REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF ADMIRALTY OF ENGLAND,

AND ON

Appeal to the Privy Council.

1859—1862.

BY VERNON LUSHINGTON, ESQ.,
OF THE INNER TEMPLE, BARRISTER AT LAW.

VOL. I.

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TEMPLE BAR.

Judge of the High Court of Admiralty.

RIGHT HON. STEPHEN LUSHINGTON, D.C.L.

Queen's Advocate.

SIR JOHN DORNEY HARDING, D.C.L.

SIR ROBERT PHILLIMORE, D.C.L.

Admiralty Advocate.

DR. PHILLIMORE, Q.C.

DR. TWISS, Q.C.

Admiralty Registrar.

HENRY CADOGAN ROTHERY.

CASES REPORTED

IN THIS VOLUME.

VOL. I.

CASES CITED.

CASES

DECIDED IN THE HIGH COURT OF

ADMIRALTY OF ENGLAND,

AND ON APPEAL TO

THE PRIVY COUNCIL.

THE PRISCILLA.

Bottomry—Liability of Cargo—Marshalling of Assets.

Where there is a creditor on two funds, and another creditor on one only of those funds, the assets will be equitably marshalled, if it can be done without violating a rule intitled to preferential observance.

But cargo hypothecated cannot be resorted to for payment of any bottomry bond until ship and freight are exhausted.

Where, therefore, there are two bottomry bonds, the first in date on ship and freight only, and the other or last bond on ship freight and cargo, and ship and freight are insufficient to discharge both bonds, the last bond, which is intitled to priority, must be paid out of ship and freight.

The *Prince Regent* (*a*) followed; *dictum* in the *Trident* (*b*) overruled.

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November 3.
December 2.

BOTTOMRY. In September, 1858, the Priscilla, then lying in Constantinople, was chartered for a voyage to Odessa and thence to England; whilst lying at anchor there, she was run into by a vessel called the African, and to repair the damages, a bond (bond No. 1) was given on the ship and the freight to grow due on the chartered voyage. This bond was dated 12th October, 1858, and was for 500*l.* and interest. The Priscilla then sailed to Odessa and took in a cargo of peas for England. Shortly after leaving Odessa, she was forced to put back damaged by a gale, and a bond (bond No. 2) for 120*l.* was, on the 11th December, 1858, given on ship and cargo. The ship again sailed, and in the course of the voyage was obliged to be put into Syra to be

(*a*) 2 N. of C. 272. (*b*) 1 W. R. 35.

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repaired, and a bond (bond No. 3) for 261*l.* 1*s.* also on ship and cargo was there given, dated 12th January, 1859. On final arrival in this country actions were brought on the several bonds, the ship was sold, the cargo (value 600*l.*) was released on bail, and the freight, 108*l.*, brought into Court. Bond No. 1 was partly paid by damages received from the owners of the African. Actions of wages and pilotage were also brought, after payment of which there remained, as proceeds of ship and freight, the sum of 410*l.* There then remained the following claims on the several bonds:—

Bond No. 1 (action against proceeds and freight) .	£387	12	11
Bond No. 2 (action against ship, freight and cargo)	120	0	0
Bond No. 3 (action against ship and cargo) . .	261	1	0
Total	£768	13	11

Twiss, Q.C., on behalf of the holders of bond No. 3, now moved the Court to order the bond to be paid out of the proceeds of the ship and freight lying in the registry.

Wambey, on behalf of the holders of bond No. 1, *contrà*.—If this motion is granted, the holders of the first bond will be altogether unpaid. The holders of the last bond have two funds to resort to, the holders of the first bond but one; the principle, therefore, of equitable marshalling of assets is applicable: *Lanoy* v. *Duke of Athol* (*a*); *Aldrich* v. *Cooper* (*b*); *Dowthorpe* (*c*); *Constancia* (*d*); *Trident* (*e*).

The *Queen's Advocate*, for the owners of cargo.—As to bonds Nos. 2 and 3, the ship and freight must be exhausted before the cargo is touched: *Prince Regent*, reported in the *Dowthorpe* (*f*). As to bond No. 1, it was executed before the cargo was put on board, without the consent or knowledge of the owners of the cargo, and they never had any interest in that bond at all.

December 2. Judgment.

Dr. Lushington:—In this case there are three bonds in all pronounced for, and the balance of proceeds in the registry is clearly insufficient to discharge them all.

The last bottomry bond, called bond No. 3, is dated the 13th January, 1859, at Hernopolis, in Syra. It states that the vessel

(*a*) 2 Atk. 446.
(*b*) 8 Ves. 388.
(*c*) 2 N. of C. 264.
(*d*) 4 N. of C. 287.
(*e*) 1 W. R. 35.
(*f*) 2 N. of C. 272.

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was bound from Odessa to London with peas, and had been compelled to put into Syra. The ship and cargo are hypothecated, and the principal and interest now due upon the bond amount to 261*l.* 4*s.* It is admitted on all hands that this bond shall be paid first. The question is, out of what fund—the ship and freight, or the cargo.

The bond next antecedent in date, called bond No. 2, was granted at Odessa on the 11th December, 1858, and purports to bind the ship and cargo. It appears that the ship had previously sailed from Odessa with her cargo, but had been compelled by stress of weather to put back. The principal and interest due upon this bond amount to 120*l.*

The next antecedent, or first bond, (bond No. 1,) is dated Constantinople, the 12th October, 1858. This bond is upon the ship and freight, and is for a voyage from Constantinople to Odessa and England, the amount 500*l.*, with 22 per cent. interest. The vessel was lying at Constantinople under charter for Odessa and England, and having been damaged by collision with the African was bottomried to repair damages. On arrival of the ship in London, the damages recovered for the collision, amounting to 222*l.* 7*s.* 1*d.*, were assigned to the bondholder in part liquidation of his claim.

A motion is now made on behalf of the holder of bond No. 3, to be paid out of ship and freight. This is opposed on behalf of the holder of bond No. 1, who says that bond No. 3 should be paid out of cargo; and the motion is in turn supported by the owners of the cargo, who are clearly the parties really interested.

The demands are, in round numbers, for the three bonds, 768*l.* The fund available from the proceeds of the ship and freight is 410*l.* The deficiency, therefore, if the cargo is not made at all liable, will be 358*l.* The sum due on the last bond (bond No. 3) is 261*l.* Assuming that it is paid out of the ship and freight, there will remain out of the ship and freight 149*l.* applicable to the discharge of bond No. 2. Bond No. 2 is for 120*l.*, and therefore, for bond No. 1, there will remain only 29*l.*; in fact, nothing at all, for the costs will have amounted to a very much larger sum than that small balance: bond No. 1 will be unpaid.

The effect then of granting this motion, if a similar course is

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taken with bond No. 2, will therefore be that nothing will be left for the satisfaction of bond No. 1, and that the cargo will be wholly exonerated from any payment to any of the bonds. The substantial question, then, is, whether the cargo ought not to be made to discharge the two last-executed bonds, so as to leave a fund for the payment of the first-executed bond.

Question to be decided.

Now the cargo was not laden until November, 1858, after the execution of the first-executed bond, and previous to the other two. This circumstance would be perfectly fatal to the holders of bond No. 1 asking to be paid out of the cargo, which was not hypothecated to them; but they make no such demand; they only ask that the cargo shall be made applicable to the payment of bond No. 3, which does bind the cargo as well as the ship. Several cases were cited in argument, to which I will now shortly advert. The first is the *Dowthorpe* (*a*). That was a most complicated case, raising many questions, and some of them of difficulty; but upon a consideration of all that is reported, it does not appear to me to have any stringent bearing on the present question. The dispute there was as to the payment of a bottomry bond on ship and freight, and certain other charges, as wages and pilotage; there was no reference whatever to any demands which could affect the cargo. The case is only useful for the present purpose as containing a report of the *Prince Regent* (*b*). The case of the *Constancia* (*c*) was also a most peculiar one. There were three bonds: first, on ship alone; second, on cargo alone; third, on ship alone. The case was brought on by motion only. The decision in that case cannot affect the present. If there were doubtful questions, they were whether the Court was right in giving preference to the first bond over the second, because the ship was not mentioned in the second bond; and whether the Court was right in holding the ship and freight tacitly hypothecated in the second bond: both very difficult questions, but not *hujus loci*. I see no reason to depart from what I said in that case, but I cannot apply it to the present. The *Trident* (*d*) was also cited. The main question in that case was wholly different from the present; it was whether a bond granted at Plymouth on a vessel belonging to an owner resident in Scotland was valid; but certain observations incidentally falling from the Court are reported at page 35, which have a bearing upon the present question. These observations did not apply to the main question, but had reference to an

Cases referred to considered.

(*a*) 2 N. of C. 264.
(*b*) Ibid. 272. 2 W. Rob. 83.
(*c*) 4 N. of C. 285.
(*d*) 1 W. R. 29.

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argument that other bonds might be prejudiced. It may be that in declaring the general principle by which the Court would be guided, namely, that of marshalling the assets where I could lawfully do so, I illustrated my opinion without sufficient accuracy. I did not bear in mind the case of the *Prince Regent.* I am of opinion that the principle of marshalling the assets ought to prevail in this Court whenever it can be carried into effect without violating other rules entitled to preferential observance. But the question now before me is, whether the present case falls within this principle, and the Court ought to compel the holders of the last bond to resort to the cargo. If the holders of the last bond, which is upon ship and cargo, have the same and equal right to proceed against the cargo as against the ship and freight, I should be disposed to hold that in equity they should be compelled to proceed against both, and in aid of the other bonds to resort, in the first instance, to the cargo. But I apprehend that, upon the authority of the *Prince Regent,* and the reasoning of Lord Stowell's judgment in the *Gratitudine* (*a*), the holders of the last bond have no such right against the cargo; they cannot make the cargo answerable until the ship and freight have been exhausted. The owners of the cargo have a perfect right to avail themselves of the principle of that decision. They have a right to say that by law the cargo, though legally hypothecated, cannot be touched till the ship and freight have been exhausted. They are strangers to all previous bonds on ship and freight. The result is, that the holders of the last bond, who are entitled to be paid in priority, are thrown on ship and freight exclusively. This motion must be granted (*b*).

Marshalling of assets to prevail generally;

but cargo cannot be touched till ship and freight are exhausted.

Stokes and *Clarkson,* proctors for the several bondholders.

Pritchard for the owners of cargo.

(*a*) 3 C. R. 255.

(*b*) A point not observed in this case, is whether the last bond is intitled to absolute priority over bonds earlier in date. For if not, and only intitled to priority, when, if postponed, it could not be satisfied, the last bond in the present case had no good claim of priority; and by concurrent application for payment of the previous bonds, the above motion might have been resisted upon the equitable principle, without infringing the rule laid down in the judgment.

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January 12.

THE IDA.

Jurisdiction—Damage—Foreign River—Actio in Rem—Wilful Tort of the Master.

Substantive objections to the jurisdiction entertained after absolute appearance.

The Court will not exercise jurisdiction over a foreign river, if the parties are foreigners, and the subject matter of the action is of doubtful cognizance by the Court.

The Court has jurisdiction over causes of collision, but not over damage generally.

Quære. Whether in an action brought in the Admiralty Court here by a foreign plaintiff against a foreign defendant, in respect of a matter occurring in foreign waters, the defendant is liable for the wilful act of his servant.

The master of a Danish schooner lying alongside the quay at the port of Ibraila in the Danube, got on board an English barque lying outside him, and with a view to get the schooner out, wilfully cut the barque adrift from her moorings, whereby she swung to the stream, and capsized a barge which contained part of her cargo belonging to Turkish owners. *Held*, that the Turkish owners of the cargo destroyed could not sue the Danish schooner in the Court of Admiralty.

COLLISION. This was an action brought by Messrs. Argenti, of Galatz, in the kingdom of Turkey, merchants, the owners of a portion of the cargo lately laden on board the English barque the Barbara Innes, against the schooner Ida and her owners, Messrs. Backhaus, of Blankenese, in Denmark, intervening. The defendants appeared absolutely. The act on petition stated: "That on the 16th of May, 1859, the barque Barbara Innes was lying at anchor at a place of discharge in the port of Ibraila, in the kingdom of Turkey. That on the said day the barque was hauled out to her anchor to let out other vessels which were inside or nearer to the quay than the said barque, and which had discharged their cargoes. That while the said barque was so hauled out, the Danish schooner the Ida, slipped inside of the said barque, and thereby deprived her of her discharging place. That the said schooner Ida remained inside the said barque, discharging her cargo till the 19th of the said month of May, when, having completed her discharge of the same, the said D. J. Backhaus, the master and part-owner of the said schooner, wanted to get out, and applied to the master of the said barque to cast off his moorings in order to enable her so to do. That the said barque was at this time discharging her cargo into a barge or lighter alongside, and could not without great difficulty and loss of time have complied with such application,

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and the master of the said barque therefore declined so to do. That the masters of the said schooner and barque, accompanied by their respective pilots, accordingly on the same day went on shore and represented the facts to the captain of the said port, who decided that the said schooner the Ida had no right to move till the said barque Barbara Innes had discharged her cargo. That, notwithstanding such decision, the said D. J. Backhaus, the master of the said schooner, returned to his ship, and immediately afterwards, between three and four o'clock of the same day, and during the absence of the master of the said barque, jumped on board the said barque, and himself, wilfully and without any authority so to do, cast off the moorings by which the said barque was made fast to the quay, whereby the said barque the Barbara Innes swung off into the stream and across the current, and thereby unavoidably sunk a barge or lighter, together with thirteen casks of sugar, being a portion of the said cargo of the said barque, and the property of the said Messrs. Argenti, and which had just been previously discharged from the said barque the Barbara Innes into the said barge or lighter. That the said thirteen casks of sugar were in consequence thereof entirely lost, and such loss arose through the wilful and unseamanlike act of the said master of the said schooner the Ida. Wherefore, &c."

The admission of this petition was now opposed.

Twiss, Q.C., and *Pritchard*, against the petition.—The petition shows that the Court has no jurisdiction. Firstly, *ratione loci;* the *locus in quo* is Ibraila, 115 miles from the Black Sea, and in the fresh waters of the Danube, and the Court has jurisdiction over tidal waters only. Ibraila is not a port in that sense of the term which may give Admiralty jurisdiction; it is no more a port than Cologne or Belgrade. Secondly, *ratione delicti;* the act complained of is purely the personal act of the master. The ship proceeded against was in no degree instrumental to the injury; and it would be against the principle on which the *actio in rem* in causes of maritime tort is founded to make the ship liable. Thirdly. The act done was not within the scope of the ordinary duties of the master, it was tortious and wilful from the beginning; and the owners therefore are not liable. This rule is well settled in the Courts of Common Law; *Macmanus* v. *Crickett* (*a*); *Bowcher* v. *Noidstrom* (*b*); *Mitchell* v. *Crasweller* (*c*); *Coleman* v. *Riches* (*d*); and was adopted by the

(*a*) 1 East, 106.
(*b*) 1 Taunt. 568.
(*c*) 13 C. B. 237.
(*d*) 16 C. B. 104.

1860. *January* 12. Court of Admiralty in the well considered judgment of the *Druid* (*a*).

Tristram, in support of the petition.—The objections come too late, for the defendants have appeared absolutely. The Court will not assume that the tide does not reach Ibraila, and that Ibraila is without the jurisdiction of the Court. The Imperial Gazetteer makes Ibraila only ninety-nine miles from the mouth of the river. The act was done in behalf of the ship, and in the service of the ship; and it does not appear that it was an illegal act, for *non constat* that the opinion of the captain of the port was good in law. The master is part of the ship, and his act in the ship's service makes the owners liable, and in this Court the ship; *Croft* v. *Allison* (*b*).

Judgment.

Dr. Lushington:—This action is brought by Turkish subjects against a ship owned by Danish subjects, for an alleged damage done in Ibraila, in the river Danube. The warrant for the arrest of the ship was issued from the Registry, with a caution that it was at the risk of the party taking it out, and an appearance was given to the action absolutely. It is usually convenient 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.

Local jurisdiction of the Court.

Semble, The Court has no jurisdiction in a foreign river, the cause being between foreigners.

The objections to the jurisdiction in this case were well put by Dr. Twiss, as 1, *ratione loci*; 2, *ratione delicti*. Formerly the local limits of the Admiralty jurisdiction were very doubtful, partly, perhaps, because the distinction between jurisdiction given by the law maritime and jurisdiction given by municipal law was not clearly apprehended. And when I first came into the profession Lord Stowell was very averse to exercising any instance jurisdiction over foreigners; the Court, he said, was not hungry after jurisdiction; *Two Friends* (*c*), referred to by me in the *Golubchich* (*d*). But in his time the number of instance causes was very small, especially collision causes, which have so greatly multiplied in recent times. I shall not now attempt to define where the Admiralty jurisdiction in foreign rivers begins or ends, and where municipal jurisdiction obtains exclusively; the Court of Criminal Appeal has lately unanimously held that

(*a*) 1 W. R. 391.
(*b*) 4 B. & Ald. 590.
(*c*) 1 C. R. 280.
(*d*) 1 W. R. 143.

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the whole of the Bristol Channel is within the counties by the shores of which its parts are respectively bounded, *R.* v. *Cunningham* (*a*): it is enough to say that this Court has not taken cognizance of torts in any foreign river, except in Turkish waters, where special provisions are applicable; that the Court is not anxious to extend its jurisdiction over foreign waters; that this cause is between foreigners, and that the jurisdiction claimed is beyond any yet exercised by the Court. These are reasons which make the Court very unwilling to affirm its jurisdiction over the present case.

The act sued upon was a wilful act out of the proper province of the master, and gave no lien on his owner's ship.

The Court, however, is still further indisposed to exercise jurisdiction on account of the peculiar nature of the act for which the plaintiffs are now trying to render the defendant's ship liable. The Court, it must be remembered, has never exercised a general jurisdiction over damage, but over causes of collision only; and this is no collision in the proper sense of the term. The ship proceeded against had nothing to do with the damage; nothing actually, nor even constructively, for the act of the master I consider to be wholly unwarrantable and out of the scope of his duty; he might as well have attempted to open a dock. And this, again, if in such a case—the case of a tort committed by one foreigner upon another in a foreign port—the law laid down in the *Druid* is to prevail, would, on another ground, disintitle the plaintiffs from recovering against the defendants or their property. This is not, however, exactly the case of the *Druid*, for there the tort was committed in the Mersey, and the Court was anxious to conform its decision to the rules adopted in the Courts of Common Law. But however this may be, in a matter like the present the Court looks to precedent; and, taking all the circumstances of this case together, I am of opinion that there is no precedent that would justify the Court exercising jurisdiction in this case. I have gone further than any of my predecessors in enlarging the jurisdiction of the Court, because the commercial and maritime world has undergone such great changes; but I must not extend my jurisdiction beyond what circumstances render necessary. I dismiss this petition with costs.

Petition dismissed, with costs.

Wills, proctor for the Barbara Innes.

Pritchard, proctor for the Ida.

(*a*) 28 L. J. M. C. 66.

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THE FOYLE.

Collision—Pleading—Admission by Crew.

In an action of collision, brought by the owners of a vessel and the crew for their private effects, admissions by the crew as to the circumstances of the collision cannot be pleaded.

COLLISION. Action brought by the owners of the brig Campbell and the cargo laden therein, and the master and crew of the said brig for the loss of their money, clothes, and private effects. Motion to strike out the following article from the Foyle's allegation, "That shortly after the collision, certain of the crew of the Campbell, whilst on board the Foyle, admitted to William Mitchenson, one of the passengers on board the Foyle, that the collision was entirely owing to the fault of the Campbell, by starboarding her helm, and afterwards, when it was too late, putting it hard aport."

Twiss, Q.C., and *V. Lushington*, in support of the motion. The Court, without hearing them, called on *Tristram* to support the article.

Tristram.—Admissions by seamen may not generally be evidence against the owners, but here the seamen are parties to the action; they are plaintiffs in the cause.

DR. LUSHINGTON:—I cannot think that a sufficient reason for admitting this article. If we allow admissions by the crew to be evidence in cases of collision, we shall have conversations in pot-houses pleaded, counter-pleaded, proved and disproved, and the expense of parties doubled; and all to no purpose. We have never allowed such admissions here, and I do not intend to allow them. The article must be struck out.

Bathurst, proctor for the Campbell.

Brooks, proctor for the Foyle.

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THE JOHN.

Salvage—Tender—Certificate for Costs—17 *&* 18 *Vict. c.* 104, *s.* 460.

If in an action for salvage services rendered in the United Kingdom a tender under 200*l.*, "with such costs (if any) as may be due by law" for the services rendered, is accepted, the Court will not certify for costs under the 460th section of the Merchant Shipping Act, except for special cause shown.

Removal of the ship salved from Yarmouth to London without *mala fides*, will not, if the salvors had opportunity at Yarmouth to have the dispute determined by the local justices, suffice to induce the Court to certify.

THIS was a motion praying the Court to certify under the 460th section of the Merchant Shipping Act, 1854, for costs in an action of salvage.

The service was rendered at Yarmouth on the 25th October, 1859. A heavy gale of wind was blowing, and the salvors, who were Yarmouth beachmen, boarded the brig John, then lying close off the flats, and assisted her in making to a safe anchorage. On the 10th November the salvors entered an action in the Admiralty Court, and arrested the brig in the port of London. An appearance for the owners was then entered and bail given in 350*l.*, and the act on petition brought in for the salvors. On the 8th December, a tender was made of 120*l.*, "together with such costs (if any) as may be due by law in full for the services rendered." This tender was accepted on behalf of the salvors. The Court was now moved to certify, as required by the 460th section of the Merchant Shipping Act, 1854, that the case was a fit one to be tried in the Superior Court. The section is as follows:—

"Disputes with respect to salvage arising within the boundaries of the Cinque Ports shall be determined in the manner in which the same have hitherto been determined; but whenever any dispute arises elsewhere in the United Kingdom between the owners of any such ship, boat, cargo, apparel, or wreck as aforesaid, and the salvors, as to the amount of salvage, and the parties to the dispute cannot agree as to the settlement thereof by arbitration or otherwise,

Then if the sum claimed does not exceed two hundred pounds,

Such dispute shall be referred to the arbitration of any two justices of the peace resident as follows (that is to say):

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In case of wreck, resident at or near the place where such wreck is found;

In case of services rendered to any ship or boat, or to the persons, cargo, or apparel belonging thereto, resident at or near the place where such ship or boat is lying, or at or near the first port or place in the United Kingdom into which such ship or boat is brought after the occurrence of the accident, by reason whereof the claim to salvage arises:

But if the sum claimed exceeds two hundred pounds,

Such dispute may, with the consent of the parties, be referred to the arbitration of such justices as aforesaid; but if they do not consent, shall in England be decided by the High Court of Admiralty of England, in Ireland by the High Court of Admiralty of Ireland, and in Scotland by the Court of Session; subject to this proviso, that if the claimants in such dispute do not recover in such Court of Admiralty or Court of Session a greater sum than two hundred pounds, they shall not, unless the Court certifies that the case is a fit one to be tried in a Superior Court, recover any costs, charges or expenses incurred by them in the prosecution of their claim: And every dispute with respect to salvage may be heard and adjudicated upon on the application either of the salvor or of the owner of the property salved, or of their respective agents."

An affidavit was brought in by two of the salvors that on the 26th of October there was no communication between the ship and the shore on account of the weather; that on the 27th of October they had some negotiation with the master of the brig on shore, and that to their surprise the brig sailed the next morning; that finding the vessel afterwards in a distant port they directed the action to be brought. For the owners an affidavit was brought in by the master of the brig, that before the salvors left the ship he had referred them to Mr. Butcher, the insurance agent at Yarmouth, to settle their claim; that on the 27th the salvors had in his presence stated their claim to Mr. Butcher; that he had in no way evaded process, and that on the 27th he had expressly informed the salvors of his intention to sail the following morning for London; and an affidavit, by Mr. Butcher, that the salvors, on the 27th, and afterwards, treated with him as the agent for the ship, and that on no occasion had they suggested an adjudication before the justices.

Deane, Q.C., moving.—The tender was not absolute; and the acceptance of it is not a recovering in Court, within the meaning of the statute; the statute evidently looks to a judicial decision.

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The acceptance of a sum smaller than 200*l.* is not to be construed as an admission by the salvors that the services were not worth 200*l.*; it was an act of prudence merely. The removal of the ship to London was a fraud upon the salvors, and rendered the action necessary.

The *Queen's Advocate, contrà.*—Accepting a tender is recovering in Court, for tender is an act of Court; the salvors are therefore precluded by the statute from recovering costs unless the Court certify. There is no ground for granting a certificate, as in the *Fenix* (*a*); no question of agreement, or any other circumstance, constituting a fit case to be tried in this Court; it was a very ordinary service. The salvors might, if they had chosen, have had the matter determined at Yarmouth by the justices; and the charge of fraud against the master is quite disproved. The attempt to justify the arrest on the ground of the ship lying in "a distant port," namely, the port of London, is ludicrous.

Judgment.

Dr. Lushington:—No doubt in ordinary cases a tender to be good must be absolute, and must include a tender of costs up to the time of tender; and if conditional and refused, the party making the tender can take no benefit of it. But here, the tender, though conditional as to costs, has been accepted, and all faults are thereby cured. It is, however, immaterial to consider the result of the tender apart from the statute, for I consider the acceptance of a tender, which is an act of Court, is a recovery in Court, and therefore the only question is, whether I ought to certify that this is a case fit to be tried in the superior Court?

Acceptance of a tender by act of Court is a recovery in Court.

The Court will not certify under s. 460, except there are unusual circumstances.

If I had in this case myself awarded 120*l.*, should I have certified? I adhere to what I said in the *Fenix*. I have carefully considered this section of the statute, and I shall not certify unless there are unusual circumstances—circumstances of peculiarity or difficulty, which, in my opinion, make the cause a fit one to be tried in this Court. Thus where there is a question of agreement, or where there is a charge of misconduct against the salvors, the Court will feel at liberty to certify. Another case is where there are no justices on the spot before whom the dispute could be heard, or only one justice, and he an interested party. Here the service rendered was quite ordinary, and the claim is not complicated by any difficult question: the question

(*a*) Swabey's Reports, p. 13.

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is one of *quantum meruit* only. If indeed the vessel had been carried away to a distant port, I might have admitted this to be a fit case to certify, but London is no distant port, and there seems to have been no pretence for charging *mala fides* in the master for leaving Yarmouth. The salvors had the opportunity of having the matter determined by the justices at Yarmouth, but they preferred negotiation. For this I do not blame them, but they were not justified in arresting the ship twelve days afterwards in the port of London. I cannot certify that this was a fit case to be tried in this Court.

The salvors forewent their opportunity to have the matter decided by the local justices, and the sailing to London was not an act of *mala fides*.

Certificate refused.

Deacon, proctor for the salvors.

Stokes, proctor for the owners.

THE CUBA.

Salvage—Appeal from Award of Justices—Discretion—17 & 18 *Vict. c.* 104, *s.* 464.

The Court will not entertain an appeal from the salvage award of justices upon the mere question of amount, unless plainly exorbitant.

January 26.

THIS was an appeal, under the 464th section of the Merchant Shipping Act, 1854, against the award of two justices in Essex, for the salvage of the brig Cuba.

The brig, on the 10th August, 1859, at 3 A.M., grounded on the Black Tail Sand, on the coast of Essex, by bad steering; at five o'clock, the salvors, nineteen smacksmen, came on board and offered their services, but the captain refused them, thinking to get the brig off unassisted. He also refused assistance from a steamer. The brig, however, could not be brought off under sail or by heaving on a small anchor, and at eleven o'clock the flood tide carried her up to high-water mark. The captain then set the smacksmen to work, and they threw overboard and rafted ten loads of railway sleepers, thereby lightening the brig twelve to eighteen inches, and about ten o'clock at night carried out the brig's bower anchor. At high water they hove her off, and between twelve and one o'clock brought her to an anchor;

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the weather was throughout calm and smooth. The value of the brig was 700*l.*, of the cargo 830*l.*, total value of property salved 1,530*l.* The justices awarded 160*l.* From this award the owners appealed.

V. Lushington for the appellants.—Ten per cent. is an excessive proportion for such a service. The award of justices, inexperienced in salvage law, is not to be so unquestionable as the decision of an Admiralty Court usually is upon the amount of salvage reward due.

Wambey for the salvors.—The Court will not disturb a finding of discretion, if the nature of the service has been understood, *Harriett* (*a*); *Clarisse* (*b*).

Judgment.

Dr. Lushington:—On appeal the burden always lies on the appellant, and especially in cases of this kind where the decision appealed from is a decision of discretion. The amount of salvage reward due is not to be determined by any rules; it is a matter of discretion, and probably in this, or in any other case, no two tribunals would agree. It would be therefore very improper to encourage salvage appeals on the mere question of amount. It is no answer that magistrates are not the most competent judges, that theirs is a *rusticum judicium*; for the legislature has appointed them to be the judges in these matters. The question, therefore, for me to decide is, whether the sum awarded by the justices is so exorbitant, so manifestly excessive, that it would not be just in me to confirm it. The sum is, perhaps, a large one for the service rendered, but I cannot call it excessive. I dismiss the appeal with costs.

Rothery, proctor for the appellants.

Deacon for the salvors.

(*a*) Swabey's Rep. p. 218. (*b*) Swabey's Rep. p. 134.

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THE THOMAS BLYTH.

Salvage—Loss of Salvors' Vessel—Onus Probandi.

Where the salvors' vessel is injured or lost whilst engaged in the salvage service, the presumption is that the injury or loss was caused by the necessities of the service, and the burden of proof is on the defendants alleging that the loss was caused by the default of the salvors.

THIS was an action of salvage brought by the owner, master and crew of the lugger Bright Star, against the British barque Thomas Blyth, her freight and cargo, for services rendered in getting her off the Roar Sand, near Dungeness. The salvors included in their claim a claim for the loss of their lugger, which was stove in and sunk during the performance of the services. The owners of the Thomas Blyth alleged that this was caused by the carelessness of the salvors.

Twiss, Q.C., and *Clarkson* for the salvors.

Deane, Q.C., and *Spinks* for the owners of the Thomas Blyth.

DR. LUSHINGTON, in the course of his judgment, said, that where the vessel of the salvors was injured or lost whilst engaged in the salvage service, the presumption was that the injury or loss was caused by the necessities of the service, and not by the default of the salvors; that the burden of proof lay upon the defendants alleging that the loss was caused by the salvors' own act.

The learned JUDGE pronounced for the salvors and awarded them 200*l.*

Clarkson, proctor for the salvors.

Rothery for the Thomas Blyth.

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THE TEMORA.

Collision — Irish Trader carrying Passengers — Compulsory Pilotage—17 & 18 *Vict. c.* 104, *ss.* 353, 354, 376, 379, 388, 17 & 18 *Vict. c.* 120, *ss.* 3, 4, *and* 6 *Geo. IV. c.* 125, *s.* 59.

The 354th section of the Merchant Shipping Act, 1854, making pilotage compulsory upon certain vessels, is not to be restricted by the provision of the 353rd section, that all existing exemptions from compulsory pilotage should continue in force.

An Irish trader (as described by 6 Geo. 4, c. 125, s. 59), therefore, carrying passengers, is compelled to employ a licensed pilot in the river Thames.

R. v. *Stanton* (*a*) distinguished.

COLLISION. The Temora, the vessel proceeded against, traded between London and Belfast: at the time of the collision she was coming from Belfast to London, and carrying passengers; and was in charge of a licensed Trinity House pilot. Neither master nor mate had a pilotage certificate. In the river Thames, off the East and West India Docks, she ran into the Gowrie, the vessel proceeding in the cause. The Trinity Masters were of opinion that the collision was occasioned solely by the fault of the pilot on board the Temora. The question then arose whether the employment of the pilot was compulsory, the owners having pleaded non-liability under s. 388 of the Merchant Shipping Act, 1854.

The following are the sections of the statutes referred to in the argument and judgment:—

17 & 18 Vict. c. 104.

Compulsory Pilotage (*General*).

Sect. 353. Subject to any alteration to be made by any pilotage authority in pursuance of the power hereinbefore in that behalf 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

(*a*) 8 E. & B. 445.

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certificate enabling him so to do, 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 the ship.

354. The master of every ship carrying passengers between any place situate in the United Kingdom or the islands of Guernsey, Jersey, Sark, Alderney and Man, and any other place so situate, when navigating upon any waters situate within the limits of any district for which pilots are licensed by any pilotage authority under the provisions of this or of any other Act, or upon any part thereof so situate, shall, unless he or his mate has a pilotage certificate enabling such master or mate to pilot the said ship within such district, granted under the provisions hereinbefore contained, or such certificate as next hereinafter mentioned, being a certificate applicable to such district and to such ship, employ a qualified pilot to pilot his ship; and if he fails so to do he shall for every offence incur a penalty not exceeding one hundred pounds.

Compulsory Pilotage (*Trinity House*).

376. Subject to any alteration to be made by the Trinity House, and to the exemptions hereinafter contained, the pilotage districts of the Trinity House within which the employment of pilots is compulsory are the London district and the Trinity House outport districts, as hereinbefore defined; and the master of every ship navigating within any part of such district or districts, 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 certificate enabling him so to do, or employs or continues to employ an unqualified person to pilot her, shall for every such offence, in addition to the penalty hereinbefore specified, if the Trinity House certify in writing under their common seal that the prosecutor is to be at liberty to proceed for the recovery of such additional penalty, incur an additional penalty not exceeding five pounds for every fifty tons burden of such ship.

379. The following ships, when not carrying passengers, shall be exempted from compulsory pilotage in the London district and in the Trinity House outport districts (that is to say),

(1) Ships employed in the coasting trade of the United Kingdom;

(2) Ships of not more than sixty 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 voyages between two places both situate out of such limits, and not being bound to any place within such limits nor anchoring therein.

388. 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.

17 & 18 Vict. c. 120, s. 3. With the exception of such provisions of this Act as are hereinafter expressly stated to be intended to come into operation immediately after the passing thereof, this Act shall come into operation at the same time as the Merchant Shipping Act, 1854.

4. There shall be hereby repealed—

The several Acts and parts of Acts set forth in the first schedule hereto, to the extent to which such Acts or parts of Acts are therein expressed to be repealed, and all such provisions of any other Acts or of any charters, and all such laws, customs and rules as are inconsistent with the provisions of the Merchant Shipping Act, 1854: provided that such repeal shall not affect—

(1) Any provisions contained in the Act of the seventh year of his late Majesty King William the Fourth, chapter seventy-nine, as to title, application of purchase-money or borrowing money, and having relation to the power of purchasing lighthouses given to the Trinity House by the same Act;

(2) Any security duly given before this Act comes into operation;

(3) Anything duly done before this Act comes into operation;

(4) Any liability accruing before this Act comes into operation;

(5) Any penalty, forfeiture or other punishment incurred or to be incurred in respect of any offence committed before this Act comes into operation;

(6) The institution of any investigation or legal proceeding, or any other remedy for ascertaining, enforcing, or re-

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covering any such liability, penalty, forfeiture, or punishment as aforesaid.

(7) Any appointment, bye-law, regulation, or licence duly made or granted under any enactment hereby repealed, and subsisting at the time when this Act comes into operation, and the same shall continue in force, but shall be subject to such provisions of the Merchant Shipping Act, 1854, as are applicable thereto respectively.

In the schedule, among the Acts to be repealed is specified Act 6 Geo. IV. c. 125: Extent of Repeal, the whole Act.

6 Geo. IV. c. 125, s. 59. Provided always, and be it further enacted, that, for and notwithstanding anything 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 (*a*) 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 within the limits of the 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.

Deane, Q.C., and *Wambey*, for the Gowrie.—The employment of the pilot was not compulsory. The 354th section of the Merchant Shipping Act, 1854, which directs that "the master of every ship carrying passengers between any place situate in the United Kingdom and any other place so situate," &c. is to be read with the preceding section, which enacts that all exemptions from compulsory pilotage existing immediately before the time when the Act came into operation shall continue in

(*a*) *Sic.*

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force. The old Pilot Act, 6 Geo. IV. c. 125, was in force at the time specified, and the 59th section permits the master of any Irish trader using the navigation of the rivers Thames or Medway to pilot his own ship. The Temora was an Irish trader, and the employment of the licensed pilot was therefore purely voluntary. It cannot be said that the 379th section of the Merchant Shipping Act, 1854, contains all the exemptions now allowed in the London district, and prevents the exemptions contained in the 59th section of the Act of Geo. IV. from being kept in force by the proviso of the 353rd section of the Merchant Shipping Act, 1854, for the reverse has been expressly decided by the Court of Queen's Bench, *R.* v. *Stanton* (*a*).

Twiss, Q.C., and *V. Lushington*, for the Temora.—*R.* v. *Stanton*, it is submitted, was wrongly decided. The Pilot Act, 6 Geo. IV. c. 125, was entirely repealed by the Merchant Shipping Repeal Act, 1854, which by the 3rd section came into operation at the same time as the Merchant Shipping Act. The Trinity House district, which was formerly provided for by the Act of Geo. IV., became then exclusively provided for by the Merchant Shipping Act. Section 376 makes the employment of a qualified pilot compulsory on the master of every ship navigating within the district, "subject to any alteration to be made by the Trinity House, and to the exemptions hereinafter contained," and section 379 defines those exemptions. The true inference from these two sections is that there is no exemption in the Trinity House district other than those contained in section 379. The proviso of the 353rd section of the Merchant Shipping Act does not keep alive the exemptions mentioned in the 59th section of 6 Geo. IV.; those exemptions are enumerated and re-enacted by s. 379, with the important condition added "when not carrying passengers:" and the proviso was introduced *ex majori cautela*, and refers to the exemptions contained in the various local Pilot Acts never repealed. This is plain from the language of the section: "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." At any rate, the 354th section which is express, and which aims at giving all passengers (between places in the United Kingdom) the security of a qualified pilot, cannot be rendered ineffectual for all Irish traders by the vague proviso of the preceding section. And if it is necessary to support the

(*a*) 8 E. & B. 445.

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decision of *R.* v. *Stanton*, there is this important distinction between that case and the present, that the 354th section was not applicable there, the vessel was not carrying passengers between places situate in the United Kingdom. The Temora falls within the absolute terms of sect. 354.

Judgment.

DR. LUSHINGTON:—This vessel traded between London and Belfast. In August last she was coming from Belfast to London with passengers on board. She was in charge of a licensed pilot. So circumstanced she ran into the Gowrie, a vessel moored off the East and West India Docks. The Trinity Masters were of opinion that the pilot was solely to blame for the collision, and in that opinion I concurred.

Was the pilotage compulsory?

The following question then arises: Was the pilot employed by virtue of any enactment rendering it compulsory on the master to take him? If so, the owners are relieved from responsibility for the pilot's act. But if the master was not compelled to take a pilot, then the pilot was the servant of the owners, and they are responsible for damages arising from his fault. The solution of the question manifestly depends upon statute law, for the whole subject matter is governed by statute.

Sect. 354 of the Merchant Shipping Act applies here, and is not to be restricted.

The statute primarily applicable is the Merchant Shipping Act, 1854; and *primâ facie*, at least, the 354th section governs the present case. This is a vessel carrying passengers between ports in the United Kingdom, and neither master nor mate have a pilotage certificate. The counsel for the Gowrie, however, contended that this section must be read with the preceding section, which keeps alive all existing exemptions from compulsory pilotage, amongst which they say, are the exemptions contained in the 59th section of 6 Geo. IV. c. 125, one of which is "Irish traders using the navigation of the rivers Thames or Medway:" and they referred me to the case of *R.* v. *Stanton* (*a*), determined in 1857 by the Court of Queen's Bench. I was reminded that this Court, in the construction of Acts of Parliament, should follow the decisions of the Courts of Common Law, and I readily accede to the proposition. But is the case cited applicable to the present? That was the case of a steamer, being a regular trader to the Baltic, carrying passengers, and the question was, whether it was compulsory upon her to take a pilot. The Court of Queen's Bench decided it was not compulsory, for that before the Merchant Shipping Act, 1854, such a vessel was exempted by the General Pilot Act of Geo. IV., that

R. v. *Stanton* distinguished.

(*a*) 8 E. & B. 445.

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that exemption was continued by the 353rd section of the Merchant Shipping Act, and was not narrowed by the 379th section. To that construction of the statute I might strongly incline, but is it applicable to the present case? The present question does not, as *R.* v. *Stanton* did, depend upon the construction of the sections 353 and 379 only, but upon these and section 354, which was not applicable there. Therefore 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 expressly imposes upon such a ship the duty of taking a pilot, and renders the employment of him compulsory. Unless I were to give such a construction to section 354, I should in this case declare the section to be a nullity; and so to hold would be against an important rule of construction applicable to Acts of Parliament.

Judgment for the defendants, but without costs.

For this reason I am of opinion that the pilot was taken by compulsion of law, and that the owners are thereby relieved from responsibility for his act. I must therefore dismiss this suit, but according to the usual practice of the Court in such cases I give no costs.

Deacon, proctor for the Gowrie.

Rothery, proctor for the Temora.

THE SEA NYMPH.

Collision—Ship in Stays—Onus Probandi.

A vessel proceeding in a cause of collision, and alleging herself to have been in stays at the time of the collision, and therefore helpless, is bound to prove in the first instance that such was the fact. The burden of proof then shifts, and the other side must show that the collision was occasioned by the vessel proceeding being improperly put in stays, or was an inevitable accident.

February 2.

THIS was a cause of collision, brought by the owners of the brig Civility against the brig Sea Nymph. The collision took place on a dark night off Flamborough Head; both vessels were carrying the regulation lights; previous to the collision both vessels were close-hauled on the starboard tack, the Civility the headmost of the two. The Civility pleaded that she had thrown herself in stays to go about, and whilst in stays, with her head yards aback and stern way on her, the Sea Nymph ran into her. The Sea Nymph alleged that the collision was occasioned by the Civility improperly putting herself in stays. The evidence was taken *vivâ voce*.

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The *Queen's Advocate* and *Spinks* for the Civility.

Deane, Q.C., and *Tristram* for the Sea Nymph.

Dr. Lushington, in the course of his address to the Trinity Masters, said:—The Civility's case is that at the time of the collision she was in stays, in irons, as you term it, and was unable to take any measure to prevent the accident. A vessel so alleging 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 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 circumstance. In the present instance you will, I think, agree with me, that it is clearly proved that the Civility was in stays at the time of the collision. The question then is, Did the mate of the Civility, who was in charge of the ship, take the proper precautions before throwing his ship in stays? Did he take a due look around him beforehand to ascertain that no ship was in his neighbourhood likely to come upon him? Or do you think that the Civility was put in stays without adequate care and caution to prevent a collision? The second question is, Do you think that the Sea Nymph kept a due look out, and was navigated with common care and skill, and that the collision was, so far as she was concerned, an inevitable accident, occasioned by the darkness of the night?

Dr. Lushington, after consulting with the Trinity Masters pronounced the Sea Nymph solely to blame for the collision.

Burchett, proctor for the Civility.

Coote, proctor for the Sea Nymph.

THE HUNTLEY.

Bottomry—Cause by default—Excessive Premium.

In a cause of bottomry *in pœnam*, the Court judging the premium to be excessive, will refer it to the Registrar and merchants to be reduced.

Bottomry. The bond was from Kingston, in Jamaica, to Liverpool, in this country, for 1,741*l.* 18*s.* 9*d.*; the sum actually advanced was only 1,219*l.* 7*s.* 2*d.*: the rate of

premium, therefore, more than 40 per cent. Proceedings went by default. 1860. *February 2.*

Spinks now moved for a *primum decretum.*

Dr. Lushington :—I shall not allow this extravagant premium. I shall sign a decree only for such a rate of interest as the Registrar and merchants shall think fit to be allowed. And I refer it to them for that purpose.

Ayrton, proctor for the bondholder.

The proceeds proving barely sufficient to meet the principal of the bond, the claim for interest dropped.

THE WILLIAM HUTT.

Collision—Consolidation of several Actions—Disseverance—Remission—Estoppel.

Where several actions are brought against a ship in respect of one collision by different plaintiffs, and several bail bonds given, and the actions are consolidated by order of the Court, and the damage pronounced for in the usual course, the Court has the power to open the order of consolidation and dissever the actions, but will not do so unless due cause be shown.

But if the cause is remitted from the Court of Appeal, with injunction "to proceed according to the tenor of former acts had and done," the Court has no authority to relax an order made previously to the appeal.

There is no appeal from an interlocutory order, which is a mere grievance; but the cause being appealed on the merits, the party may bring the grievance to the notice of the superior Court; failing to do so, the party is held to adopt the interlocutory order; and upon the cause being remitted, is estopped from moving the Court to rescind such order.

THIS was a motion to dissever three actions in respect of one collision, which had been consolidated by order of the Court. *February 6.*

In February, 1857, a collision took place between the Dutch steamship Sophie and the English steamship William Hutt. On 23rd September, 1857, Clarkson entered an action in 10,000*l.* on behalf of the owners of the Sophie against the William Hutt and her freight, and arrested the ship. Deacon appeared on behalf of the owners, and prayed a commission of appraisement. The ship was appraised at 6,625*l.*, and Deacon alleged that at the time of the collision she was in ballast. Bail was then given in 6,625*l.*, and on the 22nd October the ship was released. Pre-

1860. *February 6.*

liminary acts and the libel were brought in. On the 26th November, 1857, Clarkson entered an action in 7,000*l.* on behalf of the owners of part of the cargo shipped on board the Sophie, and arrested the William Hutt by a second warrant. On the 3rd December Clarkson entered an action in 1,000*l.* in behalf of the owners of another part of the Sophie's cargo, and executed a third warrant. On the 24th December Deacon appeared to both of these actions on behalf of the owners of the William Hutt, and, referring to the bail and proceedings in the first action, prayed the Court to decree the vessel to be released without bail. The Court rejected the prayer. Deacon then, referring to the appraisement, gave bail to the second action in 6,625*l.*, and bail to the third action in 1,000*l.*, and the ship was released. On the 13th January, 1858, the Court, at the petition of Deacon, Clarkson present, consolidated the three actions. The case then proceeded to hearing in the usual form, and on the 3rd June, 1859, the Court "pronounced for the damage, condemned the owners of the William Hutt and the bail respectively given on their behalf in the said damage and in costs, and referred the said damage to the Registrar and merchants." From this decree the owners of the William Hutt appealed to the Privy Council. Their Lordships confirmed the decree and remitted the cause to the Court below, "with all its incidents, the Court to proceed according to the exigency of the law and tenor of former acts had and done, and administer justice to the parties, and perfect that which may be wanting." On the 28th January, 1860, Clarkson brought in the remission, and the Court, at his petition, decreed to proceed according to the tenor of former acts.

Twiss, Q.C., now moved the Court to dissever the three actions. The consolidation was a consolidation of proceedings rather than of actions. It was ordered against the consent of the several plaintiffs, and it is submitted that the Court has no power to consolidate actions against the consent of the parties. The order was made for the benefit of the defendants to simplify proceedings and save expense; this has been done, and the defendants have received the benefit: the Court has now power to dissever the proceedings in the several actions. This case is different from the ordinary cumulative action in the case of seamen's wages, which corresponds to the *actio cumulata* in the civil law. Browne, in his "Civil and Admiralty Law" (*a*), quotes from the Lexicon Juridicum of Calvinus, title "Cumulatio," as follows:—"Cumulatio est jus persequendi multis actionibus in uno eodemque judicio editis, gratiâ minuendarum litium semper per-

(*a*) Pages 445, 446.

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missâ nisi fuerit nominatim prohibita. Est introducta propter compendium litigandi, scilicet ut apud eundem judicem, eodemque tempore, simul disceptentur ea quæ alioquin multiplicatis sumptibus et molestiis seorsim expedienda forent;" and this shows clearly what the object of the *cumulatio* is, it is "propter compendium litigandi." In a cumulative cause of seamen's wages it may be impossible to undo the *cumulatio*, because there is but one appearance only and one bail given: here there are three several actions and three several bail bonds.

The *Queen's Advocate* and the *Admiralty Advocate contrà*—There is no authority whatever for dissevering actions howsoever cumulated or consolidated; nobody ever heard of a disseverance before. Even if the plaintiffs could not have appealed immediately from the order of consolidation, that being only an interlocutory order and not a final decree, they could, when the cause was appealed on the merits, have moved the Court above to rescind the order: but they acquiesced in the order, and accepted the judgment of the Court above in their favour as binding in the three actions. They are therefore now estopped. But further, after the remission of the cause from the Court of Appeal, this Court has no longer power to rescind any order previously made in the cause.

Judgment.

Dr. Lushington:—The Court was not a little surprised when the learned counsel who moved sat down without giving the Court any information of the reasons for making the motion or of the consequences of granting it. When I ordered these three actions to be consolidated, did I do so according to the power and practice of the Court? If not, I should willingly retract the order if I had the opportunity. But according to my knowledge the universal practice of the Court has been to consolidate actions where the decision of each action depends on precisely the same facts; and in salvage suits the Court has gone further, consolidating actions where there are several sets of salvors not rendering precisely the same services. The power of consolidating actions is most beneficial. But for this power the owners of a ship would often be vexed by a host of different actions arising out of one matter—as in a case of collision by all the several owners of cargo in the vessel run down—and the Court could afford no relief, having no power to order the evidence in one action to be taken as evidence in another. If a cause, however, has not been remitted to this Court by the Court of Appeal, I doubt not that I have the power to dissever, if need

The Court has the power of consolidating actions, and of again severing them; but will not order a disseverance of consolidated actions, except upon good cause shown.

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be. But the Court will adhere to the common practice unless due cause be shown. This cause now comes before the Court on remission from the Privy Council. Have I the power now to rescind an order made previously to the appeal? True it is that there could originally have been no appeal from my order of consolidation, that being a mere grievance and not a definitive decree; but on the main appeal the plaintiffs might and ought to have brought the grievance to the notice of the superior Court. They did not do so; they adopted the order, and the cause is now remitted to me, with injunction to proceed according to the tenor of former acts had and done. After this I am of opinion that I have no authority, even if I had the inclination, to reverse my order. But I have no such inclination: I see no reason to think my original order wrong, and I foresee no inconvenience arising from maintaining it. I reject this motion (*a*).

The plaintiffs have adopted the interlocutory order before the Court of Appeal, and cannot now repudiate it.

The Court being enjoined by the Court of Appeal to proceed according to the tenor of former acts, has no authority to retract a previous interlocutory decree.

Clarkson, proctor for the plaintiffs.

Deacon, proctor for the defendants.

THE TAMARAC.

Arrest of Ship—Form of Bail-bond—Practice—Rules 41, 42, 43.

A bail-bond to lead the *supersedeas* of an arrest, signed before a commissioner by the sureties simply, without the addition of their descriptions and addresses, is good.

BOTTOMRY. An appearance had been given on behalf of the owner of the Tamarac, and on the 3rd of February a bail-bond had been signed before a commissioner at Exmouth, by George Tanner and Robert Pearce. In the body of the bond their several descriptions and addresses were stated, but neither of the bail added after their signatures their description or address in their own handwriting. The Registrar thereupon refused to grant a *supersedeas* of the arrest.

Rules 39—45 of the New Rules relate to bail, and are to be found in the Appendix to this Volume.

Twiss, Q.C., now moved the Court to order a *supersedeas* of the arrest. The bail-bond is executed in due form. The new

(*a*) See Appendix.

rules do not require that the sureties shall add their descriptions and addresses; rule 41 only states that "the bail-bond shall be signed by the sureties;" and to this the appointed form corresponds. The bail-bond simply signed is sufficient, because, before process executed, the names could be identified, if necessary, with the proper persons by parol evidence, as in the case of any other document. The defendant has complied with all the conditions to intitle him to a *supersedeas* of the arrest. The bail-bond was signed by two sureties before the commissioner, and the notice required by rule 43 was duly served upon the adverse proctor, and he made no appearance to oppose. 1860. *February 6.*

Dr. Lushington:—It may be desirable that the usual designations should be added, but the bail-bond simply signed is sufficient. A *supersedeas* for arrest may go.

Clarkson, proctor for the Tamarac.

THE SAINT NICHOLAS.

Salvage—Amount—Distribution.

SALVAGE. The collier steamer, value 5,000*l.*, bound from Newcastle to Seville, with a cargo of pig-iron, fell in, in the English Channel, with the St. Nicholas, a large American ship, totally disabled by tempest. A boat, at great peril, was sent on board, and the vessel taken in tow, and the next day brought safely into Portland. Value of the property saved, 52,000*l.* *February 13.*

The *Admiralty Advocate* and *Deane*, Q.C., for the salvors.

The *Queen's Advocate* and *Pritchard* for the owners.

Dr. Lushington awarded to the salvors 2,800*l.*; 1,500*l.* to the owners, 500*l.* to the master, and 800*l.* to the crew; double shares to the men who boarded in the boat.

Deacon, proctor for the salvors.

Pritchard for the owners.

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January 30.
February 6.
February 17.

THE PEERLESS.

Collision—Inevitable Accident—Pilotage Exemption—Jurisdiction—Proof of Indian Law—Proof of Pilot being duly licensed.

The pilot in charge of a ship is solely responsible for getting the ship under weigh in improper circumstances.

The catching of the cable on the windlass in running out may be an inevitable accident.

The High Court of Admiralty of England has concurrent jurisdiction with Vice-Admiralty Courts abroad.

The Admiralty Court does not require the same strict proof of colonial (and *semble* of foreign) law as a Court of common law.

An Indian Act is sufficiently proved by a clerk of the India House producing a copy of the Act officially forwarded by the Indian Government to the India House.

An order of the Lieutenant-Governor of Bengal held under the circumstances not proved.

Proof under the circumstances held sufficient to show a person to have been a duly licensed pilot of the Port of Calcutta.

THIS was an action of collision brought by the owners of the British steamship Jason, against the British ship Peerless and her owners intervening. The collision occurred on the 14th May, 1858, "off Kedgeree, in Cowcolly Roads, in the river Hooghly." The Jason was at anchor, and was run foul of by the Peerless in getting under weigh. The Peerless pleaded (as is hereafter set out fully) that she was in charge of a licensed pilot, employed by compulsion of law, and that the blame of the collision (if any) was attributable to him solely; but that in fact the collision was an accident, caused by the strength of the tide, and a link of the chain catching on the windlass in running out, and so preventing the ship from being brought up in time to avoid the Jason. To this the Jason replied on the facts, that the jamming of the chain, or at any rate, the failing to clear it promptly when jammed, was the default of the crew of the Peerless, and that the master of the Peerless was also to blame for permitting the ship to be navigated under canvas only, and without employing the steamtug which was in attendance; that for both of these negligent acts the owners of the Peerless were in any case responsible.

The Queen's Advocate and *Spinks* for the Jason.—If there is any default in the master and crew the owners are liable, not-

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withstanding the pilot is also to blame, *Diana* (*a*); *Massachusetts* (*b*). Here the master was guilty of negligence in permitting his vessel to go into obvious danger; it was his duty to have interposed with the pilot, and required the aid of the steamtug. It was also the duty of the master and crew to have the chain clear and to keep the chain clear.

Deane, Q.C., and *Twiss*, Q.C., for the Peerless.—The pilot alone is responsible for the navigation of the ship, *Agricola* (*c*). The catching of the chain is an accident that will often happen notwithstanding all care to keep it clear, and did so happen on this occasion.

Dr. Lushington, summing up to the Trinity Masters:—The general principle in cases of this kind is well determined: the law presumes that the collision is the fault of the vessel under weigh, and imposes upon such vessel the burden of showing that the collision was an inevitable accident, or was caused solely by the act of a qualified pilot, employed by compulsion of law, or was caused by the fault of the other vessel, as by being improperly moored, or by breaking her sheer.

The owners of the Peerless say, "We had a qualified pilot in charge, in obedience to the law, and the collision was his act; we are therefore not responsible." Assuming for the present that the pilot was duly licensed, and that the employment of him was by law compulsory, what are the facts? The pilot had charge of the Peerless to get her under weigh. He knew that the Jason was lying below him in the river; he knew that the tide was strong; he knew that the steamtug in attendance was anchored close at hand. Knowing all this, he gets the ship under weigh, trusting to his canvas only. Was this consistent with prudence? This is the first question I shall put to you, whether in these circumstances the pilot was justified in getting the ship under weigh without employing the assistance of the steamtug? Well, presently the pilot finds himself in difficulty, the Peerless is drifting upon the Jason; he orders to light to the starboard chain, but a delay takes place, and the order is not immediately executed in consequence of the chain catching on the windlass. Is this a circumstance to be prevented by reasonable care and caution on the part of the crew, or is it a common incident of the navigation of a ship, for which the

Was the pilot to blame for getting under weigh without a steamtug?

Was the jamming of the cable an inevitable accident?

(*a*) 4 Moore, P. C. 11. (*b*) 1 W. R. 371. (*c*) 2 W. R. 10.

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master and crew are not to blame, in fact a pure accident? This question also I leave to your nautical experience to answer, and to say further, whether the collision which ensued was not in part caused by this circumstance.

Was the master to blame for permitting the pilot so to get under weigh?

It is also urged by the Jason that the master of the Peerless was to blame for permitting the pilot to get his ship under weigh and in navigating her in the manner he did. There may be occasions on which the master of a ship is justified in interfering with the pilot in charge, but they are very rare. If we encourage such interfering, we should have a double authority on board, *a divisum imperium*, the parent of all confusion, from which many accidents and much mischief would most surely ensue.

The master must not interfere except in urgent cases.

If the pilot is intoxicated, or is steering a course to the certain destruction of the vessel, the master no doubt may interfere and ought to interfere, but it is only in urgent cases. Here the danger was not urgent, until at the last moment. But I ask you to say, looking at all the circumstances of the case, whether the master was to blame for not interfering with the pilot.

Pilot of the Peerless alone to blame.

Dr. Lushington, on returning from consultation with the Trinity Masters:—We are all of opinion that the pilot of the Peerless was solely to blame for this collision.

On the 6th of February the point was argued whether the owners of the Peerless were relieved from responsibility of the act of the pilot on board. The material articles of the allegation of the Peerless were as follows:—

I. That the Peerless, in charge of an officer from the department of the harbour master of the port of Calcutta, left the said port on the 11th day of May, 1858, bound to Liverpool.

2. That, in prosecution of the voyage, the Peerless was under the direction of the said officer dropped down the river Hooghly, and on the same evening brought to anchor off Cooley Bazaar. That the said officer then left the said ship at 4 A.M. of the next day, the 12th of May, and I. P. B. Le Patourel, a duly licensed pilot of the port of Calcutta, came on board and took charge of her to pilot her out to sea. That between 4 and 5 A.M. of that day the ship was got under weigh in charge of the said pilot, and in tow of a steamtug to proceed down the river. That at 2 P.M. of the said day the ship was brought to under the directions of the said pilot. That on the following morning, the 13th of May, the said ship again proceeded down the river, and at 4·30 P.M. of the same day was again brought to under the directions of the said pilot in Cowcolly Roads.

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3 and 4. Stating the facts of the collision with the Jason on the morning of the 14th of May.

5. That at the time of the collision the said ship was in charge of I. P. B. Le Patourel the pilot; that all the orders of the said pilot were promptly, strictly and properly executed, and that the blame of the said collision, if any, is attributable solely to the said pilot, and not to the neglect, mismanagement or want of skill of any of the crew of the said ship.

6. That by the Marine Act passed by the Legislative Council at Calcutta, and which received the assent of the Most Noble the Governor-General of India on the 13th August, 1855, and which assent was communicated to the Legislative Council on the 1st September, 1855, and the said Act thereupon promulgated, and which Act is entitled Act No. XXII. of 1855, it is enacted by section 12, "In every port subject to this Act, to which the provisions of this section shall be specially extended by an order of the local government, it shall be unlawful to move any vessel of the burthen of 200 tons or upwards without having a pilot, harbour-master, or assistant of the master attendant or harbour-master on board, or to move a vessel of any burthen less than 200 tons and exceeding 100 tons, without having on board a pilot, harbour-master, or assistant of the master attendant or harbour-master, unless an authority in writing so to do has been obtained from the conservator, or some officer empowered by such conservator to give such authority; and if any vessel shall, except in a case of urgent necessity, be removed contrary to the provisions of this section, the master of such vessel shall be liable to a penalty not exceeding 200 rupees for every such offence, unless the master of the vessel shall, upon application to the proper officer, be unable to procure a pilot, harbour-master, or assistant of the master attendant or harbour-master to go on board the said vessel."

7. That on the 1st day of July, 1856, it was ordered by the Lieutenant-Governor of Bengal, in the rules and regulations with respect to the limits of the port of Calcutta, in the words following:—"With the sanction of the Governor-General of India in Council it is hereby declared, that the port of Calcutta, and the navigable river and channels leading to that port, are subject to Act No. XXII. of 1855." And in consequence thereof the said Act hath ever since that time been, and now is, binding and in full force upon vessels navigating the said river Hooghly.

8. And the party proponent expressly alleges and propounds that under and by virtue of the aforesaid Act and Regulations, and

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by the general law in that case made and provided, his aforesaid parties, the owners of the said ship Peerless, are exempt from all responsibility for the damages alleged to have been occasioned by their said vessel while in charge of the said J. P. B. Le Patourel the pilot, as before set forth, and whom they had been compelled to take on board in obedience to the aforesaid regulations, and all of whose orders were promptly and effectually obeyed as aforesaid.

The 4th article of the Jason's reply was as follows:—"That in contradiction to what is pleaded in the 8th article of the said allegation, the party proponent alleges and propounds that the owners of the said ship Peerless are not under and by virtue of the therein recited Act and Regulations, nor by the general law in that case made and provided, exempt from all responsibility for the damages occasioned by their said vessel while in charge of the said J. P. B. Le Patourel the pilot."

In support of the allegation the master of the Peerless deposed:—"The Peerless brought up about 6 P.M. of the 11th, off Cooley Bazaar. She was in charge of the harbour-master in going down the river Hooghly, and until the next morning, at about 4 o'clock, when the pilot took charge of her; his name was J. P. B. Le Pastourel or Patourel; he was a licensed pilot for that port. I have seen his name in the pilots' lists at Calcutta; he took charge of her to pilot her out to sea to the Sandheads. I know him to be a pilot duly licensed for the port of Calcutta by his own representations, by representations of others in the pilot service, by the published list of pilots, and because I got him from the harbour-master's office at Calcutta." In cross-examination he stated that an inquiry into the circumstances of the collision and the conduct of the pilot had been held before a marine committee assembled under orders of the master attendant in his office at Fort William, Bengal, and a document purporting to be a true copy of the proceedings was produced to him and admitted to be correct. The heading of this document was as follows:—"At a marine committee assembled under orders of the master attendant on the 18th day of May, 1858, to inquire into the circumstances of the collision between the ship Peerless and steamship Jason, under the pilotage charge of Mr. Mate, pilot (on the free list) J. P. B. Le Patourel, in Cowcolly Roads, 14th May, 1858." The evidence of the mate was to the same effect as that of the master. The following affidavit was also brought in, with exhibit annexed:—

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"Joseph Parker, of the India Office, Leadenhall-street, London, clerk, in the marine and transport department there, of the age of twenty-six years, or thereabouts, a witness produced and sworn on his oath, deposes as follows:—

"20th December, 1859.

"6th. To the sixth article. I have been in the India Office aforesaid for rather more than eight years. I am acquainted with the Acts of the Legislative Council at Calcutta, because all copies of the Acts are forwarded by dispatch from India to the India Office; they are printed copies, the same as the Acts of Parliament here; such printed copies are forwarded officially to us, and I have every reason to believe them to be authentic copies. I have with me such a printed copy of the Marine Act, passed by the Legislative Council at Calcutta, and which received the assent of the Governor-General of India on the 13th of August, 1855. I do not know when such assent was communicated to the Legislative Council. That Act is intitled No. XXII. of 1855. I bring in and leave with the Examiner to be annexed to my deposition such printed copy of the Act. Such printed copy as I bring in is recognized as an authentic copy at the India Office, and is officially forwarded to us by the government. I presume that the original Acts are kept at Calcutta.

"7th. To the seventh article. I know that the port of Calcutta was made subject to the provisions of the said Act. I know that by a letter, dated 30th October, 1856, from either the Lieutenant-Governor of Bengal or the Governor-General of India, I am not sure which. The date of the order declaring the limits of the port of Calcutta was 11th July, 1856. The navigable rivers and channels leading to that port were also made subject to the provisions of the said Act No. XXII. of 1855. The letter was addressed to the Chairman, Deputy-Chairman, and Court of Directors of the East India Company, the usual way before the changes of government in which such communications were made. I have every reason to believe that the said Act XXII. of 1855 has ever since that time been and now is binding upon all vessels navigating the river Hooghly. I know of no Act nor Order repealing the Act and Order I have deposed to. I have looked to see if there was any such Act repealing the XXII. of 1855, and I have every reason to believe that if there had been such an Act it would have been forwarded to us, and that I should have known it.

"8th. To the eighth article. From the quarterly returns of the pilot service, which we receive every quarter at the India

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Office, from the government of India, it appears that John P. B. Le Patourel joined the pilot service, the Bengal pilot service, in May, 1845, and so continued up to the date of the last return, somewhere about, I think, July, 1859.

"J. PARKER."

(Exhibit to the affidavit.)

ACT No. XXII. OF 1855.

PASSED BY THE LEGISLATIVE COUNCIL OF INDIA.

(Received the assent of the Governor-General on the 13th August, 1855.)

An Act for the Regulation of Ports and Port-dues.

"XIIth. In every port subject to this Act, to which the provisions of this section shall be specially extended by any order of the local government, it shall be unlawful to move any vessel of the burthen of 200 tons or upwards without having a pilot, harbour-master, or assistant of the master attendant or harbour-master on board; or to move a vessel of any burthen less than 200 tons and exceeding 100 tons without having on board a pilot, harbour-master, or assistant of the master attendant or harbour-master, unless authority in writing so to do has been obtained from the conservator or some officer empowered by such conservator to give such authority; and if any vessel shall, except in a case of urgent necessity, be removed contrary to the provisions of this section, the master of such vessel shall be liable to a penalty not exceeding two hundred rupees for every such offence, unless the master of the vessel shall, upon application to the proper officer, be unable to procure a pilot, harbour-master, or assistant of the master attendant or harbour-master to go on board the said vessel."

Deane, Q C., and *Twiss*, Q.C., for the Peerless. The Indian Act and the order extending the Act to the *locus in quo* of the collision are admitted on the pleadings. From those enactments there follows an exemption to the owners for the act of a pilot employed by them in obedience to the law.

The *Queen's Advocate*, *Spinks* and *Hannen* for the Jason. 1. Neither the Indian Act nor the order extending the Act are proved. It is not sufficient to produce the foreign statutes; foreign law must be proved by a *testis peritus*; *Earl Nelson* v. *Lord Bridport* (*a*); *Taylor on Evidence* (*b*); and Mr. Parker, who is only a clerk in the marine and transport department in the India House, is not a *testis peritus*.—[DR. LUSHINGTON: In

(*a*) 8 Beav. 527.

(*b*) Pages 1149, 1150 (3rd ed.)

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the Privy Council we look at the Code Napoléon and the Indian Regulations every day.]—That is only because the Court there is a Court of Appeal.—[Dr. Lushington: Has not the Admiralty Court primary jurisdiction over these waters; and am I not, therefore, bound to take notice of the law?]—It is submitted not, these being colonial waters. The copy of the Indian Act, produced by Mr. Parker, is not enough; he states it to be one of many copies officially forwarded from India to the India House; but it bears no place or printer's name; nothing to mark it as being a correct copy of the original. Even copies of British statutes, to be admissible in evidence, must purport to be printed by the Queen's printers. The 8 & 9 Vict. c. 113, s. 3, and 14 & 15 Vict. c. 99, s. 7, which provide for the proof of the foreign and colonial Acts, require examined copies or copies authenticated by the foreign or colonial seal. India may not be a colony, but the inference is obvious, that the proof of an Indian Act must be as complete in formalities as the proof of a colonial Act. The proof of the order of the Lieutenant-Governor of Bengal, extending the Act, is still more palpably insufficient. Mr. Parker produces no official or any other copy, and the only evidence of its existence is, that Mr. Parker says he knows it does exist from a letter, which he does not even say that he has seen, or even that he has seen any copy of it; and neither the letter nor any copy of the letter is produced. 2. There is no proof that the *locus in quo* of the collision was subject to the Act. Even assuming the order extending the Act to be proved, it is not shown to be a valid order. The Act only speaks of ports being made subject to the Act. What right had the Lieutenant-Governor or even the Governor-General to declare the navigable river and channels leading to a port subject to the Act? Nor is there any proof that Cowcolly Roads form part of the navigable river and channels leading to the port of Calcutta; and certainly they are not part of the port itself, for the Peerless expressly pleads having left the port the day before. 3. Admitting the employment of the pilot to have been compulsory, there is no exemption to the owners. The Act expresses no exemption, and the exemption must be expressly given as it is by the English statute. The plaintiffs no doubt rely on what they call the general principle, that a person is not responsible for the act of another whom he is compelled by law to employ, as suggested in the *Protector* (*a*). But it may be doubted whether any such principle exists. In the case of the *Neptune the Second* (*b*), Lord Stowell held that the owners of a vessel

(*a*) 1 W. R. 54. (*b*) 1 Dodson, 467.

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were liable for the act of an authorized pilot; and although the decision was erroneous, as pronounced in ignorance of the statute of 52 Geo. III. c. 39, which expressly gave exemption, it is direct authority, as was observed in the case of the *Eden* (*a*), that there was no exemption for the act of an authorized pilot independent of the statute. The *Girolamo* (*b*) is to the same effect. But even if it were otherwise the principle does not apply unless the entire power of selection is taken away, and the obligation of law is to employ the particular person actually employed. *Martin* v. *Temperley* (*c*), in which all the cases are reviewed, expressly decides that where there is a power of selecting from a class, although the class is specified and limited by the law, the responsibility of the employer continues. Here the power of selection remained. The master of the Peerless might have employed any licensed pilot he chose, or any assistant of the harbour-master. 4. There is no adequate proof that the person in charge was a pilot. The mere assertion of the master will not do, and the document relating to the official inquiry was not made evidence by its production to the witness on cross-examination.

Deane, Q.C., in reply. The law stands admitted on the pleadings; at any rate Mr. Parker is an official person sufficient to prove the law. For certain purposes a professional lawyer may be necessary, as where the law depends on a variety of judicial decisions, but not to prove the passing of a mere decree or ordinance, as here. Of the Act itself the best copy possible has been produced, and the order, it is submitted, though not proved so satisfactorily, is nevertheless sufficiently established, especially as there has been no direct denial of it. The defendant's own pleading shows the collision to have occurred in the river Hooghly, and within the district of licensed pilots for the port of Calcutta. If the pilotage is in fact compulsory, there is exemption, whether expressed or not in the statute. That point must be considered settled after the cases of the *Protector* (*d*), and the *Maria* (*e*). The doctrine of selection has never been applied to pilots.

February 17. Judgment.

Dr. Lushington:—The Trinity Masters have advised the Court that the pilot of the Peerless alone was to blame for this collision with the Jason, and the Court concurs with their advice. The owners of the Peerless, however, must be responsible for

(*a*) 4 N. of C. 462.
(*b*) 3 Hagg. 177.
(*c*) 4 Q. B. 298.
(*d*) 1 W. R. 45.
(*e*) Ibid. 95.

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the damage, unless they can show a legal exemption from such responsibility. It has been contended, for the owners of the Peerless, that by reason of having a pilot on board by compulsion of law, and the collision arising solely from his fault, they are relieved from that responsibility. The *onus probandi* lies upon them to make good this defence.

The burden of proof is on the defendants.

This collision took place in the river Hooghly. The Peerless was lying in the beginning of May in the port of Calcutta, and in the first article of her allegation it is pleaded that on the 11th May, 1858, she left the port in charge of an officer from the department of the harbour-master. The second article pleads that on that same evening she was brought to anchor, having dropped down the river Hooghly off Cooley Bazaar; that on the 12th of May, Le Patourel, a duly licensed pilot of the port of Calcutta, took charge of her. It is clearly proved that a person of that name, professing to be a pilot, did so take charge of the vessel, and continued in charge until after the collision. The sixth article pleads that by an Act of the Legislative Council at Calcutta, of the date 13th August, 1855, s. 12, it was made unlawful in every port subject to the Act, to which the provisions of the section should be especially extended by order of the local government, to move any vessel above 200 tons without a pilot, and a penalty of 200 rupees was imposed for a violation of the Act. The seventh article pleads that on the 1st of July, 1856, it was ordered by the lieutenant-governor of Bengal, that the port of Calcutta and the navigable river and channels leading to that port should be subject to the Act. The eighth article pleads exemption from responsibility by reason of the Act and Regulations pleaded, and also by the general law. The fourth article of the responsive allegation on behalf of the Jason contradicts and denies the eighth article of the allegation of the Peerless, and alleges that neither by the recited Act and Regulations, nor by the general law are the owners of the Peerless exempted. It is not denied in the pleadings that Le Patourel was a licensed pilot, nor that he was piloting the vessel within pilotage waters. That, however, is the first question I have to determine. The second question is the proof of the Bengal Act of 1855. The third, whether it is proved that the provisions of that Act extend to the *locus in quo*. If these laws are proved, a fourth question would then arise, whether the owners are exempt by virtue of them, or by any general law.

Questions to be determined.

What founds the jurisdiction of the Court in this case? What laws is the Court to administer? What rules of evidence is it to

The Court has jurisdiction over British colonial waters

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observe? What notice ought the Court to take of the laws prevailing in the place where the collision occurred? These are questions on which the main questions of the case depend, and they must be decided by reference to maritime law and practice, and to the many distinctions existing between transactions on the sea and on land. The *locus in quo*, the river Hooghly, is a part of the possessions of the Crown of Great Britain. The jurisdiction of the Court over a British ship, with respect to collision occurring in such a place, is, I apprehend, founded on two considerations; first, upon immemorial usage that the High Court of Admiralty has always exercised jurisdiction wherever British Courts of Vice-Admiralty have been intitled so to do; and secondly, upon the arrest of the ship, the *res*, within Admiralty jurisdiction. Its powers extend to acts done on the high seas, and to places within British dominion. As to foreign ships provision is made by the 527th section of the Merchant Shipping Act, 1854. My observations of course refer to collisions or matters *ejusdem generis*. I speak with the more confidence as to the concurrent jurisdiction of this Court with Vice-Admiralty Courts abroad, because before the establishment of the Judicial Committee this Court was the Court of Appeal from the Vice-Admiralty Courts. A practice had crept in, I know not how, of appealing occasionally from the Vice-Admiralty Courts to the Privy Council. The last was in 1819, and I well remember it because I was counsel in the cause and opposed to Sir Samuel Romilly, and the Privy Council then said that all Vice-Admiralty appeals should thenceforth go to the Admiralty Court, as the proper Court of Appeal, that Vice-Admiralty Courts were only instituted because it was inconvenient in instance causes, as was also found in prize causes, to resort to the High Court of Admiralty sitting in England. From that time Vice-Admiralty appeals were always taken to this Court, until the establishment of the Judicial Committee and the passing of the 3 & 4 Will. IV. c. 41.

The municipal law of the colony to be followed, the strictest proof thereof not required.

I have, therefore, no doubt of the jurisdiction of the Court, and in exercising that jurisdiction, it is the duty of the Court to carry into effect the local laws of the place where the transaction in question occurred; I should therefore pay regard to the local laws of India or Canada, as I would to those of Liverpool or Newcastle. And to ascertain those laws I do not consider that I am bound to require all the strictness of proof which a Court of common law would require in proving foreign law, and for the following reasons:—First, I hold that I have local jurisdiction over the *locus in quo*, and that is not an immaterial distinction, for at common law the Courts have no local jurisdiction over the

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place. Secondly, more especially because in matters of evidence I must look to the practice of my predecessors, and the great distinction which prevails between the description of causes which come under the cognizance of the Court of Admiralty, and those in other Courts. The cases over which the Court of Admiralty exercises jurisdiction occur in all parts of the world, on the high seas and in remote places. It is a well-known principle, confirmed by authority, that Courts of Admiralty are to proceed *levato velo*, that is, with the utmost expedition. In order to carry this principle into effect, this Court has both in prize matters and civil suits been accustomed to receive evidence which would not have been admitted in other Courts. For instance, affidavits sworn almost in every way, before justices of the peace, commissioners in clearing, and so forth; even evidence not on oath, as where, according to the custom of some of the states in the north of Europe, the original evidence was not taken on oath, but the person giving it undertook to make oath afterwards if required. So, from the necessity of the case, all parties interested were, contrary to the laws of other Courts at the time, admitted to give evidence in causes of collision, salvage and others.

Rules of evidence in the Court of Admiralty not the same as in Courts of common law.

The course which I wish to follow, so far as circumstances will allow, is—1st. To observe inviolate all the great principles which govern the law of evidence in Courts of common law and equity. 2nd. In matters of merely technical proof, to exercise a discretion according to the circumstances of the case. Of course when bound by statute or authority I should strictly obey.

I will shortly sum up my reasons for prescribing to myself this line of conduct. 1st. The practice of my predecessors. 2ndly. The nature of the causes tried, occurring in all parts of the globe. 3rdly. The difficulty of getting witnesses, when those concerned are alone present, and even those persons never stationary, but traversing the seas in all directions. 4thly. The immense expense and delay which would be incurred from a rigid adherence to rules most proper elsewhere. Take the case of a bottomry bond granted in Australia, under circumstances which raise a question of its validity. 5thly. I think the Court may be safely trusted to weigh evidence that might not be so safe to leave to a jury. To any wanton departure from the strict rules of evidence no one can be more adverse than myself, but I think that their application must be modified by circumstances when necessity requires.

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The proof that the ship was in charge of a licensed pilot is adequate.

It is on these principles I proceed to consider the evidence in this case. 1st. Is there proof that the person taken on board was a licensed pilot for the *locus in quo?* The mate swears that the ship was boarded by a duly licensed pilot of the port of Calcutta, and he states that his name was Le Patourel. This is not evidence that Le Patourel was duly licensed. It is merely swearing in the words of the plea, and proves that a person called Le Patourel acted as pilot. It appears to me, however, that the evidence given on cross-examination does carry the proof considerably further, for it proves that the conduct of this Le Patourel was the subject of inquiry before the Marine Committee at Fort William; and I think the fair inference is, that he must have been a licensed pilot, to be subject to that jurisdiction; it proves also the identity of the man. The master of the Peerless swears to the same effect, and that he had seen the pilot's name in the Pilots' Lists at Calcutta. And on cross-examination he also deposes to the inquiry into the conduct of the pilot before the Marine Committee. It is not necessary for me to make any reference to the exhibit produced to these witnesses on cross-examination, nor to determine whether it is or is not evidence of facts. True it is that there might have been better evidence of Le Patourel being duly licensed, as a certificate from the pilot authorities, or a certified copy of the licence: but acting upon the principles I have stated, I am of opinion that there is adequate admissible evidence to satisfy my mind that Le Patourel was a licensed pilot in charge of this ship.

The Pilot Act is proved.

The next question is the proof of the 6th article, which pleads the Pilot Act of Calcutta. I have no doubt on this point. I think that the evidence of Mr. Parker, producing an authentic copy of the Act officially forwarded by the Bengal Government is quite sufficient. Indian marriages have been proved by an extract copy of the copy of the Indian register forwarded from India to the India House. At first the officer used to be in attendance with the copy register, but this was afterwards understood to be unnecessary, and discontinued.

But not the Lieut.-Governor's order.

The next question is of essential importance. The 7th article pleads that on the 18th of July, 1856, it was ordered by the Lieutenant-Governor of Bengal in the Rules and Regulations with respect to the limits of the port of Calcutta in the words following:—"With the sanction of the Governor-General of India in Council, it is hereby declared that the port of Calcutta and the navigable river and channels leading to that port are subject

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to Act No. XXII., of 1855:"—and that in consequence thereof the said Act hath ever since that time been, and now is, binding and in full force upon vessels navigating the said River Hooghly. The proof of this article depends entirely on the evidence of Mr. Parker. There is no copy of the Rules and Regulations pleaded or produced; and Mr. Parker only deposes, that from a letter of the Governor or Lieutenant-Governor, he knows the fact that the navigable rivers and channels leading to the port were made subject to the Act: he produces no such letter or extract from such letter. This is the turning point of the case. It matters not that the Pilot Act was passed, unless it be shown that it is applicable to the *locus in quo*; the provisions of the Act must be specially extended by order of the local government. Of this order I have no evidence, save that Mr. Parker, from some letter not produced, deposes that there was such an order. How can I receive such evidence as this? It is even less than *vivâ voce* evidence of the contents of a written instrument: it is the evidence of a person who never saw the order, and forms his opinion of its contents from an unproduced letter. Moreover, there is a section of the Act itself, which provides a proper mode of publishing the orders of the local government, and therefore of great importance: my attention was not drawn to it by counsel. It is the 8th section, and is in the following words:—"Every declaration and order of a local government, which shall be made in pursuance of this Act, shall be published in the official gazette of that government, or, where there is no official gazette, in such other public manner as that government may order; and a copy thereof shall be fixed up in some conspicuous place in the office of the Conservator of every port to which such order shall relate, and in the Custom-house, if any, of every such port." This order, therefore, of the Lieutenant-Governor must have been published in the official gazette of the Bengal Government; and surely a copy of that gazette might have been produced.

Anxious as I am to look to the real merits of every case which comes before me, and to avoid deciding upon merely technical rules, I cannot come to the conclusion that the evidence offered on this point is admissible evidence, or that the extension of the Act to the *locus in quo* is proved. Indeed, the rule in question requiring the production of the original, or a satisfactory copy, is founded upon the soundest principle; and I might add that, in this case, there might in the extension order, if actually given, have been qualifications materially affecting the case. For these reasons I must hold that the owners of the Peerless have not

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proved that their vessel was in charge of a pilot employed by compulsion of law, and consequently they have failed in establishing their defence.

Defence not proved.

Being of this opinion, it is neither necessary nor fitting that I should enter upon the other questions discussed at the bar. I pronounce against the Peerless.

Pritchard, proctor for the Jason.

Tebbs, proctor for the Peerless.

ALBERT CROSBY.

Wages of Apprentice—Action by Default—Proceeding for Penalty contained in Indenture.

An apprentice is intitled to sue proceeds of the ship he has served in for wages due under a general apprenticeship to the owner, but not for the penalty contained in the indenture for breach of the agreement.

A minor sues in the Admiralty Court by proxy.

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THIS was an action on behalf of William Compton against the proceeds of the Albert Crosby, for wages earned by him as apprentice. The plaintiff, being a minor, sued by proxy in the person of his father, as curator and guardian. Proceedings were in default. The indenture of apprenticeship was between the apprentice and the owner of the ship, and was dated 11th May, 1858; the apprentice was thereby bound to serve for four years, the owner to find provisions, &c., to pay the sum of 30*l.* in manner following: 5*l.* for the first year, 6*l.* for the second year, 8*l.* for the third year, and 11*l.* for the fourth year; for the performance of the mutual agreements either party was bound in the penal sum of 5*l.* The affidavit for the plaintiff stated that at the time of making the indenture it was intended and arranged that the apprentice should serve on board the Albert Crosby; that he accordingly joined that ship on the 1st of June, 1858, and served on board until the 22nd of September, 1859, when he left the ship in consequence of the ship being under arrest, and no provisions being supplied on board; that until the sale of the ship on the 23rd December, 1859, he was always ready to return to the ship and do his duty. The plaintiff claimed 16*l.* 11*s.* 4*d.* as wages under the indenture, and board wages between 22nd September and 23rd December, 1859, and a sum of 5*l.* by way of penalty.

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Tristram now moved the Court to order payment of the claim. The 5*l.* penalty may be looked upon as additional wages. By the 254th section of the Merchant Shipping Act, 1854, forfeitures for misconduct may be deducted from wages in civil proceedings, and it is only just that the converse should hold good too.

Right Hon. Dr. Lushington:—I cannot give you a decree for a penalty. In the case you have mentioned the Act gives the power to make the deduction; there is no such power here. Take your motion, less the 5*l.*

Coote, proctor for the plaintiff.

THE NORTH STAR.

Bottomry—General Average Contribution.

A right to general average contribution from a ship after adjustment made gives the owners of cargo no lien on the ship by the law maritime.

A debt for general average contribution, arising in respect of an outward voyage, being a personal debt only, is not a sufficient foundation for a bottomry bond on the ship for the voyage homeward.

Quære, if a lien upon the ship for general average contribution, given by the law of the foreign port where the bond is given, could support such a bottomry bond.

A bond, given at Buenos Ayres on ship and freight for the voyage to England to pay a general average contribution due upon adjustment from the ship to the outward cargo, pronounced against, but without costs.

THIS was an action of bottomry brought by Messrs. Drake & Co., the holders of a bond upon the English brig North Star and her freight. The bond was as follows:—

Bottomry Bond.

Know all men by these presents that I, John Cornish, master of the British brig North Star, belonging to Exeter, am held and finally bound unto Messrs. Fels & Co., of Buenos Ayres, merchants, in the sum of 1,897*l.* 11*s.* 9*d.* of lawful British money, to be paid to the said Messrs. Fels & Co., or their certain attornies, executors, administrators and assigns, for which payment well and truly to be made I bind myself, my heirs, executors and administrators, and also the said ship or vessel, her tackle, apparel and furniture, and the freight to be earned by her on the voyage hereinafter mentioned, firmly by these presents, sealed with my seal. Dated the 27th day of November, 1858.

Whereas the said brig is lately arrived at this port of Buenos Ayres from the Port of Hamburgh, and having during her

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voyage suffered damage by collision with a galliot, in the River Elbe, which obliged her to put into the port of Exmouth, she on entering that port grounded, was assisted by pilots of that port, and consequently made subject to an action for salvage in the Admiralty Courts of Great Britain. It was found necessary to discharge the vessel at that port, to repair damages before continuing her voyage, all of which damages were repaired, causing a considerable expense. The master having been unable to procure funds to meet these expenses, as well as those of salvage money, and other necessary and consequent expenses and legal charges, sold a portion of the cargo to defray the same. The remainder of the cargo was taken on board, and the master proceeded on his destined voyage to Monte Video and Buenos Ayres; at which latter port, having arrived, these expenses and losses became a case of general average, and a legal statement thereof having been executed through the Commercial Court of this place, it resulted in the vessel having to contribute the sum of 1,600*l.*, more or less. Now it being necessary for the master to pay this sum before leaving this port for England, to which country she is now bound, and about to return, and having no other means to procure it, advertisements were inserted in the public journals of this city for the loan thereof on the security of the said vessel North Star and homeward freight, and in answer to these advertisements, the said sum has been advanced to him by Messrs. Fels & Co. of this city, for the aforesaid purposes, on the hazard and adventure of the said vessel and freight, on her said intended voyage from this port to England aforesaid; and the said master, John Cornish, hath taken up the same on the hazard and adventure aforesaid.

Now the condition of the above obligation is such, that if the said brig do and shall with all reasonable and convenient speed sail from the port of Buenos Ayres aforesaid, on the said intended voyage to England, and that without deviation, (the perils, damages, accidents and casualties of the seas and navigation excepted); and if the above-bounden John Cornish, his heirs, executors or administrators, or the owners of the said vessel do and shall, within three days after the said vessel shall arrive in England aforesaid, well and truly pay, or cause to be paid, unto the said Messrs. Fels & Co., their agents, attornies, executors, administrators or assigns, the sum of 1,459*l.* 13*s.* 9*d.* of lawful British money, together with 437*l.* 18*s.* sterling, being the amount of bottomry premium thereon, at the rate of 30*l.* per centum; or if on the said voyage the said vessel shall be utterly lost, cast away or destroyed, in consequence of fire, enemies, men of war, pirates, storms, or other the unavoidable perils

dangers, accidents or casualties of the seas and navigation, to be sufficiently shown or proved by the said John Cornish, his executors or administrators, or by the owners of the said vessel, their executors or administrators, then the above-written bond or obligation to be void, otherwise to remain in full force and virtue. 1860. *February 23.*

JOHN CORNISH (*Seal*).

Signed, sealed and delivered
in the presence of
JOSEPH A. GREEN, } Clerks at the British
HENRY MARSHALL, } Consulate.

The action was defended by Richard Redway, of Exmouth, the owner of the brig. The recital of the facts in the bond furnishes a sufficient statement of the case, subject to the following additions. Messrs. Fels & Co. advanced no money to the master, nor did he require any. They represented all the consignees of cargo, to whom general average contribution was due from the ship, and the bond was given to them by way of security for the payment of the entire contribution due from the ship; as collateral security, bills of exchange were at the same time drawn upon Redway by the several consignees for the amounts respectively due to them. These bills were ultimately dishonoured. No proof was adduced by the bondholders of any law at Buenos Ayres enabling a vessel to be arrested upon a claim of an unpaid general average contribution, but the answer on the part of Redway alleged that "the master was compelled by the consignees, under the threat of detaining his brig at Buenos Ayres until the amount demanded was paid, to advertise for bottomry, and finally to give the bottomry bond," and the master himself deposed that "he signed the bottomry bond under coercion, with the apprehension that the brig would be detained if he did not sign it."

Deane, Q.C., and *Wambey* for the bond. The bond was necessary to enable the ship to sail, for it seems admitted on the other side that the ship might have been arrested: thus there was the necessity required by the law. It is true that no money was actually advanced at the time, but the money had been originally advanced for the necessities of the ship; it was a true debt, and a debt of the ship. The whole proceedings passed before the British Consul. Mr. Redway's conduct in selling the cargo for the necessities of his ship in his own port, must deprive him of all favourable consideration of the Court.

Twiss, Q.C., and *Clarkson, contrà.* Nothing can turn on any supposed law of Buenos Ayres, for foreign law must be

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proved, *De Louis* (*a*); *Prince George* (*b*). A mere threat to arrest, or even an actual arrest of the ship, is no necessity for justifying bottomry, *Augusta* (*c*); *Aurora* (*d*); *Osmanli* (*e*): nothing will justify bottomry except a debt for which there is a lien on the ship by the law maritime. There was no such lien here; the owner of cargo has no lien upon the ship to recover a proportion of general average contribution; he is not in possession of the ship, and he has no claim upon the body of the ship by maritime custom. The master of the ship has indeed a lien on the cargo for average contribution, but only while it continues in his possession; if it passes out of his possession his remedy is by action of *indebitatus assumpsit*, *Birkeley* v. *Presgrave* (*f*). There is no sign in the books of any maritime lien—a lien which does not depend upon possession, *Bold Buccleugh* (*g*)—for a claim of general average contribution. In the *Constancia* (*h*), this Court disclaimed jurisdiction over average. There is no maritime risk in this bond; if the ship had foundered, can it be said that the owners of the cargo would have forfeited their right of action for general average contribution? The bond was a fictitious bond altogether; no money passed, no necessaries were furnished, and the advertisements were sham advertisements. The bottomry debt was an old debt, a debt incurred upon the outward voyage: that cannot sustain a bond upon the ship and freight for the voyage homeward.

Deane, Q.C., in reply.

Judgment.

DR. LUSHINGTON:—The question for the Court to determine is, whether a bottomry bond given under the following very peculiar circumstances is a valid bond.

Facts of the case.

It appears that this vessel, the North Star, the property of Mr Redway, who now opposes the bond, left Hamburgh in November, 1857, bound for Buenos Ayres, that she received damage in the river Elbe, and in consequence thereof called off Exmouth, the port of her owner; that whilst waiting there she grounded on the Pole sand. The result of these occurrences was a salvage suit, the unlading and warehousing the cargo, and the incurring expenses to the amount of 3,428*l.* To defray these expenses a portion of the cargo, amounting to the value of 2,584*l.*, was sold. The vessel having been refitted, and the remainder of the cargo taken on board again, she proceeded to Buenos Ayres. And now I take the statement as set forth in the act on petition on

(*a*) 2 Dods. 241.
(*b*) 4 Moore, P. C. 21.
(*c*) 1 Dods. 288.
(*d*) 1 Wheaton's Rep. 104.
(*e*) 7 N. of C. 322.
(*f*) 1 East, 220.
(*g*) 7 Moore, P. C. 284.
(*h*) 4 N. of C. 514.

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the part of the bondholders. It is alleged that the vessel having arrived, the expenses and losses became the subject of a general average statement, and a legal statement thereof having been executed through the Commercial Court of Buenos Ayres, it resulted in the vessel having to contribute the sum of 1,600*l.* It is then further pleaded that the vessel was about to leave Buenos Ayres for England, and that "it became necessary" that the master should pay the 1,600*l.* No explanation has been afforded me of the meaning of this somewhat ambiguous phrase "it became necessary;" whether it means that the consignees required the money, or is intended to express in gentle language that the ship would be detained if the 1,600*l.* was not paid. It is then alleged that advertisements for bottomry having failed, Messrs. Fels & Co. advanced 1,459*l.* 13*s.* 9*d.* on bottomry, at 30 per cent., payable on the arrival of the ship at Plymouth. This is the original statement on the part of the holders of the bond, on which indeed they found their case in support of the validity of the bond; and perhaps it would not be unjust to them to try the case on such averments.

But in truth this is but a partial and very imperfect statement of the facts of the case. It appears that on the 25th of November bills were drawn by the consignees upon Mr. Redway amounting in all to 1,678*l.* 12*s.* 9*d.*, with 15 per cent. premium, each bill so drawn being the amount that the drawer conceived Mr. Redway was indebted to him upon general average. The drawing of these bills, *per se*, would not affect the validity of the bond: according to the usual custom they would be considered as a collateral security only. But these bills are of importance in another point of view: they prove the nature of the transaction. Without referring in detail to the other evidence in the case the transaction is this: The consignees made large payments at Exmouth on account of the disaster which befel the ship: these payments, they say, were subject to general average contribution as to be adjusted at the port of discharge; the general average was so adjusted at Buenos Ayres; and the result was, that upon that statement of account 1,600*l.*, or thereabouts, was found due to them from the ship. Then they say, that to liquidate this demand a bottomry bond on the ship and homeward freight is legal and valid.

I will first try this case upon the assumption that the facts so stated are entirely true; and further, that no essential facts are omitted, and that the master voluntarily gave the bond; adding, moreover, that the transaction passed under the eye of the

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British consul, and that his approval thereof must be inferred. In considering this statement the first observation that occurs is, that it is not alleged that the ship required repairs or necessaries, or that the bond was required for any purpose save to liquidate the claims upon the general average statement. I must conclude, therefore, that the ship wanted nothing. The next step is to consider these claims in respect of general average, how far they affect the ship and homeward freight. Assuming the claims to be well founded in fact, in what legal category ought they to be placed? Are they liens upon the ship in any legal sense of the term, or are they simply debts—the consignees creditors, the owners debtors? Liens, in the common law sense of the term, these claims certainly are not. Are they to be considered as maritime liens of the same nature as salvage or damage, to be inforced against the corpus of the ship? I find no authority for such a position. They are demands for which an action might lie, but which the Court of Admiralty has never taken cognizance of. I think these claims are to be considered as conferring rights of personal action only. Then can a right of personal action only be the foundation of a bottomry bond? can personal debts incurred be the foundation of a bottomry bond? The general rule is, that they cannot except preceded by the promise of a bond; but we must bear in mind the distinctions applicable to such cases. A master entering a foreign port in need of necessaries from distress or otherwise may incur debts for repairs or necessaries. Those debts may be purely personal, but he may borrow money on bottomry from any one not his creditor to pay such debts. On the other hand, the *Augusta* (*a*) has settled that a personal debt cannot be converted into a bottomry transaction.

No money or necessaries supplied to the ship.

Claims for general average contribution give no lien on the ship by the law maritime,

Now these claims are not only personal debts giving no lien by ordinary maritime law, but the bond was not given to defray the expenses of any necessaries whatever, nor did the master require money, nor was any money advanced at the time as a consideration for the bond. The bottomry bond was given to pay the consignees of the cargo the over-payments made by them at Exmouth on the outward voyage. In no sense of the word was the bond given to enable the master to complete his voyage—that is, on the assumption that the giving of the bottomry bond was voluntary and not compulsory. In this view of the case, I am of opinion that there is neither principle or authority which would justify me in pronouncing for the bond.

and therefore are no foundation for a bottomry bond on the ship.

(*a*) 1 Dods. 283.

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I am now about to consider this case in a different point of view. Was it competent to the consignees, by the law of Buenos Ayres, to have arrested the ship and proceeded against her for these demands? And if it was, is the existence of such law at the place where the bond was taken, especially when there was no actual arrest, sufficient to render the bond valid, and justify this Court in pronouncing for it? The argument in support of the bond is this, that by the law of Buenos Ayres it was competent to arrest the vessel and make her amenable to discharge these demands of general average against her, and that it was therefore necessary for the master to bottomry the ship to prevent her being arrested and sold; that thus there was a necessity to grant a bond, in order to enable the ship to complete the voyage. But there is no proof that such was the law prevailing at Buenos Ayres, and I cannot assume foreign law without proof, especially when the foreign law suggested is not easy to be reconciled with the ordinary maritime law known to this Court. The state of the pleadings relative to this question is somewhat singular. On the part of the bondholder it is alleged that the bond was voluntarily executed and not by compulsion; on the part of the owner of the ship, that the execution of the bond was inforced by compulsion. Now if this bond could be supported at all, it would be on the ground that by the law of Buenos Ayres the ship might have been arrested and sold, and that the master was compelled by that necessity to bottomry the vessel. To call the submission to necessity a voluntary act, is a contradiction in terms. To allege that the bond was given by compulsion, is to allege the case which ought to have been established on the other side. To return, however, to the facts. There is no evidence of any law of Buenos Ayres to arrest and sell the ship for the claims of the consignees of cargo. It is a bond granted to defray the claims of the consignees (and I do not deny them to have been the just claims against the shipowner), to be repaid what was due to them upon adjustment of the general average arising from the misfortune of the ship on her outward voyage. I am of opinion that such claims are not a sufficient foundation for bottomry. I must therefore pronounce against the validity of the bond.

Quære, if a lien on the ship for such claims was given by the law of the place where the bond was given, would it support the bond?

Foreign law must be proved.

One question remains, whether this is a case in which the bondholders should be condemned in costs. The general rule, and a rule not lightly to be departed from, is that in the case of bottomry the costs should follow the decision of the Court; but there are peculiar circumstances in this case. I am of opinion that the adjustment of the average in this case at Buenos Ayres

Bond pronounced against, but, considering the circumstances, without costs.

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was a correct mode of proceeding, and, moreover, had the entire sanction of the master; and I have every reason to believe that the transaction was fair and just; it certainly passed under the eye of the British consul, and I must necessarily conclude with his authority. I believe that the consignees were really creditors, and that grievous imposition was practised upon them in England, is, I think, evinced by the accounts produced. It was difficult for them, many in number, to obtain justice, and in seeking to protect themselves by means of a bottomry bond, they erred only in a misapprehension of English law, of which they could have little knowledge. I pronounce against the bond, but without costs.

Rothery, proctor for the bondholders.

Clarkson, for the owner of the brig.

THE BOTHNIA.

Collision—Vessel at Anchor—Pleading—New Matter in Reply—17 & 18 *Vict. c.* 104, *s.* 296.

A plaintiff may plead new matter in reply, if it is really matter of reply and not properly a part of the case set up in his libel.

A plaintiff, whose vessel has been run down at anchor, may charge negligence generally, and the burden of proof, the collision proved, is thrown upon the defendant to establish his defence. Where, therefore, the plaintiff's vessel was run down at anchor, and the plaintiff pleads that fact, charging negligence generally, and the answer pleads that the collision was not occasioned by negligence, but the violence of the tempest and sea, which prevented the anchors of the defendant's vessel from holding, the plaintiff may reply that the collision was occasioned by the default of the defendant's ground tackle.

Where it is intended to charge non-observance of the 296th section of the Merchant Shipping Act, with respect to the rule of port helm, the act done or not done should be specifically pleaded to be in violation of the statute.

Quære, whether not porting in time, as distinguished from not porting at all, is a non-observance of the statute.

March 1.

COLLISION. The Residue pleaded in her libel that she was at anchor in the Downs, and that the Bothnia drove from her anchor and fouled her, doing much damage: charging that "the collision was solely occasioned by those on board the Bothnia in not having kept clear of the Residue, as they ought to

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have done, whether owing to negligence, want of skill, or otherwise on their part." The allegation of the Bothnia set out the facts, pleading that the Bothnia drove in consequence of her anchors from the wind and sea not being able to hold, and then alleged that "the collision was occasioned solely by the violence of the tempest and sea, and not in any degree by negligence, want of skill, or other default of those on board the Bothnia." The responsive allegation on the part of the Residue pleaded that "the collision was occasioned solely by or through the negligence or unskilfulness of those on board the Bothnia, and the default of her ground tackle." The admission of this responsive allegation was opposed.

Deane, Q.C., against the admission of the responsive allegation. The responsive allegation introduces new matter which ought to have been pleaded in the libel.

Twiss, Q.C., *contrà*. The responsive allegation takes issue upon the statement of the Bothnia, and replies new matter to matter there alleged.

Judgment.

Limits of matter pleadable in reply.

Dr. Lushington:—Undoubtedly in collision cases the rule of the Court has been that the party plaintiff should in his first pleading set up his whole case, so far as the facts are within his knowledge. If further facts come to his knowledge subsequent to pleading, the Court will permit him to plead them, giving the other party opportunity to answer. But the plaintiff is intitled to a reply to facts pleaded by the defendant, and in that reply to introduce a new statement of fact, if it be really a matter of reply, and not properly a part of his original case. To apply that rule to the present case. The vessel proceeding was run down when at anchor, and the rule of the Court is that that fact, if proved, puts the burden of proof on the other vessel to make out her defence. The plaintiff, therefore, was not bound to assign any particular cause of blame to the defendant's vessel. He had a right to rely on the established rule of the Court as to the burden of proof. The defendant then pleads that from the violence of the tempest and sea his anchors were unable to hold, and that the collision was caused solely thereby, and not from any negligence or unskilfulness. The meaning of this plea is, that all measures were taken by the defendant's vessel which could and ought to have been taken, and that the collision was an inevitable accident. Then comes the responsive allegation of the plaintiff, in which he says that the collision was occasioned solely by the negligence of those on

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board the Bothnia, and the default of her ground tackle. This is clearly matter of reply; it takes issue upon the statement of the defendant, and the new matter alleged was not properly a part of the case originally set forth in the libel. The responsive allegation must therefore be admitted.

A non-observance of the rule prescribed by s. 296 of the Merchant Shipping Act, 1854, should be specifically pleaded as such.

I wish to take this opportunity of expressing my desire, that whenever it is intended to charge a breach of the 296th section of the Merchant Shipping Act, it should be directly alleged with respect to the rule of port helm that the act done or not done was in violation of the statute. It should not be left to the Court to draw the inference, as it was in the case of the *James* (*a*), which went up to the Privy Council, and which I had reason to consider in a recent case. The party charged ought to be informed of the precise charge that is intended to be urged against him. Notwithstanding the great discussion that that section of the statute has undergone, I am not sure that it is yet settled whether not porting in time is always a breach of the statute, or whether the vessel must have neglected altogether to port to come within the penalties assigned for a breach of the rule. The penalty falling upon a defendant makes him liable as for any other breach of duty occasioning the damage; but falling upon a plaintiff it deprives him in this Court of his right to recover anything, notwithstanding the negligence of the other side, perhaps a far more culpable negligence, contributed to the collision; and the breach of the statute may always lead to a criminal prosecution elsewhere. I think, therefore, that a charge so serious in its consequences ought always to be specifically pleaded.

Quære, Is failing to port *in time* a breach of the rule?

Clarkson, proctor for the Residue.

Stokes, proctor for the Bothnia.

(*a*) Swabey, p. 60.

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March 7

In the Privy Council.

Present—Lord CHELMSFORD.
Lord KINGSDOWN.
The Right Hon. Sir EDWARD RYAN.
The Right Hon. Sir JOHN COLERIDGE.

THE ANN. 3 Notes 98 Ld. 211

Collision—Right of Plaintiff to recover only secundum allegata et probata.

In a cause of collision the plaintiff is only intitled to recover *secundum allegata et probata.*

North American (*a*), confirmed and extended.

Where the plaintiff pleaded that the collision was wholly caused by the defendant's vessel starboarding, and the Court below dismissed the action upon the ground that the plaintiff's vessel was solely to blame, the Court of Appeal holding that the plaintiff was, on the true state of facts, intitled to recover, held nevertheless that he was barred from recovering, because the starboarding of the defendant's vessel was not proved, and therefore affirmed the judgment of the Court below, without costs.

THIS was an action brought by the owners of the British steamship Magnet, against the schooner Ann, for a collision, which took place about 6 P.M. on the 6th of November, 1858, in Halfway Reach, in the River Thames. The Magnet was going up the river, the Ann was coming down. The case of the Magnet was that she saw both lights of the schooner about a mile off on the port bow, and thereupon ported, keeping as close to the north shore as possible; but that the schooner starboarded and produced the collision. The case of the Ann was, that being in mid-channel she saw the three lights of the steamer about half a mile off, on her starboard bow, and on the south shore, and thereupon kept on her course; that in a few minutes the red light of the steamer disappeared; that shortly after the steamer ported, rendering a collision inevitable, that the Ann then ported, and the collision took place. The learned Judge of the Admiralty pronounced the Magnet solely to blame and dismissed the action. From this decision the owners of the Magnet appealed.

Twiss, Q.C., and *Clarkson*, for the Magnet.

The *Queen's Advocate* and *Deane*, Q.C., for the Ann.

(*a*) Sw. 358.

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LORD CHELMSFORD delivered the Judgment of their Lordships.—[After examining the pleadings and evidence in detail]—Their Lordships, upon a careful view of the whole case, have arrived at a clear opinion that the Magnet was not to blame; that she was in her proper course, and that the damage was occasioned entirely by the Ann having kept the course which she was taking without alteration, until the last moment, when a collision being inevitable she put her helm a-port. They would, therefore, have nothing more to do than to recommend a reversal of the sentence which has been pronounced upon the ground of the Magnet being solely to blame, if it were not for the distinct issue which has been raised upon the pleadings between the parties as to the mode in which the collision took place. The Appellants put their case in the libel entirely upon the ground of the Ann having suddenly and improperly starboarded her helm. They say the damage was solely imputable to this act, and they do not pretend, if they fail in proof of this allegation, that they have any other case to establish. The Respondents take issue upon this fact, and it is one of the questions put by the learned Judge of the Court of Admiralty to the Trinity Masters. Now their Lordships have already expressed their opinion that the Ann did not starboard her helm at all, but that the collision occurred by her having kept her course without any alteration of her helm, until it was too late, and that then the helm was not starboarded, but ported. Now it is a rule, and a most important rule, to be observed in all Courts that a party complaining of an injury, and suing for redress, must recover only *secundum allegata et probata*. There is no hardship or injustice 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 was required, because he might constantly be exposed to the disadvantage of having prepared himself to meet one state of facts, and of finding himself suddenly and unexpectedly confronted by another totally different. The great object of all Courts where trials of fact take place ought to be to bring the parties to a distinct agreement as to what is in contest between them, and this object would be entirely frustrated if it were competent to a party to place his right to redress on one ground, and then to abandon it at the trial for another, although the latter ground would originally have given him a right to recover against the other party. Their Lordships have, in a recent case before them, held that parties are bound by the statements which they make in their pleadings in the Court of

The Ann solely to blame for not porting in due time; but the Magnet having attributed the collision solely to the Ann having starboarded cannot recover.

The plaintiff can only recover *secundum allegata et probata*.

