingston-upon-Hull" to include the harbour and docks situate at Kingston-upon-Hull, but not to extend further in the river Humber than the Galley Clough. In this Act, therefore, the words used do not include Goole, which is on the Ouse.

The only clause in the present Hull Act, which purports to make the employment of a pilot in any case compulsory under a penalty, is s. 34, which enacts that "any master of any ship who being inward bound shall himself act as a pilot, or shall employ or continue to employ any unlicensed person, after any of the Humber pilots shall have offered to take charge of the ship, shall forfeit for every such offence double the amount of the sum which would have been legally demandable as pilotage." Thus there is no compulsion under this Act to employ pilots outwards in any case, nor inwards until after a "Humber pilot" shall have offered himself. The 22nd section of the Act directs that certain persons shall be called "Humber pilots," viz., pilots for conducting vessels "into and out of the port of Kingston-upon-Hull;" and this latter

(*a*) *The Dock Company at Kingston-upon-Hull* v. *Browne*, 2 B. & Ad. 43, and *Beilby* v. *Raper*, 3 B. & Ad. 284.

term, as has been seen, is to be understood in the narrower sense, as not extending further than the Galley Clough. Thus it appears that, under the *terms* of the present local Act, there is no compulsory pilotage in the Humber or its tributories, except into the port of Hull itself (*a*).

It is to be observed, however, that by s. 93 of this Act, it is provided that nothing in that Act contained should affect any of the rights, powers, privileges, jurisdictions, or authorities" of the Hull Trinity House, "in matters of pilotage or otherwise." This clause, it appears, has the effect of keeping alive the more extended interpretation of the term "the port of Kingston-upon-Hull" applied to the older statute and the charters. Consequently, the taking of a pilot is compulsory on all inward-bound vessels, not only for Hull, but for Goole, and all other ports on the Humber or its tributories.

What is defective in the Hull Pilot Acts and charters is supplied by the General Pilot Act (*b*), which enacts (*c*) that "it shall be lawful for the corporation of the Trinity House of the ports of Hull and Newcastle respectively to appoint subcommissioners of pilotage to examine pilots for piloting ships and vessels *into and out of* any ports, harbours, or places within the limits of their respective jurisdictions."

(*a*) *Killarney*, 1 Lush. 435.
(*b*) 52 Geo. III. c. 39.
(*c*) Section 21.

Under this latter Act it has been decided that, as Goole is within the limits of the jurisdiction of the Hull Trinity House, as shown above, and as that Trinity House had in fact licensed pilots to conduct ships into and out of Goole, the employment of a pilot outwards from Goole is compulsory by law (*a*).

Another point, not limited in its application to the ports in the Humber, was settled by the same decision. The *Killarney* was a ship belonging to Goole, and the collision took place within the port of Goole, through the fault of the pilot, whereupon it was contended that such pilot was not compulsory, because, by s. 59 of the General Pilot Act, there is an exemption from compulsory pilotage in favour of the master navigating his ship within the limits of the port or place to which she belongs, "the same not being a port or place in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots." But Dr. Lushington held that the exception to the exemption, contained in these last words, was applicable to this case; that, as Goole must be taken to be one of the ports or places "in relation to which" particular provision had been made by statute or charter, the employment of a licensed pilot was here compulsory (*b*).

4. Newcastle-upon-Tyne.

With regard to Newcastle-upon-Tyne, this being

(*a*) *Killarney*, 1 Lush. 443.
(*b*) 1 Lush. 442.

one of the ports "in relation to which particular provision has been made in an Act of Parliament," and which, consequently, are to a certain extent exempted from the provisions of the General Pilot Act, this port is regulated by the 6 Geo. IV. c. 86, a local statute, relating to the duties of the Newcastle Trinity House. By that statute the employment of a licensed pilot is made compulsory on all foreign vessels entering or departing from the port, but not on British vessels. It has been decided, after appeal to the Judicial Committee, that this provision of the local Act is not affected by anything in the General Pilot Act, and, consequently, that the owner of a British ship entering Newcastle-upon-Tyne is not exempted from liability for collision caused by the misconduct of a licensed pilot (*a*).

Of the pilot's license.

Where a pilot's license had been dated on the 20th of January, 1864, and purported to hold good for a year, and a collision took place in June, 1864, with a ship under his charge, it was contended that he was not at the time a "duly licensed" pilot, so as to exempt the ship: on the ground that, by s. 374 of the Merchant Shipping Act, it was enacted that "no license granted by the Trinity House shall continue in force beyond the 31st day of January next ensuing the date of such license; but the same may, upon the application of the

(*a*) *Tyne Improvement Commissioners* v. *General Steam Navigation Company*, 15 Weekly Reporter, 178.

pilot holding such license, be renewed on such 31st day of January in every year, or any subsequent day, by indorsement under the hand of the secretary of the Trinity House," or his deputy. But Dr. Lushington held, and it was confirmed by the Judicial Committee, that the license held good. The above clause was interpreted to mean, not that the act of renewal was to take place on that day, but that the effect of the renewal was to date from that day. Were it otherwise, the result would be that for a certain period—certainly hours, probably days, and possibly weeks—there would be no qualified pilots within certain pilotage districts; and this inconvenience could not have been intended by the legislature (*a*).

The employment of a pilot in Cowcolly Roads in the river Hooghly, within the channel leading to the port of Calcutta, is not compulsory (*b*).

In conclusion, the following miscellaneous decisions, bearing generally on the exemption from liability by reason of the employment of a pilot, may here be set down. A pilot will excuse none the less, it appears, though the master have the power of selection from amongst a number of pilots, and though, in consequence of such selection, the same pilot have in fact piloted the ship for a great number of years (*c*). The principle of exemption being the compulsoriness of the employment, it has

Pilot compulsory, though selected.

Compulsory harbour-master operates as pilot.

(*a*) *Beta*, 9 Mitch. 1038; 10 Mitch. 211.
(*b*) *Peerless*, 1 Lush. 114.
(*c*) *Batavier*, 2 W. Rob. 411.

been decided that a harbour master, who compulsorily directs the movements of a ship within a harbour, operates within his sphere of authority as a pilot, so as to exempt the ship (*a*). In a case where a pilot advised and pressed the captain, a Frenchman, to hire a waterman to take the wheel, and a collision took place from the fault of the waterman, the attempt was made to treat the waterman as not being the servant of the shipowner, but as on the same footing with the pilot himself; but this view Dr. Lushington refused to accede, pointing out that the waterman was really appointed by the master, on the mere recommendation of the pilot. "I have never heard it argued," observed the learned Judge, "that the pilot had any authority at all to hire men, custom or no custom" (*b*). Again, the compulsion which is to exempt a ship from liability must be a general compulsion of law, not a compulsion resulting from voluntary stipulations entered into by the shipowner. Where, by a stipulation in the charter of a vessel employed as a government transport, the master was obliged to place himself under the charge of a government tug, and this vessel towed the ship faultily so as to bring about a collision, the ship was held liable (*c*).

Waterman recommended by pilot.

Compulsion by reason of charterparty no excuse.

A pilot whose faulty conduct has occasioned a

Personal liability of pilot.

(*a*) *Bilbao*, 1 Lush. 154.
(*b*) *General De Caen*, Swab. 11.
(*c*) *Ticonderoga*, Swab. 217.

collision is himself personally responsible at common law (*a*), but cannot be proceeded against *in personam* in the Admiralty Court (*b*).

(*a*) *Tatham* v. *Cooper*, 10 Mitch. 880.
(*b*) *Urania*, 10 Weekly Reporter, 97.

CHAPTER VIII.

COMPUTATION OF DAMAGES.

In the present chapter are to be considered the principles which regulate the amount to be made good, as damages, to persons who have suffered loss by reason of a collision resulting from faulty conduct on the part of the other ship. It is to be borne in mind that there is a limit fixed by Act of Parliament to the liability of the faulty ship; the effect of this will be considered in a subsequent chapter; in the meantime, all that is set down in the present chapter is to be understood as subject to the proviso, that the compensation for damage does not exceed the amount thus limited.

General principles.

The general principle governing the computation of damages, is, that the sufferer by a collision which is the result of wrongdoing, whether negligence or mistake, is entitled to "*restitutio in integrum;*" he is, so far as practicable, to be restored to the same pecuniary position as if no collision had taken place. This, however, is on the supposition that the sufferer has not, either by himself or his servants, been guilty of any fault, neglect, or want of skill, the effect of which has been unnecessarily to augment the mischief of the collision. Such fault

is never to be presumed; it is for the wrongdoer in the collision, if he alleges it in extenuation of damages, distinctly to prove it.

One effect of a collision may be, to disable the ship in such a manner as to render her less fit to encounter subsequent dangers, and so incidentally to lead to damage from causes independent of the collision itself. In such a case, if it may reasonably be supposed that the subsequent loss would not have taken place had there been no collision—and the presumption is always in favour of this supposition—the wrongdoer in the collision is held answerable for such subsequent loss.

These principles are illustrated by the following decisions:—

First, with regard to the principle of *restitutio in integrum*: this may conveniently be considered under the following heads: 1st, the sum to be paid for a ship which is totally lost; 2nd, the sum to be paid when a ship is partially damaged and repaired; 3rd, the sum to be paid for loss of freight or of the use of the ship; 4th, the sum to be paid for damage to or loss of cargo; 5th, the sum to be paid for the baggage or effects of passengers or seamen; and 6th, the sum to be paid for loss of life.

Case of ship totally lost.

1st. In the case of a ship totally lost, the owner is entitled to recover her actual value; and this is defined in the Admiralty Court to be her market value, that is to say, the gross sum for which she might have been sold immediately before the collision.

Ordinarily, value of ship is her market value.

Where a collier schooner was sunk in a collision, Dr. Lushington, with reference to the question of damages, said, "Wherever damage is done by one vessel to another, the parties are to be restored into the same position as they were in before the accident; that is to say, they are to have the full value of the property lost; *restitutio in integrum* is the leading maxim. The value is, the market price at the time of the destruction of the property, and the difficulty is, to ascertain what would be its market price. . . . In order to ascertain this, there are various species of evidence that may be resorted to, for instance, the value of the vessel when built. But that is only one species of evidence, because that value may furnish a very inferior criterion whereby to ascertain the value at the moment of destruction. The length of time during which the vessel has been used, and the degree of deterioration suffered, will affect the original price at which the vessel was built. But there is another matter infinitely more important than this—known even to the most unlearned—the constant change which takes place in the market. It is the market price which the Court looks to, and nothing else, as the value of the property. It is an old saying, 'The worth of a thing is the price it will bring'" (*a*).

Since this decision, it seems to have been the constant practice in the Court of Admiralty to look

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(*a*) *Clyde*, Swab. 24.

to the market value, and that alone, as the test of a ship's value in case of total loss. This rule has the advantage of providing a measure as definite as perhaps the nature of the case admits. At the same time it is not to be denied that there are cases, exceptional no doubt, in which the market value by no means answers the end proposed, of giving to the sufferer a *restitutio in integrum*. When a ship is built for a special trade, requiring unusual conditions, such as a very small draft of water, or the sacrifice of carrying power or economy of working for the sake of attaining unusual speed, or peculiar accommodations for passengers, or for special descriptions of cargo, as in the case of iron ships built with tanks in the frame for carrying petroleum, the market for such vessels is so restricted, that a vessel which is exceedingly profitable to her actual owner, may be unsaleable or only saleable at a price far below her real value. That the market price cannot be the true test in all cases, has been recognized in the common law courts and in the Court of Chancery. In the case of *Wilson* v. *Dickson* (*a*), where it was a question how to determine the value of a ship in a collision suit, Bayley, J., said, "The mode of ascertaining the value is a matter of evidence. . . . The plaintiff may launch a *primâ facie* case by showing the value at the time of sailing, leaving it to the opposite party to show what deterioration has taken place. That,

Exceptional cases.

(*a*) 2 B. & Ald. 2.

however, is a mere question of evidence, and no positive rule can be laid down upon the subject." In *Dobree* v. *Schroeder* (*a*), Lord Cottenham held that the market price was a better test of a ship's value than the prime cost with a deduction for wear and tear. "The latter method," said the learned Judge, "has this disadvantage, that it can never be applied with certainty to any two cases. In one case, a ship may have been purchased advantageously and employed disadvantageously; in another, the reverse may have taken place." The other side of the argument is presented in the judgment of Wood, V.C., in *The African Steam Ship Company* v. *Swanzey* (*b*). "In ordinary cases," said the learned Judge, "the value of a ship is what she would have fetched immediately before the loss. This, however, cannot be a true criterion in all cases. A particular class of ships might be adapted for one description of traffic, and for that alone, and that description of traffic might be entirely occupied by one Company, with which it might be hopeless to compete, so that there would be no market for a ship of that particular description. If such a case should ever arise, it would be necessary for the Court to adopt some other criterion. One, I venture to suggest, might be to ascertain the price given for the ship, and her subsequent deterioration. Some such criterion would have to

(*a*) 2 Mylne & Craig, 488.
(*b*) 2 K. & J. 664.

be adopted, for otherwise the value of the ship would be, what the ship would sell for to be broken up." In the case of *Grainger* v. *Martin* (*a*), where the point in difference was, what was the true test of the value of a ship in order to determine whether a loss was total or partial under a policy of insurance, it was determined that the value in the market was not the test in that particular case. Crompton, J., said: "I do not think it is a fair argument, because the ship could only be sold for £7,500 when repaired, to say that it would not be worth while to repair the ship for £10,500; for it might be worth while to build a ship for £20,000, which would sell in the market for £7,500. It is clear the value of the ship in the market cannot in this case be the test." Blackburn, J., said that the test was not, either what a buyer would give, or what a seller would part with the ship for (two amounts which may differ very widely), but the real value of the ship. In the case before him, which was that of a ship of unusually large size, required for a particular trade, but otherwise unmarketable except at a serious loss, the learned Judge said, "The price for which a person could have got such a ship built for and brought to him, would come nearer to the value than the price for selling."

