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ON THE EVIDENCE RECEIVABLE IN THE COURT OF ADMIRALTY.

ALTHOUGH the rules which are adopted in the courts at Westminster, apply equally to what is to be received or rejected as evidence in the Court of Admiralty, yet as the actors in those dramas, whose scenes furnish matter for that Court, stand so much aloof from the common experiences and familiar language of the world, their evidence is necessarily *sui generis*, and as also it is generally impossible to entrap the witness who can give it into a sojourn on shore, sufficiently protracted to allow any great degree of regularity of examination, the forms by which their evidence may be caught up, and its evanescence preserved, must be various and multiform. We cannot feel surprised, therefore, at finding that the Court of Admiralty, acting in a catholic and comprehensive spirit, will embrace and receive evidence given in shapes which any other Court, by obeying the narrower spirit of its institution, would be compelled to reject or disallow.

What these various forms are in which the essential evidence can be contained, it may be interesting to trace.

They may be classified somewhat after this manner, viz., in the foremost place,—

Proofs taken according to the strict rules, and under the proper authority of the Court.

In the first subdivision of this class, are the depositions of witnesses examined in chief upon a libel, or on an allegation, and cross-examined on interrogatories by the opposite side.

These depositions are taken precisely upon the same principles, and by the identical method pursued in the superior Ecclesiastical Courts.

The Court of Admiralty, like the Common Law Courts, allows witnesses, under certain regulations, to be contradicted, and in so doing, it is governed by the same rules which regulate contradictions in the other courts.

Like the contradictions at Common Law, they must neither be foreign or collateral to the issue, nor merely concern the general credit of the witnesses; but at the same time that they are positive and unequivocal contradictions, they must bear directly upon, or be relevant and material to the issue in the cause.[1] Moreover, they must not be the issue itself, for in that case they would have been pleadable, and must have been pleaded before publication.[2]

Here, the reader will see, the peculiar formula of the Civil Law Courts intervenes. By that formula, the witnesses are examined in chief, and on cross-interrogatories on each pleading (libel, responsive allegation, and rejoinder), as it is successively given in; and as these pleadings together contain the issue, the evidence so taken is not seen by the parties in the cause until the pleadings which contain the issue, as I have said, are completed. In the technical words of the Court itself, the principal cause is then concluded; and if on the evidence being seen, opportunities for contradiction arise, they must then and then only, be made. These contradictions are called exceptions, and are embodied in what is

[1] Sergeant *vs.* Sergeant, 1 Curt. 5, 6; Trevanion *vs.* Trevanion, 1 Curt. 423, 426, 429, 430, 490—492; Whish and Woollett *vs.* Hesse, 3 Hagg. 682; Browne *vs.* Browne, 7 Notes, 396; Maclean *vs.* Maclean, 2 Hagg. 604; Keating *vs.* Brooks, 9 Jur. 216; Burgoyne *vs.* Tree, 2 Hagg. 482; Verelst *vs.* Verelst, 2 Phil. 147; Rep. Eccl. Com. 18.

[2] Trevanion *vs.* Trevanion, 1 Curt 424, 425; Kenrick *vs.* Kenrick, 4 Hagg. 128; Keating *vs.* Brooks, 9 Jur. 216; Rep. Eccl. Com. 18.

termed an exceptive[1] allegation. But facts discrediting a witness (though known before publication) may be pleaded, after it has passed, in an exceptive allegation where the matter pleaded is a transaction "calculated to pervert the cause of justice,"[2] for in law the witness must have been cross-examined as to such a transaction, before he can be allowed to be contradicted.[3] In the Civil Law proceedings, therefore, the excepting party is compelled to wait until publication, before he can ascertain whether his questions have been negatived by the witness, thus rendering a contradiction necessary.

Whenever it appears after publication, that a witness produced to prove any part of the libel or allegation has, whether in chief or on cross-interrogatory, *unexpectedly* to the party producing him, negatived the facts which he was expected to prove, the Court will, in accordance with the rule of common Law, and in order that a party shall not be sacrificed to his witness,[4] allow him, in case he has not previously examined witnesses to prove the same facts, to examine any other witnesses whom he may think fit to call, in order to establish that part of the libel or allegation, notwithstanding publication has passed.[5]

There is also another case in which contradictions may be made, and here it may be best to use the words of Dr. Lushington :—

"Suppose a witness examined in the cause, accidentally may have deposed to matter which may be considered in one light extraneous to the plea, or in an answer to an interrogatory, the contents of which, the parties who produced the witnesses could by no possibility tell, if any answer came entirely unexpectedly, it would be consistent with the demands of justice, and within the power of the Court, to allow an allegation to be given, not in exception to

[1] This word "exception" seems a strange and untechnical word; but it is ancient, and therefore "*magni stat nominis umbra.*"

[2] Browne *vs.* Browne, 7 Notes, 395.