Admiralty. In the case of the *Tecla Carmen* and the *North American* (*a*), the Court below had found that both parties were to blame, and had given sentence accordingly. Their Lordships were strongly inclined to think that the *North American* was alone in fault, but upon a different state of facts than that which had been alleged on behalf of the *Tecla Carmen*, and they therefore affirmed the sentence, being of opinion "that it would not be consistent with the safe administration of justice to alter the Judgment upon grounds quite inconsistent with the case made by the Appellant, both in his allegations, and in his evidence, and at the bar." The present case will furnish an additional example of the necessity of correctness and accuracy of statement in the pleadings in the Court of Admiralty. The Appellants were, in the Judgment of their Lordships, intitled, upon the true facts of the case, to succeed against the Respondents; but they have, unfortunately, undertaken to prove that the injury resulted from an entirely different state of facts; they have, of course, wholly failed in doing so, and then the rigid but wholesome rule steps in, and compels their Lordships to declare, not that the Judgment ought to be affirmed upon the ground on which it was pronounced, but that it *must* be affirmed because the case which has been set up by the Appellants has not been proved by the evidence.

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Their Lordships therefore will humbly recommend to her Majesty to affirm the sentence appealed from, but without costs.

Judgment affirmed, but without costs.

Clarkson, proctor for the Magnet.

Pritchard, for the Ann.

In the High Court of Admiralty.

THE EDMOND.

Bottomry — Mortgagee in possession — Bond for homeward Voyage—Items in bond of Expenses relating to outward Cargo —Power of Master and Owner to hypothecate—Assignment of outward Freight.

A master, on his own authority, can bottomry his vessel abroad for the homeward voyage only for necessary repairs and articles supplied to the ship: he cannot include in such a bond charges relating to the outward cargo, even though they constitute debts due from the owner of the ship, unless by the law of the port the ship can be arrested for them.

The *Prince George* (*b*); *Osmanli* (*c*), considered.

(*a*) Swabey's Reports, p. 358.
(*b*) 4 Moore, P. C. 21.
(*c*) 7 N. of C. 322.

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Semble. The owner of the ship might bottomry his ship for such charges.

An order by the owner of a ship to a house abroad to collect freight takes the freight out of the hands of the master.

An assignment to a third party of freight, or a fixed sum out of freight, passes, as between part owners, only net freight, *Lindsay* v. *Gibbs* (*a*); but a mortgagee not in possession when the freight was received has no *locus standi* afterwards to insist on such a construction.

Where, therefore, a person appointed by the owner of a ship to collect a freight abroad and remit a fixed sum to a third party, collects the gross freight and remits the sum named, which proves to be larger than the net freight, and then advances to the master, on a bottomry bond upon the ship and freight for the homeward voyage, money not only for necessary repairs but to pay the expenses relating to the outward cargo, as compensation to the consignees of cargo for short delivery, &c., the mortgagee of the ship, not having been in possession when the bond was given, is not intitled to object to those expenses under the bond, on the plea that the master or the lender had in his hands a fund properly applicable for the payment of them.

BOTTOMRY. Andrew Blowers Smith, of Liverpool, and John Smith, of Sydney, New South Wales, (trading under the firm of Smith Brothers, of Liverpool, and Sydney aforesaid,) holders of a bottomry bond upon the ship Edmond and her freight, plaintiffs; Seymour & Co., of London, mortgagees of the ship in possession, defendants. The present case was raised on objection taken by the defendants to certain items allowed in the Registrar's report.

On the 16th of May, 1856, the Edmond was chartered at Liverpool by Henry Barton to the Australian Agricultural Company of London, to take on board 850 tons of machinery and proceed therewith to Newcastle, New South Wales, having liberty to fill up in Liverpool for Sydney and discharge the cargo for Sydney there on her way out. The freight to be 2,400*l.*; three-fourths to be paid in cash before sailing, the remainder on delivery of the cargo at Newcastle. In the charter Barton was described as owner of the vessel; he was not, however, registered as owner until the 8th of July, 1856. The ship sailed from Liverpool on the 12th of July. The gross freight amounted to 3,175*l.*, viz., 2,400*l.* chartered freight and 775*l.* general freight, of which Barton received, at the time of the ship's sailing, 1,800*l.* chartered freight and 140*l.* general freight, leaving, therefore, a residue of 600*l.* chartered freight and 635*l.* general freight to be paid upon the ship's arrival in Australia. On the 1st of July, 1856, Barton, in consideration of a loan to him by Messrs. William Smith & Sons, of Liverpool, of 1,000*l.* on the security of the balance of the freight, wrote to them the following letter:—

(*a*) 22 Beav. 522.

" Liverpool, 1st July, 1856. 1860. *March* 15.

" Messrs. William Smith and Sons.—Gentlemen,—In consideration of your accepting my draft on you for 1,000*l.*, I hereby assign to you the freight of my ship the Edmond, payable in Sydney and Newcastle, amounting to £ , to be collected there by your agents, Messrs. Smith Brothers and Co., to whom I write by that vessel, desiring them to do so, and to account to you for 1,000*l.*

" Your most obedient servant,

" Henry Barton."

Messrs. Smith & Sons thereupon wrote out to the plaintiffs (letter not produced), and gave them directions to collect the balance of the inward freight of the Edmond and remit to them the sum of 1,025*l.* On the 24th of July, 1856, Barton mortgaged the ship to the defendants. On the 15th of December, 1856, the Edmond arrived at Sydney. The master thereupon, as Andrew Blowers Smith, one of the plaintiffs, deposed, " placed the ship in the hands of the plaintiffs' firm for the purpose of collecting her freight and making the aforesaid remittance of 1,025*l.* thereout to Messrs. William Smith & Sons, pursuant to directions to that effect of Henry Barton her owner." The plaintiffs collected the freight due at Sydney, and on the 24th of December, 1856, remitted to Smith & Sons the sum of 615*l.* They also, upon the application of the master, agreed to make and did make the ship's necessary disbursements, upon the understanding that the master should grant to them a bottomry bond on the ship and her homeward freight to secure repayment with a premium of 25 per cent. On the 3rd of January, 1857, the ship sailed for Newcastle, and, arriving there the next day, proceeded to discharge. The plaintiffs collected (at Sydney) the residue of the freight, and, according to the bottomry agreement, paid the ship's disbursements. On the 18th of March the vessel returned to Sydney to be remasted and receive other repairs. On the 9th of April the plaintiffs remitted to Smith & Sons the sum of 410*l.* On the 9th of May the master signed and gave the plaintiffs a bottomry bond on the ship and freight for 2,350*l.*, the voyage to be from Sydney in ballast to the Chincha Islands, thence with a cargo of guano to a safe port in the United Kingdom. On the 15th of May the vessel sailed from Sydney. On the 16th of May, in the same year, Henry Barton wrote to the plaintiffs' firm at Sydney the following letter:—

" Seymour, Peacock & Co., Insurance Agents,
17, Gracechurch-street, London, May 15, 1857.

" Messrs. Smith, Brothers, Sydney.—Dear Sirs,—I have duly

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received your favours of February and March, and I am grieved to find that the expenses of the Edmond are exceeding my expectations; also that the agents for the Australian Agricultural Company should have taken any advantage of a letter written to them. . . . . I hope you may have paid the Edmond's accounts, and taken as security the bond in favour of Messrs. Smith & Sons, of Liverpool, which shall be paid as soon as the amount is ascertained; and I hope next mail to hear of the vessel having sailed, for it would be ruinous to keep a vessel lying idle for four or five months. I should have sent you out long since a banker's credit, or equal thereto, if my old friends Messrs. Smith & Sons had not assured me you would take the bottomry bond on their account and send the ship off. I have not written to Captain Harvey to Australia, for I never anticipated I could catch her. Hoping to hear of the Edmond and Anna having sailed by the next mail,

"I remain, dear Sirs, yours most truly,

"HENRY BARTON."

On the 3rd of June, 1858, the ship arrived in Liverpool, in this country; the defendants had previously, at Callao, taken possession as mortgagees, Henry Barton having become bankrupt. On the 4th of June the present action was brought, and the vessel arrested. The defendants intervened and gave bail, and on the same day, the 12th of June, admitted the validity of the bond, and the bond was thereupon referred, with all accounts and vouchers, to the Registrar and merchants. On the 15th of June, 1859, the Registrar reported 2,836*l.* 5*s.* as due upon the bond. To this report the defendants objected, and were heard on petition. The following were the principal items objected to:— 508*l.* 0*s.* 4*d.* expenses of discharging the outward cargo at Sydney and Newcastle; 332*l.* 1*s.* 10*d.* compensation paid to consignees of cargo for short delivery and damage done to cargo; 81*l.* 5*s.* 4*d.* wages paid before the remittance of the 410*l.*, and before the advertisement of bottomry; 800*l.* 5*s.* 4*d.* price of new masts.

Twiss, Q.C. and *V. Lushington* in objection to the report. The burden of proof lies upon the bondholders, notwithstanding the report is in their favour; because they were agents for the ship, and the Court requires strict proof of a bond taken by agents, *Royal Stuart* (*a*); and because they alone have opportunity of proving the facts, *Heathorn* v. *Darling* (*The Eliza*) (*b*);

(*a*) 2 Spinks, 258; 3 Kent's Comm. 172, 4th edit.

(*b*) 1 Moore, P. C. 14.

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Santa Cruz (*a*). The unfavourable opinion of the Registrar on difficult points of law such as raised in this case ought not to shift the proper burden of proof. The expenses relating to the outward cargo, of whatever kind, are bad items under the bond, because they relate to a voyage antecedent to the voyage for which the bond was granted, *Osmanli* (*b*); *Lister* v. *Baxter* (*c*); *Jenny* (*d*); *Prince of Saxe Coburg* (*e*); *Royal Arch* (*f*); the same cases also show that it is not lawful for the master to bottomry a vessel in port before the voyage begins. Such expenses are also bad items, because they should have been deducted from the outward freight which could not have been earned without payment of them; and the assignment of the freight makes no difference; the person receiving the freight, whether master or other agent of the owner, was bound to deduct them. The assignee of a chose in action takes subject to all the equities against the assignor, *Turton* v. *Benson* (*g*); *Hill* v. *Caillovel* (*h*), and the mortgagee had an equity that the owner taking or assigning the freight should pay the expenses of earning it. The assignment of the freight on the 1st July, 1856, passed nothing, Barton not then being registered owner, *Lindsay* v. *Gibbs* (*i*); at any rate nothing more than the net freight, *S. C.*, and *Green* v. *Briggs* (*k*). Instructions (if any) sent by Barton to the plaintiffs, founded on the assignment, would go no further; but there is no sufficient proof of any instructions, no instructions are produced. The items for damage done to the cargo are also bad, because chiefly rat damage, which, if proper precautions are taken, as here, by having cats on board, is a peril of the seas, and within the exceptions of the bill of lading, *Story on Bailments* (*l*). And all the items of expenses relating to the outward cargo are clearly bad, as coming under the principle of the *Prince George* (*m*); they were not necessary to the new voyage, for there is no proof that the ship could have been arrested if they had not been paid. The item for new masts cannot be allowed, the new masts were not necessary in that strict sense of necessity required in bottomry repairs, as clearly explained by Justice Story, in the *Fortitude* (*n*). They were put in only upon the demand of the underwriters who were going to insure, not the ship, but the bond. Lastly, many circumstances raise a suspicion of fraud. The bondholders do not give the date of the agreement for bottomry, they produce

(*a*) 1 C. R. 68.
(*b*) 7 N. of C. 322.
(*c*) Strange, 695.
(*d*) 2 W. R. 5.
(*e*) 3 Hagg. 392.
(*f*) Swabey's Reports, 276.
(*g*) 1 P. Wms. 496.
(*h*) 1 Ves. sen. 122.
(*i*) 22 Beav. 522.
(*k*) 6 Hare, 895.
(*l*) Page 540 (5th ed.)
(*m*) 4 Moore, P. C. 21.
(*n*) 3 Sumner, 234.

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no instructions received from the shipowner, or Messrs. Smith, of Liverpool, they do not swear that they were ignorant of the bankruptcy of Barton or the mortgage, which they must in all probability have been informed of by Smith of Liverpool, and the bills show an expenditure by them so wasteful as to look very like fraud.

Wambey and *Clarkson* for the bondholder. Bondholders have always been treated with great favour in this Court, and here the bond is admitted, the owners have not disputed the accounts, and the items now questioned have been allowed by the Registrar; the whole burden of proof is therefore on the other side. The mortgagees had nothing to do with the ship's earnings till they took possession of the vessel in 1858, they were entirely in the disposal of the owner, who was *dominus navis*. He assigned the freight, and gave instruction to the plaintiffs for the collection and remittance of it; and they were bound to obey those instructions. The assignment meant the gross freight; *Lindsay* v. *Gibbs* was a very different case, a question between part-owners. The plaintiffs were intitled to include all the items now disputed in the bond. The expenses relating to the outward cargo must not be considered as expenses belonging to another voyage. The outward and the homeward voyages are for the purposes of bottomry but one voyage. If money could not be advanced on bottomry of a ship before beginning a homeward voyage, a ship would often rot in a distant port. *The Royal Arch* (*a*), is in favour of such a bond. It is clearly proved that all the items were advanced in contemplation of bottomry, and therefore all come within the security, *Isabella* (*b*). Many of the items are small, and the Court will not in bottomry examine minutely into small sums, *Vibilia* (*c*). But whatever may have been the original defect of the bond, if such there was, the owner of the ship, by his letter of the 15th May, 1857, ratified and approved of the whole bond, and that approval cures every defect. The owner has an undoubted right to hypothecate his vessel in a foreign port before the beginning of a new voyage, *Barbara* (*d*); *Mary* (*e*); *Draco* (*f*). The new masts were clearly necessary, the surveyors so reported: and what does it matter for whom the surveyors acted, if they were competent men? The charge of fraud is not in the pleadings, and finds no warrant in the evidence.

Twiss, Q.C., in reply.

(*a*) Swabey, 275.
(*b*) 1 Dods. 276.
(*c*) 1 W. R. 2.
(*d*) 4 C. R. 1.
(*e*) 1 Paine, 671.
(*f*) 2 Sumner, 153.

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Judgment.

DR. LUSHINGTON :—The Court has, on the present occasion, to determine whether the objections taken to the report of the Registrar and merchants are well founded. I must begin by observing that it is an established principle of this Court, that those who take objections to a report of the Registrar and merchants are bound to prove their objections by clear and satisfactory evidence. The examination of the accounts is conducted by persons of great experience in those matters, and very competent to the duty they undertake; and, as I have every reason to believe, most careful in the discharge of that duty. They too have the advantage of a full examination, which the Court has not: much unfortunately may, and indeed must have passed before them unknown to the Court.—[The learned Judge then stated the facts as above.]—The first class of items objected to consists of items which were not expended on account of the ship, but which related exclusively to the outward cargo. The mortgagees contend, in the first instance, that these expenses should have been deducted from the outward freight, which could not have been earned without payment of them; and this, whatever might be the instructions of Mr. Barton, the owner, for the disposal of the freight otherwise. This raises a question independent of the law of bottomry. Now, first, had the master the power to deduct these expenses from the freight? How does the fact stand? The master had not the collection of the freight. The collection of the freight was committed by the owner of the vessel to Messrs. Smith, of Sydney. The owner of the vessel has a right, which I think cannot be disputed, to commit to any person abroad the office of collecting the freight. It may usually be the duty of the master, but the owner has, I conceive, beyond all question, the right to devolve that duty on another. Indeed, I believe it is often done. The freight in question, therefore, was never in the power of the master. I think he could not have detained the cargo for freight. It no longer belonged to the owner of the ship, it was alienated for value received. I think, therefore, that as regards the master, it is wholly impossible to maintain that he could appropriate the freight to the payment of these expenses.

Ought the expenses relating to the outward cargo to have been deducted from the outward freight?

The master had not the power to dispose of the freight.

This being so, I proceed to consider whether it was incumbent on Messrs. Smith, of Sydney, so to appropriate it. It has been argued that the agreement of assignment (date 1st July, 1856), conveyed nothing but the net freight; and *Lindsay* v. *Gibbs* (*a*), has been cited in support of that position. If it were now a

And the owner's agents were not bound so to apply the freight.

(*a*) 22 Beav. 522.

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question between the assignees of that freight and the owner of the vessel or his legal representatives, it may be true that the assignees of the freight would claim nothing but the net freight. But the present question is very different:—1st. The assignees of the freight have nothing to do with the present case; it is not as to them a question whether they have received too much. 2ndly. Whatever may be the proper construction of the agreement, it was competent to Barton, the owner, to put his own construction upon it as against himself, or indeed, without any regard to the agreement, to give any instructions he pleased as to the freight to the persons who were his agents, for this purpose at least, though also the agents of those who advanced the loan. But suppose the agents in New South Wales mistook those instructions—suppose they were not acute lawyers, unacquainted with the decision in Beavan's Reports, and that they ought to have deducted these charges and made a less remittance under the agreement—what then? Mr. Barton might possibly have complained; might possibly have had a remedy against his agents, and if such a possibility do exist, which I greatly doubt, his assignees (he being now a bankrupt) may have a remedy against them. Even suppose, which I do not, that the mortgagees not in possession had such a remedy, it can have no effect on the present question. Take another alternative, that Mr. Barton with his eyes open to probable deductions, gave the orders to the agents at New South Wales to pay this money without regard to other charges, clearly he had a perfect right so to do, certainly before he mortgaged the vessel. There is one alternative remaining, and that the most probable of all, that neither Mr. Barton, when he executed the agreement, nor when he sent the instructions to the agents, nor the agents when they remitted the 1,000*l.*, took into consideration these charges at all. Then what is the simple result? That the master had no power, and the agent was not bound to apply the freight in payment of these charges.

A master may bottomry at a foreign port an English ship for a circuitous voyage home, in order to discharge debts on the ship incurred for the outward voyage.

The next objection raised to the same items is that they belonged to the outward voyage, that is, an antecedent and different voyage, and could not be brought within a bottomry bond on the voyage home. The mortgagees say that the charter was from Liverpool to New South Wales only, that the voyage was completed by the arrival of the ship in New South Wales, and that expenses incurred on the outward voyage could not be brought within a bottomry bond for the voyage home, that voyage also being circuitous. In support of this position their counsel

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Osmanlí distinguished.

cited the judgment of this Court in the *Osmanlí* (*a*). The first question raised by this objection is, whether the master could have bottomried the ship for such items upon his own authority; the second, whether he had the direct or implied consent of his owner. In the *Osmanlí*, the bond was given to pay debts due to a house at Malta, as agents for advances on former voyages, on account of several ships, the Osmanlí being one. I expressed a very decided opinion that the master could not execute a bottomry bond to pay such debts. Not only were the debts incurred upon former voyages, but in a great measure upon account of other ships,—personal debts previously incurred for other transactions. I adhere to the opinion I then expressed, having regard to the circumstances of the case. I think that a master by his own sole authority has no power to bottomry a ship for such demands. I think the owner might with success dispute the validity of a bond given for such expenses, or that if the bond were valid for other matters, such items might be struck out. There was another part of that case much pressed in argument, namely, the observation of the Court that if the ship and freight could be bottomried for such a debt, why not the cargo also? My meaning was, that in the circumstances of that case it was as reasonable to say that the cargo should be made subject to bottomry, as to say the ship and freight should be, and that both propositions were equally unreasonable. I never meant to lay down universally that where the ship and freight could be made subject to a bond the cargo could also, and that the liability of the cargo to be bottomried could be taken as a test whether the ship and freight could be bottomried. In several recent cases I have decided that where the cargo is not shipped when the bond was agreed upon or given, the bond cannot cover the cargo, though it may be good upon the ship and freight. I cannot think this case is governed by the case of the *Osmanlí*. There is a wide difference in my opinion between a vessel carrying a cargo being bottomried for the debts of a former voyage, and the case of a vessel going on an outward voyage to a distant port, and having to return home with a cargo, being bottomried at that distant port midway between the two voyages. I doubt, if it were necessary to decide the point, if the two voyages are to be considered for all purposes separate (see *Green* v. *Briggs* (*b*)).

Many of the items fall within the rule

I now come to the most important objection to these items. It is said that they fall within tbe principle laid down by the

(*a*) 7 N. of C. 322. (*b*) 6 Hare, 395.

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laid down in the Prince George.

Privy Council in the case of the *Prince George* (*a*). That case deserves very careful consideration; and I need not say that it is both my duty and inclination to carry into full effect the rules laid down by the Supreme Court. In the Prince George, the ship arrived at New York from London, under a charter-party to the Appellant, being destined to proceed to Quebec, under a charter to the Respondent. Part of the freight had been paid in London; a small part was due in New York, but the consignee refused to pay it, and made demands on account of short delivery of, and damage done to, the cargo. There were also port charges and outfit expenses. The bond was given to cover all these sums. The Judicial Committee held that the bond was good in part and bad in part: good, as related to the outfit and port charges; bad, as related to damage done to the outward cargo, and short delivery of part from consumption of it on board. The Court further stated, that if it had been proved that by the law of New York these charges were a lien on the ship, they would have been good items in the bond, but this fact was not established. To compare that case with the present. In this case there is no evidence as to the law in Sydney. It is pleaded that, without the advance of the money on bottomry, the vessel could not have proceeded on her voyage, but there is no evidence that the ship could have been arrested for these debts by the law of Sydney. In this respect, then, the case of the Prince George and this case precisely agree. The two cases also agree as to there being what is termed an outward voyage and also an ulterior voyage. They agree as to part of the freight being paid beforehand, and part stopped. The items rejected were items for damage done to the outward cargo and short delivery. Now this being so, have I any alternative? Am I not bound by the authority of the Prince George to reject all items of the same species as those rejected by the Judicial Committee? I am wholly unable to distinguish the two cases. I have endeavoured to find a distinction in vain. I have therefore no alternative but to refer the report back to the Registrar and merchants, with directions to expunge all items coming within the principle laid down in the Prince George. I apprehend that principle to be, that the master, by his sole authority, can bottomry his vessel only for repairs, necessary provisions, articles furnished to the ship itself, but that he cannot bottomry the ship for charges relating to the outward cargo, unless the ship could be arrested for the same, even though they constituted debts properly owing from the owner of the ship. I cannot give more precise directions

Principle of the Prince George.

(*a*) 4 Moore, P. C. 21.

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There has been no homologation of the bond by the owner, which might have given validity to these items.

without going through every item. I have considered whether the introduction of these items can be supported on any other ground, any ground reconcilable with the Prince George, as, for instance, by the owner having approved of the bond, which might cure the defect. The circumstances of the case are peculiar. Mr. Barton, the owner, receives by anticipation the largest part of the freight, and assigns a large part also of the remainder. He deprives the master of the usual means of defraying the expenses which may occur. He does not, so far as appears, even appoint an agent for the ship, and he certainly does not furnish the master with any credit. That Messrs. Smith, of Sydney, would advance on personal credit was most improbable, for they knew that Mr. Barton had received 1,800*l.* of the freight, and had assigned the remainder for an advance of 1,000*l.* The owner himself created the necessity. The master himself may be said to have been driven principally by the acts of his owner to bottomry the ship, and in part for the items objected to. But so it was in the case of the Prince George, and yet not considered to validate such charges. I have looked to see whether the facts of the case would support an argument that Mr. Barton had, to use a Scotch expression, homologated the bond, either by deed or word, but the pleading contains no such averment. It is merely alleged that Mr. Barton did not make objection to the accounts, but of that there is no proof, even if it would suffice. There is, it is true, a letter dated 15th May, 1857, addressed to Messrs. Smith, Brothers, of Sydney, in which Barton says "I hope you have paid the Edmond's accounts, and taken as security the bond in favour of Messrs. Smith & Son, of Liverpool. I should have sent you out long since a banker's credit, or equal thereto, if my old friends, Messrs. Smith & Sons, had not assured me you would take the bottomry bond on their account, and send the ship off." It is clear, therefore, that Mr. Barton contemplated that a bottomry bond would be taken, though he did not and could not know that a bond was taken, but I cannot go the length of saying that these passages contain an approval of this bond, or rather of the particular charges objected to. This is a material inquiry, for I apprehend that, though the master could not hypothecate the ship of his own authority for these charges, his owner might lawfully do so, and that, had he done so before bankruptcy and before the mortgagees had taken possession, they would be bound.

I must now briefly notice an objection taken to various small

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sums altogether amounting to 81*l.* 5*s.* 4*d.* It is alleged that they were paid prior to the remittance of the 410*l.*, being part of the freight remitted to the owners. The objection is true in fact but insufficient in law, as I have already shown. It is then further said that some of these items were paid prior to advertising for bottomry; but this objection is likewise insufficient, for whatever was the date of the advertisement, it is sworn that, on the arrival of the ship in Australia, the master applied to Smith, Brothers, to make the necessary disbursements, and that they agreed so to do on the understanding that a bottomry bond should be given to cover all payments; payment before execution of the bond cannot affect the transaction.

Objection to item for masts, &c. as not being necessary, not sustained.

The next objection is to a sum of 800*l.*, paid for new masts and other fittings, and the ground of the objection is that they were unnecessary. The evidence of the master would have been important on the trial of such an issue, for he must have had the best means of forming a judgment on such a subject; he unfortunately is not produced, but there is not the slightest reason to suppose that he would have given evidence in support of the objection; for he is the person who must have given the order; and, moreover, the facts show that he could not have had a favourable disposition towards the mortgagees; he would not strain his evidence in their favour. The evidence to support the objection is, I must say, of the loosest description. It cannot, I think, be reasonably supposed that the judgment of the Court would be influenced in a matter of this kind by the testimony of an apprentice, unsupported by the evidence of any other person present on the spot, and competent to form an opinion. There is, however, an affidavit of Mr. Lodge and Mr. Peacock, forming their opinion from a consideration of the log on the outward voyage; they think that the vessel could not have required new masts, because she had experienced very severe weather, and had been able to withstand the gales she encountered. With all respect to these gentlemen, I must consider this, if evidence at all, evidence of the very lowest description, and not to be put in competition with evidence founded upon inspection of the vessel herself upon the spot, and opinions formed with reference to the especial voyage on which she was destined. Opposed to this conjectural evidence, there is exhibited a survey made upon the spot, dated 8th April, 1857, certifying that new masts were necessary. I must conclude that those who made that survey from their positions

were competent to the work they undertook to perform. I must give credit to that evidence as the best evidence, unless the integrity or want of skill of the surveyors were impeached on similar evidence ef equal weight opposed to their testimony. I am of opinion that this objection cannot be sustained. 1860. *March* 15.

I must refer this report back to the Registrar and merchants, requesting that it may be re-formed according to the rule laid down in the Prince George, from which I have no discretion to depart, though I am of opinion that there are circumstances raising a very strong equity in favour of the bondholders, still not such as to warrant me in holding this case distinguished from the Prince George. I allude to the owner having withdrawn the freight from the master, from his having furnished no credit, from the master being under charter to proceed on another voyage, from the debts being just debts against the owner, and from his evident intention that bottomry should be taken. The question of costs I reserve. Report referred back.

Clarkson, proctor for the bondholder.

Waddilove for the mortgagees.

THE WILLIAM F. SAFFORD.

Several Causes in Pœnam—Insufficient Proceeds—Bottomry—Wages—Necessaries—Priority—Costs.

Where there are several claims on a ship, and the proceeds are insufficient to pay all, a wages claim is preferred to a bottomry bond previously pronounced for, the bond having been given before the wages were earned.

A claim by a person having paid wages to the ship's crew at the request of the master on account of the ship, is in the nature of a wages claim, and intitled to the same priority.

A bottomry bond is preferred to a claim of necessaries previously pronounced for, the necessaries having been supplied before the bond.

Where one only of several plaintiffs in different causes of necessaries has obtained a decree of the Court, he is intitled to be paid in priority; the others, being *in pari conditione*, share rateably.

Costs to be paid with the principal sums in each action.

THIS was a question of priority of payment. The William F. Safford, an American whaler, was arrested at Liverpool on the 8th of December, 1859, in an action of necessaries on behalf

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of Samuel Cearns and Aaron Brown. The necessaries were supplied in November, 1857, and the amount due was 134*l.* 11*s.* 10*d.* The action proceeded by default. On the 2nd of February, 1860, a first decree was signed, and the plaintiffs thereby put in possession of the ship to the amount of their claim. The ship was sold by order of the Court, and the net proceeds amounting to 640*l.* 8*s.* were paid into the Registry. On the 22nd of December, 1859, the ship was arrested in a cause of bottomry on behalf of James and Andrew Sutherland: the bond was dated 5th June, 1858, and the amount due was 214*l.* 13*s.* 5*d.* On the 15th March, 1860, the Judge pronounced for the bond. On the 16th March, 1860, an action of necessaries was entered on behalf of William Edmondson, of Liverpool, and, the proceeds being in the possession of the Court, a citation *in rem* was served upon the Registrar. The claim was for necessary clothes supplied to the master and crew of the ship in October and November, 1857, and amounted to 103*l.* 14*s.* 10*d.*; a bill given by the master for the payment of the same upon his owners in America had been dishonoured. On the 15th March an action of necessaries was entered on behalf of John Da Costa, of Liverpool, for wages to the amount of 120*l.*, paid by him in November, 1859, to the crew by directions of the master on account of the ship. There were two other actions of necessaries entered at the same time; one for sails to the amount of 59*l.* 7*s.* 8*d.* supplied in October, 1857, the other for repairs and stores to the amount of 35*l.* 7*s.* 11*d.*, also supplied in October, 1857. The total amount of these claims amounted to 667*l.* 15*s.* 8*d.*, exceeding therefore the proceeds of the ship.

On the 17th April, *Lushington* moved the Court on behalf of the holders of the bottomry bond for the payment of the sum pronounced due upon the bond, in priority to the other claims. Bottomry has precedence over necessaries. If the rule is to prevail as laid down in the *Clara* (*a*), that the party first in possession of a decree of the Court is intitled to priority, the bondholders are intitled to be paid before all the plaintiffs suing for necessaries, except Cearns and Brown, who alone have had their claim pronounced for.

Tristram, for the other plaintiffs:—By the rule of the *Clara*, Cearns and Brown are intitled to be paid first of all. The same rule would postpone the other plaintiffs to the bond-

(*a*) Sw. 6.

holders. Da Costa's claim is in the nature of wages, and therefore has precedence over a bottomry bond. The equity of the case seems to demand a *pro ratâ* payment of all the claims. Edmondson is not disintitled to sue, because he took the bill in payment, the bill being afterwards dishonoured; *N. R. Gosfabrick* (*a*). 1860. *April* 17.

Lushington in reply.

Right Hon. Dr. Lushington:—A bond is intitled to precedence over all claims except wages, or a subsequent bond or salvage claim. Seamen's wages, however, come first of all, according to the established practice of the Court, and I am of opinion that Da Costa's claim is in the nature of wages, and must therefore be the first paid. If he had not advanced the money, the seamen would have no doubt arrested the ship, and inforced their right to priority of payment. I shall therefore direct Da Costa's claim to be satisfied first, and next the bondholders. There then remain four actions of necessaries, the plaintiffs in one of which have already obtained a decree of the Court. The Court encourages suitors in actively inforcing their remedy, and gives preference to the party who is first in possession of a decree of the Court. Messrs. Cearns and Brown are therefore intitled to be paid before the other plaintiffs for necessaries, who, being *in pari conditione*, must share what is left of the proceeds rateably. The costs in each action will be paid with the principal sums in the order I have named. Judgment.

Rothery, proctor for the bondholders.

Toller for the other plaintiffs.

(*a*) Sw. 344.

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THE VICTOR.

Collision—Liability of Cargo—Power of Execution—Costs and Damages.

The cargo laden on board a vessel at the time of collision is in no case liable to be sued for the damage.

Cargo arrested for freight will be released upon payment of the freight into Court with an affidavit of value.

The Admiralty Court has no power of levying execution upon a defendant's goods and chattels, to satisfy a judgment.

Where cargo is improperly detained under arrest, the owner is intitled to costs and damages.

A cause of collision was entered against a foreign ship, freight and cargo. The ship was arrested, and the cargo was arrested for the freight. The ship was released upon an appearance and bail being given for the owners of the ship. The Court pronounced for the damage. An appearance was thereupon entered for the freight and the freight paid into Court, and the Surrogate was prayed to release the cargo. The value of ship and freight being insufficient to satisfy the damage, the plaintiff prayed the Surrogate not to release the cargo. The Surrogate referred the question to the Judge:

Held that the cargo, even if the property of the owners of the ship, was not liable for the damage, and must be released with costs and damages for the improper detention of it.

THIS was a cause of collision entered by *Rothery* in 8,000*l.*, on behalf of the owners of the Dutch ship Vrede, and her cargo, against the Swedish ship Victor, her cargo and freight. The warrant was issued against the ship and freight only; the ship was arrested, and the cargo was arrested for the freight. On the 31st December, 1859, an appearance was entered by *Deacon* for Samuel Gadenius & Company, as the owners of the ship. On the 8th of March, 1860, the Court pronounced for the damage of the Vrede. The cross-action was heard at the same time and dismissed; it had been entered on behalf of Samuel Gadenius & Company, as the owners of the Victor and her cargo. On the 2nd of May *Deacon* entered an appearance to the action of the Vrede for Messrs. Frederick Huth & Company, of London, the holders of the bills of lading of the cargo lately laden on board the Victor, for a valuable consideration, and brought in an affidavit with the bills of lading annexed, to the effect that Messrs. Huth & Company were the holders of the bills of lading for valuable consideration at the time of the collision, and still held the same; and *Deacon*, alleging the total amount of the freight due to be 585*l.* 2*s.* 2*d.*, and that he had paid that sum to the account of the Registrar at the Bank of England, prayed the cargo to be released from the arrest for freight. *Rothery* objected and prayed the Surro-

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gate to decree a warrant for the arrest of the cargo, to make good any deficiency in the damage of the Vrede, arising from the proceeds of the Victor being insufficient to satisfy the same. The Surrogate referred the matter to the Judge.

On the 3rd of May, *Deane*, Q.C., moved the Court to decree an arrest of the cargo, to make good the deficiency of the damage of the Vrede.—It must be admitted that this motion is a novel one; but the justice of the case requires that it should be granted. The decision of Vice-Chancellor Wood, in the case of *Cope* v. *Doherty* (*a*), confirmed by the Lords Justices of Appeal (*b*), determines that by the law maritime the owners of a foreign vessel pronounced against in a cause of collision are liable to the full extent of the damage. The plaintiffs are in possession of a decree of the Court for their damage, and the proceeds of the Victor and freight are insufficient to satisfy it. The cargo laden on board the Victor, at the time of the collision, is admitted, in the cross-action, to belong to the owners of the Victor, and it is in the possession of the Court under arrest in this action. It is submitted, therefore, that the Court has power, in these circumstances, to attach the cargo to satisfy its own decree, especially as the action was entered against it in the first instance.

The *Admiralty Advocate* and *Lushington*, *contrà*, moved the Court to decree a *supersedeas* of the arrest of the cargo, and to give costs and damages incurred by the detention since the 2nd of May.—The freight having paid in, the cargo is intitled to be released; Rule 49 of the New Rules only re-enacts the former practice of the Court in this respect. "Cargo, arrested for the freight only, may be released by filing an affidavit as to the value of the freight, and by paying the amount of the freight into the registry." Cargo cannot be sued for a collision; there is no precedent for it. If it could be sued with the ship, it might be sued alone, which no one can conceive. There is no maritime lien on the cargo for a collision. The judgment of the Privy Council in the *Bold Buccleugh* (*c*) shows that a maritime lien is an absolute claim upon the *res*, independent of ownership; the *res* itself is looked upon as offending, and therefore the lien follows the *res* even into the hands of a *bonâ fide* purchaser. So in the Roman law the maxim was, "*Omnis noxalis actio caput sequitur*" (*d*), and by abandoning the offending slave or the beast

(*a*) 4 K. & J. 367.
(*b*) 2 De G. & J. 614.
(*c*) 7 Moore, P. C. 284.
(*d*) Inst. Lib. iv. Tit. viii. 5.

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to the person injured, the owner ceased to be liable. But here the cargo cannot be said to have offended; the cargo was down in the bottom of the Victor's hold and never touched the Vrede. That the tort was done, so to speak, in the service of the cargo, matters not, because the master and crew are not agents of the owners of the cargo to commit a tort, and because a maritime lien on the *res* itself does not depend upon any relation of agency. In the recent case of the *Ida* (*a*), where the master of the Ida, in order to procure a better berth went on board another ship and cut her adrift, whereby she fouled a boat containing part of her cargo and upset it, the Court held that the Ida could not be sued, that the right of action was personal only. Again, following out the principle of the *Bold Buccleugh*, if there is a maritime lien on the cargo for a collision, it follows the cargo into the hands of a *bonâ fide* purchaser; but such a lien is unknown upon any market exchange, and to admit it would be to revolutionize the law of sale of goods. The recognized liens on cargo are either strictly possessory as for freight or general average contribution, or, if independent of possession, arise out of implied or actual contract for services rendered to the cargo itself, as in the case of salvage or bottomry. In *The Gratitudine* (*b*), Lord Stowell laid down the principle, that in cases of necessity the policy of the law makes the master of the ship agent for the cargo to bind it by a bottomry bond; but there is no such necessity here, nor any such policy of law. There is no lien on cargo for mariners' wages or towage, though these expenses are in a sense incurred for the benefit of cargo, nor even for the charges of loading or unloading.

Next, supposing the cargo was the property of the owners of the ship doing the damage, the Court has no power to levy execution upon it to satisfy the decree. There is no instance of any such power, although many cases must have occurred in which the value of a foreign ship was insufficient to satisfy the damage. To levy execution on the goods of the owner is to graft a proceeding *in personam* upon a proceeding *in rem*, which the Court has expressly decided that it cannot do; *Hope* (*c*); *Volant* (*d*). A plaintiff suing in the Admiralty Court has the advantage of the security of the ship; he must submit to the disadvantage of the want of a general power of execution, like that possessed by the Courts of Common Law. If no appearance had been given to the action, the plaintiff could

(*a*) Ante, p. 6.
(*b*) 3 C. R. 240.
(*c*) 1 W. R. 158.
(*d*) Ib. 385.

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have obtained the proceeds of the ship, but nothing further; and the appearance is only entered by the owners, as the citation in the warrant shows, in order to defend their interest in the ship; *Volant* (*a*). The cargo being under arrest of the Court in the cause is immaterial, because it was arrested for freight only; and the freight being paid, the arrest is satisfied. Public policy also is against extending the liability of the shipowner. Great Britain, and almost every other maritime state, has passed an enactment limiting the liability of its own shipowners, and a foreign shipowner is only liable beyond the value of his ship and freight, when there are several actions, and the owner has taken his ship out on bail to the first action, this Court not having the power to dismiss the second action, nor a Court of Equity to limit the liability of the shipowner, whilst the ancient maritime law remains unrepealed. But the hardship and injustice upon the foreign owner in such a case is confessed, and the Court will not depart from its customary process in order to inflict an injustice. The whole pretext, however, for the motion to attach the cargo fails upon the matter of fact; the cargo was not the property of the owners of the ship, though erroneously so described in the cross-action. Messrs. Huth & Co., who held the bills of lading for a valuable consideration, were the true owners (6 Geo. IV. c. 94, s. 2, Factors Act).

Deane, Q.C., in reply.

On the next day (4th May) the Right Hon. Dr. Lushington delivered judgment.

Judgment.

[After stating the facts as above.] It is admitted that the motion to release the cargo is in the ordinary course, and the motion made on behalf of the Vrede is without precedent. The 49th of the New Rules is founded upon the ordinary practice of the Court, that cargo arrested for freight should be released upon payment of the freight into Court. It is not denied on the other side that since the decision in *Cope* v. *Doherty*, the owners of a foreign ship cannot claim any limitation of liability under sect. 504 of the Merchant Shipping Act. The question is not as to the liability of the owners of the Victor to the full extent, but as to the power of procedure of this Court.

(*a*) 1 W. R. 388.

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Cargo cannot be sued for damage done by the ship in which it is carried.

The first question is, whether the cargo laden on board a ship doing damage, is like the ship itself, liable in this Court for the damage? I believe there is no precedent whatever to support the affirmative of this proposition. I believe that in former times it was not unusual to proceed by arrest of the person in the first instance, but I know of no instance in which the Court has arrested a cargo for the purpose of making good the damage done by the ship in which it was conveyed, and I conceive the reasons against such a course are most powerful. Damage is said to be done by the ship, but this is a mere form of expression; the truth being that it is done by the master or crew employed by the owner of the ship, who is therefore responsible for their conduct. But the master and crew are not the agents nor the servants of the owners of the cargo; upon what principle, then, are the owners of the cargo responsible? Again, nothing could be more inconvenient or more prejudicial to trade, than that the owners of merchandize should be made responsible under such circumstances. The property in goods on board is transferred by bills of lading, and it would most seriously interfere with mercantile transactions, if beyond the peril of the seas the owner of the cargo was exposed to the risk of losing his property by the vessel being improperly navigated, and he were made responsible for the misconduct of the master and crew, over whom he had no control. I have no hesitation, therefore, in deciding against this general proposition, though I regret the urgency of the case has not given me opportunity for further investigation into the earlier practice of the Court;—I mean the practice of the Court before the liability of British shipowners was limited by statute.

The Court has no general power of execution upon a defendant's chattels.

The second question is, whether, supposing the cargo belongs to the owner of the ship doing the damage, the cargo can be attached to satisfy the decree of the Court against the ship. The only reason that can be suggested for such a proposition is, that, the owner of the ship being responsible for the whole extent of the damage, it is competent for this Court to attach his property wherever found, to levy upon his goods and chattels. But unquestionably the Court has no such power. Such a proceeding would be wholly without precedent.

What I have already said disposes of the whole case, and renders it unnecessary to consider the question of fact as to the ownership of the cargo. It only remains to say, that where an experiment of this kind is made and it fails, the Court must

give costs and damages. I therefore pronounce for the release of the cargo, with costs and damages as prayed for. 1860. *May* 4.

Cargo released with costs and damages.

Rothery, proctor for the Vrede.

Deacon for the owners of the cargo of the Victor.

THE BOMARSUND.

Salvage—Vessel in distress and services of Strangers accepted—Injury caused to Ship by negligence of Licensed Pilot.

Where a ship is in distress and accepts the services of strange hands, the services are in the nature of salvage, although the work done may be of no great difficulty or importance.

Salvors having brought a vessel in distress to a situation of safety from ordinary peril but not to anchor, and having given up the charge to a licensed pilot, are not prejudiced as to their claim by injury subsequently happening to the ship from the negligence of such pilot.

SALVAGE. The salvors, eleven in number, on the 6th November, 1859, about 2 P.M., put off in their yawl from the shore at Aldborough to the barque Bomarsund, which was showing a signal for a pilot, having driven from the Downs with her windlass disabled and the loss of her starboard anchor and chain; she was in charge of her mate, the master being on shore. Having got on board some of the salvors, at the request of the mate as they alleged, took charge of the vessel to take her into Lowestoft, and the others went on in the yawl to order a steamtug to be in readiness. About 7 P.M. the vessel was brought by the salvors close to the entrance of Lowestoft harbour, and taken in tow by the steamtug, and very shortly afterwards a licensed pilot boarded, and the vessel was given over to his charge by the salvors. By the neglect of the pilot the vessel ran against the harbour pier and drove upon the beach, sustaining thereby great damage, and incurring fresh salvage expenses. The petition alleged that " the said services by the salvors were rendered at considerable risk in launching their yawl, and that the said services were prompt and efficient, and by means thereof the said ship was prevented from going on shore or otherwise from further damage, and was brought into a position of safety from all *May* 14.

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ordinary perils; and that, but for the subsequent fault of the said pilot, the said ship would have been safely brought into Lowestoft harbour." The value of the vessel, before the last accident, was appraised at 1,000*l.*; the owners tendered 18*l.*

Twiss, Q.C., and *Lushington* for the salvors.

The *Queen's Advocate* and *Deane*, Q.C., for the owners.

Right Hon. Dr. Lushington, in the course of his judgment, said :—The signal hoisted was for a pilot only, but this does not prevent the services rendered from being in the nature of salvage. The true question always is, What was the condition of the ship? Was she in distress? And the character of the signal hoisted is only one piece of evidence bearing upon this question. The Court will form its conclusion upon all the evidence and all the circumstances. It is quite clear that in this case the ship was in distress, and a pilot taking charge of the ship in her then condition would have been intitled to more than pilotage reward. The plaintiffs are therefore intitled to salvage reward; and, although their services may not have been of a very difficult kind, the owners, whose servant received them on board, and kept them, and took the benefit of their services, cannot now turn round and deny that the services were in the nature of salvage.

The salvors did quite right in yielding up the charge of the ship to the licensed pilot. In other cases I regret that this has not been done. The salvors did quite right, and they cannot suffer in their claim on account of injury done to the ship subsequently by the pilot's negligence. I overrule the tender, and give 35*l.* and costs.

Lawrie, proctor for the salvors.

Stokes for the owners.

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THE NORTH AMERICAN.
THE TECLA CARMEN.

Collision—Action and Cross-Action—Practice.

Collision between two foreign vessels A. and B.: total loss of A.: B. arrested in an action by the owner of A.: cross-aetion by the owners of B., but no appearance. The Court refused to stay proceedings in the action against B. until an appearance was given in the eross-action.

Subsequently an appearance being entered, but no bail given, and judgment in the original action pronouncing both vessels to blame, the Court refused to order any damages to be paid to the plaintiffs until decree given in the cross-action; but ordered the amount reported due by the Registrar to be paid into the Registry. In the cross-action fresh evidence was admitted, and on the application of one party the whole of the evidence in the original action.

The amount of damages being paid by order of the Court into the registry, the party finally adjudged to receive the same was not allowed interest from the date of such payment into Court: *Semble*, the Court on application would have ordered the money to have been invested.

ON the 8th of March, 1858, a collision took place off Point Lynas, between the ship North American, belonging to the port of New York, and the Spanish barque Tecla Carmen, the result of which was that the Tecla Carmen was abandoned, and became a total wreck on the Welsh coast. On the 16th of March, 1858, the owners of the Tecla Carmen entered an action in 10,000*l.* against the North American, and arrested her. The owners of the North American appeared, but did not give bail, and their ship remained under arrest. On the 16th of March, 1858, they entered a cross-action against the Tecla Carmen, but no appearance was given. On the 13th of July, 1858, the action of the Tecla Carmen against the North American was heard, and the Court finding both vessels to blame, pronounced for a moiety of the Tecla Carmen's damage. The cause was appealed, and on the 8th of December, 1858, their Lordships in the Privy Council affirmed the decree of the Court below; not, however, upon the merits of the case, upon which they expressed an opinion that the North American was solely to blame for want of a proper look-out, and failing to port her helm in time; but upon the ground that the Tecla Carmen having untruly alleged that the North American had starboarded, was not intitled to recover in full (*a*). In consequence of this judgment, limiting their liability to half the damages, the owners of the North American on the 4th of February, 1859,

(*a*) Swabey's Reports, p. 358.

1860. *April* 16. put in bail, and obtained a supersedeas of the arrest of their ship. The damage of the Tecla Carmen was then referred to the Registrar and merchants to assess.

On the 4th of May, 1859, an appearance was entered by the owner of the Tecla Carmen to the cross-action.

On the 5th of May, 1859, a motion was made on behalf of the owners of the North American, upon an affidavit of the damages sustained by them in consequence of the collision, for the same to be referred to the Registrar and merchants.

Deane, in support of the motion. This case is distinguishable from the *Seringapatam* (*a*), because an appearance has been entered to the cross-action. The owners of the Tecla Carmen have thereby submitted to the jurisdiction of the Court, and must submit to every equitable requirement. Here it is plain equity that one judgment should decide both actions, and the damages of both parties be assessed at the same time.

Addams, contrà. The action and cross-action are separate, and the Court has no authority to grant this motion.

The Court rejected the motion, and said that the cross-action must proceed in regular course.

Pleadings were then filed, (Libel, 13th of May, 1859; Allegation, 9th of June); the defendants, in their allegation, omitting the charge of starboarding. On the 16th of July, 1859, the Registrar reported the moiety of the Tecla Carmen's damage at 2,934*l.* 18*s.* 5*d.*, together with interest from the 1st of July, 1858. On the 11th of August, 1859, the Court was moved on behalf of the owners of the Tecla Carmen for a monition that the bail given by the owners of the North American should pay to them the sum reported due by the Registrar. This was opposed, and a counter-motion made that there should be no order of payment until after decree pronounced in the cross-action; the Court ordered the bail to pay the money into the Registry. The cross-action was then proceeded with. The Court, on the application of the plaintiffs (which was opposed), had previously (7th of July, 1859,) allowed the evidence given on both sides in the former action to be brought in as evidence for the plaintiffs: fresh evi-

(*b*) 3 W. R. 41, note.

dence was also taken. On the part of the Tecla Carmen, the only witness adduced as to the circumstances of the collision was the master, who now denied, or endeavoured to deny, his belief, that the North American had starboarded. On the application of the defendants the case was heard, with the assistance of Trinity Masters who had not sat on the former occasion; and on the 19th of April, 1860, the Court, reviewing all the evidence, pronounced against the claim of the plaintiffs, taking the same view of the facts as the Privy Council, but under the circumstances refused to condemn the plaintiffs in the costs. 1860. *April* 16.

On the 26th of April, *Twiss*, Q.C., moved the Court on behalf of the owners of the Tecla Carmen, for a monition upon the bail to pay the sum of 2,934*l.* 18*s.* 5*d.*, together with interest, at the rate of 4*l.* per cent. per annum, from the 1st of July, 1858.

Deane, Q.C., *contrà*.

The Court rejected the motion, on the ground that the bail having paid the money into the Registry by order of the Court, were not liable for anything further, and also that the owners of the Tecla Carmen were not intitled to interest, as they might have applied to the Court to have the money invested.

Clarkson, proctor for the Tecla Carmen.

Rothery for the North American.

THE EASTERN MONARCH.

Life—Salvage—17 *&* 18 *Vict. c.* 104, *s.* 459.

A liberal reward is to be given for the saving of human life, consideration being had to the degree of peril to which the salvors and the persons saved are exposed.

SALVAGE. This was a consolidated action on behalf of several sets of salvors for services, whereby a great number of lives were saved from a burning ship, and afterwards part of the wreck and stores preserved. The circumstances of the life *April* 19.

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salvage are stated in the judgment, and in the following affidavit, which formed part of the proofs in the cause.

"I, Andrew Timbrell Allan of Preston, in the county of Lancaster, late lieutenant-colonel of her Majesty's 81st Regiment of Foot, make oath and say as follows:—

"I was in command of the troops on board the above late ship or vessel Eastern Monarch, on her voyage from Kurrachee to London. The ship brought up at Spithead between one and two a.m. of the 3rd day of June, 1859. There were at such time on and under my command, four hundred and thirty souls—men, women and children. About two a.m. of the said day I was awoke by a violent explosion, and on getting on deck I found the said vessel on fire. There were several boats, mostly belonging to the men-of-war at Spithead, about the Eastern Monarch, in which I caused the women and children to be placed, and very shortly afterwards some mud-barges came up; one of which, the Providence, was made fast to the Eastern Monarch, and laid under her bowsprit, and nearly two hundred persons, including myself and Captain Morris, got on board her; some from the boats, others from the water into which they had thrown themselves to avoid the flames, but the largest number lowered themselves down into the said barge from the decks of the burning ship. We were all subsequently landed at the Point in safety. William Corderoy, master of the said barge, and his crew, and also his wife, who were on board at the time, all rendered most valuable, efficient, and kind assistance, and incurred great danger, both to their own lives, and to the barge herself, in making fast to the burning ship, as aforesaid; and I verily believe that my own life and those of the people who were on board the said barge were saved by the great gallantry, coolness, and steadiness of the said William Corderoy and his crew. Before I left the said ship she was in flames from head to stern.

A. T. Allan."

It is unnecessary to report the case as to the salvage of property. The value of the hull and cargo saved was 2,131*l.* 15*s.* 3*d.*; passage money, 2,001*l.* 13*s.*; total 4,132*l.* 8*s.* 3*d.*

Sect. 459 of the Merchant Shipping Act, 1854, is as follows:—"Salvage in respect of the preservation of the life or lives of any person or persons belonging to any such ship or boat as aforesaid shall be payable by the owners of the ship or boat in priority to all other claims for salvage; and in cases where such

ship or boat is destroyed, or where the value thereof is insufficient, after payment of the actual expenses incurred, to pay the amount of salvage due in respect of any life or lives, the Board of Trade may in its discretion award to the salvors of such life or lives out of the Mercantile Marine Fund such sum or sums as it deems fit, in whole or part satisfaction of any amount of salvage so left unpaid in respect of such life or lives." 1860. *April* 19.

The Queen's Advocate, Spinks, and *Lushington,* for the salvors.

Deane, Q.C., and *Tristram,* for the owners.

Right Hon. Dr. Lushington :—This is a case of salvage arising under peculiar circumstances. The claims are founded upon services rendered to a ship in distress, by the saving the lives of many persons from the ship, which was on fire, by preserving some of the property in the vessel, and by exertions which saved the ship herself from utter destruction. There are several sets of salvors, claiming for various services, and the actions are consolidated. Judgment.

It appears that very early in the morning of the 3rd of June, probably about two o'clock, a fire broke out on board the Eastern Monarch, which had recently arrived at Portsmouth from the East Indies, with troops, passengers, and a valuable cargo. Certain of the salvors being on board their barges, employed in removing mud from the bar of Portsmouth Harbour, saw the ship on fire, and proceeded to her. The barge Providence arrived first. She was fastened to the burning ship, and, as they allege, took on board from her or from the boats or out of the sea two hundred persons, and in so doing, encountered the greatest danger. The barge Petrel came next: she did not bring up, but took nearly a hundred persons out of the boats. The Abeona did the same. The barge Speedwell took sixteen persons from the boats, and put them on board H.M.S. Victory. Besides those saved in the barges, about forty were rescued by the Falcon yacht, and about a hundred and twenty by the pilot cutter Fawn, which was the first vessel that arrived on the spot to render assistance. As to the number of lives saved in each vessel it is not practicable, nor, indeed, essential, to ascertain the number in each case with precise accuracy. The Providence no doubt saved most.

Then with respect to the danger to the salvors, the evidence is Salvors en-

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countered risk of life;

very conflicting; but the evidence of Colonel Allan, the commander of the troops on board, together with the probabilities arising from the *res gestæ*, namely, the barge being made fast to the burning ship, establishes, to my conviction, that very considerable danger was incurred by those on board the Providence. The conduct of Corderoy, the master, appears to be particularly deserving of commendation. The danger incurred by the other barges, which were not made fast to the vessel, was certainly very inferior in degree.

and saved those on board from imminent danger.

As to those on board the Eastern Monarch, I consider their danger, whether there were sufficient boats or not (which is disputed), to have been most imminent. Many threw themselves into the water, which shows their own opinion of their peril. Moreover, there were a large number of women, children, and invalids.

The value of the property saved amounts to 4,132*l.* 8*s.* 3*d.* In fixing the amount of salvage to be paid, I apprehend I am bound to bear in mind the 459th section of the "Merchant Shipping Act, 1854," which contemplates the possibility of the whole proceeds being exhausted by payment of salvage for life. It is my duty to give a liberal reward for the saving of life, two things being considered, the degree of danger the persons salved were exposed to, and the degree of danger the salvors encountered. I award for all the services a total sum of 1,660*l.*, and apportion it as follows:—To the Providence (three hands) 300*l.*; Abeona (three hands), 200*l.*; Petrel (two hands), 180*l.*; New Speedwell (two hands), 180*l.*; Fawn, 200*l.*; Falcon, 120*l.* [The learned Judge apportioned the residue of the 1,660*l.*, viz. 480*l.*, amongst the salvors of the property.]

Jenner and *Dyke*, and *Waddilove*, proctors for the salvors.

Rothery for the owners.

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THE SOVEREIGN.

Salvage—Tender out of Court—Costs.

Where in a cause of salvage an offer out of Court has been made by the defendants, and rejected by the salvors, and the salvors subsequently accept a smaller sum tendered by act of Court, the salvors are intitled to their costs up to the date of the formal tender, unless the offer out of Court was made in gold or bank notes.

Quære, Whether an express offer to pay costs due by law is necessary to a complete tender, either in or out of Court.

SALVAGE. This was an action brought by the owner, master, and crew of the smack Pride of the Ocean, for salvage services rendered to the schooner Sovereign on the high seas. The cause was instituted on the 2nd of February, 1860; on the 29th February the owners entered an appearance. On the 7th of March bail was given, and affidavits filed that the value of ship, freight and cargo amounted to 445*l.* On the 8th of March the solicitor for the defendants filed the following minute:—"On Wednesday, the 28th of March, 1860, the sum of 85*l.* was tendered to Mr. Charles Lawrie, the proctor or agent for the plaintiffs, which sum was refused by the said Mr. Charles Lawrie, and was therefore paid into Court." On the 23rd of April the solicitor for the defendants filed a copy of the following notice, that day served by him on the proctor for the plaintiffs:—"Take notice, that on the 28th day of March last, I paid into the Bank of England, to the account of the Registrar of this Court, the sum of 85*l.*, which was previously tendered to and refused by you on behalf of the plaintiffs, in full satisfaction for the services rendered by them; and again offer the same, together with such costs (if any) as may be due by law. Dated 23 April, 1860." On the 7th of May the plaintiffs accepted the tender of 85*l.* On the 5th of June the defendants filed a notice that they would move that the plaintiffs should be disallowed their costs, as unnecessarily and vexatiously incurred; and brought in affidavits that on the 8th of February the defendants, then stating that the property was worth 400*l.*, had offered the owner and master of the smack 90*l.*; that on the 9th February the same offer was made to Mr. Clarke, of Yarmouth, the plaintiffs' agent, and that on the 17th of February, the offer was extended to 100*l.*

Deane, Q.C., now moved accordingly.—The salvors have in-

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curred all these costs wholly unnecessarily and vexatiously. With an adequate knowledge of all the circumstances, they refused repeatedly a larger sum than that which now, under better advice, they have accepted. To allow them costs would only be to encourage litigation. Secondly, having accepted a tender under 200*l.*, they are not intitled to their costs under the 460th section of the Merchant Shipping Act, 1854, unless the Court certifies that it was a proper case to be tried in this Court. In the recent case of the *John* (*a*), where a similar question was in issue, the Court said, "It is, however, immaterial to consider the result of the tender apart from the statute, for I consider the acceptance of a tender, which is an act of Court, is a recovery in Court; and therefore the only question is, whether I ought to certify that this is a case fit to be tried in the superior Court." Here there is no pretence for saying that the service rendered was more than an ordinary service in a very ordinary way. The tender of the 28th of March was a perfect formal tender, for no costs were due.

Lushington for the salvors:—The service took place on the high seas, it was therefore necessary to bring the action in this Court; and the argument founded on the case of the *John* and the section of the Merchant Shipping Act has no application. On the other point, there is no ground for saying that the salvors have acted improperly; the offers now relied upon were bare offers, which might or might not have been carried out, and the value of the property salved was unknown to the salvors. The Court does not care for offers and negotiations out of Court; it will only act upon a formal tender in act of Court, which tender must be absolute, and contain an offer to pay costs due by law; therefore not only the verbal offers made in February are invalid, but also the tender made on the 28th of March. The plaintiffs, it is submitted, are intitled to costs up to the date of the true tender, 23rd April; but if that is not so, the Court has continually acted on the principle expressly laid down in the *Princess Alice* (*b*), that even in the matter of costs, salvors are intitled to peculiar consideration.

Judgment.

Right Hon. DR. LUSHINGTON:—This is not a question whether the salvors shall be condemned in costs, but whether they shall receive their costs; and the case of the *Princess Alice*, having regard to the non-condemnation of the salvors in costs, has no immediate bearing on the question I have to decide.

(*a*) Ante, p. 11, where the section of the Act is printed at length.
(*b*) 6 N. of C. 596.

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The ancient practice of this Court was, that to constitute a tender, there must be offered a certain sum of money, together with the costs due by law; and any tender to which a condition was annexed of any description, sort or kind, was considered as no tender at all. During the time of Lord Stowell this doctrine was carried out in all its completeness, except under the following circumstances:—A case occurred (the name of which I do not remember) in which Lord Stowell said, "There has been a tender made without costs; this is no tender at all;" but he added, "If I am satisfied by the evidence that the salvors, with a perfect knowledge of all the facts and circumstances, refused a tender in money to the same amount as that which has since been accepted, I will not allow them their costs." It is stated that the Court can look at nothing whatever except a tender made in the regular form, together with the costs given by law. I agree in the principle upon which Lord Stowell acted, although I see a great difficulty in carrying it into effect. With regard to all loose negotiations and offers of that description, which end in nothing, the Court is not inclined to take any cognizance of them. The only cases in which I have taken cognizance of any such negotiations have been those in which tenders have been made out of Court, at an antecedent period, in money or in bank notes. I am of opinion that anything short of such a tender is not that species of negotiation upon which the Court can found any judgment at all. In the present case, I do not perceive that the owners did more than say, If you will accept 80*l.* or 100*l.*, we will pay it; but no attempt was made to offer the money. I cannot consider this as an equivalent to an offer of money. I am not satisfied that at the time when those offers were made the salvors knew of the real value of the property. The Court must be perfectly satisfied that at the time a proposal was made to pay any sum of money, the salvors were aware of the full value of the property. Looking at all the circumstances of the case, I think the salvors are intitled to their costs up to the 28th of March.

Lawrie, proctor for the plaintiffs.

Abell for the defendants.

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THE LITTLE JOE.

Salvage—Ambiguous Signal—Information—Costs.

Salvors, induced by an ambiguous signal to put off from the shore to the assistance of a ship, are not intitled to salvage reward, if the actual condition of the ship shows that the signal was for a pilot only. Action in such case dismissed, but without costs.

Semble. Mere giving of information concerning the locality, even if needed, is no salvage service.

SALVAGE. The case of the salvors, beachmen of Lowestoft, was that they were induced to put off to the ship in their yawl at considerable risk to themselves by a signal of an ensign hoisted in the ship's foretopmast rigging; that after boarding and informing the master of the ship where he was, the master changed his mind and told them that he only wanted a pilot and had no need of their assistance, and that he thereupon, using the information he had received from them, took his ship into Yarmouth. The case of the owners was that the signal was for a pilot only, that no service of any kind had been rendered by the so-called salvors, and that the information given by them as to the locality was quite unneeded, as the ship had men on board familiar with the coast. They admitted that the vessel had been in distress three days before the alleged services, and had received assistance from a smack.

Twiss, Q.C., for the salvors. The plaintiffs are intitled to salvage. The vessel was in distress and the signal hoisted must be taken to be a signal for assistance, *Hedwig* (*a*). There is no reason why advice, if needed and effectual, should not constitute a salvage service. At all events the plaintiffs are intitled to have their expenses paid them, *Ranger* (*b*).

The *Queen's Advocate* and *Deane*, Q.C., *contrà*.

Judgment. Right Hon. DR. LUSHINGTON:—The main question here is, what was the meaning of the signal hoisted? Those on board the ship say that the ensign was for a pilot only, that it was fastened in the rigging, as there were no signal halyards rove, and no union jack on board. Were the salvors on shore intitled to consider this a signal for assistance? My conclusion is, that

(*a*) 1 Spinks, 23. (*b*) 3 N. of C. 590.

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it was an ambiguous signal, and therefore that the rule applies which was laid down by the Court several years ago. There had been many disputes on the east coast, especially with foreign vessels, as to what was a signal for a pilot, what a signal of distress; and I then said that where it was clear that the vessel wanted more than pilotage, any signal should be interpreted to mean a request for salvage assistance, and on the other hand, if the condition of the ship showed that a pilot only was wanted, that the signal used should be interpreted to be a signal for a pilot only. Applying this rule to the present case, I think the signal cannot be construed into a request for salvage assistance. The vessel had been in difficulties, but she had been relieved from them and was not in a disabled condition. Then I cannot find that the plaintiffs performed any service to the ship, beyond what they call giving advice to the master. Had such advice been needed, it is very doubtful whether the mere giving of information or advice as to the locality, even to a foreign vessel, would amount to a salvage service. But it is quite clear that here the information was not wanted: there were men on board the ship quite familiar with Lowestoft and Yarmouth.

In these circumstances the plaintiffs are clearly not intitled to any salvage remuneration. I should also have condemned them in costs, if the signal hoisted had not been ambiguous. I shall not condemn them in costs, but I shall not give costs.

Lawrie, proctor for the salvors.

Stokes for the owners.

THE ALPHA.

Salvage—Removal of the Ship from Local Jurisdiction—Certificate of Costs under s. 460 *of* 17 *&* 18 *Vict. c.* 104.

Where the master of a vessel refuses to go on shore, and refer to the local justices the amount of salvage due for services rendered in the United Kingdom, and removes the vessel from the local jurisdiction, and an action is thereon brought in the Court of Admiralty, the Court, awarding only 50*l.*, will certify for the salvors' costs under sect. 460 of the Merchant Shipping Act, 1854.

June 21.

SALVAGE. Services were rendered by the crew of the Caistor life-boat on the evening of the 28th February, to the Alpha brig, then lying on the Barber Patch off Yarmouth.

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Spinks for the salvors.

Wambey, for the owners, referred to sect. 460 of the Merchant Shipping Act, 1854 (*a*).

Dr. Lushington awarded to the salvors 50*l.*, and allowed the salvors their costs, observing; "I shall certify for the costs of the salvors. It was not just of the master to refuse to give the proper references of his ship, and he had no right to refuse to submit to the local jurisdiction. By sailing away with his ship, as he did, he rendered an action in this Court necessary."

Dyke, proctor for the salvors.

Rothery for the owners.

THE UNDAUNTED.

Salvage—Agreement—Ineffectual Efforts.

Efforts to give assistance under an engagement to a ship in distress will, although the ship receives no benefit from them, be rewarded as being in the nature of salvage services, if the ship is otherwise saved.

A ship parted from both anchors at the North Foreland, and thereupon engaged a steamer to go on shore, and bring off an anchor and chain. The steamer went to Ramsgate, and, as the best method of executing the service, got the anchor and chain on board two luggers; and the three vessels were engaged for three days looking for the ship in distress. The steamer at length fell in with the ship, but no longer in a condition of imminent distress, and then towed her to Gravesend. The luggers did not arrive with the anchor and chain until the ship had arrived at Gravesend, when the master of the ship refused to accept them:—*Held*, that the original order to the steamer included a direction to take all necessary measures to carry out the order, and that the steamer and the luggers were intitled to salvage remuneration for the whole of their efforts.

June 21. SALVAGE. On the 20th December, 1859, about 9·30 p.m., the Undaunted troop ship, bound to London, in coming to in a heavy gale at the North Foreland, parted with both her

(*a*) Printed, ante, p. 11.

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anchors and cables. Sail was made on the ship and rockets fired for assistance. The steamer Resolute came up, and the master of the Undaunted then requested the steamer to proceed to the nearest harbour and bring off an anchor and cable. The steamer accordingly went to Ramsgate, and the master, as the best method of executing his order, engaged two luggers, and put on board of them a large anchor and cable. During the 21st, 22nd and 23rd December, the steamer and the luggers were engaged cruising in the neighbourhood of the Foreland, searching for the Undaunted, but without success, the Undaunted having run to the northward, as far as Lowestoft; she had in the meanwhile got ready her spare anchor. In the afternoon of the 23rd the steamer fell in with the Undaunted off the Foreland, —the weather having by this time moderated, and then, with the assistance of another steamer, towed the ship to Gravesend. The luggers with the anchor and chain followed, but were unable to come up with the Undaunted until she had reached Gravesend, when the master refused to accept the anchor and chain. The action was brought by the owners and crew of the steamer and the owners of the luggers for all these services. Value of the Undaunted, cargo and freight, 30,618*l.*; value of the steamer, 4,000*l.*; value of the luggers, 500*l.* and 300*l.*

The *Admiralty Advocate* and *Lushington* for the salvors.—The steamer is undoubtedly intitled to be remunerated for the whole of her services, as her towage was in the nature of salvage. The real question is whether the luggers are not likewise to be rewarded for their attempted services. It is submitted that they are; first, because the services were performed under an agreement of salvage; and secondly, because the crew of the luggers and the crew of the steamer are to be looked upon as one company of salvors, and the actual service of the steamer gives the Court power to award remuneration for the entire work performed: the *E. U.* (*a*) is on this point almost on all fours with the present case. Public policy and equity are in favour of the plaintiffs.

Deane, Q.C., and *Wambey*, for the owners.—It is a well-known principle in this Court, that no efforts, however meritorious, are, if ineffectual, to be treated as salvage services. The mere contract with the master of the steamer, never beneficially performed, cannot intitle the crew of the luggers to sue as salvors. The case of the *E. U.* only goes to the effect of allowing the whole of the crew of a life-boat to recover for services beneficial and not

(*a*) 1 Spinks, 63.

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beneficial, when the beneficial service was rendered by a part only of the crew: it would be going too far to extend this principle, to allow the crews of two boats to recover, none of whom ever came near the ship in distress, and none of whom were ever engaged by the ship. The crew of the luggers and the steamer cannot be looked upon as only one company of salvors.

Judgment.

Right Hon. Dr. Lushington:—I cannot have any doubt as to the duty of the Court in this case. There is a broad distinction between salvors who volunteer to go out, and salvors who are employed by a ship in distress. Salvors who volunteer, go out at their own risk for the chance of earning reward, and if they labour unsuccessfully, they are intitled to nothing: the effectual performance of salvage service is that which gives them a title to salvage remuneration. But if men are engaged by a ship in distress, whether generally or particularly, they are to be paid according to their efforts made, even though the labour and service may not prove beneficial to the vessel. Take the case of a vessel at anchor in a gale of wind, hailing a steamer to lie by and be ready to take her in tow, if required; the steamer does so, the ship rides out of the gale safely without the assistance of the steamer: I should undoubtedly hold in such a case that the steamer was intitled to salvage reward, the how much to be determined by the risk encountered by both vessels, the value of the property at hazard, and the other circumstances of the case. The engagement to render assistance to a vessel in distress, and the performance of that engagement, so far as necessary or so far as possible, establish a title to salvage reward. In the present case there was an engagement: the steamer was engaged to go on shore and bring off an anchor and cable to this ship, which had parted from both anchors in a tremendous gale off the Foreland, and was, in my opinion, in very great danger. The engagement, as usual in such cases, was not more specific than was necessary. The true effect of it was, "You are to go and get me an anchor and cable, and do all that is necessary for this purpose." The steamer proceeds to the shore, and employs two luggers to take in the anchor and chain, as being by size and construction fitted to go alongside a large vessel in a seaway; in fact employs them as the best means of executing the promised service. Now if it was necessary and proper to employ these luggers, their employment forms part of the original order, and their services must be paid for. I am of opinion that the luggers were most properly engaged by the master of the steamer; I am further of opinion that they did all in their power to reach the vessel in distress, they put out to sea immediately,

Salvors working under an engagement are intitled to salvage reward though their efforts are ineffectual.

The employment of the luggers being necessary, came within the terms of the original order.

and were for nearly three days knocking about the Foreland, and they were only disappointed of effecting their service by the act of God. The ship had driven as far as Lowestoft: she was finally fallen in with by the steamer, and towed by her and another steamer to Gravesend: on the luggers arriving with the cable and anchor, the master of the vessel then refused to accept them. Looking to all the circumstances of the case, the risk of the ship, the long labour of the salvors, and the expense and loss of profits incurred, I shall give the Resolute 400*l.*, and to each of the luggers 100*l.*

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Rothery, proctor for the salvors.

Deacon for the owners.

THE ENCHANTRESS.

Salvage Apportionment—17 *&* 18 *Vict. c.* 104, *s.* 498—*Agreement.*

Upon application to the Court under the 498th section of the Merchant Shipping Act, 1854, for an apportionment of salvage, the Court will decree an equitable apportionment, unless an equitable agreement be proved, or an equitable tender has been made.

An agreement between salvors and the agent of the salving ship to leave the amount of their reward to his determination, held inequitable and void.

Personal services to be always favourably regarded as the subject of salvage reward.

THIS was an action for the distribution of salvage brought by the masters of three fishing-luggers, of Lowestoft, against Gabriel Virgo Daniel, of Lowestoft, the agent for the owners of the steamtug Powerful, and against the owners, master, and crew of the Powerful. *June* 22.

The petition pleaded that, on the 6th November, 1859, the plaintiffs were engaged by Daniel, who was harbour-master of Lowestoft, to go on board the Powerful steamtug, and assist her in going to the rescue of the steamer Enchantress, then in great distress off the harbour of Lowestoft; that they did so, and were of great service in enabling the Powerful to reach the Enchant-

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ress by the shortest route across the sands, and take her in tow; that an agreement at the time was entered into between those on board the Powerful and the crew of the Pakefield life-boat, which was also rendering services to the Enchantress, that the salvage should be divided in equal moieties between them; that 750*l.* had been paid by the owners of the Enchantress to Daniel as salvage money for the entire services. The petition also alleged that the plaintiffs would not accept the tender of 14*l.* 17*s.* 6*d.* made to them by the defendants, and prayed the Court to award the plaintiffs an equitable proportion of the 375*l.*

The answer alleged that the original engagement of the plaintiffs took place as follows:—"That the said Gabriel Virgo Daniel went down into the fish-market, and seeing the plaintiffs doing nothing, offered them to go off in the tug to the steamer, saying, 'Mind you, if you go, you must leave it to me to make you such remuneration as I shall think proper: now you understand this before you go, so that there may be no mistake.' To which they at once assented, and ran down towards the harbour to be in time to get on board the tug." It also alleged that the plaintiffs had called upon Mr. Daniel in his office, and had expressed their content with his assurance that they should get as much as the crew of the Pakefield life-boat should dole, and that it was not until the Pakefield men had doled, and their shares were ascertained to be 4*l.* 17*s.* 6*d.* per man, that the plaintiffs expressed dissatisfaction, and refused to accept such sum. These averments were denied in the reply.

The affidavits on these points were contradictory. In one of the affidavits brought in for the plaintiffs, it appeared that at Pakefield all the landsmen present at the launching of the boat, as well as a second and third boat's crew, were admitted to participate equally with the life-boat and her crew, with the exception of a small sum allowed to the life-boat for being the first boat, and that their moiety of the salvage was therefore divided into a great number of shares.

Deane, Q.C., for plaintiffs.

Twiss, Q.C., for defendants.

Judgment.

Right Hon. Dr. Lushington:—In this case the plaintiffs are three masters of fishing-loggers belonging to the port of Lowestoft, who apply to the Court to allot them their share of 375*l.* salvage money paid to the defendants. The defendants have received

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from the owners of the ship salved 375*l.*, to be shared between them and the plaintiffs, and they have tendered the plaintiffs 14*l.* 12*s.* 6*d.*, or at the rate of 4*l.* 17*s.* 6*d.* to each man.

The Court will apportion, save in the case of an equitable agreement, or an equitable tender.

The jurisdiction of the Court to apportion salvage money now rests on the 498th section of the Merchant Shipping Act, 1854: "Whenever the aggregate amount of salvage payable in respect of salvage services rendered in the United Kingdom has been finally ascertained, and exceeds 200*l.*, and whenever the aggregate amount of salvage payable in respect of salvage services rendered elsewhere has been finally ascertained, whatever such amount may be, then if any delay or dispute arises as to the apportionment thereof, any Court having Admiralty jurisdiction may cause the same to be apportioned amongst the persons intitled thereto in such manner as it thinks just; and may for that purpose, if it thinks fit, appoint any person to carry such apportionment into effect, and may compel any person in whose hands or under whose control such amount may be to distribute the same or to bring the same into Court, to be there dealt with as the Court may direct, and may for the purposes aforesaid issue such monitions or other processes as it thinks fit." I conceive a duty is hereby imposed upon me to decree, upon application made, what in my judgment is an equitable apportionment of salvage, unless I am barred by one of two circumstances,—either an equitable agreement between the parties, or an equitable tender.

The alleged agreement was not equitable, and therefore invalid.

I will consider the present case in both ways. First, then, was there an equitable agreement made between the parties? Mr. Daniel, who no doubt was acting as the agent of the owners of the Powerful, deposes that he engaged the services of the plaintiffs, on the express understanding that they were to be intitled only to such remuneration as he should think proper. The plaintiffs deny this, but I will assume the fact to have been as Mr. Daniel deposes, that this agreement was really entered into between the parties. The question still remains, was this a just, an equitable agreement—an agreement such as the Court can sanction and enforce?

The plaintiffs were undertaking a service open to many contingencies, but a service certainly requiring skill and experience, and probably accompanied with danger; for the distressed ship was six miles from the shore, in the midst of most dangerous sands, with a gale of wind blowing, and requiring the assistance of a steamer and boats. Can it be just that men, undertaking a

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service of this arduous kind, should be bound by an agreement that the amount of their recompense should be determined by the pure arbitration of the person most interested in limiting it? The Act of Parliament (*a*) says, that every stipulation by which any seaman consents to abandon any right which he may have or obtain in the nature of salvage shall be wholly inoperative, and the Court has held (*b*) and must hold, that not only all agreements barring salvage are wholly inoperative, but that agreements limiting the proportion of salvage money are to be maintained only so far as they are really equitable. I am of opinion that the alleged agreement in this case is open to the objection that it is inequitable, and that, even if made, it is not binding on the plaintiffs.

The tender also insufficient.

The second question is, whether the tender of 14*l.* 12*s.* 6*d.* is, under the circumstances, an equitable and sufficient tender? In considering this question, it is well to remember the original principle which the Court used to follow in granting salvage reward. The ancient principle was that the Court gave salvage reward for personal services. For a long time the claim of the owners of the ship, whose crew rendered the salvage service, was not much regarded. Thus, in the *Jane* (*c*), decided in 1831, Sir Christopher Robinson said, "As to the owners, who are principal parties in these proceedings, the general principle of law is that the claim of owners generally is very slight, unless, from the circumstances of the case, their property becomes exposed to danger, or they incur some real loss or inconvenience;" and similar language may be found in many decisions.

In later times, the introduction of steam-power has effected a considerable change in the practice of the Court, and no doubt reasonably, for a steamer is now most frequently the principal salvor. It is equitable in such cases that the owners, on whom the chief risk and all the expense falls, should be rewarded in a much higher proportion than owners were formerly, and the Court has acted accordingly. But the Court will not lose sight of its ancient principle of adequately and liberally rewarding the personal services of the men engaged. The master conducting the enterprize receives a handsome reward, the seamen in proportion, and, as a rule very seldom deviated from, the owners are not to take more than a moiety of the net sum received after expenses are deducted. To apply what I have said to the present case: The steamer was here, no doubt, the principal salvor, but the plain-

(*a*) 17 & 18 Vict. c. 104, s. 182. (*b*) See *Louisa*, 2 W. R. 22.
(*c*) 2 Hagg. A. R. 343.

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tiffs were masters of fishing-luggers, experienced seamen, thoroughly conversant with the local navigation, and, without disparaging the knowledge or capacity of the master of the steamer, their presence on board was most advantageous for the performance of a service embracing so many contingencies, and what they had to do, they did honestly and skilfully. The rest of the crew of the Powerful reckoned seven hands; the amount given to the steamer was 375*l.* In these circumstances, I have no hesitation in saying that the sum of 14*l.* 17*s.* 6*d.* was an unfair proportion to offer the plaintiffs for their services,—that the tender is inadequate.

It is said, however, that the plaintiffs acquiesced in the arrangement that they were to share as the Pakefield men, and that they only turned round when they discovered that that share was smaller than they anticipated. It would take a great deal of evidence to prove acquiescence in an unfair arrangement; but it is clear that the plaintiffs never contemplated taking a share the amount of which was determined in the way in which the share of each of the life-boat's crew was determined. There was in truth no such agreement between the parties. Local and customary agreements, if equitable, such as that where there is a life-boat company, those who stay shall be rewarded as those who go, the Court will always favourably consider; but it is quite otherwise of special agreements, such as the one here relied upon, between salvors and persons of contrary interest, which, for the Court to sanction, must be clearly equitable and clearly proved. I give 15*l.* to each of the plaintiffs, and costs.

Skipwith, proctor for the plaintiffs.

Lawrie for the defendants.

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In the Privy Council.

Present—Lord KINGSDOWN.
Lord CHELMSFORD.
The Right Hon. Sir EDWARD RYAN.

THE DESPATCH.

Collision—Rule as to Recovery secundum allegata et probata.

Where the plaintiff charges two separate collisions, whereby his vessel, being at anchor, was driven on the rocks, and sustained great damage, and the first collision was such, that the plaintiff's vessel might, and probably would, have driven on the rocks, if no second collision had happened, he will be intitled to recover, on proving the first collision only; as the rule that a plaintiff must recover *secundum allegata et probata* is thereby satisfied.

The *North American* and *Ann* distinguished.

THIS was an appeal brought by the owners of the Despatch steamer from a judgment of the High Court of Admiralty, whereby they were condemned in the damage arising in a collision with the Maraquita yacht.

The collision took place in Holyhead Harbour, on the night of the 25th October, 1859. Both vessels were at anchor, and a gale of wind was blowing. The libel of the plaintiff charged two collisions, alleging that by the first collision the port-chain of the yacht was cut away, leaving her to ride by her starboard chain only; that the second collision took place about half an hour afterwards, and that the result of it was that both vessels dragged together, and the yacht went on the rocks and received the damage complained of.

The seventh article of the libel pleaded "that the damages sustained by the Maraquita are attributable wholly and solely to those on board the said steamtug Despatch, in having run into and struck the Maraquita on her port side, and carrying away her port chain, as in the fourth article of this libel pleaded, and also in having again run into and struck the port bow of the Maraquita, and caused her to drag her starboard anchor and go ashore, as in the fifth and sixth articles of this libel pleaded." The evidence for the Maraquita supported the libel. The defendants (the appellants), in their pleading and evidence, admitted the first collision, but alleged that it was caused by inevitable accident: they denied the second collision altogether.

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Manisty, Q.C., *Deane*, Q.C. and *Lushington* for the appellants. —The second collision is disproved; therefore, whatever was the cause or whatever the result of the first collision, the plaintiff cannot recover. The rule that the plaintiff cannot recover upon the true state of facts, if he has set up an untrue state of facts, is laid down in the case of the *North American* (*a*), and the *Ann* (*b*).

Twiss, Q.C. and *Clarkson* for the respondents, were not called upon.

Lord Chelmsford delivering judgment said, that their lordships were of opinion that the appellants' vessel was to blame for the first collision, and that as that collision broke one of the chains of the Maraquita, and so weakened her power to resist the force of the gale, it might be regarded as the efficient cause of the vessel afterwards going on the rocks; it was therefore unnecessary to consider whether there was a second collision in fact or not. The case was thus distinguished from the cases of the *North American* and the *Ann* referred to in argument; there the plaintiff failed in establishing the principal fact charged against the defendant's vessel; but in the present case the plaintiff had pleaded and proved a fact sufficient to found a judgment in his favour, and thereby fulfilled the condition of the rule that a plaintiff can only recover *secundum allegata et probata*. Their lordships must therefore advise Her Majesty to affirm the judgment of the Court below, with costs.

Rothery, proctor for the appellants.

Clarkson for the defendants.

(*a*) Swabey, 358. (*b*) Ante, p. 55.

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July 12.

In the High Court of Admiralty.

THE HALCYON.

Collision, duty of Vessel on Starboard Tack close-hauled— 17 *&* 18 *Vict. c.* 104, *ss.* 296, 298.

A vessel meeting another, within the meaning of the 296th section of the Merchant Shipping Act, 1854, is not, if close-hauled on the starboard tack, bound by the rule of that section to port her helm.

COLLISION. This was an action brought by the owners of the English brig Hartford, against the English barque Halcyon, for a collision off Flamborough Head on the 4th February, 1860. The Hartford was lying south by west, close-hauled on the starboard tack; the Halcyon was steering north by west. The Hartford sighted the Halcyon right ahead, and kept on her reach unaltered, until collision was inevitable, when she ported to ease the blow. The mate stated in his evidence, "John Preston reported, and I at the same time saw the red and green lights of the Halcyon right ahead of us, and distant about half a mile, and I thereupon kept the Hartford steady to her reach, and she lay without any change in her course, as close as she could to the wind to keep her well under command." It was contended at the hearing that the plaintiffs, on this statement, were barred from recovering by sections 296, 298, of the Merchant Shipping Act, 1854, for not having ported at an earlier period.

The following are the sections referred to :—

17 & 18 Vict. c. 104, s. 296. "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; and this rule shall be obeyed by all steam ships and by all sailing ships, whether on the port or starboard tack, and whether close-hauled 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 sailing ships on the starboard tack close-hauled, to the keeping such ships under command."

Sect. 298. "If in any case of collision it appears to the Court before which the case is tried, that such collision was occasioned by the non-observance of any rule for the exhibition of lights or the use of fog signals issued in pursuance of the powers hereinbefore contained, or of the foregoing rule as to the passing of steam and sailing ships, or of the foregoing rule as to a steam ship keeping to that side of a narrow channel which lies on the starboard side, the owner of the ship by which such rule has been infringed shall not be intitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it be shown to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary." 1860. *July* 12.

Deane, Q.C. and *Lushington* for the Hartford.

Spinks and *Wambey* for the Halcyon.

Dr. Lushington in the course of his summing up to the Trinity Masters, read the 296th section of the Act, and the above evidence of the mate of the Hartford, and said that if the Hartford was in their opinion close-hauled on the starboard tack, then according to his judgment of the statutory rule, she was not bound to port her helm, and was therefore not to blame.

The Trinity Masters found the Halcyon was alone to blame, and the Court pronounced accordingly for the damage.

Stokes, proctor for the plaintiffs.

Deacon for the defendants.

THE ALBERT CROSBY.

Proceeds in Registry—Attachment out of Lord Mayor's Court.

Funds lying in the registry of the Admiralty Court cannot be attached by process of foreign attachment out of the Court of the Lord Mayor of London.

ON the 29th September, 1859, an action of master's wages was entered by Thomas Martin, against the Albert Crosby, a ship registered in Nova Scotia. The action went by default, and on the 12th January, 1860, the ship was sold, and on the 25th May, *July* 13.

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the wages were paid out of the proceeds, leaving a balance of 450*l.* in the registry. Martin had also entered an action in the Court of the Lord Mayor of London, against Calvin Soule, the owner of the vessel, for money lent, and the defendant making default, on the 25th February, 1860, he attached the proceeds of the ship in the Registry of the Admiralty Court, by an attachment issued under seal of the Lord Mayor's Court, which was served upon the Registrar. The Registrar gave no appearance, and four defaults in the usual form were recorded against him. On the 1st March, 1860, a summons in the usual form, signed by the Serjeant at Mace, was served upon the Registrar, calling upon him to appear in the Lord Mayor's Court and show cause why Thomas Martin the plaintiff should not have judgment against him for 165*l.*, with notice that if he did not appear, judgment would be entered against him for the same. The Registrar did not appear, and thereupon, on the 24th March, 1860, judgment was entered against him in the Lord Mayor's Court for 165*l.*

Morgan Lloyd now moved the Court to order the sum of 165*l.* so attached to be paid out of the Registry to Martin.—This application is made to the Court because the plaintiffs are intitled to be paid the money by virtue of the ancient custom of the City of London, and the judgment of the Lord Mayor's Court, which is a Court of Record. Every due formality has been observed, and the privilege of the Registrar, if he has a privilege, has been waived by him in declining to appear after being warned. If the Registrar had paid the money under the authority of the judgment of the Lord Mayor's Court, it would have been a complete discharge to him. In *Westoby* v. *Day* (*a*), it was held that payment by a garnishee protects him from further proceedings, even if, from the Court not having jurisdiction in the particular case, the debt has been unlawfully attached; "the garnishee is safe by paying under the judgment of the Court." It is submitted that the plaintiff is intitled to this money, and he seeks to obtain it by an order of this Court instead of enforcing his judgment against the Registrar.

Dr. Lushington:—I should certainly interfere by attaching any person who meddled with my Registrar.

Wambey and *Lushington*, who opposed the motion on behalf of other creditors on the proceeds, were not called upon.

(*a*) 2 E. & B. 620.

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July 13.
Judgment.

RIGHT HON. DR. LUSHINGTON:—If I had inclination to grant this motion, I have no authority. It is my duty to protect the fund in the Registry against all claims, except such as are by the custom and law of the Court a lien on proceeds, and these claims must be fully proved to the satisfaction of the Court. Money lying in the Registry of the Court of Admiralty cannot be disposed of by process out of the Court of the Lord Mayor. This application must be refused.

Walters, solicitor for Martin.

Hand for other parties.

In the Privy Council.

Present—Lord CHELMSFORD.
Lord KINGSDOWN.
The Right Hon. Sir EDWARD RYAN.

THE PEERLESS.

Collision—Admission in Pleadings—Compulsory Pilotage in the Hooghly.

Admission by pleading extends to matters of fact, but not of law.

Foreign regulations set out in plea and not traversed are thereby admitted; but an inference of the effect of such regulations, though pleaded and not denied, being a matter of judicial construction, is not admitted.

Pilotage in Cowcolly Roads, in the river Hooghly, *held* not to be compulsory by the joint operation of Act XXII of 1855, passed by the Legislative Council of India, and the rules and regulations of the Lieutenant-Governor of Bengal, dated 1st of July, 1856.

July 18.

THIS was an appeal from the High Court of Admiralty in a cause of collision. The proceedings in the Court below are reported, *ante*, page 30. The collision took place in Cowcolly Roads, in the river Hooghly, about fifty miles from Calcutta. The defendants (now appellants), having pleaded that their vessel, the Peerless, was in charge of a pilot, further pleaded,—

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Art. 6.—"That by the Marine Act passed by the Legislative Council at Calcutta, and which received the assent of the Most Noble the Governor-General of India on the 13th August, 1855, and which assent was communicated to the Legislative Council on the 1st September, 1855, and the said Act thereupon promulgated, and which Act is intitled Act No. XXII of 1855, it is enacted by section 12, 'In every port subject to this Act, to which the provisions of this section shall be specially extended by an order of the local government, it shall be unlawful to move any vessel of the burthen of 200 tons or upwards without having a pilot, harbour master, or assistant of the master attendant or harbour master, on board; or to move a vessel of any burthen less than 200 tons and exceeding 100 tons, without having on board a pilot, harbour master, or assistant of the master attendant or harbour master, unless an authority in writing so to do has been obtained from the conservator, or some officer empowered by such conservator to give such authority; and if any vessel shall, except in a case of urgent necessity, be removed contrary to the provisions of this section, the master of such vessel shall be liable to a penalty not exceeding 200 rupees for every such offence, unless the master of the vessel shall, upon application to the proper officer, be unable to procure a pilot, harbour master, or assistant of the master attendant or harbour master to go on board the said vessel.'"

Art. 7.—"That on the 1st day of July, 1856, it was ordered by the Lieutenant-Governor of Bengal, in the rules and regulations with respect to the limits of the port of Calcutta, in the words following:—'With the sanction of the Governor-General of India in Council it is hereby declared, that the port of Calcutta, and the navigable river and channels leading to that port, are subject to Act No. XXII of 1855.' And in consequence thereof, the said Act hath ever since that time been, and now is, binding and in full force upon vessels navigating the said river Hooghly."

Art. 8.—"And the party proponent expressly alleges and propounds that under and by virtue of the aforesaid Act and Regulations, and by the general law in that case made and provided, his aforesaid parties, the owners of the said ship Peerless, are exempt from all responsibility for the damages alleged to have been occasioned by the said vessel while in charge of the said J. P. B. de Patourel, the pilot, as before set forth, and whom they were compelled to take on board in obedience to the

aforesaid regulations, and all of whose orders were promptly and effectually obeyed as aforesaid." 1860. *July* 18.

The plaintiffs (now respondents) did not traverse the 6th or 7th articles of the allegation, and the 4th article of their responsive allegation was as follows:—"That in contradiction to what is pleaded in the 8th article of the said allegation, the party proponent alleges and propounds that the owners of the said ship Peerless are not under and by virtue of the therein recited Act and Regulations, nor by the general law in that case made and provided, exempt from all responsibility for the damages occasioned by the said vessel while in charge of the said J. P. B. de Patourel, the pilot."

It is necessary further to extract from the Act of the Legislative Council so pleaded (*a*):—

Preamble.—"Whereas it is expedient to provide for the safety of vessels, and for the convenience of traffic in the several ports within the territories in the possession of and under the government of the East India Company, and in navigable rivers and channels leading to such ports," &c.

Sect. 3.—"The local government of any part of the said territories may, with the sanction of the Governor-General of India in Council, declare any port within that part of the said territories to be subject to this Act; and any navigable river or channel leading to that port to be subject to this Act. When any such port, or navigable river or channel, has been so declared to be subject to this Act, all the provisions of this Act, except such as are hereinafter made specially applicable to certain ports by order of the local government, shall have effect in that port, or navigable river, or channel."

Sect. 4.—"Every declaration by which any port, navigable river, or channel shall be made subject to this Act, shall define the limits of such port, navigable river, or channel; and such limits shall extend always up to high-water mark, and may exclude any piers, jetties, landing-places, wharfs, quays, docks, and other works made for any of the purposes mentioned in the preamble of this Act, whether within or without the line of high-water mark, and (subject to any rights of private property

(*a*) Act XXII of 1855.

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therein) any portion of the shore or bank within fifty yards of high-water mark."

The 12th, 28th, 37th, and 40th sections are each marked in the margin *Special Rule.* The 12th section commences, "In every port subject to this Act to which the provisions of this section shall be specially extended by any order of the local government." The 28th section commences, "In every such port to which the provisions of this section shall be specially extended by an order of the local government." The 37th and 40th sections, "In every port, river, or channel, subject to this Act, to which the provisions of this section shall be specially extended by an order of the local government."

Deane, Q.C., and *Twiss,* Q.C., for the appellants.—We submit that the Act and Order of the Lieutenant-Governor were admitted in the pleadings, and therefore all proof was unnecessary. The defendants pleaded the Act and Order in separate articles, Arts. 6 and 7 of their allegation; then in the 8th art. they plead that by their joint effect and the general law they are not responsible for the act of the pilot: the responsive allegation passes by the 6th and 7th articles altogether, and simply joins issue on part of the 8th: it only denies the inference of non-responsibility; it does not deny the existence of the Act and Order in question; on the contrary, it refers to them as existing. *Taylor on Evidence* (*a*) enunciates the rule in common law thus: 'It may be laid down broadly, that whenever a material averment well pleaded is passed over by the adverse party without denial, whether it be by pleading in confession and avoidance, or by traversing some other matter, or by demurring in law, or by suffering judgment to go by default, it is thereby for the purpose of pleading, if not for the purpose of trial before the jury, conclusively admitted." A similar rule applies in the Admiralty Court, *Glasgow Packet* (*b*), and the principle is of great practical importance, in order that both parties may in any case know what they are required to prove. Secondly, we submit that it is admitted in the pleadings, that the order of the Lieutenant-Governor extended the Act to the *locus in quo.* That is averred in the 7th article of the allegation, and is not traversed or in any way answered in the responsive allegation.—[*Lord Chelmsford.* Your averment that "in consequence of the order, the Act is now binding and in full force upon vessels navigating the river

(*a*) (2nd ed.), § 748. (*b*) 2 W. R. 308.

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Hooghly," is an averment not of an extrinsic fact, but of a construction of law. Do you say that the plaintiffs' not denying that, admit it?]—We do: if they intended to dispute it, they should have given us notice in pleading. But at any rate the collision took place in the Hooghly; it is so pleaded in the libel; and that is "the navigable river leading to the port of Calcutta." We are prepared, if permitted, to give further evidence on this point.—[*Lord Kingsdown.* We have the power to allow further evidence, if necessary, but at this stage of the case we do not see any necessity for it.]—The Act then extended to the *locus in quo,* and by the 12th section the pilotage was compulsory. This also is admitted in the pleadings, for the averment in the 8th article of the allegation, that the owners were compelled to take the pilot as aforesaid, is not noticed in the responsive allegation; the true meaning of which is not to deny that the pilotage was compulsory, but to allege that, though the pilotage was compulsory, the owners are nevertheless liable. Thirdly: The pilotage being compulsory, the owners are exempt for the act of the pilot; not by the 388th section of the Merchant Shipping Act, 1854 (for that, it must be admitted by sect. 330, only applies to the United Kingdom), but by the general principle of law, that a man is not chargeable for the acts of another who is not an agent of his own election. In *Carruthers* v. *Sydebotham* (*a*), it was held that there was no privity between the shipowner and a pilot employed by obligation of law; and the principle has been laid down by Dr. Lushington in the *Protector* (*b*), in the *Maria* (*c*), and in the *Agricola* (*d*). So in *Milligan* v. *Wedge* (*e*), the licensed drover's case; the licensed drover, though employed by the defendant, was held not to be the servant of the defendant so as to make him responsible. In *Martin* v. *Temperley* (*f*), referred to in the argument below, the defendant had choice out of six thousand watermen, and Lord Denman expressly distinguishes the case from the *Maria.* The pilot is not the servant of the shipowner, but the servant of the law. We submit, therefore, that the appellants have made out their defence in fact and in law.

The *Queen's Advocate* and *Hannen* for the respondents.—The burden of proof rests wholly upon the appellants to

(*a*) 4 M. & S. 84.
(*b*) 1 W. R. 54.
(*c*) 1 W. R. 106.
(*d*) 2 W. R. 19.
(*e*) 12 A. & E. 737.
(*f*) 4 Q. B. 298.

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establish their exoneration from liability; *Christiana* (*a*). We deny the efficacy of the proof that the alleged pilot was a licensed pilot; we deny that the employment of him was compulsory, and, if compulsory, we say that the exoneration of the owners did not follow. To take the last point first: independently of a statute expressly giving exoneration, the owner of a vessel is liable for the act of a pilot whom he employs under obligation of law. It may be inferred that, before the passing of the pilotage statutes, this was considered to be the law. In *Ritchie* v. *Bousfield* (*b*), which was tried in 1816, the defendant's vessel was in charge of a pilot, and no evidence was given at the trial of any interference by the defendant with the pilot. A verdict passed for the plaintiff; Serjeant Best, moving for a new trial, referred to the "new" Pilot Act (*c*), (of which sect. 11 made the employment of a pilot compulsory, and sect. 30 took away the owner's liability for the act of a pilot so employed,) admitting that he was not aware of the statute at the time of the trial. Clearly also he was not aware of any exemption independent of the statute. So in the *Neptune the Second* (*d*), which was decided in 1814, two years after the passing of the statute, Lord Stowell, not being aware of the statute, pronounced for the damage, and said, "The owners are responsible to the injured party for the acts of the pilot, and they must be left to recover the amount as well as they can against him. It cannot be maintained that the circumstances of having a pilot on board, and acting in conformity to his direction, can operate as a discharge of the responsibility of the owners." This case was referred to in the *Girolamo* (*e*), where Sir John Nicholl said, "It cannot be doubted that before these statutes passed, exonerating masters and owners when a licensed pilot is in charge of the vessel, that remedy existed in this Court." It was also referred to by Dr. Lushington in the *Eden* (*f*), as proving the proposition for which we contend. In the *Diana* (*g*), Lord Brougham delivering the judgment of the Court, says, "By the common law, owners are answerable for the damage done by their vessel, because it is navigated to their profit, and by their servants. The statute interposes, and takes the management in a great degree out of their hands; *it*, therefore, indemnifies them from any damage which the person imposed upon them may occasion." The American authorities are directly in favour of the owner's

(*a*) 7 Moore, P. C. 170.
(*b*) 7 Taunt. 309.
(*c*) 52 Geo. III. c. 39.
(*d*) 1 Dods. 467.
(*e*) 3 Hag. 177.
(*f*) 4 N. of C. 462.
(*g*) 4 Moore, P. C. 17.

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continuing liability, notwithstanding the compulsory employment of the pilot. In *Bussy* v. *Donaldson* (*a*), decided in 1800, in the Supreme Court of Pennsylvania, Shippen, C. J. says, "The legislative regulations were not intended to alter or obliterate the principles of law, by which the owner of a vessel was previously responsible for the conduct of the pilot; but to secure, in favour of every person (strangers as well as residents) trading to our port, a class of experienced, skilful, and honest mariners, to navigate their vessels safe up the bay and river Delaware. The mere right of choice, indeed, is one, but not the only reason, why the law in general makes the master liable for the act of his servant; and, in many cases where the responsibility is allowed to exist, the servant may not, in fact, be the choice of the master. For instance: if the captain of a merchant vessel dies on the voyage, the mate becomes captain; and the owner is liable for his acts, though the owner did not hire him originally, nor expressly choose him to succeed the captain. The reason is plain: he is in the actual service of the owner, placed there, as it were, by the act of God. And so, in the case under consideration, the pilot was in the actual service of the owner of the ship, though placed in that service by the provident act of the legislature. The general rule of law, then, intitles the plaintiff to recover; and we have heard of no authority, we can recollect none, that distinguishes the case of a pilot from those numerous cases on which the general rule is founded." In the second edition (1855), the editor adds in a note: "The rule was the same in England, *Neptune the Second* (1 Dods. 467), *Bowcher* v. *Nordstrom* (1 Taunt. 568); see also *Fletcher* v. *Braddick* (5 B. & P. 182). But the liability of the master and owner in such a case was removed by 52 Geo. III. c. 39, s. 30." So in *Williamson* v. *Price* (*b*), the Supreme Court of Louisiana decided that the owner continues liable: "The owner of the vessel by whom the damage is done, receiving the benefit of the voyage, it has been judged just that he should indemnify persons injured by his vessel, while employed for his benefit." So also in *Yates* v. *Brown* (*c*), before the Supreme Court of Massachusetts (1828), where the point seems to have been fully argued; and in the *Lord John Russell* (*d*), before the Vice-Admiralty Court for Lower Canada. On these authorities, as opposed to the *Agricola* and the *Maria*, we submit that there is and ought to be no such rule of law as that contended for by

(*a*) 4 Dallas, R. 194.
(*b*) 4 Martin, R. (N.S.), 399.
(*c*) 8 Pickering, R. 22.
(*d*) Stuart, R. 195.

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the appellants. But, at any rate, to give exoneration, the compulsion must be absolute; if there is any power of selection left in the owners, as the right to chose from a limited class, their liability continues; *Martin* v. *Temperley* (*a*). The English statutes almost always require the employment of the first pilot offering, but here there was no such obligation.—As to the former point: in the Admiralty Court there is no strict rule of estoppel by admissions in pleading. The appellants offered proof of the facts they now say are admitted, and the learned judge decided the case upon the evidence. The Indian Act and Order must be proved as facts (*Taylor on Evidence* (*b*)), and the evidence is insufficient. But if the respondents did, by not traversing, admit the act and order, they admitted them only as pleaded; they dispensed with proof of their having been passed or issued; they did not admit the inference from them alleged by the appellants. That is matter of law, in which there is no estoppel. In *Clark* v. *Mullich* (*c*), where the plaintiff sued as assignee of a bankrupt on promises made to the bankrupt, the defendant only pleaded that "he did not undertake or promise in manner and form as the plaintiff, *assignee as aforesaid*, complains;" and the question arose whether the bankruptcy and assignment were thereby admitted, or, if not admitted, proven. Lord Brougham, in delivering the judgment of the Court, said, "The introduction (wholly unnecessary, no doubt, and very unusual) of the words 'assignee as aforesaid,' does not appear to their Lordships to be an adoption of the description given by the plaintiff of the character in which he brings his suit; it is not an admission that he is intitled to sue as assignee, but only a reference to the description which he has given of himself; as if he had said, 'Thomas Wyatt, who sues as alleging himself to be assignee of Thomas Shepherd.' The question, then, will turn on the sufficiency of the evidence before the Court below to prove that title." Then, in the present case, on looking to the Indian Act, it appears that sect. 12, on which the appellants rely, applies only to any "port" made subject to the act; it does not apply to any navigable river or channels, and a distinction between port and river is continually taken in the act. Further, sect. 12, together with sects. 28, 37, and 40, are special rules, which by the 3rd section are not included, when any port or river is declared by the local government "subject to the act;" there must be a special order for these special rules. The order therefore of the Lieutenant-

(*a*) 4 Q. B. 308.
(*b*) (2nd ed.) p. 8.
(*c*) 7 Moore, P. C. 252.

Governor of Bengal did not extend sect. 12 of the act at all; a special order was required, and no such is proved. 1860. *July* 18.

Deane, Q.C., in reply.

Lord Chelmsford delivered the judgment of the Court:—

Judgment.

The question in this case may conveniently be considered under the three following heads:—first, was the collision occasioned by negligence on board the Peerless, while she was in charge of a licensed pilot? secondly, did any omission of the master or crew of the Peerless contribute to the collision? and, thirdly, if the pilot was wholly to blame, are the owners of the Peerless, either upon general principles of law or by any act of the local legislature, exonerated from liability?

Very little question has been raised, and very little doubt entertained, upon the first point.

The pilot of the Peerless was to blame for navigating the vessel improperly,

It appears that the Jason, at the time of the collision, was lying at anchor in a safe and proper berth in Cowcolly Roads, in the Hooghly river. The Peerless, in charge of a licensed pilot, Le Patourel, got under weigh without using the steam-tug which had been engaged to assist her, and, in consequence, drifted down on the Jason, when she was necessarily helpless, except within very narrow limits, and occasioned the injury. A clear *primâ facie* case of negligence, therefore, is established, which no explanatory circumstances on the part of the Peerless have removed.

and the master and crew were not to blame for the jamming of the cable.

The second question, as to whether there was any blame to be imputed to the master or crew of the Peerless, may be as shortly disposed of. The negligence which is imputed is the jamming of the chain cable, which, it is said, the master ought to have taken care to keep clear, for the purpose of letting go. It appears to have been the opinion of the judge of the Court of Admiralty that there was no want of foresight or precaution on the part of the master in that particular, and that it must be attributed to what he calls a pure accident; and in that opinion their Lordships entirely concur.

There being then negligence on board the Peerless, and that negligence being imputable solely to the pilot, the only remaining question is whether, upon any principle of law, or by reason of

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a local act of the legislative council in India, followed by the rules and regulations of the local government of Bengal, the owners are exempt from liability.

Pleadings.

Now, upon that point the rules and regulations are set forth in the 6th and 7th articles of the allegation on behalf of the owners of the Peerless, and by the 8th article it is alleged "that in and by virtue of the aforesaid act and regulations, and by the general law in that case made and provided, the aforesaid parties, the owners of the said ship Peerless, are exempt from all responsibility for the damages alleged to have been occasioned by their said vessel, while in charge of the said J. P. B. Le Patourel, the pilot, as before set forth, and whom they were compelled to take on board in obedience to the aforesaid regulations, and all of whose orders were promptly and effectually obeyed as aforesaid." This is met by the 4th article of the responsive allegation on behalf of the owners of the Jason, who say "that, in contradiction to what is pleaded in the 8th article of the said allegation, the party proponent alleges and propounds that the owners of the said ship Peerless are not, under and by virtue of the thereinrecited acts and regulations, nor by the general law in that case made and provided, exempt from all responsibility for the damages occasioned by their said vessel while in charge of the said J. P. B. Le Patourel, the pilot."

The parol proof of the regulations failed;

The appellants offered parol evidence of the rules and regulations, but the learned judge of the Court of Admiralty was of opinion that the proof was insufficient, and therefore, the defence of the appellants entirely failing, he pronounced against them. If the question now were to depend on the evidence given of those rules and regulations, their Lordships would entirely concur in the judgment of the judge of the Court of Admiralty, but they are of opinion that there was no necessity to give any proof of those rules and regulations having been made, because they are sufficiently admitted in the proceedings between the parties.

the regulations however, not being denied, must be taken to be admitted in the pleadings.

It is to be observed, that in this case there is not a mere allegation of the fact, and the passing it by without any denial; but, the allegation having been made, it is answered by assuming the truth of the allegation, and by drawing a conclusion from it. Their Lordships therefore think, under these circumstances, that this amounts clearly to an admission of the rules and regulations.