These decisions are here set down, to point out that in certain rare and exceptional cases the rule of looking only to the market value, which ordi-

(*a*) 8 Jurist, N. S. 997.

narily prevails in the Admiralty Court, may possibly be not applicable (*a*).

Case of ship sunk and raised again.

Next to the case of actual total loss, come the cases, where a ship has been sunk, but is raised again, and where, though merely damaged, she has been damaged to such an extent as to make it doubtful whether she is worth repairing. Under this head, there are the following decisions :—

The fishing smack *Tryall* had been sunk off Dungeness by a collision with the *Columbus*, for which the latter vessel was pronounced in fault; she had been raised again at the expense of the owner of the *Columbus*, and carried into Rye harbour; and notice of this had been given to the agents for the smack, with an intimation that the

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(*a*) The following decisions have reference to the evidence required in the Admiralty Court. If a vessel is of extraordinary strength and peculiar build, so as to raise her value above ordinary ships of her class, the owner should produce evidence of this before the registrar and merchants (*Eliza*, 5 Mitch. 276).

In another case, Dr. Lushington laid down the several methods of arriving at the value of a ship in the following terms :—"The best evidence is the opinion of competent persons who knew the ship shortly before she was lost. The second best evidence is the opinions of persons conversant with shipping and the transfers thereof. In addition to testimony of this description, many other circumstances may be called in aid; as, the original price of the vessel, the amount of repairs done to her, the sum at which she was insured, and other circumstances of a similar nature. It is manifest that facts of this kind, though not to be wholly excluded, have a slighter bearing upon the case; for, after a lapse of years, the amount of price might, from a change of circumstances, have little bearing upon the question: so, to a certain extent, it would be with respect to repairs and insurances" (*Iron-Master*, Swab. 443).

owner of the *Columbus* was ready to deliver her up, and would not be responsible for any further damage or expense that might be incurred by her remaining unrepaired in the harbour of Rye. No notice was taken of this intimation; and it does not appear from the report whether the smack was, in fact, repaired or not. The Registrar of the Court, on these facts, awarded as damages the full value of the *Tryall*, as totally lost. To this, exception was taken, on the ground that the owner of the *Tryall* ought to have taken to her again and repaired her, and ought not to claim damages resulting only from his own obstinacy. But Dr. Lushington said, "It is a matter of considerable difficulty to define under what circumstances a vessel can be abandoned by her owner in a case of collision. . . If I am asked whether the principle of abandonment, as applied to insurance cases, applies to cases of collision, I would answer, No; and I entertain no inclination or intention to import into this Court, in cases of this kind, all the rules and principles which a long series of precedents have established as the law of other courts in cases of insurance. The rule which I consider is incumbent upon this Court to follow, in cases of this description, is this, —that if a vessel is not merely run into and partially damaged, but is actually sunk at sea, it is not incumbent upon the owner of that vessel to go to any expense whatever for the purpose of raising her. Let me not be misunderstood as saying that this principle would apply in any case where the vessel is not actually sunk, but only partially

damaged. In the latter case, where there is the slightest chance of bringing the damaged vessel safely into port, the principle undoubtedly would not apply. Applying this rule to the present case, I consider that Mr. Woodward was not bound to have weighed the smack, or to have incurred the expense of carrying her into the port of Rye. Whether he was compellable or not to take possession of her after she had been raised by Mr. Fletcher and carried into the port of Rye, it is clear he was not bound to repair her, but might have left her lying in the port." The learned Judge accordingly confirmed the Registrar's report (*a*).

If a vessel which has been sunk is raised by her owner, and repaired by him at an expense considerably exceeding her value, when the cost of repairing might, and with prudence would, have been ascertained beforehand, the case will be treated, it appears, as one of total loss, giving the value of the ship and the expense of raising her, and deducting the sum for which she might have been sold when raised (*b*).

Case of ship so badly damaged as not to be worth repairing.

To determine whether a vessel which has been badly damaged in a collision ought to be repaired or to be sold as a wreck, the test employed in collision suits appears to be pretty nearly the same as that used in questions of insurance, viz.—whether under the circumstances a prudent owner, if on the

(*a*) *Columbus*, 3 W. Rob. 158.
(*b*) *Empress Eugénie*, 1 Lush. 139.

spot, and acting as if uninsured and having no claim for damages, would have elected to repair or to sell (*a*). In applying this test, it may be here remarked that there is this difference between collision suits and suits against underwriters, that, in the former, account should be taken of the freight as well as the ship. A shipowner, having his own interest solely in view, would be influenced, not merely by the cost of repairing as compared with the value of the ship when repaired, but also, if the accident took place in the middle of the voyage, by the circumstance that if the ship is repaired the freight may be earned, while if she is sold as a wreck it may be lost. This consideration leads on to various questions of detail, which it would hardly be profitable to pursue further in this place; such as, the saving of crew's wages and other expenses of the voyage which would have to be set on the other side; the question of *pro ratâ* freight, if such freight is given by the law of the flag or of the place of contract; and the like. These questions do not arise in determining whether a ship is a constructive total loss under a policy of insurance; it being generally understood that the ship alone is there taken account of.

Ship damaged, but repairable.

II. The next point to be considered is, the sum allowable for the cost of repairing a ship which is damaged by collision and repairable.

(*a*) *South Sea*, Swab. 143.

In claims against underwriters on a policy of insurance, where the object is merely to indemnify the owner for the loss he has actually suffered, a deduction is made, whenever new masts, sails, or other materials are supplied in the place of old ones, for the improvement thus received by the ship; which deduction is fixed by custom at one-third. In collision suits, however, no such rule prevails; on the contrary, the wrongdoer is to pay the entire costs of repairing the ship, without any deduction.

No deduction made for improvement to ship by repairing.

The case in which this doctrine was first distinctly laid down is that of the *Gazelle*, in 1844. The Registrar and merchants had made their Report of the sum allowable for damages, in framing which they had deducted one-third of the cost of repairing; and this was objected to on behalf of the claimant. Dr. Lushington, in giving judgment, said—"This deduction, it is said, has been made in consideration of new materials being substituted for old, and is justified upon the principle of a rule which is alleged to be invariably adopted in cases of insurance. Now, in my apprehension, a material distinction exists between cases of insurance and cases of damage by collision, and for the following reasons:—With respect to policies of insurance, the cases are cases of contract. In the construction or regulation of such contracts, all the customs of merchants founded in equity are always considered as forming a part of the contracts themselves; the shipowner who insures his ship is aware of the custom in question, and knows that he pays a

smaller premium in consideration of the deduction to be made. In recovering the amount of his loss, minus the deduction of the one-third, he in fact receives all that he agreed to receive in pursuance of his contract. Cases of collision stand upon an entirely different footing. The claim of the party who has sustained the damage arises, not *ex contractu*, but *ex delicto*; and the measure of the indemnification is not limited by the term of any contract, but is co-extensive with the amount of the damage. The right against the wrongdoer is for a *restitutio in integrum*, and this restitution he is bound to make, without calling upon the party injured to assist him in any way whatever. If the settlement of the indemnification be attended with any difficulty, the party in fault must bear the inconvenience. He has no right to fix this inconvenience upon the injured party; and if that party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burthen, which the law will not place upon him." Accordingly, the Report was referred back to the Registrar, in order to have the deduction of one-third expunged (*a*). The same doctrine was held in the Common Law Courts, in the case of *Hare* v. *Beckington* (*b*).

From the decision in the case of the *Pactolus*, it appears that the cost of all repairs rendered

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(*a*) *Gazelle*, 2 W. Rob. 280.

(*b*) Cited 2 W. Rob. 282. See also *Hebe*, 2 W. Rob. 536.

necessary by the collision are to be allowed without deduction, though those repairs may consist of additional strengthenings, not in the ship before, and though they may incidentally have the effect of materially increasing the value of the ship. The *Young Brandon* was a new American ship, just built for sale in the English market; and it was proved to be customary to send such vessels over insufficiently fastened, as it was less expensive to furnish the requisite ironwork in England. A collision having taken place, the surveyors ordered that the ship should be strengthened with iron plates and bolts in the 'tween decks. The Registrar and merchants had disallowed these additional fastenings, holding that they had been put in, not in consequence of the collision, but to strengthen her and enhance her value. This was objected to, and the question was brought before the Court. Dr. Lushington said that the only question was, whether the introduction of the plates and knees was rendered necessary by the collision; that the value of the ship before and after repairing was a matter foreign to the enquiry; and that the necessity for the repairs was to be determined by the evidence of the surveyors who had seen the ship. That evidence, in the case before him, established that the ship had been so shaken by the collision as to require these additional fastenings; and he must decline to receive, in opposition to this, any general evidence as to the ordinary condition of new American ships, in order to found on it an inference that these fastenings would have been

requisite independently of the collision. The learned Judge accordingly altered the Registrar's Report, by finding that all the work done should be paid for by the *Pactolus*, the vessel in fault (*a*).

Interest on outlay allowable.

In pursuance of the principle that there must be a complete restoration, the Court will allow, in addition to the cost of repairing, interest on the money spent in paying the tradesmen's bills, from the time of payment (*b*).

Deduction made for exorbitant charges.

If, however, the charges made for repairs are exorbitant, a deduction made on that account by the Registrar and merchants will be sustained by the Court (*c*). If discounts might have been obtained from the tradesmen by prompt payment, these must be deducted (*d*). Incidental expenses will be disallowed if incurred without reasonable necessity: thus, where the owner of the damaged ship sent down one Captain Clifton to superintend the repairs, his charge for time and travelling expenses was not allowed, on the ground that, there being a competent agent on the spot, his presence was unnecessary. The agent, in this case, had charged a commission. It was alleged that the presence of Captain Clifton was required, on account of the master's illness, and also because the master was incompetent to superintend the repairs. "Assuming

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(*a*) *Pactolus*, Swab. 173.

(*b*) *Hebe*, 2 W. Rob. 536.

(*c*) *Hebe*, 2 W. Rob. 533; *Pactolus*, Swab. 173; *Inflexible*, Swab. 201.

(*d*) *Inflexible*, Swab. 202.

the facts to be so," said Dr. Lushington, "the illness or incompetency of the *Rose's* master furnishes no reason for saddling the owners of the *Hebe* with the expenses incidental to his inefficiency. He was the servant of the owner of the *Rose*, and if he thinks fit to appoint in the person of Mr. Clifton a substitute to discharge the duties which properly belonged to the master of his own vessel, he must do so at his own cost" (*a*).

Allowance for demurrage.

III. In addition to the cost of repairing the damage, an allowance is to be made to the ship-owner for the loss of the ship's employment during the time when she is lying idle under repairs. This is called demurrage.

"The party who has suffered the injury," said Dr. Lushington, in the case of the *Gazelle*, "is clearly entitled to an adequate compensation for any loss he may sustain for the detention of his vessel during the period which is necessary for the completion of the repairs and the furnishing of new articles." . . . "In estimating the amount of such compensation, the principle must be adopted of putting the suffering party as nearly as possible in the same situation in which he would have been if no collision had taken place." Accordingly, in the case before him, where the loss of employment was determined by the amount of freight which would have been earned, the learned Judge directed that, not the gross freight, as in questions of in-

(*a*) *Hebe*, 2 W. Rob. 533.

surance, but the net freight, after deducting the amount of crew's wages and provisions and port charges, which in ordinary cases would have been disbursed in the earning of the freight, was to form the basis of the calculation (*a*).

In estimating the amount of demurrage, two things are to be taken into account; the expenses attendant upon the detention, and the amount of profit lost. Particular circumstances, which may have the effect of rendering either of these losses greater than ordinary, must be brought into consideration. Thus, where there were a large number of Lascars on board, as passengers, the expense of maintaining them during the detention for repairs was admitted as an item recoverable from the faulty ships; and, likewise, the expense of maintaining and paying European officers during such detention, at a port in the East Indies, it being the custom of the trade to retain such officers whilst ships were lying up under repairs (*b*).

Cost of maintaining passengers during delay.

On the principle, that the owner is simply to be indemnified for his actual loss, it has been determined that, if a vessel—for example, a steam

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(*a*) *Gazelle*, 2 W. Rob. 283. In calculating the amount of freight to be made good, the Registrar deducts the amount of wages at risk, and port-charges not yet paid. Prepaid wages, wages actually due at the date of the collision, and such port-charges as have been already paid, are very properly left out of consideration. The question is, how much freight would have been earned on the one hand, and, on the other, what expenses must have been incurred before that freight would have been earned, and have been saved in consequence of the ship's not earning it (*Canada*, 1 Lush. 586).

(*b*) *Inflexible*, Swab. 204.

packet which sets off on stated days,—usually lies idle for a given time, this time, if it has been occupied in repairing damages, is not to be paid for (*a*). It is not a matter of course that demurrage shall be paid in every case of delay in repairing, nor is the question, for how much might such a vessel have been hired; but, what has the owner in fact lost by the delay (*b*).

Packet missing her turn.