[3] 2 Philips, c. 9, s. 3, p. 436.

[4] *Ibid.* 447.

[5] Lochlibo, 14 Jur. 792—794; Bayley *vs.* Sayers, 3 Notes, 22; Young and Smith *vs.* Richards, 2 Curt. 37.

the witnesses, but in contradiction to the facts which have so unexpectedly come up."[1]

Answers of a party in the suit to a libel or allegation, form another element of evidence. The same rules govern their reception and use in the Civil Law Courts as in the Courts of Equity.

They only become evidence when read by the adverse party, and it is therefore at his option to make them so or not.[2]

The whole of an answer to an article, or sub-division of a libel or allegation, must be read, and even the answer to a preceding or following article must be also read conjointly with the other answer, if it be in *pari materia*, or on the same subject.[3]

The doctrine that allegations pleaded by a party in a suit, though not evidence for him, may be received as admissions on his part, and therefore as evidence against him, has always obtained in the Civil Law Courts, although doubts have been entertained elsewhere.[4]

In *Grant* vs. *Grant*, before the Judicial Committee, Dr. Lushington said,[5]—

"It is the universal rule of the Courts in Doctors' Commons, *qui ponit fatetur*, that he who sets up a plea must be bound by the words of that plea."

Dr. Lushington, in the same case, also proceeded to say,—

"This principle does not apply with the same strength to the framing of interrogatories (*i. e.* cross-interrogatories), because, in

[1] Lochlibo, *ibid.* By the Civil Law, if a material fact has been pleaded without such specification as will enable the party to apply his defence to it by way of counter-plea, and he is therefore in some degree taken by surprise on the particulars stated in the depositions of the witnesses, the Court will, for the purposes of just defence, allow a contradictory allegation to be brought in (Evans *vs.* Evans, 1 Hagg. Cons. Rep. 101). This case can scarcely, if ever, occur in maritime cases, where the system of general pleading,—*e. g.* a testator's habits of life, constant dalliances between an adulteress and her paramour, &c., as in testamentary or matrimonial cases,—is not applicable; but the rule is analogous.

[2] Oliver *vs.* Heathcote, 2 Addams, 41.

[3] Geils *vs.* Geils, 6 Notes, 100; 11 Jur. 1089; Oliver *vs.* Heathcote, *ante.*

[4] Philips (1, c. 7, pp. 371, 372) observes, "The investigation of truth would probably be best promoted by receiving the evidence."

[5] 7 Monthly Law Magazine, 122.

many instances, those interrogatories are mere suggestions for the purpose of trying the credit of the witness, whether he will contradict himself; but it does apply in a certain degree and to a certain extent, where an interrogatory is framed upon that which is entirely within the knowledge of the party, because it can never be permitted in framing interrogatories, that a party should be permitted to suggest falsehood in the case."

The Court has also established a principle of its own, bearing on the same subject. In the *Glasgow Packet*,[1] Dr. Lushington said,—

"The principle of pleading by act on petition, requires that every important matter which is intended to be denied, should be expressly negatived; and in conformity with this principle, when a fact is averred, and there is no contradiction of that fact, the Court will, *primâ facie*, assume such an averment to be true."

When a suit in the Admiralty (which by the nature of its proceedings makes the *res*, and not its owner, the party in the first instance) is undefended, owing to the non-appearance of the owner, the Court feels it incumbent upon itself to be cautious in accepting the evidence offered to it, in order to ground its orders and decrees. The Court, therefore, in support of any *ex parte* order or decree, requires all affidavits to be sworn before its own surrogate or its own special commissioner.[2] In cases of salvage, it is easy to understand that the value of the vessel salved is one of the salient points, for the reward of the salvors will be proportioned to the worth of the property salved.[3] But as this value cannot be always agreed upon between the litigant parties, the Court will step in wherever the salvor does not acquiesce in the owner's estimate, and will itself, in order to stay disputation, appraise the *res* by its own marshal or commissioner. The value thus ascertained is unimpeachable, unless it can be shown that the finding of the marshal or commissioner is contrary to law and justice.[4] Therefore,

[1] 2 W. Rob. 308; Armadillo, 1 W. Rob. 257. [2] Sylvan, 2 Hagg. 155.