But the conclusion from the regulations,

But the admission of the rules and regulations will not carry the matter to the extent contended for by Dr. Deane, viz., that

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upon the pleadings not merely the rules and regulations were admitted, but that the conclusions drawn from them by the appellants were also admitted by the responsive allegation. It is quite clear that the conclusion which the appellants draw from the regulations is not a conclusion of fact, but that it raises a question upon the effect of the act and the rules and regulations. This is a question of judicial construction, and not an admission of fact which can be made by either of the parties to the proceeding.

pleaded by the appellants, is a matter of judicial construction, and, therefore, though not traversed, is not admitted.

This being so, we have to consider what is the effect of the act, and of the rules and regulations, in the form in which they appear on the face of the proceedings?

Effect of the act and regulation considered.

Now the act is an act for the regulation of ports and port dues; and, by the 3rd section, "the local government of any part of the territories" (that is, of the East India Company) are empowered, with the sanction of the Governor-General of India in Council, to declare any port within that part of the said territories to be subject to the act; and any navigable river and channels leading to that port to be subject to the act. And, by the 4th section, every declaration by which any port, navigable river or channel, is to be made subject to the act, is to define the limit of such port, navigable river or channel; and, when the declaration in that form is made, then, by the 3rd section, all the provisions of the act, except such as are thereinafter made specially applicable to certain ports by order of the local government, are to have effect in that port, or navigable river or channel.

There are four sections in this act which in the margin are called special rules, and which under the 3rd section require to be specially extended by the declaration or order to be made, before they become applicable to the port, or to the navigable river, or channel, which is declared to be subject to the act. Amongst these is the 12th section, upon which the whole question turns. Now the 12th section provides that in every port subject to this act, to which the provisions of this section shall be specially extended by any order of the local government, it shall be unlawful to move any vessel of the burthen of two hundred tons or upwards without having a pilot on board, under a penalty of two hundred rupees for every such offence.

It was contended on the part of the appellants that this 12th section would apply not merely to the port strictly so called, but

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also to navigable rivers or channels which are declared to be subject to the act; but it is remarkable, that in the four sections which contain the special rules to which I have adverted, in the 12th and 28th, "port" and port alone is mentioned, whereas, in the 37th and 40th sections the words are "in every port, river, or channel, subject to the act," apparently, therefore, showing that where the legislature intended that the rules should be confined to the "port," it is so expressed, and when it intended the rules to be further extended there are additional words introduced. This certainly fortifies the construction which their Lordships are disposed to adopt.

If it were necessary to advert to evidence which is not upon the proceedings before their Lordships, it would strengthen very considerably the conclusion at which they have arrived, because they learn that there has been an order made defining the limits of the port of Calcutta, and also the extent of the navigable river and channels which were to be subject to the act, and especially providing that sections 12, 28, 37, and 40 of the act were to be extended to the port of Calcutta.

It is quite clear, therefore, that the limits of the port of Calcutta being defined, and the limits of the navigable rivers or channels being also defined, when a provision is made that these sections are to apply to the port of Calcutta, it must mean the port of Calcutta strictly so called, that is, as defined by the rules and regulations.

But, without relying upon what is not properly in evidence, it is sufficient to refer to the terms of the order of the Lieutenant-Governor of Bengal as set out upon the proceedings, by which it is merely declared that the port of Calcutta and the navigable rivers and channels leading to the port are subject to Act No. XXII of 1855. That being so, it is quite clear that, the 12th section not being specially extended to the navigable river or channel, it is excepted by the express terms of the 3rd section; and that the place where the collision occurred, not being a place which was subject to the operation of the 12th section, the owners of the Peerless were not bound to take a pilot on board, and, of course, there is an end of all questions arising upon the act of the local legislature.

The pilotage was not compulsory.

The third question being thus determined upon the act and the rules and regulations, it is unnecessary to consider the general principles on which the right of exemption from liability

may be founded, because if the parties were not compelled to take a pilot the whole foundation of this part of the argument fails, and there is no ground whatever for saying that the owners are exempt from the ordinary liability which attaches upon them for the negligence of their servants. 1860. *July* 18.

Under these circumstances their Lordships feel no difficulty in saying that they will humbly recommend to her Majesty to affirm the decree of the Judge of the Court below, with costs. Judgment affirmed, with costs.

Tebbs, proctor for the appellants.

Pritchard for the respondents.

In the High Court of Admiralty.

THE GLENMANNA.

Bottomry—Allowance of Commissions included in the Bond—Practice.

Where cargo is unshipped, stored, and trans-shipped at a foreign port, and a respondentia bond is given to defray the charges, the Court, though considering the custom of the port, will not allow as items in the bond any commissions beyond a reasonable amount, calculated upon a principle of *quantum meruit*.

Commissions charged at St. Thomas's of 2 per cent. on the value of cargo for storage, and of 2½ per cent. for landing and re-shipping, disallowed, and in lieu thereof reasonable sums allowed.

Commission of 5 per cent. on cash advances reduced to 2½ per cent., according to the practice observed in the Registry.

Commissions on freight in respect of the vessels chartered to trans-ship, disallowed.

Advance of money to master for alleged services in taking care of the cargo and for personal expenses, not allowed as charges on cargo.

In an appeal from a report of the Registrar the Court will not allow a party to set up a case which he did not endeavour to establish at the reference.

BOTTOMRY. On the 31st of March, 1859, the ship Glenmanna, then on a voyage from Bombay to Liverpool with a cargo of cotton, wool, seeds and other merchandize, having sprung a leak, put into port at the Island of St. Thomas. Upon survey made, the cargo was unladen and stored; and the ship having been condemned as unseaworthy, it was finally transshipped on board four vessels and carried to its destination. The master of the Glenmanna employed Messrs. Ball & Co. at St. Thomas's *July* 19.

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to take all proper measures with respect to the cargo and make the necessary disbursements. Before the cargo left he borrowed of Messrs. Rothschild & Co., on respondentia of the cargo the sum of 10,977 dollars to defray Messrs. Ball & Co.'s claim,—"the expenses arising from the said ship's entry at the port of St. Thomas's, and the charges incurred for the landing, storage, transshipping and other incidental expenses attendant on the said ship and her cargo"; as will appear more particularly in the schedule to the Registrar's report set out below. Annexed to the bond were copies of the bills of lading. On the arrival of the cargo at Liverpool it was arrested by Messrs. Cavan & Co., of the city of London, the holders of the bond. The consignees of the cargo, Edward Lawrence & Co., of Liverpool, entered an appearance to the action, and admitted the validity of the bond, which was then referred to the Registrar and merchants to determine the amount due. The defendants brought in all the accounts of the ship at St. Thomas's, and the plaintiffs brought in the bond, and an affidavit by the master of the Glenmanna, that he had received from Messrs. Ball the sum of 500 dollars for services in attending to the cargo, reshipping the same, and for his passage home to England. On the 22nd of December the Registrar reported due on the bond the sum of 7,788 dollars .34 cents, or 1,581*l.* 7*s.* 9*d.*, according to the following schedule annexed to the report.

SCHEDULE.

	Claimed. Dols.	Cts.	Allowed. Dols.	Cts.
1. To disbursements at St. Thomas's	6519	94	6519	94
2. Cash to the master for his loss of time and for his passage home	500	00		
3. 5 per cent. on cash advances	351	00	163	00
4. 2 per cent. storage on value of cargo 130713 dollars, 84 cents	2614	27		
5. 2½ per cent. commission on the landing and reshipping of same	3267	85	3000	00
6. 2½ commission on freights on bringing home the Glenmanna's cargo, say on 18125 dollars	453	12		
	13706	18	9682	94
7. Deduct net proceeds of ship Glenmanna	2729	06	2729	06
8. Cash advanced on bottomry on cargo	10977	12	6953	88
9. Bottomry premium at 12 per cent.	1317	25	834	46
	12294	37	7788	34
	£	*s.*	*d.*	£	*s.*	*d.*
Exchange at the rate of 492½ dollars to 100*l.*	2496	6	4	1581	7	9

With interest thereon at the rate of 4 per cent. per annum from 25th July, 1859, until paid.

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To the report the following reasons were appended by the Registrar :—

"The reference in this case took place on the 21st of December, 1859. There were present Mr. Cattley and Captain Embleton, merchants, Mr. Glennie, and Mr. Gordon, a solicitor for the bondholders, and Mr. Cooper for the consignees of the cargo.

"The objections to the bond having been fully stated by Mr. Cooper, Mr. Glennie contented himself with saying that he would leave it to myself and the merchants. Seeing the importance of the case, I stated that I should be prepared to hear counsel thereon, if the parties wished it. They retired to consult, and on their return Mr. Glennie said he was prepared to leave it to us. Mr. Cooper having stated all his objections to the bond did not apply to be heard by counsel. The case, therefore, may be said, when before us, to have been undefended by the bondholders.

"The circumstances of the case are briefly as follow :—

"The Glenmanna, laden with a valuable cargo of cotton and and other merchandize, having received damage, put into St. Thomas, where she was condemned, her cargo transshipped to other vessels, the hull sold, the proceeds thereof applied in part payment of the disbursements and expenses, and a bottomry bond for the balance granted on the cargo. The account of the expenses was before us; and objections were taken to the allowance of the following sums :—

(1.) 2711 dollars 47 cents for the wages of the crew.
(2.) 500 dollars paid to the master for sundries, board, passage home and other incidentals.
(3.) 5 per cent. commission on cash advances.
(4.) 2 per cent. on the value of the cargo for the storage thereof.
(5.) 2½ per cent. on the value of the cargo as a commission for superintending the landing and reshipping of the cargo.
(6.) 2½ per cent. commission on the freights, earned in bringing home the Glenmanna's cargo.

"As regards the first objection, namely, to the allowance of a sum of 2711 dollars 47 cents included in the disbursements on account of wages paid to the crew, we were of opinion that, inasmuch as the net proceeds of the vessel, which were applied in part liquidation of these disbursements, amounted to 2729 dollars 6 cents, or slightly more than the wages, we must consider

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the wages as having been paid out of the proceeds of the vessel, on which they were a prior charge; and consequently that this item could not properly be struck out.

"As regards the second objection, namely, to a sum of 500 dollars advanced to Captain Rogers for sundries, board, passage home, &c., we considered that it could not be allowed, first, because there was no evidence before us to show how this 500 dollars had been expended; and secondly, because we thought that the payment of Captain Rogers' passage home to England, at all events, ought not to fall upon the owners of the cargo, but should be a matter of arrangement between the captain and his owner; and that consequently it could not form a charge upon the cargo, or be made the subject of a bottomry bond granted on the cargo only.

"As regards the charge of 5 per cent. on cash advances, it is our invariable rule to grant only 2½ per cent. on advances, and this we accordingly did in the present case.

"As to the charge of 2 per cent. on the value of the cargo for the storage thereof, it did not appear whether the cargo had been stored in the warehouses of the bondholders themselves, or in other warehouses, and there was no evidence before us to show that any expenses whatever had been incurred for such storage. And a charge of 2 per cent. on the value appeared to the merchants to be excessive and to be wrong in prniciple.

"As to the charge of 2½ per cent. commission on the value for landing and reshipping the cargo, we conceived on the authority of the *Zodiac* (*a*), the *Cognac* (*b*), the *Calypso* (*c*), that such a charge could not be maintained; and we allowed a sum of 3000 dollars or 600*l.* as a quantum meruit for the agents' trouble in the matter, as well as to cover any expenses they might have incurred in the storage of the cargo, of the amount of which, however, as before stated, there was no proof.

"As to the last item objected to, the 453 dollars 12 cents, being a charge of 2½ per cent. on the freights paid for the conveyance of the cargo from St. Thomas to England, the merchants considered that this per centage must have been paid by the owners of the vessels who were to earn the freights (which now proves to be the fact), and that it was consequently not a charge upon the cargo. They had already received the per centage from the owners of the vessels which brought the cargo to England, and if now allowed they would be receiving it twice over."

(*a*) 1 Hagg. 323. (*b*) 2 Hagg. 392. (*c*) 3 Hagg. 163.

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The bondholders objected to the report, and brought in an act on petition, which alleged that the master of the Glenmanna had acted on the advice of the British Consul in employing Messrs. Ball, who informed him that the customary charges at St. Thomas were 2 per cent. on the value of cargo for storage, 2½ per cent. for landing and reshipping, and 5 per cent. on cash advances, and that if the master had not agreed to pay such charges, he could not have had the cargo stored at all. It also alleged that the cargo was valued at St. Thomas by three merchants at the sum of 26,142*l.* 15*s.* 4*d.*, which was nearly the same amount as that stated in the bills of lading; that Messrs. Ball & Co. had used great exertions to obtain a speedy transshipment and were intitled to commission on freight, and that the 500 dollars were rightly paid to the master for his services, and for his passage home. The answer in behalf of the consignees alleged that the commissions for storing, &c. charged were excessive, having been reckoned without regard to the value of the services rendered; that the payment of 500 dollars to the master was altogether improper; that the master was not authorized by them to include any such charges in the bond; that the custom pleaded did not exist in fact, and was not justifiable in law; and that the commission on freight had been actually paid by the owners of the vessels chartered to carry on the cargo, according to the usual custom. The reply joined issue.

In support of the act on petition were brought in a further affidavit by the master; and affidavits (sworn before the Court of Justice in St. Thomas) by the British Consul, and six merchants of long residence in the island, that the customary commission for storage there was 2 per cent. on value of cargo, for landing and reshipping 2½ per cent., on cash advances 5 per cent., and that without agreement to pay such charges the cargo of the Glenmanna would not have been received by any merchant. There were also affidavits showing that these commissions had been actually paid at St. Thomas in two similar cases (the *Matilda* and the *Borderer*).

In support of the answer an affidavit was filed showing that there was no difficulty in obtaining storage room at St. Thomas's, and the following affidavit of Mr. Christopher Thomas Anderson, Secretary to the Association at Lloyd's for the protection of commercial interests as respects wrecked and damaged property:

"The Committee of Lloyd's issues to every agent of Lloyd's in foreign parts upon his appointment a printed set of rules and regulations for his guidance, and, amongst others, as to his

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charges for services performed to vessels and cargoes; and such regulations in respect to their remuneration are in the words following:

'In the following cases the charge is to be made not by a percentage on the value, but as a fee or reward proportioned to the time and trouble bestowed on the business: viz. In cases where it may be requisite to unload goods for the purpose of repairing a vessel, and reshipping them on board the same or another vessel; in cases where the agent only acts as surveyor of damaged goods; in cases where he merely examines accounts of disbursements and certifies documents.'

"I say that no deviation whatever from such charges is sanctioned or allowed by the underwriters in England."

The *Queen's Advocate* and *Robertson*, in objection to the report:—It is clearly proved that the master acted throughout under the sanction of the British Consul, and that the commissions charged are no more than the customary commissions at St. Thomas's, and that without paying them the cargo would probably never have reached its destination. The commissions should therefore have been allowed. It is nothing that elsewhere commissions may be less; a man has to take the market as he finds it. A similar objection was taken in the *Cognac* (*a*), but overruled. There Sir John Nicholl said:—"It is said that there is an item in the amount of the bond, which is illegal and extortionate, viz., 2 per cent. commission on the value of the ship and cargo. It is answered that this is a usual charge in the Baltic trade, which is denied on the part of the owners. It is singular enough that this account is attested by the agent to Lloyd's: some persons, however, who are accustomed to settle averages, say that such a charge would not, on a reference, be allowed by them; but it is not necessary for the bondholders to show that this custom exists in all cases of bottomry. The Court is not prepared to say that this charge is extortionate." The rules of Lloyd's are not evidence at all; and those relied on apply only to the remuneration to be taken by Lloyd's agents; they do not touch the question of right between merchant and merchant, and it is absurd to say that the same commissions are to prevail all over the globe. It is also an important point in this case that Messrs. Rothschild, the lenders on bottomry, did not make the charges complained of; they were simply lenders, and it is not usual to scrutinize too closely the items of a bond, if it is proved that a

(*a*) 3 Hagg. 168.

necessity for borrowing money existed, and the whole transaction was *bonâ fide*. 1860. *July* 19.

Twiss, Q.C., and *Clarkson*, *contrà*. — The commissions charged are clearly exorbitant. A per-centage on the gross value is not the proper mode of remuneration for such services as storing and reshipping; but a sum proportionate to the labour spent and cost incurred; the right principle is *quantum meruit*. Equity requires this; and this is the custom enforced at Lloyd's. In the *Zodiac* (*a*), Lord Stowell refused to allow a per-centage commission in a case of this kind. So in the *Cognac* (*b*), Sir Christopher Robinson said:—"In respect to the commission of 5 per cent. on the value of the cargo, I shall not enter into the alleged custom of France on this point. Such a custom of a particular country would have very little effect against foreigners, unless it is reasonable and just. To sanction a charge of 5 per cent. on a whole cargo, of whatever bulk or value, for such services as these, cannot, I think, be deemed reasonable or just. This commission is manifestly a very high charge, not limited to the necessities of the case, and on that ground it is not capable of being sanctioned and allowed by this Court. Whatever then may be the reliance of foreigners on their own customs, they can only obtain by the aid of this Court such relief as is compatible with the principles of law administered here." There is no proof of the commission on freight paid by owners of cargo being customary; and the experience of the Registrar and merchants is, that it is always paid by the owners of the vessels charged. The 500 dollars paid to the master is a charge which should fall not on cargo, but on the shipowner; it was therefore properly disallowed. The argument that the lenders on bottomry are not required to examine every item of the expenditure does not apply here, where the commissions charged formed so large a proportion of the whole sum borrowed.

Right Hon. Dr. Lushington:—The questions now to be decided arise under the following circumstances. The Glenmanna sailed from Bombay with a valuable cargo bound to Liverpool, and put into the Island of St. Thomas, on March 31st, 1859, in great distress. The ship was condemned and sold, the cargo was landed and stored, and afterwards reshipped on board other vessels and sent on to Liverpool. Money to a very considerable extent was advanced on bottomry of the cargo, in order Judgment.

(*a*) 1 Hagg. 330. (*b*) 2 Hagg. 392.

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to pay the expenses which had been incurred. The validity of the bond was admitted, and a reference was made to the Registrar and merchants, to ascertain the amount due thereon. On December 22nd, 1859, the report was made by the Registrar that the sum of 1,581*l.* 7*s.* 9*d.* was due with interest at 4 per cent. till paid. To that report was annexed a schedule showing the amount which was claimed and the amount which was allowed. The amount claimed was 2,496*l.* 6*s.* 4*d.*, the sum therefore of 914*l.* 18*s.* 7*d.* was disallowed. The bottomry bondholders objected to these deductions and an act upon petition was brought in, evidence was produced in support of it, and some evidence on the part of the owners of the cargo.

On appeal from a registrar's report, a new case must not be set up.

Under these circumstances the case came before the Court, and the first observation that I have to make is, that none of this evidence was produced before the Registrar and merchants, and therefore in truth I am called upon to decide a new case, and not simply whether the Registrar and merchants did right upon the facts before them. I very much question whether this is a regular or competent course of proceeding. It deprives the Court of the advantage of the opinion of the Registrar and merchants upon the evidence. Some additional affidavits may be admissible, but it is an irregularity which for the future I shall not permit, to withhold evidence at the reference, and make a new case before the Court.

The objections taken to the report are that the Registrar and merchants disallowed cash paid to the master for his loss of time and passage home; that the commission claimed of 5 per cent. on cash advances they reduced to 2½ per cent.; that for the commission claimed of 2 per cent. on the value of cargo for storage, and 2½ per cent. on the value for landing and reshipping they substituted a lump sum of 3000 dollars or 600*l.*; and that they disallowed altogether the commission claimed on freight.

Cash to master for his services and personal expenses is not a charge on cargo, and cannot be allowed.

I will first dispose of the question of cash to the master. I entirely concur with the Registrar and merchants, it is not a charge which legally could be imposed upon the cargo, and I think there is no foundation for the averment that the master was called upon to take an active part beyond his ordinary duty as master, in the protection and trans-shipment of this cargo, for I conceive that the merchants who accepted the agency were bound to perform all that was necessary in the care and removal of the cargo.

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I then come to the question of commissions. There is very strong evidence that the commissions charged are in accordance with the custom of the island, and, on the other hand, that such charges will be repudiated so far as the authority of the Association of Lloyd's extends. First. It is almost needless to repeat what the Court always says upon questions similar to these, that great trust is to be reposed in the Registrar and merchants, who have greater practical knowledge upon these subjects than the Court can possibly have; and secondly, that, to induce the Court to support objections to their report, the affirmative of proving that the report is wrong must, by those who object, be clearly substantiated. Further, though the custom to a certain extent may deserve attention, yet as any such custom is established by the acts of persons who have the greatest interest in making the highest charges, the Court will never allow its judgment to be exclusively guided by any such consideration, and more especially does this observation apply to a small community where custom may in some degree approach a monopoly. The cases cited support this view. If the Court were able to discover and ascertain with accuracy what were the charges generally allowed and admitted by the great mercantile firms in London with respect to transactions of this description, graduated according to the circumstances of the case and the locality, that would, I think, afford the safest ground upon which the Court could proceed. But it is not to be denied that in any case the real and true principle is the *quantum meruit* for the services rendered. I have obtained from the Registrar some account of the reasons which governed his opinion and that of the merchants. With respect to the commission on cash advances, I am informed that it is the invariable rule in the Registry to allow no more than 2½ per cent.; I shall, therefore, certainly not take upon myself to make this an exception. It further appears to me that the sum of 600*l.* allowed by the Registrar and merchants is an ample compensation for all services that could have been rendered to the cargo, and I concur also with them in thinking the last item, namely, commission on freights, is wholly inadmissible. This report must therefore be confirmed.

Amount of commissions not to be determined by custom, unless reasonable, but upon a principle of *quantum meruit*.

2½ per cent. only to be allowed on cash advances.

Commissions claimed for storage and re-shipping to be reduced.

Commissions on freight disallowed.

Report confirmed.

Glennie, proctor for the bondholders.

Clarkson for the consignees of cargo.

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THE NORMA.

Salvage—Value of Freight salved, how reckoned.

Salvors are intitled to salvage upon a value calculated at the place where their services terminated.

The value of freight salved is to be reckoned *pro ratâ itineris peracti*, and the other equities of the case.

A ship bound from Honduras to England was disabled on the voyage, and towed into Bermuda, where expenses nearly equal to the whole freight were incurred to refit; the voyage home was afterwards completed and the cargo delivered. The Court allowed salvage upon one-half of the total gross freight.

SALVAGE. On the 9th October, 1859, H.M.S. Himalaya, then carrying troops from Quebec to Bermuda, in latitude 40° 5′ north and longitude 61° 45′ west, fell in with the British barque Norma, laden with mahogany from Honduras to Falmouth, utterly disabled by a hurricane, and at the request of the master towed her to Bermuda. There proceedings were taken according to ss. 486, 487, 488 of the Merchant Shipping Act, 1854, and the Judge of the Vice-Admiralty Court fixed the statutory bond to be given by the master of the Norma in the sum of 2,000*l.* The master refused to sign the bond without instructions from his owners. Communications were then held with the owners in England, the result of which was that the present action was entered in the High Court of Admiralty, to which the owners gave bail in 2,000*l.*, and thereupon instructions were sent out to Bermuda to allow the Norma to proceed on her voyage home. The vessel had meanwhile been repaired at Bermuda, and refitted with stores sent from England; upon receipt of the instructions she sailed to England, where her cargo was sold. The petition on behalf of Captain Seccombe, the commander of the Himalaya, and the crew, alleged the salvage of the ship, freight and cargo, and the lives of all on board; the answer admitted the services, and the only issue between the parties was the value of the property on which the salvage was to be awarded. The value of the ship was agreed upon at 1,000*l.*; the value of the cargo was according to invoice 3,000*l.*, according to market price in London, 6,800*l.*; the gross freight from Honduras to England was 2,210*l.*; but the expenses of refitting at Bermuda, wages at Bermuda, and thence home, and port charges in London, amounted to 1,822*l.*

The *Queen's Advocate* for the salvors.—It must be admitted

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that the value of the cargo is to be taken as at the place where the services of the salvors terminated; *George Dean* (*a*): we do not therefore dispute that here the cargo is to be estimated according to the invoice price, 3,000*l*. But we contend that we are intitled to salvage upon the entire freight. It is true that freight was not payable at Bermuda by the shippers of the cargo to the shipowners, but that depends on a rule which is necessary to keep men to their contracts: in salvage cases this Court takes a broad simple view, and if the voyage has begun, allows salvage upon the whole freight. In the *Dorothy Foster* (*b*), Lord Stowell says: "The Court, in giving salvage on freight, makes no separation as to minute portions of the voyage. If a commencement has taken place, and the voyage is afterwards accomplished, the whole freight is included in the valuation of the property on which salvage is given." No case could be stronger than that: the vessel had sailed from Savannah Le Mar in Jamaica to Bluefields, for convoy to England, and was taken on the way to Bluefields, yet salvage was given on the whole freight. So where enemy's goods are seized on board a neutral ship, the ship receives the whole of the freight. Without our assistance the entire adventure would have been utterly lost. As to the alleged expenses on the freight, the practice in this Court is for gross freight to pay salvage. Here, moreover, the expenses charged belong properly to the ship, and the value of ship is admitted.

Deane, Q.C., and *Lushington*, *contrà*.—It is a good plain rule that the services of the salvors are to be estimated at the port where they terminate. If ship and cargo are to be taken according to their value at Bermuda, why not freight also? There is no reason why salvage should be on the whole freight from Honduras to England. If the vessel had been lost on her way home from Bermuda the salvors would still have their remedy, but could they possibly have claimed salvage on the whole freight, not a tittle of which would have been earned? The practice of the Court is by no means to give salvage on the entire freight when the voyage is unfulfilled. If services are rendered in the Channel to a vessel outward bound, say to Australia, the Court does not, and could not with any equity, give salvage on freight to Australia. The *Dorothy Foster* cannot be sustained, it is at variance with many decisions of Lord Stowell himself; *Copenhagen* (*c*); *Hiram* (*d*); *Fortuna* (*e*); *Isabella* (*f*); *Diana* (*g*).

(*a*) Sw. 290.
(*b*) 6 C. R. 91.
(*c*) 1 C. R. 292.
(*d*) 3 C. R. 183.
(*e*) 4 C. R. 281.
(*f*) 4 C. R. 77.
(*g*) 5 C. R. 70.

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In the *Copenhagen* Lord Stowell clearly explains how it is that the neutral ship, on being deprived of enemy's goods on board her, receives full freight, for the captor succeeds to all the enemy's position, and the capture operates as delivery. The principle recognized in all the cases quoted is that no freight is properly due until the voyage is fulfilled, but that under circumstances salvage may be given on freight part earned. Admitting this, it is not gross freight that pays salvage, but net freight, and here the net freight of the whole is but 200*l.* It is only property saved which pays, and the freight saved is net freight; the imaginary part of freight earned on arrival at Bermuda would never have really become payable but for the expenses incurred to refit the ship. So in general average the contributory value of the freight is "the actual sum finally received as freight by the shipowner, after deducting all the expenses of earning it;" *Arnould on Insurance* (*a*).

The *Queen's Advocate* in reply.

Judgment.

Right Hon. Dr. Lushington: The services rendered in this case were undoubtedly of the most valuable kind, extending to the preservation of the ship and cargo and the lives of all on board. The services are not denied, and the value of the ship and cargo is now agreed upon, but it is disputed whether any freight is to pay salvage; and if so, at what value the freight is to be calculated.

The vessel, it seems, was on a voyage from Honduras to England, and in her disabled condition was towed by the Himalaya to the Island of Bermuda, where the salvors left her. The ship was there refitted at great expense, and finally made the voyage to London and delivered her cargo. The gross freight received was 2,210*l.*; the Bermuda expenses, including detention, wages and other charges, amounted to 1,822*l.* Upon this state of facts the salvors contend that they are intitled to salvage upon the whole 2,210*l.*; the owners say that the freight must be taken as at Bermuda, where none was payable; or that if that position is not to prevail, and the salvors must be allowed salvage on part freight, no such part exists, for the whole freight has been swallowed up by the expenses of earning it.

For purposes of estimating salvage reward, freight may be

Now, without considering the cases of military salvage, the proper rule in civil salvage, as I stated in the case of the *George*

(*a*) (2nd ed.), p. 954.

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divisible on an equitable principle.

Dean, is to estimate the value of the property saved at the place where the services of the salvors terminated; but I cannot say that the practice has been at all universally corresponding to the rule. In most cases the value of the property salved is agreed upon; if it is not, the exact value is not important; and the usual practice has been to assess the value at the port of termination of the voyage, the port of arrest. No doubt in many cases the Court has adjudicated upon a value of the entire freight though not earned. The rule itself, however, is clear enough and reasonable enough; it prescribes that the salvors suing here shall be intitled to the same amount of salvage as if they had sued in the port where their services terminated. Supposing, therefore, that the salvors had sued in Bermuda, would they have been intitled to salvage on freight, and on how much freight? Now it is certainly quite true that at Bermuda, as between the owner of the ship and the shipper of goods, no freight was earned. But I do not think that this is at all conclusive against the salvors. It is quite necessary, as the Queen's Advocate has observed, in order to hold persons to their engagements, to require, where a contract is entire in its nature, entire performance as a condition precedent to any right of payment; the contract of freight is emphatically a contract of this kind, and freight, therefore, is not properly earned (except under circumstances implying a new contract) until the cargo is delivered at the port of destination. But in salvage we have to decide on purely equitable principles, and the question here is not so much what freight was earned at Bermuda, but what services in respect of the contract for freight the salvors had then rendered. Judging by this test, the salvors are intitled to salvage upon a considerable part of the total freight, for it is clear that a large portion of the voyage had been performed before the salvage services, and that the entire benefit of so much was preserved to the shipowners by the salvors, not indeed absolutely, for expenses had to be incurred, and the perils of the voyage from Bermuda home had yet to be undergone, but preserved from immediate and total loss. I do not think it necessary to enter into detailed calculation upon this question of the value of the salvors' services to freight, how far the Bermuda expenses are to be taken into account, what items are proper items of deduction, and so on: my judgment must after all be a *rusticum judicium.* It is enough to say that the services of the salvors in respect to freight were considerable. I shall reckon the value of the freight saved at 1,000*l.*; that, with the agreed values of ship and freight makes a total value of property

1860. *Nov. 3.* saved 5,000*l.*, and I award to the salvors one third part of the whole.

Townsend, proctor for the salvors.

Rothery for the owners.

THE UNION.

Wages—Bottomry—Precedence of Liens—Lex Fori.

Questions of the precedence of liens upon ships are to be determined by the *lex fori.*

Seamen's wages earned before the giving of a bond are to be preferred to the bond.

Bond on ship freight and cargo, ship and freight insufficient to pay the same, suit by seamen against ship and freight for wages,—the owners of the cargo allowed to appear and defend, because having an interest in the administration of the fund, but the claim of the seamen ultimately pronounced for, as superior to that of the bondholder, and therefore to that of the owners of the cargo deriving through him.

July 28. THIS was an action for seamen's wages against the French ship Union and freight. The plaintiffs were some of the vessel's late crew, and the French Consul suing in respect of other seamen, some deceased, some discharged unpaid, and some who had deserted during the voyage. The ship left Bordeaux on the 8th of June, 1858, on a voyage to the West Coast of South America, and thence to the port of Liverpool. She took in a return cargo at Valparaiso, and proceeded on her homeward voyage, but was forced to put into Rio de Janeiro for repairs. At Rio de Janeiro, on the 22nd of November, 1859, the master bottomried, by acts in the Chancery of the French legation, and in the French form, the ship and cargo, for a sum amounting, with maritime interest, to 10,396*l.* The ship arrived in Liverpool on the 24th of January, 1860, and was arrested with the freight by the bondholders. On the 15th of March the ship was sold by decree of the Court, and the proceeds, together with the freight, amounting in all to 4,715*l.*, were paid into the Registry. On the 17th of February the master discharged the seamen, but without paying their wages.

The petition claimed, for the seamen discharged at Liverpool,

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wages up to the date of their discharge, and further, by the French law, an extra month's wages, and passage money to France; in respect of the seamen discharged at Rio, and the deceased seamen, the balance of wages due up to the time of their discharge or decease; and in respect of the deserters half the wages due at the time of desertion, as thereby by the law of France forfeited to the French Government. The total sum claimed amounted to more than 900*l.*

The action was defended by the Director of the Compagnie Générale Maritime of Paris, the owners of the cargo bottomried. Their answer pleaded the bottomry bond: the insufficiency of proceeds of ship and freight in the Registry to satisfy the same: it then alleged that, by the laws of France, the owner of the ship was, under the circumstances in the petition mentioned, personally answerable to the plaintiffs in respect of their claim; and, in conclusion, submitted that, by reason of the premises, the proceeds of ship and freight ought by law to be applied in payment of the amount due upon the bond in priority to so much of the wages of the plaintiffs, as was earned by them before the date of the bond.

The reply pleaded—1. That the amount of ship freight and cargo were more than sufficient to pay the bond. 2. That by the laws of France the owner of the vessel was not, under the circumstances in the petition mentioned, personally liable to the plaintiffs in respect of their claims. 3. That the proceeds of the ship and freight ought not, according to the law of France, to be applied in payment of the amount due upon the bond in priority to the wages earned before the bond.

The plaintiffs brought in affidavits by the master and crew proving the service of the several seamen, and the amount due to them; an affidavit of the French Consul proving the French law with respect to the wages of seamen deserting from French ships, and the wages of seamen deceased; and the following affidavit by M. Bouard:

> "I, Alfred François Bouard, of No. 5, Chancery Lane, in the City of London, French Advocate and Counsel to the French Embassy in London, make oath and say as follows:—

1. I am well versed in the laws of France.

2. By the laws of France the captain and crew of a ship have a lien for the payment of their wages on such ship, and the freight payable for the transportation of cargo therein, prior to any claim for bottomry (contrat à la grosse) thereon.

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3. The law of France on the subject of the preceding paragraph is contained in Articles 271 and 272 of the Code de Commerce. Article 271 is as follows:—"Le navire et le fret sont spécialement affectés aux loyers des matelots;" and Article 272 is as follows:—"Toutes les dispositions concernant les loyers, pansement et rachat des matelots sont communes aux officiers et à tous outres gens de l'équipage." Such last recited article declaring, therefore, the said Article 271 to be applicable to the wages of the captain, as well as to those of the crew, and which is also confirmed by the terms of section 6 in Article 191 of the said Code recited below.

4. By the laws of France the wages of the captain and seamen are to be paid out of the proceeds of the ship and the freight, in priority of any claim for bottomry on such ship or freight.

5. The law of France on the subject of the preceding paragraph is contained in Articles 318, 320, 190 and 191 of the said Code. Article 318 says as follows:—"Tous emprunts sur le fret à faire du navire et sur le profit espéré des marchandises sont prohibés. Le prêteur dans ce cas n'a doit qu'au remboursement du capital sans aucun intérêt." Article 320 says as follows:—"Le navire, les agrès et les apparaux l'armement et les victuailles, même le fret acquis, sont affectés par privilège au capital intérêts de l'argent donné à la grosse sur le corps et quille du vaisseau. Le chargement est également affecté au capital et intérêts de l'argent donné à la grosse sur le chargement." Article 190 is as follows:—"Les navires et autres bâtiments de mer sont meubles; néanmoins ils sont affectés aux dettes du vendeur et spécialement à celles que la loi déclare privilégiées;" and Article 191, indicates the order of priority attached to the various privileged debts (debts "par privilège" referred to in said Article 320), as follows:—"Sont privilégiées, et dans l'ordre où elles sont rangées, les dettes ci-après désignées,"—the said Article then proceeds to recite in sections numbered successively from 1 to 11, the order of priority of said debts. The sixth section in order is as follows:—"6° Les gages et loyers du capitaine et autres gens de l'équipage employés au dernier voyage;" and the ninth section in order is as follows:—"9° Les sommes prêtées à la grosse sur le corps, quille, agrès, apparaux, pour radoub, victuailles, armement et équipement, avant le départ du navire." The said Articles show, therefore, that the wages of the captain and crew referred to in said section 6 are intitled to payment in priority to a loan on bottomry, referred to in section 9 above recited; and this is further confirmed by Article 214 of the said Code, which has reference to the distribution amongst creditors of the proceeds of ships sold, and is as follows:—"La collocation

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des créanciers et la distribution de deniers sont faites entre les créanciers privilégiés, dans l'ordre prescrit par article 191, et entre les autres créanciers, au marc le franc de leurs créances."

6. By the law of France the owner of a ship having given up his ship and freight, to meet such claims as may be due thereon, is no longer answerable to the captain or crew in respect of their wages earned in the service of the said ship.

7. The law of France, in respect of the subject of the preceding paragraph, is contained in Articles 216 and 223 of the said Code. Article 216 is as follows:—"Tout propriétaire de navire est civilement responsable des faits du capitaine, pour ce qui est relatif au navire et à l'expédition. La responsibilité cesse par l'abandon du navire et du fret." And Article 223 is as follows:—"Il appartient au capitaine de former l'équipage du vaisseau, et de choisir et louer les matelots et autres gens de l'équipage, ci qu'il fera néanmoins de concert avec les propriétaires, lors qu'il sera dans le lieu de leur demeure."

A. F. Bouard."

The defendant brought in the bottomry bond, and the following affidavits:

"I, François Rosaz, of No. 51, Upper Bedford Place, Russell Square, in the County of Middlesex, Chevalier of the Order, Military and Religious, of Saint Maurice and Saint Lazar, Advocate of Paris, make oath as follows:—

1. I have practised for many years at the French bar in the leading Courts of Judicature of France, and I am well acquainted with French law.

2. By the law of France, to wit, the 216th Article of the Code de Commerce, every owner of a ship is civilly responsible for the acts of the master thereof, so far as relates to the ship and her voyage; but he is released from this responsibility by his abandonment of ship and freight. It has been recently decided by the Court of Cassation, the highest legal French Tribunal for matters of law, that this right of the owner to release himself from liability by abandonment of the ship and freight is confined only to cases of shipwreck. It results therefrom, and from the decisions of the French Tribunals on the aforegoing and other articles of the Code of Napoleon, that by the laws of France every owner of a ship is personally liable to the master and crew of his vessel (if duly hired in conformity with the laws of France), except in cases in which the ship is shipwrecked, and is also abandoned by the owner or owners thereof.

Fois. Rosaz."

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"I, Etienne Charles Barnabé, of Pope's Head Alley, Cornhill, in the City of London, Advocate, make oath as follows:—

1. I am an Advocate and Licencié en Droit of the French bar, and am well acquainted with French law.

2. By the law of France every owner of a ship is civilly and personally responsible to the master and crew of the same, duly hired in conformity with French law, for the wages of such master and crew, except in the cases of the owner's abandonment of the ship by reason of the shipwreck thereof.

ETE. CHAS. BARNABÉ."

Deane, Q.C., and *Spinks* for the plaintiffs.—The right of the seamen to wages earned after the bond is admitted; the only question is as to the wages earned before the bond. It is not true, as alleged on the other side, that the seamen have a personal remedy against the owners in France, for the French law, as appears from M. Bouard's affidavit, is that the owners, having given up the ship and freight, are no longer responsible for wages. But even if it should be otherwise, there is no equity requiring the seamen to abandon their sure remedy here against the corpus of the ship and resort to an uncertain one in another country. On the other hand the principle, that he who has a double remedy must resort to that against which there is no rival claim, is in favour of the seamen, for the bond may be satisfied out of the cargo, as the Court has ordered in the case of two bonds, one on ship and the other on ship and cargo, *Constancia* (*a*); and this is not so great a hardship on the owners of the cargo as might at first appear, for if forced to pay the bond they may recover back from the ship-owners, *Duncan* v. *Benson* (*b*). Secondly, neither by French law nor English law is a bond preferred to mariners' wages earned before the bond. Not by French law; on this point our affidavit is explicit, and there is no evidence on the other side. [DR. LUSHINGTON: Why do you say this question of priority is to be determined by French law?] All the parties are French, the seamen, the owners of ship, the owners of cargo, and the bond was executed in the French form. In the *Johann Friederich* (*c*), the Court said "In cases of wages, whoever engages voluntarily to serve on board a foreign ship, necessarily undertakes to be bound by the law of the country to which the ship belongs, and the legality of his claim must be tried by that law." [DR. LUSHINGTON: Yes, as against the shipowner, but not necessarily against the rival claim of a bondholder, or one claiming, as here, through a bondholder.] But if not, by

(*a*) 4 N. of C. 295. (*b*) 1 Exch. 537; 3 Exch. 644.
(*c*) 1 W. R. 37.

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the law maritime the seamen come first. In the *Madonna D'Idra* (*a*), Lord Stowell says, "It must be taken as the universal law of this Court that mariners' wages take precedence of bottomry bonds. These are sacred liens, and as long as a plank remains, the sailor is intitled, against all other persons, to the proceeds as a security for his wages. This is a principle universally admitted, and whoever enters into a contract or advances money upon bottomry must be presumed to do it with a full knowledge of the law upon this point." These terms are as general as terms can be, and there is no authority for limiting them to wages earned after the bond. Again, in the *Sydney Cove* (*b*), the express point was decided. The objection was taken that the wages were earned before the bond, but Lord Stowell said: "The claim of a mariner stands on very different grounds from that of a bondholder. The hypothecation of the ship cannot divest his interests, nor even a sale of it, except made under the authority of a competent court. A seaman's claim for his wages is sacred as long as a single plank of the ship remains." There is no case in which a bond has been preferred to wages. Equity is in favour of the seamen. They are poor men, they cannot insure their wages, *Lady Durham* (*c*), their consent is not asked to the bottomry, and their rights should therefore not be divested by it. The only ground on which the claim of the bondholder to priority is founded is, that the bond has been the saving of the ship, and therefore of their wages, but this is only true in a measure, and is not enough to deprive the seamen of their lien.

The Queen's Advocate and *Pritchard* for the owners of the cargo.—As to the first point, the seamen have a personal remedy against the owners. It was for the plaintiffs to show that the ordinary remedy against the owners is taken away, and they have not proved this. Their affidavit does not even say that the French law recited is applicable to a case like the present. Our affidavits show that by the French law the owners continue personally responsible for wages, except in the case of abandonment upon shipwreck; and that this point has been expressly decided in the Court of Cassation; the case referred to is reported in Dalloz (*a*). So Boulay Paty, *Cours de droit Commercial Maritime*, Vol. 2, p. 215, says, "Le propriétaire a sans doute bien la faculté de raccoucir le voyage, si son intérêt l'exige; mais comme alors il y a par son fait inexécution du marché passé avec le matelot engagé au voyage, ce dernier a droit à des dommages et intérêts, et ces dommages et intérêts sont tout le gain dont il a été privé. Voila pourquoi dans ce

(*a*) 1 Dods. 40. (*b*) 2 Dods. 13. (*c*) 3 Hagg. 196.
(*d*) Recueil périodique, 1859, Part I. p. 350.

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cas, il ne lui est fait aucune diminution sur son loyer." It is said on the other side that the bond should be satisfied out of cargo upon the principle of marshalling assets, but this is subject to the rule that ship and freight must be exhausted before the cargo is touched; *Priscilla* (*a*). And again, there is no proof that the French law corresponds to ours and gives a remedy against the shipowner to the owner of the cargo, whose property has been sacrificed to a bond; the fact that our law does give a remedy is proof of the hardship in the estimation of the law of the owner of the cargo being forced to pay in the first instance. Then as to the question of priority. If it is a question of remedy, it belongs to the *lex fori*, *Don* v. *Lippmann* (*b*); and all authority shows that it is a question of remedy. In Westlake's *Private International Law*, the last work on the subject, it is said, sect. 410: "The rank or privilege of any title, as whether it be a specialty, depends on the *lex fori*. This we have seen exemplified in the case of foreign judgments, which form here titles by simple contract only; and a bill of exchange, drawn where a peculiar process exists for those contracts, must be subject to the ordinary process where no such peculiarity exists, and conversely will be intitled to the peculiar remedy of the *lex fori*, though such do not exist in the place of drawing" (*c*). In Story's *Conflict of Laws*, 3rd ed., sect. 323: "But the recognition of the existence and validity of such liens by foreign countries is not to be confounded with the giving them a superiority or priority over all other liens and rights, justly acquired in such foreign countries under their own laws, merely because the former liens in the countries where they first attached, had there by law or by custom such a superiority or priority. Such a case would present a very different question arising from a conflict of rights equally well founded in the respective countries. This very distinction was pointed out by Mr. Chief Justice Marshall, in delivering the opinion of the Court in an important case, *Harrison* v. *Sterry* (*d*). His language was: 'The law of the place where a contract is made, is, generally speaking, the law of the contract, *i. e.*, it is the law by which the contract is expounded. But the right of priority forms no part of the contract. It is extrinsic, and rather a personal privilege, dependent on the law of the place where the property lies, and where the court sits, which is to decide the cause.' And the doctrine was on that occasion expressly applied to the case of a contract made in a foreign country with a person resident abroad." This proposition is also illustrated by the cases of the *Johannes Cristoph* (*e*), and the *Milford* (*f*).

(*a*) *Ante*, p. 1.
(*b*) 5 Cl. & F. 1.
(*c*) Reference to Savigny, v. 8, p. 151.
(*d*) 5 Cranch, 289, 298.
(*e*) 2 Spinks, 93.
(*f*) Sw. 362.

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Then if precedence is to be determined by English law, that is against the seamen. In the *Sydney Cove*, it is true, the point as to the precedence of bottomry or wages earned previously was raised, but it was not expressly decided; and, with all deference, the Court only gave utterance to a truism. Subsequent cases are the other way, *Mary Ann* (*a*); *Janet Wilson* (*b*), where the Court said: "I have very great doubt in my own mind whether, where wages have been earned prior to the time when a bottomry bond has been given, a mariner has a right at all to come to this Court and say, 'Let me have a preferential payment over the person who holds the bottomry bond;' and for the obvious reason, that the payment of those wages out of the proceeds of the ship is conditional upon the arrival of the ship in this country, and that that event was brought about by the bond having been given, and the money having been advanced." And again in the *Jonathan Goodhue* (*c*), there are observations to the same effect. These cases clearly show the opinion of the Court. Mariners' wages may be a sacred claim, but not so sacred but they give way to damage, *Linda Flor* (*d*); and to salvage, *Selina* (*e*); and the priority of the bottomry bond in this case rests upon precisely the same ground as the priority of salvage. But supposing the question of preferential payment is to be determined by the French law, their affidavit is inconclusive as to the effect of the French law. The inference that the privileged debts mentioned in Article 191 are referred to in Article 320 is not the inference of the code, but of M. Bouard. And the bottomry claims, mentioned 9th in Article 191, are sums lent *before* the departure of the ship; here the voyage out and home was one, and the sums were lent *after* the departure of the ship. The real purpose of the plaintiffs is to make cargo pay wages, which cannot be done directly; and it would be hard indeed to make the cargo pay wages indirectly, because it has the misfortune to have been bottomried, and to be forced to pay part of the bond; above all, wages which have not helped to bring the cargo home.

Deane, Q.C., in reply.

Judgment.

Right Hon. Dr. Lushington: I am very much indebted for the learned arguments which have been addressed to the Court, but I have no doubt weighing upon my mind which requires me to take time to consider my decision.

It is certainly without precedent in this Court for the owner of

(*a*) 9 Jur. 94.
(*b*) Sw. 261.
(*c*) Sw. 524.
(*d*) Sw. 309.
(*e*) 2 N. of C. 18.

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cargo to appear to resist a claim of mariners suing ship and freight for their wages. But as the facts show that the owner of cargo has an undoubted interest in the administration of the fund by the Court, I admit that he is intitled by virtue of that interest to appear and contest the mariners' claim.

The first objection taken on his behalf is, that, by the French law, the law of the country to which these seamen and the ship belonged, they may sue the shipowner personally, and that on equitable grounds they ought to be remitted to this personal remedy, in order to save the owner of cargo from having his property resorted to by the bondholder, he, the owner of the cargo, it is alleged, having no remedy over against the shipowner. It has been much disputed whether by the French law the mariners have or have not a right of personal action against the shipowner, after his abandonment of ship and freight to legal claims, but I do not propose to decide this knotty question. For assuming that the right of action is perfectly valid, this Court never remits seamen to the doubtful chance of recovering against an embarrassed owner; it always upholds their lien for wages upon the body of the ship with peculiar tenacity. Nor, on the other hand, ought I to presume without proof that the French law, differing from ours, denies to owners of cargo the power of recovering from the shipowner damages incurred by compulsion of law to satisfy debts, which are properly the shipowner's only. The appeal therefore to the equity of the Court is not well founded. It is true that it is hard upon the owners of cargo to pay in the first instance and be handed over to a doubtful remedy *in personam*, but not harder than that the seamen should be denied their wages here, and that *they* should have the doubtful remedy elsewhere.

The Court will not remit foreign seamen to their personal remedy.

Stress, however, has been laid upon the rule that where a bottomry bond is on ship, freight and cargo, ship and freight must be exhausted before the cargo is touched, and the case of the *Priscilla* was very properly cited. It was there held that the owner of cargo, bottomried with ship and freight, appealing to this rule, had a superior claim to the holder of a previous bond on ship and freight only, who, if this rule were inforced, would receive nothing. The distinction between that case and the present is this, that there the claim on the ship and freight by the holder of the first bond was inferior to the claim on ship and freight of the holder of the second bond; but is that so here? Is there any ground for saying that the bondholder here (through whom the owner of cargo claims) has a distinct preferential right

The *Priscilla* distinguished.

over the claims of the seamen suing for wages earned previously to the date of the bond ?

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That leads me to the question which has been argued at so much length, whether the right of precedence is to be determined by the French law or the law of this Court. Now, I am clearly of opinion upon the authorities cited, and upon the usual practice of this Court, as well as upon every consideration of convenience, that this question of the precedence of liens must be determined by the *lex fori*. To hold otherwise might lead to very great confusion. I shall look to the law in this Court only. What, then, is the law in this Court as to the relative rights of a bondholder, and a seaman suing for wages earned before the bond? I have in the cases quoted, the *Mary Ann*, the *Janet Wilson* and *Jonathan Goodhue*, intimated an opinion that the bondholder ought to be preferred, because the bond has been auxiliary to the saving of the wages, because it has saved the fund to which the seaman is resorting. I have, however, never decided the question. Upon an examination of all the cases, and upon investigation of the practice of the Court, I find that no distinction has ever been taken between wages earned before and wages earned after a bond, that in practice both have been alike preferred to the bond. I think it better that the ancient practice of the Court should not be disturbed. I decide, therefore, that the claim of the seamen in the present case is superior to the claim of the bondholder, and therefore to the claim of the owner of the cargo who derives through the bond. I pronounce for the seamen's claim and refer the amount to the Registrar and merchants.

Precedence of liens is to be determined by the *lex fori*,

and the lien for wages ranks before any lien for bottomry.

Toller, proctor for the seamen.

Pritchard, proctor for the owner of cargo.

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THE EMPRESS EUGÉNIE.

Collision—Reference to Registrar—Costs of Reference—Measure of Damages.

The ordinary rule in causes of collision, that the plaintiff shall pay the costs of the reference to the Registrar and merchants, if their report disallows more than one-third of his claim, is not to be relaxed, even if the plaintiff fails in substantiating his entire claim upon a question of law only.

Where the ship of the plaintiff carrying cargo was sunk in a collision, and afterwards raised and repaired, and the cost of repairs exceeded the original value of the ship, which might have been ascertained before the repairs were commenced: *Held*, by the Registrar, that the plaintiff could not recover upon a principle of partial loss, but that the measure of damages was the value of the ship before the collision, with interest from the date when the cargo would in ordinary course have been delivered, together with the costs of raising, and the cost of placing the ship in dock for inspection,—less the value of the wreck as raised.

COLLISION. The action was brought by the owners of the schooner Jane Ann and Elizabeth against the steam-ship Empress Eugénie. The collision took place on the 18th of November, 1859, in the Rock Channel leading to the river Mersey, and the schooner immediately sank. On the 30th of March, 1860, the Court pronounced the steamer solely to blame; and the amount of the plaintiffs' damage was referred to the Registrar and merchants. Meanwhile the schooner had been raised by the plaintiffs and repaired. At the reference the plaintiffs claimed upon the principle of a partial loss, charging the expenses of raising, repairs and demurrage. Their entire claim amounted to 1,534*l.* 13*s.*; the Registrar and merchants allowed only 723*l.* 8*s.* 7*d.*, and the following reasons were appended to their report by the Registrar:—

"This case was argued before myself and the merchants on the 20th of July instant, by Mr. Hannen on behalf of the plaintiffs, and Mr. Lushington on behalf of the defendants.

"The facts of the case were briefly as follows:—The schooner Jane Ann and Elizabeth, bound from Neath to Liverpool with a cargo of coals, was on the 18th day of November, 1859, run down in the Rock Channel in the river Mersey by the steamer Empress Eugénie, and sunk. She was subsequently, whilst so sunk, run into by the steamer Saint Patrick, and further injured. Ultimately she was raised, taken to Liverpool, and there repaired.

"It appeared that the schooner, which was 67 tons register, and 86 tons builders' measurement, was originally built at Appledore in 1842, and classed A 1 for 11 years; she was repaired

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in 1856, and again in 1858, and at the latter period was placed upon the red letter for 4 years. She was evidently a good vessel, was built of English oak, and was partly copper-fastened. The value before the collision, at which she was estimated by the plaintiffs, was from 675*l.* to 800*l.*; the value placed upon her by the defendants was from 450*l.* to 470*l.*

"The repairs of the vessel amounted altogether to about 1,200*l.*, this was independent of a sum of 200*l.* for further repairs, occasioned by her having been run into by the Saint Patrick, and of the cost of raising her which was about 120*l.* more, besides the dock dues which were 31*l.* 6*s.* The expense then of the repairs was no less than about 1,400*l.*, besides the dock dues and the cost of raising her. It was admitted, however, that after the repairs she was a better vessel than she had been before the collision, for she was thereupon restored to A 1 for 7 years; but it was stated by the shipwright who repaired her, Mr. William Henry Pope, that the additional expense incurred in making her a better vessel than she had been, and in giving her a higher class, was only about 140*l.*; this the plaintiffs were willing should be struck off the claim; leaving, therefore, a sum of about 1,060*l.* for the repairs applicable to the collision with the Empress Eugénie, besides the dock dues, the cost of repairing her, demurrage and other charges.

" It must be admitted by the plaintiffs' witnesses that it was a mistake to have repaired her at all, and that it would have been better to have abandoned her from the first. But the plaintiffs said that they had acted *bonâ fide* in the matter, that the repairs were effected before the result of the suit was known, that no estimate of the cost of the repairs could be formed at first, that the full extent of the damage was not ascertained until after the water-ways had been opened, nor until after about one-third of the repairs had been effected. It was contended that the plaintiffs had done what a prudent owner would have done in their place, and that, although the expenses exceeded the value of the ship when repaired, the plaintiffs had acted *bonâ fide* and must recover to the full extent of their losses.

" In reply to this, it was contended by the defendants that they could not be held responsible for more than for a total loss; that the cost of the repairs, even on the showing of the plaintiffs, was nearly, if not quite, twice the value of the schooner before the collision, that an entirely new vessel of the same size and class as the Jane Ann and Elizabeth, built of English oak, partly copper-fastened, and classed A 1 for 11 years, would not cost more than from 1,000*l.* to 1,100*l.*; that it was a mistake to have repaired the vessel at all; that admitting that the plaintiffs acted *bonâ fide* they had no right to have incurred so heavy an expense

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before they had ascertained the full extent of the required repairs, which they could easily have done. And it was contended by the defendants either that the vessel should have been blown up or destroyed in the river, or that if they are to be charged with the expenses of raising her, credit should be allowed to them for the value of the wreck as she lay in the dock.

"On a consideration of all the facts of the case, it appeared to myself and the merchants that great and unnecessary expenses had been incurred in the repairs of this vessel, that care should have been taken to ascertain the full extent of the damage before the repairs were commenced, and that the plaintiffs had consequently not acted as a prudent owner would have done. It was admitted by Mr. Perkins, the gentleman who surveyed the vessel, and who was produced as a witness for the plaintiffs at the reference, that the water-ways might have been taken up and the extent of the damage ascertained sooner than it was; and that had they known the extent of the damage they would probably not have repaired her.

"On the whole we were of opinion that the case must be regarded as one of total loss, that the plaintiffs must be allowed the estimated value of the vessel when run down, less the value of the wreck, and that, as they could not know whilst she lay at the bottom of the river whether or not it would be proper to abandon her, they should be allowed the expenses of raising her, and placing her in a dock for inspection.

"Looking at the age of this vessel, and at the fact that seven-eighths of her had been insured for 500*l.*, we were of opinion that her extreme value at the period of the collision was 650*l.*, but from this must be deducted the value of the wreck as it lay in the graving dock, which Mr. Perkins estimated at 100*l.* To this must be added the cost of raising her, and the dock dues, the additional charges incurred in regard to the cargo, and a small sum for agency. But no allowance could be made for demurrage, the case being considered as one of total loss, and interest being allowed on the amount found due from the time when the cargo would in the ordinary course have been delivered."

Lushington now moved the Court to condemn the plaintiffs in the costs of the reference.—The plaintiffs have lost half their claim before the Registrar, and they have therefore, by the rule of the Court, rendered themselves liable for the costs of the reference.

The *Queen's Advocate*, contrà.—This is a case in which equity requires the relaxation of the ordinary rule, if rule it is to be

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considered, for in the Court of Admiralty costs are always discretionary. The plaintiffs presented no excessive claim; what they said they had expended, they had expended; and they acted *bonâ fide* in all the expenses they incurred, in fact they repaired the vessel before the result of the action was known. They have recovered the sum of 723*l.* 8*s.* 7*d.*; and they only failed to recover the larger sum which they claimed, upon a question of law, which the Registrar, after hearing counsel, decided against them. It is submitted that, under all these circumstances, the plaintiffs should be allowed the costs of assessing the damages they had sustained by the wrong of the defendants.

Judgment.

Right Hon. Dr. Lushington:—In this case the Registrar and merchants have disallowed one half of the plaintiffs' claim. By the ordinary rule of the Court, therefore, the plaintiffs should be condemned in the costs of the reference. The Queen's Advocate, however, has pressed upon me that the circumstances of this case are peculiar; that this is not the ordinary case of an exorbitant claim being cut down; that the plaintiffs brought their claim in pure good faith and failed only upon a point of law; and that it would be hard upon them to make them pay the costs of an investigation, in which they have substantially been successful. Assuming in the plaintiff's favour that the question before the Registrar was one of pure law, which it was not, I think I should be making a dangerous precedent if I were upon such grounds to relax the ordinary and salutary rule of the Court. The plaintiff is bound at his peril to be well advised in law, and if he presents a claim founded upon a conception of the law which cannot be sustained, he must pay for his mistake. As Lord Cottenham said, when an application of a similar kind was made to him, "It is in law as in war, Væ victis!" I am of opinion that the rule of the Court touching references of damage gives a fair margin to plaintiffs, and that any relaxation of this rule would only be to encourage excessive claims, which lead to litigation. In the present case, if the plaintiffs had rightly estimated their claim, it is very possible that the defendants would have paid without more ado. I consider that the plaintiffs, acting upon a mistaken view of their legal rights, have necessitated the expense of an investigation before the Registrar and merchants; and it is my duty therefore to condemn them in the costs of the reference.

Pritchard, proctor for the plaintiffs.

Tebbs for the defendants.

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CARGO EX KATHARINA.

Prize—Right of Search—Wrongful Detention—Proceedings after cessation of War—Form of Monition—Limitation of Proceedings—17 *Vict. c.* 18, *ss.* 2, 56, 57.

The Court has jurisdiction to entertain prize proceedings commenced after the cessation of war.

In a case of alleged wrongful detention, the proper course is to apply to the Court for a monition against the captor to proceed to adjudication.

The Court will not entertain proceedings to recover damages for a wrongful detention, unless commenced within a reasonable time; and ignorance of the law on the part of the claimant will not excuse delay.

Delay of six years held a bar to proceeding, and application for a monition against the captor to pay damages dismissed with costs.

THIS was a motion for a monition against Captain Popplewell, late commander of H.M.S. Inflexible, for payment of the damages occasioned to Messrs. H. Theologo, Sons, of Constantinople, by the alleged illegal seizure of the Dutch galliot, Katharina, on the 31st May, 1854.

In support of the above monition were brought in an affidavit stating that Messrs. Theologo had, in July, 1860, taken the opinion of counsel on their case, and thereupon instituted the present claim, and an affidavit of Pantaleone Theologo, stating the following facts:—

"In May and June, 1854, the house of Theologo, Sons, of Constantinople (the claimants), consisted of Pantaleone Theologo, a British subject residing in Manchester; George Haggi Theologo, a subject of Otho, King of Greece; and Michael Theologo, a subject of the Sultan, both residing at Constantinople. In May, 1854, the claimants shipped on board the Katharina a general cargo, consisting of 2,035 bars of iron, 155 bundles of iron, 20 barrels of sugar, &c., consigned to Messrs. H. Theologo, Brothers, of Galatz, and on the 26th May the vessel sailed with the above cargo for Galatz. On the 31st May, when in sight of the Sulina mouth of the Danube, the Inflexible and another British frigate hove in sight, and an armed boat was sent on board the Katharina. The officer in charge demanded the ship's papers, which were at once delivered to him. On being asked whether they were in good order, he replied that they were, and ordered the galliot to follow him. Shortly afterwards

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the Inflexible took the galliot in tow, and brought her the next day (1st June), to Kustandji, in the Black Sea. In the course of the afternoon a boat came and inquired if the galliot had any coals, and received for answer that she had nothing but what was mentioned in the bill of lading. In the evening of the same day she was again taken in tow by the Inflexible, and on the next day (2nd June) was brought to the allied fleets at Varna. There an officer and four men boarded her, and opened the cases and barrels of the cargo. At 5 P.M. of that day the captain of the Inflexible informed the galliot that she was free, and that the Danube was blockaded. The captain of the galliot applied to the Admiral of the fleet for redress, and was referred by him to the Minister or Consul at Constantinople. The galliot then proceeded to Constantinople, and unshipped her cargo, thereby causing to the claimants a loss of 729*l.*" The affidavit also stated that the Danube was declared to be blockaded on the 1st of June, 1854, and not before; that neither the Emperor of Russia nor any Russian subject had any interest in the galliot, her freight, or cargo; and concluded as follows: "The said firm of Theologo, Sons, of Constantinople, have applied to the British Consul, and also to the British Ambassador at Constantinople, for compensation for their aforesaid losses, and the deponent has also applied for compensation for their aforesaid losses to the Lords Commissioners of the Admiralty. The said firm have been unable to obtain compensation for their aforesaid losses from the said British Consul, or from the said British Ambassador at Constantinople, and the said Lords Commissioners of the Admiralty having, in their communications with the deponent, the last of which bears date the 11th of July, 1860, declined to entertain the aforesaid claim of the said firm, the said firm are desirous to take proceedings, &c."

Tristram, in support of the motion.—The vessel was unjustifiably detained; being detained after a sufficient opportunity to examine and ascertain her innocent character, and indeed after it was ascertained. "It is a principle which governs the whole subject, that this right of visit and search may be conducted with as much regard to the rights and safety of the vessel detained as is consistent with a thorough examination of her character and voyage. All that is necessary to this object is lawful, all that transcends it is unlawful." (*a*). The remedy for this wrong is not in a court of common law, but in the Court of Admiralty only: *Le Caux* v. *Eden* (*b*); *Faith* v. *Pearson* (*c*);

(*a*) 3 Phillimore's Commentaries, p. 428.
(*b*) 2 Dougl. 594.
(*c*) 4 Campb. 356.

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Mentor (*a*); *Susanna* (*b*). The *Mentor* also shows that the remedy is against the actual wrongdoer. The case does not fall within "The Prize Act, Russia, 1854," (*c*), for, by the 2nd section, that Act did not come into operation until the 1st of June, 1854, the day after this wrong was committed. The claimants should not be barred in this case by the lapse of time, which is sufficiently accounted for in the affidavit, by their having to resort to redress from various authorities; their case is in this respect, and in length of time, very different from that of the *Mentor*.

The *Queen's Advocate* and *Swabey, contrà*.—Admitting for the moment all the facts, as stated by the claimants, this motion is unjustifiable; it calls upon Captain Popplewell absolutely to pay damages. But on the merits the claimants have no case; the cargo of iron was going to a country occupied by Russian troops, and was clearly contraband of war. Above all, this application is altogether too late. The affidavit of the claimants tries to explain the delay, but gives no dates of the alleged applications, and is therefore quite unsatisfactory. The alleged wrong was done in May, 1854, and the opinion on which the Court is now moved, was not taken until July, 1860 : this delay, being unexplained, it is submitted is fatal. This is the principle on which the *Mentor* was decided, Lord Stowell saying, "I do not say that the Statute of Limitations extends to prize causes; it certainly does not. But every man must see that the equity of the principle of that statute in some degree reaches the proceedings of this Court; and that it is extremely fit that there should be some rule of limitation provided by the discretion of the Court, attending only to the nature and form of the process conducted here, by which captors, or other persons, should be protected against antiquated complaints (*d*)." Again, in the *Susanna* (*e*), the Court refused a monition to proceed to adjudication because of a delay of five years, and said, "The ignorance of law, which has been suggested, is in itself not a legal excuse. It is in the present case less deserving of attention, since it is the common principle of the law of nations, and familiar to the minds of all persons, that the Court of Admiralty is the proper Court for redress of injuries of this nature. If the claimant has mistaken his way, and has not pursued his remedy in a proper manner, and in due season, his error should not expose other parties to the inconvenience of being harassed by proceedings at this distance of time, when the very circumstance of delay has unavoidably occasioned

(*a*) 1 C. R. 179.
(*b*) 6 C. R. 49.
(*c*) 17 Vict. c. 18.
(*d*) 1 C. R. 180.
(*e*) 6 C. R. 53.

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additional difficulties in establishing their defence, and on a point which must at all times have been considered as a question of delicate and difficult discussion." It is very doubtful whether the case does not fall within the Prize Act, for the Act, though not coming into operation until the 1st of June, 1854, may be retrospective, and in some cases is directly expressed so to be, as in sections 5, 9; and if within the Prize Act, the claimants are barred by sections 56, 57.

Sect. 56.—"No action shall be brought against any person or persons whomsoever, for any matter or thing whatever, done or committed under or by virtue or in the execution of this Act, unless such action shall be brought within two years next after the doing or committing of such matter or thing, nor unless notice of action shall have been given one calendar month at least before the commencement of the same, which notice shall specify the cause of the said action; and if the plaintiff or plaintiffs shall be nonsuited, or suffer discontinuance, or forbear further prosecution, or if judgment shall be given for the defendant or defendants, such defendant or defendants shall recover his costs, to be taxed as between attorney and client."

Sect. 57.—"This Act shall continue in force during the present war, and no longer, save and except as to all such matters and things as shall be depending in judgment in the Court of Admiralty, or before the Judicial Committee of the Privy Council, or in any Court of Record within her Majesty's dominions, at the time when the present war shall cease, and also save and except as to the carrying out and finally disposing of all such matters or things as shall arise out of the present war in reference to the provisions of this Act; and also save and except as to all offences which may have been committed against, and all penalties and forfeitures which may have been incurred under the provisions of this Act, in respect whereof proceedings shall and may be taken as if this Act still continued in force."

Tristram in reply.

Judgment.

Right Hon. DR. LUSHINGTON:—Questions of great importance have been raised in this case, but I have no doubt upon the point on which I am about to rest my judgment. The vessel, bound to Galatz with a cargo principally of iron, was detained on the 31st of May, 1854, by H.M.S. Inflexible. At that time the Order in Council of March 29, 1854, ordering reprisals, was in full effect, or in other words the detention took place *flagrante bello*. The claimants, who were the shippers of the cargo, now, after an expiration of six years, and long after the conclusion of

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The Court holds jurisdiction over prize, after peace.

the war, are seeking to make Captain Popplewell pay damages as for an improper detention. I cannot doubt that the Court has jurisdiction over the present case, notwithstanding that the war ceased before the authority of the Court was invoked; and if in other respects I was equally satisfied, I should feel bound to exercise it. It is quite erroneous to suppose that the Court cannot entertain a suit of prize after peace made. The Court sometimes has had to adjudicate upon cases where the capture itself took place after the cessation of the war. It is not therefore upon the ground of jurisdiction that I am going to refuse this present monition, nor do I pass any opinion that iron was in the circumstances contraband of war, or that the detention was lawful. If due expedition had been used in applying to the Court, I should have allowed a monition in some form to have issued against the alleged wrongdoer.

The application should have been for a monition to proceed to adjudication.

The application, however, for the monition in its present form is altogether unwarrantable. It is not even an application for a monition to show cause, but for a monition absolute to pay. But the proper form of monition would have been for a monition to proceed to adjudication. This was always the form adopted, even when the property was destroyed, as in the case of the *Susanna*, referred to at the bar, and in many other cases.

The plaintiffs barred by their own laches.

But I will consider this application as for a monition to proceed to adjudication. The question then arises, Why were not proceedings taken earlier? In cases of this kind the Court is bound by the authority of Lord Stowell, the practice of the Court, and by a clear principle of equity, to consider the lapse of time. Here six years have elapsed since the commission of the alleged wrong, and during all that time no application was made to this Court, which was sitting for the express purpose of deciding (among other things) all grievances of the kind. It is no answer to say that application was being made to the English Consul, or the English Minister, or to the Lords of the Admiralty, when an express and proper remedy was open to the claimants in this Court. In the analogous case of the *Susanna*, cited at the bar, Lord Stowell said that ignorance of law is not a legal excuse; and here the ignorance, if there was ignorance, was through negligence. I think it would be making a very bad precedent, and doing great injustice to Captain Popplewell, if after the lapse of these six years the Court called upon him to prove his case. I refuse the application, with costs.

Reed, proctor for the claimants.

Dyke, the Queen's proctor, for Captain Popplewell.

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THE LEMUELLA.

Master's Wages—Counter-claim—Costs of Reference.

The rule obtaining in references in causes of collision, that if the Registrar strikes off more than one-third of the plaintiff's claim, the plaintiff shall be condemned in the costs of the reference, does not apply to a reference in a cause of master's wages; but the Court will decide equitably according to the circumstances of the particular case.

In a reference in a cause of master's wages more than one-third was struck off the master's claim, and more than a third struck off the owner's counter-claim; and a balance was declared due to the master:—*Held*, that each party should pay his own costs.

THIS was a cause of master's wages instituted by Matthew Blade Mattrass against the barque Lemuella. The owners set up a counter-claim, and the cause being referred to the Registrar, the accounts between the master and the ship were investigated; they extended over a period of four years and a half, and related to voyages to India, Australia and China. The Registrar finally reported as due to the master the sum of 393*l.* 16*s.* 5*d.* At the reference the master alleging the gross amount of his payments to have been 7,686*l.* 15*s.* 5*d.*, and the gross amount of his receipts 6,618*l.* 12*s.* 5*d.*, claimed a balance of 1,068*l.* 3*s.* The counter-claim of the owners amounted to 1,961*l.* 13*s.* 3*d.*, but the Registrar allowed only 674*l.* 6*s.* 5*d.* Some of the items allowed in the counter-claim were short credits on exchanges given by the master, and some for payments alleged by the master to have been made by him, but proved to have been made by the consignee of the ship abroad.

Clarkson for the owners, now moved the Court to condemn the master in the costs of the reference.—The general rule in this Court as to costs of reference is, that, if more than one-third is struck off the plaintiff's claim by the Registrar, the plaintiff is condemned in the costs. Here nearly two-thirds have been struck off. It is important that the rule should be maintained to prevent exorbitant claims, which drive the other side into expensive litigation. The defendants have been obliged to obtain evidence from the far ends of the world to meet this unjust claim of the plaintiff. Several of the items allowed in the counter-claim and disallowed to the master, show that he has been attempting to defraud the defendants.

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Spinks, contrà.—A reference in a case of master's wages is different from a reference in collision, because there is a counter-claim, and because the result may depend as here upon a balance of complicated accounts extending over years. Here the accounts dealt with a sum of 7,686*l.*, and only a sum of about 600*l.* was struck off; and the practice of the Registrar is to disallow any items for which vouchers are not produced, although vouchers may easily be lost. It would be inequitable to apply to such a case the rule contended for. The rule in the courts of common law is to give the plaintiff all costs, if he recovers anything beyond a nominal sum. The litigation was caused by the owners refusing to pay the plaintiff what was due to him; and of their counter-claim of 1,961*l.* 13*s.* 3*d.* only 674*l.* 6*s.* 5*d.* has been allowed.

Clarkson in reply.

Judgment.

Right Hon. Dr. Lushington:—I am of opinion that the rule which obtains in references in collision cases ought not to apply to references concerning master's wages. It would clearly operate inequitably. Nor can I on the other hand lay down a rule that if the master recovers anything he is intitled to all the costs of the reference; such a rule would encourage exorbitant demands by masters, especially as an owner has not the means of estimating with precision the amount really due to the master upon accounts relating to transactions which have been conducted by the master in distant parts of the globe. I shall therefore lay down no rule, but endeavour to decide equitably according to the circumstances of each case. In the present case the accounts covered a sum of more than 7,000*l.*, and extended over a period of nearly four years. The master claimed a balanceof 1,068*l.* 3*s.*, but of this the Registrar has allowed only 393*l.* 16*s.* 5*d.*, thus striking off more than half the amount. I think also the master may be further to blame on account of the character of some of the items disallowed him, but I do not decide on this ground. On the other hand the owners are equally to blame, for their counter-claim amounts to 1,961*l.* 13*s.* 3*d.*, and the Registrar has allowed them only 674*l.* 6*s.* 5*d.* I shall order each party to pay his own costs.

Willis, proctor for the master.

Clarkson for the owners.

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THE BILBAO.

Collision—Damage by a Foreign Ship to a Barge in the River Thames—Absolute appearance—Plea denying Jurisdiction —3 & 4 Vict. c. 65, s. 6—17 & 18 Vict. c. 104, ss. 527, 529 —Plea alleging fault of Harbour Master—10 Vict. c. 27, ss. 52, 53.

Formal objections to jurisdiction not allowed to be taken after an absolute appearance given.

Quære, whether in suing a foreign ship, under sect. 527 of 17 & 18 Vict. c. 104, the arrest and action may be according to the ordinary process of the Court.

Damage done by a foreign vessel to a barge in the river Thames; arrest according to ordinary process; absolute appearance and release of vessel thereon; petition filed. Plea, that the barge was not a sea-going vessel within the meaning of 3 & 4 Vict. c. 65, s. 6, and that the Court had no jurisdiction. *Held*, that the Court had jurisdiction by sect. 527 of 17 & 18 Vict. c. 104, and that after absolute appearance, the defendants could not object that the arrest had not strictly followed the course prescribed in that section.

Where the master and crew are bound by statute to obey the directions of a harbour master in going into dock, and a collision is occasioned by the ship being conducted according to the harbour master's directions, the ship is not liable in the Admiralty Court.

COLLISION. The Bilbao, a foreign vessel, whilst entering the Victoria dock in the river Thames, came in collision with a barge. The plaintiffs, owners of the barge, obtained a warrant from the Registry, founded on the usual affidavit, and arrested the vessel; the defendants entered an appearance absolutely, and the Bilbao was thereupon released on bail. The plaintiffs then filed their petition. The defendants pleaded, amongst other pleas, that "the said barge was not a seagoing vessel within the meaning of 3 & 4 Vict. c. 65, s. 6, and that the Court of Admiralty had no jurisdiction to entertain the cause." The admission of this plea was objected to.

3 & 4 Vict. c. 65, s. 6, is as follows:—"The High Court of Admiralty shall have jurisdiction to decide all claims whatsoever in the nature of salvage for services rendered to, or damage received by, any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered or damage re-

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ceived or necessaries furnished, in respect of which such claim is made."

Tristram for the plaintiffs.—It must be admitted that before the passing of the Act of 3 & 4 Vict. c. 65, the Court had no jurisdiction within the body of a county, and that that Act did not give jurisdiction over damage done to a non-seagoing vessel. But we rely upon sections 527, 529 of the Merchant Shipping Act, 1854. 527. "Whenever any injury has, in any part of the world, been caused to any property belonging to her Majesty or to any of her Majesty's subjects by any foreign ship, if at any time thereafter such ship is found in any port or river of the United Kingdom, or within three miles of the coast thereof, it shall be lawful for the judge of any court of record in the United Kingdom, or for the judge of the High Court of Admiralty, or in Scotland, the Court of Session, or the sheriff of the county within whose jurisdiction such ship may be, upon its being shown to him by any person applying summarily that such injury was probably caused by the misconduct or want of skill of the master or mariners of such ship, to issue an order directed to any officer of customs or other officer named by such judge, requiring him to detain such ship until such time as the owner, master or consignee thereof has made satisfaction in respect of such injury, or has given security, to be approved by the judge, to abide the event of any action, suit or other legal proceeding that may be instituted in respect of such injury, and to pay all costs and damages that may be awarded thereon; and any officer of customs or other officer to whom such order is directed shall detain such ship accordingly." 529. "In any action, suit or other proceeding in relation to such injury, the person so giving security as aforesaid shall be made defendant or defender, and shall be stated to be the owner of the ship that has occasioned such damage; and the production of the order of the judge made in relation to such security shall be conclusive evidence of the liability of such defendant or defender to such action, suit or other proceeding." Here the ship proceeded against is a foreign ship, which has caused injury to British property, and we claim the benefit of these sections. As to the method of procedure, no rules have been made to regulate proceedings under these sections, but the ordinary process of this Court, where the arrest founded on an affidavit of the cause of action is the commencement of the action, seems the most convenient, and entirely meets the intent of the act of parliament. But, even if not absolutely proper, any defect in it is cured by the absolute appearance to the action.

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Lushington, contrà.—The plaintiffs have not fulfilled the conditions appointed by the statute to give the Court jurisdiction. The statute requires application to be made to the judge, the order of arrest to be issued by the judge, and contemplates the action to be brought subsequently to the arrest. None of these conditions have been fulfilled. The action is commenced by the arrest, and the arrest is by a warrant issued as a matter of course by the Registrar upon the affidavit used in ordinary cases,—not even the name of the judge has been used. Secondly, the absolute appearance does not waive the want of jurisdiction. Giving an appearance is a formal act, almost always done in a hurry in order to release the ship from detention, done by the proctor only; and he is not expected to be master of difficult questions of jurisdiction, dependent on the construction of intricate acts of parliament. The objection here is pleaded; and the Court has often considered questions of jurisdiction not mooted until the hearing.

Judgment.

Right Hon. Dr. Lushington:—This is a cause of damage, brought by the owners of a barge against a foreign ship, and the defendants have pleaded that the collision took place in the river Thames, within the body of a county; that the said barge is not a sea-going ship or vessel within the meaning of the 3 & 4 Vict. c. 65, s. 6, and therefore that this Court has no jurisdiction. The plaintiffs now take objection by way of demurrer to this plea, and I have to decide whether the plea shall be allowed. It was very properly admitted by Dr. Tristram that, previous to the passing of 3 & 4 Vict. c. 65, the Court of Admiralty had no jurisdiction within the body of a county. This appears from several cases, one of which is the *Eliza Jane* (*a*); and, indeed, the statute was passed for the express purpose of remedying that and other inconvenient defects. The language of that statute, however, though in many respects very general as to damage, gives the Court jurisdiction only in cases of damage received by any "ship or sea-going vessel," and the plaintiffs therefore, as their counsel admitted, receive no assistance from this statute, and must look elsewhere to show their right to sue in this Court.

3 & 4 Vict. c. 65, s. 6, does not give the Court jurisdiction over damage done to a vessel not "a sea-going vessel," within the body of a county.

They refer, therefore, to the 527th and following sections of the Merchant Shipping Act, 1854. [The learned Judge then read sect. 527.] It is clear that this section gives the Court authority to entertain a case like the present; but the defendant's counsel has taken the objection that the act requires certain formal pro-

But if the ship doing the injury is foreign, the Court has ju-

(*a*) 3 Hagg. 335.

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risdiction by 17 & 18 Vict. c. 104, s. 527.

And any objection purely technical to the exercise of the jurisdiction cannot be allowed after absolute appearance.

ceedings to be adopted, which the plaintiffs have not followed. This objection, therefore, is a technical one only: the defendants are forced to admit that the Court has jurisdiction; they say only that it has been informally claimed. I do not consider it necessary to examine the value of the objection, because I am of opinion that an objection of this kind comes too late. The defendants have given an absolute appearance to the action: and after that they cannot be allowed to take a mere formal objection to the jurisdiction. It is true that the Court has occasionally considered questions of jurisdiction at the hearing, but always with great reluctance, and only where there might be danger of the Court proceeding without any jurisdiction at all. The Court is necessarily obliged to be careful not to exceed its jurisdiction; but it will not admit, after absolute appearance, objections of a purely technical kind. To do so might be to do great injustice; for the plaintiffs, relying upon the absolute appearance, have allowed the defendants' vessel to be released on bail. This plea must be struck out.

The defendants subsequently pleaded the following plea:—

Defendants' proctor also says, that by the act of parliament, 10 Vict. c. 27, intituled "The Harbours, Docks, and Piers Clauses Act, 1847," and by the 52nd section thereof it is enacted, among other things, that "The harbour-master (which term, the 1st, 2nd and 51st sections of the Act provide, shall include the dock-master,) may give directions for regulating the time at which and the manner in which any vessel shall enter into, go out of, or lie in, or at the harbour, dock or pier, and within the prescribed limits, if any, and its position, mooring or unmooring, placing and removing, whilst therein." And that by the 53rd section of the said Act it is enacted as follows: "The master of every vessel within the harbour or dock, or at or near the pier or within the prescribed limits, if any, shall regulate such vessel according to the directions of the harbour-master, made in conformity with this and the special Act; and any master of a vessel, who, after notice of any such direction by the harbour-master served upon him, shall not forthwith regulate such vessel according to such directions, shall be liable to a penalty not exceeding twenty pounds." And that by the act of parliament, 16 & 17 Vict. c. 131, intituled "The Victoria (London) Docks Act, 1853," and by the 3rd section thereof it is enacted, that the said "Harbours, Docks and Piers Clauses Act, 1847," shall be incorporated with and form part of the said Victoria Docks Act, 1853; and that by the 46th section of the said "Victoria

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(London) Docks Act, 1853," it is enacted as follows:—"The limits within which the powers of the superintendent and dock-master for the regulation of the dock shall be the dock, works and premises of the company, and a distance of one hundred yards into the river Thames from the entrance gates of the said dock, such distance to be computed from the centre of the outer lock gates of the said dock." And the defendants' proctor says that before and at the time of the damage complained of those on board the Bilbao were acting under the directions given by the dock-master of the said Victoria Docks, for the said vessel to enter the said docks, and within the limits of the authority of the said dock-master, and that the said damage, if occasioned by any mismanagement of the Bilbao, was solely occasioned by the default of the said dock-master, and that the owners of the said vessel are not responsible in law for the same.

Spinks now moved that this plea should be struck out.—It is not pretended that the acts pleaded contain any express provision taking away the liability of an owner for the improper conduct of his vessel at the bidding of the dock-master. It is the statute which protects owners for the act of a pilot, and the statute only. The proceeding is *in rem*, and by this plea it is admitted that the ship was improperly managed.

Lushington, contrà.—Apart from the statute an owner is, in general principle of law, not liable for the act of a person whom he is compelled to employ; *Protector* (*a*); *Maria* (*b*); *Agricola* (*c*). But here there was no employment at all, and the harbour-master was in no sense the servant of the shipowner. The master and crew were bound by the statute to obey the harbour-master's order, and their doing so was therefore no wrongful act, however mistaken the order may have been. The blame for the collision rests altogether outside of the ship and shipowner.

Judgment.

Right Hon. Dr. Lushington:—I certainly hold by the judgment I delivered in the case of the *Maria*. I then well considered the point, and under circumstances which made a great impression upon my mind. I had to endeavour to reconcile two apparently conflicting decisions; *Carruthers* v. *Sydebotham*, in the Queen's Bench (*d*); and *Attorney-General* v. *Case*, in the Exchequer (*e*); and I there said that no one should be

(*a*) 1 W. R. 54.
(*b*) 1 W. R. 106.
(*c*) 2 W. R. 19.
(*d*) 4 M. & S. 77.
(*e*) 3 Price, 302.

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chargeable with the act of another who is not an agent of his own choice. That principle still appears to me founded in equity, and it applies to the present case with more force than to the case of the *Maria*. A shipowner cannot be responsible for obeying, under compulsion of the statute, the orders of the harbour-master, who is a stranger to him. This plea, if established, is a good defence to the action.

Plea allowed.

Burchett, proctor for the plaintiffs.

Rothery for the defendants.

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THE ONNI.

Necessaries—3 *&* 4 *Vict. c.* 65, *s.* 6.

A firm in England, having accepted and paid a bill of exchange drawn on them by the master of a foreign ship abroad to procure necessaries, may sue the ship in the Admiralty Court, as for necessaries within the statute 3 & 4 Vict. c. 65, s. 6.

An advance of money, to pay off a bottomry bond for which the ship is arrested, being made under a contract to pay off claims outstanding on the ship, and outfit her for a new voyage, in consideration of receiving brokerage and the prepaid freight for the new voyage, is not within the statute, and cannot be recovered in the Admiralty Court.

Nov. 3, 23.

NECESSARIES. This was an action by Messrs. Sieveking, Droop & Co., of London, for necessaries furnished to the Russian barque Onni, on her voyage to this country from the East Indies. Mr. Droop's affidavit stated that the master, being obliged to put into the Cape of Good Hope for provisions and necessaries, and being without funds or credit, drew a bill on their house for 125*l.*, and thereby raised the money required to procure the necessaries, which bill they had accepted and paid. Annexed to the affidavit was an account of the necessaries so provided. The bill was made payable to Richard de Rolen, and directed the sum to be placed to account of the barque Onni. No appearance was given to the action.

Wambey now moved the Court to pronounce for the claim. —The money thus provided was necessary to the ship within the statute 3 & 4 Vict. c. 65, and it is no objection that it was

furnished in a foreign port, *Wataga* (*a*). It is always to be presumed, until disproved, that credit was given to the ship, *Perla* (*b*).

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The *Admiralty Advocate* and *Lushington* for other creditors. —The case is not within the statute, and the plaintiff's liability did not accrue at the Cape, when the ship was in distress, but when they accepted the bill in London, and then the ship was not in distress. It was, in fact, a payment of necessaries already provided, which is not within the statute, *N. R. Gosfabrick* (*c*). The plaintiffs gave no credit to the ship, but only to the owners. If they can recover, any agent may recover his account against the ship, though the statute gives a remedy only for necessaries. But even at the Cape, the ship cannot be considered as having been in distress: she was in want of stores, and the master drew a bill on the agents of the ship in England, and discounted it—a proceeding in the most ordinary course.

The Court reserved judgment.

In February, 1860, the Onni having arrived from the East Indies was arrested in Plymouth for an unpaid bottomry bond, and also for wages of master and crew. Application was made by one of the owners to Messrs. Seymour, Peacock & Co., ship-brokers, of London, to advance money to release the ship and outfit her for a new voyage, for which they were to negotiate the charter and receive the freight, payable in advance. Seymour, Peacock & Co. accordingly, upon a statement by the master of the ship's liabilities, actual and probable, and upon the condition that no expense should be incurred without their knowledge, and that all orders for stores and repairs should pass through their hands, agreed to pay off the balance of the bottomry bond, and to arrange or pay the other claims on the ship, including outfit, and negotiated a charter to the East Indies. They paid the balance of the bond, amounting to 454*l.*, and also made sundry small payments on account of the ship: the ship was released and repaired, and outfitted at Plymouth. Eventually the claims turned out to be much larger than Seymour, Peacock & Co. had been led to anticipate, and they refused to liquidate them. A great many actions were then entered against the ship by different parties, who had supplied stores to the ship, by master and crew for wages, &c. Seymour, Peacock & Co. brought a claim of necessaries, founded upon an affidavit setting

(*a*) Sw. 165. (*b*) Sw. 353. (*c*) Sw. 344.

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out the facts as above, claiming the balance of the bond paid by them, the sums advanced, also proctor's charges incurred in liberating the ship, and brokerage commission that would have become due on the charter. The owners suffered all the actions to proceed by default.

Wambey moved the Court to pronounce for the claim of Seymour, Peacock & Co.—The word "necessaries" in the statute does not mean only necessary stores, or even money to supply necessary stores; it is to be construed liberally. Thus, money to pay seamen's wages, has been held to be necessary to a ship, *Robinson* v. *Lyall* (*a*), quoted in *Abbott on Shipping* (*b*). Here the ship was liberated from arrest by a timely advance of money by the plaintiffs. It may be proper to limit the right of remedy against the ship in the case of monies supplied without the owner's consent, but here one of the owners of the ship agreed to the arrangement. Having a personal remedy does not exclude a remedy *in rem*; *Rich* v. *Coe* (*c*).

Twiss, Q.C., and *Lushington*, contrà, for other creditors.—The present claim is without precedent. The advance by the plaintiffs was made on the credit of the outward freight, and not on the ship at all: the plaintiffs might have taken an assignment of the bottomry bond. The question is not now as between the plaintiffs and the owner, but between the plaintiffs and other creditors, who have an undoubted lien on the ship.

The Court reserved its judgment.

On the 23rd of November, Dr. Lushington gave judgment as follows:—

Action of Sieveking, Droop & Co.

Judgment.

[After stating the facts.] The account of this transaction is extremely meagre. I have not the least information as to any connexion between this ship and the master and Messrs. Sieveking; how the master came to draw on their firm; how they came to accept his draft; nor why Mr. De Rolen advanced the money. I have some apprehension that I have been intentionally kept in the dark. Whatever may have been the ancient jurisdiction of this Court in matters of this kind, whatever distinctions might have prevailed as to necessaries furnished to a

(*a*) 7 Price, 592. (*b*) Page 103 (10th ed.) (*c*) Cowp. 639.

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foreign ship on personal credit or otherwise, I must now consider my jurisdiction entirely governed by the 3 & 4 Vict. c. 65, s. 6. That section merely says that the Court shall be authorized to decide all cases for necessaries supplied to any foreign ship or sea-going vessel, and to inforce payment thereof. It makes no distinction whether the necessaries were furnished on personal credit or not. I have held that the advance of money for the procuring of necessaries is within the equitable construction of the statute. Can the present case be considered as a case of that kind? I can only judge by the information afforded me, and, according to that affidavit, the master obtains the money to procure necessaries by means of this bill, and the money so procured was duly expended for the benefit of the ship. I think, in these circumstances, I am justified in allowing this claim.

Action of Seymour, Peacock & Co.

I am of opinion that this claim cannot be admitted. The bulk of the claim is for money advanced to pay off a bottomry bond; money advanced too upon a mercantile account, and a mercantile speculation. I do not feel myself at liberty so to enlarge the construction of a statute intended only to secure payment for necessaries furnished upon emergency.

Deacon, proctor for Sieveking & Co.

Waddilove for Seymour, Peacock & Co.

Dubois and *Tebbs*, proctors for other creditors.

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In the Privy Council.

Present—Lord KINGSDOWN.
Lord CHELMSFORD.
The Right Hon. Sir EDWARD RYAN.

THE CLEADON.

Collision—Steam-tug with British Vessel in tow meeting at night a Foreign Vessel close-hauled on the starboard tack.

A British ship in tow of a steam-tug meeting a foreign ship in the night-time is bound by British law.

The vessel towed and the vessel towing are to be considered as one long steamer, for the conduct of which the vessel towed is responsible, and a vessel being so towed at night is bound to avoid other vessels.

A foreign vessel, close-hauled on the starboard tack, approaching another vessel at night is bound to keep her course, and will be held to blame for porting her helm, if porting was an injudicious manœuvre, and but for such manœuvre the collision would probably not have happened (*a*).

COLLISION. This action was brought by the owners of the A. H. Stevens, an American vessel, against the British ship Cleadon. A cross-action was also brought by the owners of the Cleadon, and the two actions were tried together in the Admiralty Court.

The collision took place about midnight of the 25th of March, 1860, in the Gull Stream. No point was made of the precise distance of the place of collision from the shore. The witnesses for the A. H. Stevens put the place of collision at three miles from the Gull Light; the witnesses on the other side, "off Broadstairs, between the Gull and Elbow buoys." The A. H. Stevens was

(*a*) Their Lordships' attention does not seem to have been called to the case of the *Zollverein*, Swabey, 96, which decides that a British ship meeting a foreign ship on the high seas is not bound by British law, but by the rules of the sea. This most important decision has frequently been acted upon by the Court of Admiralty. It has also been referred to with approval by Vice-Chancellor Wood in *Cope* v. *Doherty*, 4 K. & J. 375, and *General Iron Screw Collier Company* v. *Schurmanns*, 1 J. & H. 192, but with respect only to the non-obligation of the statute upon the foreigner; and by the latter case the position founded by Dr. Lushington on the non-reciprocity of the statute law may be considered as somewhat shaken.

The proposition that a steam-tug towing is bound to avoid an approaching sailing vessel is qualified by their Lordships' judgment in the *Independence*, reported *infra*, where this case is commented on and explained by Lord Kingsdown.

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close-hauled on the starboard tack, heading S. W. and making about five knots an hour. The Cleadon was in tow of the steam-tug Oracle, steering N.E. by N., and going from three to four knots an hour. The case of the A. H. Stevens was, that she sighted the green lights of both the Oracle and Cleadon together, one a little on the port bow, the other a little on the starboard bow, and kept close to the wind; that the tug, instead of porting and to wing the Cleadon clear on the port side of the A. H. Stevens, improperly crossed the hawse of the A. H. Stevens, and thereby caused the collision between the A. H. Stevens and the Cleadon, which speedily followed; that the helm of the A. H. Stevens was only put hard aport after the tug had so crossed her bows, and when the collision was imminent. The case of the Cleadon was that the green light of the A. H. Stevens was seen from the tug distant about a mile broad on the tug's starboard bow, that the vessels continuing their respective courses would have passed clear starboard to starboard, and that the collision was caused through the A. H. Stevens improperly porting her helm. It was admitted on both sides that the night was fine and clear.

In the Admiralty Court the learned Judge, in his address to the Trinity Masters, put to them two questions, 1st. Was the tug justified in holding her course and crossing the bows of the A. H. Stevens? 2ndly. Was the A. H. Stevens justified in porting her helm? The Trinity Masters found the A. H. Stevens solely to blame, and the learned Judge decreed accordingly. From this decree the owners of the A. H. Stevens appealed in both actions.

Twiss, Q.C., and *Clarkson* for the appellants.—The Stevens was close-hauled on the starboard tack, and was intitled to hold on her course, close to the wind, to the last moment, as she did. The Cleadon is liable for her management by the Oracle, the two vessels formed an extended steamer, and it was their duty to get out of the way of all sailing vessels. They might easily have avoided the Stevens, if a good look-out had been kept and they had observed her in due time. Their story is untrue as to the distance at which they allege they first descried the Stevens. By negligence the tug crossed the Stevens's bow, and then for the first time descried her when close upon the Cleadon, and a collision was inevitable; they ought to have ported long before, and passed the Stevens on the port hand. The porting of the Stevens is immaterial, it was a manœuvre adopted only at the last moment, when through the previous negligence of the tug a collison was already inevitable.

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The *Admiralty Advocate* and *Deane*, Q.C., for the respondents.—There was no duty upon the tug or the Cleadon to port, for the evidence shows that the vessels were passing clear starboard to starboard. Even the statutory rule of port helm, which the Court is inclined to enforce so rigorously, is interpreted not to apply in such circumstances, *Sylph* (*a*). The tug and the Cleadon were, as the judgment in the Court below affirms, justified in holding on their course unaltered; and if the Stevens had done the same there would have been no collision. The duty of the Stevens, as a vessel close-hauled on the starboard tack, was plain and simple, to keep on; but there was no sufficient look out, and our vessels were seen only at a short distance, and then the Stevens improperly ported her helm and so threw herself upon the Cleadon.

Judgment.

Lord Chelmsford delivered the judgment of the Court as follows:—After a careful consideration of the evidence in this case, their Lordships are enabled to arrive at certain established facts, which have led them to a satisfactory conclusion.

The collision in question took place on the 25th March, 1860, about midnight, in the Gull Stream, off Broadstairs. The A. H. Stevens was an American vessel, of 999 tons. She was a sailing-vessel, and at the time just before the collision was proceeding upon her voyage from Shields to Boston, close-hauled on the starboard tack, with her course S.W. The Cleadon, the other vessel, was towed by a steam-tug named the Oracle; she had no sails set, and her course was N.E. by N. The Stevens being a foreign vessel, was of course not bound by our regulations, but by the ordinary rules of the sea which required her, being close-hauled upon the starboard tack, if she was meeting another vessel, to keep her course. 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. Under these circumstances her rule of conduct would be our regulations, because, as already intimated, she would not be aware whether the vessel she was meeting was a foreign or a British vessel, and at all events, as she was a British vessel navigating, of course she must be governed by the rules that apply to those vessels. It was her duty, being in fact a steamer, to get out of the 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

Foreign ship governed by rules of the sea.

British ship meeting a foreign ship at night bound by British law.

Duty of a steam-tug with a vessel in tow at night to avoid other vessels.

(*a*) Swabey, 235.

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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 steam-tug had passed the bows of the *A. H. Stevens* when first sighted.

Now, this being the state of things, the two vessels came into sight; and here we are met with the usual difficulty of ascertaining the exact distance at which the vessels were seen by each other; but I think that it is quite clear, upon the whole of the evidence, that when the vessels were seen, the tug, with the Cleadon, had advanced into such a position with reference to the Stevens that it must be considered that the tug had crossed the hawse of the Stevens. Now that appears from the evidence on both sides, because, on the part of the Stevens, it is stated that when these vessels, or this vessel, as I may call it,—these combined vessels, were seen, there was a green light visible on the Stevens's starboard bow, and another green light visible on her port bow. It is unnecessary to consider whether the witnesses are accurate or not as to the number of points upon the port or starboard bow respectively on which these lights were seen; but the fact of the lights being seen upon these different bows of the Stevens appears to be confirmed by the evidence on the other side, because it is stated by the master and the pilot of the Cleadon, that they first saw the red light of the Stevens. It is stated by the master and the mate of the steam-tug, the Oracle, that they saw the green light of the Stevens. Now, if you place the vessels in the position in which they are represented to have been—the steam-tug having crossed the hawse of the Stevens, and the Cleadon being astern of her in tow, of course on the one hand from the Stevens the two lights would be seen—the two green lights—on her respective bows; and on board the Cleadon, the red light on the port side of the Stevens would probably be seen; because the Oracle having got athwart the hawse of the Stevens, she would see the light on the other side, the green light; therefore we think there is no doubt whatever that the position of the vessels, when they were first seen on each side, must have been that which was represented, that the tug had just got athwart the hawse—perhaps not speaking in technical language, but popularly,—had passed the bows of the Stevens; the Cleadon was astern, and had not passed her bows: and that was the exact position of these vessels when they became visible to each other.

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The steam-tug justified in the circumstances in not altering her course.

Now, then, under these circumstances, what was the course which each of the vessels ought to have taken? The rule with respect to the Stevens was, that she was to keep on her starboard reach, and she appears to have obeyed that rule, and to have advanced upon that course towards the other vessel. It was undoubtedly the duty of the Cleadon to have kept clear of the Stevens, and to have adopted such a course as would enable her to accomplish that object; but if, as we have reason to suppose, the two vessels came in sight of each other at a very short distance indeed, and if the position of the Cleadon, with reference to the Stevens, was that which has been represented, then, although under other circumstances it might have been her duty to have ported her helm, and so have gone clear of the Stevens, yet it appears extremely probable that if she had ported in the situation in which she is placed by the evidence, the Cleadon would have been brought by the steam-tug into collision with the Stevens; therefore the course which the Cleadon adopted appears to have been the correct one, and it seems extremely probable that if both vessels had continued upon their respective courses, no collision would have taken place.

The *A. H. Stevens* guilty of negligence in not discovering that the *Cleadon* was in tow, and to blame for porting.

The Stevens, coming on upon her starboard tack, arrives at a position with respect to the two vessels—to the tug and the Cleadon—in which, according to her own account, the tug had passed her bows, and she was in an intermediate position between the tug and the Cleadon. Now she represents that she was not aware of the fact of the Cleadon being in tow of the tug, and yet it is hardly possible to suppose that she could have been ignorant of that most important fact, considering the evidence which she herself gives of her watching the proceedings of the other vessels. The captain of the Stevens says that when he first saw the two lights, he considered that they were two vessels following each other in the same course. As one of the vessels, therefore, had arrived upon his starboard bow, crossing his bow, he would naturally have supposed, or ought to have supposed, that the other vessel following in her track would have pursued the same course, and at a certain time would have been found in the same position with reference to her. Now he advances, then, nearer to these vessels, and it is alleged that he was not at all aware—the captain was not at all aware, or the pilot—that the Cleadon was a vessel in tow of the tug. Is it possible to believe that if these persons had exercised the slightest judgment upon the subject, or had applied the smallest particle of experience to the appearance which these vessels presented, that they could have been in ignorance of that most important fact? For

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here, according to the representation of the captain of the Stevens, he found a steamer—and a large vessel, without any sails, following, as he says, in the wake of the steamer. Whether he saw the tow-rope before or after the order was given to port the helm of the Stevens may be a little questionable upon the evidence; but whether he saw the tow-rope or not, it is quite impossible to believe that he must not have been fully aware of the fact that the second vessel was a ship in tow of the steamer. Well, then, with that knowledge, pursuing the course upon the starboard tack which he had done up to that time, he had been enabled to clear the steam-tug. Could he have supposed that the Cleadon, that was following the tug in her wake, and towed by her, would be enabled to port her helm and to get out of her way? Knowing that she was in tow, he must have known, to use a familiar expression, that she was a log upon the water; that she could only move in the direction in which she was drawn by the steamer; and that, therefore, it was incumbent upon the A. H. Stevens, if the collision was to be avoided by anything done by her, either to pursue the course which she was then taking, or, instead of porting her helm, to starboard her helm, which would carry her away off the wind and away from the Cleadon. Now, instead of so doing, as is quite clear and evident, upon her own representation, she ought to have done, she put her helm hard aport, and the consequence of that was that she brought herself round three or four points, came into the starboard bow of the Cleadon, striking her stem-on a forward blow upon her starboard bow. Whether, if she had pursued her course, she would have gone clear of the Cleadon, may, perhaps, be a little questionable; but certainly the circumstances under which the blow was given, and the character of that blow, lead very strongly to the conclusion that if she had pursued the course which it is admitted it was proper for her to do, by keeping on her reach, in all probability she might have gone clear; but at all events the act of porting her helm, under the circumstances in which she was placed, was most irregular and improper, and there can be no doubt whatever that that, and that alone, occasioned the collision which has been the subject of this investigation.

Now, under these circumstances, their Lordships have come to the conclusion, with the skilful assistance which they have had upon the present occasion, that the view which was taken of this case by the learned Judge of the Court of Admiralty, assisted as he was also by persons of nautical skill, was the correct one; and therefore, inasmuch as there are cross-actions in this case, and

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the judgment of the Court of Admiralty decided both these suits against the Stevens, their Lordships think these decrees ought to be affirmed, and that the appeals in both cases should be dismissed with costs.

Decrees affirmed, with costs.

Clarkson and *Son*, proctors for the appellants.

Stokes for the respondents.

In the High Court of Admiralty.

THE EARL OF AUCKLAND.

1861. *January* 18.

Collision—Compulsory Pilotage—Pilotage Certificate—6 Geo. IV. c. 125, s. 59—17 & 18 Vict. c. 104, ss. 332, 353, 354, 355, 376, 379—17 & 18 Vict. c. 120, ss. 3, 4—Orders in Council, 18th Feb., 1854, and 16th July, 1857—Construction of Statutes in Admiralty Court.

The exemptions from compulsory pilotage given by 6 Geo. IV. c. 125, s. 59 (supplemented by Order in Council, 18th Feb., 1854), are maintained by s. 353 of the Merchant Shipping Act, 1854, and qualify ss. 376, 379, of that Act. *R.* v. *Stanton*, 8 E. & B. 445, followed.

The Order in Council, 16th July, 1857 (purporting to approve a bye-law of the Trinity House), being based on a construction of the law held erroneous by the Court of Queen's Bench, imposes no new pilotage obligation, and adds no new exemption from compulsory pilotage.

A British ship, coming from a port north of Boulogne, and carrying passengers, is not bound to employ a licensed pilot in the river Thames.

Under the 332nd section of the Merchant Shipping Act, 1854, a pilotage authority, with the consent of her Majesty in Council, has no authority to create a new penal obligation to employ a licensed pilot, but only authority to create or extend an exemption from compulsory pilotage, on condition.

Under s. 355, the Board of Trade can issue certificates to masters or mates of ships described in s. 354, and of such ships only.

A pilotage certificate issued to a master under s. 355, describing the ship as the property of a person, who was not the owner either at the time of the granting of the certificate, or at the time of a collision subsequently occurring, is invalid at the time of that collision.

In the construction of statutes the Court of Admiralty is bound to follow the decisions of the Courts of Common Law.

COLLISION. On the 1st of December, 1859, the Earl of Auckland, the vessel proceeded against, came into collision with the sea-going barge Betsy, in the river Thames. Her ordinary occupation was carrying goods and passengers between

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London and Rotterdam; and at the time of the collision she was in prosecution of a voyage from Rotterdam to London, and was carrying a general cargo, and one passenger. A licensed Trinity House pilot was in charge of her, and the Court found on the hearing, that the accident was occasioned solely by his default.

On a subsequent day (28th Nov., 1860), the question was argued whether, in these circumstances, the owners of the Earl of Auckland were liable in the damages.

William Appleton, the master of the Earl of Auckland, had, at the date of the collision, the following certificate:—

"By Order of the Lords of the Committee of Privy Council for Trade.

"*Certificate of Pilotage.*

"Whereas William West Appleton has produced satisfactory proof of having continuously piloted, from May 1st, 1853, to May 1st, 1855, a ship having a draft of water of eleven feet, within the following limits, viz., from London Bridge to Dungeness, but not into any of the intermediate ports.

In pursuance of the 355th section of the Merchant Shipping Act, 1854, we grant this certificate to William West Appleton, authorizing him, notwithstanding anything in the 354th section of the said Act contained, to pilot any ship being the property of William Henry Carey, of London, and not drawing more than eleven feet of water within the above-mentioned limits.

This certificate to be in force for one year, and no longer, unless renewed.

Given under the seal of the Board of Trade the 30th day of April, 1855.

(Registered) W. H. Walker } Officers of the
Thomas Gray } Marine Department.

Entered at the General Register and Record Office of Seamen, on the 30th day of April, 1855.

Everard Home Coleman.

Date and place of birth, 1818, Harwich, Essex.

No. of Certificate for Home Trade Passenger Ship, 120,079.

(Signature) W. W. Appleton.

Issued at the Port of London on the 1st day of May, 1855.

Everard Home Coleman.

Indorsement on back of Certificate.

Renewed for one year, pursuant to the Act 17th & 18th Vict., cap. 104, from the 1st day of May, 1856.

Everard Home Coleman, Registrar."

[Then follow three other annual renewals in like form.]