If a steamer, which is one of a line of packets sailing on stated days, misses her turn for sailing in consequence of detention resulting from a collision, the owner is to be compensated, not merely for the days lost in repairing, but also for the days lost by reason of thus missing her turn (*c*).

No demurrage given when ship totally lost.

The allowance of demurrage is limited to cases of partial damage which is repaired. If the ship is totally lost, or damaged to the extent of being irrepairable, the owner is entitled to the full value of his ship, but not to any allowance for the loss of her employment. This was determined in the case of the *Columbus*. A fishing smack having been sunk by collision, the owner claimed, in addition to her full value, a sum equivalent to her net earnings for a year. This claim was rejected by Dr. Lushington, on the ground that, whereas in the case of partial damage, followed by repair, the owner's loss by detention is definite and easily measurable; in the event of a total loss, the corresponding claim for

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(*a*) *Black Prince*, 1 Lush. 574.
(*b*) *Clarence*, 3 W. Rob. 286.
(*c*) *Black Prince*, 1 Lush. 575.

loss of employment would be vague, unlimited, and extending to almost endless ramifications. To this reason it may be added, that, in receiving a sum equivalent to the value of his vessel, the owner obtains the means of purchasing another, which he may employ as profitably as the first; and, in fact, the value of a ship really represents, and may be taken as an equivalent for, the aggregate of her net future earnings (*a*). If, indeed, at the time of loss, the ship has actually been chartered for a full cargo, and by reason of the loss the owner is prevented from earning the chartered freight, it seems reasonable to suppose that this fact should be taken into consideration, as enhancing the value of the ship to her owner at that particular time (*b*).

Loss of, or damage to, cargo.

IV. If, by reason of collision, the cargo on board is lost or damaged, the owner of it is entitled to compensation for his actual loss; that is to say, to the sum for which such cargo would have been sold had there been no collision, *minus* such expenses as must in that case have been incurred in order to realize the proceeds, and deducting also the sum for which it may have actually been sold. It is immaterial whether the cargo has been lost by the direct action of the collision, or because, the vessel having by the collision been rendered leaky, the captain has justifiably given orders to throw some of the

(*a*) *Columbus*, 3 W. Rob. 162.
(*b*) See *South Sea*, Swab. 143.

cargo overboard in order to lighten the ship for the preservation of all on board (*a*).

Effects of crew and passengers.

V. The crew and passengers of a ship which has been lost by collision are entitled to compensation, from the ship in fault, for the loss of their clothes and effects. In a case decided in the *Irish* Court of Admiralty, it was held that the actual value of such property, at the time of the collision, should be computed at two-thirds of its cost when new (*b*).

Loss of life or personal injury.

VI. There is also a liability, on the part of the owner of a ship in fault, for loss of life or personal injury resulting from a collision. Previously to the passing of the Act 9 & 10 Vict. c. 93, commonly known as Lord Campbell's Act, no action was maintainable against any person who, by his wrongful act, had caused the death of another. Injury to persons created only a right of personal action, and, if the injury was fatal, the right of action perished with the person injured. Lord Campbell's Act gave a right of action against the wrongdoer to the legal personal representative of the person killed, for the benefit of the wife, husband, parent, or child of that person. The effect of this statute, in cases of collision at sea, is of great importance; since in these cases claims for personal injury are of much less

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(*a*) *Wild Ranger*, 7 Mitch. 265.
(*b*) *Cumberland*, 5 L. T. N. S. 496.

frequent occurrence than claims for loss of life. As will be shown in the next chapter, a limit is placed by the legislature on the aggregate amount for which a shipowner can be made liable for these claims. It has been decided that the liability of the wrongdoer is not confined to the loss of life of passengers, but likewise extends to that of the crew (*a*).

Miscellaneous cases.

Those above mentioned are the principal instances of liability for collision damage. One or two miscellaneous kinds of damage may be added. Where a smack, which was run down through negligence, was at the time engaged in rendering a salvage service to another vessel, damages were given, in addition to the value of the smack, for the loss of the expected salvage reward (*b*). In another case, in addition to the value of the vessel, compensation was given for a sum which had to be paid by her owners to another vessel, in order to complete the voyage for which she was then chartered (*c*). If the vessel which has been improperly run down has been rescued from her danger by another vessel,

Loss of expected salvage.

Compensation for loss of charter.

Costs of resisting exorbitant salvage claim.

(*a*) *Glaholm* v. *Barker*, 13 Weekly Rep. 671. The liability for loss of life, when the proceedings are not under a Board of Trade inquiry, is not limited to £30 per man. Each person may, in the first instance, claim as if the ship's liability were unlimited: if the aggregate of such claims shall exceed £15 per ton, the Court of Chancery will apportion the whole sum, reducing each person's claim rateably (*Same case*, 14 Weekly Rep. 1006).

(*b*) *Betsey Caines*, 2 Hagg. 28.

(*c*) *Yorkshireman*, 2 Hagg. 30 n.

and an exorbitant demand for salvage has been put forward by the latter, the costs of resisting such claim at law are recoverable as damages from the offending ship; and this, although no tender of a reasonable salvage may have previously been made (*a*). If the act of salvage, by which a ship thus run into has been rescued from danger, includes the towing of her into her port of destination, no deduction from the sum payable by the wrongdoer will be allowed in respect of ordinary towage which may by that means have been escaped; provided that the employment of a tug for entering such port, under ordinary circumstances, however customary it may have been, was optional (*b*).

No deduction made for ordinary towage.

We have now only to deal with the two other matters of principle referred to in the opening of this chapter.

Losses resulting from improper conduct, after collision, on the part of the injured vessel.

In the first place, the wrongdoer is not liable for such loss or damage as, though incidentally attributable to the collision, has more directly resulted from the subsequent fault, negligence, or incapacity of those on board the other ship.

Where the anchor of the offending ship had knocked a hole in the other vessel's side, and the water running in at the hole had damaged the cargo, Sir John Nichol rejected the claim for damage

(*a*) *Legatus*, Swab. 170.
(*b*) *Inflexible*, Swab. 201.

to the cargo, on the ground that the crew might and ought to have stopped the hole with tarpaulins or sails, so as to prevent that mischief (*a*). Where, after collision, the crew of the injured ship had abandoned her at sea, and she had been subsequently picked up, whereby a heavy salvage was incurred, it was found by the Trinity Masters that a master of ordinary skill and ordinary courage would not, under the circumstances, have deserted his vessel: and the expense of salvage was accordingly excluded from the damages to be recovered. In directing the Trinity Masters, Dr. Lushington told them that the master and crew, after collision, were not bound to incur extraordinary risk of life by remaining on board their vessel, but that ordinary nautical skill and resolution were expected from them (*b*). With regard to the choice of measures to be taken subsequently to a collision, it is not enough to show that the master did not do the best thing possible; allowance is always to be made for reasonable doubt and uncertainty; and gross want of skill or care must be shown, in order to exempt the wrongdoer from liability. Thus, where a ship, being made very leaky by a collision, had been properly beached, and certain coast-guard men had offered to carry out an anchor in order to heave her off; which offer, as it appeared on the preponderance of evidence, it would probably have been judicious in the captain to have accepted;

(*a*) *Eolides*, 3 Hagg. 367.
(*b*) *Linda*, Swab. 306.

Dr. Lushington refused to make his having declined it a ground for exempting the wrongdoer from liability for the damage the ship suffered by subsequently thumping on the ground, whereby she became a total loss. "The true issue in this case," said the learned Judge, "is not, whether the assistance of the coastguard and the laying out of the anchor might or might not be successful, but it is, whether there was such reasonable doubt on the part of the master that he was justified in declining the risk; or whether, looking to the condition of the ship, the nature of the cargo, the weather, and the locality, he was guilty of gross nautical ignorance, or great negligence. Unless he was guilty of gross ignorance or negligence, I must hold that he was justified in adhering to his own opinion" (*a*).

Damage incidentally attributable to the collision.

Subject to the principle involved in the above decisions, it is a general rule that all damage which takes place subsequently to a collision, and is so far incidental to the collision as that, but for the collision, it would not have taken place, is to be made good by the wrongdoer.

Thus, if a ship, having by collision been placed in a position of danger, never escapes from that position, but subsequently, though after an interval, drives ashore, the damage by the grounding is to be treated as part of the collision damage, unless bad seamanship be proved. By "bad seamanship" is to

(*a*) *Flying Fish*, 9 Mitch. 1008.

be understood, want of *ordinary* nautical skill and experience; regard being always had to the size and character of the vessel in question; for it is not reasonable to expect, from the master of a fishing smack, such a perfect acquaintance with nautical science as belongs to a higher class of officers (*a*). Where, after a collision, the crew of a brig had all left her, supposing her to be sinking, but three of them had afterwards returned on board, and shortly afterwards the brig had become unmanageable, and, whilst passing through the Cockle Gat towards Great Yarmouth Roads, had missed stays and got upon the Barber Sands, and immediately became a total wreck, Dr. Lushington said that *primâ facie* the presumption of law, in all cases of this description, was, that the vessel was lost in consequence of the collision; and, as the Trinity Masters pronounced that no fault was proved on the part of the crew, the learned Judge made the wrongdoer liable for the entire amount of the loss (*b*). So, where it was alleged that the ultimate loss of the vessel did not arise from the effects of the collision, but from the premature abandonment of her by her crew, and from her not having been towed on shore, Dr. Lushington said that the faulty conduct must be established by very clear proof (*c*). The same rule, of presuming that all subsequent damage has arisen from the collision,

(*a*) *Pensher*, Swab. 214.
(*b*) *Mellona*, 3 W. Rob. 13.
(*c*) *Kingston-by-Sea*, 3 W. Rob. 157.

unless bad seamanship be distinctly proved, applies in the case when both vessels are in fault for the collision itself (*a*).

Wrongdoer answerable for the impossibility of exactly computing the damage done.

On general principles, the wrongdoer is the party to suffer from the impossibility of accurately computing the amount of mischief done (*b*); and, if the fault of the defendant have put it out of the power of the plaintiff to make an exact proof of the amount of loss, an approximative proof will suffice (*c*).

In the case of the *Egyptian*, where the vessel proceeding, a Dutch schooner called the *Jonge Walrav*, had been run into near the termination of her voyage by a large steamer, and her cargo of sugar had been considerably damaged in consequence, it appeared that, in an earlier part of the same voyage, the schooner had met with bad weather, and had put into Gibraltar Bay for shelter. The steamer was pronounced in fault, and the amount of damage was to be settled in the Registry. The Registrar and Merchants were not satisfied by the evidence laid before them as to what was the cause of the damage done to the cargo. In their opinion there were two causes; first, the bad weather encountered previously to the collision; and secondly, the collision itself; but they were wholly unable to determine, from the evidence laid before them, how much of the damage was attributable to each of those causes. Under these cir-

(*a*) *Linda*, Swab. 307.
(*b*) *Duke of Leeds* v. *Amherst*, 20 Beav. 239.
(*c*) *Plank* v. *Gavile*, 3 C. B. N. S. 807.

cumstances, they adopted the expedient of halving the claim ; arbitrarily assuming that the amount of damage from bad weather was equal to the damage from the collision. On appeal to the Court, this decision was reversed. All that was required from the claimants in such a case, said Dr. Lushington, was, that they should produce such *primâ facie* evidence that the damage resulted from the collision as would, if standing alone and uncontradicted, establish that fact. If, after this, the defendant shall allege that there was some cause antecedent to, or independent of, the collision, to which cause the damage, or some part of it, is fairly attributable, it rests with him to establish his assertion by distinct proof. Here, the collision, which made the ship extremely leaky, was by itself a sufficient cause to account for all the damage. There was, as the Registrar's Report itself showed, a failure of distinct proof that any portion of the damage had taken place previously : the cargo had not been examined and found damaged, nor was there proof of any such leakiness in the ship, previously to the collision, as must have caused damage to the cargo. There was nothing more than suspicion or perhaps probability. The learned Judge accordingly pronounced the owners of the steamer to be liable for the entire amount of damage ; observing that "the Court was bound to pronounce a judgment for or against the claim, or for a definite part, as proved by evidence, and not from conjecture" (*a*).

(*a*) *Egyptian*, 9 Mitch. 915.

From the same decision it appears that, if a ship has been weakened or strained by stress of weather previously to the collision, and is consequently more seriously damaged by the shock of the collision than she otherwise would have been, this circumstance does not exempt the wrongdoer from liability for the entire damage. Such a case is to be treated in the same manner as that of a ship which, though seaworthy, is of such an age or so inferior a structure as to suffer more severely from a collision than a stronger or newer vessel would do (*a*).

(*a*) *Egyptian*, 9 Mitch. 915.

CHAPTER IX.

PROPERTY LIABLE FOR COLLISION DAMAGE; AND LIMITATION OF LIABILITY.

THERE are two limitations to the amount of damages recoverable in the Court of Admiralty; the first, resulting from the nature of the procedure in that Court, which is for the most part a procedure *in rem;* the second, resulting from the operation of statutes passed for the protection of shipowners.

Property liable to arrest.

1. Proceedings in the Court of Admiralty are usually commenced by an arrest of the ship, and a seizure of the freight. The ship, if not bailed, will be sold by a decree of the Court; and the proceeds of it, together with the amount of freight thus appropriated, constitute the fund out of which compensation is to be made for the injury done. Thus, in cases where the owner of the ship in fault is bankrupt, or resident out of British jurisdiction, the amount of compensation is necessarily limited by the amount of the fund available for that purpose.

The ship.