[3] Persian, 1 Notes of Cases, 305; Mellona, 6 Notes, 69.

[4] Persian, *ante;* Mellona, *ante.* Should the *res* be subsequently *sold* for a higher or lower price, the Court will not take any notice of that fact in making its adjudication of salvage (Betsey, 5 C. Rob. 296; and *ibid* in note, the Yonge Bashan).

although bail be given to the action, the *res* will not be suffered to leave the hands of the Court until the value has been ascertained satisfactorily to the plaintiff or salvors.

The same proceeding is adopted in cases of damage, where the vessel causing the damage is alleged by her owners to come short of the amount claimed for such damage. As the plaintiffs can by law only recover the value of the *res*, it is imperative upon them to satisfy themselves upon that point, before the *res* slips away from the arrest of the Court.

And in an undefended case, before the Court will decree the sale of a *res*, it will have it first appraised by the marshal or commissioner, in order that as that value shall be a reserved price, the *res* may be sold fairly and advantageously for the creditors.

The Court of Admiralty does not itself, in the first instance, deal with matter of account, such as a balance of wages, the *quantum* of damage sustained by a vessel and cargo, the amount of actual injury or consequential loss sustained by a salving vessel; but refers all these questions to an official board, composed of its own registrar and two associated London merchants, or rather brokers, as the first may not be so easily obtained.[1]

This Board, it appears, examines the evidence laid before it, assesses the amount which it considers to be due, and reports that single fact to the Court, without stating the reasons and grounds of its conclusion.

This report, when it has been confirmed by the Court, is uncontrovertible evidence upon these points, respecting which, the reference has been directed.

The official merchants or brokers of the Admiralty, answer (though it must be owned they come far short of) "*les experts*" of the Code Napoleon.[2] But unlike the latter, they are unsworn, and therefore wholly unresponsible, morally and legally.

[1] Catherine, 11 Jur. 740; Catherina Anna Helena, 5 Monthly Law Magazine, 45. In our practice to Commissioners and Assessors.—Eds. Law Reg.

[2] Code de Commerce, b. 2, tit. 11, 12, s. 414. Although the "merchants" of our text answer to the "*experts*" of the French law, there is no comparison between the systems of the two nations. The English system is manifestly and outrageously faulty and incomplete; for not only are the "merchants" unsworn, and therefore

All depositions and answers must be sworn before a surrogate or a special commissioner of the Court, and, strictly speaking, all affidavits upon the merits of a contested case should be equally so taken. But the Court, in certain cases, where the deponents, inasmuch as they reside in the country, or at an outport, or abroad, cannot be sworn before a surrogate in London, will relax its rule, and will receive affidavits sworn before a justice of the peace, or a Master extraordinary in Chancery, or a foreign legal authority. But these affidavits, so sworn, can only be received in a contested case, and where the pleadings are by "act on petition."

What this form of proceeding is, it will therefore be convenient to consider. It is not (as Lord Stowell described it) a mode of proceeding "wherein the parties state their respective cases briefly,"[1] because this proceeding, being governed by the same rules as a libel or an allegation, must contain, where necessity requires it, as prolix a statement as the other forms.

But the real distinction between this and the other forms, and at the same time its correct definition, is, that it is a pleading that can be proved by affidavits and such proofs as are excepted in lieu of them, and therefore does not permit cross-examination and contradiction of witnesses,[2] or the answers of the parties to be taken.

morally and legally irresponsible, but they have not the power of compelling others to swear. By the Code de Procédure Civil, b. 2, tit. 40, s. 302, "Lorsqu'il y aura lieu à un rapport d'experts, il sera ordonné par un jugement, lequel énoncera clairement les objects de l'expertise." Le jugement qui aura ordonné le rapport, et les pièces nécessaires, seront remis aux experts; les parties pourront faire tels dires et requisitions qu'elles jugeront convenables" (s. 317). "Les experts dresseront un seul rapport; ils ne formeront qu'un seul avis à la pluralité de voix" (s. 318). "Si les juges ne trouvent point dans le rapport les éclaircissements suffisans ils pourront ordonner d'office une nouvelle expertise par un ou plusieurs experts, qu'ils nommeront également d'office, et qui pourront demander aux précédens experts les renseignemens qu'ils trouveront convenables" (s. 322). "Les juges ne sont point astreints à suivre l'avis des experts, si leur conviction s'y oppose" (s. 323). Our neighbors, therefore, possess a well-fenced and useful procedure.