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On the 30th April, 1855, the date of the master's certificate, the ship was registered as the property of the General Screw Steam Shipping Company, Mr. Carey having, in fact, no property in her, but only acting as broker and general manager. On the 31st December, 1856, the ship was sold to Mr. Carey, and the same day resold by him to Malcolmson, Brothers, the defendants, who continued the owners to the time of the collision. On the register, however, the name of the General Screw Steam Shipping Company was suffered to remain, and Mr. Carey continued to have the management of the ship. At the time of granting the certificate Appleton was in command of another vessel belonging to the General Screw Steam Shipping Company, but had previously had command of the Earl of Auckland. In January, 1856, he was appointed to command the Earl of Auckland, and continued her master to the time of the collision. At the date of granting the certificate he had inserted the name of Mr. Carey as owner, regarding him as such.

The river Thames is within the London District, as defined by the 370th section of the Merchant Shipping Act, 1854, and is within the limits of the Trinity House authority.

The following are the principal enactments referred to in the argument and judgment:—

6 Geo. IV. c. 125, s. 59. Provided always, and be it further enacted, that, for and notwithstanding anything 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 by the North Channel, but not otherwise) (*a*), 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 within the limits of the 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

(*a*) *Sic.*

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.

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Order in Council, 18*th February*, 1854.

Regulation for the extension of the exemptions from compulsory pilotage now existing under the provisions of the 59th section of the Act 6 Geo. IV. c. 125. Approved by Order of her Majesty in Council, dated 18th February, 1854.

"The masters of the under-mentioned ships and vessels shall, subject to the provision contained in the 59th section of the act of parliament, 6th Geo. IV. c. 125, in respect of the employment of unlicensed persons, be exempted from compulsory pilotage, viz.:

Of ships and vessels trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, when coming up by the south channels:

Of ships and vessels trading to ports between Boulogne (inclusive) and the Baltic on their outward passages, and when coming up by the south passages:

Of ships and vessels passing through the limits of any pilotage district on their voyages from one port to another port, and not being bound to any port or place within such limits, nor anchoring therein."

Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104).

S. 3. This Act shall come into operation on the first day of May, 1855.

S. 332. Every pilotage 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 exemptions, and to revise and extend any exemptions now existing by virtue of this act or any other act of parliament, law or charter, or by usage, upon such terms and conditions, and in such manner as may appear desirable to such authority.

Compulsory Pilotage (*General*).

S. 353. Subject to any alteration to be made by any pilotage authority, in pursuance of the power hereinbefore in that behalf given, the employment of pilots shall continue to be compulsory in all districts in which the same was by law com-

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pulsory 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 so to do, 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.

S. 354. The master of every ship carrying passengers between any place situate in the United Kingdom, or the islands of Guernsey, Jersey, Sark, Alderney, and Man, and any other place so situate, when navigating upon any waters situate within the limits of any district for which pilots are licensed by any pilotage authority under the provisions of this or of any other Act, or upon any part thereof so situate shall, unless he or his mate has a pilotage certificate, enabling such master or mate to pilot the said ship within such district, granted under the provisions hereinbefore contained, or such certificate as next hereinafter mentioned, being a certificate applicable to such district and to such ship, employ a qualified pilot to pilot his ship; and if he fails so to do he shall for every offence incur a penalty not exceeding one hundred pounds.

S. 355. Any master or mate of a ship, which by the last preceding section is made subject to compulsory pilotage, may apply to the Board of Trade for a certificate, and the Board of Trade shall thereupon, on satisfactory proof of his having continuously piloted any ship within the limits of any pilotage district, or of any part or parts thereof, for two years prior to the commencement of this Act, or upon satisfactory proof by examination of his competency, or otherwise, as it may deem expedient, cause to be granted to him, or to be indorsed on any certificate of competency or service obtained by him under the third part of this Act, a certificate to the effect that he is authorized to pilot any ship or ships belonging to the same owner, and of a draft of water not greater than such draft as may be specified in the certificate within the limits aforesaid; and the

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said certificate shall remain in force for such time as the Board of Trade directs, and shall enable the master or mate therein named to conduct the ship or ships therein specified, within the limits therein described, to the same extent as if the last preceding section had not been passed, but not further or otherwise; and every such master or mate shall, upon applying for such certificate or for any renewal thereof, pay to the Board of Trade, or as it directs, such fees not exceeding the fees payable on an examination for a master's certificate of competency under the third part of this Act as the Board of Trade directs; and such fees shall be applied in the same manner in which the fees payable on such last-mentioned examination are made applicable.

Compulsory Pilotage (*Trinity House*).

S. 376. Subject to any alteration to be made by the Trinity House and to the exemptions hereinafter contained, the pilotage districts of the Trinity House, within which the employment of pilots is compulsory, are the London district and the Trinity House outport districts, as hereinbefore defined; and the master of every ship navigating within any part of such district or districts, 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 certificate enabling him so to do, or employs or continues to employ an unqualified person to pilot her, shall for every such offence, in addition to the penalty hereinbefore specified, if the Trinity House certify in writing, under their common seal, that the prosecutor is to be at liberty to proceed for the recovery of such additional penalty, incur an additional penalty, not exceeding five pounds, for every fifty tons burden of such ship.

S. 379. The following ships, when not carrying passengers, shall be exempt from compulsory pilotage in the London district and in the Trinity House outport districts; (that is to say,)

(1) Ships employed in the coasting trade of the United Kingdom:

(2) Ships of not more than sixty tons burthen:

(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:

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(6) Ships passing through the limits of any pilotage district on their voyages between two places both situate out of such limits, and not being bound to any place within such limits, nor anchoring therein.

Merchant Shipping Repeal Act, 1854 (17 & 18 *Vict. c.* 120).

S. 3. With the exception of such provisions of this Act as are hereinafter expressly stated to be intended to come into operation immediately after the passing thereof, this Act shall come into operation at the same time as the Merchant Shipping Act, 1854.

S. 4. There shall be hereby repealed—

The several Acts and parts of Acts set forth in the first schedule hereto, to the extent to which such Acts or parts of Acts are therein expressed to be repealed, and all such provisions of any other Acts or of any charters, and all such laws, customs, and rules as are inconsistent with the provisions of the Merchant Shipping Act, 1854:

Provided that such repeal shall not affect—

(1) Any provisions contained in the Act of the seventh year of his late Majesty King William the Fourth, chapter seventy-nine, as to title, application of purchase-money, or borrowing money, and having relation to the power of purchasing lighthouses, given to the Trinity House by the same Act:

(2) Any security duly given before this Act comes into operation:

(3) Anything duly done before this Act comes into operation:

(4) Any liability accruing before this Act comes into operation:

(5) Any liability, forfeiture, or other punishment incurred, or to be incurred, in respect of any offence committed before this Act comes into operation:

(6) The institution of any investigation, or legal proceeding, or any other remedy for ascertaining, enforcing, or recovering any such liability, penalty, forfeiture, or punishment, as aforesaid:

(7) Any appointment, bye-law, regulation, or licence, duly made or granted under any enactment hereby repealed, and subsisting at the time when this Act comes into operation, and the same shall continue in force, but shall be subject to such provisions of the

Merchant Shipping Act, 1854, as are applicable thereto respectively.

[In the schedule, among the Acts to be repealed is specified 6 Geo. IV. c. 125. Extent of repeal, the whole Act.]

S. 6. The fourth and ninth sections of "The Pilotage Law Amendment Act, 1853," shall be construed as if the fifth part of the Merchant Shipping Act, 1854, were therein referred to, in lieu of the Act of the sixth year of King George the Fourth, chapter one hundred and twenty-five.

Order in Council, 16th July, 1857.

[After reciting s. 379 of the Merchant Shipping Act, *verbatim*, as above.] "And whereas it is expedient that such ships as aforesaid shall be exempted from compulsory pilotage, as well when carrying passengers as when not carrying passengers, and [reciting s. 332 as above]; and whereas the Trinity House, as a pilotage authority under the said Act, has submitted for the consent of her Majesty in Council the following bye-law, viz.:

> 'That all ships mentioned in the 379th section of 'The Merchant Shipping Act, 1854,' shall be exempted from compulsory pilotage in the London district, and in the Trinity House outport districts, as well when carrying passengers as when not carrying passengers, provided, as regards any such ship when carrying passengers, the master or his mate have a pilotage certificate in force for the time being, enabling such master or mate to pilot such ship within such district or districts, granted under the provisions either of the 340th or of the 355th section of the said Act.'

And whereas it has been made to appear to her Majesty that the said bye-law is proper and reasonable:

Now, therefore, her Majesty, by virtue of the power vested in her by the said recited Act, and by and with the advice of her Privy Council, is pleased to approve, and doth hereby approve and signify her consent to, the said bye-law, as a bye-law of the Corporation of the Trinity House of Deptford Strond."

In *R.* v. *Stanton* (*a*), decided on the 11th November, 1857, the Court of Queen's Bench held that on the 28th of June, 1857, the uncertificated master of a ship carrying passengers from London to Copenhagen, was not liable to a penalty for conducting himself the ship in the river Thames.

(*a*) 8 E. & B. 445.

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Deane, Q C., and *Lushington*, for the Earl of Auckland.—First, as to the certificate of the master. It is void, because it describes the ship as the property of Mr. Carey, which was not the fact. These words cannot be rejected as immaterial, because s. 355, under which the certificate was granted, imposes the condition "belonging to the same owner," which must mean that the name of the true owner is to be specified; the same condition is also found in s. 340, which applies to certificates granted by pilotage authorities. It may be true that the mistake arose through the master, but he was not bound to the plaintiffs to obtain or have a valid certificate, nor was he the agent of the defendants in obtaining it, so as to bind them. Secondly, as to the main point, apart from the certificate, the taking of a pilot was compulsory by the Merchant Shipping Act, 1854. Looking at the statute alone, without reference to the decision of *R.* v. *Stanton* (*a*), it plainly appears that ss. 376—379 provide as the heading says, and provide completely for compulsory pilotage within the Trinity House district. S. 376 makes pilotage compulsory on every vessel navigating that district, "subject to any alteration to be made by the Trinity House, and to the exemptions *hereinafter* contained," which exemptions are then stated in s. 379, and do not include the present case, inasmuch as the Earl of Auckland, though trading to the north of Boulogne, was carrying passengers. To say upon any argument that the vessel was exempt, is to make in s. 379 the words "when not carrying passengers" a mere nullity, which words were clearly introduced to maintain for the lives of passengers the protection of a pilot of ascertained skill. It is true there was only one passenger on board, but it would be an absurd construction to say that the Act intended to make the employment of a pilot compulsory if two passengers were carried, but not compulsory, if only one was carried. Besides it is submitted that "ships when not carrying passengers" means "ships not employed in the passenger trade." If a ship took according to custom her pilot from the dock, and her passengers in the river, with only so much delay as was necessary to embark the passengers, is the owner not to be protected from loss occasioned by the pilot's default in going from the dock to the river? *Rodrigues* v. *Melhuish* (*b*). Or if the passengers are discharged in the course of the voyage, the pilot necessarily remaining on board, does the employment of the pilot thereupon cease to be compulsory? The plaintiffs, however, will rely upon s. 353 of the Merchant Shipping Act, and the interpretation put upon it by the Queen's Bench in *R.* v. *Stanton*. They will say that,

(*a*) 8 E. & B. 445. (*b*) 10 Exch. 117.

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by s. 353, all exemptions as well in the Trinity House district, as in other districts, which were existing "immediately before the passing of the Act" continue in force, that the exemptions given by s. 59 of 6 Geo. IV. c. 125, were then existing, and are therefore continued, and that they include the present case, the Earl of Auckland being a British vessel trading to a port between Boulogne and the Baltic. We may admit that the exemptions given by 6 Geo. IV., supplemented by the Order in Council of 18th February, 1854,—if now binding,—cover the case, but we say they were not binding at the time of the collision. The question turns on the interpretation of s. 353 of the Merchant Shipping Act, which again turns on the interpretation of other sections of that Act and the Merchant Shipping Repeal Act, 1854 (17 & 18 Vict. c. 120), and the 6 Geo. IV. c. 125, s. 59, all read together. The decision in *R.* v. *Stanton*, it must be admitted, is in favour of the plaintiffs (except that the proceeding there was actually for the penalty); but we submit that the decision is erroneous, being founded on the case being imperfectly argued, and therefore ought not to be binding in this Court. It appears from the report of the argument and the judgments, that the learned Judges based their decision entirely on the two admissions made by the counsel who argued for the penalty, viz., that s. 353 of the Merchant Shipping Act revives the exemptions given by the Act of Geo. IV., and is to be read as qualifying ss. 376, 379. Thus Lord Campbell, C. J., says, "We are called upon to say that the Act of Parliament by an implication by no means necessary imposes a penalty in s. 379. Mr. Saunders properly allows that s. 353 continues the exemption of 6 Geo. IV. c. 125, s. 59. It does so in all the original latitude of the exemption. Mr. Saunders therefore admits that he finds nothing to aid him till he comes to s. 379. That extends an exemption, but it adds no penalty." The premiss granted, viz., that s. 353 revives the exemption of 6 Geo. IV., and that the penalty is to be looked for only in s. 379, the conclusion is irresistible; but we deny the premiss. S. 353 does not revive or re-enact s. 59 of 6 Geo. IV. That Act was wholly repealed by the 4th section of the Merchant Shipping Repeal Act; and by the 6th section even a reference to it was abolished. Again, reading s. 59 of 6 Geo. IV. with s. 379 of the Merchant Shipping Act, it appears impossible to hold it was intended that the two should consist together; the one re-enacts the other item by item, with evidently purposeful exceptions and additions, upon the most important of which, the new condition "when not carrying passengers" we have already

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commented. Again in s. 353 the words "then existing" may refer to their nearest antecedent "the time when the Act comes into operation," in which case the 6 Geo. IV. could not be imported into the Merchant Shipping Act,—rather than to the whole phrase "immediately before the time when, &c.," and this artificial construction should be adopted rather than defeat the important intention of the statute. But whether this be so or not is immaterial, because the 3rd section of the Repeal Act, "This Act shall come into operation at the *same time* as the Merchant Shipping Act, 1854" cannot be literally interpreted; by the necessity of the case "at the same time as" must mean "immediately before." It is impossible that the Merchant Shipping Act and the Acts repealed by the Repeal Act could co-exist a moment; the old law must cease before, *i. e.*, immediately before the new law begins to operate. It is like the case of the old year and the new year, the old king and the new king, and other cases of immediate succession. Adopting this interpretation of the words "at the same time as" in the Repeal Act, the 6 Geo. IV. was not existing "immediately before the coming into operation of the Merchant Shipping Act," as the Repeal Act intervened. This is the only construction which satisfies the cogent terms of ss. 4 and 6 of the Repeal Act, and ss. 376, 379 of the Merchant Shipping Act; and it does not nullify the general provision in s. 353 "all exemptions then existing, &c.," which will apply to other districts than the Trinity House, as Newcastle, Hull, Liverpool, &c., which are not provided for by the Merchant Shipping Act. The case of the *Temora* (*a*) is in favour of this view. That was the case of a home-trade passenger ship belonging to the class mentioned in s. 354, and navigating the river Thames, and the Court held, with the view of maintaining the compulsory pilotage, that s. 59 of 6 Geo. IV., if revived by s. 353, according to the decision in *R.* v. *Stanton*, did not affect s. 354. There are still stronger reasons of the same kind against it affecting ss. 376, 379, because they belong to another and specific portion of the Act, "Compulsory Pilotage (Trinity House)," whereas s. 354 is not only next to s. 353, but belongs to the same portion of the Act, "Compulsory Pilotage (General)." As to the bye-law, confirmed by her Majesty in Council, dated 16th July, 1857, it was not brought before the notice of the Queen's Bench in *R.* v. *Stanton*. It did not govern that case, as the act complained of occurred previously, but it is clear that it adopts and is founded upon the view of the law now submitted by the de-

(*a*) Ante, p. 17.

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fendants, viz., that the portion of the Act intitled "Compulsory Pilotage (Trinity House)" is entirely independent of the portion "Compulsory Pilotage (General)," and that a vessel circumstanced like the Earl of Auckland was by the statute compelled to take a pilot. We contend, further, that, by implication, the bye-law positively takes away the exemption supposed by the Court of Queen's Bench to continue, and that it had the warrant so to do under s. 332 of the Act, which gives authority to "revise and extend" exemptions. "Revise" is distinguished from "extend," and cannot be interpreted simply to "maintain." In all these circumstances we contend that *R.* v. *Stanton* would not now be upheld by the Court of Queen's Bench, and is not binding on this Court.

Twiss, Q.C., and *Clarkson*, contrà.—The ship was exempt, because "not carrying passengers;" she had only one passenger on board, and a penal enactment must be construed strictly. Then as to the certificate. The misdescription of ownership is immaterial. The draft of water of the ship, and the examination of the master, are the only essential statements to lead the certificate. If the ship changes hands during the year, does the certificate of the master become invalid? As to the construction of s. 353 of the Merchant Shipping Act, that has been expressly decided by the Court of Queen's Bench against the view of the defendants, and that decision was referred to with approbation by this Court in the *Temora*. In the construction of a statute, as there observed, the Court of Admiralty is bound to follow the Courts of Common Law. The decision is also clearly right. S. 353 maintains all existing obligations to take a pilot, and all existing exemptions; and the word "then," in reference to exemptions, must relate to the time which is applicable to obligations, viz., "immediately before the time when the Act comes into operation." The argument of the defendants on the words "at the same time as" in the 3rd section of the Merchant Shipping Repeal Act, does violence to plain terms. The Repeal Act and the Merchant Shipping Act must be read together as one Act; if they were in fact one act, the objection could not even be taken. The 353rd section modifies ss. 376, 379, which apply only to the Trinity House district: "Compulsory Pilotage (General)" includes all compulsory pilotage, and the section expressly speaks of "all districts" and afterwards of "any such district," and the only reservation expressed is "subject to any alteration to be made by any pilotage authority in pursuance of the power hereinbefore given." S. 379 takes away no exemption from the ships therein described when carrying passengers; still less does it impose an obligation with a penalty. The words "when

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not carrying passengers" may be rejected as immaterial, at any rate as insufficient to create a penal obligation. So the expression in s. 376, "subject to the exemptions hereinafter contained," does not exclude exemptions otherwise given; it does not repeal s. 353. As to the Order in Council, 18th Feb., 1857, even if it adopts the construction of the statute contended for by the defendants, that avails not; a Court of law is the only conclusive interpreter of law. The order does not profess to *impose a new obligation;* it professes only to revise and extend existing exemptions on condition; from such language a new penal obligation cannot possibly be inferred. The pilotage authority and her Majesty in Council had no power, in fact, to impose a new independent obligation; s. 332 only gives authority "to exempt and annex any terms or condition to *such* exemptions," and "to revise and extend any exemptions now existing." Any condition imposed therefore must attach upon a new exemption, not upon an old statutory exemption. "Revise" does not mean to "abridge," the expression is "revise *and* extend," not "revise *or* extend," and "revise" probably here means only consolidate or confirm. The result is that the Order in Council, being based upon a mistaken conception of the law, is simply futile; it neither adds to, nor takes away from, the existing law. By that law pilotage was not compulsory on the Earl of Auckland.

On the 18th of January, 1861, Dr. Lushington delivered judgment:—

Judgment.

The vessel proceeded against in this case, the Earl of Auckland, was a steamer engaged in trade between the ports of 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, she came in collision with a vessel called the Betsy; at that time she had on board a licensed pilot. The Court, with the advice of the Trinity Masters, has held that the blame of the collision is solely attributable to the default of the pilot. The question is therefore whether, under the circumstances, the owners of the Earl of Auckland are liable for the damage. They are liable, unless it was compulsory on the ship by law to employ the pilot.

The proof is upon the defendants. They say that, by the Merchant Shipping Act, 1854, and a certain Order in Council, they were compelled to employ the pilot; the plaintiffs deny this, and say further, that, if the statute or Order in Council imposed such an obligation, it was removed by the certificate of the master granted by the Board of Trade. To this the defendants reply.

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that the certificate was void. These at least are the questions which have been discussed in argument.

Construction of 17 & 18 Vict. c. 104, s. 353, with 6 Geo. 4, c. 125, s. 59.

The river Thames, where the vessel was navigating, is within the Trinity House district as defined by the 370th section of the Merchant Shipping Act; and the 376th section makes it generally compulsory, under a penalty, upon every vessel therein navigating, to employ a licensed pilot. To this, however, there are exceptions, or, as they are called, exemptions, and the counsel for the defendants say they are to be looked for in section 379, and there only. The 353rd section of the same Act enacts, "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." The word "then" here used clearly means "immediately before" the time of the Act coming into operation. Now up to the time of the Merchant Shipping Act coming into operation, the old Pilot Act, 6 George IV., c. 125, was in force; it was repealed by the Merchant Shipping Repeal Act, 17 & 18 Vict. c. 120, which by the 3rd section is appointed to come into operation at the *same time* as the Merchant Shipping Act, 1854. By the 59th section of the act of George IV., vessels under the following circumstances were exempted from compulsory pilotage, namely, British ships coming inwards from ports between Boulogne and the Baltic by the North Channel; and, by Order in Council of the 18th of February, 1854, that exemption was extended to ships trading between Boulogne and the Baltic on their outward voyages, and when coming up the south passage. The united effect of the statute and the Order in Council would be to confer on all vessels trading between Boulogne and the Baltic, whether coming up by the North or South Channel, the privilege of exemption from compulsory pilotage. No distinction is made between ships carrying passengers and ships not carrying passengers. This exemption, therefore, was in force immediately before the Merchant Shipping Act, 1854, and the question is not whether it continues in force by virtue of the statute of George IV., which it clearly does not, for that statute is repealed by the Merchant Shipping Repeal Act, but whether it does not continue in force by virtue of the 353rd section of the Merchant Shipping Act which I have stated. The language of that section itself is clear and unambiguous, that all existing exemptions shall continue; but immediately previous to the section are to be found these words by way of heading, "Compulsory Pilotage (General)."

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It may be a question what is the meaning of these words, especially with reference to the heading preceding the 376th section "Compulsory Pilotage (Trinity House);" they may include the latter or they may not. But apart from these particular words, I cannot doubt that, upon the true construction of s. 353 alone, the exemption given in the act of George IV. is continued.

Ss. 376 & 379 of 17 & 18 Vict. c. 104, considered.

The Court is bound by the decision of the Queen's Bench in *R.* v. *Stanton*.

But it has been contended that the Court must come to a different conclusion, by reason of the 376th and 379th sections of the Merchant Shipping Act. The first answer to this argument is, that the Court of Queen's Bench has had before it this same question; *R.* v. *Stanton* (*a*):—whether in a matter of penalty or not signifies little,—and the Court has construed the statute to continue the exemption. Now, in the construction of a statute, it is an established rule that the Court of Admiralty shall act in conformity with the decisions of the Courts of Common Law, and for strong and wise reasons, too apparent to require comment. To this rule I am bound to adhere, and nothing short of a conviction that the Court of Common Law had been misled by the misrepresentation or concealment of facts so palpable, that they would repudiate their own judgment if the case came again under their consideration, would induce me to depart from the rule. It is my duty to bow to the judgment of the Court of Queen's Bench. It is true that the intention of the legislature might have been expressed in less ambiguous language. The object might have been effected by enacting that all ships trading from the described ports, whether with or without passengers, should be exempted, but this would have been a reiteration of the 353rd section. I will add, however, that in my mind the difficulty, if any, arises from the circumstance I have mentioned, not, so far as I know, discussed in the Queen's Bench, that the 353rd section is intitled "Compulsory Pilotage (General)," and the 376th "Compulsory Pilotage (Trinity House)." It may be that the legislature did not intend the 353rd section to embrace the Trinity House district, but left that district to the operation of the 376th and following sections. The Court of Queen's Bench, however, did not take this view, and I cannot differ from its judgment. Apart, however, from this consideration, there is not that repugnance created by the 376th and 379th sections which could affect the construction of the 353rd, so as to take away an exemption given by it. If the case rested here, the result would be that

And the employment of the

(*a*) 8 E. & B. 445.

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the taking the pilot was not compulsory, and consequently the owners of the Earl of Auckland would be liable for the damage.

pilot was not compulsory by statute.

But since the date of the transaction which came under the consideration of the Court of Queen's Bench, an Order in Council, bearing date 16th July, 1857, has been issued. This Order in Council derives its authority from the 332nd section of the Merchant Shipping Act. What is the meaning and effect of this Order? I will first ascertain it by reference to its own contents only. The Order first recites the 379th section of the Merchant Shipping Act, which enacts that certain classes of ships, *when not carrying passengers*, shall be exempt from compulsory pilotage in the London and Trinity House outport districts: then it recites that it is expedient that such ships as aforesaid shall be exempted *when carrying passengers*, as when not carrying passengers; then recites the 332nd section of the same Act, which gives power to make bye-laws, and to exempt from compulsory pilotage under condition. The Order then confirms a proposed bye-law, which exempts all ships mentioned in the 379th section of the Merchant Shipping Act from compulsory pilotage in the London and Trinity House outport districts when carrying passengers, provided the master or mate have a pilotage certificate. Looking at the contents of this Order alone, I cannot perceive that there is the least doubt as to what is its true meaning. It proceeds upon the assumption that ships on the described voyages, not carrying passengers, were exempt from compulsory pilotage, that carrying passengers they were not exempt, and it exempts them on condition. But here comes the difficulty. The Court of Queen's Bench has said that such ships on the described voyages, though carrying passengers, are exempt from compulsory pilotage by the statute,—so that the foundation of this Order fails. Then if the Order merely exempted them, it is a nullity, it does nothing. But it purports to exempt upon condition. Is that condition validly and absolutely imposed by this Order in Council? Or is the whole Order in Council a nullity? It is my belief that this Order in Council was issued upon the foundation, if I may use such a term, that the 353rd section did not apply to compulsory pilotage in the Trinity House district, but upon the supposition that the Trinity House district was governed by the 376th and following sections, and consequently that ships exempted by s. 379 when not carrying passengers, were not exempt when carrying passengers. Unless this Order was framed upon such a supposition and for such a purpose, I am utterly unable to understand why it was issued or what object it

Effect of Order in Council, July 16, 1857, considered.

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was intended to attain. But, however this may be, I cannot bring myself to believe that the condition imposed by the Order was not intended to take effect; and thus arises this question, assuming the decision of the Court of Queen's Bench to be right, or that ships within the description carrying passengers were exempt without condition, then was it competent by Order in Council to impose a condition which had not previously existed? This question depends upon the 332nd section of the Act, which grants power to every pilotage authority by bye-law and consent of her Majesty in Council to grant exemptions and to annex any terms or conditions to such exemptions, and to *revise and extend* existing exemptions. It is clear, I think, that if the ships in the described districts carrying passengers were not exempt from compulsory pilotage, this Order in Council would be effectual, and the condition annexed binding; but if, as decided by the Court of Queen's Bench, they were already exempt by the 353rd section, I have great doubt whether the 332nd section enables a pilotage authority, with the assent of the Privy Council, to annex a condition. Upon this view of the case the Order in Council does not grant an original exemption, nor does it revise and extend any previous exemption. In one sense of the word, indeed, it may be said to revise the exemption, but it certainly does not extend, for it restricts; and I question whether it is competent to "revise" by annexing a condition not before existing. I come to the conclusion, therefore, that this Order in Council has no operative effect.

The Order in Council not operative.

The pilotage certificate of the master invalid.

I will consider, however, with a view to exhaust this case, for the moment that the Order in Council is operative, and the condition absolutely imposed. The question then arises whether that condition has been fulfilled or not, namely, whether the master of this vessel had a pilotage certificate in force, granted under the provisions either of the 340th or 355th sections of the Merchant Shipping Act. The 340th section gives power to pilotage authorities, that is to say, the London Trinity House and other authorities coming within the definition in the 2nd section, to issue certificates to masters or mates, each certificate enabling the holder to pilot ships specified therein. The 355th section enables the Board of Trade to grant certificates to masters or mates of ships, which by the section immediately preceding, the 354th, are made subject to compulsory pilotage. Now the certificate in issue in this case was issued by the Board of Trade, and purports to be issued under the 355th section of the Act. How is the Earl of Auckland included in the class of ships specified in the 354th section? For if not so in-

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cluded, no certificate from the Board of Trade will avail. The terms of the 354th section, "every ship carrying passengers between any place situate in the United Kingdom or the Islands of Guernsey, Jersey, Sark, Alderney and Man, and any other place so situate," do not, they cannot include a voyage between Rotterdam and London. But again, for I do not wish to leave questions that have been argued by counsel, there is another flaw in this certificate. The 355th section enacts, that a certificate issued by the Board of Trade shall authorize the holder to pilot any ship or ships "belonging to the same owner," and of a certain draft of water. The certificate actually held by the master authorized him to pilot "any ship being the property of William Henry Carey, of London, and not drawing more than eleven feet of water." It originally bore date on April 30, 1855, and was renewed from year to year, annually on 1st May, the last renewal bearing date 1st May, 1860. Now it is clear that neither at the time of the collision, nor at the date of the original certificate, nor at the time of any of the renewals was the ship the property of Mr. Carey. Mr. Carey was only the broker and manager of the ship, and hence the mistake; the fact being, that at the time of the certificate being granted the ship was the property of the General Screw Steam Shipping Company, that on the 31st of December, 1856, it was transferred to Mr. Carey, and the same day re-transferred to Messrs. Malcolmson, Brothers, who continued the owners up to the time of the collision, though on the Register the name of the General Screw Steam Shipping Company still remained. The certificate therefore contains a misdescription of the ship's ownership. What is the effect of this misdescription? I am of opinion that the terms of the 355th section "any ship or ships belonging to the same owner" necessarily infer that the name of the owner should be mentioned, and that this certificate therefore cannot be considered a certificate granted in compliance with the terms of the statute. It may be true, indeed, that the most essential statement in the certificate is the statement of the master's examination, but I conceive the object of the specification is to prevent the master acting as pilot for any ship that does not belong to the owner specified. For these reasons I am of opinion that this certificate was invalid to permit the master to pilot the Earl of Auckland, first, because no such certificate could be granted by the Board of Trade, and secondly, because it contained an erroneous statement of ownership.

According to my view, however, it is really unnecessary for the decision of this case to consider the certificate at all. By the

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judgment of the Court of Queen's Bench this vessel was exempt by the statute from compulsory pilotage, and I cannot hold that this exemption was narrowed by implication from the Order in Council of 16th July, 1857. I must, therefore, upon consideration of all the circumstances, come to the conclusion that the employment of the pilot was not compulsory, and that the owners of the Earl of Auckland are liable for the damage. I must condemn them in that damage and in the costs up to and including the hearing before the Trinity Masters. With regard to subsequent costs I shall leave each party to pay his own costs.

Clarkson, proctor for the Betsy.

Rothery, proctor for the Earl of Auckland.

THE JOHANNES.

Salvage of Life from a Foreign Ship on the High Seas—17 & 18 *Vict. c.* 104, *ss.* 458, 459, 460, 476—*Application of British Statutes to Foreigners out of Jurisdiction.*

The Court of Admiralty has no original jurisdiction to award salvage for the saving of life only; and the Merchant Shipping Act, 1854, does not give the Court jurisdiction over salvage of life only performed on the high seas, at a distance of more than three miles from the shore of the United Kingdom, at least if the ship from which the lives are saved is a foreign ship. It is immaterial to this question that before action the ship has been brought by other salvors into a British port.

Operation of British statutes upon foreigners out of the jurisdiction considered.

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SALVAGE. This was an action brought by some Yarmouth smacksmen against the Prussian vessel, the Johannes, and her owners, Prussian subjects, intervening. The petition stated that the salvors had fallen in with the vessel seventy miles eastward of Yarmouth, a wreck, and had taken off from her five of the crew, and brought them into Hull; that the vessel had afterwards been brought into Grimsby by other salvors. The admission of this petition was now opposed.

The following sections of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), are referred to in the arguments and judgment:—

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"*Salvage in the United Kingdom.*

S. 458. "In the following cases, (that is to say,)

Whenever any ship or boat is stranded or otherwise in distress on the shore of any sea or tidal water situate within the limits of the United Kingdom, and services are rendered by any person,

(1) In assisting such ship or boat:

(2) In saving the lives of the persons belonging to such ship or boat:

(3) In saving the cargo or apparel of such ship or boat, or any portion thereof:

And whenever any wreck is saved by any person other than a receiver within the United Kingdom:

There shall be payable by the owners of such ship or boat, cargo, apparel or wreck, to the person by whom such services or any of them are rendered or by whom such wreck is saved, a reasonable amount of salvage, together with all expenses properly incurred by him in the performance of such services or the saving of such wreck, the amount of such salvage and expenses (which expenses are hereinafter included under the term salvage) to be determined in case of dispute in manner hereinafter mentioned."

S. 459. "Salvage in respect of the preservation of the life or lives of any person or persons belonging to any such ship or boat as aforesaid shall be payable by the owners of the ship or boat in priority to all other claims for salvage; and in cases where such ship or boat is destroyed, or where the value thereof is insufficient, after payment of the actual expenses incurred, to pay the amount of salvage due in respect of any life or lives, the Board of Trade may in its discretion award to the salvors of such life or lives out of the Mercantile Marine Fund such sum or sums as it deems fit, in whole or part satisfaction of any amount of salvage so left unpaid in respect of such life or lives."

S. 460. "Disputes with respect to salvage arising within the boundaries of the Cinque Ports shall be determined in the manner in which the same have hitherto been determined; but whenever any dispute arises elsewhere in the United Kingdom between the owners of any such ship, boat, cargo, apparel or wreck as aforesaid, and the salvors, as to the amount of salvage, and the parties to the dispute cannot agree as to the settlement thereof by arbitration or otherwise,

Then, if the sum claimed does not exceed two hundred pounds,

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Such dispute shall be referred to the arbitration of any two justices of the peace resident as follows; (that is to say,)

In case of wreck, resident at or near the place where such wreck is found:

In case of services rendered to any ship or boat, or to the persons, cargo or apparel belonging thereto, resident at or near the place where such ship or boat is lying, or at or near the first port or place in the United Kingdom into which such ship or boat is brought after the occurrence of the accident by reason whereof the claim to salvage arises:

But if the sum claimed exceeds two hundred pounds,

Such dispute may, with the consent of the parties, be referred to the arbitration of such justices as aforesaid, but, if they do not consent, shall in England be decided by the High Court of Admiralty of England, in Ireland by the High Court of Admiralty of Ireland, and in Scotland by the Court of Session; subject to this proviso, that if the claimants in such dispute do not recover in such Court of Admiralty or Court of Session a greater sum than two hundred pounds, they shall not, unless the Court certifies that the case is a fit one to be tried in a superior Court, recover any costs, charges or expenses incurred by them in the prosecution of their claim:

And every dispute with respect to salvage may be heard and adjudicated upon on the application either of the salvor or of the owner of the property salved, or of their respective agents."

"*Jurisdiction of the High Court of Admiralty.*

S. 476. "Subject to the provisions of this Act, the High Court of Admiralty shall have jurisdiction to decide upon all claims whatsoever relating to salvage, whether the services in respect to which salvage is claimed were performed upon the high seas, or within the body of any county, or partly in one place and partly in the other, and whether the wreck is found at sea or cast upon the land, or partly in the sea and partly on land."

Lushington against the petition.—Admitting the facts as alleged in the petition, the Court has no power to give reward for the saving of life only from a foreign ship on the high seas. Apart from statute, the Court certainly has no such power, even

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where the ship is a British ship; that was decided in the *Zephyrus* (*a*), overruling the judgment of Sir John Nicholl in the *Queen Mab* (*b*). The statute 9 & 10 Vict. c. 99, (s. 19,) made salvage payable for the saving of life, but this provision was never appealed to in the Court of Admiralty, as Mr. Dowdeswell suggests in his edition of the Merchant Shipping Act, p. 193, because the Act did not prescribe by whom the money was payable, or how the payment was to be enforced; and the whole Act is now repealed by the Merchant Shipping Repeal Act (17 & 18 Vict. c. 120, s. 4). The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), no doubt, by the sections 458, 459, makes salvage payable by the owners of the ship for the saving of human life, and in priority to all other claims for salvage; but only where the services have been rendered in the United Kingdom. These and the following sections are headed "Salvage in the United Kingdom," the same terms are often repeated in the sections, and with respect to the 460th section, the Court has held in the *Leda* (*c*), the *Actif* (*d*), and other cases, that it applies only to salvage rendered within three miles of the shore of the United Kingdom. The only reported cases in which salvage has been given for the saving of life only, are the *Bartley* (*e*), and *Coromandel* (*f*), and in both those cases the salvage was from a British ship, apparently within British waters. Section 476 no doubt gives jurisdiction in very large terms, but it is submitted does not extend to salvage of life on the high seas from a foreign ship. It is only a re-enactment of the 40th section of the 9 & 10 Vict. c. 99, which never was supposed to carry jurisdiction to this peculiar case. The British legislature has properly no authority to make laws respecting the rights of foreigners on the high seas, and therefore any construction of a statute is to be preferred to one which would make Parliament exercise an usurped power. In the *Zollverein* (*g*), the leading case which decided that the statutory rule of port-helm was not applicable to the case of a collision between a British and a foreign ship on the high seas, the Court said, "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 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.

(*a*) 1 W. R. 329.
(*b*) 3 Hagg. 242.
(*c*) Sw. 42.
(*d*) Sw. 237.
(*e*) Sw. 198.
(*f*) Sw. 205.
(*g*) Sw. 97.

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The words of the section are in themselves ample, but they must be limited by the general limits of the power of the legislature." That case was referred to, and the principle acted upon, in *Cope* v. *Doherty* (*a*), and the *General Iron Screw Collier Company* v. *Schurmanns* (*b*). There is no difficulty, if in this section the expression "salvage" receives its ancient and well-recognized meaning, services saving ship. To hold otherwise is to render the local limitations so carefully enacted in ss. 458, 460, wholly inoperative. The subsequent saving of the ship by other salvors, and bringing her into an English port, cannot affect the question of jurisdiction, being altogether independent of the services of the plaintiffs.

Deane, Q.C., contrà.—The Court has jurisdiction by the joint operation of ss. 458, 459, 460, and 476 of the Merchant Shipping Act. S. 476 gives jurisdiction over "all claims whatsoever relating to salvage, for services rendered on the high seas;" and the principle of giving salvage for the saving of life had previously been declared by ss. 458, 459. Apart, therefore, from considerations of policy and justice, there seems a peculiar propriety in concluding that this section does extend to the case of saving of life. S. 476, moreover, distinctly refers to s. 458 both in the words "subject to the provisions of this Act," and in the use of the word "services," which is defined by s. 458 to include the saving of life. The subsequent bringing of the ships into an English port is important, not only as giving a fund upon which the Court can act, but because it brings the case within s. 458; satisfying the condition of the vessel "being distressed within the limits of the United Kingdom." The principle of giving salvage for the saving of life, imposed beyond all doubt in certain limits by the Act of Parliament, has been carried out in this Court in the *Bartley* and the *Coromandel*, and in the Privy Council, in the *Clarisse* (*a*); and ought to be applied to cases occurring on the high seas.

Lushington in reply.

Judgment.

Right Hon. DR. LUSHINGTON:—This is a cause of salvage for the preservation of life only. The asserted salvors are the owners and crew of two Yarmouth smacks; and the petition alleges that they left Yarmouth in April last on a fishing voyage; that on the 29th of May, when seventy miles from the shore, they fell in with the Prussian vessel Johannes, water-logged, and with great diffi-

(*a*) 4 K. & J. 367. (*b*) 1 J. & H. 192. (*c*) Sw. 129.

culty saved from her the mate and four men, the only survivors of her crew, and carried them to Yarmouth; that it was impracticable for them to salve the vessel, but that afterwards she was brought in by other salvors to Grimsby. A motion is now made on behalf of the Prussian owners that the petition should be rejected. This motion is equivalent to a demurrer, and all the facts stated in the petition must be taken to be true.

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Can the Court decree reward for saving life from a foreign ship on the high seas?

The case resolves itself into this question of law: Can the Court of Admiralty decree salvage for the saving of life alone from a foreign vessel, which was at the time on the high seas out of British jurisdiction? On the part of the owners it is contended that the Court has no jurisdiction or authority to decree salvage in such a case, whether the ship is a British ship or a foreign ship; but certainly not if a foreign ship, because the Court had no original jurisdiction over such a case, and no British statute could confer jurisdiction over foreigners on the high seas beyond the realm.

The Court had no original jurisdiction over salvage of life only.

I will consider, first, the original jurisdiction of the Court with respect to the salvage of life unconnected with the salvage of property. I have formerly expressed my opinion that this Court, without the aid of statute, had no power to decree salvage for the saving of life alone, whether the ship from which the persons were rescued was a British or a foreign ship: *Zephyrus* (*a*). I am not aware of any reason to induce me to think that the opinion I then expressed was erroneous. I do not know that by the general maritime law of Europe, either in ancient or modern times a contrary doctrine has been maintained. I believe if such had been the case it must have been noticed by my predecessors. Most true it is that the preservation of human life is a much higher service than the rescuing from destruction of any property however valuable, and deserves the most ample reward for the risk and labour undergone in the performance of the service. Mr. Justice Story says that no deviation for the purpose of saving life only would vitiate a policy of insurance, *Schooner Boston* (*b*). Still, high as the merit confessedly is, the Court of Admiralty did not deem itself competent to deal with such cases. Strong reasons might be assigned for this abstinence, but it is not necessary to travel further; I adhere to my opinion that the Court had no original jurisdiction to deal with cases of pure life salvage.

A British

The next inquiry is, whether by Act of Parliament adequate

(*a*) 1 W. R. 329. (*b*) 1 Sumner, 335.

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statute does not affect foreign ships out of British jurisdiction, without express terms.

power has been conferred upon the Court, to adjudicate upon cases of life salvage on the high seas, especially from foreign vessels. In the *Zollverein* (*a*) I expressed my opinion as to the power of the British Parliament to legislate for foreigners, and that opinion has since been sanctioned by the high authority of Vice-Chancellor Wood (*b*). I must now add this observation. The Instance Court of Admiralty is a municipal court, and it is bound to obey the statutes of the realm in all matters. Whatever may be my opinion as to the absence of power in the British legislature to bind foreigners in transactions out of the realm, yet if Parliament chose to make a clear enactment that foreigners should be bound, in cases where in my opinion it had no such power, I should be bound to obey the Act of Parliament. There have been doubtful cases, for instance, in the Acts to prevent smuggling. For these reasons: if the enactment relate to transactions out of the realm the inquiry is, What is the true effect and meaning of the enactment? bearing in mind that if the expressions used be doubtful as to the operation upon foreigners, the doubt ought to be solved by holding that the enactment does not operate upon them.

Sections 458, 460, 476, of the Merchant Shipping Act, 1854, considered.

In the present case I have to consider several sections of the Merchant Shipping Act, 1854. The first of these sections appealed to by the counsel for the salvors, is the 458th. In the *Leda* (*c*), I held that this and the following sections apply only to services rendered within the limits of the United Kingdom, and that those limits do not extend beyond three miles from the shore. I think that this construction is merely giving the common sense meaning of the words used. But here the service, the saving of life, was rendered out of the limits of the United Kingdom, seventy miles from the shore. It is true that by other persons the vessel was ultimately brought into a British port; but what effect can be attributed to this circumstance? Certainly no more than this, that the Court would exercise jurisdiction *in rem* for the inforcement of all lawful claims, but if the claim be not otherwise lawful, the bringing the ship within the jurisdiction of this Court cannot make that a lawful claim which before had no legal foundation. I am therefore of opinion that the 458th and 460th sections do not give the Court jurisdiction to deal with this case.

The salvors then rely on the 476th section, which is as follows:—"Subject to the provisions of this Act, the High Court of Admiralty shall have jurisdiction to decide upon all claims

(*a*) Sw. 98. (*b*) 4 K. & J. 374. (*c*) Sw. 40.

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whatsoever relating to salvage, whether the services in respect of which salvage is claimed were performed upon the high seas, or within the body of any county, or partly in one place and partly in the other, and whether the wreck is found at sea or cast upon the land, or partly in the sea and partly on land." This section is wholly silent as to salvage of life. It gives the Court jurisdiction in all the cases mentioned in the 458th section, subject to the restrictions in that section contained; but it does not enable the Court to extend the provisions of the 458th section. It does not empower the Court to say, that because s. 458 has given salvage for the saving of life within certain limits, and s. 460 has given jurisdiction generally over cases of salvage services rendered within those limits, the legislature hereby gives salvage for the saving of life all over the seas. I have no doubt upon this view of the case; but if there were room for doubt, there are other reasons to confirm my conclusion. Is it possible to suppose that Parliament intending to enact that salvage should be paid for the saving of life on the high seas would have adopted this form of expression? It is manifest that such an intention would have been expressed very differently. Again, what was the real purport of this section? It is true that its effect must be primarily judged by the words, but other circumstances must not be lost sight of. I believe that this section was intended for the purpose only of giving the Court of Admiralty jurisdiction in certain cases in which that jurisdiction had been before disputed by reason that the service had been performed wholly or in part on land, within the body of a county.

I am well aware that it may be said, How grievous it is that men should risk their lives for the preservation of others, and yet be excluded from resorting to this Court for an adequate reward, when the property has been brought by others into a port of this country,—and that merely because the lives may have been salved above three miles from shore. This may be so, and there may or may not be good reasons why the legislature did not prescribe such services to be rewarded by an action *in rem*, but it is obvious that no such consideration can confer jurisdiction. Even if I could infer, which I cannot, that Parliament intended to include the present case, my answer would be, *Quod voluit non dixit.* For these reasons I am of opinion this petition must be rejected. I shall leave, however, each party to pay their own costs (*a*).

The statute does not give the Court jurisdiction over the present case. Petition dismissed.

Skipwith, proctor for the salvors.

Coote for the owners.

(*a*) On the subject of this case, see 24 Vict. c. 10, s. 9, (printed in Appendix).

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THE PRINCESS HELENA.

Master's Wages—17 & 18 Vict. c. 104, ss. 187, 191—Right to extra Pay—Right to Salvage Money—Practice.

A master is intitled, under ss. 187, 191 of the Merchant Shipping Act, 1854, to double pay for the number of days (not exceeding ten), during which the payment of his wages is improperly withheld, but he is not so intitled, if he himself causes the delay, by improperly keeping back the accounts of the ship.

A master receiving, under an award, salvage money from the owners of property to which he, the ship and crew have rendered salvage services, is not bound to hand over to his owner the portion he *bonâ fide* conceives to be his own proper share, nor (*semble*) any part of the salvage money: the remedy of the owner is to apply to the Court under s. 498 of the Merchant Shipping Act for a distribution of salvage.

The owner of a ship refused to pay wages due to a master for a voyage, unless credited with certain salvage money received by the master under an award, and kept by him for his own share; the master refusing to account for a subsequent voyage, except on condition of a settlement for the former voyage, without reference to the salvage money:—*Held*, that the payment of wages was improperly withheld, and that the master was intitled, under the statute, to ten days' double pay.

Semble, Items not objected to on the reference to the Registrar cannot afterwards be objected to on an appeal from the Registrar's report.

THIS was a cause of wages brought against the English ship Princess Helena, by John Connell, her late master, the owners intervening and setting up a counter-claim. After petition and answer having been brought in, the cause was referred to the Registrar and merchants, who reported thereon. To their report the owners now objected. The principal items disputed, were: 1. A claim for ten days' double pay, under ss. 187, 191, of the Merchant Shipping Act, 1854, which in the report was allowed to the master; 2. An item of 200*l.* in the owner's counter-claim, which was disallowed by the Registrar.

The following were the circumstances of the case:—On the 13th of July, 1857, the plaintiff, being an owner of four sixty-fourth shares of the Princess Helena, was appointed master by Robert Wheelwright, the managing owner, to proceed in her on divers voyages, at the rate of 10*l.* a month. On the 15th of December, 1858, there was a settlement of wages; and on the next day the plaintiff sailed on a voyage to Demerara, and thence back to Liverpool. On the return voyage, on the 12th of June, 1859, the Princess Helena, then in St. George's Channel, fell in with an American ship called the Stalwart, on fire, and the plaintiff and his crew succeeded in saving the crew of the

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Stalwart, and a large quantity of specie, which he brought to Queenstown. There the plaintiff agreed with the American consul, acting on behalf of the owners of the Stalwart and her cargo, to have the salvage claim referred to arbitration. The arbitrators awarded 800*l.*, which was handed over to the master in specie. The plaintiff gave his crew 100*l.*, kept 200*l.* for himself (a sum which the arbitrators suggested as his fair share), and remitted the remaining 500*l.* to the defendants. This 200*l.* was the item claimed by the defendants on the reference, and refused by the Registrar. The defendants considered themselves intitled to have the 200*l.* given to them to distribute as they thought fit, especially as they had never consented to the plaintiff detaining it as his share, and the plaintiff writing to them on the 6th of July, 1859, had said, "you shall receive the 800*l.* by early post." On the 16th of August, 1859, an account was stated between the plaintiff and the defendants, whereby it appeared that (apart from the question as to the right to the 200*l.*), a sum of 38*l.* 11*s.* 9*d.* was due to the plaintiff as wages. The plaintiff, it further appeared, pressed for payment of this sum, but was always refused, except on condition of returning the 200*l.*, and some negotiation then ensued with a view to arbitration. The plaintiff then proceeded on a second voyage to Demerara and back. On his return to Portsmouth on the 4th of February, 1860, he offered to hand in all accounts of the voyage on condition of receiving payment of the 38*l.* 11*s.* 9*d.*, but on the defendants refusing to settle unless credited with the 200*l.*, he then refused to give in any accounts. On the 20th of February he was discharged, and the next day he wrote to the defendants, stating that all the accounts were in his proctors' hands, where they might be inspected by the defendants: at the same time he instituted the present suit. Meanwhile the consignees of the specie, disputing the validity of the award, had brought an action against the defendants to recover the whole 800*l.*

The following sections of the Merchant Shipping Act, 1854, are referred to in the argument and judgment:—

S. 2. "'Seamen' shall include every person (except masters, pilots, and apprentices duly indentured and registered,) employed or engaged in any capacity on board any ship."

S. 187. "The master or owner of every ship shall pay to every seaman his wages, within the respective periods following; (that is to say,) in the case of a home-trade ship within two days after the termination of the agreement, or at the time when such

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seaman is discharged, whichever first happens; and in the case of all other ships (except ships employed in the Southern Whale Fishery, or on other voyages for which seamen, by the terms of their agreement, are wholly compensated by shares in the profits of the adventure), within three days after the cargo has been delivered, or within five days after the seaman's discharge, whichever first happens; and in all cases the seaman shall, at the time of his discharge, be intitled to be paid on account a sum equal to one-fourth part of the balance due to him; and every master or owner who neglects or refuses to make payment in the manner aforesaid, without sufficient cause, shall pay to the seaman a sum not exceeding the amount of two days' pay for each of the days, not exceeding ten days, during which payment is delayed beyond the respective periods aforesaid, and such sum shall be recoverable as wages."

S. 191. "Every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages, which by this Act, or by any law or custom, any seaman, not being a master, has for the recovery of his wages; and if in any proceeding in any Court of Admiralty or Vice-Admiralty, touching the claim of a master to wages, any right of set-off or counter-claim is set up, it shall be lawful for such Court to enter into and adjudicate upon all questions, and to settle all accounts then outstanding and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due."

Deane, Q.C., and *Swabey*, for the owners.—A master is in no case intitled to double or extra pay; s. 191 of the statute only extends seamen's remedies for wages to masters, "so far as the case permits," here the case does not permit. The master is, as to wages, in a very different position to the seamen. He is an accountant to the owner, and has frequently money of the owner in his possession. The right to extra pay given to seamen is an extraordinary remedy given to them, to compel prompt payment of wages due, on account of their usual necessitous condition, which does not hold of masters. Again, seamen's wages, if due at all, are absolutely due, but a master is not intitled to his wages at the date of his discharge if he has neglected to account, as here, and therefore for this reason also, in the present case, the plaintiff cannot claim extra pay. As to the 200*l.*; we submit that the master should, as he promised to do, have sent the whole salvage money to the owners; he had no right to pay himself. [DR. LUSHINGTON:—The true question is, have the defendants a right to claim this as a set-off?] We

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submit that they have; the master received the whole money as agent for the defendants; and an action is now pending against them in the Common Pleas by the owners of the property salved, to recover the whole 800*l.* At any rate the master was bound to render an account of the last voyage at the earliest possible period; this he refused to do, and by his own default caused the delay, for which he now seeks to be recompensed.

Spinks, for the master, was desired by the Court to confine himself to the question of the right to double pay.—That question was not raised before the Registrar, and the defendants should not be allowed to bring it forward for the first time. But if the point be open, it should be decided in favour of the plaintiff. The claim as to the 200*l.* was the sole matter in dispute between the parties before they came to law; and that point being decided in favour of the master, it follows that the owners were not justified in requiring the master to account on the terms of crediting them with the 200*l.*, and he was not bound to account to them on such terms; he offered to account with them immediately on his arrival in England, if he was to be allowed a settlement of wages in the ordinary way, which the defendants refused; they therefore improperly withheld from him payment of his wages, at any rate of the wages admitted to be due for the former voyage. Then the 187th section of the Act, taken with the 191st, and receiving a liberal construction, as a remedial enactment should receive, gives the master right to extra pay. The case certainly "permits" such a construction. The plaintiff has suffered a wrong from the defendants in being kept out of his wages; and but for this enactment he has no remedy, except to recover the bare sum due to him under the contract.

Judgment.

Right Hon. Dr. Lushington:—This is an action brought by the master of the Princess Helena to recover his wages; and the case comes before the Court upon objection taken to a report of the Registrar and merchants.

The first objection is to the allowance in the plaintiff's claim of 6*l.* 13*s.* 4*d.* for ten days' double pay. The owners deny the legality of any such claim on the part of a master; and, even if legal, they say that such extra pay ought not to have been allowed in this case, because the master withheld his accounts. This objection is stated in the answer to the original petition, but in the schedule of deductions claimed no such deduction appears, and the Registrar informs me that the objection was not raised before him, and consequently the ten days' pay was

In an appeal from a report of the Registrar, the Court may refuse to hear questions not

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allowed, as had hitherto been the practice. It is most desirable, indeed I might say indispensable to the correct despatch of business, that the rules prescribed for taking these accounts in the Registry should be strictly observed. According to those rules this objection should have been stated in the schedule of deductions to be claimed, which was not done. It is a still more serious objection, that the point was not taken before the Registrar at all. The present proceeding ought to be in the nature of an appeal from what has been done by the Registrar and merchants: it is therefore wholly irregular to bring forward questions not discussed before them. Under these circumstances I should feel myself justified in declining to take cognizance of the legal question now raised; but as this question is one constantly liable to arise, and one that ought to be settled, I will now consider and determine it.

discussed at the reference.

A master may be intitled to extra pay under the 187th section of the Merchant Shipping Act.

The right of a master to extra pay after discharge, whilst his wages are unpaid, depends upon the construction to be given to the 187th and 191st sections of the Merchant Shipping Act, 1854. The 187th section gives to seamen two days' pay for every day not exceeding ten, for the time the payment of wages is improperly withheld, but it does not *proprio vigore* extend to masters. This we learn from the interpretation clause (s. 2), which enacts that a master shall not be included under the term "seaman." Then the 191st section says, "Every master of a ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages, which by this Act or by any law or custom any seaman, not being a master, has for the recovery of his wages." Now, with reference to the right of extra pay, what is the meaning of these words, "so far as the case permits?" If they were not in the section, I think there could be no doubt that masters would have the same right to ten days' double pay as seamen have. There are two meanings possible. 1st. That masters shall be entirely excluded from the extra pay. 2nd. That their claims to extra pay shall be admissible, but upon condition. There are reasons for either construction. Against the right to extra pay, it may be truly said that in many respects masters stand in a very different position from seamen. They are not *inopes consilii*, like the bulk of common seamen. Also, until the passing of recent statutes, they had in no case a lien for wages on ship, and Lord Tenterden says, "The master can only sue the owner personally in a Court of Common Law, but as he generally receives the freight and earnings of the ship, and may pay himself out of the money in his hands, he has not often had occasion for the aid of a court of

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justice to obtain his right (*a*). The master, too, has generally a contract with his owners, which may be deemed a special contract. Moreover, he is almost always an accountant to his owners, and it cannot be expected that they should pay him his wages till his receipts and disbursements be accounted for, and the so doing must take time. Then he may delay his accounts, and it is not just that the owners should be mulcted for his neglect. There is still another reason. If the Court should hold that the extra pay may be due, but the right modified or taken away by circumstances, the consequence must be that a door is opened for litigation,—a consequence I greatly fear.

But I must look to the other side of the question. The words are, "The master shall have, so far as the case permits, the same remedies, &c." Now, *primâ facie*, these are not words importing total exclusion from any one remedy, but, on the contrary, are calculated to convey the idea that *sub modo* all the remedies are to be extended to masters. Another reason of weight with me is, that if the legislature intended that no claim for extra pay should be allowed to the master, they might have easily excluded it by express terms, and I find no such words of exclusion. Then further, why was the extra pay given at all? Because the payment of wages might be constantly delayed. Now this may happen with respect to masters as well as seamen, and most especially with the masters of smaller vessels. The retaining the freight is sometimes impracticable, and always an odious and doubtful remedy, producing much dissatisfaction.

I have considered the reasons for both constructions, but the argument which weighs most strongly with me is, that the words of the statute are not in my opinion sufficient to absolutely exclude from masters any remedy given to seamen. I think that the legislature, in the different Acts of Paliament which have passed, have, proceeding step by step, finally manifested their intention to put masters, so far as the recovery of wages, upon the same footing as seamen. I deem this to be a wise and just provision, and certainly with relation to extra pay, for is not the unjustly withholding the wages of a master as great an injustice and as great a grievance as the withholding the wages of a seaman? I might illustrate this by another instance. Why should a ship's surgeon recover extra pay, and not a master? And yet no doubt can be entertained as to the right of the surgeon. For these reasons I shall hold that by virtue of this statute masters have a right to extra pay, but a right which may

(*a*) Abbott on *Shipping*, 10th ed. p. 480.

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be forfeited, if the circumstances of the case show that the granting such claim would be unjust and inequitable. As, for instance, if the delay in payment has been occasioned by the master's own neglect or misfeasance in improperly withholding the accounts. Whether, in the present case, the master has been guilty of this dereliction of duty I reserve for consideration, until I have examined the remaining objections.

The custody at least of the 200*l.*, until lawful distribution of the salvage money, belonged to the master, the actual salvor, not to the owners.

The next item in dispute is a sum of 200*l.*, which the owners have claimed as a deduction from the master's demand. This 200*l.* is part of a sum of 800*l.*, which it appears the master received for salvage services performed to an American ship. He remitted 500*l.* to the owners, distributed 100*l.* to the crew, and retained 200*l.* for himself. Whether the master was authorized or justified in making the original compromise, whether he was justified in making this distribution, is not the question. The question is, are the owners legally intitled to claim this 200*l.* as their own property, and as a set-off against the master's claim: and on this question I cannot entertain any doubt. The ancient doctrine of this Court was to give salvage reward to the actual salvors only, and to allow the owners of a vessel rendering salvage services only compensation for actual loss sustained. Thus, in the *Baltimore* (*a*), Lord Stowell having awarded a sum of 800*l.* for salvage, continues: "The next question is amongst whom, and in what proportion, this sum shall be divided. There can be no doubt whatever that the claim of the captain of the Rapid is well founded, for he is the life and soul of the whole business. His right to reward is indisputable, and I shall give him the sum of 100*l.*, to which I think he is fully intitled, as a sort of flag-eighth." Then, having distributed the remaining 700*l.*, he adds, "With respect to the claim of the owners of the packet, they are certainly intitled to receive the value of the sails and stores which were supplied from their vessel, and also the amount of any other loss or expense which they may have fairly incurred; but I cannot approve of their coming here and employing a separate proctor, and by so doing, putting the owners to an additional and an unnecessary expense. They might, with the same effect, and in a manner equally beneficial to their own interests, and certainly less injurious to that of others, have stated their demands in an affidavit, without writing to the act, as they have done, and therefore it is somewhat hard to hold the owners of the American ship responsible for the expense incurred by their proceedings in this suit. I desire the costs may be strictly taxed." Thus did Lord Stowell treat the claims of

(*a*) 2 Dods. 136, 138.

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owners with respect to salvage services. A more liberal rule was afterwards introduced; and from the introduction of steamers, and change of circumstances, I have deemed it my duty to give much larger proportions of the salvage to owners than was accustomed to be done by my predecessors. But though there may possibly be one or two cases in which the Court has given an extraordinary proportion, it has exceeded a moiety only under very special circumstances. In the present case the owners have received five parts out of eight. So far as I have any knowledge of the facts, the owners have not the slightest claim to this 200*l.*; but if they think they have, their remedy is of a very different kind. Their course is to proceed under the 498th section of the Merchant Shipping Act; bring the 500*l.* they have received into Court; then move for a monition to the master to bring in the 200*l.* he has received, which the Court will grant as a matter of course, and then make an order of distribution. During the progress of the argument a passage from the letter of the master to the owners was read, declaring an intention to transmit to them the whole 800*l.* Whether upon this letter an action for the recovery of the money would lie at common law, I say nothing. If such was the proper proceeding, the owners should have resorted to it; but I am confident that, according to the course of practice in this Court, no deduction in the settlement could be made on account of a claim so doubtful and, indeed, so repugnant to the principles by which claims to salvage are regulated. I ought also to add that the custody of the property salved, or the reward for it, ought by the practice of this Court to be, until distribution, in the actual salvors, and not in the owners of the salving vessel. And any previous stipulation with the master or seamen to take away or narrow their rights to salvage would be wholly inoperative by the 182nd section of the Merchant Shipping Act.

[The learned Judge then proceeded to discuss certain items objected to, trifling in amount, and immaterial to this report, deciding them in favour of the master.]

The master did not improperly withhold his accounts.

I now come to the last matter for consideration in this case; namely, whether the master wrongfully withheld his accounts, and thereby forfeited his claim to the ten days' extra pay. The Court has been instructed, I think somewhat unnecessarily, by various affidavits, that the master of a ship should be prepared to render his accounts to his owners. I think that without the aid of any affidavit I might have come satisfactorily to the con-

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clusion that the master, being the agent of the owners, and an accounting party to them, should be prepared, with as little delay as the circumstances of the cases will admit, to render his accounts. I think a wrongful delay would be a breach of duty, and if such were proved, I certainly would not allow the extra pay. But there is also a corresponding obligation upon the owners,—to be ready to pay the wages due, and not to make demands upon the master unfounded in law and justice. Now Mr. Wheelright admits that there was due to Captain Connell the sum of 38*l.* 11*s.* 9*d.*, in respect of the former voyage, ending in August, 1859; and no doubt that sum was payable to the plaintiff, unless Mr. Wheelwright was intitled to recover the sum of 200*l.* salvage money to which I have referred. It is manifestly clear, therefore, upon Mr. Wheelright's own showing, though he has not candidly admitted it, that he refused to settle accounts except upon the basis of being credited with this 200*l.*, respecting which the Court has already pronounced its opinion that his claim could not be legally supported. On the other hand, the master deposes that he from the first offered to hand over all his accounts and vouchers upon payment of the balance of 38*l.* 11*s.* 9*d.* due on the preceding voyage, which Mr. Wheelwright persisted in refusing. It is therefore quite clear to me that there was no unjustifiable withholding of accounts in this case, that the whole of this litigation has been occasioned by Mr. Wheelwright entertaining an erroneous notion of his legal rights, and attempting to enforce them by withholding a settlement without sufficient cause. I cannot avoid expressing my surprise that so unfounded a notion of legal right should have been so long and obstinately persisted in. I overrule the objections to the Registrar's report, and confirm the report with costs.

Report confirmed, with costs.

Crosse, proctor for the plaintiff.

Gregory & Co., solicitors for the defendant.

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THE WILLIAM.

Master's Wages—Costs of Reference.

Upon a report made by the Registrar in a cause of master's wages, the Court will not determine the incidence of the costs of the reference by any fixed rule, but according to the circumstances of the case.

The plaintiff suing for wages claimed 1,557*l.* 10*s.* 6*d.*, and refused a tender by the defendants of 150*l.*; the defendants thereupon set up a counter-claim of 1,571*l.* 13*s.* 6*d.*, and the accounts were referred to the Registrar and merchants, who found 413*l.* 1*s.* 5*d.* due to the plaintiff:—*Held*, that the plaintiff must pay the costs of the reference.

THIS was a cause of master's wages instituted by Joseph Grigg Milton against the ship William. The owners of the ship, Messrs. Wade & Baker, tendered the sum of 150*l.*, and, on that being refused, set up a counter-claim, and all the accounts were then referred to the Registrar and merchants. The services of the master commenced on the 12th of July, 1854, and terminated on the 23rd of March, 1860, extending over various voyages, to Quebec, Bermuda, Constantinople, Australia and the China Seas. On the 31st of December, 1860, the Registrar submitted his report, from which it appeared that the plaintiff had claimed as due to him a balance of 1,557*l.* 10*s.* 6*d.*; that the defendants' counter-claim amounted to 1,571*l.* 13*s.* 6*d.*, of which 1,144*l.* 9*s.* 11*d.* was allowed, and consequently only a sum of 413*l.* 1*s.* 5*d.* was found due to the plaintiff. It is unnecessary to specify the items in the counter-claim which were allowed against the plaintiff; some were matters of error only on the part of the plaintiff, other items were open to the imputation of fraud; but the report did not state that the plaintiff had been guilty of fraud.

Wambey, for the defendants, now moved the Court to condemn the plaintiff in the costs of the reference.—The litigation has been caused by the fraudulent and exorbitant claim of the plaintiff, four-fifths of which has been disallowed by the Registrar.

The *Admiralty Advocate*, for the plaintiff, *contrà*.—The plaintiff had a right to claim the entire sum he had expended, and leave the defendants to prove their set-off. That is the course followed in the Courts of Common Law, and there, if a defendant

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tenders a sum ever so little inadequate, a plaintiff is intitled to all the costs of the inquiry. It is submitted that this is a fair rule, because a defendant may save himself all risk by making a sufficient tender. In the present case the defendants tendered 150*l.*, and the Registrar has found due to the plaintiff the sum of 413*l.* 1*s.* 5*d.*; it is submitted, therefore, that the plaintiff is intitled to his costs of the reference. The Court has already decided in the case of the *Lemuella* (*a*), that the rule which is applied in collision references is not to obtain in references relating to a master's accounts.

Wambey, in reply.—In the *Lemuella* the Court held that the common law practice as to tender should not prevail in these cases, and there each party had to pay his own costs of the reference. This is a much stronger case, the plaintiff has been guilty of fraud.

Judgment.

Right Hon. Dr. Lushington:—I have already decided that I can lay down no fixed rule for the incidence of costs of reference in causes of master's wages. I must be governed by the circumstances of each case, endeavouring, on the one hand, to discourage perverse resistance to substantially honest claims, and, on the other hand, to discourage excessive demands. I have not adopted the common law rule, that the amount of the tender shall decide whether the plaintiff or the defendant shall pay the costs of the investigation of the accounts, because I think that rule would operate hardly upon owners, who have to base their calculations upon accounts furnished by the master. In the present case the defendants tendered 150*l.*, and the Registrar has found 413*l.* 1*s.* 5*d.* due to the plaintiff; the insufficiency of the tender intitled the plaintiff to pursue his claim, but not to pursue a claim for 1,500*l.* I do not say that any of the items found against the plaintiff convict him of fraud; but I am of opinion that he pressed an excessive claim, and thereby substantially caused the litigation, and I therefore condemn him in the costs of the reference and in the costs of this motion.

Brooks, proctor for the plaintiff.

Stokes for the defendants.

(*a*) *Ante*, p. 147.

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THE KEPLER.

Bottomry—Reference to Registrar and Merchants—Costs of Reference.

In a cause of bottomry, where the bond is admitted to be valid, and referred to the Registrar and merchants to report the amount due, the plaintiff is usually intitled to the general costs of the reference, but will be condemned in costs clearly occasioned by improperly persisting in claims which cannot be sustained.

BOTTOMRY. The action was brought by Messrs. Drake, Kleinwort & Cohen, of the city of London, holders of a bottomry bond given on the Bremen ship Kepler, her freight and cargo, at the port of Havannah. The action went by default against ship and freight, which were insufficient to discharge the bond: the owners of the cargo admitted the validity of the bond. The cause was then referred to the Registrar and merchants to report the amount due upon the bond. The Registrar and merchants held their first meeting on the 19th of July, 1860, and were attended by counsel for the bondholders and the owners of cargo, and the reference was then adjourned to enable the plaintiffs to obtain further evidence from the Havannah on certain of the disputed items. On the 18th of December, 1860, the second meeting was held, counsel attending as before. The plaintiffs' evidence from Havannah proved unsatisfactory on all the items it endeavoured to support: of the objections raised for the owners of the cargo to other items, some were overruled, others sustained. The claim of the plaintiffs amounted to 7,088*l.* 19*s.* 2*d.*, the Registrar and merchants allowed 6,174*l.* 7*s.* 6*d.*, and the report was confirmed.

Twiss, Q.C., now moved that the owners of the cargo should be condemned in the costs of the reference.—The plaintiffs are intitled to the costs of the reference, for they have established nearly the whole of their claim, and have only failed in establishing a small proportion, from want of sufficient proof.

Deane, Q.C., contrà, moved that the plaintiffs should be condemned in the costs of the reference.—The plaintiffs demanded the adjournment of the reference, to produce further evidence. and they have failed in every point for which they asked the

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adjournment. It is submitted, therefore, that they ought to pay the costs of the adjourned reference, and that they ought to pay the general costs of the reference, inasmuch as the large sum of 900*l.* has been struck off their claim.

Judgment.

Right Hon. Dr. Lushington:—The rule which applies to references in causes of collision does not apply to causes of bottomry, though if it did, it would operate in the present case in favour of the plaintiffs, as one-third of their claim has not been disallowed by the Registrar and merchants, but only about one-seventh. But it would not be equitable to enforce any such rule in bottomry cases, because the plaintiff is generally the assignee of the bond, having taken an assignment of what in this Court at least is a negotiable instrument. Even against the actual lenders on bottomry it would be unjust to insist very strictly on the limit of the claim, because if, having ascertained that the ship is really in distress, he advances his money, he is not bound to see minutely to the application of it. I shall, in cases of bottomry, determine the incidence of the costs of reference according to the circumstances of each case, but with a favourable inclination to the bondholders. In the present case I consider the plaintiffs are intitled to the general costs of the reference, but as the adjourned reference was upon their special application, and they have failed in all the items upon which they required further evidence, I shall condemn them in the costs they thereby occasioned.

Rothery, proctor for the plaintiffs.

Deacon for the defendants.

THE KILLARNEY.

Collision — Compulsory Pilotage — Pilotage — Certificate of Master—17 *&* 18 *Vict. c.* 104, *ss.* 340, 353.

The master of a vessel applied for a certificate, according to s. 340 of the Merchant Shipping Act, 1854, purporting to enable him to pilot his vessel within certain waters, and submitted to the required examination. The certificate was signed and sealed by the pilotage authority, and was lying in the office to be called for by the master, but he had not applied for it, and was ignorant that it was ready and would be given him on application:—*Held*, that the certificate was not "granted to the master," nor "possessed" by him, within ss. 340 and 353 of the Act, so as to enable him to pilot his vessel in the specified waters.

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COLLISION. This was an action instituted by the owners of the sloop Sarah against the screw steam-ship Killarney for a collision.

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The *petition* stated that on the 3rd of September, 1860, the sloop Sarah, of the port of Goole, having left the Goole dock, was made fast alongside the quay next the river Ouse, and was there run into and sunk by the Killarney; that the collision was solely caused by the negligence and mismanagement of those on board the Killarney.

The *answer* pleaded (among other matters):—

(Art. 2). "The Killarney having on the said 3rd day of September arrived from Rotterdam at the port of Hull, the master of the said vessel, in order that the same might be piloted to her port of destination at Goole, received on board William Clarke, a duly licensed pilot to navigate vessels into and out of the port of Goole and the waters thereof."

(Art. 6). "At the time and place of the collision, the employment of the said William Clarke, as such pilot as aforesaid, was compulsory upon the said vessel and the master and the owner thereof."

(Art. 7). "The said collision was not in any way occasioned by the master and crew of the Killarney or any of them, but solely by the default, incapacity, or want of skill of the said William Clarke, and the owner of the Killarney is not answerable in law for the loss or damage caused by the said collision."

Reply (Art. 3). "Before and at the time and place of the said collision the employment of the said William Clarke as pilot was not compulsory upon the Killarney and the master and owners thereof, as in the 6th article of the Answer pleaded; for, before and at the time of the collision in question, a pilotage certificate had been granted by the Corporation of the Trinity House in Kingston-upon-Hull, under and by virtue of section 52 of a certain Act of Parliament entitled, 'An Act for the better regulating the Pilotage of the Port of Kingston-upon-Hull and of the River Humber, and for other Purposes relating thereto' (2 & 3 Will. IV. c. 105), and of the 340th section of the Merchant Shipping Act, 1854, to Thomas Jewitt, the master of the Killarney, to pilot the Killarney into and out of the port of Goole aforesaid and the waters thereof, and upon any part of the river Humber between the said port and a certain part of the said river Humber called Hull Roads, and, by reason of such pilotage certificate having been so granted to the said master as aforesaid, the aforesaid employment of the said William Clarke as pilot was not compulsory upon the Killarney."

Rejoinder (Art. 2). "In contradiction to the matters alleged in the third article of the said Reply, a certificate had not been

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granted by the Corporation of the Trinity House in Kingston-upon-Hull under and by virtue of s. 52 of a certain Act of Parliament entitled 'An Act for better regulating the Pilotage of the Port of Kingston-upon-Hull and of the River Humber, and for other Purposes relating thereto' (2 & 3 Will. IV. c. 105), and of the 340th section of the Merchant Shipping Act, 1854, to Thomas Jewitt, the master of the Killarney, to pilot the Killarney into and out of the port of Goole aforesaid and the waters thereof, and upon any part of the river Humber between the said port and a certain part of the said river Humber called Hull Roads, as set forth in the said third article of the said Reply."

(Art. 3). "In further contradiction of the said third article of the said Reply, the said Thomas Jewitt sailed in the Killarney for Rotterdam on the 29th day of August, 1860, and on her return therefrom arrived at the port of Hull on the 3rd day of September following. Neither when the said vessel so sailed for Rotterdam, nor when she so arrived at Hull as aforesaid, nor down to the time of the said collision, was the said Thomas Jewitt, or any one on his behalf, informed of the fact that any certificate to the purport or effect set forth in the said third article of the said Reply had been granted to him, nor had any certificate as aforesaid been issued from the office of the said Corporation of the Trinity House in Kingston-upon-Hull."

Surrejoinder. "As to the third article of the Rejoinder, the said Thomas Jewitt in the month of August, 1860, and prior to his sailing on the said 29th day of August, 1860, in the Killarney, for Rotterdam, applied to the Corporation of the Trinity House in Kingston-upon-Hull for the pilotage certificate in question, and passed a due examination for the same: on the 30th day of the said month of August the said pilotage certificate was completed, sealed, and duly granted and issued by the said Corporation of the Trinity House in Kingston-upon-Hull, and only remained in the office of the said Corporation of the Trinity House in Kingston-upon-Hull, until it should be called for by the said Thomas Jewitt, or his agent. And if between the time of the said sailing of the Killarney to Rotterdam down to the time of the said collision, neither the said Thomas Jewitt, nor any one on his behalf, was informed of the fact that a certificate to the purport or effect set forth in the said third article of the said Reply had been granted to him, it was solely and entirely through the neglect and default of the said Thomas Jewitt, or of his agent."

To this surrejoinder the defendants demurred.

The following sections of the Hull Pilot Act until the Mer-

chant Shipping Act, 1854, were referred to in the argument and judgment:— 1861. *January* 24.

2 & 3 *Will. IV. c.* 105. (*Hull Pilot Act.*)

S. 52. "It shall be lawful for the said Corporation of the Trinity House in Kingston-upon-Hull, and they are hereby required to appoint from time to time, as often and for such periods as they in their discretion shall think fit, such number of persons at Goole, in the West Riding of the county of York, not being more than five, nor less than three, to be sub-commissioners of pilotage; and such persons so to be appointed shall examine, and they are hereby authorized and required, so long as their deputation or appointment shall not be revoked or superseded by the appointment of other persons in their places, to examine into the qualifications of persons to act as pilots for the port of Goole aforesaid, and the waters thereof, and upon any part of the river Humber between the said port and a certain part of the said river Humber called Hull Roads, and it shall be lawful for the said Corporation, and they are hereby required, on receiving a certificate under the hands of any three of the persons so to be appointed, that any person examined as aforesaid is duly qualified to act for the said port of Goole and the limits aforesaid, to give a license to such person to act as pilot accordingly."

17 & 18 *Vict. c.* 104. (*Merchant Shipping Act*, 1854.)

S. 332. "Every pilotage 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 exemptions, and to revise and extend any exemptions now existing by virtue of this Act or any other Act of Parliament, law, or charter, or by usage, upon such terms and conditions, and in such manner as may appear desirable to such authority."

S. 340. "The master or mate of any ship may, upon giving due notice, and consenting to pay the usual expenses, apply to any pilotage authority to be examined as to his capacity to pilot the ship of which he is master or mate, or any one or more ships belonging to the same owner, within any part of the district over which such pilotage authority has jurisdiction; and such master or mate shall, if such authority thinks fit, thereupon be examined; and, if found competent, a pilotage certificate shall be granted to him, containing his name, a specification of the ship or ships in respect of which he has been examined, and a description of the limits within which he is to pilot the same, such limits to be within such jurisdiction as aforesaid; and such cer-

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tificate shall enable the person therein named to pilot the ship or any of the ships therein specified, of which he is acting as master or mate at the same time, but no other, within the limits therein described, without incurring any penalties for the non-employment of a qualified pilot."

S. 353. "Subject to any alteration to be made by any pilotage authority in pursuance of the power hereinbefore in that behalf 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 an 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 so to do, 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."

S. 387. "The two Corporations of the Trinity Houses of the ports of Hull and Newcastle shall continue to appoint sub-commissioners, not being more than seven nor less than three in number, for the purpose of examining pilots in all districts in which they have been used to make such appointments, and may, with the consent of her Majesty in Council, but not otherwise, appoint like sub-commissioners for any other district situate within their respective jurisdictions; but no pilotage district already under the authority of any sub-commissioners appointed by either of the said corporations shall be extended, except with such consent as aforesaid; and no sub-commissioners appointed or to be appointed by the Trinity Houses of Hull and Newcastle shall be deemed to be pilotage authorities within the meaning of this Act, nor shall anything in this Act contained be held to confer upon the commissioners for regulating the pilotage of the port of Kingston-upon-Hull and of the river Humber any jurisdiction of a different nature or character from that which they have hitherto exercised."

S. 388. "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." 1861. *January* 24.

The *Queen's Advocate* and *Pritchard* for the demurrer.—The surrejoinder is bad. The certificate not having been delivered to the master, had no potency whatever. The 340th section of the Merchant Shipping Act on which the other side relies, says that the certificate "shall be granted *to him*," the master. Here the certificate was not granted to the master, it never reached him. In Tomlins' Law Dictionary, under the head "Grant," among other conditions of a good grant is specified "that there be an agreement to, and acceptance of, the thing granted by him to whom made." There was not even a constructive grant to the master. There is no *presumptio juris et de jure* that, because the master passed his examination, he would receive his degree; that, because the certificate had been signed and sealed, it would be granted to him; fees have to be paid upon receiving the certificate (s. 343), and the master might refuse it at the last moment. Still less did the master "possess" the certificate within the meaning of the 353rd section of the Act; and "without possessing the certificate," he was liable to a penalty, if he refused a licensed pilot. In the civil law an "*intellectus possidendi*" or "*scientia*" was required to constitute possession (Dig. xli. 2, 1, 9; Cod. vii. 32 1.) We also contend that the Trinity House at Hull had no authority to grant any certificate to the master, exempting him from employing a licensed pilot. There is no such authority given by the Hull Pilot Act; s. 52 applies only to licensing pilots for the port of Goole. The 340th section of the Merchant Shipping Act, on which the other side rely, is qualified by s. 332, which requires a regular bye-law, and the consent of the Queen in Council for any such exemptions; s. 387 relates only to the appointment of sub-commissioners to examine pilots.

Deane, Q.C., contrà.—As to the last point, that is not open, as the facts pleaded must be taken as admitted. But s. 340 of the Merchant Shipping Act is not controlled by s. 332; one refers to exempting the master of any particular ship by giving him a certificate, the other to exempting a whole class of ships by bye-law. It would be absurd to require a bye-law to give that authority, which the statute expressly gives. I also rely on the 52nd section of the Hull Pilot Act, which gives authority to license pilots; a master having a certificate to pilot his ship is so far a pilot. In the *Batavier* (*a*), a pilot, regularly employed to pilot a certain vessel in the Thames, was held to be a

(*a*) 2 W. R. 410.

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pilot by compulsion of law. As to the other point, the certificate was "granted" sufficiently to satisfy the 340th section of the Merchant Shipping Act. The purpose of the certificate is to give the authority of the Trinity House to the master to pilot, and that authority was given. Knowledge of the person to whom the grant is made is not necessary to make the grant valid; many men do not know their legal rights given them by Act of Parliament. Personal delivery may be necessary to make a deed valid between private persons, so as to pass rights of property: but the granting a certificate was a public act by a public corporation, passing no property but only authority, and needed no such confirmation or completion by the party. The certificate was also "possessed" by the master within the meaning of the 353rd section. To possess a thing it is not necessary to have it about one's person; many things are not capable of such a possession. The master is nowhere bound to carry his certificate about his person; would he not be intitled to pilot his own ship if having received the certificate he left it on shore with his wife; or if carrying it in his hat, it was blown overboard? Here the certificate was in safe keeping for him, in the safest keeping, and he had only to apply for it to receive it into his own hands.

The *Queen's Advocate* replied.

The following is a copy of the master's certificate alleged to have been granted:—

"To all to whom these presents shall come. The Corporation of the Guild or Brotherhood of Masters and Pilots, Seamen of the Trinity House in Kingston-upon-Hull, send greeting: Know ye, that, the said corporation having received a certificate under the hands of three of the persons at Goole, in the West Riding of the county of York, by the said corporation appointed to be sub-commissioners of pilotage for the port of Goole aforesaid, that Thomas Jewitt, whose description is indorsed hereon, and who is at the date of these presents the master of the ship or vessel called 'Killarney,' of the port of Goole, admeasuring 191 tons or thereabouts, has been examined by the said sub-commissioners as to his capacity to pilot the said ship or vessel called 'Killarney,' within the limits following: that is to say, into and out of the port of Goole aforesaid and the waters thereof, and upon any part of the river Humber between the said port and a certain part of the said river Humber called Hull Roads, and also in and out of the said Roads, and upon any part thereof, and that the said Thomas Jewitt has been found competent to pilot the same within the limits aforesaid,—the said corpo-

ration in pursuance and by virtue of the power given them for that purpose, in and by an Act of Parliament made and passed in the session of parliament held in the seventeenth and eighteenth years of the reign of her Majesty Queen Victoria, intituled 'The Merchant Shipping Act, 1854,' and of other powers and authorities given to or vested in them, do by this certificate, under their common seal, empower the said Thomas Jewitt to pilot the said vessel within the limits hereinbefore specified. 1861. *January 24.*

"This certificate shall be in force for one year and no longer (unless renewed according to the said Act), and shall be a full and sufficient authority pursuant to the said Act for the said Thomas Jewitt to pilot and conduct within the limits described as aforesaid the said ship or vessel called Killarney, and whereof he, the said Thomas Jewitt, is acting as master at the time, without incurring any penalties for the non-employment of a qualified pilot.

"Given under the common seal of the said corporation this thirteenth day of August, one thousand eight hundred and sixty.

"BARRICK GILL, (L.S.)
"Acting Warden.

"The within-named Thomas Jewitt is 27 years of age, stands 5 feet 7½ inches high; has brown hair, hazel eyes, and fresh complexion.

"For E. S. W.
"R. GILL."

On the 24th of January, DR. LUSHINGTON delivered judgment:— Judgment.

The question which the Court has now to dispose of arises upon the pleadings, which have extended to the unusual length of a surrejoinder.—[The learned Judge then stated the pleadings.]

The Court has before it the certificate in question. It purports to be granted in pursuance of the Merchant Shipping Act, 1854, and other powers; and it authorizes Jewitt to pilot the Killarney within certain limits (limits within which the collision occurred) for one year, without incurring any penalties for the non-employment of a qualified pilot. It is dated 30th August, 1860. Indorsed is a statement of Jewitt's age, and a description of him.

The collision happened on the 3rd of September, 1860, and, it must be admitted for the purpose of the present question, within compulsory pilotage waters. The averment for the plaintiffs is, that the certificate was granted to the master, and

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exempted the Killarney from the obligation to employ a pilot. This the defendants deny; but it must be taken as admitted that the certificate was, on the 30th of August, granted and sealed, and remained in the office, to be taken up when called for. I must assume the facts stated in the surrejoinder to be true. I cannot, upon a demurrer, enter into any question as to the power to grant the certificate. The sole question I have to consider is, whether, having been granted as stated, and never having been taken by Jewitt from the office, it was valid to exempt the ship from compulsory pilotage. I must assume further, that Jewitt was ignorant that any such certificate had been granted, for the fact is not denied.

The certificate must be producible by the master; not having been delivered to him, it was inoperative.

I am of opinion that the mere granting the certificate, as stated in these pleadings, was not sufficient, according to the true intent of the 340th section of the Merchant Shipping Act, to enable the master to pilot the ship specified. I think it necessary that the certificate should be producible; that the master should not only have cognizance of it, but have it ready to produce. If this were not requisite, how could a licensed pilot, offering his services within his district, be assured that the vessel was exempt? A contrary decision would open the door to the evasion of all compulsory pilotage. The master, too, is especially described in the certificate, to assist in his identification as the holder of it. For what purpose, if the certificate is to remain in the pilotage office? Further considerations might arise, but I do not think it necessary to follow them up; as, for instance, it appears that certain lawful fees might be payable, and the delivery of the certificate delayed till they were paid.

If it were necessary to refer to the terms of the 353rd section, then I am of opinion that the case is still clearer against this certificate, under the circumstances, having effective operation. I think that the master could not be said to "possess" any certificate at all; he might have had the power of gaining possession, but possession he had not. Suppose a man had the power or authority to receive a sum of money by going to a banking-house and giving a receipt, surely he could not be said to be in possession of the money until he had executed the power. There is nothing in the local Act which appears to me to militate against this opinion. The surrejoinder must be struck out.

Surrejoinder struck out.

Coote, proctor for the plaintiffs.

Cherrill for the defendants.

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THE EDMOND.

Bottomry—Objection to Registrar's Report—Practice—Items in Bond—Discharging Expenses of Outward Cargo—Law Expenses—Payment of Money into Court—Interest on Money pronounced due—Practice.

Objection to a Registrar's report cannot be heard on motion, except by consent.

The rule derived from the *Prince George* (*a*) with respect to items to be allowed in a bottomry bond, is that all expenses incurred in the port where the bond is given, relating to the ship or crew, being expenses for which the master or owner of the ship is liable, and being necessary to enable the ship to proceed on her voyage, may be allowed.

Expenses of discharging outward cargo allowed in a bond for the homeward voyage.

The agent of a ship abroad applied a balance of freight in discharge of law expenses relating to the ship's business, and took a bottomry bond for other payments, for which there was a lien on the ship:—*Held*, that the amount of such law expenses could not be deducted from the bond.

The defendants in a bottomry suit having paid into the Registry, by order of the Court, a sum of money, which proved larger than the amount finally pronounced due to the bondholder, the bondholder held nevertheless intitled to the full ordinary interest upon the latter sum from the date of the bond becoming due.

THE claim of the bondholder in this case was, according to the previous judgment in the case (*b*), referred back to the Registrar. At the reference the original papers in the *Prince George* were referred to by the Registrar, and it appeared that in that case, where the bond was given for 1,167 dollars, there were three items for discharging expenses, amounting to about 120 dollars, which had been allowed by the decree of the Privy Council. The Registrar thereupon made his further report as follows:—

"To the Right Honorable Stephen Lushington, Doctor of Laws, Lieutenant Judge and President of the High Court of Admiralty of England.

"Whereas by your decree or order of the 15th day of March, 1860, you were pleased, at the petition of the proctor for the defendants, to refer back the report of your Registrar and merchants for further consideration, and were also pleased to direct that the same should be reformed according to the rule laid down in the case of the *Prince George*, reported in the 4th volume of Moore's Privy Council Reports, pages 21—28 inclusive.

"Now, I do most humbly report, that having, on the 17th day of May, 1860, been attended by both parties, the proctor

(*a*) 4 Moore, P. C. 21. (*b*) Ante, p. 57.

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for the defendants claimed that the items set forth in the schedule hereto annexed, marked No. 1, together with the bottomry premium thereon, should be struck off from the amount reported due by our said former report, which was opposed by the proctor for the plaintiffs. And having had the advice and assistance of Messieurs John Cattley and Robert Embleton, of London, merchants, in considering this case,—having also carefully read and considered the case of the Prince George, and having heard counsel on behalf of the defendants, as well as what was urged by the parties, their proctors and agents on both sides, I find that, in the case of the *Prince George*, the amount for which the bond was contracted included charges for pilotage, labour, ballast, discharging the outward cargo, and other expenses usually comprised under the head of port charges, besides a sum of 329 dollars for damage to and short delivery of cargo, I find also that, besides the said sum of 329 dollars, a further sum of 1,115 dollars and 53 cents was due for other damage to and short delivery of cargo, and that the same was paid by the consignees out of the balance of freight in their hands, and in preference to the port charges and other expenses necessary to enable the ship to prosecute her voyage. I find, moreover, that the Lords of the Committee, in their report to her Majesty in the case of the Prince George, disallowed only the said sum of 329 dollars, and allowed the whole of the other charges, constituting the amount for which the bond had been given, and further refused to order that the said sum of 1,115 dollars and 53 cents, which had been applied by the consignees out of the freight in payment of damage to and short delivery of cargo, should be applied in priority to the satisfaction of the port charges and other necessary disbursements to enable the ship to prosecute her voyage.

" Acting, then, upon the principles laid down in the case of the *Prince George*, I find in the present case—

" 1. That items Nos. 1 to 15, both inclusive, in schedule No. 1, being charges for pilotage, labour, ballast, discharging outward cargo, and other expenses usually comprised under the head of port charges, are of a character similar to those which were allowed by their Lordships in the case of the *Prince George*, and ought, therefore, not to be disallowed in this case; and, moreover, that they were charges necessary to enable the ship to prosecute her voyage, and as such are properly the subjects of bottomry.

" 2. That items Nos. 16 to 22 inclusive, being charges for damage to and short delivery of cargo, ought, on the principles laid down in the case of the *Prince George*, to be disallowed.

" 3. That items Nos. 23 to 26, both inclusive, having been

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paid by the consignees out of the balance of freight in their hands, ought not to be disallowed, the consignees being justified on the principles laid down in the case of the *Prince George*, in so applying the freight if they thought fit.

"I, therefore, find that there is due to the said Andrew Blowers Smith and John Smith, upon the bottomry bond proceeded on in this cause, the sum of 2,474*l.* 0*s.* 10*d.*, with interest thereon at 4 per cent. per annum, as set forth in the schedule hereunto annexed marked No. 2.

"All which is most humbly submitted by

"(Signed) H. C. ROTHERY, Registrar.

"Admiralty Registry, Doctors' Commons,
19th May, 1860."

SCHEDULE No. 1.

List of Items claimed by the Defendants to be disallowed from the Amount of the Bond.

	Claimed. £ *s.* *d.*	Allowed. £ *s.* *d.*
1. Metcalf and Co., for towage . .	5 0 0	....
2. Fraser „ bags . .	0 15 0	....
3. R. T. Ford „ port dues .	14 17 0	....
4. H. M'Carthy and W. Haywood, for clearing stage . . .	5 0 0	....
5. Mitchell and Co., for towage .	5 0 0	....
6. Eldershaw, for customs' officer .	7 7 0	....
7. J. G. Hand, discharging clerk .	11 2 0	....
8. J. B. Viles, surveyor . . .	3 3 0	....
9. Whitaker, for discharging . .	20 0 0	....
10. Hugh M'Carthy, for ditto . .	38 15 0	....
11. Australian Agricultural Company, for discharging and use of gear	109 15 0	....
12. Jewell, for lighterage . . .	151 18 0	....
13. Baker Bingle and Sons, port dues, &c.	37 6 0	....
14. Discharging	62 11 10	....
15. Ballast	35 10 6	....
16. George Thorne and Company .	4 16 0	4 16 0
17. Brierly, Dean and Company .	7 4 0	7 4 0
18. W. W. Buckland . . .	13 0 0	13 0 0
19. Saddington and Son . . .	18 18 6	18 18 6
20. Gilchrist, Watt and Co. . .	208 5 0	208 5 0
21. Part of the Australian Agricultural Company's account . .	66 16 5	66 16 5

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	Claimed. £	s.	d.	Allowed. £	s.	d.
22. Smith, Brothers and Company .	13	1	11	13	1	11
23. Commissions on disbursements .	121	5	0	....		
24. Gurner and Roberts, law charges	69	0	1	....		
25. Expenses of witness in law suit .	2	10	0	....		
26. Whitaker and Harvey, as per award	30	14	6	....		
	£1,063	11	9	332	1	10

Together with the bottomry premium thereon.

SCHEDULE No. 2.

	£	s.	d.
Account of disbursements for which the bond was given	2,311	6	6
Deduct—Amount of disallowances, as per schedule No. 1	332	1	10
	1,979	4	8
Bottomry premium thereon, at 25*l.* per cent. .	494	16	2
	£2,474	0	10

With interest thereon, at the rate of 4*l.* per cent. per annum, from the 3rd day of July, 1858, until paid.

(Signed) H. C. ROTHERY, Registrar.

On the 22nd June, *Lushington* moved the Court to refer back the report of the Registrar to be again reformed.—The matter in dispute was a question of law only; for the information of the Court the points of law intended to be argued had been entered in the minute notice of motion, and due notice had been given to the other side.

Clarkson, contrà.—The objection to a report of the Registrar must be by petition.

DR. LUSHINGTON.—If the parties do not agree to have the case heard on motion, the objection must be by petition in the ordinary way.

The following act on petition was then brought in by the proctor for the mortgagees of the ship.

" On the 21st July, 1860.

" On which day Waddilove, as the proctor of the said George

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Seymour, George Peacock, and Martin Diedrich Rucker, the mortgagees in possession of the said ship or vessel Edmond, declared that he objected to the further report of the Registrar and merchants bearing date the 19th day of May, 1860, touching the claim given in on behalf of the said Andrew Blowers Smith and John Smith, the aforesaid legal holders of a bottomry bond on the said ship or vessel, and the freight due for the transportation of the cargo lately laden therein; for he, Waddilove, expressly alleged that on the 15th day of March, 1860, the Right Honorable the Judge having maturely deliberated, by interlocutory decree remitted the former report of the Registrar and merchants bearing date the 15th day of March, 1860, to be reformed by them according to the principle laid down by their Lordships of the Privy Council in the case of the *Prince George*, reported in the 4th volume of Moore's Privy Council Reports, adding as follows: 'I apprehend the principle of the *Prince George* to be that the master by his sole authority can bottomry his vessel only for repairs—necessary provisions—articles furnished to the ship herself,—but that he cannot bottomry the ship for charges relating to the outward cargo, unless the ship could be arrested for the same, even though they constituted debts properly owing from the owners of the ship.'

"And Waddilove referring to the printed papers brought in in this cause to the case of the *Prince George*, referred to by the Right Honorable the Judge in the decree made on the 15th day of March, 1860, as aforesaid, expressly alleged that the following items, viz.:—

	£	*s.*	*d.*
2. Fraser—bags	0	15	0
4. H. M'Carthy and W. Hayward, for clearing stage	5	0	0
7. J. G. Hand, discharging clerk . .	11	2	0
8. J. B. Viles, surveyor . . .	3	3	0
9. Whitaker, for discharging . . .	20	0	0
10. Hugh M'Carthy, for ditto . . .	38	15	0
11. Australian Agricultural Company, for discharging and use of gear . .	109	15	0
12. Jewell, for lighterage . . .	151	18	0
14. Discharging	62	11	10
15. Ballast	35	10	6

contained in the schedule No. 1 annexed to the aforesaid report of the Registrar dated the 19th day of May, 1860, and by the said Registrar and merchants allowed in the aforesaid report to the said plaintiffs in this cause, were not payments of charges for articles furnished to the ship or vessel Edmond herself, but were

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payments of charges relating to the outward cargo of the said ship, for which the said ship could not have been arrested in the port where the aforesaid bottomry bond was given, and that the aforesaid several items were not port dues or necessary disbursements to enable the said ship to prosecute her voyage, and that therefore the same should have been disallowed to the said plaintiffs by the Registrar and merchants in accordance with the aforesaid decree and directions of the Judge made on the aforesaid 15th day of March, 1860, and as not falling within the category of charges allowed by the Lords of the Privy Council in the aforesaid case of the *Prince George*.

"And Waddilove submitted that even if the said items are to be considered as disbursements necessary to have enabled the ship to prosecute her voyage, there was no lien on the ship for the same by the law maritime or the law of the port where the bond was given, and that the same therefore should have been disallowed the plaintiffs, inasmuch as the decision in the *Prince George*, referring to the law of lien in the state of New York proceeded on the principle that payments of charges, for which there is no lien on the ship by the law maritime or the law of the place where the bond is given, are to be rejected as improper items of bottomry.

"And also referring to the following items appearing in the said schedule, No. 1, annexed to the said further report as allowed to the plaintiff, viz.:—

	£	s.	d.
24. Gurner and Roberts (law charges) .	69	0	1
25. Expenses of witness in law suit .	2	10	0
26. Whittaker and Harvey, as per award .	30	14	6
	£102	4	7

"Waddilove expressly alleged that the Registrar and merchants were mistaken in alleging that the plaintiffs were justified by the aforesaid decision of the *Prince George* in paying such items out of the balance of freight in their hands, in preference to port dues and other proper charges of bottomry, inasmuch as in the case of the *Prince George* it is distinctly stated in the judgment, that there was no balance of freight whatever (except 8 dollars and 91 cents) in the hands of either the master or the consignee of the ship (who was also the lender on bottomry), and he (Waddilove) submitted that the said items 23, 24, 25 and 26, are upon the principle laid down in the case of the *Prince George*, and in the aforesaid decision of the Judge in this cause of the 15th day of March, 1860, clearly improper items of bot-

tomry, and should accordingly have been disallowed to the plaintiffs by the Registrar and merchants. 1861. *January* 31.

"And with respect to the interest allowed the plaintiffs in the said report of the Registrar and merchants, dated the 19th day of May, 1860, Waddilove submitted that such interest should not have been allowed the plaintiffs, inasmuch as his said parties, on the 15th day of August, 1859, paid into this Honorable Court the full sum then reported due on the said bottomry bond, with interest up to that time, and that the said sum so paid in exceeding in amount the sum reported due in the further report of the Registrar and merchants, his (Waddilove's) said parties were intitled to interest upon the said excess, from the aforesaid 15th day of August, 1859, and that such interest should have been allowed his said parties in the said further report."

The answer took issue on the several points raised in the petition.

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Twiss, Q.C., and *Lushington*, against the report.—The real question is, where a bottomry bond is given for the homeward voyage, what expenses relating to the outward voyage shall be allowed as items in the bond. The authority is first the decision in the *Prince George*, and then the exposition of that decision given in the former judgment in this case. The *Prince George* determines one point positively, that payments for damage to the outward cargo are not to be allowed in bottomry, where there is no lien for them on the ship by the local law. It also adds, that if the local law had given a lien for such expenses, they would have been allowed. This suggests the true rule, that charges in respect of outward cargo are not to be allowed as items of bottomry, unless there is a lien for them either by the law maritime or the local law: no lien, no bottomry. This rule is clear and simple, and fixes a fair limit to bottomry. It also accords with former decisions, as the *Augusta* (*a*), the *Osmanlí* (*b*), where expenses incurred on a former voyage were rejected, and the *North Star* (*c*), where a bottomry bond, given to pay money borrowed to discharge general average expenses, was pronounced invalid, on the ground that there was no lien for such expenses. This in fact is the rule expressly laid down in the former judgment in this case, and is the rule to be gathered from the reported judgment in the *Prince George*. The judgment in the *Prince George* rejects payments for damage done to outward cargo, because there was no lien for them; it allows payments of "port duties and other necessary disbursements, necessary to enable the mas-

(*a*) 1 Dods. 283. (*b*) 7 N. of C. 322. (*c*) Ante, p. 45.

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ter to prosecute the voyage;" that is, inward-pilotage, wages, stores and repairs, for which there is a lien by the law maritime or the law of New York. According to this rule, the heavy discharging expenses, amounting to several hundred pounds, ought to have been disallowed by the Registrar, for there was no lien for them. It is true that, on examining the papers in the *Prince George*, it appears that three items of expense incurred in discharging outward cargo were allowed, but it is submitted that this is immaterial; 1st, because they are very small items, amounting in all to about £20; they passed *sub silentio* merely, they were never mentioned in argument, or in the judgment, which dealt specifically only with the item of damage done to outward cargo; 2ndly, because there was a lien for them by the law of New York. It can hardly be supposed that their Lordships intended to lay down a rule that discharging expenses, whatever the amount, should be allowed in bottomry, when there is no lien for them; for if so, why not also the items for damage done to the cargo? The law expenses should also be deducted from the amount of the bond: there was no lien for them, and yet Mr. Smith, who was agent for the ship, paid them out of the freight, instead of paying the expenses for which there was a lien, thereby enlarging the bottomry. The freight should have been applied to the ship's expenses; *Guion* v. *Trask* (*a*). The Registrar is in error when he says in his report that, in the case of the *Prince George*, 1,115 dollars due for damage to cargo was paid by the consignees out of the balance of freight, for he means consignees of ship; but in truth no freight, except 8 dollars, was ever received by the consignees of ship, and the 1,115 dollars were not paid by the consignees of cargo, but were deducted by them out of the sum which they would otherwise have paid as freight. The judgment in the *Prince George* is therefore no authority for the allowance of these law expenses. As to the claim for interest, in consequence of the excessive demand of the plaintiffs, the defendants paid into Court a greater sum than is now pronounced due; and they are intitled to interest upon the excess being deducted from the sum otherwise due to the plaintiffs. The plaintiffs, when the money was paid in, might and ought to have applied to the Court to have the money invested.

Wambey and *Clarkson*, contrà.—As a matter of fact discharging expenses were allowed in the *Prince George*, and Lord Campbell, giving judgment, expressly says (*b*), "Upon carefully examining the evidence and the accounts, it appears to us that

(*a*) 29 L. J. (Ch.) 339. (*b*) Page 26.

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with the exception of the sum of 329 dollars, the money secured by the bond was required for the ship's necessary disbursements at New York." The discharging expenses were necessary disbursements; unless the outward cargo was discharged, the ship could not have proceeded on the further voyage; in this respect they are to be distinguished from the payments made for damage done to the cargo. The argument founded on the small amount of them is immaterial, for the whole bond was only for 253*l*. As to the law expenses, the consignees and agents of the ship had a right to pay them out of the freight, as they were expenses incurred for the ship; there is no authority determining what expenses the consignees of the ship shall first discharge out of freight. As to the interest now claimed to be deducted, the money was paid into Court by order of the Court; and the burden of applying for an investment was, if upon either side, on the mortgagees.

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Judgment.

On the 31st of January, 1860, Dr. Lushington delivered judgment:—

In this case the bottomry bond, executed in Australia, was admitted to be valid, and referred to the Registrar and merchants. Their report was objected to, and the Court referred it back to be reformed according to the principle laid down by the Judicial Committee in the case of the *Prince George*(*a*). An amended report has been brought in, and that amended report is again objected to by the mortgagees of the ship.

The first objection is, that with respect to certain items the Registrar and merchants have not correctly applied the principle laid down by the Judicial Committee. It is my duty to follow the judgment of the Judicial Committee, and the only question open for my consideration is, what did the Judicial Committee do and mean to do? The materials for this inquiry are the judgment and the decree. Every judgment is intended to justify the decree; every decree is intended to carry out the judgment: more deference, however, is due to the decree than the judgment, for the decree is the act of the Court. If once the true meaning of the judgment and decree be ascertained, the only question left for me is, whether the report in this case accords thereto.

Judgment and decree in the *Prince George* considered.

The objection is made to certain items, that they were not charges for articles furnished to the ship, but charges relating solely to the outward cargo; that the ship would not have been arrested for them; that they were not port dues, or necessary

(*a*) 4 Moore, P. C. 21.

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disbursements to enable the ship to proceed on her voyage; that they do not fall within the category of charges allowed in the *Prince George*. Now, in truth, the last averment contains the essence of the objection; for if the Judicial Committee have held that such charges, whatever their nature or description, may be included in a bottomry bond, I cannot say nay. Their Lordships' judgment decides, in the first place, that it is not competent for a master to hypothecate the ship to defray damage done to the cargo on the outward voyage, or to pay for part of the cargo consumed on the voyage,—unless, perhaps, in the case where the municipal law of the port gives a lien for such demands. Then follows a passage in the judgment of great importance to the present case:—"Upon carefully examining the evidence and the accounts, it appears to us, that with the exception of the sum of 329 dollars, the money secured by the bond was required for the ship's necessary disbursements at New York." How the precise figure of 329 dollars is arrived at is not very clear; it may be a misprint; but that is immaterial, for it undoubtedly refers to the item for damage done to the outward cargo. The judgment then adds that the master was without funds; that if he had received the freight, or could have compelled the payment of it, and thereby have obtained sufficient funds, bottomry would not have been justifiable; but that borrowing on bottomry became necessary, these remaining items being all necessary disbursements of the ship at New York. Then what were these items? They include many charges connected with the outward voyage, for all of which expenses I apprehend the owners of the ship were liable, not the consignees of cargo. Amongst them are discharging expenses, and others of the same kind.

The disputed charges which I am at present discussing, seem to me to be *ejusdem generis* with those so allowed by their Lordships; there is no substantial distinction; and this being so, it is my duty to follow the precedent established by the authority of the Judicial Committee. If I were called upon to state what was the principle which governed this decision, I should say it was that all the charges in respect of the ship or crew, from the time the ship entered port, including the unloading of the cargo, being necessary charges to enable the ship to proceed on her voyage, and being charges for which the owner or master were liable, were expenses to defray which a bottomry bond might be taken.

Rule to be derived therefrom.

Cases decided by myself have been cited, which it has been argued conflict with this doctrine. The answer, if that is so, is

Osmanli and *North Star* distinguished.

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short and conclusive. I must obey the Judicial Committee, and not adhere to what must, if different from their doctrine, be considered my own errors. But I am not disposed to admit that either the case of the *Osmanli* (*a*), or the *North Star* (*b*), conflict with the *Prince George*. In the *Osmanli* the bond covered two different sums, a larger one for balance of accounts with reference to other ships and previous voyages, the other item for 150*l*. advanced at the moment, to enable the ship to come from Malta to Liverpool: the Court pronounced for the latter sum only. Expenses incurred in respect of other ships and former voyages, are very different from expenses incurred in respect of the ship in the port in which the bond is given, which are necessary to enable the ship to proceed on her voyage: thus the *Osmanli* does not apply. Nor does the *North Star* apply; for there the bond was not for money furnished or necessaries supplied to the ship at all; but was given as security to pay a demand of the consignee of the cargo for general average occasioned by the ship on her outward voyage. I consider I am bound by the case of the *Prince George* to pronounce against this objection to the report.

The agents of the ship were intitled to pay the law charges in respect of the ship out of the freight, taking a bottomry bond for other payments.