In the first place, the ship, with all her tackle and appurtenances, is liable to Admiralty arrest.

Sails and rigging which have been detached from the ship, and sent ashore for safe custody or for the purpose of being repaired, are likewise liable to arrest (*a*). A sailmaker with whom sails have been left to be repaired, though he has a lien on them as against the shipowner, has no right to retain them against an Admiralty warrant (*b*). It appears that the fishing tackle of a whaler is to be treated as part of the "appurtenances" of the ship (*c*).

The freight.

Secondly, the amount of freight due to the shipowner at the port of destination is liable for collision damages (*d*). If any portion of the freight has been paid in advance, under the terms of a charter-party by which such advance constitutes an absolute prepayment, transferring the risk of the voyage to that extent from the shipowner to the charterer, in that case it is only the balance remaining due which can be arrested (*e*). Supposing that a vessel has been chartered, and then sublet by the charterer at a higher rate of freight, it may be a question whether the larger amount is liable to seizure, or only the amount belonging to the

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(*a*) *Alexander*, 1 Dods. 252.

(*b*) *Harmonie*, 1 W. Rob. 177.

(*c*) *Dundee*, 1 Hagg. 109.

(*d*) If, however, between the date of the collision and the arrest of the ship, the ship has been sold, then, although the right of the claimant follows the ship, so that he may take her from the purchaser, he cannot make the purchaser responsible for the amount of the freight which has never come into his hands (*Mellona*, 3 W. Rob. 25).

(*e*) *Leo*, 1 Lush. 446.

shipowner. Since it is the shipowner, and not the charterer, who is liable for collision damage, it would seem on general principles that the power of seizure, whereby a species of pledge is taken to secure that liability, ought to be confined to that portion of the freight which belongs to the shipowner. On the other hand, it has been decided that, where the bill of lading freight exceeds the charter rates, the larger amount is liable to Admiralty seizure under a bottomry bond (*a*). The liability under a bottomry bond, however, stands on a somewhat different ground from the liability for collision damage. A shipmaster has power to raise money on bottomry on the security of property not belonging to the shipowner: he may pledge the cargo; he may therefore pledge the chartered freight; and, when he has expressly pledged the freight, it is reasonable to suppose that that expression is to be read as meaning the entire freight. It does not follow that the freight belonging to the charterer is liable to seizure for the debt of the shipowner (*b*).

Crew's wages not to be deducted from the freight.

Although for several purposes, as for example in the case of a bottomry bond, the seamen have a preferential claim upon the proceeds of the ship

(*a*) *Eliza*, 3 Hagg. 87.

(*b*) Freight does not become liable for collision damage until it has been earned, that is, until the termination of the adventure. Thus, where a foreign ship, bound with cargo from Havana to Hamburg, was arrested in a collision suit in Plymouth, where she had put in, it was held that the cargo could not be arrested in respect of freight, as no freight was at that point due (*Flora*, 11 Mitch. 240).

and the freight in respect of the wages due to them, it appears that, at all events if the owner of the ship is a foreigner and not bankrupt, they have no such right as against the claimant for collision damage.

In the case of the *Linda Flor*, where a foreign ship had been arrested and sold for damages in a collision suit, and the proceeds with the freight were insufficient to satisfy the demand, the claim of the crew, to have their wages first paid out of such proceeds, was rejected. The grounds assigned were, that, as the crew had a right of personal action against the shipowner for their wages in addition to their right of lien, whereas the claimant of collision damage had no such personal remedy against the foreign shipowner, less hardship would result from taking away the benefit of the lien from the former than from the latter. "These," said Dr. Lushington, "constitute the grounds of my decision. It is, however, not to be forgotten that, in all these cases of damage, or nearly all, the cause of the damage is the misconduct of some of the persons composing the crew. This is not the case of a bankrupt owner; it will be time enough to consider such a case when it arises" (*a*).

It may be doubted whether the same rule applies when the owner of the ship is domiciled in Great Britain; since in that case the reason which in the

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(*a*) *Linda Flor*, 4 Jurist, N. S. 172. See also, to the same effect, *Benares*. 7 Notes of Cases, suppl. 1.; *Duna*, 5 L. T. N. S. 217.

Linda Flor was assigned as the principal ground of the decision is not applicable; the claimant for collision damage having the right, should the proceeds prove insufficient, to recover the deficiency by a suit at common law (*a*).

Limitations by Act of Parliament.

II. The second limitation to the liability of a shipowner for collision damage is that imposed by Act of Parliament.

"To protect the interests of those engaged in the mercantile shipping of the state, and to remove the terrors which would otherwise discourage people from embarking in the maritime commerce of a country, in consequence of the indefinite responsibility which the ancient rule attached to them" (*b*), the English Legislature has from time to time imposed an arbitrary limit to the amount for which an English shipowner shall be made liable, even personally, for damages resulting from the negligence of his servants. That limit, until recently, was fixed at the value of the ship and amount of freight (*c*).

(*a*) *Triune*, 3 Hagg. 114.

(*b*) *Carl Johan*, cited 1 Hagg. 113.

(*c*) The law of England is, to this extent, assimilated to the sea laws of most European countries, which, speaking generally, limit the responsibility of a shipowner for all debts not springing out of his own personal engagement to the value of his ship and the freight. There is, however, one important difference. The English law, as interpreted by the judges, limits the owner's liability to the value of the ship immediately *before* the collision, that is, in her undamaged state; whereas, the general continental rule is, that the owner may discharge himself from personal liability by abandoning

Old limit, value of ship and freight.

The statute 53 Geo. III. c. 159, enacted (*a*) that no owners or part owners of ships should be subject to answer for any damage done to other ships without their fault, further than the value of their own vessel, and "the freight due or to grow due for and during the voyage which may be in prosecution, or contracted for, at the time that the loss or damage may happen." In the event of two or more distinct collisions taking place on one voyage, each is to be treated as if there had been no other (*b*). This Act did not extend to any vessel used solely in rivers and inland navigation, nor to any vessel not duly registered according to law (*c*). Nor does it take away the responsibility of the master, although he may be a part owner of the ship (*d*).

In the Merchant Shipping Act, 1854, the provisions of the act of Geo. III. are substantially repeated. The sections bearing on the liability for collision damage are contained in the ninth part of this Act (*e*), and it is provided (*f*) that "the ninth part of this Act shall apply to the whole of Her Majesty's dominions." The 504th section enacts that "No owner of any seagoing ship or share

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to the claimants the ship and the freight, such as they ultimately are at the termination of the voyage.

(*a*) Section 1.

(*b*) Section 3.

(*c*) Section 5.

(*d*) Section 4. The master, however, cannot be personally proceeded against in Admiralty under an action commenced *in rem.* (*Hope*, 1 W. Rob. 158; *Volant*, 1 W. Rob. 383).

(*e*) 17 & 18 Vict. c. 104.

(*f*) Section 502.

therein shall, in cases where, without his actual fault or privity, 1st, any loss of life or personal injury is by reason of the improper navigation of such seagoing ship as aforesaid caused to any person carried in any other ship or boat; or 2nd, where any loss or damage is by reason of any such improper navigation of such seagoing ship as aforesaid caused to any other ship or boat, or to any goods, merchandize, or other things whatsoever on board any other ship or boat; be answerable in damages to an extent beyond the value of his ship and the freight due or to grow due in respect of such ship during the voyage which at the time of the happening of any such events as aforesaid is in prosecution or contracted for; subject to the following proviso, that is to say, that in no case where any such liability as aforesaid is incurred in respect of loss of life or personal injury to any passenger, shall the value of any such ship and the freight thereof be taken to be less than £15 per registered ton."

In the two following sections it is further enacted that (*a*), "For the purposes of the ninth part of this Act, the freight shall be deemed to include the value of the carriage of any goods or merchandize belonging to the owners of the ship, passage-money, and also the hire due or to grow due under or by virtue of any contract, except only such hire, in the case of a ship hired for time, as may not begin to

(*a*) Section 505.

be earned until the expiration of six months after such loss or damage;" and (*a*) "The owner of every seagoing ship or share therein shall be liable in respect of every such loss of life, personal injury, loss of or damage to goods as aforesaid, arising on distinct occasions, to the same extent as if no other loss, injury, or damage had arisen."

Limitation does not apply to costs or interest.

The limitation by statute, it has been decided, applies only to the capital sum claimed; costs, interest on money, and interest upon interest included in an account made up, are also recoverable (*b*).

The value of the ship, to which the liability of the shipowner is limited, is her value immediately before, not after, the collision (*c*). This is to be determined by the amount for which she might at that point of time have been sold, not deducting the expense of selling (*d*).

The amount of freight, to which the statute refers, is the entire gross freight earned during the voyage or term therein specified, whether such freight has been prepared or is not due until the termination of the voyage, and without deduction of crew's wages or portcharges (*e*).

Present limitation £8 if register ton as regards property, or £15 as regards life.

The provisions of the Merchant Shipping Act,

(*a*) Section 506.

(*b*) *Dundee*, 2 Hagg. 137; *Amalia*, 13 Weekly Reporter, 111; *Straker* v. *Hartland*, 9 Mitch. 1617. See also *John Dunn*, 1 W. Rob. 160.

(*c*) *Mary Caroline*, 3 W. Rob. 107.

(*d*) *Leicester* v. *Logan*, 4 Kay & J. 725.

(*e*) *Benares*, 14 Jur. 581; *Duna*, 5 L. T. N. S. 217.

above cited, have been modified by s. 54 of the Merchant Shipping Amendment Act, 1862 (*a*), which constitutes the law now in force on this head. This section is as follows :—

S. 54. "The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say,

1. Where any loss of life or personal injury is caused to any person being carried in such ship ;
2. Where any damage or loss is caused to any goods, merchandize, or other things whatsoever on board any such ship ;
3. Where any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat ;
4. Where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandize, or other things whatsoever on board any other ship or boat ;

be answerable in damages, in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, merchandize, or other things, to an aggregate amount exceeding £15 for each ton of their ship's tonnage ; nor, in respect of

(*a*) 25 & 26 Vict. c. 63.

loss or damage to ships, goods, merchandize, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding £8 for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steam ships the gross tonnage without deduction on account of engine room."

Rule as to tonnage of steam ships.

The section goes on to give directions for ascertaining the tonnage of foreign ships; directing, that in case such vessel has been or can be measured according to British law, such tonnage shall be taken; and, if not, the Surveyor General of Tonnage in the United Kingdom, and the chief Measuring Officer in any British possession abroad, shall certify what would in his opinion be the tonnage of such ship, if measured according to British law, and that the tonnage so determined shall be the basis of the limitation.

This section now takes the place of s. 504 of the Act of 1854, which has been repealed. It is still to be read in connection with s. 506, above cited, which remains in force; so that, if there are more collisions than one, the shipowner is liable for each, independently of the other.

Each collision to be taken separately.

It has been decided that the limitation of liability to £15 per ton applies equally to the loss of life of the crew as to that of passengers (*a*).

Rule of apportionment when several claimants.

Where there are several distinct claims upon a

(*a*) *Glaholm* v. *Barker*, 13 Weekly Reporter, 671; 14 Weekly Reporter, 296.

ship, springing out of the same collision, and which may be made the subject of separate actions,—*e. g.*, the claim of the shipowner for the loss of his ship, and that of the merchant for the loss of his goods on board,—that claimant who shall have obtained judgment before the other has commenced his suit is entitled to a priority over the others (*a*); the law favouring those who are most active in seeking its aid: but if a second action has been commenced before a decree has been pronounced in the first, and if, as is customary, it has been arranged that the second action shall abide the result of the first, then the two are to be placed on the same footing; so that, if the proceeds of the ship and freight are insufficient to satisfy both, the amount realized is to be apportioned rateably between the two claimants (*b*).

The effect of the limitation of liability upon the position of those who have given bail in order to obtain the ship's release from an Admiralty arrest will be considered in the chapter on Procedure.

To what extent the limitation of liability is applicable to foreign ships, will be considered in the following chapter.

(*a*) *Saracen*, 2 W. Rob. 453; 6 Moore, P. C. 56.
(*b*) *Clara*, Swab. 3.

CHAPTER X.

TO WHAT EXTENT FOREIGN SHIPS COME UNDER STATUTORY RULES.

WHEREVER the liability of a shipowner in respect of collision damage is affected by the terms of an Act of Parliament, so as to be greater or less than, or in any way different from, that which would have been his liability under the common law of the sea, it becomes a question how far ships which are the property of other than British subjects can be brought within the jurisdiction of such statutory law.

Principle in British waters.

The principle, now established after a series of decisions in the Admiralty Courts, is this. With respect to collisions which take place within British territory, as, in the rivers and harbours of this country, a British Act of Parliament is operative upon foreign as well as British ships: with respect to collisions upon the high seas, the British Legislature has indeed power to bind foreigners, but its Acts are not binding upon them unless the intention that they shall be so is expressly declared in the Act itself. Further, wherever a foreign ship is exempted from a liability, or debarred from a right, in relation to a British ship, on the ground that

On the high seas.

the collision has taken place out of the jurisdiction of a British statute, there is a corresponding exemption on a British ship which under similar circumstances comes into collision with a foreigner; on the ground that there would otherwise be no reciprocity, or equality of rights between the two.

It will be convenient first to set forth the decisions which have established these principles, and then, in order to define their practical bearing, to point out to what extent the legislature of this country has expressly declared an intention to bind foreign vessels coming into collision on the high seas and seeking redress in an English Court.

As to steering rules.