[1] 2 Dodson, Ville de Varsovie, 184.

[2] The Court will even reject an affidavit impeaching the credibility of a witness (by affidavit), unless the merits of the case be so effected by the evidence of such person as to require the admission of the affidavit (H. M. S. Volcano, 3 Notes, 210).

Such a proceeding is necessarily summary and inexpensive, as the evidence is all in chief and voluntary.

If the deponents are sojourning in London, the surrogates of the Court of course take their affidavits; but if they must be sworn elsewhere, the tacit consent of both parties precludes the Court from objecting to receive these latter affidavits, though irregularly taken.[1]

Every reader, as well as concoctor of affidavits, knows that, while these documents are generally garbled, they are seldom entirely false. Though it would be too much to expect that witnesses under such an artificial system of narrating their testimony, should speak *Romane et severe*, yet as there are salient points in most cases which no cross-examination can successfully combat and overthrow, the Court by putting its finger upon them, will always be able to come to a conclusion more or less correct, and deal out to the parties substantial and moderate justice.

All the proofs hitherto mentioned, are taken judicially. But there are also documents taken *extra judicium*, which the Court admits as proof. Amongst the documents to be enumerated in this category, is the log-book. This document, though intimately connected with the matters at issue in every maritime suit, is not absolutely or generally admissible as evidence. It is not evidence in favor of a suitor who is the owner, or one of the crew of the vessel to which it appertains;[2] as such, it is of course inadmissible on the general principle, for, to use Lord Stowell's words in the Eleanor, "It may have been manufactured for the purpose."[3] But it can be made evidence of the most authentic kind against a suitor, whether he be plaintiff or defendant.

It is admissible to contradict the evidence of the mate or seaman

[1] Bui if the affidavits are sworn before a Master extraordinary in Chancery, all the forms required by that Court must be complied with in order to insure their reception (The Reward, 1 W. Rob. 176; and 10 Monthly Law Magazine, 59).

[2] Sociedade Feliz, 7 Notes of Cases, 292, 293; *Ibid.* 1 W. Rob. 311; Niemen, 1 Dod. 9; Zepherina, 1 Hagg. 318.

[3] 1 Edw. 163.

by whom it has been kept,[1] and it would seem that it can be equally made evidence to contradict the master, inasmuch as the entries must be made with his knowledge and privity, if not under his express directions. In the L'Etoile, Lord Stowell said, "They cannot be supposed to have given a false representation with a view to prejudice themselves."

It might seem to follow from these remarks, that the Court would not compel an unwilling party to bring in a log, as it can only be made evidence against him; but inasmuch as the Court regards it "as a document common to the Court," it will direct a log to be brought in, either on a special application from the other side,[2] or of its own mere motion, if a statement in the affidavits filed on the part of the vessel whose it is, raise a doubt or suspicion in the mind of the Court.[3] When the log has been thus brought in, it will of course be available for all or any purposes of the suit, and may be made evidence if practicable against its keepers or the vessel.

In cases of subtraction of wages, the seaman always obtains an order (as a matter of acknowledged right and common form) upon the owner to file the log in conjunction with the mariner's contract (or articles), and the other ship's papers, if any, and if this order fails to obtain it, a monition will be granted to enforce the production of all of them. As the Court in making the order, appears to treat the seaman's application as a right, it would seem to regard the document not only as common to the parties in the suit, but by coupling it with the mariner's contract, it would also seem to regard it as affording proof *ejusdem generis* with the former in the cause, probably as satisfactorily showing the nature and duration of the voyage, and the length of the seaman's services.

By the practice of the Admiralty Court, in order to make an entry in the log available as evidence against a party, it must be

[1] At the same time it is not to be otherwise wholly withheld from the suit; for the individual who has kept the log, when he comes to be examined, may refer to any entry therein for the purpose of refreshing his memory (Socied. Feliz, 7 Notes, 292; Eleanor, 1 Edw. 163; Zepherina, 1 Hagg. 318; L'Etoile, 2 Dod. 113; Malta, 2 Hagg. 158, note).