The next objection relates to certain law charges. These items were not included in the bottomry bond; and the proposition on behalf of the mortgagees is not to disallow any of the items included in the bottomry bond, but to claim a deduction from the amount of the bond on account of these items, which were paid by agents of the ship out of the freight. If these were just demands against the owner in respect of the ship's business, I know of no reason in law or otherwise, why they should not have been paid out of the freight. I am of opinion that this objection is untenable.

The bondholder intitled to usual interest, although a larger sum was paid into Court by the defendants than that finally pronounced for.

I now come to the last matter for consideration in this case. The report gives to the bottomry bondholder the sum of 2,474*l*. 10*s*., with interest thereon at the rate of 4*l*. per cent. per annum from the 3rd of July till paid. Now this is the usual and ordinary order made in similar cases, and no objection can be raised to it on that account; but it is said that special circumstances in this case require that this part should be altered. This circumstance, namely, that by order of the Court on August 15th, 1859, the defendants paid into Court the full sum then reported due on the bond, with interest up to that time. Now this order was made by the Court in consequence of the great delay which was asked by the defendants in order to substantiate their

(*a*) 7 N. of C. 322. (*b*) Ante, p. 45.

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defence, and the Court in granting that delay considered that it was but justice to the bondholder, the validity of whose bond was admitted, that he should have the most perfect security for the payment of what was due to him. It was in substance a condition upon which further time was granted. I considered, and do now consider, that in justice the bondholder was intitled to that security; but the bondholder was not thereby intitled to take the money out of Court; and if I refused him now the interest assigned by the report, I should deprive him of that to which in ordinary course he would be intitled. It is not the case of a tender.

Report confirmed.

I confirm the report with costs.

Clarkson, proctor for the bondholder.

Waddilove for the mortgagees.

THE GEORGE ARKLE.

Collision—Subsequent Salvage—Pleadings.

In a cause of collision the pleadings should be confined to the merits of the collision.

Special damages, as reward paid to salvors for services rendered necessary by the collision, are not to be pleaded.

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COLLISION. The petition for the plaintiff, the owner of the brig Violet, charged the George Arkle with running into the Violet, whilst at anchor in Yarmouth Roads, at 9 P.M. of the 17th November, 1860. The 9th Article of the petition pleaded:—

"That at 3 A.M. on Sunday, the 18th day of November, a life-boat came off to the Violet, when the master of the Violet, finding her in a dangerous condition, and having only two men on board, and in order to get his damages repaired, engaged the crew of the life-boat to take her into Yarmouth Harbour in safety for the sum of 130*l.*; that between 7 and 8 A.M., the said master, assisted by the crew of the life-boat, got the brig under weigh, and brought her up off the harbour's mouth to wait for water; that between 10 and 11 A.M. he again got her under weigh, and the crew of the life-boat having employed a steam-

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tug to take her in tow, she proceeded for the harbour, where she was safely moored about 12 at noon on the same day, and that the said sum of 130*l.* has since been paid by the plaintiff to the said crew of the life-boat for their aforesaid services, pursuant to the said agreement."

Deane, Q.C., now moved that the 9th Article of the petition should be struck out.—The petition should be confined to the merits of the collision; by the practice of the Court all questions of damages are referred to the Registrar, when the liability is settled. It is quite irregular to plead a salvage arising out of a collision. That is a subsequent matter for the Registrar, *Legatus* (*a*), *Pensher* (*b*). As the petition now stands, the defendants do not know whether they are bound at the hearing to produce evidence as to the salvage or otherwise.

The *Queen's Advocate* and *Tristram*, contrà.—There is no instance of any article like this now objected to having been struck out. We desire to have the salvage as well as the collision tried by the Court, and thereby to avoid the expense of a preliminary hearing of the salvage before the Registrar. We submit that the Court is the proper tribunal to assess salvage reward.

Right Hon. Dr. Lushington:—I am not aware that a petition in a cause of collision, containing an article like the present, which sets out a salvage service consequent on the collision complained of, has ever been admitted by authority, and evidence taken upon it. It may be conceded that, whether such an article is rejected or admitted, either course has its inconvenience. If the article is struck out, and the defendants require the opinion of the Court upon the extent of the salvage service, there is the expense of the preliminary hearing before the Registrar. On the other hand, if the article remains, great expense may be incurred unnecessarily by contesting the value of the salvage before the liability of the damage is determined. I prefer to maintain the general practice of the Court, which confines the pleadings to the merits of the collision, and leaves all questions of damage to be investigated in the first instance by the Registrar. The petition must be reformed by striking out this article.

Fielder, proctor for the plaintiff.

Deacon for the defendants.

(*a*) Sw. 168. (*b*) Sw. 211.

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In the Privy Council.

Present—Lord Kingsdown.
Lord Chelmsford.
Right Hon. Sir Edward Ryan.

THE JULIA.

Collision—Ship towing and Ship towed—Terms implied by Law in Contract of Towage.

In a contract of towage, each party contracts to use proper skill and diligence, and for damages solely occasioned by the negligent act of his servant is responsible to the other party.

Priestley v. *Fowler*, 3 M. & W. 5, distinguished.

Semble, a steam-tug, under engagement to tow a ship when required, is not, if the circumstances are perilous to her own safety, bound to take the ship in tow upon orders from the master; and the owner of the tug, so taking the ship in tow, cannot recover damages for a collision thereby occasioned. But if misconduct on the part of the ship, combined with the perilous circumstances, produces a collision, *held*, that the owner of the steam-tug is intitled to recover.

The Court of Appeal will not reverse a judgment upon nautical questions determined by the Court of Admiralty, except on the most conclusive reasons.

COLLISION. On the 2nd of November, 1859, the Julia, a ship of 477 tons, then being off Dungeness, bound to London, and in charge of a licensed pilot, engaged the steam-tug Secret, to take the Julia in tow when wanted, and tow her to Gravesend. The wind was at this time blowing a light breeze from the westward. After proceeding some distance under sail only, the master of the Julia gave orders for the Secret to take the ship in tow, and thereupon the mainsail and light sails of the Julia were stowed. The first rope given from the Julia proved insufficient, and broke. The Secret, then, in compliance with hailings from the Julia, steamed up to her starboard bow, and took another rope from her. This rope was secured, but before full strain could be got on it, the wind, which was blowing strong and in gusts, had increased the Julia's way, which was considerable: and no measure was taken on board the Julia, by shortening sail or otherwise, to lessen it. On the part of the Secret evidence was given that at the same time the helm of the Julia was ported. The Julia ran into the Secret's port-side, doing her immense damage. The crew of the Secret, in terror for their lives, climbed on board the Julia, but whilst the vessels were still together, the master and the engineer returned to the Secret. The anchor of the Julia

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was carried away by the collision, and running out with forty-five fathoms of chain brought the Julia up; the effect of this, and of the helm being, as it then was, starboarded, brought the Julia's sails aback, and the Julia made a stern-board towards the Secret, and again came in collision with her. The pilot of the Julia in his evidence spoke to the disorder of the crew on board; he said that he had never given orders for the Secret to take the Julia in tow after the first rope had broken, as he thought it was dangerous in the circumstances; that he had even waved off the Secret; that he was not aware the Secret had made fast the second time; and that, after the first collision, the crew of the Julia refused or neglected to work the ropes according to his orders, to fill the mainyard.

The cause was brought by the owner of the Secret against the Julia, to recover the damages sustained by both collisions. The libel pleaded the leading facts nearly as above, alleging that the first collision was occasioned by the helm of the Julia having been put a-port, and the second collision through the negligence of those on board the Julia in not filling the mainyard. The allegation, as to the first collision, denied that the helm of the Julia had been ported, and alleged that a sudden gust increased the speed of the Julia, and the Secret, by some mismanagement, got athwart the Julia's bows; as to the second collision, it denied the negligence of the Julia, and alleged that the collision was unavoidable. The defendants also pleaded that if any blame was imputable to the Julia, the accident was occasioned by the pilot in charge.

In the Court of Admiralty (27th July, 1860), the contest was almost entirely on the question of fact. The learned Judge summed up to the Trinity Masters as follows:—

Gentlemen,—In this case the vessel proceeded against is of large dimensions, and was manned by twenty-three hands; but upon the present occasion there have been produced from her entire crew only the carpenter and a seaman; neither the master, nor any one of the officers, nor the man at the wheel, have been brought forward as witnesses. Now, the collision took place on the 2nd of November; the action was commenced on the 8th of December; an appearance for the present defendants was made on the 9th of December; and the only excuse for the non-production of these most essential witnesses is, that Miller, the master, was dead, without the least statement, moreover, where he died, or when. But assuming him to be dead, there is not the slightest excuse whatever for the non-production of one of

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the officers, or the man at the helm. If you should, therefore, be of opinion that a difficulty arises from an insufficiency of evidence as to what took place on board the Julia, it is to be attributed to the default of the defendant, and not to any other cause.

Having made these observations, I will now call your attention to a point of some importance; namely, as to the employment of the tug, and on whom rests the responsibility consequent thereupon. It appears that the master of the Julia, in the first instance, declined the assistance of the tug; but afterwards the pilot on board engaged her. It is said there was great pressure on the part of the master of the tug; and I daresay there was, for it was his occupation to tow vessels: but I take it, it was a pressure that the master of the Julia could have resisted with the greatest possible ease if he had been so inclined. With whom, then, rests the responsibility of engaging the tug: with the master or the pilot? I apprehend, in all ordinary circumstances, with the master. I am speaking of the ordinary case where a tug is employed for accelerating speed, and for completing the voyage in a short time for the benefit of the owners; and I apprehend, that although there may be a pilot on board, the master is the proper person to determine whether a tug shall be employed or not. 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 in which the master ought to attend to the pilot's voice; but in all ordinary cases where a tug is employed merely for the purpose of accelerating speed and quickening the voyage, the master is responsible.

It appears that a rope was got out, that objection was taken to the rope in the first instance as being insufficient to hold the ship, and so it turned out; but that is a matter of no consequence, because it was not the cause of the collision that afterwards ensued. But a second rope was then taken from the ship, and it is exceedingly important to come to a decision who was responsible for that act. The pilot disclaims it: he says he did not wish the ship to be taken in tow the second time; and he goes further, and says that he waved to keep off the tug; whether that waving was seen or not we have no satisfactory evidence in the slightest degree. But what was done on board the Julia? This second rope was sent from the Julia to the tug for the Julia to be taken in tow. If that was an improper act, who was responsible? Why, the master. The pilot expressed an opinion to the master that it was unsafe to take the Julia in tow;

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but the master said he thought it was not, and allowed it to be done. Then who is responsible for that? Why, the master. It is not to be supposed that those on board the tug were responsible; they were following their vocation; and I have no hesitation in telling you that if it was a matter that ought not to have been done, the master of the Julia was responsible, as he had it in his power to prevent it. Now, the pilot says this was the cause of the collision, and in one sense certainly it was, because, if the rope had not been taken on board there would have been no collision. Then, having got the rope on board, what follows? I think the result of the evidence is, that the rope was not taut at any time before the collision. That is the evidence of the master of the tug, and I think it is in conformity with the other evidence in the case. The substance of his evidence is, that he went to leeward of the ship, and took her in tow, and that then he took every precaution—that I am aware any one could take—namely, the tug being on the Julia's starboard side, by keeping his helm a-port; of course he presumed the other vessel would keep her helm a-starboard, so that there would be no chance of a collision. It is of importance, because, assuming that you believe his evidence, assuming that he took all the means he could take in order to prevent the collision, by porting his helm, and so keeping it in the manner he says he did, how could the collision have taken place, unless the Julia's helm was altered? That will be, of course, a subject for your determination. It is said there is no evidence of it. The evidence of the pilot is, that the Julia's helm was put a-starboard, but his evidence does not go on to say it was kept to starboard. Now, if the helm of the steam-tug was kept hard a-port till the collision took place, could it have taken place without the starboard helm of the other vessel being relaxed? There may have been a gust of wind, but if there was, still if the helm of the steam-tug was kept hard a-port, I cannot see how the collision could have taken place, unless the Julia came round on the starboard hand; but that is for you to determine.

The next question is, whether the tug ported sufficiently, and in proper time; and was it possible for those on board her to have adopted any other measure, which it was incumbent upon them to take? I say incumbent, because it may be true that by throwing off the rope the tug might have escaped the collision; but I put it to you whether you think that was a measure they ought to have taken? They were employed to tow the vessel, and it was their duty so to do as long as there was a prospect of safety, and they had a right to expect the Julia

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would take proper measures. The master of the tug expected the Julia would back her sails. These are the circumstances I wish you to take into your consideration. There is certainly no direct evidence that the Julia ported her helm (except what the sailmaker says), but you must say whether you infer from the whole of the circumstances she did all she ought to have done to have avoided the collision.

Then with respect to the second collision, that stands on a single and simple point. Was it the duty of those on board the Julia to fill the mainyard? The pilot gave the order; the pilot's order was disobeyed, and if you are of opinion that the second collision might have been avoided if that order had been obeyed, it is as clear as daylight that the Julia was to blame.

After Consultation.

Dr. Lushington:—The Trinity Masters are of opinion that it was wholly improper for the Julia to be taken in tow the second time; and that the steam-tug did her best to avoid the collision. I told them that the responsibility of taking the Julia in tow, and consequent risk, attached to the master of the Julia, and not to the steam-tug. I told them so because the master knew from the pilot that the attempt ought not to have been made; and instead of prohibiting the attempt, he sanctioned it, when he had it in his power altogether to prevent it by refusing to allow the rope to be sent on board the tug. I hold the Julia, therefore, solely to blame.

Deane, Q.C.—The owners of the Julia are not exempted, then, by having a pilot on board?

The *Court.*—Certainly not: the master was to blame, and I take it that this ship's company was in a state of great disorder.

From this decree the owner of the Julia appealed.

The *Admiralty Advocate* and *Twiss*, Q.C., for the appellant. —The learned Judge in the Court below has decided against the appellant (then defendant), on the ground that the collision was occasioned by the Julia having been taken in tow in dangerous, and therefore improper circumstances. We submit that this decision is wrong for three reasons: first, because it proceeds upon an issue not raised in the pleadings; secondly, because, what-

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ever the danger, it was voluntarily accepted by the Secret: thirdly, because the duty of avoiding collision rested with the steam-tug, not the sailing-vessel; and the balance of evidence is in favour of the Julia. As to the first point, the decisions in the *North American* (*a*), and the *Ann* (*b*), show that a plaintiff is not intitled to recover except *secundum allegata et probata:* here the fact on which the judgment turns was not alleged in pleading, and was never urged by counsel; and the fact that was pleaded, namely, the porting of the Julia's helm, was not found by the Court. As to the second point, the danger was a danger incidental to the ordinary occupation of the steam-tug, and having voluntarily accepted that danger as part of the employment for money consideration, the owner of the steam-tug cannot complain of damages sustained thereby. This point in the relation between employer and employed, is well settled by a series of decisions in common law, beginning with *Priestley* v. *Fowler* (*c*), and ending with the recent cases, before the House of Lords, of *The Barton's Hill Coal Company* v. *Reed*, and *The Barton's Hill Coal Company* v. *MacGuire* (*d*), where all the previous cases were considered. The same cases also establish that a servant cannot recover against an employer for the negligence of a fellow-servant acting in the same employ. Supposing the fact proved that the helm of the Julia was ported by the order of the master, or the negligence of the helmsman, the appellant would nevertheless, by this rule of law, not be liable for the consequences. But thirdly, we deny the charge of the Julia porting; it was not found by the Court below, and we contend that the superior advantages of a steamer always impose upon her the duty of avoiding a collision, and that in a case of this kind there must be a strong presumption that the collision was occasioned by the negligence of the steam-tug to take due measures. [They then argued upon the evidence.] The second collision was a pure accident rendered inevitable by the first.

Deane, Q.C., and *Lushington*, contrà.—The evidence shows that the second collision was caused by the gross negligence of the crew of the Julia, and in respect of that collision the respondent is therefore intitled to recover. As to the first collision, the evidence also shows, we submit, that the Julia ported her helm, and in that case the negligence would be the negligence of the master and crew, for which the owners would be liable. But supposing the evidence as to the porting of the Julia to be inconclusive, so long as the fact is not positively disproved, the

(*a*) Sw. 358.
(*b*) Ante, p. 55.
(*c*) 3 M. & W. 5.
(*d*) 4 Jur., N. S. 767, 772.

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respondent is not barred from recovering; that would be pushing the rule of pleading, which is only intended to exclude *mala fides* and a false case, too far: it was impossible for the respondents to produce direct evidence of what took place on board the other vessel. The case may be distinguished from the *North American* and the *Ann* on this ground, that in those cases the party pleading had full opportunity of observing the course of the other vessel, and notwithstanding set up a false case. Then the respondent is intitled to rely on the point taken and decided by the learned Judge, that the accident was occasioned by the wrongful act of the Julia in ordering the tug to come and make fast a second time. That point arose out of facts proved, and not denied in pleading or otherwise by the respondents, and ought not to be now excluded. The point was rightly decided by the Court below: it was a wrongful act towards the respondents, and a breach of the implied contract with them, for the master of the Julia to order the tug to make fast in dangerous circumstances, without the directions of the pilot, and to continue to keep the sails of the Julia full. The doctrine of *Priestley* v. *Fowler* does not apply here, for the owner of the tug and the crew of the Julia were not fellow-servants; the owner of the tug was an independent contractor, a distinction well known to the common law tribunals in cases of this kind: *Knight* v. *Fox* (*a*), *Sadler* v. *Henlock* (*b*). The owner of the tug would have been liable in heavy damages for a want of common care on the part of his servants in the performance of their side of the contract, and it would not be equity to say that a similar obligation did not rest on the other party. It is not therefore true in law that the respondent took upon himself the risk of damage from the negligence of the crew of the Julia. Moreover, the rule of *Priestley* v. *Fowler* has never been extended to maritime contracts, where the duty of the party engaged to perform a service such as towing is much more stringent than in contracts to be performed in land, and the rule, though settled law in a certain class of cases, is one which encourages negligence on one side, and on the other deprives an innocent party of remedy for damages he has received.

Twiss, Q.C., in reply.

Cur. adv. vult.

Judgment.

Lord Kingsdown now delivered the judgment of the Court:—This is an appeal against a decree of the Court of Admiralty in

(*a*) 5 Exch. 721. (*b*) 4 E. & B. 570.

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an action brought by a steam-tug called the Secret against a vessel, the Julia, which she was engaged to tow. The Secret seeks to recover damages for two collisions alleged to have been occasioned by the improper management of the Julia.

The case is said to be of the first impression, and to involve the decision of nice questions of law, upon some of which complaint is made of the principles laid down by the learned Judge in the Court below in summing up the case to the Trinity Masters. He is supposed to have held that the employment of the steam-tug at all, under the circumstances, was a wrong act, and that it occasioned the collision; that the responsibility of such employment rested entirely on the master of the Julia; and that on this ground, without more, the Julia must be condemned. Their Lordships do not so understand the opinion of the learned Judge, and whatever novelty there may be in the circumstances of the case, they think that the principles on which it must be decided are very familiar to courts of justice, and admit of no reasonable doubt.

The tug was hired off Folkestone, and the contract was, that she should take the Julia in tow when required, and tow her as far as Gravesend. Their Lordships think it quite immaterial whether this hiring took place on the importunity of the crew of the tug, or on the spontaneous suggestion of the master of the Julia. When the contract was made, the law would imply an engagement that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board of each; and that neither vessel, by neglect or misconduct, would create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken. If, in the course of the performance of this contract, any inevitable accident happened to the one without any default on the part of the other, no cause of action could arise. Such an accident would be one of the necessary risks of the engagement to which each party was subject, and could create no liability on the part of the other. If, on the other hand, the wrongful act of either occasioned any damage to the other, such wrongful act would create a responsibility on the party committing it, if the sufferer had not by any misconduct or unskilfulness on her part contributed to the accident. These are the plain rules of law by which their Lordships think that the case is to be governed. It does not appear to them to fall within the principles laid down in *Priestley* v. *Fowler* (*a*), in the Court of Exchequer, which were subsequently acted upon in other cases, and were finally recog-

In a contract of towage, each party engages to use proper skill and diligence.

The case does not fall within *Priestley* v. *Fowler*.

(*a*) 3 M. & W. 1.

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nized and adopted by the House of Lords in the Scotch cases referred to in the argument.

The questions to be decided are :—

1. Did the accident arise from the misconduct of the ship? 2. Did the tug, by any misconduct on her part, contribute to the accident, or (what is in truth but another form of the same question) could she by using due diligence have avoided it? 3. If both these questions are decided in favour of the tug, can the ship escape the consequences of her misconduct, on the ground that it is to be imputed solely to the pilot, and in no degree to the master or crew? 4. Is the case of the tug, as stated in her libel, consistent with the facts as they appear in the evidence?

Upon the first point, viz., whether the ship was guilty of misconduct, and thereby wholly, or in part, occasioned the accident, their Lordships, and the naval captains by whom they are assisted, entirely agree with the opinion of the Court below. The master had taken a licensed pilot on board, and was bound to attend to his directions in the management of the vessel. He had engaged the tug off Folkestone to take the ship in tow when wanted and to tow her up to Gravesend. It is obvious that this engagement by no means involved the necessity of keeping the ship constantly attached to the tug. In the voyage from Folkestone to Gravesend, where the engagement was to end, the course of the ship would be quite changed; and in rounding the Foreland and afterwards, the wind, which while the ship was going up the Channel was favourable, would, of course, if it continued in the same quarter, have a different bearing. The tug having been engaged was immediately attached to the ship by a rope, which both the master of the tug and the pilot thought insufficient, but which the master of the ship determined to employ. It soon broke, and the tug dropped astern in order to gather it up, and having done so, came again alongside the ship on her starboard side, for the purpose of having another hawser attached to her. What passed at this time appears to their Lordships to be of great importance. The wind was aft, blowing with occasional gusts, and the ship under the sail which she carried, and without the aid of steam, was going at the rate of five or six knots an hour. Under these circumstances the pilot was of opinion, and, as far as their Lordships can judge, most reasonably of opinion, that it would not be prudent to attach the tug to the ship; accordingly, when the tug came up for the purpose of throwing aboard the ship the line by which the hawser was to be drawn on board the tug, he motioned her off with his

The taking the ship in tow was, in the circumstances, dangerous to the tug.

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hand. The crew of the tug supposed that the meaning of this action was that the ship was not yet ready with her hawser. Some further movements took place on board the ship, which were understood by those on board the tug to mean an invitation to throw the line on board, which they accordingly attempted to do, and after one or two failures succeeded in doing. The hawser was then attached by the crew of the ship to the line, and having been drawn on board the tug, was secured to the towing-hook in the usual manner. For the act of thus attaching the ship to the tug, contrary to the advice of the pilot, the Judge in the Court below has held, and, as their Lordships think, properly held, that the master and crew of the Julia, are exclusively responsible. The tug was to give her services whenever they were required; whether they were to be used or not was a matter for the discretion of those on board the Julia.

But, *semble*, the tug voluntarily accepting the danger would be barred from recovery, if the master of the Julia had not done wrong by neglecting to inform the pilot, which led to the collision.

But however injudicious the act of so attaching the ship to the tug may have been, still, if there had been no subsequent misconduct on the part of the ship, it might have been argued that the risk, however great, was one incidental to the duty which the tug had undertaken, and that she was not, therefore, intitled to recover compensation for any injuries which, by reason of it, she might sustain. But what are the facts with respect to the conduct of the Julia, as they stand upon her own evidence? In the state of the wind, the danger of the Julia running over the tug depended partly on the sail which the Julia carried, and partly on the mode in which she was steered. Both these matters were to be regulated by the pilot; yet it appears distinctly by the evidence of the pilot, who is the witness of the appellants, that he had objected to the tug being attached to the ship; that she was so attached without his knowledge; and that the fact was never communicated to him, and he was ignorant of it till the collision took place. How then was it possible that he should order the movements of the ship with reference to this most important circumstance; or how can the master of the Julia be excused on the ground of having obeyed, even if he had obeyed, the orders of the pilot, given under such circumstances? The tug having made fast the hawser the second time, proceeded a-head, keeping her helm a-port so as to keep a little to the starboard side, and out of the direct line of the Julia's course. In this state of things it was the duty of the Julia to keep her helm a-starboard, and not to carry so much sail as to incur the risk of running over the tug. The pilot, however, was in ignorance that any such dangers were to be guarded against, or that

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any such precaution was required, and a strong gust of wind carried the ship with her starboard bow against the port-sponsons of the tug, and the first collision was thus occasioned. Their Lordship have not the least doubt that the Julia was in fault.

The tug did not contribute to the accident.

2. The next question is whether the tug in any way contributed to the accident.

It is said that she is to blame in two respects:—first, that she did not put on sufficient steam to keep her a-head of the Julia; and secondly, that when the danger was imminent, she did not slip the hawser, and turn aside out of the way of the ship. In support of the first charge reliance is placed on the evidence that the master of the tug desired the engineer "to go easily" with his engines; but it is clear that this direction was given only when the hawser was first attached to the tug, and it appears to have been proper, in order to avoid a sudden jerk in drawing the hawser taut, by which it might have been broken a second time; but as soon as the master found that the Julia was gaining on the tug, he ordered all the steam to be put on, which, in fact, had been done before the order was given. In this respect their Lordships are satisfied that no blame is to be imputed to the tug. With respect to the second objection—that the tug ought to have slipped the hawser, and have got out of the way, and the allegation that by slipping the hawser she might have escaped, there is perhaps more difficulty. But their Lordships are not satisfied that slipping the hawser at the last moment would have enabled her to get out of the way; and they think that the reason assigned for not doing so at an earlier period is sufficient. The fact that the ship was gaining upon the tug was open to the observation of those on board the Julia. The tug assumed that they would observe it, and would do their duty by shortening sail. That they did not do so is accounted for by the circumstance that the pilot had been kept in ignorance that the ship was in tow. This objection, however, depends almost entirely upon nautical considerations; and if it be a matter of some doubt, it is to be remembered that the Court is called upon to reverse a decision which, after full consideration, was arrived at by the Trinity Masters, and approved of by the Judge. The very question whether the tug had done all in her power to avoid the collision was distinctly put by the latter to the former, and answered by them in the affirmative. The Court below had likewise the advantage which their Lordships have not had, of seeing the principal witness—the pilot, and hearing his exami-

nation, and of judging how far his evidence was to be depended upon.

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They who require this Board, under such circumstances, to reverse a decision of the Court below, upon a point of this description, undertake a task of great and almost insuperable difficulty. In all cases, as we have frequently observed, we must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong. And when a controversy arises upon facts of the nature of that now in question, there are some peculiarities in the jurisdiction which we are now exercising deserving of attention.

The Court of Appeal will not overrule decisions in the Court of Admiralty on nautical questions, without the most conclusive reasons.

In a Court of Law, if the Judges are dissatisfied with a verdict as against the weight of evidence, they can send the case before another jury. In the Court of Chancery, when the Court of Appeal reverses the judgment of the inferior Court on the result of evidence, the Judges of the Appellate Court are as capable as the Judge below (and, indeed, are presumed to be more capable) of forming an opinion for themselves, as to the proof of facts and as to the inferences to be drawn from them. But in these cases of appeal from the Admiralty Court, when the question is one of seamanship, where it is necessary to determine, not only what was done or omitted, but what would be the effect of what was done or omitted, and how far, under the circumstances, the course pursued was proper or improper, their Lordships can have but slender means of forming an opinion for themselves, and certainly cannot have better means of forming an opinion than the Judge of the Admiralty Court. They do not speak with reference to the distinguished person who now fills, and has so long filled, that office, though it would be impossible to imagine a stronger example of the truth of the remark; but any Judge who sits from day to day on such cases must necessarily acquire a knowledge and experience to which ordinary members of this Board cannot pretend. They must in such cases act entirely upon the advice of the nautical assessors, who form no part of the Court, whose opinion they can regard only as they might regard the advice of any nautical men out of Court. If they reverse in such cases, they must upon the authority of their assessors overrule the judgment of the Trinity Masters, who form a part of the Court below, and they must do this without any certain means of knowing the comparative weight which is due to the two authorities, and without hearing what reasons might be assigned by the Trinity Masters, if they were present to justify the conclusion at which they have arrived.

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We have thought it right to make these observations in order that the vexation and expense of hopeless appeals may, as far as possible, be avoided, by parties being made aware of the difficulties which the appellants must have to encounter when the merits depend upon the differing opinions of nautical men. The importance of these considerations is the greater by reason of the extraordinary increase which has taken place, and is still continuing, in the number of collision cases brought before the Court of Admiralty. According to a return with which we have been furnished by Mr. Rothery, it appears that, in the first twenty years of the present century, the number of such cases was 112; in the second, twenty, 153; and in the last twenty, and up to the 15th of December of last year, 2,216—the number in 1860 considerably exceeding those of any previous year.

Their Lordships are of opinion, that the judgment of the Court below, "that the Julia was alone to blame for the collision, and that the Secret did everything which it was her duty to do in order to avoid it," must be supported.

The charge against the Julia of porting without the order of the pilot is also substantially proved.

There remain the third and fourth questions, whether the blame is to be attributed exclusively to the pilot, and whether the case proved by the Secret in her evidence is the case stated in her libel.

3. The third question may be considered as disposed of by what we have already said; but all doubt upon it, if there were any, will be removed by the evidence which we have to consider on the fourth question.

4. The statement in the libel is, that the Secret had her helm hard a-port; that, as the Julia gained upon her, she hailed the ship to put her helm a-starboard; that the pilot gave orders accordingly, "but that the master ordered the helm to be put hard a-port, which was done; and that the effect was, that the bow of the Julia came to leeward, and the Julia with her starboard-bow came into collision with the port-sponson of the Secret abaft her paddle-box." It alleges that the collision and the damages consequent thereon were occasioned solely by those on board the Julia, in improperly porting her helm instead of keeping it to starboard. The allegation of the Julia is, that her helm before and at the time of the collision was kept hard a-starboard, and was never put a-port at all, and it insists that the first collision was occasioned exclusively by the tug having

by some mismanagement (it is not explained by what mismanagement) got athwart the bows of the ship. 1861. *Feb.* 13.

Now, it is to be observed in the first place, that in the position in which the vessels were, the accident could hardly have happened unless either the Secret had starboarded, or the Julia had ported her helm. But not only is it extremely improbable that the Secret should have so exposed herself wantonly to destruction, but it is positively sworn by the master of the tug that the helm was kept hard a-port. This statement is confirmed by the mate, who was at the wheel, and by the second mate, and, as regards the orders given by the master, by a seaman who heard them, and no statement to the contrary is contained in the allegation of the Julia. This fact, therefore, must be considered as established, and if so, it almost draws after it, as a necessary inference, the conclusion that the Julia ported, and that this was the cause of the collision, as stated by all the witnesses on board the tug.

It does not, however, rest here. A witness is produced who was on board the Julia, and he says expressly that the pilot had ordered the man at the helm to keep it well a-starboard, but that afterwards the master suddenly came up and ordered the helm hard a-port, and that within a minute and a-half afterwards the collision took place. This, of course, entirely confirms the story of the Secret, and, if it be true, removes all doubt as to the misconduct of the master, and as to his disobedience of the orders of the pilot. It is said, however, that this account is not to be believed, and that it is contradicted by those on board the Julia. Now, the crew of the Julia were about twenty in number, and of these only two are examined on her behalf. Neither of these men was an officer of the ship, and neither was at the helm at the time in question. One, Connar, was the carpenter, and the other was an able seaman. The first says he does not know how the helm was put; and the other says he thinks, from the direction of the ship, that the helm was a-starboard, and that it was not put a-port, but he is not positive. The absence of so many witnesses who would have been able to speak positively to this point, and who are not called, must weigh heavily against the appellant. The captain, indeed, is said to be dead; but the absence of the mate, of the man at the helm, and others who might have known the fact, is unaccounted for. This deficiency is, however, said to be supplied by the pilot; but his evidence, when it comes to be exa-

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mined, really amounts to nothing. He says that he ordered the helm to be put hard a-starboard just before the collision, that it was done, and that he ran forward to see the effect of it. This is consistent with the statement of the Secret. The question is, whether, after the pilot had given orders to starboard, those orders were not countermanded by the captain, and whether the helm was not put to port. Upon this, all that the pilot says is, that, "whether the man at the helm afterwards put it to port, or steadied it, he does not know; that it might have been done, and he not know it; he could not swear that it was; he should not expect that it was." Upon this evidence their Lordships cannot doubt that the statement in the libel as to the cause of the first accident is supported.

The Julia also to blame for the second collision.

As to the second collision, it is admitted by the appellant, that if the Julia is responsible for the first, she must also be responsible for the second. Their Lordships are of opinion that she is responsible for the second, even if, with respect to the first, the case were not sufficiently established against her. The evidence as to the second, in the view which their Lordships have taken, is important only as showing the disgraceful want of discipline which prevailed on board the Julia, the ill-feeling which existed between the captain and his officers and crew, and which may account in some measure for what it would otherwise be difficult to conceive, the gross misconduct and neglect of all proper precautions established against the Julia.

Decree affirmed, with costs.

Upon the whole their Lordships have no hesitation in advising her Majesty to affirm the sentence complained of, with costs.

Brooks, proctor for the appellant.

Rothery for the respondent.

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THE SCHWALBE.

Collision—17 *&* 18 *Vict. c.* 104, *s.* 388.

In a cause of collision, a defendant relying upon the statutory exemption given to the owner of the ship to blame, where the collision is "occasioned by the default of the pilot" employed by compulsion of law, is bound to prove his case in the strictest way.

The defendants' vessel was charged with improperly starboarding. The defendants denied the starboarding, and gave evidence that the helm was ported only, and by the order of the pilot; they also pleaded the statutory exemption. The Court found that the helm was improperly starboarded, and the collision thereby occasioned:—*Held*, that the defendants not having proved any order by the pilot to starboard had failed to establish their exemption under the statute.

COLLISION. This was an action brought by the owners of the brig Crown, against the steamship Schwalbe, for a collision which took place in the river Thames. The plaintiffs pleaded, and gave evidence that the collision was caused by the helm of the Schwalbe having been improperly starboarded. The defendants pleaded that the helm of the Schwalqe was not starboarded but ported only, and their witnesses deposed to this most positively; the master, however, admitted that the pilot had given the order to starboard, but deposed that the pilot immediately corrected it, and gave the order to port, which was obeyed. The defendants also pleaded that the collision, if caused by the improper navigation of the Schwalbe, was occasioned solely by the default of the pilot who was employed by compulsion of law.

The Judge of the Admiralty Court decided that the Schwalbe had starboarded and was solely to blame for the accident, and that the defendants had not established that the default was of the pilot only. From this decree the defendants appealed.

Twiss, Q.C., *Digby Seymour* and *Clarkson*, for the appellants.

Deane, Q.C., and *Karslake*, for the respondents.

LORD CHELMSFORD now delivered the judgment of the Court. [After stating the pleadings and going through the evidence in detail.]

Amidst such doubtful and conflicting evidence their Lordships would not be supposed to disturb the judgment of the learned Judge of the Court of Admiralty, even if the counsel for Judgment.

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the appellants had raised a doubt in their minds as to its correctness; for to repeat the language used by them in the *North American* (*a*), and in the case of the *Julia* (*b*), upon which judgment has just been pronounced, "in order to advise the reversal of a judgment, we must not merely doubt whether it is right, but be satisfied that it is wrong."

Although no view of the present case is free from difficulty, and no judgment can be formed upon it without hesitation, yet there being sufficient evidence to warrant the finding of the Court below, assisted as it was by nautical assessors, their Lordships could not with propriety reverse the decision merely upon the ground that if a judgment had been pronounced in favour of the opposite party, it would have been equally capable of being supported by the evidence produced on their side.

The Schwalbe, therefore, being found to be in the wrong, it only remains to be considered whether the owners have succeeded in exonerating themselves from their *primâ facie* responsibility, by showing that the pilot was the sole author of the injury. For this purpose it is not sufficient for them to prove the vessel to have been in charge of a licensed pilot, under whose orders the crew were acting, and then to call upon the Court to presume that the particular order which occasioned the collision was given by him. By the express words of the 388th section of the Merchant Shipping Act, which protects the owners from loss or damage where it is occasioned by the fault of the pilot, the *onus probandi* lies upon them, as their Lordships decided in the case of the *Christiana* (*c*), upon corresponding words in the former Pilotage Act (6 Geo. IV. c. 125). It has been shown, in the consideration of the circumstances of the collision, that it must have been occasioned by the Schwalbe having starboarded her helm a short time before it occurred. The owners, to relieve themselves from their liability, are bound to prove that an order to starboard the helm at this time was given by the pilot. But no such proof is anywhere to be found, except in the hasty expression (corrected as the witness says, almost before the words were out of his mouth, and not acted upon) just at the moment of the collision. The owners, therefore, fail entirely in the evidence necessary to transfer the responsibility from themselves; and without considering whether there was any negligent act or omission on the part of the crew of the Schwalbe, their Lordships think it sufficient to say, that the owners have not succeeded in establishing that the collision

(*a*) 12 Moore, P. C. 338. (*b*) Ante, p. 235. (*c*) 8 Moore, P. C. 160.

is to be attributed solely (if at all) to the fault of the pilot. They will, therefore, recommend to her Majesty to affirm the judgment of the Admiralty Court, with costs. 1861. *Feb.* 13.

Clarkson, proctor for the appellants.

Deacon for the respondents.

In the Privy Council.

Present—Lord Kingsdown.
Lord Chelmsford.
Right Hon. Sir Edward Ryan.

THE EAST LOTHIAN.

Collision—Pleading—Onus probandi.

The plaintiff in a cause of collision is bound to plead facts from which the law will infer that the collision was occasioned by the default of the defendant, but not to plead the legal inference.

The defendant is not bound to do more in plea than deny that the collision was occasioned by the default of his vessel or of his servants.

The defendant, though pleading a particular fact as the cause of the collision, is not bound to prove it; and if he fails in so doing he is not thereby concluded; but the plaintiff must establish his case according to his pleading and evidence.

The *North American* (*a*) and the *Ann* (*b*) distinguished.

COLLISION. This was an action brought by the owners of the schooner Laurel against the barque East Lothian, for damages arising from a collision, which took place on the night of the 21st of October, 1859, off the South Foreland.

The libel for the plaintiffs pleaded, (article 2), that the Laurel was close-hauled on the starboard tack, heading W. by S. with the wind N.W. by N.; (article 3), that the red light

(*a*) Sw. 358. (*b*) Ante, p. 55.

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of the East Lothian was seen a little on the Laurel's starboard bow, about two or three hundred yards distant, that the helm of the Laurel was then ported as much as possible so as to keep her under command; that the East Lothian ran stem-on into the Laurel's starboard bow between the cat-head and bowsprit, splintering with her jib-boom the port side of the Laurel's fore-mast; (article 5), that the collision, and the damages and losses consequent thereupon, were and are solely attributable to those on board and in charge of the East Lothian, and that no blame whatever in respect thereof is imputable to the master or any one on board the Laurel.

The allegation for the defendants, the owners of the East Lothian pleaded, (article 2), that the East Lothian was on the port tack heading N.E. by E. ½ E., with the wind N.N.W.; (article 3), that the red light of the Laurel was seen a little on the port bow of the East Lothian, distant about half a mile; that the East Lothian's helm was instantly put hard a-port, and the vessel in consequence went off several points; that the Laurel, which had the wind nearly two points free, instead of porting her helm, improperly starboarded the same, the consequence of which was that the East Lothian a few minutes afterwards struck the Laurel on her starboard bow, the bowsprit of the East Lothian passing under the Laurel's forestay on the starboard side, and the stem of the East Lothian striking the Laurel on her starboard bow. The 5th Article traversed in express terms the fifth article of the libel, and alleged that the collision, and the damages and losses consequent thereupon, were solely and entirely caused by and were attributable to those on board the Laurel, to wit, from their having improperly starboarded their helm instead of porting the same.

The responsive allegation pleaded "That it is untruly alleged in the third article of the allegation, to the effect that the schooner Laurel, when within the distance of about half a mile from the East Lothian, instead of porting her helm, improperly starboarded it; and that it is further untruly alleged in the fifth article of the said allegation, that the collision, and the damages and losses occasioned thereby, were solely and entirely caused by and attributable to those on board the said schooner Laurel, from their having improperly starboarded their helm; for the party proponent expressly alleges and propounds, that the helm of the said schooner Laurel was never at any time whilst she was within the distance of half a mile from the said barque East Lothian put to starboard."

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The evidence produced supported the pleadings on either side, and is more fully noticed in the judgment printed below.

On the 26th of March, 1860, the case was heard before the Judge of the Admiralty Court, assisted by Captain Drew and Captain Webb, Elder Brethren of the Trinity Corporation.

The counsel for the plaintiffs contended that, upon the evidence, the Laurel was close-hauled on the starboard tack and ported as much as possible so as to keep under command; and that the burden of proof was upon the East Lothian, 1st, because she was on the port tack, and bound to avoid by porting in time a vessel close-hauled on the starboard tack; and 2ndly, because the defendants, having pleaded that the collision was caused solely by the Laurel having starboarded her helm, was bound to make good their plea, according to the rule laid down in the *Ann* (*a*).

The counsel for the defendants contended that the Laurel was not close-hauled on the starboard tack and did not port in time; that the East Lothian ported in time, and that the collision was caused, as the nature and direction of the blow proved, by the Laurel starboarding.

The learned Judge summed up to the Trinity Masters as follows:—

Gentlemen,—There can be no doubt but that the evidence in this case is very conflicting. I will endeavour to place before your consideration, as clearly as I can, the questions on which I shall request your opinion. In order to do this, I must in the first place direct your attention to the rule laid down by the Privy Council, in the case of the *Ann*, which has been referred to at the bar.

The Magnet brought an action against the Ann, pleading that the collision was occasioned solely by the Ann having starboarded her helm. That was the plea; but when the case came before the Judicial Committee, their Lordships came to the conclusion that the Ann had not starboarded her helm, but had not ported in due time. They then said that the charge of starboarding was not supported by the evidence, and that though the Ann was to blame for not porting her helm in due time, yet that was quite a different charge from starboarding, and could not be taken into consideration; and they therefore dismissed the action. With this decision of their Lordships

(*a*) Ante, p. 55.

1861. *Feb.* 13. I entirely concur, for it would be against all right reason to allow a party to allege one charge in pleading, and then prove and rely upon quite a different charge.

This decision bears upon the present case. Let me therefore call your attention to the pleadings.

You are well aware that in this libel it is stated that the Laurel was a small schooner of sixty-three tons, that she was close-hauled on the starboard tack, and on descrying the East Lothian at two or three hundred yards off, a little on the starboard bow, standing to the eastward, she ported her helm, and that then the libel alleges that the collision was solely attributable to those on board the East Lothian. The case of the Laurel therefore is, that the East Lothian being on the port tack, and going free, was to blame for not giving way to a vessel on the starboard tack close-hauled.

Now comes the allegation. After having stated that the schooner was seen a little on the port bow, or rather the red light distant about half a mile, it alleges that the barque's helm was instantly put hard a-port, and that in consequence she went off several points; and then it goes on to state that the Laurel, instead of porting, improperly starboarded her helm. Then it states the mode in which the collision took place, to which I will call your attention particularly hereafter.

The real issue in this case arises on the fifth article of the allegation which recites what is said in the fifth article of the libel—namely, that the blame is attributable entirely to the East Lothian,—and then states, "That the said collision, and the damages and losses occasioned thereby, were solely and entirely caused by, and are attributable to, those on board the said schooner Laurel, to wit, from their having improperly starboarded their helm instead of porting the same." Now I pray your attention to these words, "solely and entirely caused by the Laurel having starboarded." In my judgment, gentlemen, the use of these words, "solely and entirely," operates as an exclusion of any other circumstance of blame which could have contributed to the collision. I do not say with reference to the pleadings in this Court that circumstances may not sometimes be relied upon which are not pleaded; but they are always circumstances of which the party pleading was necessarily ignorant. We have had such cases. We have had cases where the person in charge of the other vessel has been drunk, or where

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the pilot was below, and cases of no look-out and misconduct. The party pleading can never know of these circumstances on board the other vessel, and therefore I never will exclude these matters from the case. But this is not a case of that kind, and we must therefore confine our attention exclusively to the fact whether the Laurel did or did not starboard her helm. I am of opinion that since starboarding is alleged, the duty of proof must be upon the party alleging.

There are two modes of considering this fact put in issue, first, with reference to the evidence in the case; I mean what is sworn on the one side or the other; and we must always in these cases endeavour to come to a conclusion without imputing perjury to the one side or the other. Then, after having considered the positive testimony of the witnesses, we must look to see whether there are not certain facts probable or facts admitted in the case from which an inference necessarily arises, and which give a preponderance to the evidence one way or the other—facts and circumstances satisfactorily proved.

Now, on the part of the witnesses who are produced on behalf of the barque which charges the starboarding, the evidence is of this description. They do not say they ever saw the green light of the schooner, which would be evidence itself of the schooner's starboarding. One or two of them say that the schooner approached in the same line; that there was no deviation from her course one way or the other. But they all say this, that the collision could not have taken place by possibility except by the schooner starboarding her helm. They draw that inference, and swear to their belief in it.

The evidence on the other side consists of the testimony of three persons, all of whom swear that the schooner never did starboard her helm, but ported, and that is in my judgment very strong evidence.

Now, as it stands on the evidence of the witnesses in the case, I should have no hesitation in suggesting to you my opinion, that if the case rested there, your verdict must be that the starboarding is not established by the evidence. But there remains a most material consideration in this case, and that is the fact of the mode of collision. The collision took place, as admitted on all hands, by the barque going into the starboard side of the schooner; and it will be for you to determine whether

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that does not inferentially and necessarily lead you to conclude that the schooner must have starboarded her helm. If you are of opinion that you have no other alternative than to come to that conclusion from the mode of collision, then of course your judgment will be to that effect. In order to come to that conclusion you must look and see whether the collision could otherwise have taken place in the mode described by the witnesses. Could it have taken place by the barque not giving way, as stated by the Laurel's witnesses? Could the vessels have been in such close proximity that the collision took place as described by them? Do you think the barque was seen on the starboard side of the schooner? Do you think it impossible, or do you think it reconcilable with probability?

The Trinity Masters found that the Laurel starboarded her helm, and thereby occasioned the collision; and the learned Judge thereupon dismissed the plaintiffs' claim, with costs.

From this decree the plaintiffs appealed. The case was argued on the 20th of December, 1860.

The *Queen's Advocate* and *Deane*, Q.C., for the appellants.

Twiss, Q.C., and *Clarkson*, for the respondents.

Cur. adv. vult.

On the 13th of February, 1861, Lord Chelmsford delivered the judgment of the Court:—

Judgment.

In this case the owners of the Laurel, a schooner of 63 tons, proceeded against the owners of the East Lothian, a barque of 388 tons, for damages arising from a collision which took place between the vessels, off the South Foreland, about 8 p.m. of the 21st of October, 1859. There is some little difference in the evidence, in certain particulars, as to the direction of the wind and the courses of the vessels, but nothing which can be considered to be of importance. The wind is, on one hand, stated to have been N.W. by N., on the other N.N.W., a difference only of a point. The courses of the vessels ought to be taken from the persons on board of each of them respectively, as likely to be more correctly known by them than by the other party. Proceeding upon this ground, it appears that the Laurel was

The Laurel was

heading W. by S., the East Lothian N.E. by E. ½ E. It is

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agreed on both sides that the Laurel was on the starboard tack, and the East Lothian on the port tack. The witnesses of the East Lothian say, that both vessels had the wind a point free; but taking the direction of the wind, and the course of the Laurel, from her own witnesses, she must have been only six points from the wind, and therefore (as they represent her to have been) close-hauled. Upon the statement on behalf of the East Lothian of her course and the direction of the wind, she must have been more than a point freer than the Laurel. However this may have been, the vessels were bound to obey the well-known and long-established rule. The Laurel being upon the starboard tack, it was her duty to keep her course; the East Lothian being upon the port tack was bound to give way. This would be done on each part by the Laurel's porting her helm to such an extent only as to keep her full and so under command, and by the East Lothian putting her helm to port, and passing on the port side of the Laurel. The vessels being in the relative positions described, and the course which each ought to pursue being clearly defined, they came into collision, the East Lothian striking the Laurel on the starboard bow, between the cat-head and the bowsprit, and her jib-boom passing over the starboard bow of the Laurel in a slanting direction before the foremast. Under these circumstances, as it was the duty of the East Lothian to give way to the Laurel, the primâ facie presumption would be that she was to blame, and it would be incumbent upon her to show that she did all that she was required to do, and that the Laurel threw herself in her way, and so occasioned the collision. And this she endeavours to do by raising an inference drawn from the nature of the injury, and the place where the Laurel was struck, that the Laurel must have starboarded her helm, and in that way alone could have presented her starboard side to the blow.

close-hauled on the starboard tack; the East Lothian a point free on the port tack.

It was the Laurel's duty to port, keeping herself under command; and the East Lothian's to port and pass on the Laurel's port side.

Primâ facie the East Lothian to blame.

The owners of the Laurel, after describing in their libel the relative positions of the vessels, allege that "the Laurel's helm had been ported as much as it was possible so as to keep her under command, but that the barque came stem on into her starboard bow." It is clear that the Laurel was not bound to state with more precision the mode in which the collision occurred, because if she alleged that she obeyed the rule which governed her course, and then showed that another vessel, bound by the same rule to give way to her, came into and struck her, she substantially charged the blame on the other vessel. And it was not at all necessary for her to add, as in Article 5,

Pleadings.

The Laurel was not bound to plead specifically that the East Lothian did not port in time;

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"that the aforesaid collision, and the damages and losses consequent thereupon, were and are solely attributable to those on board and in charge of the East Lothian, and that no blame whatever in respect thereof is imputable to the master or any one on board the said schooner Laurel."

nor to plead the legal inference from the facts that the collision was occasioned by the East Lothian.

The owners of the East Lothian might, if they had pleased, have contented themselves with a denial of the averment in Article 5; but in their allegation, in which they describe the navigation of their own vessel, they allege "that the collision was solely and entirely caused by and is attributable to those on board the schooner Laurel, to wit, from their having improperly starboarded their helm, instead of porting the same." In the responsive allegation, the owners of the Laurel deny expressly this averment, and allege on their part that "the helm of the Laurel was never at any time, whilst she was within the distance of half-a-mile from the East Lothian, put to starboard."

The defendants might have simply denied that the collision was occasioned by their default, but they expressly plead that the Laurel starboarded.

The cases of the *Ann* and *North American* considered.

The learned Judge of the Court of Admiralty appears to have considered that, upon the authority of the case of the *Ann* (*a*), the East Lothian, having in her allegation expressly ascribed the collision to a distinct cause, and to that "solely and entirely," the onus probandi lay upon her to prove what she had thus alleged, and that if she did not succeed in doing so her defence altogether failed. It becomes necessary, therefore, to consider to what extent parties must be bound by their pleadings according to the opinions of their Lordships, as expressed in the case of the *Ann*, and in the previous case of the *North American* (*b*). It must be observed that, in each of those cases, the pleadings by which the parties were held to be bound were those of the party proceeding to recover the damage sustained, in which he gave his own account of the acts which produced the collision, and in each of them the blame imputed to the other party was his having starboarded his helm.

In the case of the *Ann*, it was strongly pressed upon their Lordships that to hold parties to be strictly bound by the description which they give of the manner in which the acts of the opposite party occasioned the collision, might lead to great injustice, as it might be impossible, in many cases, to ascertain from the one vessel what was the course of proceeding in the other. This objection, however, scarcely applies to such a fact

(*a*) Ante, p. 55. (*b*) Swabey, 358.

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as whether a vessel ported or starboarded her helm, which must generally be known by the turning of the head of the vessel in one or the other direction, and can be perceived equally well by the vessel meeting as by those on board who give the order, or see the helm shifted. Occasionally, indeed, a sudden gust of wind, or some other cause, may drive the head of the vessel round so as to present the appearance of her helm having been altered to produce the effect. But these instances are extremely rare, and as it is always quite sufficient for a party who complains of an injury to his vessel, occasioned by the improper course of another vessel, to describe that course, without undertaking to attribute it to any particular cause, the possibility of exceptional cases arising, in which a party may be misled by appearances into an erroneous statement of the acts which produced the injury, appears to their Lordships to afford no reason for their departing from the strict but salutary rule which was adopted by them in the cases referred to. But the reason of the rule altogether fails in its application to the defence of the vessel proceeded against. 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 intitle 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. Although, therefore, the East Lothian has distinctly asserted that the collision was solely and entirely caused by the Laurel having improperly starboarded her helm; yet if it had been clearly shown that the collision occurred in a totally different manner, unless the allegation on the part of the Laurel, that the injury was attributable to those on board the East Lothian, was supported by the facts proved, the case of the Laurel would not be established, and therefore the defence of the East Lothian would prevail. Upon the pleadings in this case, the only point to be determined is, whether the Laurel has proved the truth of her own allegation that the East Lothian was to blame for the collision in question.

The defendant, though failing to establish his own case, even if specifically pleaded, is not thereby concluded, but the plaintiff must prove the facts as by him pleaded.

The East Lothian is not therefore bound to prove that the Laurel starboarded, but the Laurel must prove her case.

Both parties appear to have directed their evidence principally to the question whether the Laurel did, or did not, starboard her helm. Undoubtedly if it had been proved that she had done so, she would have been clearly in the wrong. But her witnesses swear positively that their helm was not starboarded; not one of the witnesses of the East Lothian will venture to state that it was; and the learned Judge of the Court of Ad-

Evidence considered.

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miralty expressed an opinion, in which their Lordships entirely concur, that "if the case rested here, the starboarding is not established by the evidence." But then the learned Judge pointed out to the Trinity Masters, his assessors, the fact of the mode of collision by the barque going into the starboard side of the schooner, and told them "it was for them to determine whether that did not inferentially and necessarily lead them to conclude that the schooner must have starboarded her helm." After consultation with them, he delivered their opinion that "the schooner starboarded her helm, and so occasioned the collision." If their Lordships had not, in common with the Court of Admiralty, the advantage of nautical skill and experience to aid them in their decision of this case, they would probably have felt themselves bound to adhere to the judgment of that Court. But their nautical advisers are of opinion that the fact that the Laurel received the blow on the starboard side does not necessarily prove that she must have starboarded her helm.

Result; the Laurel did not starboard.

In this conflict of scientific opinion, their Lordships feel that the question must be left open to the testimony of the witnesses, and that the positive evidence of the Laurel's witnesses, scarcely met by even negative evidence on the other side, leads irresistibly to the conclusion that the assertion of the Laurel's helm having been starboarded is disproved. This, however, will not of necessity decide the case in favour of the Laurel, for she must still be required to show that the collision occurred by the fault of the East Lothian.

And the East Lothian was to blame for not giving way in time.

The questions then suggested by the learned Judge to the Trinity Masters in the Court of Admiralty arise: Can the collision be accounted for by the East Lothian not giving way, as alleged on the part of the Laurel? and, Can the nature of the blow and the parts of contact of the vessels be reconciled with this view of the case? Aided by the judgment of their experienced assessors, their Lordships have come to a conclusion on both these points in favour of the Laurel. It is clear upon the evidence that the two vessels, when first seen, were approaching nearly stem-on to each other. It is only necessary to refer to the evidence of the master of the East Lothian, to show that the Laurel was quite close to her when first seen, and therefore to lead to the belief that the look-out on board the East Lothian was not what it ought to have been. If, then, at this moment, the East Lothian was rather on the starboard bow of the Laurel, as stated by the Laurel's witnesses, and came close upon her

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before there was time to get out of her way, the collision would have taken place exactly in the manner described in the libel. It must be borne in mind that the East Lothian considered it essential to her case to establish that the Laurel had starboarded, and suggested no other mode by which the vessels could have come in contact. It must be taken to be proved that the Laurel did not starboard her helm, but kept her course; and it having been the duty of the East Lothian to give way to the Laurel, and a failure to obey the rule having been shown to be capable of occasioning the contact with the Laurel in the exact point where it occurred, all other causes of the collision having been negatived, the only remaining conclusion is, that the East Lothian is alone to blame, and that their Lordships must recommend to her Majesty that the decree of the learned Judge of the Court of Admiralty should be reversed, and sentence be pronounced for damages against the East Lothian, with costs both in the Court below and upon this appeal.

Judgment reversed, with costs.

Deacon, proctor for the appellants.

Clarkson for the respondents.

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THE BONITA.

THE CHARLOTTE.

Possession—Sale of British Ship by Master abroad—Necessity—Communication with Owner—Order of Sale by Commercial Court abroad—Ratification by acceptance of Purchase-Money.

The validity of the sale of a British ship in a foreign port is determined by the law usually enforced in the Court of Admiralty, unless the foreign law be specially pleaded.

The master of a British ship, except under urgent necessity, is not intitled to sell without the authority of the owner; and the proof of such necessity lies upon the purchaser.

A master before selling the ship is bound, if practicable, to communicate with his owner; and, *semble*, if he sells without such communication, the sale is invalid.

It is the duty of the master of a British ship before selling her in a foreign port to consult the British Consular officer there resident, the opinion of the Consul being much considered by the Court in determining the validity of the sale.

The order of a foreign Commercial Court for the sale of a British ship within twenty-four hours of the application by the master, held not to be a judicial proceeding.

Confirmation of a sale by the owner will not be inferred from vague expressions of approval, if the owner at the time was not aware of the true state of the facts relating to the sale.

Acceptance of purchase-money generally operates as a ratification of the sale, but not so if the money was received without the intention of appropriating it, or if received in ignorance of the facts relating to the sale.

The owner of a ship, being ignorant of the true state of facts relating to the sale of his ship abroad by the master, received as proceeds of the sale bills of exchange at sixty days. Before the bills became due, he became aware of the true circumstances; and his ship having arrived, he arrested her. When the bills fell due he obtained payment of them, and paid the money into Court:—*Held*, that such receipt of the purchase-money by him did not amount to a ratification of the sale.

POSSESSION. This was an action brought by Thomas Redaway Matthews to recover from the defendant John Maguire Cooke the schooner Bonita, which had been sold abroad by Robert Cumming, the master, on the 22nd of October, 1859, under the following circumstances:—

The Bonita, a schooner of 120 tons, registered in the port of Dartmouth, on the 28th of September, 1859, arrived at Figueira Roads, on the coast of Portugal, with a cargo of fish, consigned to Mr. Rendell, who was also British Vice-Consul at Figueira, and agent to Lloyds. The harbour at the time was closed, in consequence of a breakwater being constructed across the mouth of the river Mondego, for the purpose of re-opening the old entrance to the harbour on the north side;

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and notice was given that the entrance would be opened on the 25th of October. The Bonita, therefore, anchored outside and close to the breakwater; there discharged cargo and took in ballast. She was ready for sea about the 7th of October, but was detained by contrary winds. On the 13th of October a violent gale blew, and the Bonita, having parted from her anchors, came in collision with another schooner, called the Charlotte, and afterwards drove against the breakwater and beat against the piles. She thereby suffered some considerable damage, and at low-water she was abandoned by the master and crew. On the next day, the weather having moderated, the crew returned, and the Bonita (as also the Charlotte) was floated off, and got into a sea-bay, *i. e.*, a small creek in the sands immediately outside the breakwater, where other small vessels were at anchor. Here the Bonita was anchored,—as the defendant alleged, hauled up on the sand; but, according to the plaintiff, floating and grounding with the tide. On the same day (14th October) Mr. Rendell, with the consent of the master, telegraphed to Lloyds that the Bonita had gone ashore at Figueira during a severe gale, and the master was waiting the owner's instructions. The contents of this telegram became known to the plaintiff on the 18th of October, through a letter from his broker in London, and he at once went to the office of the club in which the Bonita was insured, and claimed for a total loss. The next day (19th October) he telegraphed to Cumming, the master, "Is Bonita total wreck? Can she be repaired there? Say if repaired or abandon. Telegraph." The defendant denied that this message was received; but no evidence was given on this point on either side. On the 14th of October the master wrote to the plaintiff a letter, describing the accident and the condition of the ship, and ending thus:—"Now there is no place here to examine her bottom, and they are about to open a new bar in nine or ten days. The opinion of the pilots and others is the place where we now lie will fill up, and I think so. You must please understand the place where we now lie is open to the Atlantic, sheltered only by a sandbank at half-tide, the river stopped up from side to side by a breakwater. Now, how am I to act in such circumstances? Please telegraph or write. I shall go into no repairs until I hear from you or the club. I think it is useless; the Bonita makes water, and no means whatever to see her bottom." This was received in course of post by the plaintiff on the 25th or 26th of October.

On the 18th of October a survey was held on board the Bonita by William May, master of the Charlotte, a Portuguese shipmaster, and a Portuguese shipwright, and on the next day (19th October) sworn before Mr. Rendell, as British Vice-Consul. The survey

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stated, " Having duly and carefully surveyed and examined the said vessel's hull, we found as follows, viz., the bowsprit carried away to the stem, and with it the cutwater, the deck hove up amidships, the rudder forced up and rendered useless, the vessel completely twisted, the floors and futtocks apparently forced in; the planks of the bottom, as low down as could be seen, much cut and injured by having laid aground on the rocks; and having taken into consideration the almost impossibility of effecting such repairs on the said vessel as she absolutely requires to make her seaworthy, originating in the nature of the ground and the position where she now lies; and furthermore, that any attempts with the view to put the said vessel in a state to proceed to sea would only appear to us to be a useless expenditure of money, without the hope of that result which should be the object of the undertaking, consequently would, according to our judgment, in the end prove to be abortive; we therefore concur in recommending the vessel to be abandoned and sold by public auction for account of those to whom it may concern."

Mr. Rendell then (19th October) telegraphed to the plaintiff, " Bonita Charlotte condemned. Inform Fox at Kingsbridge." This message was received on the same day by the plaintiff, two hours after he had despatched the telegram to the master; and on the 21st of October he wrote to the master a letter, containing the following passages:—" I sent you a telegram, about an hour or two before I received the second to say the vessels were condemned, which perhaps was under the circumstances the best thing. I can't say much about it to you, not knowing much of the facts. I hope the wreck will be sold well: I underwrite one quarter her value. I trust you have done everything for the best as well as you could." This letter was conveyed by the mail on the 27th of October, and reached Cumming on the 2nd of November, ten days after the sale of the vessel.

On the 21st of October, Cumming, not hearing from the plaintiff, and, as was alleged by the defendant, apprehending, with good reason, that the vessel could not be repaired as she lay, because of the shallowness of the water, and that the opening of the new entrance to the harbour would cause the sea-bay in which the vessel lay to silt up with sand, and so prevent the Bonita from coming out, petitioned the Commercial Court of Figueira for the sale of the vessel. The petition recited that the surveyors had pronounced the vessel innavigable, and prayed the Judge to " name a day and hour for the sale with all possible despatch, on account of the danger the vessel was in, as delay

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would inutilise her." The Judge immediately granted under his certificate a sale to take place the following morning, at nine o'clock, in the ordinary manner, by the officer of the Court; the buyer binding himself to pay the duties to the revenue according to the decree of 11th August, 1852, deducted from the price of sale, in case the said vessel should be definitely considered innavigable, and to pay the price of sale at three days' sight in gold and silver, as well as to pay the respective duties according to the decree, if the said vessel should be considered navigable. Accordingly the sale took place the next morning (22nd October) by public auction, the "Attorney-General" attending on behalf of the Court: and the defendant, John Maguire Cooke, a British merchant, residing at Figueira, purchased the hull of the Bonita for 170*l.*, and certain stores of the ship for 12*l.*

On the same day on which the sale took place, and shortly after the sale, a heavy flood in the river broke away part of the breakwater opposite the sea-bay, and scoured away part of the sandbanks adjoining the sea-bay, and deepened the water around the Bonita and Charlotte. The defendant, who was likewise the purchaser of the Charlotte, thereupon hove the Bonita down to the Charlotte, and effected temporary repairs to her bottom; he afterwards did the same to the Charlotte, and then temporarily repaired them. The cost of the Bonita's repairs, according to the defendant's evidence, was 295*l.* 8*s.* 10*d.* On the 7th of November a "Letter of Sale" was given to the defendant on his request by the Commercial Court. This document was signed and sealed by the Court: it recited the sale by auction, and declared that the vessel should be delivered to the defendant, "and as he can make away with her as he thinks fit, the present is passed, which will serve as documents of title."

On the 10th of November, Mr. Rendell, as Vice-Consul, at the request of William May, who had been appointed master of the Bonita by the defendant, indorsed a provisional certificate on the certificate of the Bonita's registry according to the 54th section of the Merchant Shipping Act, 1854, which recited the sale of the ship by public auction, "in virtue of a petition signed by the late master, on his, the said master's, responsibility." Four days afterwards Mr. Rendell cancelled this certificate, adding a memorandum that doubts had arisen as to the legality of the sale, and granted the following provisional and conditional certificate:—

[After specifying dimensions, &c.,] "I, the undersigned, T. B.

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Rendell, her Britannic Majesty's Vice-Consul at the port of Figueira, in Portugal, hereby certify that the ship, the description of which is extracted from the original register (now in my possession), and is prefixed to this my provisional and conditional certificate, which vessel was driven on shore at this port, and in consequence of damage alleged to have been sustained, was, at the instance of the late master, Robert Elson Cumming, and upon his responsibility, sold by the Judge of the Tribunal of Commerce of this town, on the 22nd day of October last past, which sale not being authorized by the original owner, I have granted the present provisional and conditional certificate accordingly, that it be left to the decision of the party or parties concerned in the said vessel, directly or indirectly, in case of their disapproval of the sale, to exercise their own rights, being at liberty to confirm it or not, as they think proper, after the vessel's arrival in England, provided also that a British subject residing in a foreign country, and not a member of a British factory or partner in a house actually carrying on business in the United Kingdom, be qualified to become owner of a British ship. That William May, of Salcombe, is the master of the said ship. That the person whose name is hereunder written has purchased all the shares in the before-mentioned ship.

(Signed) JOHN RICHARD MAGUIRE COOKE."

The Bonita was then laden with oranges, and on the 19th of November sailed for Plymouth, where she arrived on the 26th of November. She was there arrested by the plaintiff. The purchase money of the vessel was paid by the defendant to Mr. Rendell, on behalf of the plaintiff, and, less a deduction for seamen's wages, was, on the 4th of November, remitted to the plaintiff by two bills, one payable on the 22nd of December, 1859, the other payable on the 4th of January, 1860. The plaintiff received the bills in ignorance of the true state of facts; but afterwards, and after he had arrested the vessel, he received payment upon them when they fell due, and on the 11th of February paid the amount into Court. The Insurance Club did not pay on the policy.

The evidence produced in the cause established the facts generally as above; but on four points the evidence was conflicting. 1. As to the amount of damage received by the Bonita in the collision, and beating against the breakwater. 2. As to the possibility of repairing the vessel whilst lying in the sea-bay, in its condition before the breach in the breakwater. 3. As to the grounds for anticipating that the sea-bay would silt up immediately upon the entrance to the harbour being opened. In point of fact it did

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silt up, but not until forty days after the harbour was opened on the 26th of November, and then partially only. 4. As to the share of Mr. Rendell in the proceedings relating to the sale. There was some evidence that he had been a party to the original survey, and the proceedings in the Commercial Court, where he had certainly acted as interpreter to the master; but Mr. Rendell himself deposed as follows:—

"On the 21st day of October, 1859 (after the Charlotte was sold), Robert Elson Cumming, the master of the Bonita, called on me, and said he wished the vessel to be sold, as the Charlotte had been, or his owners might blame him for not doing so, or words to that effect. On his stating that he had received no communication from his owner, and as I had received none, I endeavoured to dissuade him from such a step, the said schooner being so little injured; and I proposed to put the vessel in a state to proceed forthwith to Lisbon, which could have been done at a small expense; and I also read the law to him forbidding the sale of vessels in such circumstances as his without authority from the owners, and that without it such sale would be null and void, to which he replied he would have the vessel sold in justice to his owner, and if he did wrong in so doing it was an error in judgment, or words to that effect. I then told him it would be on his responsibility. The paper writing annexed hereto, marked B., is a true extract from the Portuguese law, and the translation at the foot thereof is a true and correct translation.

'*B.*

'Art. 41 do Codigo Commercial Portuguez.

'1401. Fora do caso d'innavigabilidade legitimamente provada, o capitaõ naõ põde vender o navio sem authorizaõ especial dos donos d'elle: fazendo o, a venda é nulla, e o capitaõ obrigado a responder pessoalmente por perdas e damnos, sem prejuizo da acçaõ criminal a ter logar.'

'*Translation.*

'Art. 41 of the Portuguese Commercial Code.

'1401. When it is not lawfully proved that the vessel is not seaworthy, the master cannot sell her without special authority from her owners; if he does so, the sale is null, and the master obliged to answer personally for losses and damages, and still subject to a criminal action if requisite.'

"On the 22nd day of October the said schooner was sold, as she lay afloat, on the petition of the said master, and solely on his responsibility, by the judge of the Commercial Court at Figueira, and I was afterwards called upon to authenticate such proceedings in the said Court, which I declined to do, on the ground that the sale was null and void, and merely recognized

1861. *March 2.* the signatures to the Portuguese documents in reference to the sale; and I say that, by the law of Portugal, a sale of a vessel under the circumstances under which the Bonita was sold, is absolutely null and void, as being made without a judicial survey of such vessel, and without the consent of the owners; and I deny that the sale of the Bonita met with my fullest approval, or that I at all approved thereof, or that I considered a sale of the Bonita necessary, and the best course that could be pursued."

Nov. 30. The *Admiralty Advocate* and *Spinks* for the plaintiff.—The law is quite settled that, without absolute necessity, the master is not allowed to sell his ship without the authority of his owner, and this necessity must be proved by the purchaser: *Fanny and Elmira* (*a*), *Hunter* v. *Parker* (*b*), *Eliza Cornish* (*c*), *Glasgow* (*d*), *Tilton* (*e*). All the circumstances in this case show that there was no urgent necessity for a sale. Considering the facility of telegraphic and postal communications between Figueira and England, the master was bound to have awaited the positive instructions of the plaintiff before selling. Communication with the owner, if practicable, is essential to a valid bottomry, *Oriental* (*f*), *Bonaparte* (*g*), and, à fortiori, must be essential to a valid sale. Upon the evidence of Mr. Rendell, we are intitled to say, that the sale was, if not a fraudulent, at least a most unjustifiable act on the part of the master, and was void by Portuguese as well as English law.

Twiss, Q.C., and *Clarkson*, for the defendant.—It is not denied that a master has no right to sell without necessity, but it is equally clear that he has authority to sell, if there arises a necessity for an immediate sale; the cases cited on the other side establish this, to which many other cases might be added, as the *Australia* (*h*), decided by the Privy Council. The Court will now judge of the necessity, not by the actual event, but by the aspect of the circumstances at the time when the judgment of the master had to be formed; *Idle* v. *Royal Exchange Assurance Company* (*i*), *Somes* v. *Sugrue* (*k*), *Sarah Ann* (*l*). The evidence shows that at the time when the ship was sold, every reasonable person, the owner himself, if he had been present, would have concluded she

(*a*) Edwards, 118.
(*b*) 7 M. & W. 342.
(*c*) 1 Spinks, 46.
(*d*) Sw. 146.
(*e*) 5 Mason's Reports, 473.
(*f*) 7 Moore, P. C. 408.
(*g*) 8 Moore, P. C. 471.
(*h*) Sw. 480.
(*i*) 8 Taunt. 755.
(*k*) 4 C. P. 282.
(*l*) 2 Sumner, R. 215.

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would be sanded up where she was lying as soon as the harbour was opened on the 25th of October; there was, therefore, such a necessity for an immediate sale as the law requires. The master waited for telegraphic instructions, but received none. We also contend that the plaintiff, by the telegram which he sent, but which was never received by the master, and by his letter of the 21st October, gave the master full discretionary power; and his intention is manifest from his claim on the underwriters for a total loss. But, at all events, the plaintiff, if in doubt, was bound to have made further inquiries, and to repudiate the sale without delay, which he did not do; and the subsequent acceptance by him of the purchase-money amounts to a ratification of the sale; *Hunter* v. *Parker* (*a*).

The *Admiralty Advocate* replied.

Judgment reserved.

THE CHARLOTTE.

The circumstances in this case were very similar to those of the *Bonita*. The action was brought by the late owners of 56 sixty-fourth shares of the Charlotte, to recover possession of their vessel, which had been sold at Figueira on the 21st of October, by William May, the master, who was also registered owner of the remaining eight shares.

The Charlotte was a schooner of sixty-three tons, registered in the port of Dartmouth; the managing owners were Messrs. Fox of Kingsbridge. On the 24th of September, 1859, she arrived at Figueira Roads with a cargo of dried fish, consigned to John Maguire Cooke, the defendant, and in crossing the outer bar on the 27th of February to reach anchorage just outside the breakwater, she struck the ground and damaged her rudder case. Her cargo was then discharged, and the vessel made ready for sea. On the 14th of October, the collision took place with the Bonita, and the Charlotte was driven on shore, and at low tide abandoned. On the next day the Charlotte was floated off and hauled into the sea-bay previously described. The master took advice of the defendant as consignee of cargo, and a survey was held on the ship by the same surveyors as in the Bonita, (Cumming only being substituted for May), and they recommended to sell. The master then by defendant's advice

(*a*) 7 M. & W. 342.

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petitioned the Commercial Court, and on the next day (21st of October) the ship was sold, by order of the Court by public auction. The defendant was the purchaser for 270*l.* On the 22nd October, the breach in the breakwater took place, and the defendant thereupon repaired the Charlotte, as he deposed, for 520*l.* He also obtained a "letter of sale" from the Commercial Court, and a conditional certificate of registry was given by Mr. Rendell, as in the case of the Bonita. On the 27th of November, the Charlotte sailed with a cargo of oranges for England, where on her arrival she was arrested by the plaintiffs. The circumstances differing from those of the Bonita relate chiefly to the alleged confirmation of the sale. These were, 1st. The purchase-money paid by the defendant to the master was not handed over by him to the plaintiffs. 2ndly. The plaintiffs, after hearing of the accident to their vessel, sent no message either by telegraph or post to Figueira. They first received intelligence on the 17th of October, through the following telegram from the defendant: "Figueira. Charlotte stranded. Injury great. Repairs 600*l.* Likely condemned, repairs, great delay through which may be sended and expense post" (meant for "sanded and expense lost"). On the 19th of October, they received from Mr. Matthews (the owner of the Bonita), a letter in these terms: "I have this day received the following telegram, 'Bonita and Charlotte condemned. Inform Fox at Kingsbridge.'" On the 27 tor 28th of October, they received a letter from May the master, stating that the Charlotte was condemned, and about the same date a further letter from him announcing the sale; to these the plaintiffs made no reply either by telegram or letter, but on the 28th of October, they made a claim for a total loss on their insurers; they did not become aware of the true facts relating to the condemnation and sale of the vessel until after the arrival of the Bonita in this country. The insurers did not pay on the policy. The evidence as to the facts in dispute, except as to the participation of Mr. Rendell in the proceeds, was precisely similar on both sides to that in the Bonita.

Deane, Q. C., and *Joseph Sharpe*, for the plaintiffs.

Twiss, Q. C., and *Clarkson*, for the defendant.

Counsel on either side argued as in the *Bonita*; and it was further urged for the plaintiffs that the defendant as consignee of cargo and adviser to the master, was, under the circumstances, a trustee, or at all events occupied a fiduciary character, and was therefore, precluded from the right to purchase even at an

auction; and the following cases were cited, *Pike* v. *Vigers* (*a*); *Ex parte Bennett* (*b*); *Ex parte Lacey* (*c*); *The Governor and Company of Undertakers for raising Thames water in York Buildings* v. *Mackenzie* (*d*); *Murphy* v. *O'Shea* (*e*). 1861. *March* 2.

Judgment reserved.

Right Hon. Dr. LUSHINGTON.—These two cases, the *Bonita* and *Charlotte*, must be decided on the same principles, for the general circumstances are precisely the same in both. I shall address my attention first to the Bonita. 1861. *March* 2. Judgment.

The question for me to determine is, whether the sale of this vessel the Bonita by the master, which took place at Figueira, in Portugal, on the 22nd of October, 1859, was valid in law. To pass the property from the plaintiff who was the original owner, to the defendant, the purchaser, there must be proved a sale valid by law. But by what law? I am well aware that a difference of opinion may prevail upon the question what law is to determine validity of a sale of a British ship abroad by the master (*f*); but upon the present occasion I do not consider myself obliged to enter into that controversy. I discard all consideration of Portuguese law: if that law was to be relied upon, it ought to have been specially pleaded, so as to have given the purchaser full notice, and moreover, the Court would have required the assistance of some person skilled in Portuguese law. The law by which I shall try this case, is that law by which all such cases have hitherto been tried in this Court. I have considered all the authorities which have been cited, but I do not think it necessary to make a formal declaration whether the law I proceed upon is purely municipal, or whether it has any commixture of what is termed the maritime law of Europe. It suffices to say, that I adopt the law as laid down by Lord Gifford, that it is not sufficient that such a sale is *bonâ fide* and for the benefit of all concerned, unless it be also shown that there was an urgent necessity for a sale being resorted to, *Robertson* v. *Clarke* (*g*); and further, that the proof of this necessity lies upon the purchaser.

Was the sale by the master valid?

To be decided according to the law usually administered in the Admiralty Court.

The purchaser must prove a necessity for the sale.

The distress of the vessel may be so urgent as to leave the master no alternative but an immediate sale; any delay may be

A master is bound to communicate (if

(*a*) 2 Dr. & Walsh, 262, 264.
(*b*) 10 Vesey, 394.
(*c*) 6 Vesey, 625.
(*d*) 8 Brown, Parl. C. 42.
(*e*) 2 Jones & La Touche, 424.
(*f*) Mac-Lachlan on Shipping, 155—163.
(*g*) 1 Bing. 450.

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practicable) with the owner before selling; and omission so to do may invalidate the sale.

destructive of the interest of the owner. But where there is a possibility of communicating with the owner without such consequences, I hold it to be the first duty of the master to communicate with the owner and await his instructions. Perhaps I should not venture to found a judgment adverse to the purchaser, on the single fact of the master having omitted to communicate with the owner when communication was practicable, but I strongly incline to the opinion that the sale of a ship in such circumstances would be null and void. In the present case the sale took place at Figueira on the coast of Portugal,—no remote country where communication with the owner and insurers was a matter of difficulty, and would have occupied a long space of time: in less than twenty-four hours there was communication with England by telegraph, and in a few days by post. These are circumstances of great importance.

[The learned Judge then examined in detail the pleadings, which set forth the leading facts of the case.]

Questions of fact.

Having thus stated the general proposition of law, which I have to maintain, and the pleadings, I will now state the more particular questions, partly of fact and partly of law, which it is my duty to consider. These are—1. What degree of damage the Bonita sustained by the collision and driving against the breakwater. 2. The possibility of repairing the vessel in the sea-bay where she was lying. 3. Whether there was any reasonable prospect of getting the vessel out of the sea-bay, or whether, from the peculiar circumstances connected with the breakwater and the new entrance to the harbour, it was reasonable to conclude that the vessel could not be rescued. 4. Whether the master took the proper means to communicate with his owner, and whether he ought not to have taken other means, and waited longer, before he proceeded to a sale. 5. The sale itself, whether it was properly conducted; whether it had the advice and approbation of those who ought to have been consulted: this will include consideration of the conduct of all the parties concerned, the master, the purchaser, Mr. Rendell, and the owner. 6. Whether the plaintiff by any conduct on his part concurred in or ratified the sale.

[The learned Judge then examined the evidence on both sides, stating his conclusions as follows.]

It is not possible upon this conflicting evidence to estimate accurately the damage which this vessel had received; but in

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order to put the case as favourably as possible to the purchaser, I am willing to admit that it was perhaps considerable; but then I am also of opinion that it might have been repaired in the place where the vessel lay, as in fact was afterwards done. As to the next point, I think it is proved, and it is the strongest part of the defendant's case, that at the time of the sale there was a probability that the place where the Bonita lay might be sanded up, and her egress made doubtful; I say a probability, for I do not think the evidence carries the case further. I have already said, and I repeat it, that I entirely concur in the argument urged for the defendant, that the Court has to consider the reasonableness of the master's judgment, and should therefore look to the state of facts existing at the time when the judgment was formed, and not to the actual event which was produced by circumstances which could not have been foreseen But I have come to the conclusion that previous to the sale it was only a probability that the egress of the vessel would be rendered impracticable; and especially for this reason, that the sanding up of the creek could not follow immediately upon the entrance to the harbour being opened, but must have taken some considerable time, as the subsequent fact serves to indicate, for after the harbour was opened on the 25th of November, forty days elapsed before the creek was sanded up, and then only partially.

The vessel might have been repaired.

The danger of the creek sanding up, and making the vessel's egress doubtful, only amounted to a probability.

The proceedings in the Commercial Court deserve only the briefest notice. The master presented a petition to that Court on the 21st of October, and the Court authorised the sale to take place the next day. I cannot deem this to be a judicial proceeding, and, indeed, I do not think it was insisted so to be.

Proceedings in the Commercial Court give no title.

The conduct of the master with respect to the sale I consider highly to blame. He was bound to have consulted with the agent for Lloyds, who, he ought to have known, was in all probability the protector of the real interests at stake, namely, that of the insurers, and who also filled the office of British Vice-Consul at the port—an officer whose peculiar duty it was to advise and render assistance in all matters relating to British shipping. It is established to my satisfaction that Mr. Rendell disapproved of the intended sale, and very clearly so expressed himself to the master; and the master was therefore higly culpable in proceeding to a sale in defiance of that advice and warning. But what is of greater consequence still, there was, in my opinion, ample time and opportunity, without seriously risking the property, for the master to have telegraphed to the owner, and to have waited his instructions.

The master disregarded the warning of the Vice-Consul, who was also agent to Lloyds;

and omitted to communicate duly with his owner.

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The defendant to blame for not consulting the Vice-Consul.

And now as to the conduct of the defendant, the purchaser. It is not at all necessary for this decision for the Court to question the *bona fides* of the defendant or the master. It is enough to say that the defendant must be presumed to have known the caution which he was bound to exercise in making a purchase of a British ship from the master, acting without authority from the owner, and that he neglected to use any such caution. I think that he was bound to have made inquiry into all the facts relating to a communication between the master and owner, and that he was further bound to have advised with Mr. Rendell as Vice-Consul and Lloyds' agent, and that he ought not to have made the purchase without the approbation of that officer.

The sale was invalid.

On the consideration of all these circumstances, I have no hesitation in saying that the sale of this ship on the 21st of October by the master to the purchaser, was without sanction of law, and a voidable transaction. It was a sale without necessity, and without the authority of the owner.

Has the plaintiff confirmed the sale?

The only question then remaining is, whether the plaintiff by any conduct on his part has confirmed the sale. The confirmation of the sale by him, would undoubtedly be a good defence to the purchaser. But what is a confirmation? An approval of a measure already taken or announced to be about to be taken, with a knowledge of all the important circumstances. A man cannot approve that which he does not know. Confirmation resembles condonation: knowledge is a necessary constituent part. Now it is clear that the telegram was despatched by the plaintiff on the 21st of October, without any further knowledge on his part than that the Bonita had gone ashore at Figueira in a gale of wind; he says expressly, "Is Bonita a total wreck? Say if repaired or abandoned." The letter of the plaintiff of the same date was received after information that the vessel had been condemned, but the plaintiff knew no more. He says, "I hope the *wreck* will be sold well," evidently supposing that the ship was a wreck, which she was not, nor anything like it. Nor do I see anything in the further correspondence which can be construed into a ratification of the sale by the plaintiff. The claim for a total loss which the plaintiff made upon his underwriters on receiving the telegraph of the first accident, is open to the same observation. By the very imperfect information afforded to the plaintiff, he was in the first instance placed in considerable difficulty. His vessel was insured, and of course it was of the utmost importance to him, in

There cannot be confirmation without adequate knowledge of the facts; and the plaintiff was imperfectly informed.

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the belief created by that imperfect information, to secure the protection of his policy, and he therefore immediately made his claim for a total loss. But this is no confirmation of a sale to the purchaser, under circumstances quite different from those which the plaintiff believed to exist.

Acceptance of purchase-money generally amounts to ratification of the sale.

It has been urged, however, that his conduct as to the purchase-money did amount to a confirmation of the sale. The plaintiff received the bills for the purchase-money, and presented them for payment: he received the money, and immediately paid it into the Registry of this Court. I agree that a receipt of purchase-money is generally to be considered as a ratification of a sale, but in my opinion, for a receipt of money so to operate, the money must be received with the intention of the receiver to appropriate it to his own use, and, I think I might add, with a knowledge of the facts relating to the sale. It is said that the plaintiff ought to have given the purchaser earlier intimation of his dissent from the sale, so as to have prevented the purchaser incurring the expense of repairs; but to this it may fairly be answered, that the plaintiff had no adequate information of the facts, and that to have declared his dissent to the purchaser would have been a warning to him not to send the ship to England, and so the plaintiff would have shut himself out of his own remedy. I am clearly of opinion that neither by the correspondence, nor by the receipt of the purchase-money, did the plaintiff ratify the sale.

But not in the circumstances of this case.

I have now disposed of the whole case. I will only add, that looking at the great mass of valuable property in shipping intrusted to the care of British masters, and considering the great losses which may accrue from the disposal of that property without the authority of the owners, I am not inclined to relax the law concerning sales by masters abroad, beyond the limits laid down by the Superior Courts. I pronounce for the restoration of this vessel to the plaintiff with costs, but I do not give damages.

Ship to be restored to plaintiff.

The learned Judge then proceeded to pronounce a similar decree in the Charlotte.

The sale by May was not justified by any necessity, and was not confirmed by the owners, and was therefore wholly invalid. The only circumstance at all distinguishing this case from the *Bonita* in favour of the defendant is the alleged amount of re-

1861. *March* 2. pairs executed at Figueira, but that was grossly exaggerated, and the silence of the owners, who had been deceived by the exaggerated and false information, cannot be construed into a confirmation of the sale.

Braikenbridge, proctor for the owner of the Bonita.

Farrar, *French* and *Tatham*, proctors for the owners of the Charlotte.

Clarkson, proctor for the defendant in both cases.

THE RUBY QUEEN.

Collision—Preliminary Acts—Liability of Defendant's Vessel for Contractor's Act.

In a cause of collision, where the case is to be heard on *vivâ voce* evidence only, the preliminary acts are to be exchanged before the evidence is taken.

The ship of the defendant is liable for the act of a contractor in sole charge of the ship.

The yacht of the defendant was intrusted for reward to yachting agents for sale, and, by their servants, moored in the winter season without striking her top-gear, whereby, on a gale occurring, the yacht drifted and fouled another yacht:—*Held*, that the defendant's yacht was liable in a proceeding *in rem* in the Court of Admiralty.

March 13. COLLISION. This was a cause brought by the owner of the yacht Wildfire against the yacht Ruby Queen, for driving upon the Wildfire, during a gale, in Southampton Water, and was defended by the executors of the late owner of the Ruby Queen. The case was heard by oral evidence only. The Answer pleaded that the Ruby Queen had been placed for sale in the hands of Messrs. Clarke and Price, yachting agents of Southampton, who agreed to take charge of her for a certain sum per week, that she was afterwards moored by the servants of Messrs. Clarke and Price, and that the collision was an inevitable accident.

Deane, Q.C., on the case being called on for hearing, said:—The Preliminary Acts have not been exchanged between the parties. The rules as to Preliminary Acts, rules 63, 64 of the New Rules (*a*), seem framed with a view to printed proofs only.

(*a*) See Appendix.

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The *Admiralty Advocate* not objecting on the other side,

Dr. Lushington directed the Preliminary Acts to be exchanged.

The witnesses for the defendants proved the agreement pleaded with Clarke and Price, that the yacht was moored by their servants for the winter, that as the yacht was for sale, the yards and top gear were not struck according to the usual custom in mooring for the winter season.

The *Admiralty Advocate* and *Swabey* for the plaintiff.

Deane, Q.C., and *Lushington* for the defendants.

The Learned Judge having summed up to the Trinity Masters, they found that the Ruby Queen had driven through her yards and upper gear having been left aloft, and so occasioned the collision.

The counsel for the defendants then contended, upon this state of facts, that the ship, the property of the defendants, was not responsible.—The negligence in not striking the top gear was not the negligence of the defendants, or of those for whom they are responsible, or their property. It was the negligence of Messrs. Clarke and Price, who were independent contractors, or of their servants. In the Courts of Common Law it is now fully established that an independent contractor is liable for the acts of himself and his servants, and not the person by whom he is employed; *Reedie* v. *The London and North-Western Railway* (*a*). The principle holds in the Admiralty Court that a defendant's ship is not liable, unless the collision is occasioned by the negligence of some person for whom the defendant is responsible. Thus a defendant's vessel is not liable when the collision is an inevitable accident, or if caused by the default of a pilot taken by compulsion of law, or by the plaintiff's own negligence. The proceeding *in rem* does not alter the law of liability or alter the law of negligence; it only gives security to the plaintiff that a judgment in his favour will be satisfied.

Swabey, contra.—The Court, I trust, will if necessary allow this question to be argued another time. We rely on the proceeding being *in rem*, and an appearance having been given in the ordinary way.

(*a*) 4 Exch. 244.

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Right Hon. Dr. Lushington :—I shall not trouble you, Dr. Swabey. I am of opinion that this objection comes too late after an appearance, and after a plea, which, whatever facts it may state, does not apprise the Court and the plaintiff that this objection, wholly a new one here, was about to be taken. Neither on the merits could I maintain the objection. I do not dispute the cases referred to by the counsel for the defendants: but the distinction is, that here the proceeding is *in rem*. I pronounce for the damage, with costs.

Hilliard, Dale & Stretton, solicitors for the plaintiff.

Marshall for the defendants.

THE WESLEY.

Collision—Compulsory Pilotage in the Thames—17 & 18 *Vict. c.* 104, *ss.* 376, 379.

In the 379th section of the Merchant Shipping Act, 1854, the description "ships trading to any place in Europe north of Boulogne," extends to vessels coming from a place north of Boulogne to the port of London.

A vessel, not carrying passengers, on a voyage from Cronstadt to London, is exempted from compulsory pilotage in the river Thames.

March 14.

COLLISION. The action was brought by the owners of the Antelope against the screw-steamer Wesley, for a collision which took place on the 17th September, 1860, in the river Thames, within the London district, as defined by the 370th section of the Merchant Shipping Act, 1854. The answer of the defendants stated that the Wesley was on a voyage from Cronstadt to London, and had taken a Trinity House pilot at Gravesend, and then pleaded (7th Article) that the employment of the pilot was compulsory; that the accident, if occasioned by any mismanagement of the Wesley, was occasioned by the pilot's default; and that the defendants, by reason of the premises and of the 388th section of the Merchant Shipping Act, 1854, were not liable for the damages. The admission of this article was objected to.

The various enactments referred to in the argument (7th March, 1861), are printed in the case of the *Earl of Auckland* (*a*).

(*a*) Ante, p. 166.

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Pritchard, for the plaintiffs.—The facts stated in the Answer show that the pilotage was not compulsory. The ship was on a voyage from Cronstadt to London, and the collision happened in the river Thames. The defendants will rely on the general terms of s. 376 of the Merchant Shipping Act, as imposing an obligation to take a pilot; but from any such obligation we contend the defendants' vessel was exempted on two grounds. First, because s. 353 of the Merchant Shipping Act, as *R.* v. *Stanton* (*a*) and the *Earl of Auckland* (*b*) decided, keeps alive the exemptions given by 6 Geo. IV. c. 125, s. 59, and the Order in Council of 18th February, 1854; and their joint operation is to exempt all vessels trading to the Baltic. Secondly, because the Wesley was not carrying passengers, and the 379th section of the Merchant Shipping Act expressly exempts, when not carrying passengers, ships trading to any place in Europe north of Boulogne. On both of these grounds the plea is bad.

Clarkson, for the defendants.—Neither of the exemptions by which the plaintiffs contend the Wesley was relieved from the general obligation imposed by s. 376 of the Merchant Shipping Act, really covers this case. Here the vessel was coming *from* Cronstadt, and it must not be taken that she was a regular trader to that place, for the plea mentions but a single voyage. The vessel was, therefore, not "a trader to the Baltic," nor a "constant trader inwards from the ports between Boulogne (inclusive) and the Baltic," which are the terms specified in 6 Geo. IV. c. 125, s. 59, and in the supplementary Order in Council, 18th February, 1854. Nor was the Wesley within s. 379 of the Merchant Shipping Act, "trading to any place in Europe north of Boulogne." The pilotage was compulsory by the general terms of s. 376.

Judgment.

Right Hon. Dr. Lushington:—The vessel proceeded against, the Wesley, was on a voyage to London from Cronstadt, and was not carrying passengers, when this collision occurred in the river Thames, within the London district. The 379th section of the Merchant Shipping Act, 1854, enacts that the employment of a pilot in the London district shall not be compulsory upon "ships trading to any place in Europe north of Boulogne," when not carrying passengers. I am of opinion that this section must be interpreted to cover inward as well as outward voyages, and therefore it extends to the present case. The employment of the pilot was accordingly not compulsory on the Wesley, and

(*a*) 8 E. & B. 445. (*b*) Ante, p. 166.

1861. *March* 14. the defence raised by this plea is not a valid one. The plea must be struck out.

Pritchard, proctor for the plaintiffs.

Clarkson for the defendants.

In the Privy Council.

Present—Lord KINGSDOWN.
The Right Hon. Sir EDWARD RYAN.
The MASTER OF THE ROLLS.
The Right Hon. Sir J. T. COLERIDGE.

THE ARTHUR GORDON AND THE INDEPENDENCE.

Collision—17 *&* 18 *Vict. c.* 104, *s.* 296—*Steamer towing, and Vessel close-hauled on the port-tack, crossing.*

The statutory rule of port helm, given by the 296th section of the Merchant Shipping Act, 1854, applies only to a case when vessels meet in opposite directions end on, or nearly so, when the observance of the rule would make the vessels diverge, so as to pass port side to port side.

A steamer towing has not the same obligation to give way to sailing vessels as a steamer not towing.

A vessel close-hauled on the port-tack, in the open sea, and in day time, and a steamer towing a large ship, were standing so as to cross each other's bows, the steamer being on the lee-beam of the sailing-vessel:—*Held*, that the sailing-vessel was to blame for holding her reach, and that the steamer was likewise to blame for taking no measure in time to avoid collision.

March 15. COLLISION. This was an action of collision brought by the owners of a three-masted schooner, called the Arthur Gordon, against the owners of the steam-ship Independence; and there was also a cross-action. The collision took place on the 6th of March, 1860, off the Orme's Head, about 10 o'clock in the morning, in fine weather and smooth water. The tide was running to the westward; the wind was west, blowing a moderate breeze. The Arthur Gordon, heading about N.N.W., was close-hauled on the port-tack; the Independence, having a large vessel called the J. K. L. in tow, was steaming about W.N.W.: either vessel sighted the other in the first instance, at a long distance, bearing on the beam, the steamer being on the

lee-beam of the Arthur Gordon. The Arthur Gordon held on her reach to the last; the Independence likewise held on till a collision was inevitable, when she starboarded her helm; and the evidence disclosed that no sufficient look-out was maintained on board her. Both vessels foundered almost immediately after the collision.

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The following sections from the Merchant Shipping Act, 1854, were referred to in the Court below and in the Court of Appeal:—

17 & 18 *Vict. c.* 104.

S. 296. "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; and this rule shall be obeyed by all steam ships, and by all sailing ships whether on the port or starboard tack, and whether close-hauled 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 sailing ships on the starboard tack close-hauled, to the keeping such ships under command."

S. 298. "If in any case of collision it appears to the Court before which the case is tried that such collision was occasioned by the non-observance of any rule for the exhibition of lights or the use of fog signals, issued in pursuance of the powers hereinbefore contained, or of the foregoing rule as to the passing of steam or sailing ships, or of the foregoing rule as to the steam ship keeping to that side of a narrow channel which lies on the starboard side, the owners of the ship by which such rule has been infringed shall not be intitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary."

The following passages are extracted from the charge of the learned Judge of the Admiralty Court to the Trinity Masters:—

"It appears to be an admitted fact, that the Arthur Gordon was proceeding on a north-north-west course, and that the Independence was proceeding on a west-north-west course. Now I am clearly of opinion that the Act of Parliament (17 & 18 Vict.

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c. 104, s. 296) has nothing to do with this case—nothing whatever. I conceive that the Act was meant to apply to the case of two vessels meeting, end on, or nearly so: the effect of obeying the statute would then be to make the vessels diverge in different directions; whereas in this case, if both vessels ported, they would have followed each other, and it would have depended on the speed they were going whether they came into collision or not. I have therefore no hesitation in requesting you to discard from your minds all consideration of the Act of Parliament. . . . . The Arthur Gordon being close-hauled on the port-tack, and the steamer towing this large vessel, was the steamer bound to give way to the Arthur Gordon, or was the Arthur Gordon bound to give way to the steamer? Supposing the steamer to have had no vessel in tow, it is admitted on all hands that she was bound to get out of the way of the vessel that was close-hauled. Now, in broad daylight, does the fact of the steamer having another vessel in tow take away that obligation upon her to get out of the way of the sailing vessel that was close-hauled? That will be for you to determine; but let us look at the reason of the general rule, whereby a steamer is bound to give way to a sailing vessel close-hauled. It is this, that a steamer is able to go in the teeth of the wind; she can either port her helm or starboard her helm, or stop her engines, or reverse them; in fact a steamer, steaming alone, can do anything. But that, to a certain extent, a steamer having a vessel in tow may not have the same facility of movement as if unincumbered, I admit to be true. This being so, was the steamer, having this ship in tow, bound or not bound to give way to the Arthur Gordon, which was close-hauled? This is important, because if bound to give way to the Arthur Gordon, then the Arthur Gordon had a right to expect that she would do so. The Arthur Gordon speculating upon what the steamer would do—if the steamer was bound to give way—had a right to say, 'I will so shape my course, under the expectation that you, a steamer, will comply with the rule and obligation upon you to give way.' If you should be of opinion that the steamer was not bound to give way, then arises this question immediately, why did not the Arthur Gordon take steps to avoid the collision? If the Arthur Gordon was bound to get out of the way, she clearly did nothing but keep her reach, and then she is to blame in that respect. But if you should be of opinion that the Arthur Gordon was not bound to give way, then she was perfectly justified in expecting the steamer would do what the law required."

The learned Judge, with the advice of the Elder Brethren, held

the Independence solely to blame for the collision. From this decree the owners of the Independence appealed.

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The *Queen's Advocate* and *Brett*, for the appellants.—We contend, first, that as the steamer was incumbered with a ship in tow, the schooner was bound to have made way for her. A steamer towing is not as a free steamer, and her obligations are altogether different. In the *Kingston-by-Sea* (*a*), Dr. Lushington says, in his summing-up to the Trinity Masters, "It has been urged in the argument that as a steamer is always to be considered as having the wind free, the consideration applies 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 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 ship is towing, and the nature of the impediments that she may meet with in her course." And in that case a sailing vessel was found solely to blame for coming into collision with a vessel in tow of a steamer. Here the Arthur Gordon had ample time and opportunity to avoid the Independence. 2ndly. We contend, that at all events the obligation to take active measures to avoid the collision was mutual, and that the Arthur Gordon, having done nothing, was guilty of negligence which contributed to the accident; in which case according to common law neither party could recover, but according to the Admiralty Court rule the damages would be divided: *Dowell* v. *General Steam Navigation Company* (*b*). 3rdly. Even if the Arthur Gordon had a right to hold on in the first instance, and the steamer was bound to give way, those in charge of the Arthur Gordon were not justified in clinging obstinately to their right, when it was evident that thereby a collision would follow. There must have been a time before the collision when they could have clearly seen that the steamer was not going to give way; they ought *then* to have yielded their original right, and are to blame for not having done so. 4thly. We submit that the 296th section of the Merchant Shipping Act, 1854, extends to this case; that the Arthur Gordon ought to have ported her helm, that not having ported, she contributed to the collision, and by the 298th section cannot recover anything. The language of the 296th section states the rule in the most general terms, and then continues, "and this rule shall be obeyed by all steam-ships, and by all sailing-ships, whether on

Feb. 19.

(*a*) 3 W. R. 154. (*b*) 5 E. & B. 206.

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the port or starboard tack, and whether close-hauled or not, unless, &c.:" the exceptions which follow must be taken to be the only exceptions, and manifestly they do not include the present case. The advantages of a simple general rule are obvious, and such a rule it was the purpose of the enactment to establish in lieu of the various maritime rules; nor is there any serious danger to be apprehended from the operation of the single rule, since, on the one hand, it does not apply except there is some risk of collision, and on the other hand, it imposes the obligation when the vessels are at such a reasonable distance, that by obeying the rule the risk may be avoided. In the *James* (*a*), this Court enforced the rule in the case of two vessels lying hove-to on opposite tacks. On these grounds we submit the judgment of the Court below should be reversed.

Edward James, Q.C., and *Lushington*, for the respondents.—The steamer was bound to get out of the way of the schooner, and the schooner was intitled to hold her course. The steamer being broad on the schooner's starboard beam, it would have been an extravagant measure for the schooner to port, and she could not starboard without throwing herself into the wind out of command, or tacking, neither of which operation a vessel is ever bound to do to avoid another, except on pressure of necessity, which did not exist here: on this point the exception in the statutory rule of port helm given to vessels close-hauled on the starboard tack, presents a forcible analogy. Moreover, the steamer, though towing, should be considered as a vessel going free: she could port or starboard at will, or acting in reasonable time, she might have slowed her engines or stopped altogether, and thus prevented all risk of collision. This case partly resembles that of the *Cleadon* (*b*). There the A. H. Stevens was close-hauled on the starboard tack, and the Cleadon in tow of a steamer; and Lord Chelmsford, delivering the judgment of the Court, said:—"The Stevens being a foreign vessel, was of course not bound by our regulations, but she was governed by the ordinary rules of the sea, and they required her, being close-hauled on the starboard tack, if she were meeting another vessel, to keep her course. 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. Under these circumstances her rule of conduct would be our regulations, because, as already intimated, she would not be aware whe-

(*a*) Sw. p. 60. (*b*) Ante, p. 158.

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ther the vessel she was meeting was a foreign or a British vessel, and at all events, as she was a British vessel navigating, of course she must be governed by the rules that apply to those vessels. It was her duty, being in fact a steamer, to get out of the way of another vessel that she was meeting, and it 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." (*a*) It may be true that a steamer towing is not to be considered as a vessel going free in the same full sense as a steamer unincumbered, and that some allowance must be made for her circumstances, as suggested in the passage quoted from the *Kingston-by-Sea;* but here there were no unfavourable circumstances, except the mere fact of having a vessel in tow; the wind being a-head was even favourable to the ready manœuvring of the steamer. In the Court below, the question, which of the two vessels was bound to give way, was distinctly put to the Trinity Masters, and the effect of the decision is, that the obligation lay with the steamer, and that the collision was solely caused by her careless and improper navigation. No case can be quoted to show that a steamer engaged in towing is intitled to make every vessel give way to her; which is the proposition the appellants now contend for. Their second contention, that even if the schooner had a general right to hold her reach, she had no right to hold on, when by so doing, a collision threatened to be imminent, is met by the observation of the learned Judge in the Court below: the schooner had a right to expect, and to continue expecting, that the steamer would fulfil her obligation: and the responsibility for this collision, as in other cases, does not depend on measures taken or not taken at the last moment, but dates from an antecedent period, when the vessel which was bound to avoid the other could, by proper measures, have prevented all risk of collision. In this view there was no obstinacy or perverseness on the part of those navigating the schooner. To the last point urged by the appellants, that the statutory rule of port-helm applied, and that the schooner not having ported, the owners are barred from recovery; we answer, that the phrase in the 296th section is, "when two vessels *meet* one

(*a*) Ante, p. 160.

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another;" and the nature of the case requires that the word "meet" should have a limited interpretation, so as to exclude the case of vessels crossing. A rule of port-helm binding on vessels crossing, would often immediately bring the ships into imminent danger of collision, which the legislature could never have intended. The case also of vessels going in opposite directions, and therefore in one sense meeting, but proceeding so as to pass starboard to starboard, shows that the word "meet" must have a strictly qualified meaning. Further, the statute adds, that the effect of porting shall be, that the vessels may pass on the port side of each other, which, in the present case, could not have followed if both vessels had ported, as is observed by the learned Judge in his summing up to the Trinity Masters. In *The General Steam Navigation Company* v. *Tonkin* (*a*), a similar condition was attached to the application of the corresponding Trinity House Rule. Lord Campbell says, "The rule can only be applicable where the vessels, by continuing their respective courses, are likely to come into collision, and where, by putting their helm to port, the collision may probably be avoided." The limits of the statutory rule of port-helm, though never fully brought before the notice of this Court, have been frequently discussed in the Court of Admiralty, and the learned Judge of that Court has uniformly limited the operation of the rule to the case of vessels meeting end-on, or nearly so, carefully excluding the case of vessels crossing: *Inflexible* (*b*); *Cleopatra* (*c*). We submit, therefore, that the judgment of the Court below should be affirmed.

The *Queen's Advocate* replied.

Cur. adv. vult.

March 15. Judgment.

Lord Kingsdown now delivered the judgment of the Court:—In this case, on the 6th of March, 1860, a collision took place off the Great Orme's Head, between a three-masted schooner of 347 tons, the Arthur Gordon, and a steam-tug, the Independence. The collision was so violent that both vessels shortly afterwards foundered, and cross-actions were brought by the owners of the schooner against the tug, and by the owners of the tug against the schooner. The Court of Admiralty has decided that the Independence was alone to blame, and from this decision the present appeal is brought.

Facts of the case.

There is hardly any controversy as to the facts. The two

(*a*) 4 Moore. P. C. 320. (*b*) Sw. 35. (*c*) Sw. 137.

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vessels were both bound in the same direction. The Arthur Gordon, laden with a cargo of iron ore, was proceeding from the port of Barrow, on the Lancashire coast, to Neath, in Glamorganshire, and the steam-tug was towing a large ship of 1,000 tons, called the "J. K. L." from Liverpool to Holyhead, on her way to Bristol. The wind was west, or west-by-south. The Arthur Gordon was standing north-north-west, close-hauled on the port tack. The steam-tug was standing west-north-west, or nearly head to wind. The tide was running from the west; the sea was calm; the wind moderate. It was broad day-light, about ten o'clock in the morning, and there was ample sea-room. It appears that each vessel saw the other long before the collision, and noticed the direction in which the other was standing. Each vessel held its course till just before the collision, when the Independence starboarded her helm, and her stem caught the Arthur Gordon on her starboard quarter.

Upon this statement it seems difficult to understand how, without some fault on the part of both ships, an accident could have happened.

It was contended on the part of the Independence: 1st, that the Arthur Gordon was alone to blame; but if not, 2ndly, that at all events she in part contributed to the accident, by negligence or misconduct on her part; 3rdly, that whatever might be the misconduct of the Independence, the Arthur Gordon could not recover; for that the clauses in the Merchant Shipping Act which provide that under certain circumstances a ship which does not port her helm shall not recover damages, applies to this case, and that the Arthur Gordon did not port her helm.

The statutory rule of port helm did not apply.

Upon the last point their Lordships have no doubt. They agree with the opinion expressed upon that subject by the learned Judge of the Admiralty, which is supported alike by the language of the statute and by the reason on which the rule is founded:—that the statute applies only to a case when vessels meet in opposite directions end-on, or nearly so, when the observance of the rule would make the vessels diverge so as to pass port-side to port-side. If, therefore, the Arthur Gordon is on other grounds intitled to recover the whole or a share of the damage, there is nothing in the Act of Parliament to interfere with her right to do so.