The first decision which it is necessary to notice is that of the *Dumfries*, in 1856. It was there determined that, where a collision had taken place between a British and a foreign vessel, meeting on the high seas, the provisions of the Merchant Shipping Act, with reference to the porting of the helm, —which provisions, as we have seen, were in some respects inconsistent with the common law of the sea,—were to be entirely disregarded, and the merits of the collision, as regards the steering, were to be determined solely by reference to ordinary nautical rules (*a*).

As to lights

In the case of the *Borussia*, in the same year, Dr. Lushington held that a foreign ship, lying at anchor in an English harbour, was not bound to exhibit lights in the manner prescribed by the

(*a*) *Dumfries*, Swab. 64. See also *Williams* v. *Gutch*, 14 Moore, P. C. C. 202; *Elizabeth*, 5 Mitch. 336.

Admiralty regulations issued under the authority of an Act of Parliament (*a*).

As to the right of recovery, when both ships in fault.

The Merchant Shipping Act of 1854, as has been seen, made an important modification in the common sea law, which is now repealed; directing that in certain cases, where both ships were in fault, neither should recover. It was determined, in the case of the *Zollverein*, that this rule was not operative on a British shipowner claiming damages against a foreigner for a collision on the high seas, on the ground that the statute could not bind the foreigner, so as to preclude his recovering his half-damage, and that there must be mutuality. Dr. Lushington, in the course of an elaborate judgment, said:—"The principle which governs all these questions of jurisdiction and remedies is admirably stated in Mr. Justice Story's 'Conflict of Laws,' c. 14. 'In regard to the rights and merits involved in actions, the law of the place where they originated is to be followed; but the forms of remedies and the order of judicial proceedings are to be according to the law of the place where the action is instituted, without any regard to the domicile of the parties, the origin of the right, or the country of the Act.' . . In endeavouring to put a construction on a statute, it must be borne in mind how far the power of the British Legislature extends, for, unless the words are so clear that a contrary construction can in no way be avoided, I must presume that the

(*a*) Swab. 95.

legislature did not intend to go beyond this power. The laws of Great Britain affect her own subjects everywhere—foreigners only when within her own jurisdiction." The learned Judge then, after giving his reasons for holding that the Merchant Shipping Act was not so framed as expressly to declare an intention to bind foreign ships, and that the question before him related not merely to the form of remedy but to the rights and merits of the dispute, went on to say, "Then comes the question, whether, in a trial of the merits of a collision, a foreigner may urge in his defence that the British vessel, though free by the law maritime, has violated her own municipal law, and so, being plaintiff, cannot recover. Reverse the position: suppose the foreigner plaintiff, and to have done his duty by the law maritime. I am clear that he must recover for the damage done. If so, it is contrary to equity to say that the British shipowner, *in eadem conditione*, shall not recover against the foreigner. What right can the foreigner have to put forward British statute law, to which he is not amenable so far as the merits are concerned" (*a*) ?

So, in *Cope* v. *Doherty*, Wood, V. C., said—"The legislature of each separate country, by its acts, unless otherwise expressed, only attempts to regulate those rights which subsist between its own subjects. . . The rules of the *lex fori* do not apply to modify those rights. The hypothesis

(*a*) *Zollverein*, Swab. 96.

of a legislative contract cannot be applied to the case of a contest between a British subject and a foreigner, and still less to a contest between two foreigners (*a*)." And, on appeal, Turner, L. J., said :—"It is not, I think, to be presumed that the British Parliament could intend to legislate as to the rights and liabilities of foreigners. In order to warrant such a conclusion, I think that either the words of the Act ought to be express, or the context of it to be very clear" (*b*).

As to limitation of liability.

The same principle which excuses a foreign ship, or an English ship meeting a foreigner on the high seas, from observing statutory steering rules, operated, previously to the passing of the Merchant Shipping Amendment Act of 1862, to debar such vessels from the limitation of liability referred to in the last chapter. Thus, in *Cope* v. *Doherty* (cited above), it was determined that, as between two foreign ships colliding on the high seas, the wrong-doer was liable to the full extent of the damage, though exceeding the value of his ship with her freight. In the previous case of the *Carl Johan*, the same doctrine had been laid down by Lord Stowell, in the case where one of the colliding vessels was British-owned (*c*). In the case of the *Wild Ranger*, Dr. Lushington carried the same principle a step further: deciding that, if an English and an American ship come into collision

(*a*) Jurist, 1858, 453.
(*b*) Jurist, 1858, 701.
(*c*) Cited 3 Hagg. 186.

on the high seas, there is no statutory limitation of liability, notwithstanding that the American statute law, limiting liability to the value of the ship with her freight, was the same as our own then was. The wrongdoer, said the learned Judge, is liable to the full extent of the damage done, unless that liability is restricted by some statute: our own statute does not apply to the present case, and the construction of that statute cannot be affected by the circumstance that a similar statute has been passed by the legislature of the United States (*a*).

An English vessel, it appears, meeting a ship, and not knowing whether she is English or foreign, ought to adopt that mode of steering which is conformable to the English statutory regulations (*b*).

What is being "on the high seas."

It has been questioned whether a ship is to be considered as "on the high seas," so as to be beyond the ordinary jurisdiction of British statute law, if she is within the distance of three miles from the coast of Great Britain. "By the common law of nations," said Wood, V. C., in giving judgment in the case of *The General Iron Screw Collier Company* v. *Schurmans*, every nation is allowed to have, at least for certain purposes, jurisdiction over that portion of the seas adjacent to its territory. The origin of the right may probably be found in the fact that at one time it was supposed, by some degree of stretch perhaps, that the limit of gunshot,

(*a*) *Wild Ranger*, 1 Lush. 553.
(*b*) *Cleadon*, 1 Lush. 160.

according to the then existing capacity of gunnery, was at that distance, and it was supposed that so far from the shore as a nation could protect should be deemed within its own province." Within this distance, therefore, the learned Judge determined that the English statute law must prevail (*a*). This decision, however, must now be considered as overruled. In the case of the *Saxonia*, where a collision took place within the Solent Sea, and within a distance of three miles from the shore on either side, Dr. Lushington determined, although the above-mentioned decision was cited, that the case must be determined by the common law of the sea; and this decision was affirmed in Privy Council. "We are of opinion that this collision must be considered to have taken place on the high seas, in a place where a foreign vessel has a right of sailing without being bound by any of the provisions of the statutes enacted to govern British ships" (*b*).

Within a tidal river, as the Thames, a foreign ship, whether bound or not to obey the directions for sailing laid down by the Merchant Shipping Act—a point which the Privy Council declined to determine—is at any rate bound by a custom of the river emanating from the statute, the existence of which custom the Court would presume (*c*).

(*a*) Jurist, 1860, 883.
(*b*) *Saxonia*, 1 Lush. 414. See also *Amazone*, 7 Mitch. 944.
(*c*) *Fyenoord*, Swab. 377.

The Merchant Shipping Amendment Act of 1862 (*a*), introduces a fresh complication.

System of reciprocity introduced by the Merchant Shipping Amendment Act, 1862.

First, with regard to the limitation of liability, this is now extended to foreign as well as British ships; section 54 expressly enacting that "the owners of any ship, whether British or foreign," shall not, in the event of loss or damage to another vessel by improper navigation, be liable beyond the amount of £8 per ton of the ship's register.

With regard to all other statutory regulations contained in the Act, which include, as has been shown, sailing rules, and regulations concerning lights and fog-signals, it is enacted by section 57 that "whenever foreign ships are within British jurisdiction, the regulations for preventing collision contained in Table C in the schedule to this Act, or such other regulations for preventing collision as are for the time being in force under this Act, and all provisions of this Act relating to such regulations, or otherwise relating to collisions, shall apply to such foreign ships; and in any cases arising in any British court of justice concerning matters happening within British jurisdiction, foreign ships shall, so far as regards such regulations and provisions, be treated as if they were British ships." It is further enacted by section 58, that "Whenever it is made to appear to Her Majesty that the Government of any foreign country is willing that the regulations for preventing collision contained in

(*a*) 25 & 26 Vict. c. 63.

Table C in the schedule to this Act, or such other regulations for preventing collision as are for the time being in force under this Act, or any of the said regulations, or any provisions of this Act relating to collisions, should apply to the ships of such country when beyond the limits of British jurisdiction, Her Majesty may, by Order in Council, direct that such regulations, and all provisions of this Act which relate to such regulations, and all such other provisions as aforesaid, shall apply to the ships of the said foreign country, whether within British jurisdiction or not."

As the law now stands, therefore, the distinction between foreign and British ships, so far as regards sailing rules, lights, fog-signals, and the penalty for not assisting a vessel endangered by collision, is now limited to ships of those countries which have not given in their adhesion to the terms of this statute, or whose adhesion has not been signified by an Order in Council. So far as regards limitation of liability, the distinction is swept away entirely.

Countries which have given in their adhesion.

From the decision in the case of the *Gustav* (*a*), we learn that Hamburg and Bremen, and, from another decision, (*b*) that the United States of America, have been declared by an Order in Council to have given in their adhesion to the new rules; and consequently that the vessels of those States are to be treated in every respect like British vessels.

(*a*) 8 Mitch. 1586.

(*b*) *Funny Buck*, 11 Mitch. 239.

In the case of the *Amalia*, it was contended that, although the words of the Act plainly purported to limit liability in the case of foreign as well as British ships, yet, as the legislature had no power to restrict the common natural rights of foreigners, except as to matters occurring within the limits of British territory, such a provision must be treated as inoperative. This, however, was negatived by Dr. Lushington, whose decision was confirmed in Privy Council. The provisions of the Act, it was held, did not constitute a breach of international law or undue interference with the natural rights of foreigners (*a*).

The statute acted on, as towards foreigners, in the Court of Admiralty.

It is, perhaps, hardly necessary to add that municipal regulations of foreign laws, contrary to the general sea law, as, with regard to the carrying of lights in harbours, will be disregarded by the Court of Admiralty, which can only administer, either the law of England, or the common law of the high seas (*b*).

(*a*) *Amalia*, 12 Weekly Reporter, 24.
(*b*) *William Hutt*, 4 Mitch. 718.

CHAPTER XI.

JURISDICTION OF THE ADMIRALTY AND OTHER COURTS.

We come now to questions of remedy and procedure. Among these, the first to be considered are such as have reference to the court in which claims for collision damages are to be prosecuted. That court which has the most extensive jurisdiction over cases of collision, and the most effective machinery for enforcing payment, is, the High Court of Admiralty.

Jurisdiction of Admiralty Court.

The jurisdiction of the Admiralty Court, originally confined to such collisions as took place on the "high seas," has been successively extended by statute, until it now extends to all collisions whatsoever. Until the commencement of the present reign, this jurisdiction was restricted by the statute 13 Rich. II. c. 5, which enacted that "The admirals and their deputies shall not meddle from henceforth of anything done within the realm, but only of a thing done upon the sea, as it hath been used in the time of the noble prince King Edward, grandfather of our lord the king that now is." From this limitation arose a variety of questions, now antiquated. For example, it was in one case deter-

mined that the court had no jurisdiction over collisions which took place *infra corpus comitatis*, as, in the Solent Sea, or in the Humber, opposite Hull (*a*); but that it has jurisdiction in the Thames below Woolwich, this being within the "flux and reflux of the sea(*b*). The statute 3 & 4 Vict. c. 65, section 6, enacts that "The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of damage received by any ships or sea-going vessel, and to enforce the payment thereof, whether such ships or vessel may have been within the body of a country, or upon the high seas, at the time when the damage was received in respect of which such claim is made." And this extension of authority was carried still further by the Admiralty Court Act, 1861 (*c*), which enacts that "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." The word "ship" is defined in the same Act to "include any description of vessel used in navigation not propelled by oars."

Under these Acts, and particularly the latter, it has been determined that the Admiralty Court will take cognizance of collisions occurring in the Hooghly (*d*), and in a Dutch canal (*e*), and in foreign

(*a*) *Public Opinion*, 2 Hagg. 398.
(*b*) *Girolamo*, 3 Hagg. 179.
(*c*) 24 Vict. c. 10.
(*d*) *Peerless*, 1 Lush. 40.
(*e*) *Diana*, 1 Lush. 539.

waters, as in the harbour of Rio Grande, even where both the disputants are foreigners (*a*).

What is a "ship."

A barge, it appears, is a "ship," within the meaning of the Act (*b*). Even a keel, or vessel propelled by a pole, may, if the collision have taken place on the high seas, proceed in Admiralty (*c*).

The Admiralty Court has jurisdiction over foreign as well as British ships (*d*); and equally so, though both of the contending parties be foreigners (*e*).

Right of procedure against Queen's ships.

When the ship proceeded against is a Queen's ship, the Admiralty Court has refused to grant a monition against the Lords of the Admiralty, to compel them to appear and defend the suit (*f*); but the usual course appears to be for the Lords of the Admiralty to give their approbation, probably as a mere matter of form, to the bringing of the suit, after which the Admiralty Court will take cognizance of it (*g*).