[2] Europa, 13 Jur. 856; Malta, 2 Hagg. 159, note.

[3] Anna, 5 C. Rob. 380, note.

pleaded, in order to give him the opportunity, by counter-pleading, to offer such explanation as he may find practicable.

Another document, to which the Court of Admiralty attributes weight and importance, though other tribunals reject it, is the Protest.[1] As it is more regular in form, so it is also of a higher character than the log, being a statutory declaration of the master and crew.

In proceedings by act on petition, the protest, though extra-judicially made, is "admitted *per se*, because it is sworn to, or if not sworn to, yet it is made under the provisions of an Act of Parliament."[2] It follows, therefore, that a cause in the Court of Admiralty might be heard upon such proof only on either side. But as the necessity for parties restricting themselves to such limited evidence, can only arise from the absence and non-practicability of intercourse with the master or seamen—a fact of uncommon occurrence—the Court is generally assisted in its knowledge of the facts of the case by the additional proof of affidavits made in the cause. It is superfluous to say that these additional proofs, in order as well to be credible themselves, as also not to impeach the credit of the protest, should be in unison with, and in corroboration of it.[3] But this corroboration need not be of the most complete and minute kind. The protest does not over-ride subsequent evidence, and the affidavit may therefore state circumstances which haste or inadvertence on the part of the notary (who drew the protest) has left doubtful, or has passed over and omitted.[4]

The Court feels itself even at liberty to hold that a statement subsequently made may be true, though it is somewhat discrepant from the protest; for the notary may have drawn the latter artificially, and may not have called the attention of the parties to one or more facts which may accordingly have been omitted, but which, being reinstated, have caused an apparent discrepancy.

[1] Mr. Philips (c. 2, s. 2, p. 125) says, "A ship protest is of itself only evidence to contradict the captain's testimony." Lord Tenterden (part 4, c. 5, p. 380) says, "With whatever formalities drawn up, it cannot be received in our courts as evidence for the master or his owners.

[2] Mellona, 10 Jur. 994.

[3] Commerce, 3 W. Rob. 295.

[4] Osmanli, 7 Notes, 510, 511.

Upon these grounds, the Court will not regard the protest as containing a full or complete statement of *all* the facts of the case.[1]

But where there occurs, not a mere omission of a collateral circumstance,—not a trifling discrepancy in an immaterial matter,—but a plain and absolute contradiction in a great and important fact at issue, on a comparison between the protest and the subsequent proofs, or where there is found in the protest a suppression of an important fact, the Court will take an objection which will be fatal to the evidence of the parties making the protest and the affidavit.[2] The protest in such a case becomes evidence against the owners by whose servant it is made.

The Court of Admiralty credits the protest in general, from the assumption or belief that owing to its recency, it will be truthful, fair and impartial in its representations, inasmuch as there cannot have been sufficient time for fabricating evidence. This reason, and along with it the favorable leaning of the Court, falls to the ground when the protest has not been extended until long after the event in question; and here arises the consideration of the degree and character of evidence which the Court of Admiralty attributes to it. The ordinary mercantile purposes for which the protest is framed necessitate that it be recently made; and it is this recency which makes it valuable when that instrument is transported into the Admiralty Court, whether as evidence *per se*, or as a test of and in comparison with other evidence bearing a subsequent date which has been imported into the suit.[3] Regarding it in the light of affording the best evidence, as a test of evidence also, the Court calls for its production, and notices its absence with suspicion.

In the British dominion,[4] Dr. Lushington observed—

"That in all cases the protest ought to be brought in, and if it were not, there would be no difficulty in forming a conclusion as to the reason why it was kept back."

This observation applies to cases of salvage and damage equally; but the Court expresses a greater desire for its production in the former than the other, on the ground that the declarants, as they

[1] Diamond, 9 Jur. 694.
[2] Mellona, 5 Notes, 453; Rob Roy, 13 Jur. 756.
[3] Emma, 2 W. Rob. 317.
[4] 10 Monthly Law Magazine, 225.

make it in order that they may obtain a reimbursement from the insurers, will state more clearly and copiously, the dangers which their vessel has escaped, and the mischief which she has sustained, than when they are defending a claim brought against themselves by others claiming a salvage reward for the same perils and losses.

In proceedings by act on petition, the protest therefore enacts two characters.

In proceedings for damage by libel, the Court will, on application, direct the protest of both vessels to be brought in.