A steamer towing is not absolutely

It was urged in support of the decree that a steam-tug with a ship in tow is in no degree in a different situation from a steamer

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bound, as when not towing, to give way to a sailing-vessel.

unincumbered, and that as such a steamer would have been bound to give way to a sailing-ship close-hauled, the steam-tug 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 close-hauled, 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 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—in this case of about fifty fathoms; and the very movement which sends the tug out of danger may bring the ship to which she is attached into it. Even if the danger of collision be avoided, it may be much less inconvenient for a ship close-hauled 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 sailing-vessel close-hauled, and that she neglected to do so.

Their Lordships think that the law is accurately laid down by Dr. Lushington, in the case of the *Kingston-by-sea* (*a*). He there says, addressing the Trinity Masters:—"It may be necessary to point out to you the law of the case where a merchant vessel is in tow of a steamer. It is well known that according to your rules (founded upon common sense and sound reason) a steamer is always to be considered as having the wind free." Then after some observations upon a different subject, he proceeds:—

(*a*) 6 N. of C. 651; 3 W. Rob. 155.

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" But it is said a steamer being always considered as having the wind free, is she not to be considered so when she has a merchant-vessel in tow? I consider that to be a wholly different case. It is true a steamer is always considered as having the wind free, but it does not follow that a steamer having a merchant-vessel in tow is always free. That will depend upon the state of the wind and weather, the direction in which the steamer is towing, and what are the impediments to her course."

Case of the *Cleadon* considered.

Their Lordships never intended to lay down in the case of the *Cleadon* (*a*), that a steam-tug in charge of a ship must be considered as a free steamer. The case, in truth, did not raise any such question, and was in all its material circumstances a contrast to this. In that case the A. H. Stevens, a sailing-vessel, close-hauled on the starboard tack, met the Cleadon in tow of a steam-tug proceeding in the opposite direction. The time of the collision was midnight; the lights only of the different vessels could be seen, and when they were first descried it could not be known by those on board the A. H. Stevens that the Cleadon was in tow of the steamer. The vessels were on opposite but nearly parallel lines, and if the A. H. Stevens had kept her course as under the circumstances she was intitled and bound to do, it was in the opinion of their Lordships probable that the A. H. Stevens would have gone clear both of the steam-tug and the ship which she was towing. The steamer did keep clear of the A. H. Stevens, and the Cleadon was following her when the A. H. Stevens suddenly ported her helm and ran stem-on into the starboard bow of the Cleadon. Their Lordships were of opinion that when the order to port was given, the A. H. Stevens must have known or ought to have known that the Cleadon was in tow of the steamer and could not possibly therefore do otherwise than follow her; that the act of the A. H. Stevens in porting her helm was wrong, and was the sole cause of the accident.

The first question of importance in this case then is, on which vessel was the duty imposed, under the circumstances proved in evidence, of giving way to the other. Now this question was distinctly put by the learned Judge to the Trinity Masters, but, unfortunately, it received no distinct answer. The facts are not in dispute. The steamer, with a large ship in tow, was proceeding against both wind and tide; the schooner, with all her sails set, was sailing full-and-by, or, in less technical language, as near the wind as she could be without lifting her sails so as to impede her course through the water. In this state of things,

(*a*) Ante, p. 158.

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our nautical assessors inform us that the schooner might, without any difficulty and with very little loss of time, have got out of the way of the steamer and the J. K. L.; that she might have gone astern of the J. K. L. or have tacked, or have hove herself up in the wind and thus have allowed the steam-tug and ship to pass; and they are clearly of opinion not only that she ought to have done so, but that the steamer had a right to rely upon her doing so, and accordingly to hold her own course. They think, therefore, that the Arthur Gordon was solely to blame. We are not, however, prepared to adopt that conclusion. That one vessel did wrong by no means proves that the other did right. We think that both vessels were bound to take such measures as, when danger was seen to be imminent, would be calculated to avoid it.

Both vessels were bound to take measures to avoid danger.

The Arthur Gordon to blame for crossing the steamer's bows.

It appears to us that the Arthur Gordon, in this case, seeing that the steamer was bearing down on the line of her course, was not justified in attempting, as she did, to run across her bows, unless she was quite sure of effecting her object with safety both to herself and to the vessels which she was crossing. She was herself on her port tack, and she knew that the steamer had a ship in tow, and was not therefore in the same situation as a steamer unincumbered; she had no right to run into danger and depend on the steamer getting out of her way. We think that by the course which she pursued she occasioned the collision.

The Independence to blame for want of reasonable care.

But the question remains whether the steamer did what ordinary prudence required in order to avoid it, and we are satisfied that she did not. It is plain that she might, with a very slight deviation from her course, after the risk of collision was apparent, have avoided it. She did not actually starboard her helm till the vessels were so close to each other that an accident was inevitable, yet even then she all but cleared the schooner, striking her on the starboard quarter about three yards abaft the mizen rigging. It is clear that if the Independence had starboarded a minute or two earlier she would have gone astern of the Arthur Gordon. The reason why she did not do so is apparent from the evidence. There was no proper person on deck to give the necessary directions. The master was below at his breakfast; the mate was ashore; the deck was left in charge of a common sailor, a young man of twenty-one, who acted as mate, but was not competent to the task of managing the tug. He says in his evidence that he had seen the schooner for nearly half-an-hour; that when he first saw her she was on her starboard tack; that she then went about on her port tack, bearing

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about four points on the port bow of the steamer; that she was approaching the steamer very fast under all sail; that he watched her from the look-out on the fore deck till shortly before she came in close quarters, when he went aft to the man at the wheel to give him orders to starboard the helm. Had he shouted to the helmsman instead of going aft, it is probable that he might have been in time. But the helm, he says, was not starboarded till those on board the schooner waved their hands to him to starboard. It was then too late. Had the master or mate been on deck and in charge of the tug, we have no doubt that the order would have been given in proper time and the collision avoided. Under these circumstances, we think it impossible to hold that there was not on board the Independence such want of reasonable care and skill as contributed to the accident.

Damages to be divided: no costs.

We must, therefore, advise that the sentence below be altered by ordering the damages to be divided, and the costs below must be disposed of according to the rule of the Admiralty in such cases. There will be no costs on either side of this appeal.

Pritchard, proctor for the appellants.

Rothery for the respondents.

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THE ALBION.

Salvage arising out of Towage—Danger to Ship rom condition of Ground Tackle.

Towage of a ship near the land in unsettled weather, if her ground tackle is disabled, is in the nature of salvage.

A steam-tug was engaged to tow a ship from the North Foreland to Gravesend, and towed her to the Prince's Channel, where both vessels anchored to stop tide. In the night a gale of wind arose, and blew the ship to sea, with loss of anchors and damage to hawsepipes, bowplanking and windlass. The tug was forced to run to Ramsgate, and the next day, the weather having moderated, put to sea, and after considerable search discovered the ship, which had received an anchor and chain by a lugger from the shore. The ship was then towed by the steam-tug, another tug assisting, to the port of London:—*Held*, that the services of both tugs were in the nature of salvage, and that the first tug was intitled to salvage remuneration for her labour and loss of employment whilst seeking the ship.

SALVAGE. This was a cause of salvage, brought by the owners and crew of the steam-tugs Wonder and Energy against the Albion, her cargo and freight, for the following services:—

On the 27th of May, 1860, the Albion, having on board a cargo of rum and sugar, and then being off the North Foreland, engaged the Wonder to tow the ship to Gravesend. The Wonder towed her to the Light Ship in the Prince's Channel, where both vessels anchored to stop tide. In the course of the night a violent gale arose, and forced the Wonder to run for shelter first to the North Foreland, and on the next day (the 28th) to Ramsgate Harbour. On the morning of that day the Albion was obliged to slip both her anchors, with loss of hawsepipes and injury to her bowplanking and windlass, and put out to sea. Early on the 29th, the weather having moderated, the Wonder put out to sea to seek the ship, and, after several cruises, came up with the ship a long way out from the North Foreland. The ship had just previously received from a lugger an anchor and chain, and the Energy had also come up and been engaged by the ship. The Wonder and Energy then towed the ship up to the West India Docks, arriving there on the morning of the 30th of May. The Master of the Albion gave the following certificate to the tugs on completing the service:—

"Albion, Blackwall, May 30, 1860.

"This is to certify that the steam-tugs, Energy and Wonder, towed the Albion from off the North Foreland. To be settled in London.

"T. HARRIS, Master, Albion."

The value of the Albion, freight and cargo, was 11,590*l.*

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Deane, Q.C., and *Lushington*, for the plaintiffs.—The ship when taken in tow by the Wonder and Energy had no means of bringing up with safety, and if, on nearing the land, a gale had occurred blowing on shore, she must, but for steam assistance, have in all probability been lost. The joint services of the Wonder and Energy were therefore not simple towage, but salvage. The *Kingaloch* (*a*) was a case of this kind, and there the Court, overruling an agreement to tow, which had been made without communicating the loss of ground tackle and the disabled condition of the windlass, allowed salvage. We also submit that the Wonder is entitled to recompense for all her services. As soon as the extraordinary danger to the ship supervened, all further labours for the ship terminating, as these have done, successfully, were in the nature of salvage. The Wonder did not renounce her obligation to the ship, as possibly she might have been justified in doing, but, knowing the danger of the ship, made every effort to return to her assistance, and finally succeeded in reaching her and bringing her to a place of safety.

Twiss, Q.C., and *Clarkson*, for the defendants.—The ship was not rescued from any immediate danger by the tugs; she was in all respects fit for a sea-voyage, except that the hawsepipes and windlass were a little injured. The lugger had brought an anchor and chain, and with that the ship might have been safely brought up, if necessary; perhaps the anchor, if let go, could not have been hove up in the ordinary way by the windlass, but that is immaterial. If the weather had not moderated, or if any second gale had arisen, the ship could have kept to sea. The joint services of the Energy and Wonder were therefore simply towage, like the previous towing by the Wonder from the Foreland to the Prince's Light ship; and the wanderings of the Wonder between cannot be taken into account; they were voluntary, and of no service to the ship. It is submitted that the original contract was either terminated by the perils of the seas intervening, and that the second towage was a new service of simple towing, for which only an ordinary towing remuneration is due; or else that the original contract bound the Wonder to take all reasonable measures, notwithstanding the interruption, to fulfil the contract. In either case no salvage is due. The ship was rescued from no extraordinary danger.

Right Hon. Dr. Lushington:—The only real question in this Judgment.

(*a*) 1 Spinks, 263.

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case is, what was the condition of the Albion when the steam-tugs came up with her on the 29th of May? She had lost both anchors and chains, but had received an anchor and chain from a lugger; her hawsepipes were also carried away, her bow-planking injured, especially on the starboard side, and her windlass was disabled. Whether the ship could in such a condition have anchored with any safety, the witnesses differ, the witnesses for the plaintiffs stating positively that she could not, the witnesses for the defendants maintaining the contrary. The ship was certainly not in any immediate danger; but, on the other hand, she was upon a most perilous coast, the weather was unsettled, and, if a gale had set on to the shore, the ship must have been in considerable danger from the want of sufficient ground tackle, and the disabled condition of the hawsepipes and the windlass. From this danger she was saved by the services of the Wonder and Energy; and adhering to the case of the *Kingalock*, which has been referred to, I am of opinion that these services were in the nature of salvage and require salvage remuneration. I am also of opinion that the earlier services of the Wonder in seeking the vessel must be taken as part of the same transaction, and be remunerated in the same way. I give the Wonder great credit for the resolution and perseverance with which she endeavoured to discover and assist the ship; and this must be taken into acount, for it is of the utmost importance to the safety of shipping, that the owners of steam-tugs and other salvors should know that this Court is inclined to reward liberally unusual efforts to assist vessels in distress, wherever those efforts are successful. As Mr. Justice Story has said, "Salvage is a mixed question of private right and public policy;" and that has always been the doctrine maintained in this Court. Considering the value of the property salved, 11,590*l.*, the danger to which it was exposed, and the services rendered by the salvors, I award to the plaintiffs the sum of 350*l.*

Rothery, proctor, for the plaintiffs.

Clarkson for the defendants.

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THE HARRIET.

Wages—Special Contract—17 & 18 *Vict. c.* 104, *s.* 189.

The Court of Admiralty has no jurisdiction over a contract for wages different from the ordinary mariner's contract.

The 189th section of the Merchant Shipping Act, 1854, bars a seaman from recovering wages less than 50*l.* in the Court of Admiralty, except in the contingencies therein specified.

The plaintiff signed the ship's articles as mate at 5*l.* 10*s.* per month; he also verbally agreed with the owner to act as purser, and superintend the ship's accounts for 4*l.* 10*s.* per month additional; he served afterwards in both capacities, and finally claimed 63*l.*:—*Held*, that the parol agreement was, in the circumstances, a special agreement, which the Court could not inforce; and the claim, thus falling below 50*l.*, was dismissed altogether.

THE plaintiff, George Lines, sued the British ship Harriet for wages; claiming for wages as mate 33*l.*, and 30*l.* as wages for superintending the ship's disbursements. The action was defended by John Rogerson, mortgagee of the ship in possession.

It appeared that on the 16th of November, 1859, when the Harriet was lying at Hartlepool, designed on a voyage to Carthagena in Spain, John Winspear, the owner of the vessel, verbally engaged the plaintiff to serve as mate, at the rate of 5*l.* 10*s.* a month, and also entered into a further agreement with the plaintiff that he should take the management of the ship's accounts, and superintend the ship's disbursements during the voyage. This latter agreement was not reduced to writing, and on the ship's articles, which the plaintiff signed on the 19th of November, he was entered in the capacity of mate at the rate of 5*l.* 10*s.* per month, receiving at the same time an advance of the like sum. The plaintiff sailed on the voyage, acting as mate, and also superintending the ship's disbursements, according to the oral agreement. On the return of the vessel to this country he was discharged, and thereupon brought this action. The services of the plaintiff in both capacities were proved by the owner of the ship, but it was contended by the defendant that the plaintiff could not recover any wages not specified in the ship's articles, and this being so, the claim fell within the statutory limit of 50*l.*

The following sections of the Merchant Shipping Act, 1854, (17 & 18 Vict. c. 104) were referred to in the argument:—

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S. 149. "The master of every ship, except ships of less than eighty tons registered tonnage exclusively employed in trading between different ports on the coasts of the United Kingdom, shall enter into an agreement with every seaman whom he carries to sea from any port in the United Kingdom as one of his crew in the manner hereinafter mentioned; and every such agreement shall be in a form sanctioned by the Board of Trade, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars as terms thereof; (that is to say,)

(1) The nature, and, as far as practicable, the duration of the intended voyage or engagement:

(2) The number and description of the crew, specifying how many are engaged as sailors:

(3) The time at which each seaman is to be on board or to begin work:

(4) The capacity in which each seaman is to serve:

(5) The amount of wages which each seaman is to receive:

(6) A scale of the provisions which are to be furnished to each seaman:

(7) Any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishments for misconduct, which have been sanctioned by the Board of Trade as regulations proper to be adopted, and which the parties agree to adopt.

And every such agreement shall be so framed as to admit of stipulations to be adopted at the will of the master and seaman in each case, as to advance and allotment of wages, and may contain any other stipulations not contrary to law: provided, that if the master of any ship belonging to any British possession, has an agreement with his crew made in due form, according to the law of the possession to which such ship belongs, or in which her crew were engaged, and engages single seamen in the United Kingdom, such seamen may sign the agreement so made, and it shall not be necessary for them to sign an agreement in the form sanctioned by the Board of Trade."

S. 150. "In the case of all foreign-going ships, in whatever part of her Majesty's dominions the same are registered, the following rules shall be observed with respect to agreements; (that is to say,)

(1) Every agreement made in the United Kingdom (except in such cases of agreements with substitutes as are hereinafter specially provided for) shall be signed by each seaman in the presence of a shipping master:

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(2) Such shipping-master shall cause the agreement to be read over and explained to each seaman, or otherwise ascertain that each seaman understands the same before he signs it, and shall attest each signature:

(3) When the crew is first engaged, the agreement shall be signed in duplicate, and one part shall be retained by the shipping-master, and the other part shall contain a special place or form for the descriptions and signatures of substitutes or persons engaged subsequently to the first departure of the ship, and shall be delivered to the master:

(4) In the case of substitutes engaged in the place of seamen who have duly signed the agreement, and whose services are lost within twenty-four hours of the ship's putting to sea by death, desertion, or other unforeseen cause, the engagement shall, when practicable, be made before some shipping-master, duly appointed in the manner hereinbefore specified; and whenever such last-mentioned engagement cannot be so made, the master shall, before the ship puts to sea, if practicable, and if not, as soon afterwards as possible, cause the agreement to be read over and explained to the seamen; and the seamen shall thereupon sign the same in the presence of a witness, who shall attest their signatures."

S. 157. "If in any case a master carries any seaman to sea without entering into an agreement with him in the form and manner and at the place and time hereby in such cases required, the master in the case of a foreign-going ship, and the master or owner in the case of a home-trade ship, shall for each such offence incur a penalty not exceeding five pounds."

S. 189. "No suit or proceeding for the recovery of wages under the sum of fifty pounds shall be instituted by or on behalf of any seaman or apprentice in any Court of Admiralty or Vice-Admiralty Court, or in the Court of Session in Scotland, or in any superior Court of Record in her Majesty's dominions, unless the owner of the ship is adjudged a bankrupt or declared insolvent, or unless the ship is under arrest, or is sold by the authority of any such Court as aforesaid, or unless any justices acting under the authority of this Act, refer the case to be adjudged by such Court, or unless neither the owner nor master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore."

Tristram, for the plaintiff.—The plaintiff seeks to recover

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wages as mate and as purser. A purser to a ship is considered as a seaman, both by the practice of the Court, and the terms of the Merchant Shipping Act, 1854, s. 2; which provides that the term "seamen" shall include every person (except masters, pilots, and apprentices duly indentured and enrolled) employed or engaged in any capacity on board ship. It is true that the agreement of wages for superintending the ship's accounts is not in the ship's articles, but that is immaterial to the right of the plaintiff: it was the fault of the master, who may have rendered himself liable, under the 157th section of the Act, to a penalty; but a seaman who has actually served on board a ship is always intitled to recover wages in this Court. The present statute does not, like some of the previous statutes, contain any proviso expressly declaring that the ship's articles shall be conclusive and binding on all parties. Authority is in favour of the plaintiff. In the *Prince George* (*a*) Sir John Nicholl allowed a purser to recover a round sum of money agreed upon before the voyage, although in the ship's articles his name was entered with no wages annexed. In that case also the *Isabella* (*b*), on which the other side will rely, was distinguished. Sir John Nicholl says, "An agreement for wages may be made by word of mouth, or in writing: the mariner incurs no forfeiture or penalty by not signing articles, it is only the master who does so. There might be another question, whether the Act of Geo. II. applied, for it was repealed a few days after the ship sailed, and the services were mostly performed (and there was no suggestion in the argument that they were not duly performed) after its repeal. The case of the *Isabella*, has been relied on; there, articles were signed, and a rate of wages was specified in the articles: the claim for the wages was admitted, but the Court refused to admit a claim—in itself not very favourable—set up for the value of a slave under a custom of trade: that case cannot apply where the articles do not specify any wages, and where the only proof as to wages is from facts *dehors* the articles. There are cases in this Court, and recent ones, in which it has been held that the articles, where there are no wages specified, are not conclusive. Such was the case of the *Porcupine*, 1 Hagg. 379, in which Lord Stowell sustained a *quantum meruit;* and can it be held in this case that the man is not to have any compensation? The law favours a mariner suing for wages. Lord Tenterden says, 'Every officer, except the master, may sue in the Court of Admiralty, and may by the process of that Court arrest the ship as a security for his demand, or cite the master or owners personally,' Abbott on Shipping (Shee's ed.),

(*a*) 3 Hag. 376. (*b*) 2 C. R. 241.

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p. 588; and a case in Sayer's Reports (*a*) is there referred to; that was a suit in the Admiralty, by the surgeon of a ship, for wages due upon a contract in writing entered into upon land; and Chief Justice Ryder said, 'As the surgeon of a ship is under the command of the master, and is as much obliged, if called upon by the master, to assist in navigating the ship as the carpenter, he is to be deemed a mariner;' so in this case, the purser has signed the mariner's contract, but that is not so much to settle the rate of wages as to point out the voyage, and enjoin the party who signs the contract 'to obey all lawful commands.' And Sir Dudley Ryder adds, 'Upon considering all the cases, we are of opinion that the privilege of suing in the Court of Admiralty for wages does extend to every person employed on board a ship, except the master.' And it was also held in that case, that a mariner may sue on a contract made on land, not being under seal." This decision would seem to be conclusive as to the present case. Here the plaintiff was entered on the articles as mate, but he performed the duties of purser under a separate verbal agreement. This agreement cannot be fairly described as a special agreement, so as to oust the jurisdiction of this Court. In Abbott on Shipping (*b*), it appears that in the cases of *Opy* v. *Child* (*c*), and *Day* v. *Serle*, and *Howe* v. *Nappier* (*d*), the only cases of the kind in which a prohibition has been granted, the contract was in each case under seal, and contained special covenants of an unusual kind. Here the contract was oral, and of a purely ordinary description.

Twiss, Q.C., and *Clarkson*, contra.—The statutory ship's articles were signed three days after the oral agreement, and to admit the oral agreement would be not only to defraud the statute, but to vary a written document by parol, which cannot be done, *Pickering* v. *Dowson* (*e*), *Trueman* v. *Loder* (*f*), *Powell* v. *Edmunds* (*g*). The point has been expressly decided as to seamen's wages. In the *Isabella* (*h*) Lord Stowell refused to allow the plaintiff to recover anything beyond the sum stipulated in the articles, saying: "I take it to have been the intention of the general Act, as well as of the Act lately passed, 39 Geo. III. c. 80, s. 27, for the regulation of this peculiar trade to Africa, to render the agreement as distinct and definitive as possible; to prevent any part of it from resting in parol or vague conversation, which is at all times so difficult to be ascertained in a Court of justice,

(*a*) Page 136.
(*b*) 10th ed., pp. 482—486.
(*c*) 1 Salk. 31.
(*d*) 4 Burr, 1944.
(*e*) 4 Taunt. 784.
(*f*) 11 A. & E. 597.
(*g*) 12 East. 9.
(*h*) 2 C. R. 241.

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and in no cases more so than in such as relate to the transactions of this class of persons. If there had been no such Act, or if it had been less imperative, still the rule is no more than what the discretion of the Court would have wished to apply to such a subject." So in *Elsworth* v. *Woolmore* (*a*). In *Harris* v. *Carter* (*b*), a promise by the master of extra wages was held invalid; and in *Hartley* v. *Ponsonby* (*c*), where the extra wages were allowed, it was only because "the mariners not being bound to go on, were to all intents and purposes free, and might make the best contract they could" (*d*). But, secondly, if the agreement for purser's wages is to be considered altogether as a separate contract, it is a special agreement, and as such excludes the jurisdiction of this Court. We submit that any agreement by a mariner *dehors* the ship's articles, which are appointed by the Legislature, is a special agreement. The case of the *Prince George* referred to is distinguishable on this ground, because there the plaintiff had no wages specified in the articles. The Court has no jurisdiction over a special contract, and enforcing such a contract might draw down a prohibition, *Mona* (*e*), *Sydney Cove* (*f*), *Riby Grove* (*g*), *De Brescia* (*h*). Then, if the claim for purser's wages is struck out, the plaintiff's claim is reduced below 50*l.*, and by the 189th section of the Merchant Shipping Act, 1854, is not recoverable in this Court.

On the 21st of March DR. LUSHINGTON delivered judgment.

Judgment.

This is a suit by George Lines, who alleges that he was engaged by the owner of the Harriet to serve as mate on board that ship on certain voyages, that the owner agreed to pay him for his services as mate 5*l.* 10*s.* per month, and also hired him to manage the accounts and superintend the ship's disbursements, for which he was to receive wages after the rate of 4*l.* 10*s.* per month. The plaintiff now claims 63*l.* for wages due to him at 10*l.* per month. This claim comprises wages as mate at 5*l.* 10*s.*, and wages for the other services at 4*l.* 10*s.* per month.

The suit is opposed on behalf of a mortgagee upon legal grounds. The actual services of the plaintiff, as alleged, have been proved by the owner; as far as equity is concerned, the plaintiff's claim is clear; and I had at first some doubts in my own mind whether a mortgagee, who only appears by favour in

(*a*) 5 Esp. 87.
(*b*) 3 E. & B. 559.
(*c*) 7 E. & B. 878.
(*d*) Per Erle, J., p. 878.
(*e*) 1 W. R. 141.
(*f*) 2 Dods. 12.
(*g*) 2 W. R. 60.
(*h*) 3 W. R. 36.

this Court, should be allowed to avail himself of objections which operate contrary to equity. However, one of the objections is so serious in its nature that I cannot refuse it. 1861. *March* 21.

The first objection taken by the mortgagee is, that in the ship's articles the plaintiff is described as mate only, at wages of 5*l.* 10*s.* a month, and that to admit a larger claim upon a verbal agreement would be to violate the intent and even the letter of the Merchant Shipping Act, 1854, and to vary a written contract by parol evidence.

The second objection is to the jurisdiction of the Court. The defendant contends that the parol agreement by the mate to act as purser is a special contract, and, as such, cannot be sued upon in the Court of Admiralty.

However differently the Courts of Common Law may now be disposed to view the jurisdiction of this Court from what they did in former times, I am bound by the limitations imposed on my predecessors, and acted upon by them and by myself in former cases, and I cannot inforce any contract for seamen's wages different from the ordinary mariner's contract. I cannot but consider this agreement to serve as purser for a fixed sum, so tacked on by parol to a regular engagement, in the written statutory form, to serve as mate, does constitute a special agreement, and one therefore over which this Court has by custom no jurisdiction.

The agreement is a special agreement, which the Court cannot inforce.

I regret that this decision not only deprives the plaintiff of wages which he has justly earned as purser, but must also bar him from recovering in this Court the wages he has earned as mate. His claim, reduced to a claim for mate's wages only, does not amount to the minimum of 50*l.*, which the statute requires for a proceeding for seamen's wages in a Superior Court, except in certain contingencies, which are not applicable to this case. It is true that the words are, "No suit or proceeding for the recovery of wages under the sum of 50*l.* shall be instituted," and that here a claim, and a *bonâ fide* claim, has been made for a sum exceeding 50*l.*; but I must interpret the statute to require a recovery of 50*l.* I dismiss this case, but I do not give costs. I am happy to say that an Act (*a*) is now passing through the legislature, which will remedy the defect in the jurisdiction of

The plaintiff's claim, then, falls below 50*l.*, and is barred by the statute.

(*a*) 24 Vict. c. 10, see Appendix.

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Addams, proctor for the plaintiff.

Clarkson for the defendant.

THE HERZOGIN MARIE.

Suit by Foreign Master for Wages—Protest of Consul.

The master of a foreign ship instituted a cause against the ship for his wages, and no notice of the institution of the cause was given by him to the consul of the foreign state. The owners appeared under protest; and the consul swearing an affidavit in the cause, protested as consul against the cause being allowed to proceed:

Cause dismissed on the ground that the jurisdiction of the Court of Admiralty over causes of wages of foreign masters is discretionary only; that notice of the institution of any such cause ought to be given to the consul of the state to which the ship belongs; and that the protest of the consul was in the circumstances a bar to the cause proceeding.

March 21. THIS was a suit, instituted on the 10th of April, 1860, against the screw-steamer Herzogin Marie, belonging to the port of Rostock, in Mecklenburg Schwerin, by Heinrich Kossow for his wages as master. The owners appeared under protest, and brought in their petition; further pleadings followed, and evidence was taken. On the part of the defendants it was proved that proceedings had been taken in Rostock, by P. Burchard, as the managing owner of the ship, against the plaintiff, to deliver up the ship's papers, and that the plaintiff had refused to appear, as he might have done, to justify his detention of the papers, and make good his claim (if any) for wages. Mr. Siegevich Christopher Kreeft, the consul-general and sole representative in London of the Grand Duchy of Mecklenberg Schwerin, in an affidavit, dated the 26th of November, 1860, deposed as follows: "I am informed, and believe, that the said Heinrich Kossow is prosecuting a claim for wages in this Court against the screw steam-ship Herzogin Marie. Such claim should have been prosecuted by him at Rostock, in answer to the aforesaid action or proceeding of P. Burchard, in the Gewett Gericht, which Court would have entered upon all matters in

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difference between the parties to the said proceedings, and would have adjudicated upon them, and done justice between the said parties, according to the law of Rostock. The said Heinrich Kossow is in contempt of the laws of Rostock, and cannot return to Rostock without being liable to arrest and imprisonment, and would have no power to prosecute his claim for wages there, until he had complied with the sentence outstanding against him, or otherwise satisfied the Court as to his contempt. For these reasons I feel it my duty as Consul to protest, which I do most respectfully, against the said Heinrich Kossow being allowed to prosecute a claim for wages in the High Court of Admiralty of England."

The *Admiralty Advocate* and *Tristram*, for the plaintiff, were called on to begin.—Foreign masters have a right to sue in this Court for wages under the Merchant Shipping Act, 1854, s. 191; the *Milford* (*a*). [DR. LUSHINGTON.—Certainly no absolute right; the statute expressly says, "if the case permits." Foreign seamen are allowed to sue, but, by the practice of the Court, not without notice to the Consul of the State to which the ship belongs; here no notice was given at the institution of the suit, and the Consul now solemnly protests.] The protest of the Consul cannot take away the jurisdiction of this Court, as the Court observed in the case of the *Golubchick* (*b*). [DR. LUSHINGTON.—But I there said, that in all future cases, I should hold it indispensable that notice should be given to the Consul in the first instance. The jurisdiction of the Court is discretionary only.] This protest is dated six months after the institution of the cause; it is altogether too late. The omission to serve the notice ought not, we submit, to bar the plaintiff from entering into the merits of the case.

Deane, Q.C., and *Lushington*, for the owners, were not called upon.

Judgment.

Right Hon. DR. LUSHINGTON:—I have no doubt as to the course I ought to take in this case. Suits by foreign seamen were not formerly encouraged in this Court; they are now allowed upon a principle of comity, and with a view to prevent injustice to seamen. The jurisdiction of the Court, however, is discretionary only, and the Court requires as a condition that previous notice should be given to the Consul or representative of the foreign state. Foreigners here are bound to some extent by the acts of their own Government, and in shipping matters

(*a*) Sw. 364. (*b*) 1 W. R. 148.

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by the act of their consul. If the representative of the foreign state expresses his dissent to the suit, this Court, though not bound so to do, will incline to hold its hand and remit the foreign master to remedy under the laws of his own country. Here the Consul has recorded his solemn protest against the Court exercising its jurisdiction, and I consider that I am bound to act upon his protest. I do not enter upon the merits of the case, for they are beside the question at issue, and they have not been argued before the Court, but it is clear that this is not a case in which the plaintiff will suffer much injustice from being disappointed of his suit in this Court. I dismiss this suit, but I do not give costs.

Brooks, proctor for the plaintiff.

Deacon for the defendants.

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THE ANNAPOLIS.—THE JOHANNA STOLL.

Collision—Compulsory Pilotage in the Mersey—Operation of British Statutes on foreign vessels—Mersey Dock Acts Consolidation Act, 1858 (21 & 22 *Vict. c.* 92), *ss.* 128, 129, 130—*Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 388—*Action and Cross-action ; costs.*

The British Legislature has no authority over foreign vessels on the high seas out of British jurisdiction, but may impose any conditions on foreign vessels entering a British port, and consequently an obligation on foreign ships inward bound to take a pilot at a convenient station beyond three miles from the British shore.

A statute imposing in general terms on all inward-bound vessels the obligation to take a pilot at a convenient station beyond three miles from the British shore, is binding on foreign vessels ; such construction being justified on grounds of public policy. *Cope* v. *Doherty* (*a*), distinguished.

A foreign vessel inward-bound for Liverpool is required by 21 & 22 Vict. c. 92. ss. 129, 130, to make a signal for a licensed pilot on coming to the usual pilot-station, and to employ the first pilot offering his services.

Every vessel lying in the Mersey inward-bound is required by 21 & 22 Vict. c. 92, s. 128, to employ a pilot in removing from the river into dock.

The 388th section of the Merchant Shipping Act, 1854, applies to foreign vessels sued in the Court of Admiralty for damage done in British waters.

Apart from any statute, the owner of a ship is not responsible in proceedings *in rem* for damage done by his ship, occasioned solely by default of a licensed pilot employed by compulsion of law. *Maria* (*b*) followed.

A foreign vessel bound for Liverpool took a pilot off Point Lynas, was brought to anchor in the Mersey, and there lay two or three days, waiting for want of water to dock. She was then conducted by the same pilot into dock. In proceeding towards the dock, a collision was occasioned by the pilot's default:—*Held*, that the vessel was not liable for the damage.

Action and cross-action for a collision ; mutual defences, licensed pilot on board, and accident occasioned by his default ; agreement that the evidence taken in the principal action should be used in the cross-action. The vessel of the plaintiff in the principal action being found solely to blame but for the pilot's default only:—*Held*, that such plaintiff must pay all costs in his action, and that the cross-action should be dismissed, without costs.

COLLISION. On the 25th of January, 1861, a collision took place in the river Mersey between the American ship Annapolis, and the Johanna Stoll, a Prussian barque. Each vessel was proceeding into dock, in tow of a steam-tug, and each was in charge of a licensed pilot, who had been taken on board at the usual pilot-station off point Lynas, and had conducted the ship to an anchorage in the river two or three days before. The delay in the river had been occasioned by want of water to dock. The owners of the Annapolis brought an action for their damage

(*a*) 4 K. & J. ~~357~~ 375 (*b*) 1 W. R. 105.

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against the Johanna Stoll, and the owners of the Johanna Stoll brought a cross-action. In each case the defendants pleaded, first, a denial of negligence, and secondly, that the accident was occasioned by the default of a pilot employed by compulsion of law. An agreement was entered into between the parties that the evidence taken in the principal action should be used in the cross action. The case was heard on oral evidence, and the Court found the Annapolis solely to blame, and for the fault of the pilot only.

On a subsequent day the question was argued whether the employment of the pilot on board the Annapolis was compulsory by law, and the owners of the Annapolis were exempt from responsibility for the collision occasioned by his default.

The following are the principal enactments referred to in the argument and judgment:—

5 *Geo. IV. c.* 73, (*the old Liverpool Pilot Act, now repealed by* 21 *&* 22 *Vict. c.* 93, *s.* 6).

S. 32. "Every pilot so to be licensed as aforesaid, who shall pilot or conduct any ship or vessel into the said port of Liverpool, is hereby required to take care (if need be) to cause such ship or vessel to be properly moored at anchor in the river Mersey, and afterwards to conduct such ship or vessel into one of the wet docks within the said port, without being paid any other rate or price than is hereby directed to be taken for the piloting or conducting such ship or vessel into the said port of Liverpool; but in case such attendance shall be required during such ship or vessel being at anchor in the river Mersey, and before she is docked, five shillings per day shall be paid: Provided always," etc. (The rest of the section is immaterial.)

S. 34. "If the owner, master, or commander of any ship or vessel shall require the attendance of a pilot, licensed as aforesaid, on board any ship or vessel, during her riding at anchor, or being at Hoylake, or in the river Mersey, such pilot shall attend such ship or vessel, and be paid for every day he shall so attend five shillings and no more: provided always, that in case such pilot shall not be employed the whole day, but be dismissed in less time than a day, such pilot shall be paid five shillings for his attendance: provided also, that the pilot so to be licensed as aforesaid, who shall have the charge of any ship or vessel, shall be paid for every day of his attendance whilst in the river, except the day of going to sea with such ships or vessels as shall be outward-bound, and the day of returning from sea, and the day of docking for such as shall be inward-bound."

21 & 22 *Vict. c.* 92, "*The Mersey Dock Acts Consolidation Act*, 1858." 1861. *April* 18.

S. 123. "If any person shall pilot any vessel into or out of the port of Liverpool without having been first duly licensed by the Board to act as a pilot, or after the expiration of his licence and before the same shall have been renewed, he shall for every such offence be liable to a penalty of not exceeding twenty pounds."

Part VI. 3. As to the Duties of Pilots.

S. 128. "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 intitled to receive five shillings per day for such attendance."

Part VI. 4. *As to the duties of, and penalties on Masters and Owners of Vessels.*

S. 129. "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 made under the authority of this act, display and keep flying the usual signal for a pilot to come on board, and if any such master shall omit so to do, he shall be liable to a penalty on every such omission of not exceeding five pounds, and if any pilot shall come within a reasonable distance of any such vessel, the master thereof shall render all necessary assistance (so far as may be consistent with the safety of such vessel), to enable such pilot to come on board."

S. 130. "In case the master of any inward-bound vessel, other than a coasting vessel in ballast, or under the burthen of one hundred 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."

Part VI. 5. *As to Pilotage Rates.*

S. 133. "The Board may from time to time determine, vary, and alter and fix rates of pilotage to be paid to pilots for piloting vessels, such rates to be according to the draught of water of such vessels, and to be within the limits following, that is to say:—*a.* As to British vessels. For piloting a vessel from the distance of the

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Great Ormshead on the coast of Wales to the port of Liverpool, not less than five shillings nor more than eight shillings per foot, &c., &c. *b.* As to alien vessels. For piloting a vessel from the distance of the Great Ormshead on the coast of Wales to the port of Liverpool, not less than eight shillings nor more than eleven shillings per foot, &c." (Immaterial parts omitted.)

S. 138. "If the master of any vessel shall require the attendance of a pilot on board any vessel during her riding at anchor, or being at Holylake 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."

Bye-laws for the licensing and government of the pilots under the jurisdiction of the Liverpool Pilot Committee, approved by Order in Council, 24 June, 1856. 5. "*Duties of individual pilots.*"

. . . . . "Every pilot on his arrival from sea, either in charge of a vessel or otherwise, shall give notice thereof to the master of the boat to which he belongs as soon as possible; and shall not leave his vessel until she is safely anchored in the river; nor then leave her without a written permission from the commander, or on being relieved by a pilot of equal class, by order of one of the masters of the boat." (Immaterial parts omitted.)

17 *&* 18 *Vict. c.* 104. (*Merchant Shipping Act,* 1854.)

Part V. s. 330. "The fifth part of this act shall apply to the United Kingdom only."

S. 353. "Subject to any alteration to be made by any pilotage authority in pursuance of the power hereinbefore in that behalf 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 an 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 so to do, or employs or continues to employ an unqualified person to pilot her, and every master of any exempted ship navigating within

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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."

Rights, Privileges and Remuneration of Pilots (General).

S. 362. "An unqualified pilot may, within any pilotage district, without subjecting himself or his employer to any penalty, take charge of a ship as pilot under the following circumstances; (that is to say,)

"When no qualified pilot has offered to take charge of such ship, or made a signal for that purpose; or

"When a ship is in distress, or under circumstances making it necessary for the master to avail himself of the best assistance which can be found at the time; or

"For the purpose of changing the moorings of any ship in port, or of taking her into or out of any dock, in cases where such act can be done by an unqualified pilot without infringing the regulations of the port or any orders which the harbour-master is legally empowered to give."

Saving of Owners' and Masters' Rights.

S. 388. "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."

Brett, Q.C., and *Pritchard*, for the owners of the Annapolis.—The owners of the Annapolis are not responsible, unless the negligent act was the act of their servant. The pilot was not their servant; he was the servant of the law, received on board by compulsion of the local statute (21 & 22 Vict. c. 92, ss. 129, 130), and by the same statute (s. 124), thereupon bound to "take charge" of the vessel; that is to say, take the entire direction of the ship's navigation. In these circumstances, independently of any statutory exemption, the defendants are not liable. That the original employment of the pilot was compulsory under ss. 129, 130, of the Local Act, can hardly be disputed after the decision of the *Maria* (*a*), that a positive direction by a statute to employ a pilot, and an obligation to pay pilotage fees, whether a pilot is employed or not, amount to a statutory obligation to employ a pilot. Many cases have followed this ruling. Moreover, s. 353 of the Merchant Shipping Act, 1854, imposes a penalty for navi-

(*a*) 1 W. R. 105, 108.

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gating in any district without a pilot, where the employment of a pilot is compulsory by law. But it will be contended that the original employment which was compulsory had ceased, and that the employment of the pilot to take the ship into dock was voluntary. We admit that whilst the ship was lying at anchor in the river, and the pilot was receiving five shillings a day, the employment was voluntary; but we say that the employment to take the ship into dock was compulsory,—that the original employment reattached by the statute, and that the statute appoints this service of the pilot as an incident and part of the original employment. This is the true construction of s. 128 of the Local Act, by which the pilot is bound to conduct the ship into dock, and without making any additional charge. This clearly indicates that there is but one service, but that it need not be continuous. The purpose of the enactment is obvious; it is to secure the employment of a qualified person for the difficult operation of navigating a vessel into dock: in fact, such a rule is necessary for the safety of property in the river. The distinction is obvious between lying at anchor and navigating the river; in the one case the pilot is not needed, and his employment is voluntary; in the other he is needed, and his employment is compulsory. The terms of the former Liverpool Pilot Act, 5 Geo. IV. c. 73, ss. 32, 34, were almost identical with the present, and the decisions upon that Act are almost conclusive in our favour. In the *Agricola* (*a*), where the vessel ran up the river from sea, and the accident took place off the entrance to the dock, the owners were held not liable for the act of the pilot. In the *Montreal* (*b*), the ship had anchored in the Mersey before the accident, which took place in docking, and the Court giving judgment, said, "I have carefully referred to all the enactments bearing upon this question in the Liverpool Pilot Act, especially to the 32nd section, and I am clearly of opinion that the fact of the vessel anchoring off the Albert Dock Wall, a necessary measure before she could be conveyed into the Queen's Dock, was no interruption of the original agreement, and in no degree rendered the employment of the pilot from the Albert Dock Wall to the Queen's Dock a voluntary measure: it was one continued service, which the pilot was bound to perform, and for which the master was bound to take a pilot; and it would be almost absurd to hold, looking at the terms of the Act of Parliament, that the service ended upon the mere entrance into the port of Liverpool, and before the vessel was docked. I am therefore of opinion that at the time of the collision the pilot was compulsorily employed." The employment of a pilot in like circumstances was also held to be compulsory in *Carruthers* v. *Sydebotham* (*c*).

(*a*) 2 W. R. 10. (*b*) 17 Jurist, 538. (*c*) 4 M. & S. 85, 86.

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Milward and *Lushington*, contra.—The Annapolis having been found to blame, the entire burden of proof is upon the other side, to show that the ship is not to be responsible for the damage; and they cannot succeed unless they show that the employment of the pilot at the time of the accident was strictly compulsory by law. The common law exemption rests upon this basis only; *Lucey* v. *Ingram* (*a*); and likewise the present statutory exemption given by s. 388 of the Merchant Shipping Act, differing in this respect from the exemption given by the old Pilot Act, 6 Geo. IV. c. 125, s. 55, which only required that the pilot should be "acting under or in pursuance of the provisions of the Act." It is erroneous to suppose that because a pilot is taken on board in pursuance of a statute, and thereupon by the nature of his office takes charge of the ship, that the owners are therefore not to be liable for damage occasioned by his default. Even in common law, the pilot not being employed by compulsion of law, would probably be the servant of the owners, and they would be liable for his act; but in the Admiralty Court the ship would certainly be liable, because the remedy is *in rem*. Thus, in this Court, a ship is always responsible for damage occasioned by the default of the steam-tug engaged in towing her; so also if the negligent management of the ship is the act of the charterer's servants as distinguished from the owners, *Ticonderoga* (*b*); or is the act of any person to whom the charge of the ship has been consigned by contract with the owners, *Ruby Queen* (*c*), the ship is responsible. Nothing therefore but compulsory employment of the pilot will relieve the defendants. The difference between employment by compulsion of law, and employment in pursuance of a statute, a distinction most material in this case, is pointed out by Parke, B., in *Lucey* v. *Ingram* (*d*). "The legislature has considered that there may be some classes of cases, in which the presumption of due competency on the part of the master is so great, as to make it safe to relieve him from the obligation of taking a pilot, if he chooses to navigate for himself; still, however, making it the duty of the pilot to serve, if required so to do, and in most of such excepted cases preventing the master from employing any person other than a licensed pilot, if he does not undertake the navigation himself. The language in which the legislature has exempted masters or owners from responsibility on account of accidents arising from the fault of the pilot, is certainly comprehensive enough to embrace these latter cases, as well as those in which the taking a pilot has been made matter of absolute obligation." This was upon the extensive immunity given by

(*a*) 6 M. & W. 315.
(*b*) Sw. 215.
(*c*) Ante, p. 266.
(*d*) 6 M. & W. 315.

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s. 55 of 6 Geo. IV. c. 125. The plaintiffs then contend, first, that the original employment of the pilot off Point Lynas was not compulsory, because the Annapolis was a foreign ship, beyond three miles from the British coast, and therefore beyond the authority of the British legislature. The cases of the *Zollverein* (*a*), *Cope* v. *Doherty* (*b*), and *The General Iron Screw Collier Company* v. *Schurmanns* (*c*), show conclusively that beyond the three mile limit, no British statute can affect a foreign ship, unless foreigners are expressly named to be bound. In the *Zollverein* the Court said, "In looking to an Act of Parliament with reference to such a question as I am now discussing, viz., as to whether it is intended to apply to foreigners or not, I should, in endeavouring to ascertain the construction of the Act, always bear in mind the power of the British legislature; for unless the words are so clear that a contrary construction can in no way be avoided, I must presume that the 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 words of the section are themselves ample, but they must be limited by the general limits of the power of the legislature." This language is quoted with approval by Wood, V. C., in *Cope* v. *Doherty* (*d*). In the *Johannes* (*e*), the same important rule of construction was followed; and British salvors, having saved lives from a foreign ship on the high seas, were held not intitled to sue *in rem*. Applying this rule to the present case, ss. 129, 130, of the Local Act, on which the alleged compulsion rests, and which are in general terms, without naming foreigners, do not apply to foreign ships. S. 133, which prescribes the rates of pilotage for alien vessels, only appoints the amounts payable on a pilot being actually employed. The original employment of this pilot was therefore voluntary.—2dly, Assuming the employment of the pilot in the first instance to have been compulsory, that compulsory employment had ceased, and at the time of the accident the employment was voluntary only. After a vessel has been lying for more than twenty-four hours in the river, the law imposes no obligation to employ any pilot to conduct her into dock. The general reason of the thing is against any such obligation. The purpose of compulsory pilotage is to secure the presence of qualified pilots, as far as possible, in all circumstances and all weathers, in districts where the navigation is peculiarly perilous, especially to human life. Thus, with re-

(*a*) Sw. 96.
(*b*) 4 K & J. 367; 2 D. & J. 614.
(*c*) 1 J. & H. 192.
(*d*) 4 K. &J. 375.
(*e*) Ante, p. 182.

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spect to the port of Liverpool, the necessity is to have pilots off Port Lynas, cruising in all weathers; and this necessity is satisfied by making all British ships inward-bound contribute to the pilotage fund, and all foreign ships actually employing pilots. There is no such necessity with respect to the navigation of the river by vessels docking. The operation of docking requires skill and local knowledge, but it is not an operation of danger; it is not performed in violent weather; and at all times persons, not being licensed pilots, can be obtained fully qualified to conduct the ship. Again, it is clear that vessels lying at anchor, are not bound to have a licensed pilot, though really they may often require the very best assistance, as in the event of a violent gale arising. Further, there are many instances in which vessels may navigate the river without a pilot: thus in changing from dock to dock, to discharge or receive different cargoes, or in proceeding from a wet dock to a dry dock, &c., or in changing moorings in the river, &c. So also *Rodrigues* v. *Melhuish* (*a*), shows that the employment of a pilot to take an outward-bound ship from dock into the river, is not compulsory. So also s. 362 of the Merchant Shipping Act, 1854, raises, to say the least, a strong presumption against the defendants on this point. The defendants, to establish the obligation for which they contend, can only rely on the Local Act. S. 353 of the Merchant Shipping Act, which has been referred to on the other side, relates to pilotage prescribed by antecedent statutes, in the case of Liverpool, to 5 Geo. IV. c. 73, but that Act is repealed by the 6th section of the present Local Act, and therefore the clause of the Merchant Shipping Act has no relation. Turning to the Local Act, ss. 129, 130, which, it is said, render the engagement of the pilot outside compulsory, do not specify the terminus of the engagement. We submit that the terminus is, in a case like the present, anchoring in the port of Liverpool. We refer to the concluding words of s. 130, to the commencing words of s. 238, to the continual recurrence to the phrase "to the port of Liverpool" in s. 133, and to the provision made in the 5th bye-law, whence it appears that the pilot, upon safely anchoring the vessel in the river, may, with the permission of the master, leave the vessel. But it is enough for the plaintiffs, if the compulsory pilotage ceases altogether upon the pilot being employed under the five-shilling section, s. 138. Under that section (comparing it with the corresponding section, s. 34, of the former Act, 5 Geo. IV. c. 73), the pilot, having been retained, was intitled to five shillings for the day of docking; if so, his employment was voluntary

(*a*) 10 Exch. 110.

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only. The defendants admit that the pilotage became voluntary whilst the vessel lay at anchor, but say, that by reason of s. 128 it became compulsory again whilst removing into dock. Can it be that a vessel may lay any time in the river and require the services of the pilot originally employed to dock? Here the circumstances show that the Annapolis anchored *animo morandi*. But the obligation, whatever it is, imposed by that section, is upon the pilot only, not upon the master and owners, as appears from the heading, "As to the duties of pilots," prefixed to the batch of sections, 125—128, compared with the heading, "As to the duties of and penalties on masters and owners of vessels," prefixed to ss. 129—132. The importance of such headings is remarked upon in the *Earl of Auckland* (*a*). With the pilot, the employment was matter of compulsion; with the master it was matter of choice: the case therefore falls precisely within the observations of Parke, B., in *Lucey* v. *Ingram*. The terms of the section itself tend in the same direction. The obligation upon the pilot cannot be absolute, there must be implied a condition "upon the requisition of the master," for the vessel may never be wanted to go into dock at all. The section should be regarded simply as a regulation respecting the payment of the pilot, and the duty he may be required to do for the consideration. But what is also most important is that the obligation of the pilot is to pilot the ship into dock, "*unless* his attendance shall be required on board such vessel while at anchor in the river," &c.; terms, it is to be observed, not found in the former statute (*b*). If, therefore, such attendance is required, as here it was, there is no obligation even on the pilot to conduct the ship into dock; and the section, in fact, only provides for the case of a vessel coming from sea and going into dock without delay. Indeed, as before mentioned, the pilot is intitled, under s. 138, to his five shillings for the day of docking. Upon all these considerations, we contend there was no compulsion upon the master to employ a pilot to take his ship into dock; if he had piloted her himself, or employed an unqualified person, what is the penalty to which he would have been subject, and where is it to be found? The cases referred to on the other side, *Carruthers* v. *Sydebotham* (*c*), the *Agricola* (*d*), and the *Montreal* (*e*), are distinguishable on two grounds. 1. That in none of those cases had the five shillings a day, which marks the boundary, begun to run. 2. That in consequence of the terms of the then statutory exemption, it was

(*a*) Ante, p. 178.
(*b*) 5 Geo. IV. c. 73, s. 32.
(*c*) 4 M. & G. 85.
(*d*) 2 W. R. 10.
(*e*) 17 Jur. 538.

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not necessary to decide that the employment of the pilot was compulsory by law. The lapse of time between anchoring and going into dock is very material. The plaintiffs' third point is, that s. 388 of the Merchant Shipping Act, 1854, does not apply to a foreign ship in the Admiralty Court. This rests upon the same argument as the first point, but also upon the decision in the *Girolamo* (*a*), referred to by Wood, V.C. in *The General Iron Screw Collier Company* v. *Schurmanns* (*b*). The defendants, therefore, are not intitled to the statutory exemption.

Brett, Q.C., in reply.—As to the plaintiffs' first point, the British Legislature has the right to determine on what terms it shall permit foreign ships to enter a British port; it has always exercised such a right, and foreigners, unless specially exempted, are bound by the ordinary conditions of the port. It would be defeating the purpose of the enactment to allow foreign ships to come into the port of Liverpool without pilots. As to the second point, *Rodrigues* v. *Melhuish* is not in the plaintiffs' favour; the real decision there was that the defendants were responsible for a joint act of negligence of the pilot and crew. The *Montreal* was expressly decided on the local Act alone, and is therefore in all respects still a binding authority. As to the third point, the judgment in the *Girolamo* is overruled by the *Protector* (*c*), and the statutory exemption has been continually acted on in this Court.

Cur. adv. vult.

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Judgment.

Right Hon. Dr. Lushington:—This case has been fully and very ably argued on the facts, and the Court has found that the Annapolis was solely to blame for the collision, and through the default of her pilot alone. The question then arose, whether the owners of the Annapolis are legally liable to make good the damage, or whether they are exempted from responsibility for the act of the pilot. This question has also been fully discussed, and is now to be determined by the Court.

The onus probandi is on those who allege the exemption. The case of the Annapolis is shortly this:—"We had a licensed pilot, who was employed by compulsion of law; and by s. 388 of the Merchant Shipping Act, 1854, and on general principle, we are not responsible for his act." The counsel for the Annapolis contend that a compulsory obligation to take a pilot was imposed by the Merchant Shipping Act, 1854, s. 353, and by the Mersey Dock Acts Consolidation Act, 1858, which I may

(*a*) 3 Hag. 169. (*b*) 1 J. & H. 197. (*c*) 1 W. R. 51.

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call the local Act. The 129th and 130th sections of this local Act are as follows :—

S. 129. "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 made under the authority of this Act, display and keep flying the usual signal for a pilot to come on board, and if any such master shall omit so to do, he shall be liable to a penalty on every such omission of not exceeding five pounds; and if any pilot shall come within a reasonable distance of any such vessel, the master thereof shall render all necessary assistance (so far as may be consistent with the safety of such vessel) to enable such pilot to come on board."

S. 130. "In case the master of any inward-bound vessel, other than a coasting vessel in ballast, or under the burthen of one hundred 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."

National jurisdiction in pilotage matters, by custom and general policy, extends beyond the three miles limit.
The British legislature may appoint a pilot-station more than three miles from the British shore, for vessels inward-bound to a British port; and an enactment, general in terms, requiring inward-bound vessels there to take pilots, is binding on foreign vessels entering the port.

Now the Annapolis was a foreign ship, and took the pilot on board off Point Lynas; and an argument has been urged on the part of the Johanna Stoll, that these sections did not render the original employment of the pilot compulsory, because the Annapolis was a foreign ship out of the jurisdiction, and the British Parliament had no authority to impose upon her a binding regulation; the sections, they say, must not be construed to include foreign vessels. The Parliament of Great Britain, it is true, has not, according to the principles of public law, any authority to legislate for foreign vessels on the high seas, or for foreigners out of the limits of British jurisdiction, though if Parliament thought fit so to do, this Court, in its instance jurisdiction at least, would be bound to obey. In cases admitting of doubt, the presumption would be that Parliament intended to legislate without violating any rule of international law, and the construction accordingly. Within however British jurisdiction, namely, within British territory, and at sea within three miles from the coast, and within all British rivers intra fauces, and over foreigners in British ships, I apprehend that the British Parliament has an undoubted right to legislate. I am further of opinion that Parliament has a perfect right to say to foreign ships that they shall not, without complying with British law, enter into British ports, and that if they do enter, they shall be subject to penalties, unless they have previously complied with the requisitions ordained by the British Parliament: whether those requisi-

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tions be, as in former times, certificates of origin, or clearances of any description from a foreign port, or clean bills of health, or the taking on board a pilot at any place in or out of British jurisdiction before entering British waters. Whether the Parliament has so legislated is now the question to be considered. It appears to me that this is a question of construction only, whether, upon a fair consideration of the whole Act, the 129th and 130th sections apply to foreign vessels. I cannot entertain a doubt that the statute does extend to foreign vessels, when, from the subject-matter, its provisions can be reasonably so applied. I do not think it necessary to go minutely into the various enactments contained in this statute to establish the truth of this proposition; indeed it is hardly denied; but I will briefly state two or three reasons which satisfy my mind. 1st. In all matters relating to pilotage, docking, damage done, the provisions of the Act are expressed in general terms. In all matters in which foreign ships will be concerned, terms amply sufficient to embrace foreign ships are used. 2ndly. In s. 133 alien or foreign ships are mentioned expressly with respect to the rates of pilotage. I think it impossible that I could come to the conclusion that this section, which manifestly settles the rates to be paid by foreign ships, could be taken alone, and not in conjunction with all the other regulations applicable to pilots. Indeed the other sections are so intimately connected with this provision, that it could hardly stand by itself, without them: for instance, we must look to the rest of the statute to know what is meant by the word piloting, what the duties of the pilot are, and especially as to docking the vessel. 3rdly. The act would be substantially inoperative, unless it applied to foreign vessels, and the utmost confusion must ensue. All the numerous arrangements contained in this Act for the better conducting the great commerce of the port of Liverpool would be defeated, unless the statute comprised foreign vessels. I am of opinion, therefore, that it was within the legitimate power of Parliament to make such enactments as it thought fit for all matters and things to be done or arising in the river Mersey; and that this statute is binding on all foreign vessels with respect to all transactions within those waters to which the provisions of the Act can by fair construction apply. I am further of opinion that as to s. 129, the legislature did intend that foreign vessels should be bound by this enactment, and that it is my duty to carry it into effect. Admitting the pilot-station off Point Lynas to be out of British jurisdiction for some purposes, I think it was competent to the British legislature to make this enactment without any violation of international law. In revenue, quarantine, and

ss. 129, 130 of the Mersey Dock Acts Consolidation Act, 1858, apply to foreign vessels; and the original employment of the pilot was therefore compulsory.

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pilotage matters, the necessity of the case seems to require a more extended jurisdiction than the three-mile limit. This enactment 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. It resembles an enactment that before a ship shall be received into the port of Liverpool, she shall bring a clean bill of health from another country; and it is an undoubted and indispensable accessory to the enforcing the employment of pilots on ships entering that port. What shall be the pilot-rendezvous must always depend upon the peculiar circumstances connected with the entrance to the port in question; and all experience shows us that the place of rendezvous for pilots cannot generally be at the very mouth of the entrance into British jurisdiction, or within it. Thus with respect to pilots for the river Thames, the place of rendezvous is off Dungeness. The penalty then imposed by this section, is imposed not merely upon a foreign ship neglecting to make a signal for a pilot, but is indissolubly connected with that foreign ship intending to enter, and subsequently entering the port of Liverpool within British jurisdiction. I apprehend that a foreign vessel entering the port of Liverpool without complying with this section, would be guilty of violation of English law, and of an attempt to make an illegal entry. It may be true that it may be difficult, if not impossible, to find any authority or decision directly applicable to the proposition I am now maintaining. But I believe it is equally true that though complaints may have been made on behalf of different states against heavy dues exacted upon entrance into ports of commerce, yet no remonstrance has ever been made in England or elsewhere against any regulation requiring pilots to be taken in a convenient place upon the high seas, where for the common advantage of all a pilotage station is established. This general acquiescence by all civilised states does in truth constitute international law, and I have no hesitation in upholding a custom which may be taken to be deemed just and beneficial by all those states most deeply interested in commerce and navigation. But if there be no precise authority to be quoted in support of the proposition, I certainly know of no case which impugns it. *Cope* v. *Doherty* (*a*), and *The General Iron Screw Collier Company* v. *Schurmanns* (*b*), have been cited. I entirely acquiesce in the principles and reasoning upon which those cases stand, but they refer to another question, namely, within what limits when a foreign ship is concerned as plaintiff or de-

(*a*) 4 K. & J. 367. (*b*) 1 J. & H. 197.

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fendant, shall the rule prevail whereby Parliament has limited the amount of liability in cases of damage. The first of those cases decides that the rule does not apply to a collision between foreign ships on the high seas out of British jurisdiction; the second, that the rule does apply where a British ship is sued for a collision with a foreign ship, within three miles of the British coast. The language of both these decisions is, that the intention of the legislature was to protect British interests; and in *Cope* v. *Doherty*, where the rule was excluded, the circumstances had no relation to a highway contiguous to English ports, as in the General Iron Screw Collier Company's case, or to entry into an English port as here. Now the enactments as to the regulation and supply of pilots, are of universal interest to ships of all nations. Their safety from the numberless risks which must be encountered in entering the narrow channels of the Thames and the Mersey, beset with sandbanks and shallows, is at stake; and I feel that I am not transgressing the bounds of the ancient maritime law, which has governed from time immemorial the great interests of commercial nations, in giving the most extended construction to measures so important to the safety of navigation and commerce; and I hold that no nation would have a right to complain of the construction which I put upon this statute, as not in accordance with the strict principles of international law. I am of opinion that the statute imposed upon the Annapolis an obligation to employ a pilot into the port of Liverpool.

Cope v. *Doherty* and *The General Iron Screw Collier Company* v. *Schurmanns*, distinguished.

The original employment of the pilot to take the ship into the port of Liverpool being compulsory, the next question is, whether the compulsion prevailed at the time when the ship was proceeding from the river into dock and the collision occurred. The ship had been anchored for some days previously in the river. The 128th section of the local Act is as follows:—"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 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 intitled to five shillings per day for such attendance." This section prescribes the duty of a pilot piloting a vessel inward-bound. It appears to me carefully to provide for all probable contingencies. 1st. The pilot is to moor the vessel in the river if need be, that is, if she cannot at once go into dock. 2ndly. He

The employment of the pilot to dock the ship was also compulsory.

ss. 123, 124, 129, 130, and especially s. 128 of the local act, considered on this point.

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must pilot her into dock without making any additional charge. 3rdly. He is intitled to five shillings a-day, if his attendance is required on board the vessel whilst at anchor, and before going into dock. It appears to me that this section contemplates considerable delay between mooring the ship and taking her into dock, and it provides for the consequences of that delay in two ways: for the master, that he shall not pay more for complete pilotage, that is, the bringing into dock; for the pilot, that if detained on board ship, he shall be paid for such additional service. I put a very different construction on the proviso beginning "unless," &c., than that contended for by the plaintiffs. These words in my judgment do not diminish or control the duty of the pilot, but under circumstances increase the pay. That it should be necessary for inward-bound vessels frequently to be moored in the river because they cannot at once get into dock, sometimes for want of water, sometimes because the docks are too crowded, admits, I apprehend, of no doubt; and it appears to me that this section was expressly formed to meet such cases. I come therefore to the conclusion that the duty of the pilot to pilot this vessel into dock was compulsory, not indeed that a specific penalty is imposed, but because the pilot is bound to obey the enactment, and is liable to lose his licence if he does not (s. 124). I do not mean to say that this duty might not be performed by any other licensed pilot; probably another pilot from the same boat may often perform the duty. The important question then arises—Was the master of the vessel bound to employ this pilot or any pilot to pilot her into dock? There is not to be found in this statute any enactment specifically prescribing the duty of the master on this head, but the true inquiry is, whether looking at all the provisions of this statute, the compulsory obligation to take and have a pilot for the removal of the vessel into dock did not attach. It may be true that it does not follow as a necessary consequence that, because a pilot may be bound to do a certain duty, the master is bound to employ him. It may be that the obligations are not reciprocal; but I must think, à priori, the probability is that they are so; and it would certainly be absurd to say that the master, though obliged to employ the pilot in the first instance, might discharge him when he pleased, with his statutory duty unperformed. It is manifest to me from the language used in the 128th section, that the legislature esteemed it of great importance to the safe navigation of the river that vessels should be piloted into dock. How then is this object to be effected, unless the master's obligation is reciprocal to the obligation of the pilot? But, independently of the language used,

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it is manifest that the docking a vessel, though a simple operation in itself, may in the crowded commerce of the port of Liverpool, call for the superintendence of a person of known experience as a pilot, and should not be left to the chance of masters who may be ignorant of the river, or to other persons employed by them, of whose capacity there is no adequate test; and here it may be observed that if this service was part of the pilot's duty, no other person could legally undertake it. I think, therefore, that the true intention of the legislature could not be effected, unless it was compulsory upon the master to employ the pilot to conduct his vessel from the river into dock. I am confirmed in this construction of s. 128 by other sections in the Act. The 123rd section imposes a penalty on any person not a licensed pilot piloting a vessel into or out of the port of Liverpool. It may be doubtful if this section would apply to the master, but it would apply to all other persons, and it must mean pilot into or out of the port of Liverpool, either in whole or in part. Any other construction would render the enactment nugatory. The 129th and 130th sections are also very important. The master must, under a penalty, make a signal for a pilot. He must, under the penalty of paying the full pilotage rates, employ a pilot; and it is my opinion that the true interpretation of the words "employ a pilot," is to employ him for the whole service the pilot is bound to perform, which includes the docking of the vessel. Where else is the limit? For all these reasons I have come to the conclusion that it was compulsory upon the master of the Annapolis to employ a pilot to conduct his ship from its moorings into dock.

The pilotage being compulsory, the owners of the Annapolis are on general principle not liable for the act of the pilot; and *semble* also by 17 & 18 Vict. c. 104, s. 388.

The only question remaining is, whether a foreign ship, employing a pilot by compulsion of law, is relieved from responsibility for damage occasioned purely by his default. If the 388th section of the Merchant Shipping Act applies, it decides the question: the owners of the Annapolis are not responsible. The words of that section are sufficiently comprehensive to include this case. The 330th section prescribes that Part V. of the Act (to which s. 388 belongs) shall apply to the United Kingdom; and Parliament, as I have already said, has an undoubted right to legislate for foreign vessels for all transactions in British territory. The Merchant Shipping Act is prior in date to the Liverpool Act. It appears to me clear beyond all question that many sections of Part V. of the Merchant Shipping Act apply to foreigners; indeed, that they must of necessity so do, or the statute would be to a great extent inoperative, and the most dangerous confusion occur in British waters. The ex-

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ceptions specified tend to establish the conclusion on the old principle, "*expressio unius est exclusio alterius.*" But whether the Merchant Shipping Act applies to this case or not, I am of opinion that the owners of the Annapolis are exempt from responsibility by reason that the employment of the pilot was compulsory: the pilot was not their servant or agent; they could not avoid intrusting him with the management of the vessel. In the case of the *Maria* (*a*), I have stated at some length my reasons for coming to this conclusion. I believe that the doctrine I then maintained, and now adhere to, is consonant with justice, supported by authority, and is in strict accordance with the principle adopted by the Legislature in the Merchant Shipping Act. I therefore pronounce against the claim brought by the owners of the Johanna Stoll.

On the 25th of April the question of costs was argued.

Milward and *Lushington* for the Johanna Stoll.—The general rule is clear that an unsuccessful plaintiff pays costs; but there is an exception to this, always followed in this Court, that if the plaintiff proves the defendant's ship to have been solely to blame, and fails in his action only because the collision was occasioned by the default of the defendant's pilot, compulsorily employed, no costs are given. The owners of the Johanna Stoll are therefore intitled to have their action dismissed without costs. It is otherwise with the action brought by the owners of the Annapolis. They have failed altogether in their action, and, according to the general rule, should be condemned in costs. The principle of the exception does not apply. The exception is given to an unsuccessful plaintiff, only because his own vessel is not to blame, and because the defendant's ship having been negligently managed, the plaintiff has a right to bring his action, especially as it is out of his power to know beforehand that the improper navigation of the defendant's vessel was occasioned by the default of the pilot alone. But here the owners of the Annapolis might have ascertained beforehand that their vessel only was to blame, and that their pilot was in fault, yet they chose to bring their action, and provoked the whole of this litigation.

Brett, Q.C., and *Pritchard*, for the Annapolis.—In the Court of Admiralty there is no absolute rule as to costs; costs are in the equitable discretion of the Court. Here neither the owners of the Annapolis nor their servants were to blame for the colli-

(*a*) 1 W. R. 106.

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sion, which was the act of a servant of the law. There was no impropriety therefore in bringing their action, so as to merit the penalty of costs. But, further, this was a case of action and cross-action. All the evidence was adduced in the action for the Annapolis, with an agreement that it was to be used in the cross-action; and, as the owners of the Johanna Stoll have failed in the cross-action, it is submitted that there should be an equitable order apportioning the costs.

Judgment as to costs.

Right Hon. Dr. Lushington:—I know of no precedent applicable to this case; but I have no doubt of the order I am bound to make. The owners of the Johanna Stoll, the plaintiffs in the cross-action, have failed only because the collision was occasioned by the act of the pilot of the Annapolis, who was employed compulsorily. According to the usual practice, therefore, they are intitled to be dismissed without costs in their action, and I see no reason for departing from the established rule. The claim of the owners of the Annapolis for a similar decree in the original action is not supported by similar circumstances. The collision was occasioned by the act of a person who was not their servant; but their ship was improperly navigated. They had, therefore, no right to bring their action, and they must be condemned in the costs. I have considered the agreement with respect to the evidence, but I am of opinion that it affords no sufficient ground for ordering an apportionment of costs.

Pritchard, proctor for the Annapolis.

Tebbs, for the Johanna Stoll.

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THE MARTHA.

Towage—Authority of Master to enter into an unusual Agreement—Jurisdiction—3 & 4 Vict. c. 65, s. 6.

The master of a vessel agreed with a tug for towage from Sea Reach in the Thames to a London wharf, and agreed to pay 6*l.* and give an order upon the owner of the wharf for the amount usually allowed by him (under the name of towage) as a premium to vessels of the kind coming to his wharf. The service was performed by the tug, and the master paid the 6*l.*, but refused to give the order on the owner of the wharf. The amount actually paid by the owner of the wharf according to his practice was proved; and it was also proved that if an order, signed by the master of the vessel towed, was presented by the master of the tug, the money would be (as a matter of practice) paid to him:

Held, that the master of the vessel had no authority to agree to transfer to the master of the tug an uncertain sum payable to the owners of the vessel; and that the Court had no authority to enforce such a contract or give damages for the breach of it.

TOWAGE. This was an action brought by the owners of the steam-tug Lass o' Gowrie against the brig Martha.

The petition pleaded (1) that on the 19th of October, 1860, the master of the Martha engaged the Lass o' Gowrie to tow her from Sea Reach in the river Thames to Davis's Wharf at Horsleydown, in the county of Surrey, and agreed to pay for the same in manner following, namely, to pay 6*l.* in money, and sign and give the usual order on the owner of the said wharf, or his agent, for payment to the owners of the Lass o' Gowrie of the amount due for the towage of the Martha from Gravesend to the said wharf, which amount would thereupon, according to the usual custom in such cases, be paid by the owner of the said wharf. (2) That the Lass o' Gowrie duly towed the Martha from Sea Reach to Davis's Wharf, according to the said agreement. (3) That the master of the Martha, upon completion of the service, paid the said 6*l.*, but refused to give the order on the owner of the wharf, according to the agreement. (4) That the Martha was a brig of 123 tons, and the amount due by custom for her towage from Gravesend to Davis's Wharf was 5*l.*

The answer pleaded that the agreement was for the sum of 6*l.* only, which amount had been paid.

The case was heard chiefly on vivâ voce evidence. The evidence was conflicting as to the terms of the agreement; but it was proved that the owner of Davis's Wharf was accus-

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tomed to allow a vessel like the Martha coming to the wharf towage from Gravesend, and to pay the amount of this towage, which in this case would be £5, by allowance in account to the owners of the vessel towed, or to the master of the tug, on presenting an order to that effect from the master of the vessel.

The 3 & 4 Vict. c. 65, s. 6, enacts: "That the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered, or damage received, or necessaries furnished, in respect of which such claim is made."

Lushington for the plaintiffs.—The evidence shows that the agreement stated by the plaintiffs was made, and it certainly was not performed. A contract of this kind is a usual contract for the towage of ships inward-bound to the London wharves, and the case is therefore of importance to the plaintiffs and other owners of tugs in the river Thames. It was also a reasonable contract. There may be no precedent for suing in this Court upon a breach of a contract of towage containing any such particular terms; but the contract is entire and indivisible, and the Court, by 3 & 4 Vict. c. 65, s. 6, has jurisdiction to decide all claims and demands whatsoever in the nature of towage, and to enforce the payment thereof. The case may be considered as one of ordinary towage, where the plaintiff seeks to recover the stipulated reward for the service done. Here the damages are liquidated; but even if unliquidated that would be no objection, for in actions of collision the Court deals with unliquidated damages, and there are cases reported in which seamen have sued and recovered in this Court damages for personal ill-treatment by the master.

Horace Lloyd for the defendants.—The agreement pleaded is not proved. But, even if proved, it does not give the plaintiffs a right to recover, for the payment of any towage by the owner of the wharf is purely gratuitous; it is merely a voluntary premium to obtain custom, and any order upon him, signed by the master of the ship towed, has no legal force. The defendants submit that this is an unusual contract; that it is unusual to sue in this Court for unliquidated damages for a breach of contract;

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and that here the damages are nominal only. The arrest of the vessel for the sum of 5*l.* was an oppressive proceeding.

On the 25th of April, the Right Hon. DR. LUSHINGTON delivered judgment.

Judgment. Pleadings.

This is a cause of towage brought by the steam-tug Lass o' Gowrie against the Martha and her owners. It originates out of a transaction which took place on October 19th, 1860. On the part of the owners of the steam-tug it is alleged that the master of the Martha engaged the steam-tug to tow her from Sea Reach to Davis's Wharf, and agreed to pay 6*l.* in money, and to sign an order on the owner of the wharf for payment by him, according to custom, to the owners of the steam-tug of the amount due for towage from Gravesend to the said wharf. The petition further pleads that the master of the Martha paid the 6*l.* but refused to sign the order or pay the amount; that 5*l.* is the usual amount; and the prayer is to condemn the steamer in the sum of 5*l.* and costs. The answer denies that any agreement to sign the order in question was entered into, and alleges that the master of the Martha agreed to pay 6*l.* only, that being the full value of the stipulated services; and that the 6*l.* has been paid.

The sum paid by the owner of the wharf is purely voluntary.

Witnesses have been examined on both sides. It appears from the evidence, that when a vessel is towed by a steamer to Davis's Wharf, and perhaps some others, it is occasionally, and in some degree according to the nature of the cargo, customary for the owner of the wharf to make a payment, or rather a donation of a certain sum of money to the owner of the vessel so brought to the wharf. It is quite evident what is the cause of this practice. It is a donation to induce the owners of vessels to give a preference to the wharf; the donation, on the part of the owners of the wharf, is therefore a purely voluntary payment. On the present occasion, the sum was 5*l.*, and it was paid to the owners of the Martha.

There are two questions before the Court; 1st. A question as to the fact whether any such agreement as that pleaded was made; 2ndly. Whether it is competent to the Court to enforce such an agreement.

The agreement pleaded by the plaintiffs is proved.

With respect to the entering into the alleged agreement there is conflict of evidence. [The learned judge here examined the evidence in detail.] Looking at the whole of the evidence, I think that the preponderance of the testimony is in favour of

the plaintiffs, and that they have proved the agreement they rely upon. 1861. *April 25.*

The second question subdivides into two: 1st. Was it competent to the master to bind his owners to an arrangement to give up what was altogether uncertain in amount? This I greatly doubt; though it was certainly competent to him to agree for a reasonable amount for towage, I think that the master exceeded his authority in making this particular arrangement. 2ndly. I have great doubt as to the power of the Court to deal with this agreement. No doubt the Court can enforce an agreement for reasonable towage, but the agreement in question is to sign an order for an uncertain sum. It is clearly out of the power of the Court to compel the execution of such an agreement; nor can I give damages for the breach of it. The sum actually given by the wharf turns out to be 5*l.*, but that is a subsequent fact which does not affect this consideration.

The master of the Martha had no authority to agree to transfer an uncertain sum payable to his owners.

And the Court has no power to enforce such an agreement, or to give damages for the breach of it.

I am of opinion that the Court cannot pronounce for the plaintiffs in this case, and I the less regret it, because it appears to me upon the evidence, that the 6*l.* already paid, is by no means an inadequate payment for the service rendered.

I dismiss this case with costs.

Action dismissed with costs.

Nicholl, proctor for the plaintiffs.

Green and *Allin*, solicitors for the defendants.

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THE SARATOGA.

Salvage arising out of Contract to Tow—Rights and Obligations of the Parties.

If, in the performance of a contract to tow, an unforeseen and extraordinary peril arise to the vessel towed, the steam-tug is not at liberty to abandon the vessel, but is bound to render to her the necessary assistance, and thereupon becomes intitled to salvage reward.

A steam-tug under contract to tow into dock was lashed alongside a vessel; in rounding to enter the dock basin the tide forced the vessel and the steam-tug close to a landing-stage, the steam-tug next to the stage: the pilot of the vessel hailed the tug to hold on and go ahead, which the tug did, but was forced against the stage and injured:—*Held*, that the steam-tug was bound to endeavour to save the vessel from the impending peril, especially upon the order of the pilot, and so doing was intitled to salvage reward, including repayment of all damages and losses thereby incurred (*a*).

SALVAGE. This was an action of salvage brought by the owners of the steam-tug Reliance, for services rendered on the 13th of January, 1861, to the American ship Saratoga, in the river Mersey.

The Saratoga, a ship of 1237 tons, being in a dismasted and otherwise crippled condition, was towed by a steam-tug called the Universe, from Crookhaven Harbour in Ireland, to the port of Liverpool. At some distance from the entrance of the river Mersey, two other tugs, called the Chieftain and Reliance, were engaged to assist. The agreement with the Reliance, was for the sum of 15*l.*, as the plaintiffs alleged, to tow into the river; but according to the defendants, to tow into the river, and into any dock as required. The ship was towed into the Mersey, and alongside the Sandon Pier, the master at that time intending to dock in the Sandon Dock. The Chieftain was then dismissed, but the Universe and Reliance continued fast, the Reliance being lashed to the ship's port side, and the Universe having a tow-rope out forward. After waiting half an hour at the Sandon Pier, the master received orders from the consignee of the ship to take the ship to the Prince's Dock up the river, and thereupon orders were given, through the pilot in charge, to the Universe and Reliance to recommence towing. When the Saratoga was brought opposite the St. George's basin, and the steamers gave her a sheer to enter the basin, the tide, which was then ebbing, caught the ship on the starboard side, and drove her in towards

(*a*) On the subject of this case, see the *Minnehaha*, post, and the *Annapolis*, post.

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the corner of the great landing stage, thereby placing the ship and the Reliance, which was between her and the stage, in considerable danger. The master of the Saratoga called out to the Reliance to let go, but the pilot of the Saratoga hailed him to hold on and go ahead full speed. The master of the Reliance held on and went ahead full speed, with her helm hard aport, in order if possible to clear the stage, but in result the Reliance was forced against the stage, and crushed between it and the ship, thereby receiving some damage. The ship was then towed back into the river by the Universe. The plaintiffs claimed to be paid all losses consequent on the damage, including demurrage, and also salvage reward.

The defendants paid into Court 15*l.*, the sum stipulated in the original agreement, and (among other matters) pleaded—

Art. 12. "The whole of the aforesaid services rendered to the Saratoga by the Reliance were services under the original contract pleaded, and were simple towage services, and not services in the nature of salvage."

Art. 13. "The risk of the Reliance being forced by the Saratoga against the landing stage was voluntarily undertaken by those on board the Reliance, and the owners of the Saratoga are not liable for any damage to the Reliance consequent thereupon."

The value of ship, cargo and freight, was agreed at the sum of 52,092*l.* The value of the Reliance (according to the plaintiffs) was 10,300*l.*

The case was heard chiefly on vivâ voce evidence; and the Court was attended by two Elder Brethren of the Trinity House.

Brett, Q.C. and *Aspinall* for the plaintiffs.—We claim salvage from the time of leaving the Sandon Pier. The original contract was then ended; a new service then began,—a towage of a disabled ship: and in the performance of that service the tug encountered great danger, and suffered loss; she also rescued the ship from serious danger. But assuming that the service of towing from the Sandon Pier to the Wellington Dock was a towage service only, it was converted into salvage by the sudden peril intervening. A towage agreement is for towage only, and if the vessel towed is exposed to unforeseen peril, the services rendered by the steamer take the nature of salvage. It is not true that the peril incurred by the Reliance was accepted voluntarily, for the master received order from the pilot of the Saratoga to hold on, and this order he was bound to obey. But it is

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always the custom of this Court to give to salvors, who are volunteers, reward for the peril they incur, and to reimburse them in all losses they have, without negligence on their part, sustained in the performance of the service. Here, the salvors acted with great courage and skill.

Deane, Q. C. and *Lushington* for the defendants.—The original agreement extended to taking the ship into the Wellington Dock. But if it did not, the towage from the Sandon Pier was towage only, for a quantum meruit reward; the ship, though disabled, was not in danger or distress; she was secured to the pier, and in tow of another steamer which had towed her safely from Ireland; and any further steam aid, if needed, might have been immediately obtained. The danger which occurred in docking, was not such a danger as to convert the towage service into salvage. Every ship in docking runs some danger, and but for the assisting tug would be in immediate danger; the very duty of the tug, and the service she is employed to render, is to prevent the danger from issuing in damage. Then the injury to the Reliance was a pure accident, for which she cannot recover against the ship. If the ship whilst being towed, had accidentally come in collision with another vessel and thereby injured the tug, or if she had accidentally taken the ground and fallen over on the tug, no claim of salvage would thereby arise. The tug by the contract to tow, takes upon herself all ordinary, all accidental risks. Further, the immediate risk of being crushed against the pier was voluntarily accepted by the tug; the master might have cast off, if he would, but he chose to hold on; and therefore, according to the rule laid down in *Priestley* v. *Fowler* (*a*), which has been followed by many decisions to the same effect, there is no right to recover. The order of the pilot is generally binding upon the tug, but no man is required to put himself and his property in jeopardy at the order of another. On all these points, we rely upon the law recently pronounced by the Privy Council in the case of the *Julia* (*b*). Lord Kingsdown there said, "When the contract was made, the law would imply an engagement that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board of each; and that neither vessel, by neglect or misconduct, would create any unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken. If in the course of the performance of this contract, any inevitable accident happened to one, without any default on the part of the other, no cause of action would arise. Such an accident would be one of the necessary risks of the engagement, to which each

(*a*) 3 M. & W. 1. (*b*) Ante, p. 231.

party was subject, and could create no liability on the part of the other."

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Dr. Lushington:—Do you wish that I should put any question to the Trinity Masters?

The counsel on either side answering in the negative, the learned judge pronounced judgment.

Judgment.

The only nautical question which I should have submitted to the Trinity Masters is, whether, if the Reliance had cast off, the Universe alone, could, in the circumstances, have rescued the Saratoga from the peril in which she was placed of striking the landing-stage. As counsel do not desire me to submit this or any question to the Trinity Masters, and the evidence is quite conclusive to my mind, that the Universe, in the position she was, could not have prevented an accident to the ship, I shall not trouble the gentlemen who have come here to assist the Court with their nautical knowledge.

The question has been raised, whether the terms of the original agreement extended to towing the ship into dock. If it were necessary for me to decide that point, I should incline to consider that the defendants are pressing too hard the vague words used at the making of the agreement. But I will assume in their favour that the agreement with the Reliance was to dock the ship. Assuming this, such an agreement was only to tow the ship into dock under ordinary circumstances; it was not an agreement to render salvage services upon an unforeseen peril intervening, *without* salvage reward. The law I have laid down in more than one instance upon this point is, that if, in the performance of a contract of towage, an unforeseen and extraordinary peril arise to the vessel towed, the steamer is not at liberty to abandon the vessel, but is bound to render to her the necessary assistance; and thereupon is intitled to salvage reward. I am of opinion that these rights and obligations incident to a contract of towage are implied by law, and that the law thereby secures equity to both parties and the true interests of the owners of ships. A similar law holds with respect to a pilot. On certain emergencies occurring, which require extraordinary service, he is bound to stay by the ship, but becomes intitled to salvage remuneration, and not a mere pilotage fee.

If in performance of a contract of towage, an unforeseen and extraordinary peril arise to the vessel towed, the steamer is not at liberty to abandon the vessel, but is bound to render to her the necessary assistance, and thereupon is intitled to salvage reward.

In the present case there can be no doubt that by the default of the pilot, and I think also the master of the Saratoga—for

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he must have perceived the danger of attempting to dock in that condition of the tide—the ship was placed in imminent peril of receiving serious damage, which the parties to the contract of towage had never contemplated, and that from this peril the ship was rescued by the Reliance, which was then fast to her and towing. This was a salvage service, and in performance of it the Reliance received damage, by being forced against the stage by the ship. Acting upon the principle I have stated, I am of opinion that the Reliance was bound to endeavour to rescue the ship she was towing from the impending danger, especially upon receiving the order of the pilot of the ship so to do. On all grounds this is a clear case of salvage. The value of the Saratoga, freight and cargo, is 52,000*l.* Estimating the damage to the Reliance at 150*l.*, and the loss of employment while under repair at 250*l.*, I shall give 600*l.* and costs.

Pritchard, proctor for the plaintiffs.

Rothery for the defendants.

THE VREDE.

Salvage—Claim by Passengers to Salvage Reward.

Passengers rendering services to ship, where there is a common danger, are not intitled to salvage reward.

The *Branston* (*a*) followed.

Passengers voluntarily remaining on board a vessel injured by a collision, and working at the pumps, held under the circumstances not intitled to salvage.

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SALVAGE. The plaintiffs were twenty emigrants, passengers on board the Dutch barque Vrede, suing for alleged salvage services to that vessel and her cargo, after she had received damage from a collision.

The collision took place about 5 o'clock, A.M., of the 27th November, 1859, off the South Foreland, and the Vrede sustained great damage, and began to make water rapidly. The plaintiffs manned the pumps and kept working them. At 7 o'clock a steam-tug took the vessel in tow; the passengers continued to work the pumps; and about noon the vessel was safely brought into Ramsgate Harbour. The petition alleged that the plaintiffs might have left the Vrede in the boats or in the steam-tug, but

(*a*) 2 Hag. 3 n.

remained on board to work the pumps, at the request of the master, and that but for their services the Vrede must have foundered and been lost with her cargo. The answer admitted the facts generally, except as to the extent of the Vrede's danger.

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Twiss, Q.C., and *Clarkson*, for the plaintiffs.—The plaintiffs come within the definition of salvors, "volunteers assisting a ship in distress"(*a*). They were bound by no contract to render any services to the ship; and by their voluntary services they saved the ship from total loss. Their relation to the ship as passengers is no bar to their claim for salvage. In the *Two Friends* (*b*), salvage was allowed to seamen for recapturing from the possession of the enemy the ship in which they had been working their passage home. So in the *Salacia* (*c*), salvage seems to have been allowed to seamen-passengers for services to the vessel on its being wrecked. It is true that in the *Branston* (*d*), Lord Stowell rejected the claim of a lieutenant in the Royal Navy, a passenger, for salvage, saying, "Where there is a common danger, it is the duty of every one on board the vessel to give all the assistance he can; and more particularly this is the duty of one whose ordinary pursuits enable him to render more effectual service. No case has been cited where such a claim by a passenger has been established; though a passenger is not bound, like a mariner, to remain on board, but may take the first opportunity of escaping from the ship, and of saving his own life. I reject the claim." But the present case can, if necessary, be distinguished from that, for here the services of the passengers continued after the *common* danger had ceased; they might have made their own escape on board the tug or pilot boat, but they remained and saved the ship. In such circumstances a favourable opinion to the present claim can be inferred from this judgment. But we also contend that the *Branston* is not an authority to be followed; for it is held that, under extraordinary circumstances, pilots may sue as salvors, *Joseph Harvey* (*e*), and even mariners, *Florence* (*f*); and likewise the crew of a steam-tug under a contract to tow. Almost this very case was determined by the Court of Common Pleas, in *Newman* v. *Walters* (*g*). There the ship had stranded and been abandoned by the master, and some of the crew; the plaintiff, a master-mariner, who was taking a passage, was requested by the mate to take the command; he did so, and got the vessel off; a special jury gave

(*a*) Abbott on Shipping, 10th Ed. p. 490.
(*b*) 1 C. R. 278.
(*c*) 2 Hag. 269.
(*d*) 2 Hag. 3 n.
(*e*) 1 C. R. 306.
(*f*) 16 Jur. 572.
(*g*) 3 B. & P. 612.

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him 400*l.*, and the Court upheld the verdict. Lord Alvanley says (*a*), "Without entering into the distinctions respecting the duties incumbent on a passenger in particular cases, I think, that if he goes beyond those duties he is intitled to a reward in the same manner as any other person. In this case the plaintiff did not act as a passenger when he took upon himself the direction of the ship; he did more than was required of him in that situation, and having saved the ship by his exertions is intitled to retain his verdict in this action;" and Mr. Justice Heath and Mr. Justice Rooke both lay stress on the plaintiff having waived his opportunity to go on shore and make his own escape, and having thus voluntarily rendered services to the vessel. So here the plaintiffs went beyond their duty: having the means of escape they declined to avail themselves of it, but remained to assist. Public policy and equity are in favour of their claim, in these circumstances, to salvage.

Deane, Q.C., and *Spinks*, contra.—The plaintiffs being passengers on board the ship to which they rendered services, and the contract being undissolved, cannot sue as salvors. In all the cases in which salvage has been allowed to supervene upon a contract, the contract has been either absolutely, or by construction of law, terminated. In *Newman* v. *Walters*, and in the *Florence*, the ship had been actually abandoned; the *Two Friends* was a case of military salvage, the ship had been captured, and was in the possession of the enemy. In the *Salacia* there never was any contract at all between the parties; the salvors were on board the ship simply by accident. But here the contract was subsisting, and the judgment of Lord Stowell, in the *Branston*, ought to be decisive. The effect of that case is, that passengers have a duty to the ship in circumstances of common danger, for the performance of which they cannot claim salvage: a most reasonable conclusion of law. Possibly the passengers in this case might have escaped with their lives, but they had property on board, which thereby they would have lost; there was therefore a continuing common danger, if there was any danger at all. This claim is novel and contrary to public policy.

Judgment. The claim of passengers for salvage unusual.

Right Hon. Dr. Lushington:—This case is one of considerable importance. The plaintiffs were passengers on board this ship, the Vrede, and are claiming salvage for services rendered to the ship when in distress. Services rendered by passengers must have occurred over and over again, yet, except the cases

(*a*) Page 616.

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of the *Branston* (*a*) and the *Salacia* (*b*), there is apparently no precedent in which a claim of salvage by a passenger has been prosecuted in this Court. This is enough to put the Court on its guard against readily admitting any such claim; and I must hesitate before giving salvage reward to services, which are of ordinary occurrence, and have not hitherto been regarded as founding a title to extraordinary reward.

Passengers can only sue as salvors in extraordinary circumstances.

It is true, as the counsel for the plaintiffs have urged to-day, that a pilot, or master, or ship's crew, may sue as salvors in certain circumstances; and so I say that in certain circumstances passengers also may sue as salvors. But it is equally clear that it is only extraordinary circumstances in the strict sense which can justify a claim for salvage from persons so related to the ship as the first class of persons I have named. A master cannot be a salvor so long as he is performing his duties as master under his contract; nor can a mariner until his contract is at an end; nor can a steam-tug under a contract to tow make a title to salvage, unless, unforeseen danger arising, she performs different services from those stipulated for in the original contract. With respect to a passenger, there is no engagement on his part to perform any service, but there is a contract betweeen him and the shipowner that for a certain money payment the ship shall convey him and his property to the place of destination. To a certain extent therefore he is bound up with the ship.

Newman v. *Walters* considered.

The case of *Newman* v. *Walters* (*c*) is much relied upon by the plaintiffs as showing that passengers may sue as salvors. In that case the master and part of the crew had abandoned the ship, the pilot was drunk, and the ship was on the rocks; the plaintiff, who was a master mariner taking his passage, was requested to take command of the ship; he took command, and brought the ship off the ground and safely into harbour, for which he was held intitled to salvage reward. Lord Alvanley seems to have at first doubted whether as a passenger the plaintiff could be intitled to salvage, and there may have been reasons which, if the case had come before the Court of Admiralty, would have furnished room for doubt; but be this as it may, that case is not an authority to govern this case. The circumstances are not the same or nearly the same. The case of the *Salacia* I pass by without remark, because the claim of the so-called passengers in that case was incidental only to the claim of the main salvors, and hardly seems to have been contested. Far more important is the case of the *Branston*, and I may

The *Branston* governs this case.

(*a*) 2 Hagg. 3 n. (*b*) 2 Hagg. 269. (*c*) 3 B. & P. 612.

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be permitted to observe that in a question of Admiralty law, especially in a question of salvage, if conflicting authorities are found, the Court of Admiralty differing from a court of common law, I must in ordinary cases follow the decision of the Admiralty Court, and least of all should I be disposed to depart from any judgment of Lord Stowell on a matter of principle. Now in the *Branston*, a lieutenant in the Royal Navy, being a passenger, contributed his assistance and claimed to be remunerated; but Lord Stowell said,—"Where there is a common danger, it is the duty of every one on board the vessel to give all the assistance he can; and more particularly this is the duty of one whose ordinary pursuits enable him to render most effectual service. No case has been cited where such a claim by a passenger has been established." To this principle I adhere; and it is to be remarked that we have here also a statement that up to the year 1826 there was no instance of any claim by a passenger for salvage in this Court. Lord Stowell then adds,—"A passenger is not bound, like a mariner, to remain on board, but may take the first opportunity of escaping from the ship and of saving his own life. I reject the claim." Mr. Clarkson has ingeniously argued that the meaning of this passage is not only that the passenger may leave the ship, if he will, but that if he remains and performs services, he will be intitled to salvage. But I do not think any such meaning was intended.

The *Florence* considered.

In the case of the *Florence* (*a*), which has been cited, I gave salvage to a mate and seamen, who, having fallen in by chance with their vessel several days after it had been abandoned in the open sea, returned to her, and brought her into port. That case again is no authority to-day; because it is not necessary for me to say, nor do I say that in circumstances such as those passengers could not claim as salvors. Here the passengers were never separated from the ship, and their only service consisted in pumping. They pumped first, as they themselves admit, to save their own lives and property. For such efforts in a time of common danger, they were not intitled to salvage, by the authority of the *Branston*. Then the steamer comes up, and takes the vessel in tow. I am of opinion that all danger then ceased, whatever the danger might have been. The tug and the pilot-cutter were present, the water was smooth and the weather fine, and a harbour at no great distance. The passengers might, if they chose, have left the ship, but they remained on board, and continued working at the pumps. I cannot consider the ship to

Whilst the danger lasted, it was a danger common to ship and passengers, and they were bound, without reward, to give their assistance; and the subsequent services were not sufficient to found a claim for salvage.

(*a*) 16 Jur. 572.

have been in any danger of sinking; and I think I should be furnishing an evil precedent if I encouraged suits of this description. I pronounce against the claim of the plaintiffs, but without costs.

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Claim dismissed, without costs.

Clarkson, proctor for the plaintiffs.

Rothery for the defendants.

THE AURORA.
THE ROBERT INGHAM.

Collision — Action and Cross-Action — Admiralty Lights — Maritime Rule, and 17 *&* 18 *Vict. c.* 104, *ss.* 295, 298— *Estoppel by Pleading.*

A British vessel losing her Admiralty lights by tempestuous weather, is bound to obtain new lights on the first opportunity.

A. and B. British vessels: A. alleged in petition that the collision was *solely* occasioned by vessel B. not exhibiting the regulation lights; the Court found that the collision was partly so occasioned, and partly by vessel A. not keeping a due look-out; and that the rule of port helm imposed by 17 & 18 Vict. c. 104, s. 296, did not apply. The cross-action being determined at the same time, *Held*, that B. was barred by 17 & 18 Vict. c. 104, s. 298, from recovering anything, but that A. was intitled to recover half damages by the maritime rule.

COLLISION. On the 10th of June, 1860, a collision took place off Dungeness at night, between the Aurora and Robert Ingham, both British vessels. The Aurora was close-hauled on the starboard tack; the Robert Ingham on the port tack. The owners of the Robert Ingham alleged in their petition that the collision was solely occasioned by the Aurora not carrying her regulation lights. The owners of the Aurora, in their answer, admitted that their vessel was not carrying the regulation lights, but alleged that they had been destroyed by heavy weather on the voyage from Sunderland. They further alleged that the collision was not occasioned by want of the lights, but by the insufficient look-out of the Robert Ingham, and her not keeping away in time. It appeared in evidence that the Aurora had previously put into the Downs, windbound, and

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The 296th and 298th sections of the Merchant Shipping Act, 1854, are printed *ante*, p. 271. The Admiralty regulation as to lights in the Appendix to Swabey's Reports, p. vii.

Deane, Q.C. and *Clarkson* for the Robert Ingham.

Twiss, Q.C. and *Lushington* for the Aurora.

Judgment.

DR. LUSHINGTON, in the course of his summing up to the Trinity Masters, said:—The Aurora did not carry the lights required by the Admiralty regulation. The owners endeavour to excuse themselves for this omission by alleging that the lights had been carried away by tempestuous weather. But the evidence shows that after their lights were so carried away, the vessel was at anchor for more than a week in the Downs, and had communication with the shore. There was, therefore, ample opportunity to have obtained fresh lights, and I have no hesitation in saying that the master was bound to have obtained them. As regards the Aurora, therefore, I have to ask you, whether the want of lights did not prevent the Robert Ingham from descrying her at an earlier period, and so contribute to occasion the collision?

The Aurora was bound to have replaced the lights in the Downs.

As to the Robert Ingham, you will consider whether, under the circumstances, a due look-out was being kept, and if the want of such a look-out contributed to occasion this collision. Being on the port tack, and approaching the Aurora on the starboard tack, her duty was to avoid the Aurora in time; but the Act of Parliament does not apply to the case, as the vessels were crossing, not "meeting," in the sense of the word there used.

After consultation, DR. LUSHINGTON said:—We are all of opinion that both vessels were to blame; the collision being occasioned partly by the Aurora not exhibiting the regulation lights, and partly by the want of a proper look-out on board the Robert Ingham.

Twiss, Q.C.—The Aurora is barred from recovering anything by the statute. The owners of the Robert Ingham are not barred on that ground, but they are barred, we submit, by the rule established by the *Ann* (*a*). They have expressly alleged that

(*a*) Ante, p. 55.

the collision was *solely* occasioned by the Aurora not carrying the regulation lights, and that is negatived by the finding of the Court. It would be an inequitable result that, when both vessels are to blame, one should be allowed to recover half damages, and the other nothing. 1861. *May* 30.

DR. LUSHINGTON:—I cannot visit with so severe a penalty the use of the word "solely."

The decree of the Court passed, that the owners of the Robert Ingham should recover half their damages. No costs were given.

Stokes, proctor for the Robert Ingham.

Rothery for the Aurora.

THE COMTESSE DE FRÈGEVILLE.

Necessaries—3 & 4 *Vict. c.* 65, *s.* 6.

"Necessaries," in 3 & 4 Vict. c. 65, s. 6, means articles immediately necessary for the ship, as contra-distinguished from those merely necessary for the voyage. The statute does not apply to ordinary mercantile accounts between ship-owner and agent.

NECESSARIES. This was a suit for necessaries, brought by Messrs. Julius Henry Thompson and Company, against the French steam-ship Comtesse de Frègeville. The petition stated that in 1860, the plaintiffs were agents for the owners of the ship, and were also brokers to the vessel, in which capacities they received the freights on cargo delivered in the port of London, and paid the dock dues, pilotage, clearance, and other charges connected with the vessel; that they had also paid 186*l.* 3*s.*, for coals supplied to the vessel by direction of the master, to enable her to leave the port of London. The plaintiffs prayed judgment for the payment of 81*l.* 15*s.* 10*d.*, the balance of their account against the ship. *June* 13.

Clarkson moved to reject the petition.—By far the greatest part of the money was advanced, not to procure necessaries, but to pay for necessaries already procured, and is therefore not

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within the statute, *N. R. Gosfabrick* (*a*). In *Beldon* v. *Campbell* (*b*), the Court of Exchequer held that, although a master might borrow money for necessary services to be rendered, he could not do so to pay for services already rendered. But besides this objection, the plaintiffs advanced the money not only upon the personal security of the owners, with whom they had a general contract, but on the security of the monies they received on the part of the ship; they cannot now claim the security of the ship itself. It is wholly without precedent for the broker of a foreign ship to claim a lien on the ship for the balance of his bill, which consists only of ordinary disbursements.

Lushington, contra.—This question is of importance, as affecting the rights of all brokers of foreign vessels. The terms of the statute (3 & 4 Vict. c. 65) show that the word "necessaries" should be liberally construed. The act is called "An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty." The 6th section says the Court "shall have jurisdiction to decide *all claims and demands whatsoever* for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the necessaries were furnished." The jurisdiction thus given is not stinted, it is in the most general terms, and trenches upon municipal law on the one hand, and international law on the other. It practically revives the ancient power of the Court, and gives, in the case of foreign vessels, the maritime lien which exists in continental countries. The plaintiffs' contract of agency with the owners is no bar to the present action. In all cases of wages, towage, and damage, there is a personal as well as a real remedy. An agent may even take a bottomry bond. The agency of the plaintiffs is in their favour, as a presumption that they have well managed the affairs of the ship, and that the owner preferred them to others as his creditors. So having had a fund appointed for payment, is no bar, if it has proved insufficient; an agent having received freight is, nevertheless, intitled to take a bottomry bond for advances beyond it, *Edmond* (*c*). Then what are "necessaries"? In the *Alexander* (*d*), the Court followed the language of Abbott, C. J., in *Webster* v. *Seekamp* (*e*), "Whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel, as a prudent man, would have ordered, if present at the time, comes within the meaning of the term 'necessary.'" And as to money,

(*a*) Swabey, 344. (*b*) 6 Exch. 866.
(*c*) Ante, p. 57. (*d*) 1 W. R. 360. (*e*) 4 B. & Ald. 354.

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the Court quoted the words of Lord Ellenborough, in *Rocher* v. *Busher* (*a*), "The money supplied must not be understood of an indefinite supply of cash, which the master may dissipate, but only such as is warranted by the exigency of the case, as for the payment of duties or other necessary purposes." Here the money was advanced to pay dock dues, and claims of the like nature, which any owner on the spot would have paid, or borrowed money to pay. All such items, moreover, would be allowed as "necessary disbursements" in bottomry, or in the investigation of a master's accounts in this Court; why then should another and a narrower meaning be attached to the statutory word "necessaries"? There are even particular reasons for limiting bottomry; viz., the extra premium, and the fact that the loan is generally made by a stranger, without communication with the owner. The item of payment for coals furnished, it must be admitted, is not allowable according to the judgment in the *N. R. Gosfabrick*; but it is submitted that case should be reconsidered. It hardly agrees with *Robinson* v. *Lyall* (*b*), where advance of money to a master to pay seamen's wages already earned was allowed, or with the recent judgment of this Court to the same effect in the *William F. Safford* (*c*). *Beldon* v. *Campbell*, referred to on the other side, was really decided on another ground, viz., that the master of the English ship, being in his own port, had borrowed without communication with his owner. Here the payment of the money for the coals was virtually made with the owner's consent; and it was to his advantage. It is far better for the owner of a ship to have one lien upon his ship in the hands of a man whom he has himself selected as the ship's agent, than to have several liens in the hands of several persons. The lien the plaintiffs contend for is no urgent or hard claim, and seems warranted by the statute.

Clarkson in reply.—*Robinson* v. *Lyall* must be taken as overruled by *Beldon* v. *Campbell*. The case of the *William F. Safford* may be distinguished on the ground that the Court always favours the payment of wages due to seamen; and, moreover, that the further services of the seamen were required. Money is only a necessary within the statute, when supplied to obtain necessaries, *i.e.* cables, anchors, and other articles capable of manual delivery, *Sophie* (*d*), and of absolute necessity to the ship.

Judgment.

Right Hon. Dr. Lushington:—I have to determine whether the demand made in this suit can be maintained within the statute of the 3 & 4 Vict. c. 65, s. 6, and this question wholly

(*a*) 1 Starkie, 28.
(*b*) 7 Price, 592.
(*c*) Ante, p. 69.
(*d*) 1 W. R. 368.

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turns upon the proper legal meaning to be affixed to the word "necessaries." I have no hope of finding the means of solving this difficulty from resort to any other part of this statute, or to any other statute; neither has the question ever been submitted directly to the Court of Appeal. In former times and up to a late period, up to the decision in the case of the *Neptune* (*a*), by the Judicial Committee, the Court of Admiralty was accustomed to allow material creditors to sue against the proceeds when in Court; material men were those who repaired a vessel, or furnished materials to enable her to proceed to sea; it was a technical term, the meaning of which was well understood. I do not think, as my former decisions show, that the term "necessaries" in this statute should receive so circumscribed a meaning. On the other hand, it has been urged that the term "necessaries" ought to receive the same liberal construction as in cases of bottomry. This construction would include every requisite for a voyage, for there are many articles allowed to be covered by a bottomry bond, which would be very difficult to comprise within any ordinary meaning attached to the word "necessaries." Unless enabled by superior authority, I cannot venture to adopt so comprehensive a meaning for this enactment. It appears to me that the most convenient course I can follow is to take an intermediate one, to make a distinction between the ship and the voyage: I shall hold that "necessaries" means primarily indispensable repairs,—anchors, cables, sails, when immediately necessary; and also provisions: but, on the other hand, does not include things required for the voyage, as contradistinguished from necessaries for the ship. Were I to hold otherwise, I might be led into allowing expensive outfits, and expenses of many kinds, far removed from any proper meaning of the term "necessaries"—indeed, some articles for speculative purposes, outfit for passengers, accommodation for troops or special cargoes. The principle upon which I apprehend the statute to have been founded, requires me to draw this line. It was not intended, I conceive, to do more than meet an emergency frequently occurring. Before the statute, foreign ships could not be subjected to actions in rem under any circumstances for necessaries supplied; it therefore happened that great inconvenience and sometimes danger to ships took place, by the want of anchors or cables, or of provisions. It was to remedy those evils that the statute passed, to remove on the one hand the pressure of immediate want, and on the other to give the British merchant or broker his remedy for such advances. But it would be dangerous to hold that the master could, in all cases,

Meaning of "necessaries" in the statute.

Does not include necessaries for voyage, as distinguished from necessaries to ship.

(*a*) 3 Knapp, P. C. 94.

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for the commencement of a voyage for instance, bind the property of his owner, even if all was done bonâ fide. There must be a necessity. True it is that by an extended construction of the statute the expense of a bottomry bond might sometimes be saved, but on the other hand it is most dangerous to enlarge the discretionary power of the master to bind the property of his owner. I have looked to see what has been the practice in other countries, especially in the United States, but the practice so differs, and there are so many distinctions, that I cannot derive much assistance from such considerations. I regret exceedingly that I cannot attempt a more clear and decided definition, or lay down any general rule beyond what may be understood from the observations I have made. I am unable to do so, and it may be from this difficulty that all the decisions of this Court may not be strictly uniform. I must form the best judgment I can, on each individual case.

The present suit is brought by Messrs. Thompson & Co., under the following circumstances. They state that they were the agents of the owner of the vessel arrested, and also the brokers, that as such agents they received the freights, and paid dock dues, and other charges in 1860; that, in addition, they paid 186*l.* for coals supplied to enable the vessel to leave London. An account is annexed, and this is a suit for the balance of that account. This is in fact an account between shipowner and agent: all the business was done by the plaintiffs as agents; the monies were so advanced, and so received; and the monies received were sufficient to pay all necessary expenses, unless the coals are to be so considered, the vessel arrested being a steam vessel. In one sense, no doubt, coals are necessaries for a steam vessel, and there are cases in which I should probably hold them so to be. But in my judgment, the arrest of the ship for the payment of the balance of an account of this description, was not contemplated by the statute: the statute looks to an immediate necessity, not to the liquidation of a mercantile account, where credit is given by the agent in the ordinary course of business. If I entertained this case, this Court might have to settle accounts between merchant and agent to an unlimited extent. I cannot so construe the statute. I reject this petition.