Procedure *in personam.*

It may be convenient in this place to make some mention of a mode of procedure in the Admiralty Court not now often resorted to, namely, the procedure *in personam*. Generally speaking, action is taken in Admiralty by attaching the *res*, that is, in collision suits, the offending ship, and her freight; and the *res* thus seized becomes the pledge

(*a*) *Courier*, 1 Lush. 541.
(*b*) *Malvina*, 1 Lush. 495; *Bilbao*, 1 Lush. 151.
(*c*) *Sarah*, 1 Lush. 549.
(*d*) *Christiana*, 2 Hagg. 183.
(*e*) *Johann Friederich*, 1 W. Rob. 35.
(*f*) *Athol*, 1 W. Rob. 374.
(*g*) *Volcano*, 2 W. Rob. 338. Queen's ships may sue merchantmen for collision damages (*Leda*, 7 Mitch. 1519.

and the security for the damages which may be recovered. But there has also existed in this court, from very ancient times, a right of personal suit, which may be exerted, for example, against the captain of a ship alleged to be in fault. Again, if the offending ship have been sunk by the collision, or have gone away out of the reach of Admiralty process, so that there is no *res*, the claimant still has the remedy of a personal suit in Admiralty. "The jurisdiction of this court does not depend," said Dr. Lushington, in the case of the *Volant*, "upon the existence of the ship, but upon the origin of the question to be decided, and the locality" (*a*). It has been decided that a personal suit cannot be engrafted upon a proceeding *in rem;* that is to say, that, if an action in the Admiralty Court has been commenced in the usual manner by an attachment of the ship and freight, and the owner puts in an appearance and defends the suit, he does not, by doing so, incur any personal liability beyond the value of the ship and freight. Had the owner not come forward, the sum recoverable would of necessity have been limited to the *res*, and his appearance is treated as a measure taken "only to protect his interest in the ship" (*b*). Practically, however, the mode of procedure in Admiralty *in personam* has for many years been obsolete (*c*).

Jurisdiction of common-law courts.

The claimant of collision damages may elect to

(*a*) 1 W. Rob. 388.
(*b*) *Volant*, 1 W. Rob. 390.
(*c*) *Clara*, 1 Swab. 3.

proceed in the common law courts rather than in Admiralty. It is to be observed, however, that whenever there are several claimants, *e. g.*, when there is damage by the collision to the cargo as well as the ship, or when there is loss of life in addition to damage, the defendant in a common law court has power to stay proceedings and to transfer the litigation to the Court of Chancery, or (in certain cases) to the Admiralty Court. This power is given by the 17 & 18 Vict. c. 104, s. 514, and the 24 Vict. c. 10, s. 13. The former section enacts that "in cases where any liability has been or is alleged to have been incurred by any owner in respect of loss of life, personal injury, or loss of or damage to ships, boats, or goods, and several claims are made or apprehended in respect of such liability, then (subject to the right hereinbefore given to the Board of Trade of recovering damages in the United Kingdom in respect of loss of life or personal injury), it shall be lawful in England or Ireland for the High Court of Chancery, and in Scotland for the Court of Session, and in any British possession for any competent court, to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability subject as aforesaid, and for the distribution of such amount rateably amongst the several claimants, with power for any such court to stop all actions and suits pending in any other court in relation to the same subject-matter; and any proceeding instituted by such Court of Chancery or Court of Session or other competent court, may be conducted in such manner,

Of Court of Chancery.

and subject to such regulations as to making any persons interested parties to the same, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of costs, as the court thinks just." And, by the latter section, it is enacted that "Whenever any ship or vessel, or the proceeds thereof, are under arrest of the High Court of Admiralty, the said Court shall have the same powers as are conferred upon the High Court of Chancery in England by the ninth part of the Merchant Shipping Act, 1854." The clause first cited is within the ninth part of this Act.

Transfer of suits from Common Law Courts to Chancery.

It appears, then, that whenever there are several claimants or possible claimants under a collision, the defendant has in all cases the power of transferring the suit from the Common Law Courts to the Court of Chancery; and, if any one of such claimants shall have arrested the ship under Admiralty process, the defendant has the power to compel the transfer of all other litigation springing out of the same collision to the Court of Admiralty.

After suit at common law, may proceed in Admiralty.

After judgment has been obtained in a common law court, if the defendant shall have become bankrupt, so that no damages are in fact recovered, the ship may still be proceeded against *in rem* through the Court of Admiralty, though in the hands of a third person to whom she has been sold: though there is no such power, *pendente lite* (*a*). And,

(*a*) *John and Mary*, Swab. 473.

And conversely.

conversely, after having sued in Admiralty, and exhausted the *res*, the claimant may then go to a common law court, and sue the owner personally for the residue of his damages (*a*).

Suits in Court of Session.

An action commenced in the Scotch Court of Session, which has Admiralty jurisdiction, may be abandoned, before judgment given, in order to take proceedings in our Admiralty Court; and the ship may be arrested here before formal abandonment of the action there (*b*).

Even though the collision have taken place on the high seas, and though one or both of the colliding ships be foreigners, the Common Law Courts have jurisdiction, and power is given by the Merchant Shipping Act, 1854, s. 527, to the Judge of any Court of Record in the United Kingdom, as well as to the Judge of the Admiralty Court, or, in Scotland, of the Court of Session, or the sheriff of the county, to arrest and hold any foreign ship, under suit for collision damages, until a satisfactory security be given (*c*).

Jurisdiction of inferior courts.

In many cases, when the collision has taken place within the limits of an English port, proceedings may be taken summarily in one or other of the inferior Courts, as in the Court of Passage in Liverpool, or before the magistrates.

(*a*) *Nelson* v. *Couch*, 11 Weekly Reporter, 964.

(*b*) *Bold Buccleugh*, 3 W. Rob. 228.

(*c*) In dealing with collisions in Indian or colonial waters, the Court of Admiralty will take cognizance of the local laws of those places,—*e. g.* as to whether the taking of a pilot is compulsory (*Peerless*, 1 Lush. 40).

The Merchant Shipping Act, 1854 (*a*), gives a special jurisdiction to the Board of Trade in the case of claims for loss of life or personal injury resulting from a collision. The Board may call upon any sheriff to summon a jury to assess damages for such loss or injury, and to preside at their enquiry, assisted, if so required, by a barrister as assessor. Power is given to the Board of Trade to make any compromise as to the amount of damages payable, but otherwise, by s. 510, "the damages payable in each case of death or injury shall be assessed at thirty pounds." If, however, the claimant is dissatisfied with this amount of damages, he may, on certain conditions, bring his action as if no such enquiry had taken place.

The English Consular Court at Constantinople has, by long established usage, a right of Admiralty jurisdiction, and many proceed *in rem*, though it has no compulsory power except over British subjects. It has been decided that this Court is bound to follow the Admiralty rule, in preference to that which prevails in our Common Law Courts; that is, when both are in fault, the damages of both are to be halved (*b*).

(*a*) Sections 507—513.

(*b*) *Laconia*, 12 Weekly Reporter, 90.

CHAPTER XII.

PROCEDURE IN ADMIRALTY.

THE subject next in order for our consideration is, the machinery of the Court of Admiralty, and of its Court of Appeal, the Judicial Committee of Privy Council, for enforcing claims for collision damage. The most convenient method of doing this appears to be, to follow the course of a collision suit, from its commencement to its close.

The materials for doing this are to be found in the "Rules, Orders, and Regulations of the High Court of Admiralty of England," issued by an Order of Council, dated the 29th of November, 1859 (*a*), and in the various decisions in Admiralty and Privy Council, bearing on the construction of those Rules, and questions incidental thereto.

Arrest.

Admiralty procedure being mostly *in rem*, the first step to be taken is to bring the property which is to be the security for the suit within the control of the Court; and this is done by arrest.

A proctor desiring to institute a cause must first file in the registry of the Court of Admiralty a

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(*a*) 1 Lush. App. iii.

præcipe, and thereupon the cause will be entered for him in a book to be kept in the registry, called the "Cause Book" (*a*). He is at the same time to make an affidavit, setting forth the name and description of the party on whose behalf the cause is instituted, the nature of the claim, the name and nature of the property to be arrested, and that the claim has not been satisfied. Hereupon the proctor is entitled, without any formal decree of the Court, to obtain a warrant for the arrest of the property. The registrar may in any case, if he think fit, allow the warrant to issue, although the affidavit may not contain all the required particulars. The warrant, thus obtained, shall be served by the Marshal of the Court or his substitutes, whether the property to be arrested be situate within the port of London, or elsewhere within the jurisdiction of the Court. The proctor taking out the warrant must, within six days from the service thereof, file the same in the registry (*b*).

If there is reason to believe that the property will be removed out of the jurisdiction of the Court before the warrant can be served, the proctor may, with the warrant, take out, at his party's expense, a detainer. Such detainer may be served by the proctor, his clerk, or agent; and shall not continue in force for more than three days from the date

(*a*) Rule 5.
(*b*) Rules, 8—14.

thereof, exclusive of the day of such date, nor after service of the warrant (*a*).

If, when any property is under arrest of the Court, a second or subsequent cause is instituted against the same property, it is not necessary to take out a second warrant for the further arrest thereof; but the proctor in such second or subsequent cause may, on filing in the registry a *præcipe* and an affidavit, take out a citation *in rem*, and cause a *caveat* against the release of the property to be entered in the "Caveat Release book" of the Court (*b*).

Effect of letting case go by default.

The owner of the property arrested must either suffer the cause to go by default; in which case the plaintiff will still be required to bring forward his proofs, and can then obtain a judgment which will be enforced as against the property under seizure (*c*); or else enter an appearance through a proctor. The appearance may either be entered absolutely, or, if it is wished to object to the jurisdiction of the Court, under protest (*d*). The appearance must, under a certain penalty as to costs, be entered within six days of the service of the warrant (*e*).

Time for entering appearance.

Of appearance under protest.

After appearance entered absolutely, it is too late to raise a mere formal or technical objection to

(*a*) Rule 15.
(*b*) Rules 16, 17.
(*c*) Rules 33, 34
(*d*) Rule 37.
(*e*) Rule 38.

the jurisdiction of the Court; as, that certain formalities required by the Merchant Shipping Act have not been complied with (*a*). It is otherwise, however, if the objection is of a substantial character. Thus, where a question was raised as to the jurisdiction of the Court when the collision was between two foreign ships in the river Danube, Dr. Lushington did not refuse to entertain it even after an absolute appearance. "It is usually convenient," said the learned Judge, "to take objection to the jurisdiction at the earliest moment, and the Court is unwilling to entertain petty objections to an Act on petition; but the defendant may delay raising an important objection to the jurisdiction until the facts are stated in the Act on petition (*b*).

It may here be mentioned that a judgment either *in rem* or *in personam*, given by a Court having competent jurisdiction, will be held a bar to proceedings in the Admiralty Court; though it is otherwise if the Court have had no proper jurisdiction,—*e. g.*, if it be a Prussian Consular Court at Constantinople dealing with a British subject (*c*).

After appearance entered absolutely, and judgment given for the plaintiff, it is too late for the defendant to raise the objection that the plaintiff is not the party entitled to receive the damages, not having been, at the time of the collision, the registered owner of the ship: but in such a case

(*a*) *Bilbao*, 1 Lush. 152.
(*b*) *Ida*, 1 Lush. 8.
(*c*) *Griefswald*, Swab. 435.

the Court will provide that substantial justice be done, by directing that the amount of damages be paid into the registry, and not taken out thence but by the party who shall prove himself to be lawfully entitled to it (*a*).

Appearance. Bail. Regulations as to.

The next step to be taken is, to obtain the release of the property, if such be the desire of the owners of it, on the giving of satisfactory security for the demands made on it. The security usually taken for this purpose consists of bail, entered into by sufficient sureties. The sufficiency of the persons offering bail is to be determined by the Marshal of the Court, who is to make a report to that effect. A bail bond, signed by the sureties, is to be deposited in the registry, after a notice of twenty-four hours shall have been given to the adverse proctor. When these formalities have been complied with, an instrument called a release will be issued from the registry; on the production of which the Marshal will release the property. If, however, for any reason, one of the parties in the suit shall desire to prevent the immediate release of any property under arrest, he may do so, under certain regulations, and at his own risk, by causing a *caveat* against the release to be entered in the registry (*b*).

On the subject of bail, there have been the following decisions:—

Extent of liability of sureties.

The liability of sureties in a collision suit, where

(*a*) *Ilos*, Swab. 100.
(*b*) Rules, 39—61.

by statute the liability of the owner is limited to a sum which may be less than the amount of damage sustained,—*e. g.*, to £8 per register ton,—does not exceed that limit, even though bail may in the first instance have been given to a larger amount (*a*).

After arrest and bail given, the ship cannot be again arrested, or further bail required, merely on the ground that the damages are found to be greater than were at first supposed (*b*).

Effect of allowing time to a principal.

If, without the assent of the sureties, time shall have been given to the principal, instead of enforcing the demand when due, and if the principal subsequently fail, recourse cannot be had to the sureties. And, in such a case, the question is not whether the surety's position have in fact been damnified by the delay, but whether it might have been (*c*).

A ship's husband has authority to give bail in a collision suit, so as to bind his co-owners (*d*).

When bail has been given to an insufficient amount, the sureties are liable for no more than the amount of bail, but the owner of the ship in fault may be liable up to the real damages, or to the amount to which his liability is limited by law (*e*).

Of security to meet cross-action.