In the Mellona,[1] Dr. Lushington said:—

"In all cases (*i. e.* of collision) the protest ought always to be brought in; but then it must be recollected that I say nothing as to its effect when brought in; it does not follow that it will be evidence in favor of those on whose behalf it is brought in, *though it unquestionably is evidence against them;* but it will not be evidence for those on whose behalf it is brought in, unless all the evidence made on oath be in corroboration of it. It is admitted *per se* in proceeding by act on petition, because it is sworn to, or if not sworn to, yet it is made under the provisions of an Act of Parliament."

Should the protest contain matter which the other side desires to use in exception to the evidence of their opponents by whom it was made, they cannot plead its contents, it being an instrument, but must apply to the Court to direct the production of the original.[2]

But one of the greatest peculiarities of the English Admiralty remains to be mentioned. At the hearing of every suit for collision, and occasionally, if it thinks fit, at the hearing of a salvage suit, the Court of Admiralty is assisted by two elder brethren of the Trinity Corporation. The function of these gentlemen is to guide the Court by advice only, and their opinion consequently, although influential, is not legally or absolutely binding upon the Court,—at least, so it is said. The appointment of assessors, like these seems reasonable, if clear and disinterested information and advice can be obtained from them; and it is probable that the

[1] 10 Jur. 994.

[2] Mellona, *Ib.*, 992, 993; Speculator, 12 Jur. 546; Rob Roy, 13 Jur. 756.

system acts well, for it does not appear that the Court quarrels with it; and without assistance given in this form, the Court would be compelled to resort to another mode, which is practically defective, and is objectionable on principle, viz: the examination of material witnesses nominally unconcerned, but in reality, all partisans of the one side or the other.[1]

There is, however, a great and startling anomaly in the assessorship of the Trinity brethren; they are not sworn, although their advice and opinion is expected to control or bias the Court.

The questions upon which the Court consults the brethren, are referrible to the *conduct of the ship, and the circumstances which led immediately or directly to the collision in question.*[2] Those points of a case which are more a matter of law than of plain and simple fact, are not for their consideration. In the Benares, the Court excluded from their consideration, *transactions which took place after the collision,—alleged conversations and admissions said to have occurred at different times during a period subsequent to the collision.* The degree and extent to which the opinions of the brethren bind or influence the Court, may be seen in the reported judgment of the Christiana,[3] and the observations made by Mr. Baron Parke in the same case on appeal,[4] are equally demonstrative. The latter said:—

"We certainly are not bound, any more than the learned Judge of the Admiralty Court was, by the opinion of the Trinity Masters; but we of course give great weight to their nautical experience, and we do not see any ground for being dissatisfied with the opinion that they have formed."

In another case, the same Judge stated the legal position of the Court and the Trinity Masters in more definite terms. In *Chapman* vs. *Williams* (the Iron Duke)[5] he said:—

"The Trinity Masters are merely assessors of the Judge, and assist him with their advice; the sentence is entirely his, and

[1] The Court of Admiralty will not receive affidavits containing the opinions of nautical men upon points in the case when it has the assistance of Trinity masters (Ann and Jane, 7 Jur. 1001). [2] Benares, 7 Notes, 539. [3] 7 Notes, 7.

[4] *Ibid.* 47, suppl. [5] 4 Notes, 586.

neither the opinion of the masters nor the decision of the Judge is analogous to the verdict of a jury on a question of fact at common law, which is altogether conclusive."

Though it is becoming to the pride of a Court to assert its legal independence of all other courts and individuals, it is easy to suppose that a complete moral independence is not and cannot, be exerted in all cases, for the opinions of experienced and disinterested men given, *proprie et signate*, upon matters with which a previous life of apprenticeship has made them practically conversant, must, if they do not impress upon the Court an implicit reliance, at least carry a conviction, which it may not be at all times inclined to resist.

Accordingly, it will not surprise the reader to find Dr. Lushington expressing himself in a case of this kind as follows:[1]—

"This being the opinion of these gentlemen (*i. e.* the Trinity Brethren), it becomes my duty to pronounce against the claim of the owners of the Vesta."