The statute does not aid the liquidation of an ordinary mercantile account between shipowner and agent.

Rothery for the plaintiffs.

Clarkson for the defendants.

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THE CAROLINE.

Salvage—Part Owner of the salving Vessel, part Owner of the Vessel salved.

Where a part-owner of the salving vessel has an interest in the vessel salved, his co-owners and the master and crew of the salving vessel may sue for salvage; the sum to which they are intitled being computed by deducting, from the value of the entire service, the share which would have been due to such part owner, if he could have joined as plaintiff.

SALVAGE. This was a cause of salvage brought by the master and crew of the steamtug Emperor, and by Henry Teasdel, owner of fourteen 64th shares of the said tug, and Frederick Brown, owner of sixteen 64th shares, against the barque Caroline. The remaining thirty-four shares of the Emperor were owned by Robert Steward, who also was part owner of the Caroline. The owners of the Caroline (amongst other matters) pleaded this fact, and also tendered a sum of 200*l.* for the services.

Deane, Q.C. and *Spinks* for the salvors.

The *Admiralty Advocate* and *Tristram* for the owners.

Right Hon. Dr. Lushington [after dealing with the circumstances of the salvage service]: To estimate whether this tender of 200*l.* is sufficient, I must estimate the value of the services of the plaintiffs, and to do this, I must deduct from the value of the whole service the share which would be due to Robert Steward, the remaining owner of the Emperor, who is not joining as co-plaintiff, because he is a part owner of the Caroline. I think that 300*l.* would have been the amount I should, if called upon, have decreed for the entire service; and considering the steamer to have been the efficient agent, I should have allowed out of this amount to the owners the sum of 200*l.*; the remaining 100*l.* to the master and crew. I believe, as a matter of fact, the master and crew do not receive one-third, but such might be my distribution. Then Steward is the owner of more than half of the Emperor, and therefore at least 100*l.* would have to be deducted, in order to arrive at the sum due to the plaintiffs. This will reduce their right to something under 200*l.* I must, therefore, pronounce for the tender.

Cole, proctor for the plaintiffs.

Shephard and *Skipwith* for the defendants.

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August 2.

In the Privy Council.

Present—Lord KINGSDOWN.
The Right Hon. Sir EDWARD RYAN.
The Right Hon. Sir JOHN COLERIDGE.

THE MINNEHAHA.

Salvage arising out of Contract to Tow—Legal effect of Contract to Tow—Misconduct or negligence of Tug occasioning Danger—Pleadings—Certificate as to Costs—17 & 18 *Vict. c.* 104, *s.* 460.

A contract to tow is not a warranty to tow to destination, but an engagement to use best endeavours and competent skill for that purpose, with a vessel properly equipped.

If performance of the stipulated service is rendered impossible by a *vis major*, the obligation is terminated.

If unforeseen danger unavoidable by the steam-tug supervenes to the ship in tow, as by breaking of the hawser, the steam-tug is bound to complete the service, if still possible; and the steam-tug, if thereby incurring risk and performing duties not within the scope of the original engagement, is intitled to salvage reward.

The conversion of towage into salvage depends on the circumstances of each case.

A tug under contract to tow, by misconduct or negligence, or want of reasonable equipments, occasioning or materially contributing to occasion danger to the ship in tow, is not intitled to salvage reward for rescuing the ship from such danger.

A steam-tug engaged in towing or performing salvage services is generally bound to follow the directions of the pilot in charge of the ship.

Under a simple traverse of salvage services, wilful misconduct of salvors cannot, but negligence may, be proved.

The Privy Council awarding a sum less than 200*l.* for salvage services within the United Kingdom, will give costs, if the case was a fit one to be tried in a Superior Court.

SALVAGE. This was an action brought in the High Court of Admiralty by Henry John Ward and others, the owners of the steam-tug Storm King, and the United Steam Tug Company (Limited), of Liverpool, the owners of the steam-tug United Kingdom, and the masters and crews, against the ship Minnehaha, freight and cargo, for services rendered on the 6th of March, 1861.

The Storm King was a Liverpool steam-tug, of 110 tons register, with two disconnecting engines of 290 actual horse power, and valued at 6,000*l.*; the United Kingdom, of 129 tons register, with engines of 400 horse power, and valued at 10,000*l.* The Minnehaha was a ship of 1,127 tons register, belonging to the port of Londonderry, in Ireland, and, at the time of the ser-

1861. *August 2.* vices rendered, was laden with cotton and other merchandize, and drew 19 feet of water. The value of ship, freight and cargo was about 45,000*l.* The action was entered in the sum of 6,000*l.*

The petition stated the facts in great detail, but for brevity's sake the statement from the case of the Appellants is here printed:—

"On the morning of the 6th March, 1861, the Minnehaha was entering the river Mersey by the Crosby Channel. The wind was blowing strong from S.W. to S.W. by. W. and increasing with a heavy sea. It was high water in the Mersey at 7.15 a.m. and 8 p.m. of that day. When a little to the eastward and inside of No. 4 C Black Buoy in the Crosby Channel, the sails of the Minnehaha were clewed up, and she was brought up by her port anchor on the eastern side of the Channel and about the southern end of Taylor's Bank. Taylor's bank is a large shoal on the north-eastern side of the Crosby Channel, and to the westward of it is the Formby Bank, there being a narrow channel of deep water, known by the name of Formby Hole, between the two banks.

"Upon the Minnehaha being brought to anchor, the United Kingdom, which was proceeding out of the river on her ordinary avocation as a steam-tug, went alongside the Minnehaha, and an agreement was made between the two masters for the United Kingdom to tow the Minnehaha into the river and dock her for thirty guineas. The Storm King also went alongside and offered her services, but they were not accepted. The Storm King, however, remained near the Minnehaha.

"About 9 a.m. a hawser of the Minnehaha was made fast to the United Kingdom, and she towed the Minnehaha twice up to her anchor, and it was hove up. The United Kingdom then tugged at the Minnehaha for about ten minutes, but owing to the violence of the wind and weather she made no way. The jib of the United Kingdom and some sails of the Minnehaha were then set, and the United Kingdom again towed for about five minutes, when, owing to the great strain arising from the state of the tide, the wind and the sea, the hawser parted. The Minnehaha's anchors were then let go, but she drifted on to Taylor's Bank, and knocked and thumped violently upon it.

"The United Kingdom returned at once to the Minnehaha, and endeavoured to throw a line on board, but failed, and the Storm King was then hailed by the master of the Minnehaha, and her services accepted by him. A new and unusually large hawser of the United Kingdom's was then got on board the

Minnehaha and made fast, and the Storm King, by direction of the pilot of the Minnehaha, made fast to the United Kingdom. The wind had now increased to a gale, and before strain could be got upon the hawsers, the Minnehaha slipped both her anchors and drifted across the shoal until she got into Formby Hole, and she then took the ground with her stern on the Formby Bank, and her head canted to the northward. 1861. *August* 2.

"The United Kingdom and Storm King then brought the head of the Minnehaha to the wind and towed her stern off the Formby Bank; but in consequence of the ebb-tide and the violence of the gale, they could not get her over the shoal, notwithstanding repeated efforts to do so. The Storm King then signalled the ship to delay further efforts to get her out of the Hole until the flood, to which the tugs understood the pilot to assent; and thereupon, and in the meantime, the two tugs, by heaving the lead, and, as occasion required, going ahead full speed or otherwise, or backing, succeeded with great labour and difficulty in keeping the head of the Minnehaha to the wind, and preventing her from getting fast upon Formby Bank.

"About 1.30 p.m. a steam-tug called the Enterprise came up and made fast to the Minnehaha, and about 2.30, the flood tide having sufficiently made, the three tugs towed the Minnehaha across the shoal and up to the entrance of the Mersey. The Storm King then proceeded with a message to the captain of the great landing-stage, and the United Kingdom and Enterprise towed the Minnehaha abreast thereof, and there held her among a number of vessels at anchor until the next day, the gale continuing the whole time.

"When the Storm King returned from the great landing-stage, she again proceeded there with the master of the Minnehaha, and from thence to the George's Basin, and then towed an anchor-boat with two anchors alongside the Minnehaha.

"On the 8th March, 1861, the United Kingdom and the Enterprise docked the Minnehaha in the Huskisson Dock.

"Both steam-tugs were much strained and injured in rendering the service, and the United Kingdom especially received very serious damage, to repair which her owners were put to an expense of about 220*l.* They were also deprived of her services while she was necessarily laid up for repair. The hawser of the United Kingdom, used for towing the Minnehaha, was a new 13-inch Manilla hawser, never before used, worth 48*l.*, and this was rendered useless. A 2-inch Manilla line of 100 fathoms was also lost in rendering the service."

The answer for the Minnehaha did not set out any account of

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the transaction. (1.) It admitted the agreement with the United Kingdom stated in the petition, and, alleging that the other averments in the petition were severally untrue, denied that the United Kingdom or the Storm King performed any salvage service whatever to the Minnehaha. (2.) It then pleaded that the master of the Storm King agreed with the master of the Minnehaha to assist the United Kingdom in towing the Minnehaha to Liverpool, and there docking her, for the sum of thirty guineas. (3.) It pleaded a tender of thirty guineas to the owners of each steam-tug.

The reply traversed the second and third articles of the answer.

The case was heard on *vivâ voce* evidence in the Admiralty Court, with Captain Pigott and Captain Webb, Elder Brethren of the Trinity House, on the 1st of May, 1861. The action on behalf of the Enterprise was determined at the same time, but was not afterwards appealed.

The witnesses for the plaintiffs consisted of the masters and crews of the steam-tugs, who deposed to all the facts in the petition, and denied any agreement made with the Storm King; Rodriguez and Hudson, the master and mate of an anchor-boat, who raised the anchors of the Minnehaha, and deposed to finding them inside the south-east end of Taylor's Bank, in 9 feet water at low tide; and the masters of the Formby and Crosby lightships, who deposed to seeing the Minnehaha in Formby Hole, and observing sundry manœuvres on the part of the tugs. The witnesses for the defendants were the master, mate, and one seaman of the Minnehaha, and the pilot. Their account of the transaction was, that the hawser was originally broken by the United Kingdom by gross negligence, if not wilfully and by concert with the master of the Storm King; that the United Kingdom, disregarding the order of the pilot to back astern to the bows of the ship, took a circuit round the stern, and so suffered the ship to drift to leeward towards the bank; that the two anchors were let go, not in Formby Hole, but on the leeside of the fairway; that the Storm King then came up, and an agreement was made for thirty guineas; that the anchors were then slipped, as it was a matter of importance to get to Liverpool in order to dock before the tides fell; that the two steam-tugs having taken the ship in tow, negligently or wilfully, and against the order of the pilot, suffered the ship to go astern till she touched Formby Bank, not Taylor's Bank, nor in Formby Hole; that the ship then struck several times amidships and aft, not forward, nor unshipping the rudder or suffering any damage beyond the loss of

13 or 14 feet of the false keel; that the tugs alternately drew the ship forward or suffered her to go astern for a considerable time, wholly disobeying the pilot, till the Enterprise came up at nearly dead low water, and the ship crossed the shallow in tow of the three tugs with less water under her than she had when suffered to drift across it in the earlier part of the day. They also deposed that the condition of wind and sea were exaggerated by the plaintiffs. 1861. *August* 2.

On the cross-examination of the plaintiffs' witnesses, Mr. Brett, counsel for the plaintiffs, objected that no cross-examination should be allowed to show wilful misconduct or even negligence on the part of the salvors, as it had not been pleaded. The learned Judge ruled that the defendant was not intitled under the pleadings to set up a charge of wilful misconduct, but, having denied the performance of any salvage services, might show that the danger which the ship incurred was occasioned by the negligence of the salvors, and ineffectual performance of the contract of towage. In result, the defendants' witnesses gave their entire version of the transaction as above.

Brett, Q.C. (*Pritchard* with him), for the plaintiffs.—The agreement of the United Kingdom to tow was determined by the hawser accidentally breaking, and the immediate exposure of the vessel to imminent danger. The Storm King entered into no agreement whatever, and her services were salvage throughout. The evidence proves that the ship was in the most critical position, and in danger of total loss: the tugs saved her from that danger, incurring also themselves considerable hazard.

The *Admiralty Advocate* (*Spinks* and *Aspinall* with him), for the defendant.—The danger of the ship was exaggerated by the plaintiffs, and was wholly occasioned by their negligence or misconduct; therefore, no salvage was due, *Neptune* (*a*); *Duke of Manchester* (*b*). There was also an agreement with both the United Kingdom and the Storm King, by which the parties were bound, *Galatea* (*c*); *Julia* (*d*). Towage can only become salvage under extraordinary circumstances, and when performance of the original service is become impossible, which was not the case here.

The summing of the learned Judge (omitting the detailed comments on the evidence), was as follows. The questions submitted to the Trinity Masters are stated below :—

(*a*) 1 W. R. 299. (*b*) 2 W. R. 470; 6 Moore, P. C. 98.
(*c*) Sw. 349. (*d*) *Ante*, p. 231.

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"There are two actions upon the present occasion; the one brought by the United Kingdom and Storm King, and the other by the Enterprise.

"The petition of the United Kingdom and Storm King details their services. The defence alleges that there was no salvage service, that there was an agreement to tow to Liverpool and dock for thirty guineas for each of these vessels, and then that there was a tender of that sum to each of the parties suing. The effect of this defence is, that it is open to the defendant to show that the service was a mere towage service, and covered by the agreement. It is not open to the defendant to charge intentional misconduct, for such a charge has not been pleaded. The Court does not require every minute circumstance requisite to support such a charge to be pleaded, but it does require the substance of the defence to be set forth, to enable the other party to answer, if answer and defend they can. In Courts of Common Law there may be a new trial in cases of surprise: there can be no new trial in this Court, and an appeal takes up only the old proceedings and evidence. New pleadings and evidence are seldom allowed in the Court of Appeal, and such a proceeding would be inconvenient.

"In the present case there will be two questions for the Court. The first point for the Court is, whether there was any agreement or not with the Storm King or Enterprise; that with the United Kingdom is admitted. The second question is also for the Court, namely, whether the agreement has become void, but the solution of this second question will mainly depend upon the answer you, gentlemen, give me when I come to the third, which is, whether there was any error, or want of skill, or carelessness on the part of the parties suing? I think this question is open, though I am by no means satisfied with the mode of pleading in the defence.

"A good deal has been said about this agreement with the United Kingdom, but I apprehend that it must be assumed, as the master of the Minnehaha says, that at the time he entered into the agreement he saw no reason why the service could not be performed as an ordinary towage service. Nor can I go the length of the argument of the shipowner that the tug warranted her own competency to perform the task whatever might be the matter. All that the tug undertook for was to use her best endeavours to perform the service.

"Eventually the Court will be under the necessity of making up its mind upon these questions—first, whether the United Kingdom was to blame? secondly, whether the Storm King was to blame?

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"I apprehend that if there was no fault at all, and a superior service to towing has supervened upon the occasion, without any blame attaching to the vessels claiming salvage, the agreements would be vacated, because, as I stated before, the agreement was simply to perform an ordinary towage service. If, in consequence of unforeseen circumstances, it so happens that what was intended to be an ordinary towage service, turns into a salvage service in fact, then the parties that perform that service are perfectly intitled to salvage reward; but, on the other hand, if there was want of due skill, promptitude, or energy on the part of these vessels, I am of opinion that a salvage reward is beyond all question forfeited."

After consultation, DR. LUSHINGTON:—I will now read the questions on which I desired to have the benefit of the Trinity Masters' advice, and the answers to them.

The first question was this, Was the hawser broken by the erroneous conduct of the alleged salvors?—Yes. The next question is, Was the ship in danger at this time, and, if so, from the default of the United Kingdom?—She was not in danger. The third question is this, Was the Storm King justified in disobeying the order of his employers, and attaching himself to the United Kingdom instead of making fast alongside?—The Storm King was not justified in what she did. The fourth question is this, Were the measures taken by the tugs skilful and proper, justified by reference to the place, the wind, and the tide; or might the United Kingdom and Storm King have rescued the ship from her dangerous position sooner, without risking their own safety?—The Trinity Masters are of opinion that the United Kingdom and Storm King might have rescued the ship from her position at an earlier period, without risking their own safety. The fifth question is this, Was the ship in danger when the Enterprise took hold of her?—If the ship had been properly managed by the tugs, there was no danger, but as circumstances were, danger might be apprehended.

The result of that advice of the Trinity Masters is, that two of the tugs were very much to blame in performing the service they undertook to discharge; and the consequence is, they have forfeited all claim for salvage. In the case of the United Kingdom and the Storm King, I pronounce against their claim with costs. To the Enterprise I give 200*l.* and costs.

From this decision the owners of the United Kingdom and Storm King appealed. The appeal was argued on July 12, 15, and 16.

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Brett, Q. C., and *Pritchard* for the appellants.—The judgment in the Court below against the salvors is founded on certain supposed negligence or unskilful management on their part, whereby they have forfeited their claim to salvage reward. But the appellants contend in the first place, that the question of negligence was not open upon the pleadings. The answer pleaded for the owner of the Minnehaha was a simple traverse of the statements in the petition, and a denial of salvage service having been performed: under this plea it is submitted that the defendant had no right to prove negligence. That is a matter of confession and avoidance which should have been pleaded specially. In the Admiralty Court it is usual to plead material facts fully, in order to give due notice to the Court and the opposite party, and omission to do this acts as an estoppel. Thus in the *Exeter* (*a*), where a mate was suing for wages, and the plea alleged that he had been guilty of drunkenness and neglect of duty, Lord Stowell refused to consider the question of the mate's general incapacity, though evidence had been produced upon it, on the ground that no such charge had been specially pleaded, saying, "I must leave it entirely out of my consideration" (*b*). So in the *Aurora* (*c*), in an appeal from an award of salvage, Dr. Lushington refused to allow the appellants to plead in their reply facts which should have been pleaded in their act on petition, "in which they were bound to set forth all the circumstances intended to be brought before the Court." The same rule was referred to in the *Anne and Jane* (*d*), and in the *Hebe* (*e*), where the question was as to the admissibility of a rejoinder. And in the *Two Sisters* (*f*), where in answer to a suit for seamen's wages the owners endeavoured to set up a forfeiture by desertion, Dr. Lushington, ruling that the circumstances proved did not amount to an absolute desertion, so as to enure to forfeiture of wages, but only to a temporary desertion, for which the Court might have mulcted a portion of the wages, allowed the plaintiffs to recover in full, because "no reference had been made in the pleadings to any charge of temporary desertion." So in the *Speed* (*g*), a cause of collision, the plaintiff's evidence as to his vessel having starboarded was excluded by the learned Judge from the Trinity Masters, the fact not having been pleaded. In the *Ebenezer* (*h*), also a cause of collision, Dr. Lushington says, "The answer of the party defendant in the suit ought to contain all the grounds of his defence, and not only so, but also any blame which he deems imputable to the party

(*a*) 2 C. R. 261. (*b*) Page 263. (*c*) 1 W. R. 322. (*d*) 2 W. R. 104.
(*e*) 2 W. R. 146. (*f*) 2 W. R. 125, 146. (*g*) 2 W. R. 227. (*h*) 2 W. R. 209.

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proceeding in the case. This is of the utmost importance, and ought to be distinctly understood; and I hold it indispensable in this case, and all others, that we should consider the charge on the one side and on the other upon what is originally stated in the pleadings of the cause, and if affidavits are produced in this or other causes at variance with these statements, or extraneous to them, such affidavits are to be rejected." In the *North American* (*a*), this Court rigorously enforced proceeding secundum allegata et probata; and afterwards in the *Ann* (*b*); on the ground that otherwise a party might be taken by surprise. Upon all these authorities we submit that the defendant in the Court below was not intitled to show negligence on the part of the salvors.

Secondly.—The appellants contend that the negligence imputed to them is not sufficient to work a forfeiture of salvage reward. Salvage may be forfeited by wilful and gross misconduct, for instance embezzlement, as in the *Blaireau* (*c*); *Dove and Cargo* (*d*); or wilfully running of the ship on shore, *Bello Corranes* (*e*); *Duke of Manchester* (*f*); but misconduct of any lesser kind operates only to diminish salvage, *Glascow Packet* (*g*), where the salvors having rendered good services were found to blame for not retiring from the ship at the direction of the owners, and the *Dantzic Packet* (*h*), a similar case; *Dosseitei* (*i*), where the salvors brought the ship unnecessarily, but only carelessly, in danger before they completed their services. In the *Cape Packet* (*k*), the salvors, having successfully conducted a derelict vessel for three days, improperly navigated the vessel, whereby she struck on a rock and suffered great damages, but the Court awarded them 600*l*. The Judge, in summing up to the Trinity Masters, said (*l*), "When persons undertake to perform a salvage service, they are bound to exercise ordinary skill and ordinary prudence in the execution of the duty which they take upon themselves to perform. I do not mean to say that they must be finished navigators, but they must possess and exercise such a degree of prudence and skill as persons in their condition ordinarily do possess, and may fairly be expected to display. I need scarcely point out to you, that where the neglect or the misconduct is wilful, it entails an entire forfeiture of the whole claim to salvage remuneration. This is not attributed to

(*a*) Sw. 358.
(*b*) *Ante*, p. 55.
(*c*) 2 Cranch's Reports, 264.
(*d*) 1 Gallison, 593.
(*e*) 6 Wheaton, 173.
(*f*) 2 W. R. 477; 6 Moore, P. C. 98.
(*g*) 2 W. R. 313.
(*h*) 10 Jur. 866.
(*i*) 3 Hag. 385.
(*k*) 3 W. R. 122.
(*l*) Page 125.

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the salvors upon the present occasion. There may again be instances of such gross negligence, independent of any wilful inattention, as would debar all claim for salvage recompense. There is also another kind of negligence, the effect of which is to diminish the amount of salvage reward, not to take it entirely away. The extent of this diminution, I may further state, is not measured by the amount of loss or injury sustained, but is framed upon the principle of proportioning the diminution to the degree of negligence, not to the consequences." We submit, therefore, that the alleged breaking of the hawser by the United Kingdom by unskilful management, or any other injudicious manœuvring of the steam-tugs, was not such negligence as to bar salvage. Indeed it would be hard if the merit of valuable services actually performed, as in this case, could be wholly vitiated by some act of negligence in the performance of it. The alleged disobedience to the order of the pilot (even if proved) would not be negligence. The *Duke of Manchester* (*a*) expressly decides that salvors, being the crew of a steam-tug, have a duty to exercise their own discretion apart from orders, or in spite of orders, given by the pilot in charge. Lord Campbell says, "The very notion of saving a ship supposes that the salvor, instead of merely executing orders, shall perform some extraordinary service, and exert himself to the utmost for the safety of life and property." We contend, however, upon the facts, that there was no negligence whatever on the part of the salvors, or disobedience to the pilot's orders, but, on the contrary, great skill and judgment was displayed, and that the ship was thereby rescued from danger of total loss. The appellants, we submit, are intitled to a liberal salvage reward.

The *Admiralty Advocate* and *Aspinall* for the respondent.—The respondent in his answer denied that any salvage service had been performed by the plaintiffs, and was, therefore, intitled to adduce any evidence that would deprive the service of its salvage character, and the plaintiffs of any title to the extraordinary reward, and had a right to show negligence, which it is admitted may reduce salvage reward or bar it altogether. The salvors, as plaintiffs, were bound to prove their case. The authorities quoted, as to the necessity of pleading facts specially, are nearly all confined to the obligation of a plaintiff; a defendant may content himself with a general traverse of the allegations in the petition, and thereupon the plaintiff must prove his case: this was finally decided by this Court in the recent case of the *East*

(*a*) 2 W. R. 478; 6 Moore, P. C. 99.

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Lothian (*a*). In the present case a strict burden of proof was imposed upon the plaintiffs, for they were originally employed under a contract to tow. Even admitting that towage may occasionally be converted into salvage, it can only be so when the performance of the original contract is entirely interrupted and becomes impossible, *Galatea* (*b*); or when risk of life and property is voluntarily incurred to save the vessel from unexpected peril, as in the *Saratoga* (*c*). The ordinary obligations of a contract to tow are laid down in the *Julia* (*d*); the tug has to use all proper skill and diligence, and is liable for any damage occasioned by her wrongful act. On every principle, therefore, the appellants are bound to prove circumstances which avoided the original contract. Thus a pilot may become a salvor, but only in extraordinary circumstances, of which the Court will require strict proof, *Jongé Andries* (*e*). The respondent charges the salvors with negligence of the grossest kind, amounting even to wilful misconduct. The disobedience to the pilot was especially reprehensible, for it is not pretended that any order of the pilot would have brought the ship into danger, which alone is the foundation of the decision in the *Duke of Manchester*. The judgment in the Court below, we submit, should be affirmed.

Brett, Q.C., replied.

Cur. adv. vult.

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On the 2nd of August Lord Kingsdown delivered the judgment of the Court.

Judgment.

This is an appeal from a decision of the Court of Admiralty respecting a claim of salvage brought by the owners of the steam-tugs Storm King and United Kingdom against the owners of the ship Minnehaha, and of the cargo on board of her.

General facts of the case.

The steam-tugs both belong to the port of Liverpool. The Minnehaha is a ship of 1,127 tons register, and belongs to the port of Londonderry. On the 11th March, 1861, she was bound from New Orleans to Liverpool, with a valuable cargo of cotton and other goods, and on entering the mouth of the River Mersey had brought up at anchor in Crosby Channel, being unable to continue her voyage to Liverpool by reason of the tide, which was ebbing, and the wind which was blowing strong south-west down the river.

(*a*) *Ante*, p. 241. (*b*) Sw. 349. (*c*) *Ante*, p. 318.
(*d*) *Ante*, p. 231. (*e*) Sw. 229.

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It is not in doubt that at this time the ship was lying in safety; but she was anxious to get into dock at Liverpool, which was distant about seven miles, without waiting for a change of the tide, and about nine o'clock in the morning she made an agreement with the master of the United Kingdom to tow her to Liverpool and dock her for thirty guineas. The Storm King, at the same time, offered her services for the same purpose. Her assistance was considered by the master of the Minnehaha as unnecessary, and he rejected it; but the Storm King still remained near for the purpose of rendering assistance if it should be required.

The hawser of the Minnehaha was made fast to the United Kingdom, and the Minnehaha was towed up to her anchor, which was hove up, but soon afterwards the hawser broke. How this interval was employed, and what was the cause of the breaking of the hawser, are two important points in dispute in this case. After the hawser broke, the ship of course drifted: how far she drifted is another important question. She let go both her anchors, but it is said by the appellants that they were unable to hold her. The United Kingdom, on being relieved from the weight of the Minnehaha, by the breaking of the hawser, of course started a-head, but she returned and got her own hawser on board the Minnehaha, which was attached to the ship. The Storm King again came up and offered her services, which were accepted. Another steam-tug, called the Enterprise, joined the other two, and finally the three boats, the tide having changed and the flood tide set in, towed the ship to Liverpool.

Claims for salvage were made by the three boats. Those of the first two boats, the United Kingdom and the Storm King, are alone before us. The cases of these two boats differ in some material points, and we will deal first with that of the United Kingdom.

In her case it is admitted that a contract for towage was first entered into, but she alleges that by reason of the danger in which, as she insists, the Minnehaha was afterwards placed, and from which she was rescued by the exertions of the United Kingdom, the original towage contract was superseded and she became intitled to claim salvage. On the part of the Minnehaha, it is contended that she never was in any danger at all, but that if she was, such danger was occasioned entirely by the fault of the United Kingdom, and that the United Kingdom

cannot therefore be intitled to any reward for rescuing her from such danger: that, in fact, the United Kingdom performed none but towage services, and performed those services very ill.

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So much discussion has taken place at the bar on the rules of law by which this case is to be governed, and so much doubt has been supposed to exist with respect to principles which we had imagined to be entirely settled, that it may be advisable for us, before considering the evidence, to state our view of the law.

Legal effect of a contract to tow.

When a steam-boat engages to tow a vessel for a certain remuneration from one point to another, she does not warrant that she will be able to do so and will do so under all circumstances and at all hazards; but she does engage that she will use her best endeavours for that purpose, and will bring to the task competent skill, and such a crew, tackle and equipments, as are reasonably to be expected in a vessel of her class. She may be prevented from fulfilling her contract by a vis major, by accidents which were not contemplated, and which may render the fulfilment of her contract impossible, and in such case, by the general rule of law, she is relieved from her obligations. But she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task; because the performance of the task is interrupted, or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship's hawser. But if in the discharge of this task, by sudden violence of wind or waves, or other accidents, the ship in tow is placed in danger, and the towing-vessel incurs risks and performs duties which were not within the scope of her original engagement, she is intitled to additional remuneration for additional services if the ship be saved, and may claim as a salvor, instead of being restricted to the sum stipulated to be paid for mere towage. Whether this larger remuneration is to be considered as in addition to, or in substitution for, the price of towage, is of little consequence practically. The measure of the sum to be allowed as salvage would, of course, be increased or diminished according as the price of towage was or was not included in it. In the cases on this subject, the towage contract is generally spoken of as superseded by the right to salvage.

(1.) It is not a warranty to tow to destination, but an engagement to use best endeavours and competent skill with a properly equipped steam-tug.

(2.) If performance is rendered impossible by a vis major, the obligation is terminated.

(3.) If unforeseen danger unavoidable by the steam-tug supervenes to the ship in tow, the steam-tug is bound to endeavour to complete the service, and if thereby the steam-tug incurs risks and performs duties not within the scope of the original engagement, the steam-tug is intitled to salvage reward.

It is not disputed that these are the rules which are acted upon in the Court of Admiralty, and they appear to their Lordships to be founded in reason and in public policy, and to be not inconsistent with legal principles. The tug is relieved from the

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performance of her contract by the impossibility of performing it, but if the performance of it be possible, but in the course of it the ship in her charge is exposed, by unavoidable accident, to dangers which require from the tug services of a different class and bearing a higher rate of payment, it is held to be implied in the contract that she shall be paid at such higher rate. To hold, on the one hand, that a tug, having contracted to tow, is bound, whatever happens after the contract, though not in the contemplation of the parties, and at all hazards to herself, to take the ship to her destination; or, on the other, that the moment the performance of the contract is interrupted, or its completion in the mode originally intended becomes impossible, the tug is relieved from all further duty, and at liberty to abandon the ship in her charge to her fate;—would be alike inconsistent with the public interests. The rule as it is established guards against both inconveniences, and provides at the same time for the safety of the ship and the just remuneration of the tug. The rule has been long settled; parties enter into towage contracts on the faith of it; and we should be extremely sorry that any doubt should be supposed to exist upon it. It is said that it has never been brought before us for decision. If so, considering how often the rule has been acted upon, the necessary inference is, that it has never been made the subject of appeal because it has been universally acquiesced in.

The conversion of towage into salvage depends on the circumstances of each case.

Whether the circumstances in each particular case are sufficient to turn towage into salvage must often be a subject of great doubt, as it is in the present case; but there is one point upon which their Lordships can entertain no doubt, and upon which they are surprised that any doubt should have been thrown at the bar. If the danger from which the ship has been rescued is attributable to the fault of the tug; if the tug, whether by wilful misconduct, or by negligence, or by the want of that reasonable skill or equipments which are implied in the towage contract, has occasioned or materially contributed to the danger, we can have no hesitation in stating our opinion that she can have no claim to salvage. She never can be permitted to profit by her own wrong or default. When it is remembered how much in all cases—how entirely in many cases—a ship in tow is at the mercy of the tug; how easily, with the knowledge which the crews of such boats usually have of the waters on which they ply, they may place a ship in their charge in great real or apparent peril; how difficult of detection such a crime must be, and how strong the temptation to commit it, their Lordships are of opinion that such cases require to be watched with the closest attention, and not without some degree of jealousy.

If danger is caused, or caused in a material degree to the ship in tow by the misconduct or negligence, or improper incapacity of the tug, no claim to salvage.

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Case of the United Kingdom.

In applying these principles to the claim of the United Kingdom, the first point for consideration is whether the Minnehaha was ever in danger, and if she was, whether the Court below was warranted in finding, as it has found, that the danger was owing to the misconduct of the tug.

The ship drifted into Formby Hole, and was in great danger.

There seems to be no reason for thinking that there was any danger till the hawser broke; but when it broke, and the ship drifted, the question is whether she did not then drift into a position in which she was in very serious danger. She was originally at anchor, in the fair way of the Crosby Channel. It appears by the charts that this fair way is bordered on the north-north-east by a long ridge or shoal, beyond which lie two sand-banks called Taylor's Bank and Formby Bank, and between these banks there is a narrow channel. The two banks shelve down towards each other, but in the midway there is a space of comparatively deep water called Formby Hole. This channel is stated to be about a mile and a-half long, but not more than from twenty to thirty fathoms across, from shallow to shallow. That a large ship, in rough weather, getting into Formby Hole must be in great danger appears to their Lordships to be clear, from circumstances of which even landsmen can form an opinion; that the fact is so, is proved by many witnesses in this case; and the nautical gentlemen who assist their Lordships entertain no doubt whatever that, in the then state of the wind and tide, the Minnehaha, which drew nineteen feet of water, if she got into Formby Hole, was in imminent danger of wreck. If, on the other hand, she did not drift across the ridge to which we have referred, but only, as is alleged by the respondent, touched the ridge with her stern, there was no such danger as would justify a demand by the United Kingdom for anything beyond her stipulated hire.

The question then is one of evidence. The pilot, who ought to be well acquainted with the facts, no doubt, swears that the ship never was in Formby Hole. But upon this point their Lordships think that the evidence of the appellants is quite conclusive. Not only is there the evidence of the claimants themselves, but there is the testimony of two wholly independent witnesses, the masters of the two light-ships; and the evidence of the master of the ship rather confirms their statement. In addition to this evidence, there is a fact proved which is decisive. The ship when she drifted let go both her anchors. The ship would of course drift beyond the anchors. If therefore the anchors were beyond the ridge, the ship would be still further

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beyond the ridge. When she was towed away by the three tugs she slipped her anchors, and after she got to Liverpool she sent an anchor-boat to get them up and bring them to her. Now it is proved by Rodriguez the master, and Hudson the mate of the anchor-boat, that these anchors were found beyond the ridge inside of Taylor's Bank, or, in other words, on the bank forming one side of Formby Hole.

Their Lordships being satisfied that the ship was in danger, the next question is, whether she was brought into such danger by the misconduct, wilful or otherwise, of the United Kingdom.

The charge of misconduct in breaking the hawser not proved, and not being pleaded, could not be allowed.

The first charge brought against her by the respondent, is one which, if properly alleged and proved, would make it fit that those who were guilty of it, instead of appearing in the Court of Admiralty as claimants, should stand in the dock at Liverpool as criminals. It is nothing less than this: that the persons in charge of the steam-tug, with a view to their own advantage, purposely put in peril this valuable ship and cargo, and the lives of those on board of her. It is contended that after the tug was attached to the ships she purposely forbore to exert her full power for the performance of her contract, and that when she was compelled to go a-head she did so with a sudden jerk, with the intention of breaking the ship's hawser, and succeeded in doing so. No such charge is contained in the answer of the respondent, and their Lordships agree with the learned Judge below that if it were intended to be made it should have been brought forward in the pleadings. There does not appear to be anything in the evidence to warrant such an accusation, and it is unnecessary to consider it further.

Negligence, though not specifically pleaded, might be proved, as negativing a claim for salvage, but negligence is not established by the evidence.

It is then contended by the appellants that, as to negligence or error in judgment, there is no case brought forward by the answer, and that the Court is precluded from inquiry into that matter. We are not prepared to go that length. The claimants must prove their own case; they must show that, the ship being in danger from no fault of theirs, they performed services which were not covered by their towage contract, and did all they could to prevent the danger. If intitled to salvage at all, the amount must in a great degree depend on the promptness and efficiency of the services rendered.

If the Court below was right in holding that after the hawser broke the United Kingdom did not come up as soon as she might reasonably have done, and ought to have done, in order to

repair the mischief, then we think it was properly decided that she could make no claim to salvage. 1861. *August 2.*

It has been found by the Trinity Masters in the Court below that the hawser was broken by the erroneous conduct of the alleged salvors, and that the United Kingdom and Storm King might have rescued the ship from her position at an earlier period without risk to their own safety. If these findings are warranted by the evidence, the judgment is right. But we have great difficulty in arriving at these conclusions. As to the first, and much the most important point, the breaking of the hawser. It is found to have been done "by the erroneous conduct of the alleged salvors." But the alleged salvors were the United Kingdom and the Storm King; and what could the Storm King possibly have to do with it?

Again, we have looked in vain for any sufficient evidence to justify the finding with respect to the United Kingdom. Our nautical assessors are of opinion that the accident was caused by the failure of the hawser, which was unequal to bear the heavy strain to which it was exposed between a large ship drawing nineteen feet of water and a powerful tug pulling her against a strong tide and squalls of wind in a rough sea.

The other complaint made against the United Kingdom is that she ought to have come up sooner after the hawser broke, and that she might have done so by backing under the bows of the Minnehaha. Upon this point there is no distinct finding in the Court below. It is sworn by the witnesses for the United Kingdom that by reason of the hawser of the Minnehaha having broken close to the ship and dragging in the water, it was impossible for the tug, in the position in which the ship was, to have backed under the bows of the ship. Our nautical assistants are of that opinion; they think that the course which the tug actually adopted was that which in the circumstances of the case was proper; and that considering what was to be done in getting out their own large hawser to supply the place of that which was broken, there was no want of promptitude or nautical skill on the part of the crew of the United Kingdom.

The United Kingdom acted with proper skill and promptitude.

Though we think that the appellants must make out their own case, and that the objections to which we have referred are open to the respondent, still in judging of the effects of evidence we must have regard to the degree of notice which was given by the respondent to the appellants of the nature of the objections

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on which it was intended to rely. Certainly the defence here is so framed that although it puts in issue all the facts alleged by the appellants, it does not give them notice of any particular point to which their evidence should be especially directed. Notwithstanding the strong impression which we entertain as to the result of the evidence, yet if it depended in any material degree upon the demeanour of the witnesses and the mode in which their evidence was given, and if it appeared to us that the finding of the Trinity Masters was consistent with what we hold to be certain facts, we should, probably, yield to the authority of the Court below, however it might differ from the advice given to us. But there are in the finding below conclusions which we are satisfied are mistaken. It is found amongst other things that the ship never was in danger, a fact with respect to which we can entertain no doubt. Thus much as to the case of the United Kingdom.

Case of the Storm King.

If the agreement was proved, there could be no salvage, as the danger existed at the time of making the agreement.

The case of the Storm King is different. After her services had been rejected she came up again after the Minnehaha was in Formby Hole, and when the danger had occurred. If in this state of things she made a towage contract she can claim nothing more; for nothing supervened afterwards to change the character of the services. And with respect to her, the main question is whether she entered into any engagement or not. Upon this point we do not observe any finding in the Court below. It seems to have been assumed that whether there was a contract or not, yet if the ship was rescued from danger without any default of the tug she would be intitled to claim salvage, notwithstanding the contract. We cannot, for the reasons already assigned, agree in this view, for the danger, whatever it was, had been incurred before the contract had been entered into.

Agreement not proved.

The evidence as to the contract is quite contradictory; it is for the respondent to prove such an agreement, and we think he has failed to establish it. There appears to be, as it was likely there should be in the confusion which prevailed, some misunderstanding. The utmost extent to which the evidence could be carried (and we do not think it goes even to that length) appears to us to be that the Storm King insisted on being placed on the same terms as the United Kingdom, *i. e.*, not receiving thirty guineas, but being on the same footing as the United Kingdom, whatever that might be.

Then, were any services rendered by these vessels which could

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be properly termed salvage? On the assumption that the ship was in the position in which we have no doubt that she was, we think such services were rendered. The attempt to tow the ship across the shoal at first failed. It became necessary so to manœuvre that, till the tide turned, the ship should be kept from getting on the bank, and this, we are advised, required considerable skill, and we think it is made out that, in endeavouring to tug the ship out of the shoal, the United Kingdom suffered some injury by straining. With respect to the alleged disobedience by the Storm King of the orders of the pilot as to the mode in which he should attach himself to the ship, the general rule is not disputed, that the directions of the pilot are to be obeyed. But in such cases there may well be a difference of opinion as to the most advisable mode of proceeding, and we think, upon the result of the evidence, that the pilot acquiesced in the course taken by the tug.

A steam-tug rendering salvage ought to obey the pilot in charge of the ship.

Disobedience to pilot's orders not proved.

Upon the whole, notwithstanding the extreme reluctance which we always feel, for the reasons assigned in the *Julia* (*a*), to disturb judgments in the Admiralty Court upon grounds such as those upon which we must proceed in this case, we feel ourselves compelled to advise her Majesty to reverse the present sentence as to both vessels.

Conclusion.

We are satisfied that the breaking of the ship's hawser placed the ship in danger; that when she drifted over the shoal into Formby Hole, and as long as she lay there, such danger continued; that she was rescued from such danger by the exertions of the steam-tugs; that as to the United Kingdom, the towage contract was so far suspended as to intitle her to a larger remuneration under the head of salvage; and that as to the Storm King, no towage contract at a fixed price is established. We think the evidence does not warrant a finding that as to both or either of the steam-tugs, there was any default in the performance of their duty.

With respect to the amount of remuneration we are in considerable difficulty. The United Kingdom was by no means relieved from the performance of her towage contract by the accident of the rope breaking. She was bound to do what she could to repair the mischief by throwing on board her own hawser, and, when circumstances made it possible, to tow the

United Kingdom 300*l.*, Storm King 50*l.* and costs.

(*a*) *Ante*, p. 231.

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ship to Liverpool. And in estimating the amount to be awarded, we think this must be taken into account. We shall advise Her Majesty to award a sum of 300*l.* to the United Kingdom, to cover all her claims. As to the Storm King, the services which she rendered were little more than towage, and we think they will be amply remunerated by a sum of 50*l.* Both vessels must have their costs, both in the Court below and in this Court. We think that the circumstances of this case made it fit to be tried in a superior Court (*a*).

Pritchard, proctor for the appellants.

Ayrton for the respondent.

(*a*) The 460th section of the "Merchant Shipping Act, 1854," (printed at length *ante*, p. 183,) after enacting that questions of salvage arising in the United Kingdom, where the claim exceeds 200*l.*, shall, in England, be decided by the High Court of Admiralty of England, enacts that "if the claimants in such dispute do not recover in such Court of Admiralty a greater sum than 200*l.*, they shall not, unless the Court certifies that the case is a fit one to be tried in a superior Court, recover any costs, charges or expenses incurred by them in the prosecution of their claim."

The 6 & 7 Vict. c. 38, s. 12, enacts, "as well the costs of defending any decree or sentence appealed from as of prosecuting any appeal, or in any manner intervening in any cause of appeal, and the costs on either side, or of any party, in the Court below, and the costs of opposing any matter which shall be referred to the said Judicial Committee, and the costs of all such issues as shall be tried by direction of the said Judicial Committee respecting any such appeal or matter, shall be paid by such party or parties, person or persons, as the said Judicial Committee shall order."

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In the Privy Council.

Present—Lord KINGSDOWN.
Lord Justice KNIGHT BRUCE.
Lord Justice TURNER.
Sir EDWARD RYAN.

THE ANNAPOLIS.
THE GOLDEN LIGHT.
THE H. M. HAYES.

Salvage—Services undemanded and unaccepted, but performed—Services rendered indirectly—17 *&* 18 *Vict. c.* 104, *s.* 460—*Rights and Obligations of Steamer under Contract to Tow—Misconduct of Salvors affecting Right to Salvage—Right of Strangers to avail themselves of Breach of Contract.*

A steamer engaged to tow is bound, notwithstanding a merely temporary accident interrupting the service and endangering the vessel towed, to complete the stipulated service with all reasonable skill and promptitude, and for so doing the steamer, if incurring no risk, is not intitled to salvage reward.

Express demand or express acceptance of salvage services actually performed is not necessary to intitle to salvage reward; but for services rendered without demand or acceptance, and indirectly only, no salvage is due.

A steamer was engaged to tow a vessel A; in performance of the service, whilst in the river Mersey, A came in collision with another vessel, and the steamer for her own safety was obliged to let go A; A drifted with the tide upon a vessel B, and A and B then drove together; the steamer then came up and towed A to safety, and then returned and towed B (at her request), B being then in collision with a vessel C.

Held, that the steamer was not intitled to salvage from A, because of the contract to tow, nor from C, because the services were rendered too indirectly, but was intitled to salvage of 100*l.* from B, which vessel was also required to pay costs, the case being fit to be tried in a superior Court.

Quære, if the steamer had been guilty of negligence in fulfilling her contract to tow A, and thereby had occasioned the danger to B and C, from which the steamer subsequently relieved them, could the owners of B and C take advantage of the breach of contract to which they were strangers, to repel the steamer's claim for salvage?

SALVAGE. These three cases were heard together in the Court of Admiralty, the learned Judge being assisted by Captain Pigott and Captain Webb, Elder Brethren of the Trinity House, and arose out of the following circumstances.

On the 19th of January, 1861, the steamer Storm King was engaged by the American ship the Annapolis, then off the port of Liverpool, inward bound, to tow her into the river Mersey and to dock her. The Annapolis was accordingly towed into the river, where she anchored off Rock Ferry, and was obliged to wait several days before the dock was ready. On the 25th of

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January, about 7.30 a.m., the dock being then ready, the Storm King made fast along the port side of the Annapolis, and proceeded with her in tow down the river towards the Waterloo Dock. Whilst so doing, and when off the King's Dock Basin, a collision became imminent between the Annapolis and the Johanna Stoll, a Prussian vessel in tow of another steam-tug. The master of the Storm King obeyed the orders of the pilot in charge of the Annapolis, but when the collision was inevitable, and his own vessel became in jeopardy of being crushed between the two opposing vessels, he (without orders) cast off the tow ropes. About the same time the other steam-tug let go of the Johanna Stoll. The Annapolis and the Johanna Stoll then came into violent collision. The tide was flowing with great rapidity, and the two vessels, locked together, with the port anchor of the Annapolis fast in the starboard side of the Johanna Stoll, immediately began to drive up the river. They first came in collision with a brig, Annie; then clearing her, they drifted some further distance, when the Johanna Stoll brought up with her anchor, and separated from the Annapolis. The Annapolis continued drifting, and shortly after drove upon the bows of the Golden Light, a New Brunswick vessel of 1,051 tons, which was riding by a single anchor about three-quarters of a mile from the place of the original collision, and caused her to drive also. Both vessels were entangled together, and drove up the river broadside to the tide. They approached the H. M. Hayes, an American ship of 1,670 tons, also riding at single anchor, but when at a short distance from her, the Storm King and another steamer called the Lioness, which had come up to the assistance of the Annapolis, towed the Annapolis clear of the Golden Light, and head to the tide. The Storm King continued towing the Annapolis for a few minutes, and then leaving her in charge of the Lioness, went to the assistance of the Golden Light. That vessel meanwhile had fouled the H. M. Hayes, and with her had drifted to within a short distance from Her Majesty's ship Majestic. Two small steamers had hold of the Golden Light, but were unable to hold her; the Storm King came up, and was hailed by the pilot of the Golden Light then to make fast; the Storm King accordingly did so, and the three steamers towed the Golden Light clear of the H. M. Hayes, and the Hayes thereupon swung to her anchor. The Storm King towed the Golden Light a short distance down the river to an anchorage; and, at the request of the pilot, who was anxious on account of having one anchor only, laid by her till midnight, and then towed her into dock. The Annapolis was towed into dock by another steamer.

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The owners and crew of the Storm King instituted actions against the Annapolis, the Golden Light, and the H. M. Hayes for the above salvage services. The value of the Annapolis, freight and cargo, was 23,071*l.*; of the Golden Light, 36,000*l.*; of the H. M. Hayes, 47,000*l.*; the value of the Storm King was 6,000*l.*

The action against the Annapolis was entered in the sum of 2,000*l.*; against the Golden Light, 1,000*l.*; against the H. M. Hayes, 1,500*l.*; but bail was taken in each case for the sum of 1,000*l.*

An action and cross-action also arose between the owners of the Johanna Stoll and the Annapolis in respect of the original collision, which was tried in the Admiralty Court. The Court held that the collision was wholly occasioned by the default of the pilot of the Annapolis; and this fact was not disputed as between the Storm King and the Annapolis.

The main question on the hearing in the Admiralty Court, was whether the Storm King, after parting from the Annapolis in the first instance, had not been guilty of negligence in not coming earlier to her assistance, and so had occasioned all the subsequent mischief, for remedying which the owners of the Storm King were now seeking salvage reward.

The answer on behalf of the Annapolis pleaded, among other things,—

8. After the Storm King left the Annapolis (on the Annapolis coming into collision with the Johanna Stoll) the Storm King did not come to the assistance of the Annapolis, until the latter vessel had by means of her starboard anchor and with the assistance of the Lioness, got clear of the Golden Light, and was kept from further drifting.

9. On the Storm King so coming to the assistance of the Annapolis, the Storm King only remained about five minutes, and then left her, and never afterwards returned to her.

15. It is not true, as set forth in the 10th article of the petition, that the Annapolis had been towed to anchor and placed in safety (*i. e.*, when the Storm King left her to go to the Golden Light).

17. Under the circumstances aforesaid, the defendants' proctor submits,—

That the Storm King and those on board of her rendered no salvage services to the Annapolis.

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That the master of the Storm King wilfully broke the said agreement to dock the Annapolis, and in consequence thereof it became necessary to obtain the assistance of the said steam-tug Lioness, and thereby to incur considerable salvage and other expenses, and that by reason of the premises the plaintiffs are not intitled to any compensation for their said salvage services (if any).

The answer of the Golden Light pleaded (among other matters),—

10. The Storm King did not make proper and sufficient efforts, as she was bound to have done, to get re-attached to the Annapolis with all speed, and prevent her from driving.

The answer of the H. M. Hayes pleaded (among other matters),—

14. The proctor for the defendants further says that he admits a certain slight benefit to have accrued to the owners of the H. M. Hayes from the service performed by the Storm King on the said occasion, but the said service was performed to other vessels and not to the H. M. Hayes, nor at the request of those on board the H. M. Hayes.

The cases came on for hearing with *vivâ voce* evidence on the 4th of May. Witnesses were produced for the Storm King and for the Annapolis, but none for the Golden Light or the H. M. Hayes. The master of the Storm King deposed that shortly after the collision with the Johanna Stoll, he ranged up alongside the Annapolis and threw a heaving-line on board, which the crew neglected to make fast; that he then got out of position, but did all he could to return with the utmost despatch to the Annapolis. On the other side, the master and pilot of the Annapolis swore that they saw nothing of the kind, as they must have done if it had taken place; and their evidence went to show that there had been negligent delay on the part of the Storm King in returning to give assistance.

Brett, Q.C. (*Clarkson* with him) for the Storm King.—The towing contract with the Annapolis was terminated by the extraordinary circumstance of the collision with the Johanna Stoll, and the consequent danger to the Annapolis. The Storm King was guilty of no negligence or want of skill; on the contrary the best manœuvres were adopted, and the Storm King performed important salvage services to all the three vessels proceeded

against; to the Annapolis and the Golden Light by express request and consent; to the H. M. Hayes important services in fact, to which the law would imply consent. 1861. *August 2.*

Aspinall (*Pritchard* with him) for the Annapolis.—The contract of towage was not terminated by the collision: the performance of it was suspended, and for the moment only, just as if simply the tow-rope had broken; it was the duty of the Storm King to use all skill in order to return immediately and complete performance, and the duty, ever so well performed, would not carry with it salvage reward, but only towage remuneration under the original contract. The case thus resembles those cases in which promises of gratuities made in an hour of peril to seamen under articles have been pronounced invalid. But in point of fact the Storm King, by the want of proper skill or diligence, failed to return with sufficient promptitude, and so occasioned all the mischief. She was therefore disintitled to reward, whether the service was in its nature towage or salvage. And besides the original breach of duty in not returning with due promptitude, the Storm King improperly left the Annapolis, still in danger, to go to the Golden Light: if the original contract was still binding, this was a further breach of the contract, and if the service was salvage, this was a breach of salvor's duty, being wilful negligence in the performance of the salvage service. The Storm King is therefore not intitled to any remuneration.

Broun (*Lushington* with him) for the Golden Light.—The Storm King was the motive power of the Annapolis, by whose default the original collision with the Johanna Stoll was caused. The evidence further shows great negligence on the part of the Storm King: she had a duty not only to the Annapolis, but to the Golden Light and all vessels in the river, not to allow the Annapolis which had been intrusted to her charge to go drifting helplessly up the river, causing danger to all the shipping. The damage and danger to the Golden Light were caused by this negligence. The alleged danger is also greatly exaggerated.

Milward (*Lushington* with him) for the H. M. Hayes.—The Storm King cast off the Annapolis voluntarily, and this and her subsequent failure to return put the H. M. Hayes in the alleged danger. The Storm King rendered no services to the H. M. Hayes at her request, express or even implied. The H. M. Hayes did not want her help, and did not ask for it, and did not by any subsequent conduct accept the services, as the owners of a salved derelict vessel do by taking possession. The H. M.

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Hayes had no opportunity to refuse the services, and salvage services, to which extraordinary reward is attached, cannot be forced upon a vessel. The services, whatever their value, and it was very small, were rendered not to the H. M. Hayes, but to the Golden Light, and for that the plaintiffs are suing the Golden Light: they are seeking to be paid twice over. They might with equal reason sue the Majestic, and all the vessels further up the river.

Brett, Q.C., replied on all three cases.

The learned Judge summed up to the Trinity Masters as follows:—

Gentlemen,—Without any preamble I shall at once enter into what I conceive to be the material questions in this case.

I will first assume that the Storm King had no contract whatever with the Annapolis. I entertain no doubt that if such had been the case, she would be intitled to sue as salvor for what she did to the Annapolis after the collision with the Johanna Stoll; and also for her services to the Golden Light.

But with regard to the H. M. Hayes a very able argument has been raised, that she is not to be considered in the same predicament as the other two vessels, for two reasons; because the Storm King never got hold of her, and because she never requested any assistance whatever. Now the law which I shall apply to this case will depend upon the facts and upon your opinion and finding. If, looking at all the circumstances in which the H. M. Hayes was placed with regard to the facility or non-facility of dropping her second anchor, and the probability of her anchor holding, you should be of opinion that, at the time when the Storm King took the Golden Light in tow, there was then serious and probably immediate danger of the H. M. Hayes being injured either by the collision with the Golden Light or by driving upon other vessels, then I shall come to the conclusion that she is bound to pay salvage; though I fully admit that it would be difficult to find a case resembling the present.

It is said that she had no opportunity to refuse. What is the presumption of common sense? If persons are in a state of great and immediate danger, and means are offered to rescue them from that danger and place them in a state of safety, is it not to be presumed they will accept that offer? and is it not fairly to be presumed that the H. M. Hayes would not have

repudiated these services? Therefore I shall have no hesitation in saying that this was a salvage service, if you should hold that the H. M. Hayes was in immediate danger. I hold the case to be different with the Majestic: for I can only look to probable and immediate danger, and not to that which is merely contingent, and may or may not happen according to the occurrence of circumstances. 1861. *August* 2.

I come next to the case of the Annapolis, where a question is raised upon the continuance of the contract to tow. The law which I shall lay down to you, as the rule of this Court, is I trust for the benefit of the navigation of this country, and also just to those who render services to ships upon the seas. It is this, that a contract for mere towing does not include the rendering of any salvage service whatever. If it happens by reason of unforeseen occurrences in the performance of the contract to tow that new and special services are necessary, the contract is not at once rendered void, nor is the tug at liberty to abandon the vessel, for that would be most detrimental; nor, on the other hand, is the tug bound to perform the new service for the stipulated reward agreed for the original service; but the law requires performance of the service and allows salvage reward. There is no such thing as salvage on land; and we must look at things done on the sea with a very different eye to those which are done on the land. It was therefore the duty of the Storm King, after the collision took place with the Johanna Stoll, to render every sort of assistance she could to the Annapolis, in order to rescue her from the danger immediately arising in consequence of the collision: and the question I shall put to you is this, Was there culpable delay or misconduct on the part of the Storm King which contributed to cause the subsequent collisions? I shall ask you to say whether the tug did all she reasonably could do to execute her new duty of effecting the salvage of the Annapolis.

With regard to the tug casting off from the Annapolis, at the time of the collision with the Johanna Stoll. Under the circumstances, I really do not think it could be seriously argued that she could continue fast with any safety; all the evidence is the other way.

We then come to the next and perhaps that part of the case which has been most discussed, namely, whether the tug did what she ought, and what her witnesses depose to; that is, go up on the starboard side of the Annapolis, and throw a rope for

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the purpose of getting it affixed to the hawser in order to tow. That is a question partly yours and partly mine. So far as relates to the nautical manœuvre likely to be done and proper to be done at the time, it is in your department, but it is mine to consider what the evidence is upon the subject. There is a contradiction in the evidence. The master of the tug has sworn there was a line thrown and taken hold of by a man, and if that turns out to be untrue, then unquestionably he is perjured; but, on the other hand, the master of the Annapolis and the pilot only say they did not see it, and they may speak according to their own conscience, and yet be mistaken as to the fact itself. That is a matter you must take into your consideration. It is, in other words, this, that affirmative evidence as to a fact is intitled to more credibility than that of persons who cannot say positively that the fact did not happen.

Now I come to the next step; the alleged delay of the tug in coming back after this alleged transaction with the heaving-line. It is quite clear the tug did not get hold of the Annapolis until after the Johanna Stoll was gone, and she was in collision with the Golden Light. I was anxious, when the evidence was given, to ascertain, if I could, anything like the time occupied by the Storm King in her manœuvres. I really cannot come to any conclusion, and think it very unlikely that if we had examined and cross-examined the witnesses for hours together we should have been able to come to an accurate conclusion as to the time it occupied: one witness says forty minutes. You well know what I mean, when I say the witnesses cannot speak positively; the memory of the witnesses is not accurate as to time, and could not be when their attention was occupied with other matters which particularly attracted it. I can form no opinion as to how long it would reasonably take for the Storm King, having failed to get the hawser affixed to the tow-rope, to perform the manœuvres described. The master says it took but a few minutes; you, as nautical men, will be able to say how long it probably would take. That is a question of great importance in every point of view; not as relates to the Annapolis only, but as relates to the other two vessels. You will say, upon consideration of all the evidence, if the tug negligently delayed to assist the Annapolis.

With regard to the last part of the case, which relates to the subsequent period, that may possibly diminish the amount of salvage reward, but it will not alter the nature of the case. It is said that the tug ought to have continued with the Annapolis

instead of going to the Golden Light. That depends upon considerations which we need not trouble ourselves much with, because the utmost extent it would go to would be this; that another tug was necessarily employed, and that there ought to be a diminishing of the amount of compensation. The evidence certainly shows that the Annapolis was not left in danger. If the required service could be performed by a vessel of inferior calibre, I hold, notwithstanding the orders of the pilot, that the master of the Storm King was perfectly at liberty to go to the vessel in distress. 1861. *August 2.*

The questions upon which I shall ask you to give information are what I have already named; and next, in what degree of danger, if any, the Golden Light was, and also the H. M. Hayes. Now if you should advise me, and I should coincide in the advice, that there was negligence, and culpable negligence, on the part of the Storm King in failing to take the Annapolis in tow, and that was the cause of the subsequent collisions, then beyond all doubt there can be no claim for salvage; for no man can possibly apply for a reward for giving a remedy to mischief that he himself has occasioned.

Cur. adv. vult.

On the 13th of May, Dr. Lushington delivered judgment:— *May 13.*
The substantial question in these cases of salvage was, whether the Storm King did her duty as promptly and effectually as she ought to have done to the Annapolis, which she was engaged to tow.

Several complaints were made against the Storm King. In the first place, it was alleged that she ought not, when the collision took place with the Johanna Stoll, to have cut away the ropes and separated herself from the Annapolis. We are all of opinion that she was fully justified in so doing, and that, so far, no blame attaches to her.

Then arose another question, which was, whether or not after this collision she came alongside the Annapolis and threw a rope on board, which rope was not fastened; and I told the Trinity Masters that that was a question rather upon a consideration of the evidence than merely a nautical matter; and I told them that, in my opinion, that fact was proved. There was another matter of inferior importance, which was this: it was said that the tug quitted the Annapolis at too early a period, when the Annapolis was in danger, for the purpose of going to

1861. *August 2.* the assistance of the Golden Light, but my opinion was and is, that the Annapolis was then practically in safety, and that looking at the urgent danger in which the Golden Light was, the tug was justified in going to her assistance.

Now I come to the most important part of the case, and I can assure the parties that it has undergone the most careful consideration possible; namely, the question whether, after the Storm King had failed to obtain a tow rope from the Annapolis, she afterwards returned to her assistance with due expedition and promptitude.

This was of the last importance, because the consequence was that the Annapolis ran against the Golden Light, and the Golden Light against the H. M. Hayes. I have requested the opinion of the Trinity Masters on that question, and I will now read it:—"We hold that the Storm King did not act with due skill and promptness in again taking the Annapolis in tow, and so enabling that vessel to avoid coming into collision with the Golden Light."

It is perfectly clear that under these circumstances the Court must pronounce against the claims of the Storm King, because it was in consequence of the want of promptitude and skill on her part in performing her duty that the collision with the Golden Light occurred, and the subsequent collision with the H. M. Hayes; therefore I pronounce against the claim for salvage in these three cases, together with costs.

From this decree the owners of the Storm King appealed in all three cases.

July 19.

Brett, Q.C., *Eddis* and *Clarkson* for the appellants, owners of the Storm King:—I. As to the Annapolis. That certain services in fact were rendered by the Storm King to the Annapolis when in danger cannot be disputed, but the learned Judge of the Court below refused salvage, on the ground that the salvors had by their negligence occasioned the danger. (1.) This charge does not appear in the pleadings of the Annapolis, and ought not therefore to be admitted. We were salvors; if the defendants intended to charge us with wrong, they were bound to give full notice of it in pleading, as was recently argued in the *Minnehaha* (*a*). The burden of proof was upon them, although defendants; and the case is thus distinguished from the *East Lothian* (*b*), where the burden was on the plaintiffs. (2.) We

(*a*) *Ante*, p. 342. (*b*) *Ante*, p. 249.

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deny any negligence, in fact, on the part of the Storm King, and contend that the evidence shows that every effort was made by the Storm King to render prompt assistance. (3.) After the collision with the Johanna Stoll the Storm King had no legal duty to the Annapolis. The contract was to tow and to tow simply; that contract was terminated, by extraordinary circumstances over which the tug had no control, and there was no obligation to render salvage services. (4.) If there was any duty on the part of the Storm King to the Annapolis after the collision, it was only to exercise ordinary skill and diligence in returning to give assistance, and the evidence proves that this duty was performed. (5.) The negligence attributed to the salvors, even if proved, is not enough to disintitle them to salvage reward. The damage and danger to the Annapolis were really occasioned by the original default of her pilot, not by any conduct or misconduct of the Storm King. The Court of Admiralty views salvors with favour, and it is only in extreme cases that salvors are deprived of reward for services actually rendered. On all these points we refer to the argument in the *Minnehaha* and the cases there cited.

II. As to the Golden Light. (1.) The Golden Light was in great danger, and requested the services which rescued her therefrom; the owners are therefore estopped from complaining of any previous misconduct on the part of the Storm King. (2.) The alleged misconduct is immaterial, because the owners of the Golden Light were strangers to the contract between the Storm King and the Annapolis, and cannot complain of the nonfulfilment of that contract. (3.) The owners called no witnesses in the Court below and denied the right of reply to the plaintiffs, and there is therefore no evidence of any negligence. (4.) The whole evidence shows that there was no negligence in fact. (5.) The negligence, if proved, would not, as before argued as to the Annapolis, be such as to disintitle salvors to salvage reward.

III. As to the H. M. Hayes. The vessel was in great danger, which was removed by the efforts of the Storm King. The owners have not pleaded that the Storm King was guilty of any negligence causing their distress, and they are therefore not intitled now to charge any such negligence; moreover as they called no witnesses in the Court below, they have no evidence on which to found the charge. The owners admit receiving certain benefit from the services of the Storm King, but because

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the rope was not fastened to their vessel, they deny that the services were rendered to them. But it is submitted that if the H. M. Hayes was in danger, and was delivered from that danger by the voluntary efforts of the plaintiffs, salvage is due, as in the case of services to derelict vessels. The law of salvage, which is founded on equity and common sense, will imply consent of the owners to beneficial services rendered to their vessel at an imminently critical time; just as the law implies the owner's consent to bottomry or even sale of the ship in circumstances of necessity. Here the best, perhaps the only, mode of relieving the peril of the H. M. Hayes was by towing away the Golden Light; and no prudent owner would have refused to accept the assistance given. The Golden Light and the H. M. Hayes were in actual contact, and may be considered as one vessel only. But there can be no difference in removing peril from a vessel, or in removing a vessel from peril; salvage is given for extinguishing a fire on board a vessel as much as for towing off a vessel from rocks. On this point we have the authority of the learned Judge in the Court below.

Aspinall and *Pritchard* for the Annapolis.—Upon the facts we contend that the Storm King might, by the exercise of ordinary care and skill, have come up again to the Annapolis much earlier than in fact she did, and so might have prevented the collision with the Golden Light, and all that followed. The alleged coming up of the Storm King to the starboard side of the Annapolis immediately after the collision is not proved by the evidence. On this state of facts, we contend that no salvage whatever is due to the Storm King. That a steamer having a vessel in tow, on being casually separated from her by some sudden peril, is relieved from all obligation, and may abandon the vessel to her fate, as argued by the appellants, is against all reason and public policy. It would be contrary to the intention of the parties making the contract, for the owners of the vessel employ the tug not only for expedition but safety; and might cause wholly unnecessary loss to shipowners. The decision of the learned Judge in the Court below is that on extraordinary peril intervening, the contract to tow is terminated, and an obligation implied by law then attaches, to render, if practicable, all services required by the circumstances, on salvage terms. If this be correct law, the appellants negligently failed to satisfy this obligation, and have therefore forfeited all right to salvage reward, according to the well-established doctrine of the Court of Admiralty with respect to the duty of

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salvors. But we submit that this law is too favourable to steam-tugs, and that the Storm King was bound by the contract to tow to render all necessary services to the Annapolis for the sum stipulated in the contract. The extent of the obligation imposed by an ordinary contract of towage has never been discussed in the Court of Appeal, except in the recent case of the *Minnehaha*. Admitting that in some cases it may be prematurely terminated, and that subsequent services are in the nature of salvage, we submit that those are extreme cases only, and that the true law is that a steam-tug engaging to tow to a dock or other destination is bound to perform that engagement, unless *prevented* by perils of the seas. Such was the case of the *Galatea* (*a*), where the violence of the gale rendered the performance of the contract impossible. So if the ship towed takes the ground and remains hard and fast and cannot be got off in reasonable time, the tug remaining far beyond the time originally contemplated for the performance of the contract, may be intitled to salvage reward. So if the tug voluntarily incurs danger to rescue the ship towed, salvage may become due, as in the *Saratoga* (*b*), where the tug, in effect, made herself a fender between the vessel towed and the landing-stage; for this acceptance of danger is beyond the original intention of the parties. But it is too much to say that the temporary intervention of any peril to the vessel towed, not amounting to a prevention of performance, puts an end to the contract to tow. Would the mere parting of the tow-rope be sufficient? Here the original accident was, so far as it affected the possibility of performing the contract, hardly more. We submit that an obligation to perform the contract, unless prevented by perils, would effectuate the original intention of parties making the contract, and be just to shipowners and owners of tugs, and that the burden of proof should lie on the party alleging the extraordinary termination of the contract, and claiming the extraordinary reward of salvage. To allow readily salvage claims to arise out of contracts to tow, would not only neutralize the intention of the contracting parties, but might also induce masters of tugs, who practically exercise a large control over the movement of the vessels towed, to bring ships into peril, or to part the tow-rope on the first threatening of danger. We contend, therefore, that the Storm King was bound to do all that she did do, and much more, under the original contract to tow into dock.

Broun and *Lushington* for the Golden Light.—Our case is that the Storm King might have prevented the collision between

(*a*) Sw. 349. (*b*) *Ante*, p. 321.

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the Annapolis and the Golden Light, and was bound to have done so. Upon the facts we rely upon the circumstances deposed to by the appellants in their examination and cross-examination. The obligation of the Storm King to the Golden Light arises out of her contract to tow the Annapolis safely into dock. That contract, as previously contended, the Storm King was bound to perform, unless prevented by perils of navigation. This is the ordinary condition of maritime contracts. Thus seamen are bound to render all services to the ship in danger without additional reward, *Harris* v. *Carter* (*a*); and in the Court of Admiralty cannot be salvors except in very extraordinary circumstances. So in a contract under charter-party or bill of lading, the shipowner is bound to carry, unless prevented by perils of the sea, and the exception in his favour, it is to be observed, is not given by the common law, but by express reservation in the contract. At common law a carrier is an insurer, perhaps, on grounds of public policy, because the whole control of the undertaking is lodged in him, just as an innkeeper likewise is an insurer of the property of his guest against risks not caused by the guest's own negligence. At common law, also, a party absolutely engaging to do anything, is liable in damages for non-performance, even though the performance becomes, from unforeseen circumstances, impossible, *Paradine* v. *Jane* (*b*). Without pressing this doctrine too far, and contending that a party contracting to tow is an insurer, it may be urged that he is bound to perform his contract in full, unless prevented by perils of navigation, and that every presumption should be against the premature dissolution of the contract. Then assuming that the Storm King negligently failed to fulfil her duty to the Annapolis, whereby the Annapolis drifted upon the Golden Light, this was a wrong to the Golden Light. The Storm King undertook to perform a work, the negligent performance of which was dangerous to other vessels. The Annapolis was as it were bailed to her, and wholly in her control, and the Storm King thereby took upon herself an obligation to perform the engagement with reasonable consideration for the safety of all vessels in the river. It was an obligation to the Golden Light and all the vessels of the river implied by law from all the circumstances of the case, of which the contract of the Annapolis was only one: we do not rely upon the contract only. It is a common law obligation that every person shall carry on his business with reasonable care for the public safety, and shall be responsible to an innocent party suffering injury from want of

(*a*) 3 E. & B. 559. (*b*) Alleyne, 27.

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such reasonable care. The owners of the Storm King are independent contractors, and they, therefore, are responsible for the acts of their servants, not the ultimate employers. It is submitted that the negligence to return with due promptitude to the Annapolis was a breach of the obligation towards the public safety. If a man carrying a loaded weapon in the streets has it knocked out of his hand, is he at liberty to leave it lying in the street? Or if a man taking a horse to a farrier's to be shod, has, by accident or negligence of a third party, the halter snatched from his hand, is he not bound to make all reasonable efforts to recover the horse, and prevent him from doing mischief? But here we are not suing as plaintiffs, but rebutting a claim for extraordinary reward. Salvage is altogether an equitable claim, and if the so-called salvor might and ought in reason to have prevented the danger from which he afterwards rescues the ship, he in effect renders no service, and is not intitled to salvage. This was the ruling of the learned Judge in the Court below, and seems founded in equity and good sense. It is true that the alleged services were rendered at request, but without knowledge of the preceding circumstances; it is therefore submitted that the request did not operate as a waiver of complaint against the conduct of the Storm King. Lastly, the danger of the Golden Light and the services of the Storm King are much exaggerated, and the action was entered in an exorbitant sum.

Milward and *Lushington* for the H. M. Hayes.—1st. We deny any danger in fact, amounting to that degree of danger, which is the foundation of salvage service; the H. M. Hayes had not sustained any damage by the collision with the Golden Light, and had another anchor ready to let go, if necessary; and the adverse force was simply an ordinary Mersey tide. 2ndly. Though we have not charged negligence in the pleadings, and called no witnesses, we are intitled to rely on the fact, which came out on cross-examination, and is patent on the face of the circumstances proved by the plaintiffs. The facts were not properly within the knowledge of the defendants, and therefore, as in the like case of collision, there was no obligation to plead them. The *East Lothian* (*a*), shows that defendants in the Admiralty Court are not bound to plead specifically. 3rdly. The services were not rendered to the H. M. Hayes, but to the Golden Light, and the plaintiffs are seeking to be paid twice over. They might with equal right have sued the Majestic, or any other vessel at anchor up the river. The claim is for con-

(*a*) *Ante*, p. 249.

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structive salvage, to which the Court of Admiralty lends no sanction. Thus, in the *Franklin* (*a*), where military salvage was claimed for saving a British vessel from entering in ignorance a hostile port, Lord Stowell says, "Is military salvage due, as for a rescue from the enemy? I think not. No case has been cited, and I know of none in which military salvage has been given, where the property rescued was not in the possession of the enemy, or so nearly as to be certainly and inevitably under his grasp. There has been no case of salvage, where the possession, if not absolute, was not almost indefeasible, as where the ship had struck, and was so near as to be virtually in the hands and gripe of the enemy. In such cases, the same hazard is incurred by the salvor, and the same reason holds out a stimulus to recaptors. But in this case there was no enemy to encounter. The danger to the parties was contingent only, and though probable to occur, had not actually occurred. The case which has been cited in argument does in point of authority apply. It was the case of a Spanish ship coming from New Orleans, ignorant of hostilities, which had lately commenced, and going into the port of Bordeaux, where she would undoubtedly have been confiscated. A claim of salvage was set up on the part of a British cruiser; but the Court said, 'No, the danger was something distant and eventual; you had no conflict to sustain, as well might you demand salvage for giving the first information of a war. On the same principle, a British man-of-war, on the breaking out of hostilities, might seize a whole fleet going, ignorant of the war, into an enemy's port, and set up a claim of salvage against them.' On the authority of that judgment, the claim of military salvage cannot be sustained." So here the danger of the H. M. Hayes was something distant and eventual, and the benefit was rendered by a remote and circuitous way. 4thly. The services were not rendered at the request of the owners or of their servants. Salvage services, which carry with them a title to extraordinary reward, cannot be forced upon a ship owner. The master of the H. M. Hayes might and would have preferred to meet the peril by his own resources, rather than incur a salvage claim. If two tugs are assisting by engagement a ship in distress, and a third tug, without orders, makes fast to one of the tugs and assists in towing, which the ship cannot prevent,—has the third tug a right to salvage against the ship? Or can it be said that the Lioness, which towed the Annapolis from the Golden Light, and so prevented her from coming upon the H. M. Hayes, is intitled to sue the H. M.

(*a*) 4 C. R. 150.

Hayes? It is true that owners have to pay for salvage to a derelict ship; but that is because, having abandoned possession, they retake possession upon condition of satisfying the lien which the salvors have acquired, but here the alleged salvors never had possession at all; the ship continued throughout in the control and in the possession of the owners' servants. 5thly. The Storm King was guilty of gross negligence, which occasioned the danger. The original default of the pilot of the Annapolis would not have produced the danger, if the Storm King had thereafter used ordinary care and skill to retake her in tow; nor can a wrong-doer rely on the joint default of a third party.

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Cur. adv. vult.

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Lord Kingsdown delivered the following judgment:—

Judgment.

Actions were brought against these three ships by a steam-tug, the Storm King, for salvage, and have been dismissed in the Admiralty Court. The Court below appears to have held that in each case salvage would have been due, but for the circumstance that it considered the accident which created the danger to be attributable to the Storm King herself. The principles applicable to cases of this description have been so fully explained in the case of the *Minnehaha* (*a*), that we think it unnecessary here to discuss the question of law.

Facts of the case.

The facts are, to a certain extent, free from doubt. The Annapolis is an American ship, which in the month of January last was bound with a cargo for the port of Liverpool. On the 19th of January, when off the Orme's Head, she engaged the Storm King to tow her into the Mersey, and there to dock her. The Storm King accordingly towed her into the Mersey, where she was anchored, and remained there several days. On the 25th of January, in performance of her engagement to dock the Annapolis, the steam-tug again took her in tow, being lashed on her port side, and was towing her down the river towards the Waterloo Dock. The tide at this time was flowing rapidly, when a barque called the Johanna Stoll came into collision with the Annapolis on her port side. To avoid being crushed by the collision, the Storm King let go the Annapolis, slipped out from between the two vessels, and dropped astern. It is admitted on all sides that this manœuvre was perfectly justifiable.

The Annapolis and the Johanna Stoll then drifted with the tide up the river, till they came into collision with the brig

(*a*) *Ante*, p. 347.

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Annie. After getting clear of her, the Johanna Stoll was brought up by her anchor, and the Annapolis continued to drift alone until she came into collision with the Golden Light, which was lying at anchor, near Tranmere Ferry. The anchor-chain of the Golden Light parted, and she and the Annapolis drifted together in the direction of a ship called the H. M. Hayes. Before the Annapolis had come into collision with the H. M. Hayes, and while she was in collision with the Golden Light, the Storm King came up, and got her hawser on board the Annapolis, and together with another steam-tug called the Lioness, which had previously given her assistance, towed away the Annapolis till she was brought up by her anchor, and placed in safety. The Storm King then sent another steamer to assist in docking the Annapolis, and herself steamed away to assist the Golden Light, and towed her away from the H. M. Hayes, with which she had come in contact.

Thus far there is no controversy about the facts; and in these circumstances the Storm King claims salvage for all these ships:—against the Annapolis, on the ground that, by reason of the accident, she was in peril, from which she was saved by the Storm King, whose claim for towage service was thereby converted into salvage service;—against the Golden Light, because she was rescued from the danger to which she was exposed by the collision with the Annapolis and the H. M. Hayes; and against the H. M. Hayes by reason that she was relieved from the Golden Light, and saved from the danger of a collision with Her Majesty's ship Majestic, against which, if she had not been so relieved, it is said that she would have drifted.

We will consider the defences separately.

Defence of the Annapolis, that the Storm King was guilty of negligence, either in casting off, or in not returning with due promptitude, not proved.

First, as to the Annapolis. She insists at the bar that the Storm King did not perform her duty with due skill and promptitude; and secondly, that in point of fact she rendered no service which was not included in her towage contract, and which was not covered by her towage hire. The Court below has decided in favour of the Annapolis upon the first ground. The Storm King having backed, and left the Annapolis adrift, was bound to return with all possible speed, and attach herself again to that ship. It is sworn by witnesses on her behalf that she did so; that she immediately came up again on the starboard side of the Annapolis, and succeeded in throwing a rope on board, which one of the crew took hold of, but instead of fastening to a hawser

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afterwards let go. This is said to be accounted for by the circumstance of all the men on board the ship being engaged on the port side, in consequence of the collision with the Johanna Stoll, and the subsequent collision with the brig Annie. There is contradictory evidence upon this important point, but the Court below has held, and we concur in that opinion, that the preponderance of evidence is in favour of the tug, and that this fact must be taken as proved.

If, therefore, there was any want of skill or promptitude on the part of the tug, it must have been in some subsequent proceeding, in adopting a wrong course in following the ship, or in not pursuing that course with sufficient activity. The grounds upon which the Trinity Masters came to their conclusion are not stated, and their opinion is, as too often happens in these cases, directly opposed to that of the nautical gentlemen who assist us, who, after being strictly questioned upon every point which has been suggested in the argument, as showing want of skill or of diligence on the part of the tug, are quite satisfied that the course which she took was that which good seamanship prescribed, and that there is no reason to believe, from the time which was occupied, or otherwise, that there was any default upon her part. We confess that this is the conclusion at which we have arrived.

But as regards the Annapolis, the question, in our view of the case, is not very material; because whether she did or did not come up to the Annapolis as soon as she might have done, she rendered, in our opinion, no services beyond those which she had stipulated to render. She was bound to tow the Annapolis into dock. In performing that duty, she, for her own safety, let the Annapolis go adrift. She was justified in looking to her own safety in the first instance, but that consideration did not exonerate her from the obligation of following the Annapolis to complete her engagement, and from doing what she could to prevent the mischief which might arise from the temporary interruption of her service. Assuming that she could not have come up sooner, what did she do beyond what she was bound to do? She attached her hawser to the ship, and towed her out of danger, leaving the remainder of the service to be performed by another tug. She incurred no risk herself; she performed, with more or less diligence, the duty which she had undertaken; and the fact that when this service was renewed the Annapolis was

But the Storm King, being under contract to tow the Annapolis into dock, was bound by that contract to return and fulfil the stipulated service, and not running any salvage risk, is not intitled to salvage reward.

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entangled with another ship, can no more intitle her to salvage than if a collision had taken place without interrupting the towage service. Upon these grounds, we think that the sentence as far as it dismisses the claim against the Annapolis must be confirmed.

With respect to the two other ships, the case is different. To these the Storm King was under no obligation.

The Storm King rendered salvage services to the Golden Light at her request, and is therefore intitled to salvage.

1st. As to the Golden Light. It appears that she hailed the Storm King, and required her assistance, that such assistance was afforded, and that the injury which the Golden Light might have suffered by collision with the H. M. Hayes was prevented or diminished. She was afterwards towed, at her request, by the Storm King to another part of the river, and the tug remained near her, at the request of the pilot of the Golden Light, till the latter ship went into dock. This certainly intitles the Storm King to require payment for salvage service, unless by some means she has disintitled herself to it. Now it has been held below that she has so disintitled herself, because she has not performed her duty to the Annapolis, and it is said that if she had performed such duty, the Annapolis would not have run into the Golden Light, and the Golden Light would have been in no danger of running into the H. M. Hayes: that the accident must be considered to have been primarily caused by the Storm King, and that she therefore cannot claim salvage from any of these vessels. A most important principle of law is involved in this decision, which, as far as our knowledge extends, is new: that third persons can avail themselves of the breach of a contract to which they are strangers, on the ground that if it had been duly performed they would have escaped injury to which they have been subjected (*a*). But it is not necessary to pronounce a decision upon this point, for we think it is not made out in fact that the collision with the Annapolis was caused directly or indirectly by the fault of the Storm King. As to the Golden Light, therefore, we must advise a reversal of the sentence.

Quære, even if the Storm King had been guilty of a breach of contract to tow the Annapolis, and thereby occasioned the danger to the Golden Light, could the owners of the Golden Light, being strangers to the contract, avail themselves of a breach of it, so as to repel a claim for salvage services then rendered by the Storm King?

There remains the case of the H. M. Hayes.

Her case in this respect differs from that of the Golden Light, that she neither invited nor accepted any assistance from the Storm King. She fairly admits that she received some slight

Express de-

(*a*) See *Langridge* v. *Levy*, 2 M. & W. 519; *Winterbottom* v. *Wright*, 10 M. & W. 109; *Blakemore* v. *The Bristol and Exeter Railway Company*, 8 E. & B. 1035.

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benefit from the service performed by the Storm King on the occasion, but she insists that such service was rendered not to her but to the Golden Light. It appears to their Lordships that it would be dangerous to hold that if salvage service be actually rendered to a ship, she cannot be called upon to pay anything unless it can be shown that she either requested or expressly accepted assistance. In many cases the urgency of the case may be too great to admit of previous discussion, and if a salvor were required to prove such agreement before he could recover, it is to be feared that there would be much slackness in cases which most require energy and activity. They agree with what they understand to be the opinion of the learned Judge below, that it is sufficient if the circumstances of the case are such that, if an offer of service had been made, any prudent man would have accepted it. But in the present case the H. M. Hayes received only indirectly a benefit from the service rendered to the Golden Light. There was not only no acceptance of the service by her, but there was nothing done by the Storm King with a view to her benefit. She received benefit indirectly, as Her Majesty's ship Majestic, or any other ship lying higher up the river than the H. M. Hayes, may have received benefit. As to the H. M. Hayes, therefore, their Lordships think that the judgment must be affirmed with costs.

mand or express acceptance of salvage services actually performed, is not a condition to salvage reward;

but here the services were rendered too indirectly to the H. M. Hayes, for salvage to become due.

Their Lordships must observe that the services rendered by this tug, and the danger of the ships, appear to have been grossly exaggerated by the appellants, and they cannot express too strongly their disapprobation of the enormous amounts for which, in each case, bail has been demanded. They are advised that, having regard to the state of the tide and weather, and the situation in which these different vessels were, the only danger they incurred was that of some injury to their bulwarks and rigging; that the cargoes were not in any danger at all; and that nothing but the most ordinary service was rendered by the tug, without the least risk to herself. They will advise 100*l.* to be awarded in the case of the Golden Light, and the appellants must have their costs both here and in the Court below, the case being proper for the decision of a superior Court (*a*).

The Golden Light to pay 100*l.* and also costs, the case being proper for the decision of a superior Court.

As their Lordships differ from the Court below on the grounds of its decision in the case of the Annapolis, and much expense was incurred in the evidence, which they think does not warrant the finding below, they will advise that the sentence as to costs should be reversed, and that there should be no costs in her case, either there or of this appeal.

(*a*) See note, *ante*, p. 354.

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They will humbly advise Her Majesty to alter the Judgments below in conformity with the opinions which they have thus expressed (*a*).

Nethersole and *Owen*, proctors for the owners of the Storm King.

Pritchard for the Annapolis.

Tebbs for the Golden Light.

Toller for the H. M. Hayes.

(*a*) Another cause also arose out of this transaction, namely, by the owners of the Golden Light against the Annapolis. It was admitted in the pleadings, that the Golden Light was at anchor, and also that the original collision between the Annapolis and the Johanna Stoll was occasioned solely by the negligence of the licensed pilot in charge of the Annapolis. At the hearing, the counsel for the defendants submitted that this latter fact took the case out of the ordinary rule, which requires a defendant, whose ship was in motion, to justify running into a ship at anchor, as the presumption was that the original collision was the sole cause of all that followed. The Court, however, held that the general rule must prevail, and called on the defendants to begin.

The case then proceeded, and on the 19th November, 1861, the Court decided with the advice of the Trinity Masters, that the master and crew of the Annapolis were to blame; (1) for not taking the rope of the Storm King, when offered after the first collision; (2) for not paying out cable with sufficient promptness; (3) for not setting the foresail, and thereby preventing the ship from drifting with the tide.

1861.
October 10.

In the High Court of Admiralty.

THE FRANZ ET ELIZE.

Wages—Foreign Master—Security for Costs.

The master of a foreign ship suing for his wages will be required to give security for costs.

THIS was a cause of wages instituted by the master of the foreign ship Franz et Elize for his wages. The owners of the vessel appeared under protest.

The Court was now moved on behalf of the defendants to order a stay of proceedings until the plaintiff should give security for costs.

Right Hon. Dr. Lushington:—The Court of Exchequer has recently decided, in a case of this kind, that the master of a foreign ship suing in this country shall be required to give security for costs, *Nylander* v. *Barnes* (*a*). This precedent I consider myself bound to follow.

The learned Judge then ordered the plaintiff to give security for costs to the amount of 130*l.*

(*a*) 6 H. & N. 509.

1861.
November 12.

THE ALMA.

Salvage by H. M. Ships — Services to Ship and Cargo and Passengers — Consent of Admiralty — 17 & 18 *Vict. c.* 104, *ss.* 484, 485.

Officers and crew of Her Majesty's ships, on receiving, in the usual form, the consent of the Admiralty, as required by the 485th section of the Merchant Shipping Act, 1854, may recover salvage from the owners of ship and cargo for services rendered thereto, and for salvage services rendered to passengers belonging to the ship.

SALVAGE. This was a cause of salvage instituted on behalf of Sherard Osborn, Esq., C.B., the commander, and the officers and crew of Her Majesty's steam ship Furious, and William Pullen, Esq., the commander, and the officers and crew of Her Majesty's steam ship Cyclops, in all 380 men, against the Peninsular and Oriental Steam Navigation Company and others the owners of certain stores and cargo laden on board the late steam ship Alma.

On the 12th of June, 1859, the Alma, a steamer belonging to the Peninsular and Oriental Steam Navigation Company, then on her voyage from Aden to Suez, with a great many passengers, and a valuable cargo, consisting chiefly of silk and indigo, went ashore on the island of Mooshedgerah, one of the Harnish islands in the Red Sea, distant about 180 miles from Aden. A boat was immediately despatched to Mocha to order supplies of water and stores, and thence to the Straits of Babelmandeb to intercept Her Majesty's ship Cyclops, commanded by Captain Pullen, which was then engaged in superintending the laying down of the Red Sea telegraph. On the 14th of June the boat fell in with the Cyclops, and Captain Pullen immediately proceeded in the Cyclops to Mooshedgerah to render assistance. The Alma's boat went on to Aden to report the disaster to the company's agent, and obtain further assistance. On the 15th of June the Cyclops reached Mooshedgerah. The crew and passengers of the Alma were found encamped on the highest part of the island, and much debilitated by the heat and want of water, of which four bottles only remained. The purser of the ship had died from sunstroke. The passengers (115 males, 26 females, and 19 children), 10 stewards, in all 170 persons, and the Admiralty agent with the mails, were taken on board

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the Cyclops, and conveyed to Aden. The captain and crew of the Alma remained by the wreck, in order to save as much property as possible, and also an officer and twenty-one men belonging to the Cyclops remained, to assist, and, as alleged, to keep order amongst the native crew of the Alma, who showed signs of insubordination. The Cyclops also left two tanks of water, and ten tons of water obtained by condensation. On the morning of the 16th of June Her Majesty's ship Furious arrived at Aden from a cruise, and was boarded by Captain Caldwell, the company's agent, who informed Captain Osborn of what had taken place. Captain Osborn immediately started for the wreck, meeting on the way thither the Cyclops with the passengers of the Alma on board. On the 17th of June the Furious reached Mooshedgerah, and under Captain Osborn's directions her crew, assisted by the officers and crew of the Alma, and the twenty men of the Cyclops, set to work to remove everything of value from the Alma. In this work they were engaged for three days, when the Cyclops returned with fifty tanks, four lighters and Arab divers. The work at the wreck continued until the 23rd, by which time all the cargo then accessible was saved, and it appeared that the rescue of the ship was impossible. The Furious then returned to Aden with the greater proportion of the property saved, and delivered the same over to the agent of the Peninsular and Oriental Company. Other property, but of inferior value, was carried on to Suez in the Cyclops, and delivered to the company's agent in that place. A petty officer and ten men of the Cyclops remained at the wreck, and assisted the Arabs in saving further portions of the cargo which became accessible as the wreck broke up; they remained on the island altogether ten weeks. The total value of the property saved was 45,000*l.* The company admitted that the plaintiffs had saved property to the value of 23,000*l.*, but the plaintiffs claimed to have saved a larger proportion.

Captain Osborn stated in his affidavit:—"The island of Mooshedgerah is totally destitute of wood, water, or shelter of any kind. The period of the year at which the said services were performed was the height of the hot season in that latitude, and the heat and drought were extremely oppressive, the thermometer ranging from about 80 degrees to 100 degrees in the shade. The cargo being for the most part under water, the crew (especially for the latter part of the time) were compelled, in extracting it from the hold, to work for the most part wholly or partially immersed, and in some cases the men fainted from over-exertion in diving, and from the effects of noxious gases;

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there was also a most offensive and sickening smell proceeding from the decomposition of the indigo and silk, which formed part of the cargo immersed in the sea water."

Other affidavits were to the same effect; and the surgeon of the Cyclops deposed to the health of some of the men having suffered from their labours at the wreck.

Captain Osborn received the following certificate from the Secretary of the Admiralty, authorizing him to sue :—

"Admiralty, October 22, 1859.

"I hereby certify that the Lords Commissioners of the Admiralty consent to Captain Sherard Osborn, C.B., of H.M.S. Furious, prosecuting his claim as he may be advised, for salvage in respect of services rendered by such ship under his command, in recovering various articles from the wreck of the Peninsular and Oriental Company's steam ship Alma.

"W. G. Romaine."

A certificate in similar form was addressed to Captain Pullen of the Cyclops.

The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), enacts,

"s. 484. In cases where salvage services are rendered by any ship belonging to Her Majesty, or by the commander or crew thereof, no claim shall be made or allowed for any loss, damage or risk thereby caused to such ship, or to the stores, tackle or furniture thereof, or for the use of any stores or other articles belonging to Her Majesty, supplied in order to effect such services, or for any other expense or loss sustained by Her Majesty by reason of such services."

"s. 485. No claim whatever on account of any salvage services rendered to any ship or cargo, or to any appurtenances of any ship by the commander or crew or part of the crew of any of Her Majesty's ships, shall be finally adjudicated upon unless the consent of the Admiralty has first been obtained, such consent to be signified by writing under the hand of the Secretary to the Admiralty; and if any person who has originated proceedings in respect of any such claim, fails to prove such consent to the satisfaction of the Court, his suit shall stand dismissed, and he shall pay all the costs of such proceedings; provided that any document purporting to give such consent and to be signed by the Secretary to the Admiralty, shall be primâ facie evidence of such consent having been given."

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The *Queen's Advocate* and *Clarkson* for the plaintiffs.

Deane, Q.C., for the defendants.

Dr. Lushington, in the course of his judgment, said:—The passengers and crew of the Alma were undoubtedly exposed to great peril in being without shelter, and almost without water, on this barren island of Mooshedgerah, in the heat of a fierce tropical season; and from this peril they were relieved by the timely succour of the Cyclops. But Dr. Deane has contended that for these services, as distinguished from their general services to ship and cargo, the plaintiffs are not intitled to reward, because they have received no special permission of the Admiralty. I am not of that opinion. The consent of the Admiralty to these proceedings has been obtained in the usual form, and that is sufficient; and I consider myself perfectly at liberty to follow the ancient practice of the Court, and allow the salvors additional remuneration for services rendered to life simultaneously with the services rendered by them to ship and cargo. By the Merchant Shipping Act no salvage can be recovered for the mere use of Her Majesty's ships or stores, and the claims of the plaintiffs are therefore limited to their personal services. Looking to the exposure and risk of sickness which they incurred, the risk from which they rescued the passengers and crew of the Alma, the large value of the property saved by their exertions, and in short, all the circumstances of the case, I decree 4,000*l.*

The consent of the Admiralty in the usual form covers the services of the plaintiffs to the passengers, as well as services to ship and cargo; and the plaintiffs are intitled to reward for all such services.

Burchett, proctor for the plaintiffs.

Skipwith for the defendants.

1861.
December 9.

In the Privy Council.

Present—Lord Kingsdown.
The Master of the Rolls.
Sir Edward Ryan.
Sir John T. Coleridge.

THE GEORGE ARKLE.

Collision—Admiralty Regulation as to Coloured Lights—Vessel under Way—Negligence.

A vessel driven from her anchors by a gale of wind, and setting sail to get out to sea, is, even if wholly unmanageable, "under way," within the meaning of the Admiralty regulation (1858), and is bound to exhibit coloured lights.

Omission, under such circumstances, to exhibit the coloured lights, is negligence, notwithstanding the ship is in great difficulty and danger, and the ship is liable for any collision occasioned thereby.

COLLISION. This was an action brought by the owners of the Violet against the George Arkle for a collision which took place in Yarmouth Roads, between 9 and 10 P.M. on the night of the 17th November, 1860. Both were British vessels. The wind was blowing a gale from the northward, and the tide was setting with the wind. The Violet was riding head to wind and tide, at single anchor, with her helm lashed astarboard, and was carrying her regulation anchor-light. According to the evidence of the master and mate, they descried the George Arkle at the distance of about one quarter of a mile right ahead, without lights, and could not make out which way she was standing, until close to, when it was too late for them to take any measure to prevent the collision; and they deposed that if the George Arkle had carried her red light, they would have ported the helm of the Violet, as soon as the red light was seen, and so have avoided the collision.

The defendants, the owners of the George Arkle, pleaded that the collision was an inevitable accident, and proved the following facts. About 5·30 P.M. of the evening of the 17th November, the George Arkle, then at anchor in Winterton Roads, was run into by a vessel called the Charlemagne, and lost thereby cutwater, bowsprit, and all headstays and head-gear, which remained under the bows, and the vessels laid in collision until 7 o'clock; about 8.15 P.M. the George Arkle parted from both her anchors, and the pilot and master there-

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upon resolved, out of necessity, to put out to sea, to hang out the gale, and then run into the first suitable port to repair. With this view the maintopmast staysail was set, but it was almost immediately blown away; the foresail was also dropped, and the fore and main topsails, but the topsail sheets were not sheeted home, nor the topsail yards hoisted, partly on account of the headstays being gone. The ship thus drove before the wind, and great difficulty was found in steering her from the want of headsail, and from the wreck of the bowsprit and a considerable length of the port chain hanging under her bows. The chain was then slipped, and the ship partially steered by working the yards by the braces; but in a short time the ship struck upon the Scroby Sand. After beating over the sand for a few minutes she cleared it, and then proceeded through the Cockle-Gat. A few minutes after 9 P.M. the wheel chains of the vessel broke, and the vessel became wholly unmanageable, and drifted upon a schooner at anchor. Almost immediately afterwards the George Arkle, being still quite unmanageable, drifted with her port broadside upon the Violet, and afterwards into another vessel, and the pilot and master of the George Arkle then, after consultation, beached the vessel to prevent further damage. No coloured lights were at any time exhibited on board the George Arkle, but at the time of the collision with the Violet, it was deposed that a white light was being carried in her port rigging.

The following are the Admiralty Regulations (24 Feb. 1858,) concerning Coloured Lights, referred to in the arguments and judgments:—

"1. All sea-going sailing vessels, *when under way*, or being towed, shall, between sunset and sunrise, exhibit a green light on the starboard side, and a red light on the port side of the vessel, and such lights shall be so constructed as to be visible on a dark night with a clear atmosphere, at a distance of at least two miles, and shall show an uniform and unbroken light over an arc of the horizon of ten points of the compass, from right ahead to two points abaft the beam on the starboard and on the port sides respectively.

"2. The coloured lights shall be fixed, whenever it is practicable so to exhibit them; and shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent the lights from being seen across the bow.

"3. When the coloured lights cannot be fixed (as in the case of small vessels in bad weather), they shall be kept on deck

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between sunset and sunrise, and on their proper sides of the vessel, ready for instant exhibition, and shall be exhibited in such a manner as can be best seen on the approach of, or to, any other vessel or vessels in sufficient time to avoid collision, and so that the green light shall not be seen on the port side, nor the red light on the starboard side."

17 & 18 Vict. c. 104, s. 295, after providing that the Admiralty shall make and publish Regulations, enacts,

"(4.) All owners and masters shall be bound to take notice of the same, and shall, so long as the same continue in force, exhibit such lights, and use such fog signals, at such times, within such places, in such manner, and under such circumstances, as are enjoined by such regulations, and shall not exhibit any other lights or use any other fog signals; and in case of default, the master, or the owner of the ship, if it appears that he was in fault, shall, for each occasion upon which such regulations are infringed, incur a penalty not exceeding 20*l*."

The 299th section of the same Act enacts,

"In case any damage to person or property arises from the non-observance by any ship of any of the said rules, such damage shall be deemed to have been occasioned by the wilful default of the person in charge of the deck of such ship at the time, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary."

The case was tried in the Admiralty Court on the 6th of July, 1861.

The *Queen's Advocate* and *Tristram*, for the plaintiffs.

Deane, Q. C., and *Robinson*, for the defendants.

Dr. Lushington, in the course of his address to the Elder Brethren, said:—"The George Arkle at the time of the collision had not the lights required by the Admiralty Regulation, which, as you well know, begins with these words, 'All sea-going sailing vessels, when under way or being towed, shall, between sunset and sunrise, exhibit a green light on the starboard side, and a red light on the port side.' I shall ask you, therefore, whether, under the circumstances, the George Arkle was 'under way.' If you consider she was 'under way,' I have no hesitation in saying that she was to blame for not exhibiting the coloured lights. The lights could have been put

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up by those on board the George Arkle, if they had taken notice of the obligation imposed upon them. Secondly, did the non-observance of the Admiralty Regulation, by those on board the George Arkle, contribute to occasion the collision? In other words, if the lights had been properly exhibited, would they not have given warning to the Violet of the course the George Arkle was coming, and have enabled her to take measures whereby collision would probably have been avoided?"

The learned Judge, with the advice of the Elder Brethren, found the George Arkle solely to blame, on the ground that she was bound to have carried the coloured lights, and that the want of such lights contributed to occasion the collision.

From this decree the owners of the George Arkle appealed.

Deane, Q.C., and *Lushington*, for the appellants.—We contend that the owners of the George Arkle are not liable for this collision. There was, under the circumstances, no obligation to carry the coloured lights. 1st. The vessel was unmanageable, and therefore not "under way" within the true meaning of the Admiralty Regulation. The purpose of the coloured lights is to indicate the course in which a manageable vessel is proceeding; an unmanageable vessel has no course or direction of her own, but drives at the mercy of the winds and waves; and coloured lights exhibited on board a vessel in such a condition would only mislead. In the case of the *Smyrna*, decided May, 1860(*a*), Dr. Lushington ruled, that a vessel dredging with her anchor down was not bound to carry coloured lights. 2ndly. The appellants are only liable if they have been guilty of a want of common care, all the circumstances of the case considered. Even if the vessel was under way, the mere non-carrying of the lights does not necessarily amount to culpable negligence. The second and third rules touching coloured lights show that there may be circumstances which may excuse the non-carrying of the lights; and the penal clause of the Merchant Shipping Act (s. 295) expressly only inflicts the penalty on the master or owner of the ship, "if it appears that he is in fault." So section 299 assumes, that there may be cases in which the circumstances render a departure from the rule necessary. It is submitted that the circumstances of extraordinary difficulty and danger which beset those on board the George Arkle constitute a sufficient excuse for not exhibiting the coloured lights. 3rdly.

(*a*) Not reported.

1861. *December 9.* It is not sufficiently proved that the non-exhibition of the coloured lights contributed to the collision. The Violet being at anchor was not bound to take measures to avoid a ship under way; on the contrary, she was bound to remain passive, so as to give the vessel under way the option of passing on either side. The collision was, in truth, an inevitable accident.

The *Queen's Advocate* and *Tristram*, for the respondents, were not called upon.

Judgment. Lord Kingsdown delivered the judgment of the Court:—Their Lordships have consulted the nautical gentlemen who assist the Court, and are of opinion that the George Arkle was "under way," and was bound to have exhibited the coloured lights according to the Admiralty Regulation. They are further of opinion that the unmanageable condition of the vessel was immaterial; for, upon the evidence given by those on board the Violet, the Violet might and probably would have avoided the collision, if any coloured light had been exhibited on board the George Arkle. The judgment of the Court below must therefore be affirmed, with costs.

Deacon, proctor for the owners of the George Arkle, appellants.

Fielder, for the owners of the Violet, respondents.

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In the Privy Council.

Present—Lord Kingsdown.
The Master of the Rolls.
Sir Edward Ryan.
Sir John T. Coleridge.

THE EARL OF AUCKLAND.

Collision — Compulsory Pilotage — Ship carrying Passengers trading to North of Boulogne—6 *Geo.* 4, *c.* 125, *s.* 59—17 *&* 18 *Vict. c.* 104, *ss.* 353, 376, 379—17 *&* 18 *Vict. c.* 120, *ss.* 3, 4.

The exemptions from compulsory pilotage, given by 6 Geo. IV. c. 125, s. 59 (supplemented by the Order in Council, Feb. 18, 1854), are maintained by the 353rd section of the Merchant Shipping Act, 1854, and qualify ss. 376, 379, of that Act. *R.* v. *Stanton* (*a*) followed.

A British ship coming from a port north of Boulogne, and carrying passengers, is not bound to employ a licensed pilot in the river Thames.

THIS was an appeal from the judgment of the High Court of Admiralty, reported *ante*, p. 164, where the facts and arguments are fully reported, and the various enactments set out.

Deane, Q. C., and *Lushington*, for the owners of the Earl of Auckland, the appellants, argued as in the Court below, upon the construction of ss. 353, 376, 379, of the Merchant Shipping Act, 1854, and upon *R.* v. *Stanton* (*a*). During the argument, Sir John Coleridge called attention to the words in s. 376, "in addition to the penalty hereinbefore specified," as indicating that s. 376 might be considered as subject to the exemptions maintained by s. 353. To this Dr. Deane replied, that the words only fortified the obligation otherwise contained in s. 376.

Twiss, Q.C., and *Clarkson*, for the respondents, were not called upon.

Lord Kingsdown:—Their Lordships are of opinion that this appeal must be dismissed, and with costs. To reverse the decision of the Court below, they must be satisfied that that Judgment.

(*a*) 8 E. & B. 445.

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decision, and the decision of the Court of Queen's Bench, on which it was founded, were erroneous. But their Lordships are of opinion that the decision of the Court of Queen's Bench was correct, and imposed a right construction upon the statute.

Rothery, proctor for the appellants.

Clarkson, for the respondents.

In the High Court of Admiralty.

THE MILAN.

Collision — Owner of Cargo suing — Both Ships to blame — Admiralty Rule — 17 & 18 *Vict. c.* 104, *s.* 298.

The 298th section of the Merchant Shipping Act, 1854, which enacts, that in certain cases of collision the owner of a *ship* shall not be intitled to recover, does not apply to the owner of cargo suing.

The negligent navigation of a carrying vessel is not in law the negligence of the owner of the cargo carried, if he is not the owner of the ship; but the rule in the Admiralty Court, that the plaintiff in a cause of collision recovers half damages where both ships are to blame, applies to the case of owner of cargo suing alone.

Thorogood v. *Bryan* (*a*), not followed.

In a cause of collision brought against vessel B by the owners of cargo laden on board vessel A, the Court found both vessels to blame, and vessel A for a breach of the rule imposed by s. 296 of the Merchant Shipping Act. *Held*, that the plaintiffs should recover one half of their damages.

COLLISION. This was a cause instituted by British subjects, owners of part of the cargo laden on board the British brig Lindisfarne, which was sunk by a collision with the British steamer Milan. On the 28th of November, the cause was heard before the Court, assisted by Trinity Masters, and upon their advice the Court held that both vessels were to blame, the Milan for proceeding at an undue rate of speed, the Lindisfarne for non-observance of the rule of port helm prescribed by the 296th section of the Merchant Shipping Act, 1854 (*b*).

On a subsequent day, the right of the plaintiffs upon this

(*a*) 8 C. B. 129.

(*b*) A question having also arisen whether the Lindisfarne had exhibited proper fog-signals, according to the Admiralty Regulation, 24 Feb. 1858, and 17 & 18 Vict. c. 104, s. 295, the Trinity Masters also found that the Lindisfarne, which was proceeding in a fog, steering East, with the wind W.S.W., and carrying topgallant studding-sails set both sides, was, nautically speaking, "on the starboard tack:" but as they did not further find that the accident was occasioned by the want of due fog-signals, or by improper fog-signals, the finding as to the starboard tack became immaterial.

state of facts was argued. The following sections of the "Merchant Shipping Act, 1854," were referred to in the argument and judgment:— 1861. *December* 17.

"s. 298. If in any case of collision it appears to the Court before which the case is tried, that such collision was occasioned by the non-observance of any rule for the exhibition of lights or the use of fog signals issued in pursuance of the powers hereinbefore contained, or of the foregoing rule as to the passing of steam and sailing ships, or of the foregoing rule as to a steam ship keeping to that side of a narrow channel which lies on the starboard side, the owner of the ship by which such rule has been infringed shall not be intitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary."

"s. 299. In case any damage to person or property arises from the non-observance by any ship of any of the said rules, such damage shall be deemed to have been occasioned by the wilful default of the person in charge of the deck of such ship at the time, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary."