There is a case in which this method of procedure

(*a*) *Duchesse de Brabant*, Swab. 264; *Richmond*, 3 Hagg. 431.
(*b*) *Kalamazoo*, 15 Jurist, 885.
(*c*) *Harriett*, 1 W. Rob. 201.
(*d*) *Barker* v. *Highley*, 11 Weekly Reporter, 968.
(*e*) *Mellona*, 3 W. Rob. 22.

by arrest and bail, taken by itself, is inadequate to the rendering of equal justice; and that is, when, of two colliding ships, concerning which it must before trial be uncertain which is the one in fault, or whether both are, one is within the reach of Admiralty process, and the other is either sunk in the collision or for any other reason cannot be got hold of. To remedy this unfairness, the Court of Admiralty is accustomed, when one ship is sunk and the other is proceeded against, to require, before admitting the case for trial, that bail shall first be given by the claimant to meet any cross action (*a*). And this case is now specially provided for by s. 34 of the Admiralty Court Extension Act, 1861 (*b*), which enacts that "the High Court of Admiralty may, on the application of the defendant in any cause of damage, and on his instituting a cross cause for the damage sustained by him in respect of the same collision, direct that the principal cause and the cross cause be heard at the same time and upon the same evidence; and if in the principal cause the ship of the defendant has been arrested or security given by him to answer judgment, and in the cross cause the ship of the plaintiff cannot be arrested, and security has not been given to answer judgment therein, the Court may, if it think fit, suspend the proceedings in the principal cause, until security has been given to answer judgment in a cross cause."

(*a*) *Johann Friederich*, 1 W. Rob. 39.
(*b*) 24 Vict. c. 10.

The Admiralty Court will exercise the power thus given, even against a British owner residing within the jurisdiction and in solvent circumstances. "At present," said the learned Judge, "the two parties stand in different and very unequal positions; the one has proved substantial security, the other has only the personal responsibility of his opponent, which may or might prove worthless. The intention of the Act was, to put the two contending parties on a fair footing (*a*)."

Security for costs.

Security for costs must be given in suits by foreigners (*b*); but must be applied for, if at all, at an early stage of the proceedings (*c*).

In a case where a cross action once commenced had been dropped, and when it was held by the Court that both vessels were in fault, it was decreed that the half-damages of the one ship should not be paid over until the owner of that ship had consented to make good the half-damages of the other (*d*).

The property and the parties having thus been brought before the Court, the step next in order is, the setting forth of the case on either side by pleadings. Under this head it is unnecessary to refer to the ancient methods of pleading in Admiralty, further than to mention that there were two; the more solemn and elaborate method,

(*a*) *Cameo*, 1 Lush. 408.
(*b*) *Sophie*, 1 W. Rob. 326.
(*c*) *Volant*, 1 W. Rob. 383.
(*d*) *Seringapatam*, 3 W. Rob. 44.

resorted to in cases of importance, being called the way of "plea and proof," and the more compendious and less expensive method that of "act on petition." Both these methods are now abolished, and the course to be taken is defined in the Rules of 1859.

Preliminary acts.

Before any pleading is given in, each proctor is to file a document, to be called a Preliminary Act, which shall contain a statement of the following particulars:—1st, the names of the vessels which come into collision, and the names of their masters; 2nd, the time of the collision; 3rd, the place of the collision; 4th, the direction of the wind; 5th, the state of the weather; 6th, the state and force of the tide; 7th, the course and speed of the vessel when the other was first seen; 8th, the lights, if any, carried by her; 9th, the distance and bearing of the other vessel when first seen; 10th, the lights, if any, of the other vessel which were first seen; 11th, whether any lights of the other vessel, other than those first seen, came into view before the collision; 12th, what measures were taken, and when, to avoid the collision; 13th, the parts of each vessel which first came in contact. The Preliminary Acts are to be delivered into the registry sealed up, and are not to be opened, save by order of the Judge, until the proofs are filed. If both parties shall consent, the Judge may, if he think fit, order the Preliminary Acts to be opened and the evidence to be taken thereon, without its being necessary to file any pleadings.

The facts stated in the Preliminary Act are not

to be subsequently departed from (*a*); nor can a mistake therein be corrected, unless upon immediate application to the Court, fortified by affidavit (*b*).

Pleadings.

There is now only one mode of pleading in the Court. The first pleading is to be called the Petition, the second the Answer, the third the Reply, and the fourth the Rejoinder. Each pleading is to be divided into short paragraphs, numbered consecutively, which are called the Articles of the pleadings, and are to contain brief statements of the facts material to the issue (*c*).

Principle, all facts relied on must be set out from the outset.

The principle of pleading in the Admiralty Court is, that the whole of the facts, intended to be relied upon on either side, should be set forth from the outset; and the reason for this is given by Sir J. Nicholl, in the case of the *Gladiator* (*d*). "The jurisdiction of the Admiralty Court," said the learned Judge, "is summary and *de plano*, and proceeds at once to the whole facts of a case. . . . If proceedings be stopped by a preliminary objection and by splitting the defence, the foreign vessel may quit the country, and there may be a loss of witnesses." On this ground, the Court refused to allow a protest tendered against a collision suit, on the ground that it was not alleged in the petition that the collision was owing to other persons on

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(*a*) *Inflexible*, Swab. 33.
(*b*) *Vortigern*, Swab. 518.
(*c*) Rules, 65—77.
(*d*) 3 Hagg. 343.

board and not the pilot; and required that a full answer should be put in.

What facts should be set forth.

All the essential particulars of the defence, the wind, the pace, the tack, the course, the sails set, and the place where struck, should be set forth in the defence (*a*). So of the attack: the pleadings should embody all the essential facts (*b*). A material fact, stated in the petition, and not denied in the answer, is to be taken as proved (*c*). The defence "pilot on board" should be put in the pleadings; yet, if not put, may be set up (*d*). Irrelevant matter, which might affect the minds of the Trinity Masters, must be struck out from the pleadings, before the papers are printed and placed in the Trinity Masters' hands (*e*). The petition is invariably delivered to the defendant, so as to give him time to shape his defence (*f*). The pleadings should be confined to the merits of the collision, and should not set forth special damages, as the payment of salvage, and the like (*g*). Whenever facts not pleaded have been allowed to be given in proof, it is because they were such of which the party pleading was necessarily ignorant at the time (*h*). A breach of statute, if relied on, should

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(*a*) *Virgil*, 2 W. Rob. 204.
(*b*) *Ebenezer*, 2 W. Rob. 209.
(*c*) *Switzerland*, 2 W. Rob. 484.
(*d*) *Canadian*, 1 W. Rob. 343.
(*e*) *Neptunus*, Swab. 297.
(*f*) *Ebenezer*, 2 W. Rob. 210.
(*g*) *George Arkle*, 1 Lush. 223.
(*h*) *Bothnia*, 1 Lush. 53; *East Lothian*, 1 Lush. 244.

be specifically pleaded (*a*). The plaintiff, in his reply to facts pleaded by the defendant, may introduce a new statement of fact, if it be really a matter of reply, and not properly a part of his original case (*b*).

Court proceeds *secundum allegata et probata.*

The Court will proceed *secundum allegata et probata*, even though a failure of substantial justice in the particular case be the result. Thus, where it was alleged in the petition that the vessel proceeded against was in fault for starboarding her helm, and it was proved that she was in fault for not keeping a sufficient look-out, but that in fact she did not starboard her helm, the plaintiff was not allowed to recover (*c*). The principle of this decision was adopted in Privy Council, in the case of the *Ann* (*d*). "There is no hardship or injustice," said Lord Chelmsford, in giving judgment, "in adhering strictly to this rule against the complainant, for he knows the nature of the wrong for which he seeks a remedy, and can easily state it with precision and accuracy. But great inconvenience would follow to the opposite party unless this strictness were required, because he might constantly be exposed to the disadvantage of having prepared himself to meet one set of facts, and of finding himself suddenly and unexpectedly confronted by another totally different."

(*a*) *Bothnia*, 1 Lush. 54.
(*b*) *Bothnia*, 1 Lush. 53.
(*c*) *North American*, Swab. 358.
(*d*) 1 Lush. 56.

This rule applies only to the side on which lies the *onus probandi*.

This rule, however, applies only to the plaintiff's case, not to that of the defendants; for the reason of the rule applies only to the party on whom lies the burden of proof. An erroneous allegation of the mode in which the injury occurred, made by way of answer to a libel, does not narrow the issue down to the particular fact alleged, so as to entitle the complaining party to recover, if the proof of it should fail. He must rely upon the establishment of his own case, and not upon the failure of his adversary; and must succeed upon the truth of his own allegation, or not at all (*a*).

Effect of admissions in pleadings.

Admissions in pleadings are conclusive as to matters of fact, but not as to matters of law, such as legal inferences to be drawn from those facts. This appears conclusively settled by the decisions in the cases of the *Peerless* (*b*), and the *Killarney* (*c*); although in the previous case of the *Seine* (*d*), Dr. Lushington complained of the conduct of a party to a suit in raising a point of law that was not stated in the pleadings, and made the fact of its not having been so stated, one of the grounds on which he pronounced against the party who had raised it.

Consolidation of actions.

When several actions have been brought in respect of the same collision, *e.g.*, one by the owner of the ship sunk in a collision, another by the

(*a*) *East Lothian*, 1 Lush. 249.
(*b*) 1 Lush. 113, in P. C.
(*c*) 1 Lush. 431.
(*d*) Swab. 413.

owner of the cargo on board, and another for the loss of the crew's effects, the Court will order them to be consolidated, so as to save expense. This is done as a matter of course, whenever the decision of each action must depend on precisely the same facts. After judgment given, the Court has power to order a disseverance of the actions, so that the proceedings in Registry, with reference to the amount of damages, may be taken separately. It appears, however, that it is not the common practice to dissever actions once consolidated, and it will not be done unless due cause be shown, to the satisfaction of the Court. Application for this purpose should be made before a case is carried by appeal to the Judicial Committee; as it may not be in the power of the Admiralty Court to order a disseverance after a case has been remitted back from that Committee in the ordinary form (*a*).

Cross actions.

In collision suits, when both the ships are damaged, the party proceeded against may himself be a claimant in respect of the same collision. In order to save the expense of two distinct actions, the course adopted in the Admiralty Court is the instituting of what is termed a cross-action. Before the evidence is taken, the original action and the cross-action are consolidated. Both causes are tried upon the same evidence (*b*). It does not follow, however, that the party defeated in the one action must be victorious in the other; because questions

(*a*) *William Hutt*, 1 Lush. 27.
(*b*) *Vortigern*, Swab. 519.

of *onus probandi* may complicate the result (*a*). It is not compulsory on the defendants to institute a cross-action; when he has not done so, should the judgment in the original action be either wholly or in part in favour of the defendant, he may afterwards bring his action (*b*). It is practicable, it appears, by simply entering an appearance and then taking no further steps, for the plaintiff in the cross-action to lie by, till after the original action has been determined, and then to go in separately, bringing additional evidence (*c*).

Proofs.

Next in order to questions concerning pleading come those which relate to the giving of evidence in support of the allegations contained in the pleadings.

Introduction of *vivâ voce* evidence.

Formerly, the course adopted in the Court of Admiralty was, to receive all the evidence in a written form, by affidavit or deposition. But, by the Act 3 & 4 Vict. c. 65, the practice of this Court was so far assimilated to that of the Common Law courts as to admit, though not to compel, the admission of *vivâ voce* evidence. The reason why this best method of eliciting the truth was not made compulsory is, no doubt, that in Admiralty suits the witnesses are for the most part seamen, who cannot be detained on shore for a length of time except at an expense which would be unreasonably burthensome on the suitors. The Act

The different kinds of evidence admissible by statute.

(*a*) *Vortigern*, Swab. 519.
(*b*) *Calypso*, Swab. 28.
(*c*) *North American*, 1 Lush. 80.

accordingly gives power to the Court of Admiralty either (*a*) to direct a trial by jury of any contested issue on a question of fact, or (*b*) to summon before it and examine witnesses by word of mouth, or (*c*) to appoint a commissioner with power thus to examine witnesses, upon oath, in the presence of the parties or their counsel, who shall have the right to examine, cross-examine, and re-examine, after which the commissioner is to transmit the evidence thus obtained to the Court. The same statute (*d*) gives power to the Judge of the Court to make Rules for the practice and procedure in his Court, subject to the confirmation of Her Majesty in Council.

The Rules now in force, under this authority, are, as respects the giving in of proofs, as follows :—

Rules as to the taking of evidence.

Causes may be proved by affidavits, by written depositions, or by the oral examination of witnesses in open Court, or partly by one mode, partly by another. The proctors in the cause may consent to the mode or modes in which the proofs shall be taken; or either proctor may apply to the Judge to direct which mode is to be adopted. Either proctor may apply to the Judge to fix a time within which all the written proofs shall be filed, after which time nothing can be admitted save by permission of the Judge. Either proctor in the cause may apply to the Judge to order the

(*a*) Section 11.
(*b*) Section 7.
(*c*) Section 8.
(*d*) Section 18.

attendance of any witness for examination *vivâ voce* at the hearing, although the witness may have already made an affidavit or been examined before an examiner or commissioner. Affidavits must be sworn before some person other than a party in the cause, and there are some detailed regulations for securing clearness and accuracy. Written depositions may be taken either before an examiner of the Court or before a commissioner appointed by a commission. Provision is made that before a witness is examined in order to take down his deposition a sufficient notice shall be given to the adverse proctor; and the witness is liable to cross and re-examination by counsel on either side or by the proctors or their substitutes. The examination in chief may, on the application of the proctor producing the witness, be conducted by the examiner or commissioner himself. In any case, the examiner or commissioner may put any questions to the witnesses for the purpose of eliciting the truth, as to him shall seem fit. The depositions are to be signed, certified by the examiner or commissioner, and filed in the registry of the Court (*a*).

If the evidence is to be taken orally, the preliminary acts must have been exchanged before the evidence can be taken (*b*).

Admissibility of evidence.