A few more words as to the general character of maritime testimony, and the difficulties which the Court experiences in dealing with it. An obvious peculiarity of maritime questions, consists in the evidence being principally and generally obtainable only from persons who have either a direct and defined interest in the success of the action, as salvors have, and are induced to inflame their case, or who are indirectly defending their own conduct whilst apparently protecting their owners' interests, as the master and crew of a vessel which has inflicted damage upon another. There is, therefore, a penury of really disinterested and of highly credible witnesses; what witnesses there are, as the Scotch lawyers say, are receivable *cum notâ*. The evidence being thus more or less tainted, the Court must feel a serious difficulty in extricating truth from the prejudiced and conflicting statements which such evidence necessarily contains, and the Court is compelled to scrutinize and weigh with rigid particularity, the minute circumstances of the case, and pick out its course as it best may. On this ocean of doubt and uncertainty, it is not surprising that the suitor grasps at

[1] Blenheim, 7 Notes, 399

each straw of evidence. Among the *quisquiliæ* of proofs which, where there is a want of better things, attract attention, are declarations made or supposed to be made by the master or crew of either vessel; and it is accordingly a common practice for the one side to plead admissions of their opponents which, if true or uncontradicted, would amount to *peccavimus*, and determine the cause. It has therefore been a task proposed to the Court of Admiralty to settle the worth or worthlessness of these declarations, and it has accordingly, by necessary compulsion, established certain rules which shall assist it in dealing with them.

A declaration made by the master of a defendant vessel, unless it be satisfactorily rebutted or absolutely denied, if it be pertinent to the issue, is evidence against the owners whom he represents; *ratione qua*, he is their agent.[1]

But a separate and distinct admission from the mate, the helmsman, or any other of the crew, is not receivable as evidence, for these persons can in no way be regarded as the owners' agents.[2] It is only evidence when the conversation containing such declaration or admission forms part of the *res gestæ*.[3]

Therefore, while the declaration of the master, who is the owners' agent, is pleadable, before publication, as evidence in the cause, the declarations of seamen are only pleadable after publication, as contradictions attacking their credit.[4] But the controvertible nature of seamens' evidence is such that these declarations are seldom, or rather never left undenied. When these declarations are denied by the persons to whom they are imputed, the Court feels it impossible, in the conflict of evidence, to ascertain to which side credence is to be given, and excludes them from its consideration altogether.[5] The same practical rule is applied by the Court in the case where the same person has made two contradictory affidavits, viz: one in favor of one side, and one in favor of the other, in which case the Court will pay no attention to either.[6] But

[1] Rob Roy, 13 Jur. 856; Glory, *ibid.* 991; Concord, 5 Monthly Law Magazine, 124.
[2] *Ibid.*
[3] Mellona, 10 Jur. 994.
[4] Rob Roy, Glory, Concord, *ut ante*,
[5] Virgil, 2 W. Rob. 204.
[6] Glasgow Packet, 3 Notes, 113.

where a person has made a subsequent affidavit, contradictory to the protest in which he was a joint declarant, the Court will believe the protest, and reject the affidavit.[1]—*London Law Magazine.*

RECENT AMERICAN DECISIONS.

Supreme Court of New Jersey, June Term, 1853.

STEWART & METTLER, *vs.* SCUDDER.

1. A commission merchant in New York receiving a parcel of corn, with orders to sell for cash, sold it to a person, at the time of sale, in good credit. The sale was made on Monday, and the price was called for on the succeeding Friday, but not paid. On the next Monday, it became known that the purchaser had failed. The loss was held to fall on the commission merchant, notwithstanding an attempt was made to set up a usage in New York, that where a sale is made for cash, the purchaser has three or or four days to pay the money.
2. A usage to control or interpret contracts, must be known, certain, uniform, reasonable, and not contrary to law.
3. *Semble.*—That such usage as was set up in this case, was unreasonable and illegal.

ELMER, J.—The plaintiffs, who are commission merchants in the City of New York, sold a parcel of corn for the defendant, and advanced the money. They sold for cash, without any special instructions, at the usual charge for commissions in such cases, of one cent a bushel. The sale was made on Tuesday, the 2d of April, the corn being then on board the vessel in which the defendant, whose residence is in Princeton, New Jersey, had sent it to New York, he being himself in the city at the time, and informed who was the purchaser. He left town the next day, and on Thursday, 4th of April, plaintiff sent to him by mail, the measurer's bill, bearing date 2d, and an account of sales bearing date the 4th. The account stated the sales to have been made on the 2d, to D. D. Conover, for $742 72, and from this sum is de-

[1] Towan, 2 W. Rob. 266; Commerce, 3 W. Rob. 295.