The protest of a master and seaman is not admissible as evidence (*c*); nor are proceedings under

(*a*) Rules, 78—95.
(*b*) *Ruby Queen*, 1 Lush. 266.
(*c*) *Betsey Caines*, 2 Hagg. 28.

a Board of Trade enquiry (*a*); nor, that a Pilot Committee had exonerated the pilot (*b*), nor, again, such matters of hearsay as, that the pilot told a sailor that the fault was not his but the crew's (*c*). It has been decided that the captain's confession of being in fault may be pleaded, he being the agent of the owner in the navigation of the vessel (*d*); it has also been decided that admissions to a like effect, in conversation, made by the crew, are not admissible as evidence (*e*). The crew, though interested parties, *e.g.*, when sailing on shares, are admissible witnesses, as no other evidence is to be had in these cases (*f*). The Court discourages the attempting to get evidence out of the crew of the hostile ship (*g*). The Court, it has been said, proceeds *levato velo*, and therefore is not difficult as to the kind of evidence sent from abroad (*h*).

The exclusion of extra-articulate evidence, when such evidence is material to the issue, will be discouraged by the Court; the Court will not shut its eyes to the truth; but, if the opposite party has been surprised, and desires an opportunity of meeting such evidence, the Court will give leave to counterplead and produce evidence on the counterplea (*i*).

(*a*) *Mangerson*, Swab. 122; *City of London*, Swab. 246.
(*b*) *Lord Seaton*, 2 W. Rob. 393.
(*c*) S. C. 392.
(*d*) *Manchester*, 1 W. Rob. 62.
(*e*) *Foyle*, 1 Lush. 10.
(*f*) *Catherine of Dover*, 2 Hagg. 145.
(*g*) *Commerce*, 3 W. Rob. 295.
(*h*) *Peerless*, 1 Lush. 41.
(*i*) *Schwalbe*, Swab. 523.

Where witnesses are examined *vivâ voce*, this is to be conducted as in Common Law Courts, by examination in chief and cross-examining (*a*). Where the crew of one ship are absent, the Court will allow those of the other ship to be examined and cross-examined, if they are going to sea, but will adjourn the case till they can hear both sides (*b*).

Where two collisions have been pleaded, the rule as to *allegata et probata* is satisfied when the first is proved, and that the other ship was in fault for it, and that the whole damage claimed was done by it; the plaintiff needs not to go into proof as to the second (*c*).

Onus probandi.

It may not be out of place here to insert two or three miscellaneous decisions bearing upon the question on which side lies the *onus probandi*, to show that the other is in the wrong.

Where, by the rules of the sea, it is the duty of one vessel to hold on her course, and of the other to make way, the *onus probandi* lies with the latter, to show that she has made way, and in the proper manner. Thus, a vessel with the wind free meeting one closehauled (*d*), or, of two closehauled vessels, that on the port tack (*e*), or a steamer meeting a sailing vessel (*f*), has the burden of such proof

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(*a*) *Glory*, 3 W. Rob. 187.
(*b*) *Chance*, Swab. 294.
(*c*) *Despatch*, 1 Lush. 98.
(*d*) *Baron Holberg*, 3 Hagg. 215.
(*e*) *Mary Stewart*, 2 W. R. 245.
(*f*) *Emma*, 10 Mitch. 399.

thrown upon her. And, generally, any vessel which has departed from the rules is so far primarily to blame that it rests with her to make out a justification, if she can (*a*). In the absence of proof, or in case of violent and equal conflict of testimony, the presumption is always in favour of a master's having acted rightly (*b*). If the evidence is so conflicting that the Trinity Masters are unable to say on which side the truth lies, the result might be that neither side would recover; for, to recover, the right must be made out affirmatively (*c*).

The hearing and decree.

In the hearing of the case, the Court is assisted, in case of need, by Trinity Masters, who act as assessors or nautical advisers, to pronounce opinions on questions of fact which involve nautical skill or technical knowledge concerning matters of navigation. Such questions as the propriety of letting go a second anchor under given circumstances, or of anchoring in a particular place, are for the Trinity Masters (*d*). The Trinity Masters are paid by fees, and the employment of them is optional; either party, however, may require the attendance of Trinity Masters, if the case involve technical points.

Trinity Masters.

A decree once made may in exceptional cases be varied; so far as to alter an error arising from defect of knowledge or information upon a parti-

(*a*) *Columbine*, 2 W. Rob. 30.
(*b*) *Mary Stewart*, 2 W. Rob. 246.
(*c*) *Speed*, 2 W. Rob. 228.
(*d*) *Volcano*, 2 W. Rob. 344.

cular point; provided such error be instantly noticed and brought to the attention of the Court with the utmost possible diligence (*a*).

Reference to registrar and merchants.

After decree made, if no appeal be entered, the case is ordinarily remitted to the Registrar and merchants to determine the amount of damage. The Registrar is assisted by one or two merchants, official persons who are supposed to possess the technical knowledge requisite for investigating matters of account, affecting the values of different kinds of property, the cost of repairing a ship, and the like. The Registrar and merchants constitute a species of Court, and are to proceed, not *meri arbitrii*, but upon evidence; and their mode of dealing with such evidence will be criticised, and if necessary overruled by the Court of Admiralty (*b*). In investigating accounts for repairs, they are not to confine themselves to the captain's protest and the surveys; but are at liberty, and indeed are bound, to obtain the best evidence that the case admits of (*c*). In case of need, they should, and habitually do, call in the assistance of shipwrights or persons accustomed to shipbuilding (*d*). One important rule has been laid down by the Court for their guidance; namely, that whenever the owner of a ship, while repairing collision damages, takes the opportunity of making additional repairs

(*a*) *Monarch*, 1 W. Rob. 27.
(*b*) *Alfred*, 3 W. Rob. 235.
(*c*) *Ibid.* 236, 237.
(*d*) S. C. 236.

for his own benefit, the deduction from the claim which is to be made on that account is not to exceed the increase in the total cost of repairing, over and above what the cost would have been had the repair been confined to the collision damage. It frequently happens, for example, that the collision damage can only be repaired in a graving dock, and that the alterations or owner's repairs can only be done in a graving dock; but that both can be done without any greater delay in the graving dock than the collision damage singly would have necessitated. In such a case the entire cost of the graving dock is to be treated as part of the collision damage, and the owner thus gains an incidental benefit free of charge. This springs out of the principle of *restitutio in integrum* (*a*).

Claims for demurrage, made in the Registry, must be sustained by proof of actual loss (*b*).

The judgment of the Registrar and merchants takes the form of a Report to the Admiralty Court, and it is open to either side, if dissatisfied, to raise objections to that Report. The Court will not reverse the Registrar's decision in a case of doubt (*c*); but, if satisfied, will not refuse to reverse it even on matters of mere detail, as, by allowing a larger portion of a blacksmith's bill (*d*).

(*a*) S. C. 238, 239.
(*b*) *Clarence*, 3 W. Rob. 285.
(*c*) *Clyde*, Swab. 25.
(*d*) *Alfred*, 3 W. Rob. 242.

In appeals from the Registry, fresh evidence is admissible (*a*).

We may now pass on to the subject of Appeals from the Admiralty Court.

Appeals.

An appeal lies from the High Court of Admiralty to the Judicial Committee of Privy Council. The time for appealing is by practice limited to fifteen days after the making of the decree; but the Court may grant an extension. It has been decided that neither the statutes of Hen. VIII. (*b*), which regulate appeals in matters ecclesiastical, nor the rule of the civil law, which limits the time of appealing to ten days, are applicable to appeals of this kind (*c*). An appeal may be instituted after an offer has been made by the appellant to pay a lump sum as damages, which offer has not been accepted (*d*).

Before reversing a decree, the Judicial Committee hold it necessary, not merely to entertain doubts, but to be satisfied that the judgment was wrong (*e*). In giving judgment, wherever matters requiring nautical skill are involved, the Judicial Committee is assisted by Nautical Assessors, who perform the functions which in the Admiralty Court are exercised by the Trinity Masters. On questions purely nautical, the Judicial Committee, though reluctant,

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(*a*) *Iron Master*, Swab. 442.
(*b*) 24th, c. 12, and 25th, c. 19.
(*c*) *Mœander*, 1 Lush. 530.
(*d*) *Ulster*, 1 Lush. 426.
(*e*) *Julia*, 1 Lush. 235.

will not refuse to reverse the decisions of the Trinity Masters on the judgment of their own Nautical Assessors (*a*).

Appeals determined upon the original evidence.

Appeals are determined upon the original evidence, the written proofs filed in the registry being transmitted to the registry of the Court of Appeal, together with the shorthand writer's certified report of the evidence taken orally.

After appeal, the practice is for the Judicial Committee to remit the case back to the Admiralty Court, to determine the amount of damages (*b*).

Costs.

The costs, in collision causes, usually follow the event. When both ships are pronounced in fault, the rule is that each party pays his own costs (*c*). It is to observed, however, that the Admiralty Court exercises an enlarged equity in the matter of costs; and, in all cases involving questions *primæ impressionis*, or such questions as from their doubtful character are fair subjects for litigation, its disposition has been to let each party bear their own. Where there are difficulties in the case, which might mislead, costs will not be given (*d*). In one case, costs were refused on the ground that the captain had not stopped, when he might have done so, to save a drowning man (*e*). In case of inevitable accident, costs are never given on either

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(*a*) *Navigator*, 8 Mitch. 1039.
(*b*) *Vaux* v. *Schaffer*, 8 E. F. Moo. 75.
(*c*) *Monarch*, 1 W. Rob. 26; *Eclipse*, 1 Lush. 423.
(*d*) *Ebenezer*, 2 W. Rob. 213.
(*e*) *St. Lawrence*, 14 Jurist, 534.

side (*a*). When the party actually in fault escapes liability on the ground that the fault was that of a compulsory pilot, costs will not ordinarily be given to him (*b*). The Court will discourage, by not giving costs, any unnecessarily expensive mode of proceeding, *e.g.*, the not bringing a cross-action (*c*). When a judgment of the Court of Admiralty is reversed by the Judicial Committee, costs will sometimes be given both as regards the proceedings in the Court below and in the Court of Appeal (*d*).

With regard to the costs of procedure in the Registry, it is the rule that, when more than one-third of the amount claimed has been struck off on account of overcharge or as not allowable, the costs are charged to the plaintiff; when less than a third and more than a fourth has been struck off, each party pays his own costs; and when the defendants have made an insufficient tender, they must pay the costs occasioned thereby (*e*). The rule, when one-third has been struck off, is applicable, though the deduction result simply from the decision of a purely legal question (*f*). These rules, however, do not apply to the costs of appeals from the Registry

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(*a*) *Itinerant*, 2 W. Rob. 244.

(*b*) *Montreal*, 17 Jurist, 538; *Temora*, 1 Lush. 23; *Johanna Stoll*, 1 Lush. 313. But see, *contra*, the *Castor*, 6 L T. N. S. 106.

(*c*) *Calypso*, Swab. 30.

(*d*) *East Lothian*, 1 Lush. 251.

(*e*) *Seine*, Swab. 513; *Nimrod*, 17 Jurist, 767; *Black Prince*, 1 Lush. 577.

(*f*) *Empress Eugénie*, 1 Lush. 141.

to the Court; these usually follow the event (*a*). In one case, however, though the Registrar's report was confirmed, yet the costs of appeal were allowed to the appellant, because the Court had doubts (*b*).

The Crown, it appears, neither gives nor takes costs (*c*). In one case, an opposite rule was followed (*d*), but this has been overruled by the subsequent decision in the Leda's case (*e*), in which the subject was fully gone into. The ground of this exemption is set forth at large in that judgment. At common law, it appears, no costs were recoverable from any party except in virtue of special statutes; and in the statute of Gloucester, by which costs were made recoverable, the Crown was not mentioned, and therefore it did not bind the Crown. The Court, thus having no power to enforce a decree condemning the Crown in costs, naturally declined to make such a decree, and therefore, from equitable considerations, rarely or never gave costs to the Crown. But when there are co-plaintiffs with the Crown,—*e. g.*, when a suit for collision damages has been instituted by the Crown jointly with the commander and officers of a Queen's ship, the Court will give costs against the latter (*f*).

(*a*) *Black Prince*, 1 Lush. 577.
(*b*) *Clyde*, Swab. 27.
(*c*) *Duke of Sussex*, 1 W. Rob. 274.
(*d*) *Swallow*, Swab. 32.
(*e*) *Leda*, 8 Mitch. 115.
(*f*) *Leda*, *ub. sup.*

Since either party to a collision suit has the right to have his witnesses examined orally, the expense of detaining foreign seamen or other foreigners in this country for that purpose are to be allowed as costs in the suit (*a*).

Effect of delay in bringing suit.

Before leaving this branch of the subject, it only remains to be added, that collision suits should be brought into Court within a reasonable time, while the evidence is still fresh and accessible. In a case where there was an interval of fully two years between the collision and the judgment, resulting from dilatoriness in commencing proceedings, Dr. Lushington said he had no authority to refuse to entertain any suit commenced within the period of time limited by law; but that, if he saw any unreasonable or improper delay, he would, in all cases, when the proof was not sufficiently clear to enable him to arrive at a satisfactory conclusion, consider that such delay in the proceedings raised a presumption against the party guilty of the laches, inasmuch as valuable and important evidence might have been lost in consequence thereof (*b*).

(*a*) *Karla*, 13 Weekly Reporter, 295.
(*b*) *Mellona*, 3 W. Rob. 10.

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THE END.

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