Edward James, Q.C., *Milward* and *Lushington* for the plaintiffs.—The first contention of the plaintiffs is that they are not barred from recovering by s. 298 of the Merchant Shipping Act. That section, though not in form penal, is a disintitling enactment; it takes away a remedy; in effect, where applicable, it imposes a penalty in this Court to the amount of half the damage suffered, which otherwise by the maritime rule would be recoverable; it is therefore to be strictly interpreted. The language of the section does not include owners of cargo, it only says that "the owner of the *ship* shall not be intitled to recover for any damage sustained by such *ship*." These terms are specific and limited; and not only is cargo different from ship, but the owner of the ship is most frequently, and in this case was, a different person from the owners of the cargo. In the interpretation clause, s. 2, "ship" is defined to "include every description of vessel used in navigation not propelled by oars." Ship cannot mean cargo. If owners of cargo carried in the offending ship were to be affected, they would have been expressly mentioned, as in s. 504, which limits the liability of the shipowner against claims of damage by shipowner or owner of goods or passenger. And if in s. 298 the word "ship" is to be stretched to include cargo, there is no reason why it should

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not be further stretched to mean "passenger;" and thus bar the right of the passenger injured by a collision of this kind to sue at common law, or, in case of his death by the accident, the right of his representative to sue under Lord Campbell's Act. Can it be considered that such was the intention of the enactment? Even granting the intention, it is not expressed, *quod voluit non dixit.* No such intention appears. Part IV. of the Act, to which s. 298 belongs, and which is intitled "Safety and prevention of accidents," throughout deals with the obligations of shipowners and masters only; it makes no reference anywhere to owners of cargo, except in s. 329, where, for the benefit of the shipowner, a penalty is enacted against any person sending dangerous goods on board a vessel without notice. The owner of the cargo ought not to suffer for the breach of the rule of navigation; he is innocent, and the master, who is the guilty party, is not his servant. Section 299 enacts that "in case any damage to person or property arises by the non-observance by any ship of any of the said rules"—a field apparently wider than that covered by s. 298—"such damage shall be deemed to have been occasioned," that is "occasioned in part," as in s. 298, "by the wilful default of the person in charge of the deck." Before the passing of the Act the plaintiffs would have been intitled to recover at least one half damages, *Hay* v. *Le Neve* (*a*); *Vaux* v. *Sheffer* (*b*); and since the Act the old Admiralty rule has been carried out except where superseded by the statute. It has even been carried out, when it operated inequitably, as in the case of the *Aurora* and the *Robert Ingham* (*c*). There is no precedent deciding that owners of cargo are affected by s. 298. In the *James* (*d*), the plaintiff sued on behalf of ship and cargo, and was held barred by the statute, but the distinction between ship and cargo was not taken, and it does not appear that the plaintiff was not the owner of cargo as well as of ship.

We also contend that the plaintiffs, as owners of cargo, are intitled to recover their whole loss. The defendants were wrongdoers, and the plaintiffs are innocent. The negligence of the master and crew of the Lindisfarne was not, we submit, the negligence of the plaintiffs. It is clear that the owners of cargo sued as defendants could not be responsible for the negligence of master and crew. This was decided in the recent case of the *Victor* (*e*), where the Court said, "The master and crew are not the agents nor the servants of the owners of the cargo;

(*a*) 2 Shaw's Scotch Appeals, 395.
(*b*) 8 Moore, P. C. 75.
(*c*) Ante, p. 327.
(*d*) Swabey, 60; 10 Moore, P. C. 162.
(*e*) Ante, p. 76.

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upon what principle, then, are the owners of the cargo responsible?" But if the owners of cargo are not responsible as defendants, how can they be responsible as plaintiffs? How can they at the same moment, in the same transaction, and towards the same parties, be at once employers and not employers of master and crew? The plaintiffs are not liable for the act of other parties, unless the relation of master and servant exists between them. In *Reedie* v. *The London and North Western Railway Company* (*a*), Baron Rolfe, delivering the judgment of the Court of Exchequer, said, "The liability of any one other than the party actually guilty of any wrongful act, proceeds on the maxim '*qui facit per alium facit per se.*' The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill or care of the person employed; but neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned. The doctrine of *Quarman* v. *Burnett* (*b*) has since been acted on in this Court, in the case of *Rapson* v. *Cubitt* (*c*), and in the Court of Queen's Bench, in *Milligan* v. *Wedge* (*d*), and *Allen* v. *Hayward*" (*e*). The case of *Reedie* v. *The London and North Western Railway Company* has been continually followed, and the test of master and servant is, By whom is the servant chosen, appointed and controlled? In this case, clearly by the owner of the ship, and not by the owner of the cargo. The rule *Respondeat superior* is not to be extended beyond the necessity of the case; it often operates with hardship; one of its principal purposes is to provide a solvent party only remotely guilty in order to redress wrongs to innocent persons. This is satisfied by making the true employer of the wrong-doer liable; in this case the owner of the ship. One of the most recent decisions on this subject is *Dalyell* v. *Tyrer* (*f*). There Hetherington, the owner of a ferry, had contracted with the defendants for the use of a steamer with tackle and crew for the day, and the plaintiff was a passenger, having a season ticket under a contract with Hetherington; an accident happened to the plaintiff through the mismanagement of the master and crew; and it was held that the plaintiff had a right to recover against the defendants. Erle, J., says, p. 905, "The question is, are the defendants liable for that negligence? They

(*a*) 4 Exch. 255.
(*b*) 6 M. & W. 499.
(*c*) 9 M. & W. 710.
(*d*) 12 A. & E. 737.
(*e*) 7 Q. B. 960.
(*f*) E. Bl. & E. 899.

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were by their crew in possession of the vessel; and I am of opinion, that if the negligence in question had injured a mere stranger not on board, but standing, for instance, on the pier at the time, they would have been liable. That is established by *Quarman* v. *Burnett* (*a*) and *Fenton* v. *The City of Dublin Steampacket Company* (*b*). Then can the plaintiff lose a right of action which he would have had as a stranger, merely because he was a passenger for hire to Hetherington, and not to the defendants? He clearly loses no right of action against them, though he may possibly acquire an additional right against Hetherington." This case, therefore, shows that the crew of the Lindisfarne were the servants of the shipowner only, and that the owner of the cargo (who stands in the same position as a passenger) is to be considered as a stranger; it also shows, if any authority were necessary, that having a remedy under a contract against a third party is no hindrance to recovering in tort against a stranger, who is the wrong-doer. The defendants will probably rely on *Thorogood* v. *Bryan* (*c*), where it was held that a passenger on an omnibus was so far identified with the owner of the omnibus that he could not recover against the owner of another omnibus, if both drivers were to blame. But that case proves too much; it would make the passengers or owners of cargo liable as defendants, which they certainly are not; and accordingly it has long been marked as a bad authority in the profession. In *Smith's Leading Cases* (4th ed.), in the notes to *Ashby* v. *White* (*d*), the learned editors say, "If two drunken stage-coachmen were to drive their respective carriages against each other and injure the passengers, each would have to bear the injury to his own carriage, no doubt; but it seems highly unreasonable that each set of passengers should, by a fiction, be identified with the coachmen who drove them, so as to be restricted for remedy to actions against their own driver or his employer. This, nevertheless, appears to be the result of the decision in *Thorogood* v. *Bryan*, but it may be questioned whether the reasoning of the Court in that case is consistent with those in *Rigby* v. *Hewitt* (*e*), and *Greenland* v. *Chaplin* (*f*), or with the series of decisions from *Quarman* v. *Burnett* (*g*) to *Reedie* v. *The London and North Western Railway Company* (*h*). Why in this particular case both the wrong-doers should not be considered liable to a person free from all blame, not answerable for the acts of either

(*a*) 6 M. & W. 499.
(*b*) 8 A. & E. 835.
(*c*) 8 C. B. 115.
(*d*) Page 220.
(*e*) 5 Exch. 240.
(*f*) 5 Exch. 243.
(*g*) 6 M. & W. 499.
(*h*) 4 Exch. 244.

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of them, and whom they have both injured, is a question which seems to deserve more consideration than it received in *Thorogood* v. *Bryan*." This passage was referred to, apparently with approval, by Mr. Justice Williams, in the argument in *Tuff* v. *Warman* (*a*).

Further, many rules of maritime law, well-established both in this Court and the courts of common law, show that the master of the ship is not the general agent of the owners of cargo, but is only occasionally constituted agent of the cargo by necessity, and for the benefit of cargo; *Gratitudine* (*b*). Thus, in general average, the owners of cargo do not contribute, unless the act is extraordinary and for their benefit, as well as for the benefit of ship. So in bottomry, though the master can hypothecate the cargo for the ship's necessary repairs, and the cargo may be forced to pay the bond, cargo cannot be resorted to until ship and freight are exhausted, and the ship-owner may then, by a personal action, be compelled to refund; *Duncan* v. *Benson* (*c*). So in salvage; the master may bind the cargo by a salvage agreement, but only in case of necessity, and for the good of cargo. The law thus reduces the agency of the master towards the cargo to a minimum, and only allows it for the benefit of cargo. But the defendants seek to impose an agency for the burden of cargo.

It may be said that the distinction taken by the plaintiffs is a novel one, and that hitherto the owners of cargo have suffered with the owners of ship. This may be true, but the point, having never been raised, has never been decided. In all the reported cases upon the maritime rule of dividing damages, either the plaintiffs have been owners of ship only, or else owners of ship and cargo, where it may well be that ship and cargo were owned by the same parties; *Woodrop—Sims* (*d*); *Hay* v. *Le Neve* (*e*), and the case of the *Petersfield*, there quoted (*f*). Thus, in *Hay* v. *Le Neve*, Lord Gifford's judgment begins (*g*): "This is an appeal which arose out of proceedings originally in the Admiralty Court of Scotland, and afterwards in the Court of Session, instituted by the *owners of a vessel* called the Wells, against the owners of a vessel called the Sprightly, *for the damage which the owners of the Wells* had sustained, in consequence of that vessel having been run down and sunk, and the property destroyed, by the ships striking." To all such cases

(*a*) 2 C. B. (N. S.) 750.
(*b*) 3 C. R. 261.
(*c*) 1 Exch. 557; 3 Exch. 655.
(*d*) 2 Dods. 83.
(*e*) 2 Shaw's Scotch Appeals, p. 395.
(*f*) Page 403.
(*g*) Page 400.

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the maxim applies, *vigilantibus non dormientibus succurrit lex.* Precedent thus being wanting, resort must be to general principles of law, and on those principles the plaintiffs are intitled to recover in full against the wrong-doer.

The defendants may contend that it is a hardship to make them pay not only for their own negligence, but for the negligence of others. But no rule is more securely established than that tortfeasors are jointly and severally liable. The plaintiff may choose whom he will of his wrong-doers to sue, and he generally chooses not him who did the most wrong, but him who is most solvent; thus he chooses the employer, personally innocent, who can pay; not the servant, the actual wrong-doer, who cannot pay. Were it not so, an innocent party, suffering wrong, would often be without redress. It is therefore submitted that the defendants are responsible for the whole amount of the plaintiffs' loss.

Brett, Q.C., and *Clarkson*, for the defendants.—We contend, 1st. That the plaintiffs, as in the case of the *James* (*a*), are barred from recovering anything by s. 298 of the statute. It is true that the statute only uses the word "ship," but "ship" is here meant to include cargo. The section begins, "In any case of collision;" and s. 299, which immediately follows, and is closely connected with s. 298, begins, "In case any damage to person or property arises from the non-observance" &c. The argument based on the mention of goods in s. 504, is answered by the observations of Lord Justice Turner, in *Cope* v. *Doherty* (*b*):—"This Act is divided into several parts, each of which relates to a distinct and independent branch of merchant shipping law. The Act indeed may well be considered as embodying several distinct Acts in one Act; and one part of the Act therefore throws no further light upon the other parts of it than would be cast upon them by the existence of other separate and distinct enactments to the same effect." It would be an inequitable and almost ridiculous result, if the owner of the ship could not recover, and the owner of the cargo carried in the ship could recover. Every presumption is to be made against a construction leading to such a result: and s. 298 is not a penal enactment, as the plaintiffs argue, but a rule regulating the law of liability in cases of collision in the Admiralty Court, and bringing it into correspondence with the municipal law of England. The ancient rule followed in the Admiralty Court is properly a rule for cross-

(*a*) Swabey, 60. (*b*) 2 De G. & J. 622.

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actions, where both vessels are held to blame: its effect was not that either might recover, but that neither might recover, and then, by a *rusticum judicium*, it divided the damages between the contending parties. In the Admiralty Court the cargo is considered part of the ship, and it is only in recent times that owners of cargo have appeared as plaintiffs in this Court; the Court looks to the maritime property, the ship; and the cargo follows the fate of the ship in which it is carried. Thus often the owner of the ship sues on behalf of ship and cargo; and often, too, actions, one on behalf of ship, and the other on behalf of cargo, are consolidated and tried together. If therefore the owner of the ship is barred by the statute from recovering in the Admiralty Court, so should be the owners of cargo.

2ndly. The contention of the plaintiffs to recover in full is wholly unwarranted by authority or practice. There is no precedent or authority, or even suggestion, that before the statute the owners of cargo stood in a better position than the owners of the vessel carrying the cargo. The case of *Hay* v. *Le Neve*, which has been referred to, proves this, for there the action was brought on behalf of ship and cargo; the rule was discussed and no such distinction was drawn. The comment on this case in Abbott on Shipping (*a*) is, "It appears from the decision of the House of Lords above cited, that in the Court of Admiralty, where both vessels are in fault, the value of the cargo damaged or lost by the collision of the two vessels is to be included in the estimate on which the apportionment is made." So, in Kent's Commentaries (*b*). So Maclachlan, in his work *The Law of Merchant Shipping* (*c*), says: "The maritime law of this country, founding upon clear evidence of blame on both sides, as contributing to the collision, estimates the damage done to the ships and cargoes, and equally divides the burden between the ships, subject only to the limit set by our municipal law to the owner's responsibility." In this view, therefore, the utmost the plaintiffs would be intitled to recover is half damages.

3rdly. If the question is open, apart from statute law and Admiralty custom, the plaintiffs cannot recover anything. This was decided in *Thorogood* v. *Bryan* (*d*), and still continues the law. The question was fully argued, and was pronounced upon by Justices Coltman, Maule, Cresswell and Williams. Thus Coltman, J., says (*e*), "It appears to me, that having trusted the

(*a*) Page 529 (10th edit.).
(*b*) Vol. III. p. 323 (10th edit.).
(*c*) Page 277.
(*d*) 8 C. B. 115, 129.
(*e*) Page 130.

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party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants, that if any injury results from their negligence, he must be considered a party to it. In other words the passenger is so far identified with the carriage in which he is travelling, that want of care on the part of the driver will be a defence of the driver of the carriage which directly caused the injury." So Maule, J. (*a*), "Although I at one time entertained a contrary impression, upon further consideration I incline to think that, for this purpose, the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased. If the deceased himself had been driving, the case would have been quite free from doubt. So there would have been no doubt, had the driver been employed to drive him and no one else. On the part of the plaintiff it is suggested, that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom by his servant the driver he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it. According to the terms of his contract, he has unquestionably a remedy for any negligence on the part of the person with whom he contracts for the journey. And it seems strange to say, that although the defendant would not, under the circumstances, be liable to the owner of the other omnibus for any damage done to his carriage, he would still be responsible for an injury to a passenger." And Mr. Justice Maule had, during the argument, observed (*b*), "When a man has a wrong done to him by several tort-feasors, he clearly has a right of action against some of them." Cresswell, J., says (c), "If the driver of the omnibus the deceased was in, had by his negligence or want of due care and skill contributed to any injury from a collision, his master clearly could maintain no action. And I must confess I see no reason why a passenger who employs the driver to convey him stands in any better position." And Williams, J. (*d*): "I am of the same opinion; I think the passenger must, for this purpose, be considered as identified with the person having the management of the omnibus he was conveyed by." A similar judgment was about to be given at the same time in *Cattlin* v. *Hills*, where the plaintiff was a passenger on board a steam-boat, and it was only prevented by a compromise between the parties (*e*). This decision has never

(*a*) Page 131. (*b*) Page 129. (*c*) Page 133.
(*d*) Ibid. (*e*) Ibid.

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been overruled, and, it is submitted, is now binding on this Court. The rule of law it imposes has been acquiesced in, notwithstanding the many cases which must have arisen in which it might have been questioned, which is an additional reason for its now being maintained. As regards the rights of owners of cargo, this argument applies with great force, for all contracts of affreightment and insurance must have been based upon an assumption of this rule of law prevailing. Up to the present time this rule of law has been continually acted upon, never put in question; and the claim now put forward for owners of cargo is unwarranted by law or custom. It is therefore submitted that the plaintiffs are barred altogether from recovering.

Judgment.

On the 17th of December, DR. LUSHINGTON gave judgment.

Facts of the case.

The present cause was instituted by owners of part of the cargo laden on board of the brig Lindisfarne, against the owners of the steamship Milan, for a collision between the two vessels, whereby the property of the plaintiffs was sunk and destroyed. Both are British vessels. The result of the finding of the Court upon the facts is, that the Milan was to blame for this collision for a fault not mentioned in the Merchant Shipping Act, and that the Lindisfarne was to blame for non-observance of the rule imposed by the 296th section of that Act.

Upon this finding several most important questions have been raised and elaborately argued.

On behalf of the plaintiffs, it is contended:—First, That they are intitled to recover their whole loss sustained. Secondly, If not intitled to recover the whole, then a moiety.

By the law of the Admiralty Court respecting damage by collision, the owner of cargo, as well as the owner of ship, was intitled to recover in full, if the opposing ship was solely to blame.

By the ancient law of the Admiralty with respect to damage by collision, whether the damage was occasioned to ship or to cargo, the mode of proceeding was twofold, either by an action *in rem* or by an action *in personam*; and in either form of action the whole damage might be recovered, if the party defendant was solely to blame. These remedies were equally open to the owner of ship and to the owner of cargo. In ordinary practice, the owner of the cargo did not sue alone; but that really makes no difference in the legal view of the question. In many cases there might be reasons why the owner of the ship would not proceed; he might be insured, and the underwriters might not be disposed to enter on a lawsuit, or he might have com-

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promised. None of these circumstances could exclude the owner of cargo from his action against the adverse ship or its owner, more especially as he might not have any claim against the owner of the ship which carried his goods, as when the latter was not to blame for the collision.

Where both ships were in fault, the Admiralty law divided the damages of the owners of the ships;

This being the general law, I will now consider to what modifying rules it is subject, either by the Admiralty law or by statute. The first of these is, that by the law of the Admiralty, as it is called, if the owner of one ship bring an action against the owner of another ship for damage by collision, and both ships be found to blame, the party proceeding recovers only a moiety of his damage; if there is a cross action, the damages are divided, each party recovering half his own loss. It must be remembered that I am speaking now of ships only, not of cargoes.

Secondly, there are statutory provisions, at which I need only glance, whereby the ship-owner is relieved of responsibility for the default of a licensed pilot employed by compulsion of law, and in certain cases his liability is limited to the value of his ship and freight.

but this rule is now qualified by s. 298 of the Merchant Shipping Act.

Thirdly, the 298th section of the Merchant Shipping Act 1854 in certain cases deprives the owner of a ship of the right to recover at all. That section is as follows:—

"If in any case of collision it appears to the Court before which the case is tried, that such collision was occasioned by the non-observance of any rule for the exhibition of lights, or the use of fog signals issued in pursuance of the powers hereinbefore contained, or of the foregoing rule as to the passing of steam and sailing ships, or of the foregoing rule as to a steamship keeping to that side of a narrow channel which lies on the starboard side, the owner of the *ship* by which such rule has been infringed shall not be intitled to recover any recompense whatever for any damage sustained *by such ship* in such collision, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary."

This section does not apply to the owner of cargo; the terms used, and the nature of the enactment, being considered.

So much relates to the ship: now as to the cargo. I will first consider the question whether this section of the Merchant Shipping Act, which I have just read, applies to the owner of cargo; that is to say, whether the owner of a cargo on board a ship which has infringed the statute, and so contributed to occasion the damage, is prohibited by this section from recovering any compensation whatever from the owner of the other ship, which

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is likewise in fault. It is perfectly clear that *primâ facie* this section does not apply to the owner of cargo. The plain grammatical sense of the section does not include the owner of cargo, and I feel considerable doubt whether I am at liberty to look further. I have a great repugnance to construing a statute by what may be called extrinsic evidence; I deem it the safer course to abide by the plain meaning of the words, when they convey a distinct idea and do not sound to folly. It is however said that in other parts of this statute, and in other statutes, and by the practice and usage of courts of justice, the word "ship" includes cargo. But is this really so? In the Merchant Shipping Act itself there is nothing that I can discover tending to introduce this latitude of interpretation; on the contrary, Mr. Milward has very properly directed the attention of the Court to the interpretation section (s. 2), where "ship" is defined to "include every description of vessel used in navigation not propelled by oars," and after that definition it is almost impossible to say that *expressio unius* is not *exclusio alterius*. The 504th section leads to the same inference. The legislature, intending to limit the liability of ship-owners, does not confine itself to the use of the word "ship" as including the cargo, but having spoken of damage to "any ship or boat," adds specifically, "or to any goods, merchandise, or other things whatsoever on board." Why should the Court, in construing the 298th section, put a more extensive construction on the word "ship" than parliament has done in the 504th? Again, has there been any course of proceeding in the Admiralty Court favouring the suggestion that the ship may include the cargo? Have the owners of a ship suing for damage by collision ever recovered for the damage done to the cargo laden on board the ship? I know not of any such practice. When damage has been pronounced for, reference is always made to the registrar and merchants to assess that damage, and restitution can be made only to those who are parties to the suit, and whose ownership of the property damaged is proved or admitted. Actions indeed are seldom brought by the owners of the cargo alone, when no action is brought by the owners of the ship, but that is easily accounted for; the owners of the ship know all the facts of the collision, have the control of the master and crew and all the material witnesses; the owners of the cargo are comparatively strangers.

The broad distinction between ship and cargo is forcibly put by Lord Stowell in the case of the *Dundee* (*a*). Having to determine the meaning of the phrase "appurtenances to a ship," he

(*a*) 1 Hag. 122.

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says:—"A cargo cannot be considered as appurtenances of the ship, being that which is to be disposed of at the foreign port for money, or money's worth vested in a return cargo. Its connection with the ship is merely transitory, and it bears a distinct character of its own. But those accompaniments that are essential to a ship in its present occupation not being cargo, but totally different from cargo, though they are not direct constituents of the ship (if indeed they were, they would not be appurtenances; for the very nature of an appurtenance is, that it is one thing which belongs to another thing); yet if they are indispensable instruments, without which the ship cannot execute its mission and perform its functions, it may, in ordinary loose application, be included under the term *ship*, being that which may be essential to it, as essential to it as any part of its own immediate machinery."

But again, in the plain construction of the 298th section, limiting the word "ship" to mean ship and ship only, there is no injustice, repugnancy or incongruity, for there is a wide difference between the owner of cargo suing and the owner of the ship. The owner of the ship has the appointment of the master and other officers, and the active control over them; if the law be violated by his agents, there is no injustice in visiting the consequences upon him; he alone can take precautions against the occurrence of negligent or erroneous navigation, whereas to visit the errors of the master and crew upon the owner of the cargo is to inflict a loss upon one who has no power, directly or indirectly, to prevent the misconduct which occasioned the disaster. For these reasons I shall hold that the plaintiffs, who are owners of cargo, are not barred by the statute from recovering in this action.

The right of the plaintiffs considered, apart from the statute.

The next question is, so far as I know, now distinctly raised for the first time, and is of great importance. It is this, whether, apart from the statute, both ships being to blame, the owner of goods carried in one ship is intitled to recover against the other ship, and if so, whether the whole of his loss or a moiety only.

I think that this case should be viewed in several aspects. First. What is the abstract justice of the case, if I am justified in using that term? Secondly, Has there been any rule or practice in the Court of Admiralty; and Thirdly, Is there any principle or decision in common law, which ought to influence the judgment of the Court?

Now as to the first head, it is most clear, that when A. has

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received a loss from the misconduct of B. and C., A. ought to have a full and complete recovery, but it is not so clear that A. should be intitled to recover from one the whole amount of the damage, which has been occasioned by the acts of both. Strict justice would say that the burthen of making good the loss should fall upon the two delinquents in proportion to their delinquency; but in practice that proportion is impossible to be ascertained. The only inference that I can draw from this view of the matter is, that beyond all doubt an action would be maintainable by the owners of cargo against the owner of either vessel, but to what extent damage should be recoverable against one party only is left an open question.

Practice in the Admiralty Court and the Court of Appeal, that when both ships are to blame, the owner of cargo as well as the owner of ship, recovers from the owner of the other ship only a moiety of his damage.

Secondly, the practice of the Court of Admiralty appears to have been uniform, that where both ships are to blame and where the provisions of the statute do not interfere, the owners of cargo, equally with the owners of ships, recover a moiety of their damage. Thus in the case of *Hay* v. *Le Neve* (*a*), half the value of the cargo was pronounced for. So in the case of the *Anna Kimball* and *Bonito*, decided in 1854, in which both vessels were pronounced to blame, one half of the value of the cargo, estimated at between 5,000*l.* and 6,000*l.*, was recovered. So in the case of the *Marian* and *Kingston-by-Sea*, decided in 1855; so in the *Frederick Warren* and *Alfred*, 1855; in the *Vianna* and *Rossendale*, 1858; and again in the case of the *Palm* and *Josè Maria*, decided in the present year, where the value of the cargo was above 6,000*l.* The same practice also appears to have prevailed in the Court of Appeal; thus, in the case of the *Cambridge* and *Despina*, decided in 1855, where both vessels were pronounced to blame, and where the value of the *Despina's* cargo was 4,645*l.*, one moiety thereof was recovered. So in the case of the *Independence* and *Arthur Gordon*, decided by the Judicial Committee in the present year (*b*).

And this practice rests upon equity towards the ship-owner.

It would seem then to have been the practice, both in the Court of Admiralty and in the Court of Appeal, where both ships are to blame, to decree a moiety of the damage, as well of cargo as of ship. Without entering into the *vexata questio* whether the rule of the Admiralty or the rule of the common law, in cases where both plaintiff and defendant are to blame, is the better or more consonant to justice, the Admiralty rule, as applied to the owner of cargo, would appear to me to rest upon the con-

(*a*) 2 Shaw's Scotch Appeals, 405.

(*b*) The above cases are not reported at all, or do not mention the point in question.

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siderations I have just mentioned, that abstract justice might give a remedy to him against the owner of each vessel in proportion to the culpability of each; but as it is impossible, where both of these are in fault, strictly to apportion the blame, by an equitable though arbitrary rule, or, as it has been called, a *judicium rusticorum*, the opposing ship is made liable to one half only of the damage, and the innocent owner of the cargo is left as to the other half to sue the owner of the ship on board which his goods were carried. I do not see injustice in this arrangement: on the contrary, its purpose is equity.

Common Law rule of liability.

Thirdly. Is there any principle of the common law, or any adjudged case, which ought to lead me either to refuse to give any damages at all, or to decree the full amount of the loss sustained? As to the refusal to decree any damages at all, I must first be satisfied that the case of common law is so strong that I ought to overrule what was done in *Hay* v. *Le Neve*, admitting, however, that the exact point was not there specially raised and considered. With respect to the authority of the superior courts, and of their decisions upon the Court of Admiralty, I apprehend the rule to be that the Court of Admiralty implicitly obeys a decision of the House of Lords, or the Judicial Committee; that it also follows the courts of common law in the construction of statutes (I have lately done so, though with great doubt (*a*)); that it would always decide in consonance with a series of cases adjudged at common law, but that it would not be bound by one or two cases, especially if they had been doubted by the profession.

The general rule that a plaintiff cannot recover if he has by his own negligence contributed to occasion the damage, does not apply to the owner of cargo in cases of maritime collision.

The general rule of common law in cases of damage by collision is that the party injured may recover his whole loss from the owner of the ship negligently causing the injury, but can recover nothing if on his part he has been guilty of any contributory negligence. But there is no case to my knowledge which precisely applies to the present, namely, to an action brought by the owner of a cargo on board one of two delinquent ships. The principle, I apprehend, of this rule of common law is, that a party shall not recover where he himself is in any degree to blame for the loss. Now, cases apart, can it be reasonably contended that the owner of a cargo is responsible for the acts of the master and crew of the vessel in which his goods are laden, he himself not being owner or part owner of the ship? The owner of the cargo does not, it seems to me, commit any negli-

(*a*) Semble in *Earl of Auckland*, ante, p. 178.

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gence contributing to the loss; certainly not by himself personally, certainly not by his agents, for the master and crew are in no respect under his control. It is difficult to conceive how it can be contended that he is *particeps criminis*, when he is not so either as principal or agent. It is argued that he shall be so considered, and deprived of his remedy, because he himself, or his agent, selected the ship by which his goods were carried. But there is, in my judgment, in the mere selection of the ship for the conveyance of his cargo, none of the ingredients which constitute any kind of responsibility for a collision, for I cannot conceive a responsibility for an act done where the individual has not, either by himself or his agent, any power of interference or control.

Thorogood v. *Bryan*.

The case of *Thorogood* v. *Bryan* (*a*), it is said, has laid down a rule to the contrary. With due respect to the Judges who decided that case, I do not consider that it is necessary for me to dissect the judgment, but I decline to be bound by it, because it is a single case; because I know upon inquiry that it has been doubted by high authority; because it appears to me not reconcileable with other principles laid down at common law; and lastly, because it is directly against *Hay* v. *Le Neve*, and the ordinary practice of the Court of Admiralty;—for if, by the practice of the Court of Admiralty, the owner of a delinquent ship, where both ships are to blame, may recover one half of his loss, a fortiori the innocent owner of the cargo cannot be deprived of a like remedy. I am therefore clearly of opinion that, to the extent of one half the damage, the owners of this cargo are intitled to recover.

The Admiralty rule to prevail: the plaintiffs to recover a moiety only of their damage.

It remains then only to determine whether the plaintiffs can recover damages for the whole loss. There is, I apprehend, no doubt at common law that they could so recover, if they could recover at all; but I must be governed, where they apply, by the rules and practice of the Court of Admiralty. It is true, as I think, that the owner of the cargo is to be considered a perfectly innocent person, and that he does not stand in the same position as the owner of one of two delinquent ships; and if the sole ground upon which the Admiralty rule rests is the joint culpability of the plaintiff and the defendant, it might well be that the owner of cargo would recover his whole damage against the adverse ship, but this is not exactly the view taken by Admiralty law; it endeavours, whether wisely or not I do not say, to administer more equitable justice, and, generally, where both ships

(*a*) 8 C. B. 129.

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are delinquent, it makes the owner of each bear a moiety of the loss, and a moiety only. I apprehend that, carrying out this principle, the Court of Admiralty must say, "You, the innocent owners of cargo, proceeding against one only of two delinquent ships, shall recover only half your damage, because we can affix to the vessel proceeded against only half the blame, and you shall be left, with respect to the other half of your loss, to your remedy against the owner of the other vessel, which we hold to be equally delinquent." It may be very true that this conclusion is not conformable with the rule of common law, and much might be said as to its equity, or otherwise, but I think it is most conformable to the Admiralty rule acted upon in *Hay* v. *Le Neve* and other cases, and therefore my decree must be that the plaintiffs do recover a moiety of the damage only.

Pritchard, proctor for the plaintiffs.

Jennings, for the defendants.

THE LADY KATHERINE BARHAM.

Salvors' Lien after Release by Receiver of Wreck—17 & 18 *Vict. c.* 104, *s.* 468.

After release of salved property by the receiver of wreck upon security to his satisfaction, salvors have no right to detain the property, or to arrest it by warrant of the Admiralty Court: release, in such case, granted, with costs, against the salvors.

SALVAGE. On the 29th of October, 1861, the British barque Lady Katherine Barham, laden with a general cargo, was driven on the Margate Sands, and subsequently became a total wreck. From the 30th of October to the 4th of November a number of Margate boatmen were engaged saving cargo from the wreck. The recovered property was taken possession of and stored by the Receiver of Wreck for the ports of Ramsgate and Margate. On the 5th of November the Receiver received instructions from the Board of Trade to deliver up the cargo saved to the owners on receipt of a bond of 1,000*l.*

executed by John William Harper, of Lloyd's; on the 7th of November the bond reached the Receiver's hands, and on the following day he informed the agent of the owners that the cargo was released and at his disposal. On the same day (8th November) the agent for the owners made two attempts to remove the cargo, in order to send it to London for sale, but was forcibly prevented by the salvors, who alleged a right to have the property valued before it was removed: a similar attempt was resisted by them on the morning of the 9th November. 1861. *December 17.*

On the 9th of November the London agent of the salvors received from the Wreck and Salvage Association, who were acting for the owners of cargo, a verbal assurance that a verified copy of account sales should be furnished, &c.; and on the 11th of November the assurance was made in writing. The salvors, notwithstanding, on the 13th of November, instituted an action for 1,000*l.* in the Admiralty Court; and on the 14th of November arrested the property.

The defendants filed in the Registry the bond given to the Receiver, and affidavits setting forth the facts above; and gave notice of motion for the cargo to be released, and the plaintiffs to be condemned in the costs of the arrest.

The 468th section of the Merchant Shipping Act, 1854, enacts,

"Whenever any salvage is due to any person under this Act, the receiver shall act as follows (that is to say),

"(1.) If the same is due in respect of services rendered in assisting any ship or boat, or in saving the lives of persons belonging to the same, or the cargo or apparel thereof,

he shall detain such ship or boat and the cargo and apparel belonging thereto, until payment is made, or process has been issued by some competent court for the detention of such ship, boat, cargo or apparel:

"(2.) If the same is due in respect of the saving of any wreck, and such wreck is not sold as unclaimed in pursuance of the provisions hereinafter contained,

he shall detain such wreck until payment is made or process has been issued in manner aforesaid:

"But it shall be lawful for the receiver, if at any time previously to the issue of such process security is given to his

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satisfaction for the amount of salvage due, to release from his custody any ship, boat, cargo or apparel, or wreck so detained by him as aforesaid; and in cases where the claim for salvage exceeds 200*l.*, it shall be lawful in England for the High Court of Admiralty of England, in Ireland for the High Court of Admiralty of Ireland, and in Scotland for the Court of Session, to determine any question that may arise concerning the amount of the security to be given, or the sufficiency of the sureties; and in all cases where bond or other security is given to the receiver for an amount exceeding 200*l.*, it shall be lawful for the salvor, or for the owner of the property salved, or their respective agents, to institute proceedings in such last-mentioned courts for the purpose of having the questions arising between them adjudicated upon, and the said courts may enforce payment of the said bond or other security, in the same manner as if bail had been given in the said courts."

The 50th rule of the Admiralty Court Rules, 1859, is as follows:—

"In a cause of salvage, the value of the property under arrest shall be agreed, or an affidavit of value filed, before the property is released."

The *Queen's Advocate* (*Pritchard* with him), on behalf of the defendants, now moved the Court according to the notice of motion.—The forcible detention by the salvors was unlawful, and the arrest an abuse of the process of the Court. The 468th section of the Merchant Shipping Act allows the receiver to give possession of wrecked property to the owners, on security being given to his satisfaction "previously to the issue of process," and then goes on to provide that the Court may enforce payment of the bond or other security as if bail had been given. Here a bond was given for 1,000*l.*, the amount being fixed by the Board of Trade, which, by the 439th section, has "the general superintendence of all matters relating to wreck;" and the Receiver gave a release. The bond obviates the necessity of a valuation of the property; but in this case the salvors had besides a written undertaking that they should be furnished with account sales.

Deane, Q.C., contra.—Salvors have, as the 50th rule of the Court shows, a right to detain the property salved, not only until bail is given, but until the property is valued, or an affidavit of value is filed; and that security is necessary for the right of salvors. Here the salvors had no evidence of value; and no

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security except the bond, which they had no hand in choosing or approving, and which might turn out worthless. [Dr. Lushington: But is not that the security appointed by the Act of Parliament?] The salvors who are not *legis periti* had good reason to suppose that the property was being secretly taken out of their hands, to the injury of their lawful claim.

Dr. Lushington [after stating the facts]: The only question in this case is, whether the Receiver had power to grant a valid release of salved property which was under his custody. I have no hesitation in saying that he had, and that the very purpose and effect of this 468th section is to allow an immediate and final release of valuable property, on security being given to the Receiver's satisfaction. After release by him, the salvors had no right to detain the property, or to arrest it by warrant of this Court. The salvors here took the law into their own hands. In these circumstances, I must now grant a release of the property, and condemn the salvors in costs. Salvors must be restrained within the bounds of the law.

Lawrie, proctor for the plaintiffs.

Pritchard, for the defendants (*a*).

(*a*) The Merchant Shipping Act Amendment Act, 1862, now enacts, s. 50, "When any salvage question arises, the Receiver of wreck for the district may, upon application from either of the parties, appoint a valuer to value the property in respect of which the salvage claim is made, and shall, when the valuation has been returned to him, give a copy of the valuation to both parties; and any copy of such valuation, purporting to be signed by the valuer, and to be attested by the receiver, shall be received in evidence in any subsequent proceeding, and there shall be paid in respect of such valuation by the party applying for the same, such fee as the Board of Trade may direct."

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THE CAMEO.

Collision—24 Vict. c. 10, s. 34—Security required to answer Cross-Cause.

The provisions of the 34th section of the Admiralty Court Act, 1861, relating to the giving of security in certain cases to answer a cross-cause, &c., apply to the case where the plaintiff suing in rem is a British subject, resident in the jurisdiction.

The section regulates procedure from the date of the Act coming into operation, and may be applied to cases then pending.

ON the 15th of March, 1861, a collision took place off the coast of Norfolk, between two British ships, the Cameo and the Restless, whereby the Restless was sunk and lost. On the next day an action was instituted against the Cameo by the owner of the Restless; the Cameo was arrested, but released on bail for 2,000*l.* A cross-action was afterwards instituted by the owners of the Cameo in personam against the owner of the Restless.

Lushington now moved that proceedings against the Cameo and her owners be stayed, until security should be given by the plaintiff to answer the cross-cause, and that the two causes should be heard together.—This application is under the 34th section of the Admiralty Court Act, 1861, which enacts, "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 the cross-cause." The 3rd section appoints the Act to come into operation on the 1st of June, 1861. The collision took place before that date; but the 34th section relates to procedure, and, therefore, it is submitted, is applicable to procedure immediately upon the Act coming into operation, whatever may be the date at which the cause of action arose, or the cause was instituted. It applies, therefore, to this case. In the *Alexander* (*a*), the Court went further, and said, "Where a statute creates a new jurisdiction, the new jurisdiction, I apprehend, takes up all past cases."

(*a*) 1 W. R. 295.

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Deane, Q.C., contra.—The language of the section gives a discretion to the Court, "The High Court of Admiralty *may*, &c." It is submitted that the purpose of this enactment was to provide a cross remedy against a plaintiff who is out of the jurisdiction of the Court, against whom no proceedings or no effectual proceedings can otherwise be taken. Here the plaintiff is British, resident in the jurisdiction, and by the 15th section of the Act full power of enforcing judgment by execution, as at common law, is conferred upon the Court.

Judgment.

Dr. Lushington.—In this case of collision, the owner of the Restless has sued the Cameo in rem, and has the security of bail to the amount of 2,000*l.* to answer his action. The Restless sank after the collision, and the owners of the Cameo have brought their cross-action against the owner of the Restless in person. At present, therefore, it is quite clear that 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 be worthless. In these circumstances application is made to the Court under the provisions of the 34th section of the recent statute, 24 Vict. c. 10, to require the plaintiff in the suit in rem to give security to answer judgment in the cross-action, and to have the two actions tried together. The present case appears to me to be within the very purpose of the enactment, which, according to the experience of the Court, was much required. The intention of the Act was to put the two contending parties on a fair footing; the language is general, not drawing any distinction between persons in and persons out of the jurisdiction; and I do not think it makes any difference that the plaintiff is within the jurisdiction of the Court, whatever powers of execution the Court may now possess, for such security cannot be considered as at all equivalent to the security of bail. The only objection which has been made to the order therefore fails. It has not been argued that, as the cause was instituted before the date of the Act coming into operation, the Court has therefore no power to make the order. I think it right, however, to state, that as the 34th section governs procedure, it clearly takes effect immediately upon the date assigned for the Act coming into operation, and, if on other grounds applicable, applies to pending cases. It is plain that the result is not inequitable, but is entirely consistent with equity.

24 Vict. c. 10, s. 34.

The enactment applies, though the plaintiff is within the jurisdiction.

The causes were afterwards heard together. and decided in favour of the Cameo.

Deacon, proctor for the Restless.

Green and *Allin*, solicitors for the Cameo.

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In the Priby Council.

Present—Lord KINGSDOWN.
The Right Hon. Sir EDWARD RYAN.
The MASTER OF THE ROLLS.
The Right Hon. Sir JOHN T. COLERIDGE.

THE SAXONIA.

THE ECLIPSE.

Collision in the Solent between a British Ship and a Foreign Ship—17 *&* 18 *Vict. c.* 104, *ss.* 296, 297, 298—*Maritime Law as to Lights and Rule of the Road—Adhesion to Appeal—Costs.*

The Merchant Shipping Act 1854 (ss. 296, 297, 298) does not apply to a foreign ship navigating the Solent between the Isle of Wight and Hampshire, and within three miles of the British coast; and if a collision there happens between a British ship and a foreign ship, the conduct of each ship is to be tried by the law maritime.

The *Zollverein*, (Swabey, 96,) confirmed and extended.

By the law maritime, a vessel sailing free, or a steam-ship, is bound to give way to a vessel close-hauled; the vessel close-hauled is not bound to alter her course, but at night is bound to exhibit a sufficient light in time to enable the other to avoid collision.

The above rules applied to the circumstances of the case: both the steam-ship and the vessel sailing close-hauled found to blame; damages ordered to be divided.

Action and cross-action in the Court of Admiralty: judgment, both ships to blame and damages to be divided: appeal by one party in both actions, and adherence to the appeal by the other party: the judgment being affirmed, each party was sentenced to pay his own costs.

COLLISION. On the night of the 29th December, 1860, a collision took place between the steam-ship Saxonia and the barque Eclipse, in the Solent, about half a mile distant from the shore of the Isle of Wight, and three or four miles eastward of Yarmouth. The Saxonia belonged to the Free Hanseatic city of Hamburgh, and was bound from New York to London, calling at Cowes to land passengers. The Eclipse was a British vessel bound from Auckland, New Zealand, to London. The moon was forty-three hours past the full, but the night was otherwise very dark, with snow. The Saxonia, in charge of a licensed pilot, and carrying her three lights brightly burning, was coming up her starboard side of the Channel, at the speed of about nine or ten knots, steering E. ½ N. The Eclipse was standing in for Yarmouth Roads, close-hauled on the port tack, heading S. W. 6. S.,

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and barely stemming the flood tide. It was disputed whether she carried the Admiralty lights, but the green light was admitted to have been a very dim light; the lantern having been cracked outside the Needles, and the spray having got in. The Eclipse sighted the Saxonia's three lights at about three miles distance, broad off on the starboard bow, and they continued to approach the starboard side; shortly before the collision, the mate of the Eclipse, by the master's order, exhibited a flare-up light on the starboard quarter, and the helm was starboarded. The Saxonia did not observe the green light of the Eclipse at all, and only observed the vessel itself, right ahead, shortly before the flare-up light was exhibited; the Saxonia then, or after seeing the flare light, ported her helm, but without slackening her speed. In result, the Saxonia shot across the bows of the Eclipse, carrying away her bowsprit, jibboom, &c., and receiving considerable damage to her own port side.

In respect of this collision an action and cross-action were brought by the Hamburgh-American Steam Packet Company, the owners of the Saxonia, and by the North of Scotland Banking Company, the mortgagees in possession of the Eclipse.

The two actions were heard together on the 31st of May, 1861, before the Judge of the Admiralty Court, assisted by Captain Pigott and Captain Pelly, Elder Brethren of the Trinity Corporation.

The following sections of "The Merchant Shipping Act, 1854" (17 & 18 Vict. c. 104), were referred to in the argument, as afterwards in the Court of Appeal:—

Part IV.—Safety and prevention of Accidents.

Application.

s. 291. "The Fourth Part of this Act shall apply to all British ships; and all foreign steam-ships carrying passengers between places in the United Kingdom shall be subject to all the provisions contained in the Fourth Part of this Act, and likewise to the same provisions with respect to the certificates of the masters and mates thereof to which British steam-ships are subject."

Lights and Fog Signals, and Meeting and Passing.

s. 295. "The following rules shall be observed with regard to lights and fog signals; (that is to say,)

(1.) The Admiralty shall from time to time make regula-

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tions requiring the exhibition of such lights, by such classes of ships, whether steam or sailing ships, within such places and under such circumstances as they think fit, and may from time to time revoke, alter or vary the same.

(2.) The Admiralty may, if they think fit, make regulations requiring the use of such fog signals, by such classes of ships, whether steam or sailing ships, within such places and under such circumstances as they think fit, and may from time to time revoke, alter or vary the same.

(3.) All regulations made in pursuance of this section shall be published in the London Gazette, and shall come into operation on a day to be named in the Gazette in which they are published, and the Admiralty shall cause all such regulations to be printed, and shall furnish a copy thereof to any owner or master of a ship who applies for the same, and production of the Gazette containing such regulations shall be sufficient evidence of the due making and purport thereof.

(4.) All owners and masters shall be bound to take notice of the same, and shall, so long as the same continue in force, exhibit such lights and use such fog signals, at such times, within such places, in such manner and under such circumstances as are enjoined by such regulations, and shall not exhibit any other lights or use any other fog signals; and in case of default, the master or owner of the ship, if it appears that he was in fault, shall, for each occasion upon which such regulations are infringed, incur a penalty not exceeding twenty pounds."

s. 296. "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, and this rule shall be obeyed by all steam-ships, and by all sailing ships, whether on the port or starboard tack, and whether close-hauled 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,

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as regards sailing ships on the starboard tack close-hauled, to the keeping such ships under command."

s. 297. "Every steam-ship, when navigating any narrow channel, shall, whenever it is safe and practicable, keep on that side of the fairway or mid-channel which lies on the starboard side of such steam-ship."

s. 298. "If in any case of collision it appears to the Court before which the case is tried, that such collision was occasioned by the non-observance of any rule for the exhibition of lights, or the use of fog signals, issued in pursuance of the powers hereinbefore contained, or of the foregoing rule as to the passing of steam and sailing ships, or of the foregoing rule as to a steam-ship keeping to that side of a narrow channel which lies on the starboard side, the owner of the ship by which such rule has been infringed shall not be intitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary."

The Regulations issued by the Admiralty, dated 24th February, 1858, are printed in *Swabey's Reports*, Appendix, p. vi: they prescribe for "all seagoing steam-vessels," and "all seagoing sailing vessels."

The *Admiralty Advocate* and *Middleton*, for the Saxonia, referred to the *Fyenoord* (*a*), *General Iron Screw Collier Company* v. *Schurmanns* (alias the *William Hutt*) (*b*), and argued that the Eclipse was to blame for non-observance of the statute, and thereby barred from recovering.

Deane, Q.C. and *Lushington* for the Eclipse, referred to the *Zollverein* (*c*), arguing that the case was to be dealt with according to the maritime law, by which a steam-ship was bound to avoid a vessel close-hauled.

Dr. Lushington, in the course of his summing up to the Elder Brethren, said:—I have been called upon on the present occasion to pronounce an opinion as to the law by which this case should be decided; and it has been earnestly insisted that I ought to state to you, gentlemen, that assist me, that the parties in this case are bound by the terms of the statute. I shall do no such thing.

(*a*) Swabey, 377. (*b*) 1 J. & H. 180. (*c*) Swabey, 96.

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In the case of the *Fyenoord* (*a*), where the collision happened off Gravesend, the question arose whether a foreign steamer was not bound to keep the starboard side of the fairway according to the Act of Parliament and according to the custom, the custom being undoubted that it was usual to obey the terms of the statute, and for a steamer to keep a course along the starboard side of the river. When the case came before me, I decided it according to the custom, declining to enter into the greater consideration as to whether the statute was binding or not on foreign ships in the River Thames. When the case came before their lordships, they likewise pronounced no opinion on the statute, for they declined so to do; but they were of the same opinion with myself, that the custom was binding.

When a British and foreign ship meet on the high seas, the usual rule is, that the statute is not binding: clearly it is not binding on the foreigner; and if it were considered binding on the British vessel, the British vessel would manifestly be under an undue disadvantage. I believe the practice of applying the maritime law to such cases has been followed universally up to the present moment, and I hold such to be the law.

But I am urged to apply the statute not only in consequence of the case of the *Fyenoord*, but of the case of the *William Hutt* (*b*), because these vessels, the Eclipse and the Saxonia, were between the coast of Hampshire and the Isle of Wight. If, however, I had a difficulty in applying the statute to foreign ships in the River Thames, I have greater difficulty in applying it to them in the water between the Isle of Wight and the mainland, and in saying that all ships going through those waters are bound by our regulations. I should hesitate before I came to that conclusion; and in the extreme case, that of a vessel sailing along the North Sea, and within three miles of the coast, my difficulty would be absolutely insuperable, because I am clearly of opinion that a foreign vessel has a right of so sailing, without being bound by any of our rules whatever.

How, then, are we to decide this case? Why, by the ordinary rules of the sea.

The learned Judge then proceeded to discuss the facts, submitting the following questions to the Elder Brethren:—

1. Was the Saxonia justified in coming up the Solent, in the circumstances, at so great a speed?

(*a*) Swabey, 377. (*b*) 1 J. & H. 180.

2. Was the Saxonia justified in continuing her speed, and in porting, after sighting the Eclipse? 1862. *February* 13.

3. Was any sufficient light exhibited on board the Eclipse in time to give the Saxonia a fair opportunity to avoid collision?

4. Was the Eclipse justified in keeping her course, and afterwards in starboarding?

After consultation, DR. LUSHINGTON said, "We are all of opinion that both vessels are to blame for this collision; the Eclipse for having improperly starboarded her helm, and the Saxonia, when she was not able to discover what the other ship was, in not having slowed her engines."

The decree then passed that the damages in each case were to be divided, each party to pay his own costs.

From this decree the Hamburgh-American Steam Packet Company, owners of the Saxonia, appealed in both actions; and the North of Scotland Banking Company adhered in each action to the appeal.

The *Admiralty Advocate* and *Kingdon*, for the Saxonia.—We contend that the collision was occasioned by the Eclipse not carrying a sufficient green light on her starboard side, as prescribed by the Admiralty Regulation, and by starboarding her helm, contrary to the 296th section of the Merchant Shipping Act; that in both respects the Eclipse was to blame, and is barred by the 298th section from recovering anything. 1861. *Dec.* 9, 10.

The Eclipse was a British vessel, and as such was bound by the British statute, unless ground to the contrary be shown. It may be admitted that on the high seas, out of national jurisdiction, the statute does not apply to a British ship meeting a foreign ship, but that is because the foreign ship is beyond British jurisdiction and cannot be bound, and the nature of the statute requires reciprocity; *Zollverein* (*a*). But here the *locus in quo* of the collision was within three miles of the shore, inclosed between portions of British territory; and, therefore, in British waters, and, as we contend, within the body of a county. The authorities respecting the limits of national jurisdiction over the sea adjoining the coast are collected in Phillimore's *Commentaries on International Law* (*b*); the limit is a marine league; and this limit is recognised in the statute under discussion,

(*a*) Swabey, 96. (*b*) Vol. 1, p. 210.

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s. 527. It is extremely reasonable that foreigners, passing through territorial waters, should submit to the territorial law; and it is submitted that within British waters British law governs all ships. This principle has been acted upon in several recent cases of importance. In the *Annapolis* (*a*) it was held, that a foreign ship entering Liverpool, was bound by British statute to take a pilot offering at a greater distance than three miles from the British shore; and Dr. Lushington expressly says (*b*), "Within British jurisdiction, namely, within British territory, and at sea within three miles from the coast, and within all British rivers intra fauces, and over foreigners in British ships, I apprehend that the British Parliament has an undoubted right to legislate." *General Iron Screw Collier Company* v. *Schurmanns* (*c*), decided that where a British ship damages a foreign ship by a collision within the distance of three miles from the shore of the United Kingdom, the provisions of the Merchant Shipping Act, limiting the liability of the owner to the value of ship and freight, apply. Vice-Chancellor Wood there says (*d*), "Then comes the question, how far our legislature could properly affect the rights of foreign ships within the limits of three miles from the coast of this country. There can be no possible doubt that the water below low water-mark is part of the high seas. But it is equally beyond question that for certain purposes every country may, by the common law of nations, legitimately exercise jurisdiction over that portion of the high seas which lies within the distance of three miles from its shores. Whether this limit was determined with reference to the supposed range of cannon, on the principle that the jurisdiction is measured by the power of enforcing it, is not material, for it is clear, at any rate, that it extends to the distance of three miles, and that many instances may be given of the exercise of such jurisdiction by various nations. . . . . Authorities were cited to the effect that every nation has the right to use the high seas, even within the distance of three miles from the shore of another country; and it was contended that it was not legitimate to interfere with foreigners so using this portion of the common highway, except for the bonâ fide purpose of defence, protection of the revenue, and the like. It is not questioned that there is a right of interference for defence and revenue purposes; and it is difficult to understand why a country, having this territorial jurisdiction over a certain portion of the high road of nations, should not exercise the right of settling the rules of the road in

(*a*) *Ante*, p. 295.
(*b*) Page 306.
(*c*) 1 J. & H. 180.
(*d*) Page 193.

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the interests of commerce. An exercise of jurisdiction for such a purpose would be at least as beneficial as for purposes of defence or revenue." That is a direct authority in favour of the appellants. In the *Fyenoord* (*a*), this Court declining to pronounce any opinion whether or not s. 297 of the Merchant Shipping Act was binding on a foreign ship navigating the River Thames, held that the foreign ship was at any rate bound by the custom of navigation emanating from the statute. The same argument applies to this case. As to the terms of s. 298, they are general, and should therefore include foreigners. In the *Milford* (*b*), Dr. Lushington held that s. 191 of the Merchant Shipping Act applied to masters of foreign ships, and said, "The general rule has been that where vessels are within British waters, a statute general in terms, and intended for the protection of navigation, would apply to foreigners, as in the case of statutory obligations to take pilots on board under certain circumstances." Thus the 388th section of the same Act, which exempts shipowners from liability for the act of a pilot employed by compulsion of law, undoubtedly applies to foreigners. It is therefore submitted that the British statute applied to this case, and that the 298th section of the Merchant Shipping Act bars the owners of the Eclipse from recovering. But even if this be not so, the Eclipse was to blame for not exhibiting a light in due time to warn the Saxonia, and so occasioned this collision. If the Saxonia was in fault, which we deny, still, by reasonable care, the Eclipse might have avoided the accident.

Deane, Q.C., and *Lushington*, for the respondents.—The statute, it is admitted, does not apply to the Eclipse, unless it also applied to the Saxonia; *Zollverein* (*c*); the reason being incontrovertible that you cannot adjudicate on a collision, except by applying one law to both parties. We contend that the statute does not apply to a foreign vessel. The *locus in quo* was the high seas, over which foreign vessels have the right of passing freely, subject only to the maritime law. Blackstone says (*d*), "The main or high seas are part of the realm of England, for thereon our Courts of Admiralty have jurisdiction, as will be shown hereafter; but they are not subject to the common law. This main sea begins at the low water-mark." It is not denied that within a marine league from the shore territorial jurisdiction exists, but it is for purely territorial purposes, as for defence, protection of the revenue, or maintenance of due neutrality.

(*a*) Swabey, 377.
(*b*) Swabey, 367.
(*c*) Swabey, 96.
(*d*) 2nd Ed. by Stephen, vol. 1, p. 110.

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All the early authorities are directed to the question of the limits within which belligerent rights may be exercised. It is contrary to public policy that foreign ships casually passing near the shore of a strange country should be bound by laws of which they may never even have heard. It is unnecessary to argue that a national legislature has no right to prescribe to foreign ships passing within three miles of the shore, but every presumption is against such an intention. In the *Twee Gebroeders* (*a*), Lord Stowell says, "The act of inoffensively passing over such portions of water, without any violence committed there, is not considered as any violation of territory belonging to a neutral state—permission is not usually required: such waters are considered as the common thoroughfare of nations, though they may be so far territory, as that any actual exercise of hostility is prohibited therein." So Grotius, *De Jure Belli et Pacis* (*b*), "*Illud certum est, etiam qui mare occupaverit navigationem impedire non posse inermem et innoxiam.*" The Merchant Shipping Act, on which the appellants rely, is a purely domestic statute, like Lord Liverpool's Act (*c*) concerning the registration of shipping, referred to in *Nostra Signora de los Dolores* (*d*), and applies to British subjects only. The terms of the 296th and 298th sections make no reference to foreign ships; on the contrary, they are limited by s. 291, the application clause of which enacts, "The fourth part of this Act shall apply to all British ships, and all foreign steam-ships carrying passengers between places in the United Kingdom shall, &c." In *Cope* v. *Doherty* (*e*), Wood, V. C., commenting on this section, says, "Taking the whole of that together, the wording is rather favourable to the contention that foreign ships are not intended except where specifically adverted to;" and again (*f*), "I decide entirely upon those general principles which; to my mind, render it proper for every Court of judicature, in construing the enactments of any legislature, to presume primâ facie, and unless the contrary be expressed, or be implied from the absolute necessity of the case, that such legislature intended by its enactments to regulate the rights which should subsist between its own subjects, and not in any way to affect the rights of foreigners, whether by way of restricting or augmenting their national rights. In construing our own statutes, no other rule can be a sound rule to adopt, unless it be clear, from the absolute necessity of the case, that the legislature intended to affect the rights of foreigners." And on appeal, Lord Justice Turner

(*a*) 3 C. R. 352.
(*b*) Lib. ii. 3, 12.
(*c*) 26 Geo. III. c. 60.
(*d*) 1 Dods. 297, 298.
(*e*) 4 K. & J. 381.
(*f*) Page 390.

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said (*a*), "This is a British Act of Parliament, and 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." This rule seems to have been departed from by Wood, V.C., in the case of the *General Iron Screw Collier Company* v. *Schurmanns*, for there, in according protection to the British shipowner, he abridged the right of the foreign plaintiffs. That judgment, it is submitted, cannot be supported. But in any case it was decided on a different section of the Act, s. 504, which belongs to Part IX., which is controlled by ss. 502, 516. So s. 191, on which the *Milford* was decided, belongs to Part III., and is governed by s. 109. The *Annapolis* was decided upon another statute altogether, upon a question of compulsory pilotage, and in the judgment great stress was placed upon the fact of the vessel being destined to enter and entering a British port. We contend, therefore, that the Merchant Shipping Act has nothing to do with this case, which must be governed by the maritime law, which is clear in favour of the Eclipse. By the maritime law, there was no obligation on the Eclipse to carry a light, *Rose* (*b*), and the evidence shows that the bright light was exhibited in due time for a vessel proceeding at moderate speed to avoid her. The collision was wholly caused by the improper speed of the Saxonia on a dark night and in a narrow channel. Her porting was also improper, for the vessels were not meeting, but crossing; and starboarding, to go under the Eclipse's stern, was clearly the proper measure. In any case, s. 296 did not apply; *Arthur Gordon* (*c*). The starboarding of the Eclipse at the last moment was immaterial.

The *Admiralty Advocate* replied.

Judgment.

On the 13th of February, 1862, the MASTER of the ROLLS delivered judgment.

In this case cross-causes have been instituted, each party attributing the collision which took place between these vessels to the fault in the management of the other.

Facts of the case.

The facts are shortly these. The collision occurred on the 29th of December, 1860, in the Solent, off the shore of the Isle of Wight, three or four miles to the eastward of Yarmouth, about ten o'clock at night. The Saxonia is a steam-ship belonging to the Free Hanseatic City of Hamburgh, of 2,200 tons burthen, with engines of 500 horse-power. She was bound

(*a*) 2 De Gex & Jones, 624. (*b*) 2 W. R. 4. (*c*) *Ante*, p. 277.

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These facts are not in dispute, and are the common case on both sides. There are other circumstances which must be referred to, respecting which there is some contrariety of evidence. We consider, however, the following facts to be established by the evidence before us. The Eclipse exhibited a flare-up light when the vessels were approaching, but not in our opinion until the collision was either inevitable, or almost so. The evidence of Elliot, the mate of the Eclipse, and of Salmon, a mariner on board of her, show that the moment the flare-up light was exhibited, the Saxonia altered her course by porting her helm. We are also of opinion that the Eclipse was not seen by the persons on board the Saxonia until the collision was so imminent that if she continued at the speed at which she was then proceeding it was inevitable. We are of opinion that the failure to discover the Eclipse sooner than when she was first seen on board the Saxonia, was owing to the circumstance that the Eclipse failed to exhibit any proper light on her starboard side. The evidence on behalf of the Eclipse states that the green light on the starboard side was burning dimly, that the glass of it had been cracked, and that the spray had several times got into the lantern. The evidence on the side of the Saxonia denies the existence of any light at all on the starboard side, with the exception of Wilstermann, who saw the green light only when the Eclipse got quite close, and just before she struck. On the full consideration of the evidence, we agree with the Judge of the Court of Admiralty in believing that the real state of the case was that the green light on the starboard side was burning, but exceedingly dimly, and that it was not discern-

ible at any distance from the vessel herself, and that it was never visible on board the Saxonia until the collision actually took place, or until it was inevitable. 1862. *February* 13.

In this state of circumstances in the court of Admiralty the Judge, assisted by the Elder Brethren of the Trinity Corporation, pronounced that the collision in question was occasioned by the default of the master and crew of both vessels, and that the damage arising therefrom ought to be borne equally by the owners of both vessels. From this decision both parties appeal. The Saxonia insisting that the Eclipse was in default; first, for not having exhibited the regulation light; secondly, for not having exhibited any light at all until too late; and thirdly, for having starboarded her helm instead of porting it.

On behalf of the Eclipse it is contended, that the Merchant Shipping Act (17 & 18 Vict. c. 104, ss. 296, 297, 298) has no reference to this case, which applies only when both vessels are British, and that she was not bound to exhibit any green light or to port her helm, and that the collision is solely attributable to the Saxonia, whose duty it was, being a steam-vessel, and therefore going free, to make way for a sailing vessel close-hauled on the port tack. On the other hand it is contended, that if the Merchant Shipping Act does not affect foreign vessels on the high seas, it does apply to all vessels navigating tidal rivers or estuaries, within the limits of a county, and that the Solent must be considered to fall within that description.

The Merchant Shipping Act (ss. 296, 297, 298) has no local application to the Solent, so as to affect foreign ships there navigating.

In our opinion the statute cannot be considered to have any local application to the Solent, so as to affect foreign as well as British vessels navigating within the limits of that channel; and that even if the statute were binding on all vessels navigating within a tidal river, which, however, the case of the *Fyenoord*(*a*) discountenances, we think that it could not be locally binding within the water of the Isle of Wight and the main land, and that the circumstance that the Isle of Wight is by local and territorial designation to be deemed a portion of the county of Southampton does not in any degree affect this question.

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. This being so, it follows that the Merchant Shipping Act has no

The collision to be tried by the ordinary maritime law.

(*a*) Swabey, 377.

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application to this case, as it has been fully determined that where a British and a foreign ship meet on the high seas the statute is not binding on either. The principle, therefore, by which this case must be decided must be found in the ordinary rules of the sea.

Maritime rules: a vessel sailing free, or a steam-ship, bound to give way to a vessel close-hauled;

That being established, there are two rules affecting sailing vessels of all countries, which, in our opinion, decide this case. The first of these rules is, that a vessel which has the wind free is bound to give way to a vessel close-hauled, and that a steam-ship is to be treated as a vessel which has the wind free. This was the case of the Saxonia; she was therefore bound to give way to the Eclipse, and the Eclipse had a full right to expect her to do this, and was not bound in any respect to alter her course.

the vessel close-hauled to show a sufficient light in time.

But the second rule which we consider affects this case is, that, though the close-hauled vessel is not bound to give way, she is, nevertheless, bound to show some proper and sufficient light, in sufficient time to enable the steam-ship, or other vessel whose duty it is to give way, to avoid any collision. No blame can attach to a vessel for running foul of another vessel, if it has been impossible to distinguish it until the collision was inevitable. This is not a question of green or red light, but of no light at all. A vessel at anchor, or a fishing boat, is bound by the general rules of the sea to exhibit a light so as to afford to the vessels whose duty it is to avoid her, the means of doing so.

The Eclipse did not show a sufficient light in due time.

In our opinion, on the result of the evidence, this was not done by the Eclipse. The evidence establishes that although the moon, which was not quite two days past the full, was risen, still that owing to the clouds and snow the night was dark; this is distinctly mentioned in the protest of the Saxonia; and in the protest of the Eclipse it is stated that the night was cloudy at times: the darkness of the night at this time is confirmed by the evidence. We think there is evidence to show that a sufficiently good look-out was kept on board the Saxonia, and that if a proper light had been exhibited on board the Eclipse, it would have been seen on board the Saxonia in sufficient time to have enabled her to avoid any collision. It cannot be admitted as any excuse for this omission that several hours previously, and owing to severe weather, the glass had got broken, and the light extinguished, or so dimmed as to be indiscernible at any distance; and we concur in the opinion of the learned Judge of the Admiralty Court that she cannot recover against another vessel if in consequence of that misfortune she gave the other vessel no means of seeing her in reasonable time to avoid her.

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If the matter rested here, it would follow that the Eclipse was solely to blame for the collision which took place, but this is not our opinion. We think that the Saxonia was also to blame for the collision which occurred; and if she had done all that could have been done, the collision might probably have been avoided. When the Eclipse was first discovered by those on board the Saxonia, and even after the flare-up light had been exhibited on board the Eclipse, the Saxonia continued at full speed, proceeding at the rate of nine knots through the water until the collision took place. It was the duty of the Saxonia to give way, and to do whatever was possible on her part to avoid any collision. We think that as soon as she discovered the Eclipse, and when, according to the evidence given on her behalf, the Saxonia was unable to discover what the Eclipse was doing, the Saxonia should have eased and stopped her engines, and should have ascertained in what way she might best have avoided running foul of the other vessel, which, according to the evidence, might probably have been accomplished.

The Saxonia also to blame for not slowing or stopping on discovering the other vessel.

We are, therefore, of opinion, that both vessels are to blame for this collision, and that the decision of the Court below is correct in both cases, and that both appeals must be dismissed, each party paying his own costs, and we shall advise Her Majesty accordingly.

Appeals dismissed, each party paying his own costs.

Burchett, proctor for the Saxonia.

Rothery for the Eclipse.

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In the Privy Council.

Present—Lord KINGSDOWN.
The MASTER of the ROLLS.
Sir JOHN COLERIDGE.

THE ULSTER.

Time within which Appeal may be asserted—Practice—Peremption of Right of Appeal.

An appeal from the High Court of Admiralty asserted after ten, but before fifteen days from the sentence, held to be in time according to the practice in force.

An offer by a defendant out of Court to pay the plaintiff a specific sum and costs, made after judgment pronouncing the defendant liable in general damages, does not perempt his right of appeal.

THE following case for the appellants sets forth the material facts of this case, and the points of law raised and afterwards determined.

"This was a suit for damage instituted in the Admiralty Court on behalf of the respondents the owners of the schooner Tagus, against the steam-ship Ulster, belonging to the appellants.

On the 27th of November, 1860, the Judge of the Admiralty Court, being assisted by two of the Elder Brethren of the Trinity Corporation, and having heard the evidence, by his interlocutory decree or sentence pronounced for the damage proceeded for, condemned the appellants in costs, and referred the case to the registrar and merchants to report upon the amount.

On the 11th day of December, 1860, the appellants asserted their appeal against the said decree.

On the 8th of June, 1861, the usual inhibition, citation, and monition for process were decreed.

On the 20th day of November, 1861, the inhibition, citation, and monition for process executed were returned.

On the 29th day of November, 1861, Mr. Rothery appeared to the inhibition as proctor for the respondents, and prayed to be heard on his petition in objection to the appeal.

The petition prays that the appeal may be dismissed on two grounds:

First—That it was originally invalid by reason of its not having been made within ten days from the date of the decree or sentence.

Secondly—That if valid, it was perempted by a letter written by the agents of the appellants to the agents of the respondents on the 18th of January, 1861.

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The appellants deny that according to the law and practice of the Court the appeal is invalid unless interposed within ten days of the sentence, and contend that the appeal was duly made.

They also deny that it was perempted by the said letter, which was as follows:—

'19, Exchange Alley, North, January 18th, 1861.

'*Re* THE ULSTER.

'DEAR SIRS,—Without referring to any particular items in account of damages you have handed us, we now on the part of Mr. Laird tender the sum of £540, as the full amount and in satisfaction of the damages the owners are intitled to recover; and we also, on behalf of Mr. Laird, offer to pay the plaintiffs their costs of the suit up to this time when taxed.

'If this tender and offer are refused, we shall make such refusal a ground for seeking to compel the plaintiffs to pay all costs incurred in the suit subsequent thereto.

'Yours truly, 'WATSON and SON.

'Messrs. Duncan, Squarey, and Blackmore.'

On behalf of the appellants it has been admitted that the said letter was written, as alleged, by their agents. On behalf of the respondents it has been admitted that the offer contained in the said letter was rejected.

The appellants therefore claim their right to proceed with their appeal."

Deane, Q.C., and *Lushington*, in support of the petition of the respondents.—An appeal from the Court of Admiralty must be asserted within ten days. The 3 & 4 Will. IV. c. 41, s. 20, enacts, that "All appeals to His Majesty in Council shall be made within such times respectively within which the same may now be made, where such time shall be fixed by any law or usage, and where no such law or usage shall exist, then within such time as shall be ordered by His Majesty in Council; and that, subject to any right subsisting under any charter or constitution of any colony or plantation, it shall be lawful for His Majesty in Council to alter any usage as to the time of making appeals, and to make any order respecting the time of appealing to His Majesty in Council." No Order in Council has been passed regulating the time for appealing from the High Court of Admiralty. The time therefore for appealing is to be determined by the pre-existing usage. Formerly the appeal from the Admiralty Court was to the Court of Delegates, and the time for appealing was regulated by the civil law, which gave ten days and no more, according to Nov. XXIII., "De Appellationibus," Cap. I., an edict of Justinian: "Sancimus omnes appellationes, sive per se, sive per procuratores, seu per defensores, vel cura-

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tores, vel tutores ventilentur, posse intra decem dierum spatium a recitatione sententiæ numerandum judicibus ab iis quorum interest offerri," &c. In matters of appeal from the Court of Admiralty, the civil law as distinguished from the canon law prevailed, *Sir Henry Blount's case* (*a*); and the statutes of Henry VIII. (24 Hen. VIII. c. 12, s. 7; 25 Hen. VIII. c. 19, s. 3), which give fifteen days for appealing, apply to ecclesiastical causes only. This is expressly so stated in Browne's Civil and Admiralty Law, 2nd ed. vol. 2, p. 436, and in MacPherson's Practice of the Judicial Committee, p. 155. In Clerke's Praxis Admiralitatis (Ed. 1798), the rule is thus given, Tit. 53: "Appellare licet a quâcunque sententiâ definitivâ sive decreto interlocutorio habente vim definitivæ sententiæ, sive vivâ voce apud acta coram judice tempore latæ sententiæ vel interpositi decreti hujusmodi, sive coram notario et testibus infra *quindecim* dies ad appellandum indultos, ex statutis hujus regni." But to the word "quindecim" is appended a note, "Imo infra *decem* dies; nam statutum anno 24 Hen. VIII. c. 12, loquitur de appellationibus in causis ecclesiasticis tantum." The edition of 1722 has in the text "infra *decem* dies" (*b*). However, in MacQueen's Appellate Jurisdiction of the House of Lords and Privy Council, it is stated, p. 704, and apparently upon official authority, p. 698, that the time of appealing from a sentence of the High Court of Admiralty is fifteen days; and it is to be admitted that the ten days' limit has not in recent practice been strictly insisted upon.—Secondly, we submit that the appellants have perempted their right of appeal by the tender made subsequent to the judgment.—[Sir JOHN COLERIDGE:—Was not the letter merely an offer for peace?]—The doctrine of peremption has been in many cases rigorously enforced in this Court: *Clifton* (*c*); *R.* v. *Dias* (*d*). [This point was then abandoned.]

Spinks and *Aspinall*, for the owners of the Ulster, were not called on.

Lord KINGSDOWN:—Looking to the practice of the Court, we cannot say that this appeal is too late.

The case was afterwards heard on appeal, and the judgment of the Court below was reversed.

Wright and *Venn*, solicitors for the appellants.

Rothery for the respondents.

(*a*) 1 Atkyns, 296.

(*b*) So likewise the Edition 1667 has in the text, "infra *decem* dies." This Edition professes to be an exact copy from a MS.; and the editor, one E. S., says in his preface, "Religio mihi semper fuit in aliorum scriptis describendis, et ipsa errata ad minimum apicem exscribere; id enim viris eruditissimis maxime placere video." This is the earliest edition in the British Museum.

(*c*) 3 Knapp, 378.

(*d*) 6 Moore, P. C. 115.

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In the High Court of Admiralty.

THE KILLARNEY.

Collision — Compulsory Pilotage of Vessels inward-bound to Goole—2 & 3 Will. IV. c. 105 (*Local*), *ss.* 22, 34, 52, 89—6 *Geo. IV. c.* 125, *ss.* 58, 59—17 *& 18 Vict. c.* 104, *ss.* 353, 387, 388—*Practice as to allowing further Evidence, and the Intervention of a third Party interested in the Suit.*

The employment of a licensed Goole pilot is generally compulsory upon vessels inward bound to Goole, including vessels belonging to that port; not, however, by the Hull Pilot Act, 2 & 3 Will. IV. c. 105, but by the General Pilot Act, 6 Geo. IV. c. 125, ss. 58, 59, and the Merchant Shipping Act 1854, s. 353.

Beilby v. *Raper* (3 B. & Ad. 284) distinguished.

The 59th section of 6 Geo. IV. c. 125, allows the master of a ship to conduct his own vessel, "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:"—*Held*, that this exception, thus attached to this exemption from compulsory pilotage, applied to a Goole ship in Goole inward-bound to that place, by reason of 52 Geo. III. c. 39, s. 21, by which provision was made for the appointment of pilots by the Hull Trinity House, for ships "*into* or out of any ports, harbours or places within the limits of their jurisdiction;" and, consequently, that the exemption did not apply.

Quære, if royal charters which provided for the appointment of pilots for vessels outward-bound only, would be sufficient to take such an inward-bound vessel out of the exemption.

In a cause of collision it was proved that the collision was caused by the default of the pilot of the defendant's vessel, who was licensed by the Hull Trinity House; the defendant having pleaded that the employment of the pilot was compulsory, the point was argued on the Hull Pilot Act; the Court pronounced an opinion that the employment of the pilot was not by that Act compulsory, but allowed the defendant to give in evidence the royal charters to the Hull Trinity House and other public documents, and to have a further argument, upon terms of paying all further costs in any result. The Court refused an application on behalf of the Hull Trinity House to be heard by counsel.

COLLISION. This was an action instituted by the owners of the sloop Sarah against the screw steam-ship Killarney for a collision.

The case is reported upon another point, *ante*, p. 202. Here it is only necessary to state that the collision took place at Goole, which is on the river Ouse, a few miles above its junction with the river Humber; that the Killarney was inward-bound from Rotterdam to Goole, and was being navigated by one William Clarke, who was taken on board in Hull Roads, and

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who held a licence from the Trinity House in Kingston-upon-Hull (granted to him upon certificate of examination from the sub-commissioners of pilotage for the port of Goole), appointing him "to act as pilot for the port of Goole and the waters thereof, and any part of the river Humber between Goole and Hull Roads:" that the Court held the collision to have been occasioned by his default, and that the master of the Killarney did not possess any certificate (such as referred to in s. 353 of the Merchant Shipping Act 1854), enabling him to pilot his own vessel in the place in question.

The question now came on to be argued, whether, in these circumstances, the employment of William Clarke, the Goole pilot, was compulsory by law. The point was first argued, as appears below, on the effect of the Hull Pilot Act, now in force, 2 & 3 Will. IV. c. 105, and the Merchant Shipping Act 1854: afterwards, upon the effect of the charters, documents and other statutes.

The following are the principal enactments referred to in the arguments:—

2 & 3 *Will. IV. c.* 105—"*An Act for better regulating the Pilotage of the Port of Kingston-upon-Hull and of the River Humber, and for other Purposes relating thereto.*" [4th July, 1832.]

s. 22. "And whereas the Guild or Brotherhood of Masters and Pilots, Seamen of the Trinity House in Kingston-upon-Hull, commonly called 'The Corporation of the Trinity House in Kingston-upon-Hull,' have, as well by usage for a long period of years, as by virtue of letters-patent or charters granted to them by the crown, been empowered to appoint pilots to conduct ships and vessels sailing or navigating *into* and out of the port of Kingston-upon-Hull, *and the limits and liberties thereof*, and into and out of and upon the river Humber, and from the said river out to sea, and between Flamborough Head northward and Winterton Ness southward, and into and out of the several ports, creeks, harbours and places situate between those two last-mentioned headlands or places, in pursuance of which powers the said corporation have from time to time appointed a sufficient number of pilots for the purposes before mentioned; be it further enacted, that it shall be lawful for the said Guild or Brotherhood of Masters and Pilots, Seamen of the Trinity House in Kingston-upon-Hull, commonly called the Corporation of the Trinity House in Kingston-upon-Hull, and they are hereby required, to grant licences under their common seal to such persons as they shall, after due examination, approve of and think pro-

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perly qualified to be pilots for conducting ships and vessels *into and out of the port* of Kingston-upon-Hull, and of the port of Great Grimsby in the county of Lincoln, and upon any part of the river Humber, below the said port of Kingston-upon-Hull, and so far out at sea as to bring the North Ness 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 a certain sand or shoal called the New Sand, and also so far along the coast to the northward thereof as the said North Ness of Dimlington, and to the southward thereof as a certain point or headland on the coast of Lincolnshire, commonly called or known by the name of Donna Nook; and the persons so licensed shall for the purposes of this Act be called *Humber Pilots;* and all ships and vessels sailing, navigating and passing as aforesaid, except as hereinafter provided, shall be conducted and piloted within the limits aforesaid by pilots so licensed, and by no other pilots or persons."

s. 34. "Every master of any ship or vessel outward-bound from the said port of Kingston-upon-Hull, who is by this Act required to take a pilot, shall apply for such pilot at the pilot office aforesaid, and upon such application the commodore of pilots shall appoint a pilot to take charge of such ship or vessel; and any master of any such ship or vessel, or of any ship or vessel outward-bound, by this Act required to take a pilot, who shall himself act as a pilot, or who shall employ as a pilot any unlicensed person *within the limits for which pilots are directed to be licensed under this Act*, or being *inward-bound* shall himself act as a pilot, or shall employ or continue to employ as a pilot *within the limits aforesaid* any unlicensed person, *after any of the said Humber pilots shall have offered* to take charge of such ship or vessel, or shall have made a signal for that purpose, shall forfeit for every such offence double the amount of the sum which would have been legally demandable for the pilotage of such ship or vessel, &c."

s. 52. "It shall be lawful for the said corporation of the Trinity House in Kingston-upon-Hull, and they are hereby required, to appoint from time to time, as often and for such periods as they in their discretion shall think fit, such number of persons at Goole, in the West Riding of the county of York, not being more than five or less than three, to be sub-commissioners of pilotage; and such persons so to be appointed shall examine, and they are hereby authorized and required, so long as their deputation or appointment shall not be revoked or superseded by the appointment of other persons in their places, to examine into the qualification of persons to act as pilots for the port of

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Goole aforesaid and the waters thereof, and upon any part of the river Humber between the said port and a certain part of the said river Humber, called Hull Roads; and it shall be lawful for the said corporation, and they are hereby required, on receiving a certificate under the hands of any three of the persons so to be appointed, that any person examined as aforesaid is duly qualified to act for the said port of Goole and the limits aforesaid, to give a licence to such person to act as a pilot accordingly."

s. 89. "And in order to prevent doubts touching the meaning of certain expressions used in this Act, be it enacted, that for the purposes of this Act, *the entrance of the river Humber* shall be taken to be at an imaginary line drawn from the Spurn Point on the coast of Yorkshire to the floating light-vessel near the New Sand or the buoy of the said sand, and from such floating light-vessel or buoy to a certain headland on the coast of Lincolnshire, called Donna Nook; and the word *pilots* shall be taken to mean pilots licensed by the corporation of the Trinity House in Kingston-upon-Hull in pursuance of this Act or the said recited Act hereby repealed; and the words *inward-bound* and *outward-bound* shall in all cases (where a contrary or different meaning is not specifically expressed) be taken to mean respectively and to include all ships and vessels bound to or from the said port of Kingston-upon-Hull, or to or from some other port or place situate on the said river Humber, or some or one of the several rivers and streams flowing into the same, or to or from some or one of the several roadsteads in the said river Humber; and *the port of Kingston-upon-Hull* shall be taken to include the harbour and docks situate at the town of Kingston-upon-Hull, but not to extend higher up the river Humber than a certain clough, called Galley Clough, &c."

s. 93. "Provided always, and be it further enacted, that nothing in this Act shall . . . . . affect any of the rights, powers, privileges, jurisdictions or authorities of the Guild or Brotherhood of Masters and Pilots, Seamen of the Trinity House in Kingston-upon-Hull aforesaid, in matters of pilotage or otherwise, or in about or concerning the said haven, docks or roadsteads, or other premises vested in them in or by the said recited Act hereby repealed, or otherwise, or which they might have used exercised or enjoyed by virtue of the said recited Act or of any Act or Acts of Parliament, or of any charters, letters patent, ancient usage, or title whatsoever, in case this Act had not been made, otherwise than as the same are by this Act expressly extended, varied, altered or restrained, &c."

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6 *Geo. IV.* c. 125—"*An Act for the Amendment of the Law concerning Pilots and Pilotage, &c.*" [5th July, 1825.]

s. 58. "Every master of any ship or vessel who shall act himself as a pilot, or who shall employ or continue employed as a pilot any unlicensed person, or any licensed person acting out of the limits for which he is qualified, or beyond the extent of his qualification, after any pilot licensed and qualified to act as such within the limits in which such ship or vessel shall then actually be shall have offered to take charge of such ship or vessel, or have made a signal for that purpose, shall forfeit for every such offence double the amount of the sum which would have been legally demandable for the pilotage of such ship or vessel, &c. (*a*)."

s. 59. "Provided always, and be it further enacted, that for and notwithstanding anything in this Act contained, ... the master of any other 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, 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."

The 353rd, 387th, and 388th sections of the Merchant Shipping Act 1854, were also referred to: their effect was not disputed, and they are printed *ante*, p. 206.

The *Queen's Advocate* and *Pritchard* for the defendant.—The employment of the pilot was compulsory. The plaintiffs have so admitted on the pleadings; in their reply they say that the pilotage was not compulsory, "*for that* the master had a certificate, &c." That reason has been adjudged to be void (*b*), and with it, for it is their only reason alleged, their negative proposition falls. In the *Peerless* (*c*) the Privy Council held certain regulations not denied in the pleadings to be thereby admitted.—[Dr. Lushington:—Yes, a party may be estopped by his pleading as to a matter of fact, but this is a matter of law.]—The pilotage was compulsory by the Merchant Shipping Act, 1854, and the Hull Pilot Act, 2 & 3 Will IV. c. 105. The 353rd section of the Merchant Shipping Act maintains com-

(*a*) This section was not referred to in the first argument.

(*b*) *Ante*, p. 202.

(*c*) *Ante*, p. 112.

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pulsory pilotage in all districts where it was previously compulsory, and inflicts upon an offending master a penalty of double pilotage. Here the collision took place off Goole, which was solemnly decided by the Court of Queen's Bench in *Beilby* v. *Raper* (*a*), to be within the jurisdiction of the Hull Trinity House, by whom the pilot on board the Killarney was licensed. The powers of the Hull Trinity House are recited and maintained by the 22nd section of the Hull Pilotage Act; and the 52nd section expressly gives power to the sub-commissioners of Goole to examine persons as pilots for Goole waters, and to give certificates, upon which the Hull Trinity House is required to give licences. It is clear, therefore, that the Act expressly directs persons to be licensed as pilots for Goole waters, and provides for the same. Then the 34th section imposes a penalty upon any master of a ship inward-bound, himself acting as a pilot, or employing an unlicensed pilot within limits for which pilots are directed to be licensed under the Act.

Deane, Q. C., contrà.—The pilotage was not compulsory. The Hull Pilot Act is subsequent in date to the case of *Beilby* v. *Raper*, and in the 89th section the Port of Kingston-upon-Hull is defined so as to exclude Goole. This statute is now the law, and does not make pilotage compulsory within the limits of the port of Goole. The 34th section, on which the defendant relies, only inflicts a penalty upon a master piloting his own ship, "after any of the said *Humber pilots* shall have offered to take charge." This condition was not fulfilled, for Clarke was not a Humber pilot, but a Goole pilot, only licensed for Goole waters, and a Humber pilot is defined by s. 22 as a pilot to conduct ships into and out of the port of Kingston-upon-Hull, that is, Kingston-upon-Hull proper. This may be a *casus omissus*, but it is clear that if the man Clarke had been refused, and the master had piloted his own ship, no penalty could have been enforced. But I also contend that an exemption from compulsory pilotage was given by the 59th section of 6 Geo. IV. c. 125, the General Pilot Act. The exemptions there given are maintained, as decided by the *Earl of Auckland* (*b*), and one of those exemptions is in favour of the master navigating his ship within the limits of the port or place to which she belongs. This was a Goole ship navigating Goole waters: the master therefore was not bound to take a pilot.

The *Queen's Advocate* in reply.

As to the argument for the plaintiffs on the Hull Pilot Act,

(*a*) 3 B. & Ad. 284. (*b*) *Ante*, p. 164 (affirmed on appeal, *ante*, p. 387).

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it cannot be denied that Goole is "within the limits within which pilots are directed to be licensed by the Act," or that the Killarney was "an inward-bound vessel," for it was bound to "a port on one of the rivers flowing into the Humber," as defined by s. 89. It would therefore be contrary to the intention of the statute, which has its own exemptions (ss. 24, 25), as to coasting vessels, &c., and indeed almost an absurd construction to confine compulsory pilotage to the waters below Kingston-upon-Hull, for the narrow inland navigation must be the more perilous. The 22nd section, which defines "Humber pilots," does not exclude from this appellation a Goole pilot, for it expressly recites the ancient power and practice of the corporation, "to appoint pilots to conduct ships sailing into and out of the port of Kingston-upon-Hull and *the limits and liberties thereof*." By *Beilby* v. *Raper* Goole is within the limits and liberties of the port of Kingston-upon-Hull, even if by s. 89 of the statute it is now no longer to be considered an actual part of the port in the interpretation of the statute. We submit that Clarke was a Humber pilot.

Then as to the alleged exemption from compulsory pilotage under s. 59 of 6 Geo. IV. c. 125, the section expressly adds an exception to the exemption, "the port or place 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." *Beilby* v. *Raper* shows that certain charters granted by Queen Elizabeth and Charles II. did in effect provide for the appointment of pilots to Goole, and besides there is the former Hull Pilot Act, 39 & 40 Geo. III. c. 10.

On the 16th of May, 1861, when the Court was about to give judgment, the *Admiralty Advocate* for the defendant, applied for leave to put in evidence certain royal charters granted to the Hull Trinity House and other documents, and for a further argument, in case the judgment of the Court should be adverse to the defendant upon the construction of the local Act.

Judgment.

Dr. Lushington thereupon reserved his final decree, but pronounced the following opinion:—

On the hearing of this cause on the facts, the Court was of opinion that the collision was occasioned solely by the default of William Clarke, the pilot, and the Court had previously held that the master of the Killarney did not possess any certificate enabling him to pilot his vessel in the place where the collision occurred. The question now remaining is, whether the employ-

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ment of Clarke was compulsory by law, for, if so, by the 388th section of the Merchant Shipping Act, the owner of the Killarney is not responsible for the damages.

It is clear that Clarke had a licence from the Trinity House in Kingston-upon-Hull, appointing him to act as pilot "for the port of Goole and the waters thereof, and any part of the river Humber between Goole and Hull Roads;" and that this was granted to him in pursuance of the 52nd section of the Hull Pilot Act, 2 & 3 Will. IV. c. 105, and the Merchant Shipping Act. I have no doubt that this was a valid licence for piloting within the limits specified; but these limits do not include the whole of the river Humber. The question then takes this shape: Was it compulsory on the Killarney to take a Goole Pilot?

Was it compulsory to take a Goole pilot? 2 & 3 Will. IV. c. 105, ss. 22, 34, 89, considered.

The provisions of the Hull Pilot Act now in force, 2 & 3 Will. IV. c. 105, concerning compulsory pilotage, are expressly continued by the 353rd section of the Merchant Shipping Act, which enacts that "the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory immediately before the time of the Act coming into operation." This local Act contains an interpretation clause, s. 89, defining the meaning of several terms used in the Act, which proves to be of great importance. It defines "pilots" to mean pilots licensed by the corporation of the Trinity House in Kingston-upon-Hull in pursuance of the Act; therefore a Goole pilot will be included. It defines "inward-bound" to include all ships bound to the port of Kingston-upon-Hull, or to some other port or place situate on the river Humber, or to some or one of the several rivers and streams flowing into the same, or to some or one of the several roadsteads in the river Humber: according to this definition, the Killarney was an inward-bound vessel. It then 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. Therefore the words "the port of Kingston-upon-Hull" do not in this Act include Goole, which is on the Ouse.

The 34th section is the only section in the Act purporting to make the employment of a pilot in any case compulsory under a penalty. That section 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

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ship, shall forfeit for every such offence double the amount of the sum which would have been legally demandable as pilotage," &c. In other words, there is not by this section nor by this Act any penalty, unless a *Humber pilot* has offered to take charge of the ship. Clarke is a Goole pilot: is a Goole pilot a Humber pilot? Who are Humber pilots? The 22nd section of the Act directs that certain persons shall be called Humber pilots; namely, pilots for conducting vessels "into and out of the port of Kingston-upon-Hull." These words by the interpretation clause exclude Goole. Clarke therefore was not a Humber Pilot, but only a Goole pilot, and there is no penalty of any kind for not employing a Goole pilot. The employment of Clarke was therefore not by this Act made compulsory. I have little doubt that the attention of the draftsman of this Act was only directed to conferring the power to license Goole pilots, and that for other purposes his mind was solely directed to Humber pilots.

No compulsion under the local Act to take a Goole pilot.

In these circumstances my decree would be for the plaintiffs, but, at the request of the Admiralty Advocate for the defendant, I reserve my decree, and allow the royal charters and other documents to be brought in evidence, and there must be a further argument. I do this with great reluctance, and upon terms that the defendant shall in any result pay the further costs; and I am only induced so to suspend my decree out of respect to the Hull Trinity House, whose authority and interests are involved, and on account of the great inconvenience of deciding a question of such importance as this is to the navigation of the river Humber without the evidence of all the public documents relating thereto, and their due consideration.

Decree reserved.

Leave to produce further evidence granted to the defendant on terms.

On a subsequent day, (30th May,) *Milward* applied to be allowed to appear and be heard on behalf of the Hull Trinity House.

Judgment.

Dr. Lushington.—There is no precedent to allow a third party to intervene in a case of this kind. The Court is very reluctant to multiply parties to a suit, on account of the great additional expense it necessarily produces, and it will not make a precedent of the kind, except under pressing necessity.

It is true that the interests of the Hull Trinity House are directly involved in the decision of this case, but as I have given permission to the defendant, in order to establish a defence if he can, to adduce in evidence the royal charters to the Trinity House and other documents, I think I may trust that the inte-

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Application refused.

rests of the corporation will be duly cared for, without the appearance of separate counsel in their behalf.

The following evidence was then produced for the defendant:—

Royal Charters.

Copy of a charter granted by Queen Elizabeth in the 23rd year of her reign, re-establishing the Guild or Brotherhood of Masters and Pilot Seamen of the Trinity House in Kingston-upon-Hull; and copy of a charter to the same corporation granted by King Charles II. in the 13th year of his reign. In each of these charters "the limits and liberties of the port of Kingston-upon-Hull" were stated to be "all havens, creeks and other places where our customer of Hull, by virtue of his office, hath any authority to take any custom by the name of primage as in times heretofore," &c. (*a*), and each of the charters contained the following clause respecting pilotage:—

"We give and grant full power and authority unto the Warden, Elder Brothers and Assistants, and to their successors for ever, that from henceforth for ever hereafter it shall be lawful for them to forbid stay and keep back any manner of seaman or mariner of the port of Hull or the limits thereof before specified, to begin to take charge upon him as master or pilot of any ship or vessel to cross the seas, or to pass from Humber beyond Flamborough Head northward or Winterton-ness southward, other than such as shall be first examined by them, whom, if they shall find to be sufficient for that service and charge, and also to be naturally our subject born within our obeisance, they shall receive into their Guild or Brotherhood and give him a writing under the seal of their house, signifying thereby the countries, coasts and places for which he is found by them sufficient to take charge; whereby men unto whom he shall be unknown, when they have occasion to hire him or any of them, may be certified and satisfied for what places he is fit and sufficient. And this order we do expressly command to be observed, to the intent thereby to avoid the placing and preferring of unskilful men to take charge hereafter, which some men before this have done for affection to the person only, without regard of his sufficiency in knowledge and aptness thereunto. And whosoever hereafter shall or doth take upon him the charge as master or pilot from the said port of Kingston-upon-Hull, or

(*a*) In the argument it was admitted that this description included Goole, as decided in *Beilby* v. *Raper* (3 B. & Ad. 286), and also that Goole was first constituted a port in the year 1828, as described in *The Hull Dock Company* v *Browne* (2 B. & Ad. 52).

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the limits thereof, to cross the seas, or to pass from Humber beyond Flamborough Head or Winterton Ness, before he be examined or allowed as aforesaid, it shall be lawful unto the said Wardens, Elder Brethren and Assistants, or some of them, to punish such offenders by imprisonment or fines, according to their discretions."

Resolutions and Bye-Laws of the Trinity House in Kingston-upon-Hull.

Resolution, dated 17th May, 1828: "In compliance with the application of the directors of the Aire and Calder Navigation, and for the accommodation of ships and vessels trading to and from the port of Goole, and particularly that ignorant and improper persons may be prevented taking charge of such ships and vessels, *It is resolved*, 'That six pilots be appointed and licensed to take charge as pilots of ships and vessels into and out of the port of Goole, &c.'"

Resolution, dated 14th May, 1828, fixing rates of pilotage upon all ships and vessels trading to and from the port of Goole; and Bye-laws of the same date for the observance and good government of the Goole pilots.

Resolution, dated 23rd March, 1832, reciting that certain actions were then pending for the recovery of penalties incurred by unlicensed persons taking charge as pilots between Hull and Goole, and *resolving* that all actions pending for the recovery of any penalty or penalties incurred in this pilotage under any of the provisions of the General Pilot Act, be discontinued, and that the corporation will consent to the introduction of a clause in the Bill now before the House of Commons "for better regulating the pilotage of the port of Kingston-upon-Hull, and of the river Humber," authorizing and requiring the corporation to appoint sub-commissioners of pilotage for the port of Goole.

Resolution, dated 8th September, 1832, appointing sub-commissioners of pilotage for the port of Goole, to examine and recommend pilots for Goole, &c., and establishing rules and bye-laws for the better regulation of such pilots.

Bye-Laws and Regulations, dated 29th May, 1858 (amended 13th July, 1858), fixing the terms and conditions of granting pilotage certificates to masters and mates of ships by the corporation. The 5th of these Bye-laws relates to certificates to masters and mates for the limits within which pilots are licensed for Goole; and the 9th and subsequent Bye-laws impose various penalties for certain offences committed by persons holding such certificates.

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Bye-law, dated 13th November, 1858, reducing the rates of pilotage on steam-vessels to and from Goole.

Orders in Council.

Order in Council, dated 31st July, 1858, approving the Bye-laws of the corporation, dated 29th May and 13th July, 1858 (mentioned above).

Order in Council, dated 11th January, 1859, confirming Bye-law of Corporation dated 13th November, 1858 (mentioned above).

The 1st section of the earlier Hull Pilot Act, 39 & 40 Geo. III. c. 10, "*An Act for the Appointment and Regulation of Pilots for the conducting of Ships and Vessels into and out of the Port of Kingston-upon-Hull*," &c. (4th April, 1800), which was repealed by the 1st section of 2 & 3 Will. IV. c. 105, is as follows:—

"Whereas the Corporation of Wardens, Elder Brethren, and Assistants of the Guild or Brotherhood of the Trinity House of Kingston-upon-Hull, have for a long period of years, by usage as well as by virtue of letters-patent or charters granted to them by the Crown, exercised the power of appointing pilots to conduct ships and vessels from the river Humber to cross the seas, or to pass from the said river Humber beyond Flamborough Head northward and Winterton-ness southward; but they are not invested with sufficient powers to prevent other persons from acting as pilots within the said limits; and whereas it would greatly tend to the safety of ships and vessels sailing or trading from and to the port of Kingston-upon-Hull, if effectual powers were given for appointing and regulating of pilots for conducting of such ships and vessels between the said port and the sea, and for a small distance out at sea; and for preventing persons not so appointed from acting as pilots of any such ships and vessels, or of any ships or vessels destined from the said port to cross the seas, or to pass beyond Flamborough Head northward or Winterton-ness southward, ... Be it enacted, that it shall be lawful for the Wardens, Elder Brethren, and Assistants of the said Trinity House, and they are hereby authorized and empowered from time to time, by writing under their common seal, to license and appoint such persons as they shall, upon examination touching their skill and abilities, approve of and think properly qualified for that purpose, to be 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

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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 the persons so licensed shall, for the purposes of this Act, be called *River Pilots;* and if any person, without having such license to act as a river pilot as aforesaid, shall after the expiration of one calendar month from the passing of this Act, take upon himself to conduct or pilot any ship or vessel into or out of the said port, or at any place between the said port and the place at sea where the said Northness of Dimlington bears as aforesaid; or if any person, other than such as shall have been examined and declared by the said Wardens, Elder Brethren and Assistants, under their common seal, to be properly qualified and capable of conducting ships and vessels as a pilot at sea, shall, after the expiration of the said one calendar month from the passing of this Act, take upon himself to act as pilot of any ship or vessel destined on a voyage from the said port of Kingston-upon-Hull, in conducting such ship or vessel from the place near the entrance of the said river Humber, where the said Northness of Dimlington bears as aforesaid, to cross the seas, or to pass from Flamborough Head northward or Winterton-ness southward; every such person shall respectively forfeit and pay for every such offence any sum not exceeding twenty pounds."

The 46th section saves the rights of the Hull Trinity House in the same terms as the 93rd section of the Hull Pilot Act, 1832, printed *ante*, p. 430.

The *Queen's Advocate* and *Pritchard* for the defendant.—The rights and powers conferred by the royal charters, whatever they be, are continued by the Acts of Parliament, 39 & 40 Geo. III. c. 10, s. 46; 2 & 3 Will. IV. c. 105, s. 93, and the Merchant Shipping Act 1854, s. 331; and we contend, first, that the charters made pilotage to and from Goole compulsory as soon as licensed pilots were appointed in 1828. It is clear from the Orders in Council and the Bye-laws, that Her Majesty in Council and the Trinity House in Hull have acted on the belief that pilotage to and from Goole was and is compulsory. Secondly, at any rate the charters made provision for the appointment of pilots to and from Goole. This was in effect decided by *Beilby* v. *Raper* (*a*), for the Court of Queen's Bench there held that the pilot was duly licensed by virtue of the powers granted by the charters, and his licence was for the port of Goole and the waters thereof, and upon any part of the Humber between Goole and Hull Roads. It was not said that his licence was in part bad; it was held to be a good licence. This point

(*a*) 3 B. & Ad. 284.

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is not of importance in itself, but it is in its bearing on the argument on s. 59 of 6 Geo. IV. c. 125. Thirdly, it is admitted, that Clarke was duly licensed; and the 58th section of 6 Geo. IV. c. 125, which is maintained by the 353rd section of the Merchant Shipping Act, made his employment compulsory on the master of the Killarney. To this there is no answer except that it may be said that the Killarney was in Goole, the port to which she belonged, and was therefore within the exemption given by the 59th section. But to this we reply, that particular provision had theretofore been made by the royal charters for the appointment of pilots in relation to Goole; we say to and from Goole, but if it be only from Goole, that is sufficient, it is in relation to Goole. The compulsion, therefore, imposed by the 58th section obtains.

Deane, Q. C., and *Tristram*, contrà.—The whole case turns upon the fact that the Killarney was a vessel inward-bound. A careful examination of the language used in the charters shows that they apply to outward-bound vessels only; and this is confirmed by the first section of the first Hull Pilot Act, 39 & 40 Geo. III. c. 10, which, after reciting the power of the corporation under charter to appoint pilots to conduct vessels outward-bound, proceeds to grant power to appoint pilots to conduct ships "*into* and out of the port of Kingston-upon-Hull." *Beilby* v. *Raper* is not decisive the other way, for there it was only necessary to decide that the pilot was duly licensed to conduct an outward-bound vessel. The practice (disputed too at the time) of the Hull Trinity House in licensing pilots to conduct ships in and out of Goole, in the short interval of four years between 1828, when Goole was made a port, and the passing of the 2 & 3 Will. IV. c. 105, in 1832, which gave them express power so to do, is immaterial; and so is the notion supposed to underlie, or which does underlie, the Orders in Council and the Bye-laws. To save the defendant, the pilotage must have been compulsory by law.

The argument for the defendant upon ss. 58 and 59 of 6 Geo. IV. c. 125, is answered in this way, that particular provision had not previously to 1826 been made by charter or statute for the appointment of pilots to conduct inward-bound ships to Goole. The charters made no provision, as already argued: the Hull Pilot Act of 1800, then in force, did not mention Goole, and the present Hull Pilot Act was not in existence: consequently there was not compulsory pilotage under s. 58, for the master of the Killarney was by s. 59 allowed to pilot his ship in Goole, being the place to which she belonged.

The *Queen's Advocate* replied.

On the 18th February, 1862, Dr. Lushington gave judgment. 1862. *February* 18.

Judgment.

In this case, the Court, after pronouncing an opinion upon the question as originally argued upon the local act, has consented to receive in evidence the charters to the Hull Trinity House and other documents, and to allow a further argument. The facts are undisputed; and I have now to determine whether by the operation of the charters, or of the charters and documents taken with the statutes, or by the statutes only, the employment of the pilot was at the time of the collision compulsory by law.

As to the charters.

I will speak first of the royal charters granted to the Corporation of the Trinity House in Hull. The 93rd section of the Hull Pilot Act, 2 & 3 Will. IV. c. 105, saves all rights of the Corporation of the Hull Trinity House in matters of pilotage, which they had used or enjoyed by virtue of any charters. Two charters have been produced, one granted by Queen Elizabeth, the other by Charles II. Each of these charters contains the following clause. [The learned Judge then read the extract from the charters, printed p. 436.] The power thus conferred by the charters on the Corporation, to restrain by penalties unlicensed persons from piloting, appears to refer to outward voyages and not to inward voyages; and it has been argued by Dr. Deane that the power to appoint pilots must be considered as limited in a corresponding manner. The effect of this I shall refer to again.

The Orders in Council, &c.

Then as to the two Orders in Council and the Resolutions and Bye-laws of the Hull Trinity House. [The learned Judge stated these various documents in detail.] It is clear from all these documents that ever since Goole was made a port in 1828, the Hull Trinity House have licensed pilots for Goole, and have ever since acted on the belief that pilotage to and from Goole was compulsory by law, and that the recent Orders in Council confirming the Bye-laws of the Corporation likewise proceed on this foundation. But there is not to be found in any of these documents, nor (as there was an express Hull Pilot Act as well as a General Pilot Act) was it to be expected that there would be found, any direct requirement that vessels to and from Goole should under penalty take licensed pilots. Accordingly these documents do not make the pilotage compulsory.

Hull Dock Company v. *Browne.*

Next as to the two cases cited in the argument on both sides. The first of these is *The Dock Company at Kingston-upon-Hull* v. *Browne* (*a*). It has no bearing upon the present question,

(*a*) 2 B. & Ad. 43.

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except that it decides that the term "port of Kingston-upon-Hull" is used in the ancient documents and the statutes in two significations, a larger one, which includes Goole and other places—the plaintiffs admit this—and a narrower one, which is confined to the port of Kingston-upon-Hull proper; and that the term is used in this latter or limited sense in the Hull Dock Company Act, 14 Geo. III. c. 56. The second case is *Beilby* v. *Raper* (*b*). That was an action for a penalty under the 70th section of the General Pilot Act, 6 Geo. IV. c. 125, brought against an unlicensed person for taking charge of a vessel called the Amelia, which was outward-bound from Goole to Hamburgh. The defendant had assumed charge of the vessel in the river Ouse, between Goole and Hull Roads, after a pilot had offered, who held a licence from the Hull Trinity House to act as pilot for the port of Goole and the waters thereof, and upon any part of the River Humber between Goole and Hull Roads. The charters of Elizabeth and Charles II. were in evidence, and the Court of Queen's Bench decided that by virtue of those charters the corporation had power to license the pilot, and that he was duly licensed. A verdict against the defendant was therefore maintained. This case, however, unfortunately does not dispose of the question before me, for it only necessarily decides that the corporation had, as the charters provide, authority to license pilots to conduct ships *from* Goole; it does not necessarily decide that the corporation had authority to license pilots to conduct ships *to* Goole, nor does it decide that the charters alone, though purporting so to do, were valid to make pilotage compulsory under penalty.

Beilby v. *Raper*.

Effect of 6 Geo. IV. c. 125, ss. 58, 59, considered.

The decision of this case must therefore turn on other considerations. These I will now proceed to state. William Clarke was a duly licensed pilot, and duly offered himself to the Killarney in Hull Roads. The collision took place in Goole within the limits of his licence. By the 58th section of 6 Geo. IV. c. 125, it is enacted, that the master of any ship who shall act himself as a pilot, after any pilot licensed and qualified to act as such within the limits in which such ship shall then actually be shall have offered to take charge of the ship, shall forfeit double pilotage. The effect of this section, which is maintained by the 353rd section of the Merchant Shipping Act 1854, was to render the employment of William Clarke compulsory upon the master of the Killarney, unless the case falls within the exemptions from compulsory pilotage contained in the following section, s. 59, which are also maintained in the same manner

(*a*) 3 B. & Ad. 284.

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by the Merchant Shipping Act. One of these exemptions (the only one at all applicable to this case) is that a master may pilot his own ship whilst the same is within the limits of the port or place to which she belongs. Here the Killarney was in Goole, to which port she belonged; and accordingly proceeding thus far only, this case would appear to be within the exemption, and the pilotage would be voluntary only. But there is an exception to this exemption, for the section goes on to say "the same," that is, the port or place, "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." The whole case, therefore, comes to this—Had any particular provision been made in relation to Goole before the year 1826 by any Act of Parliament or by any charter for the appointment of pilots? If there had been, the exemption just mentioned did not attach, and the pilotage was compulsory.

At the time of the passing of this Act in 1826, the local Act of 1800, 39 & 40 Geo. III. c. '0, was in force; but it appears to me upon consideration of the various provisions of the Act, and the judgment of Lord Tenterden in *Beilby* v. *Raper* (*a*), that this local Act of 1800 did not apply to Goole, but only to the River Humber between the port of Hull proper and the sea. This local Act, therefore, will not suffice for the purpose. Then by the charters provision was made, as *Beilby* v. *Raper* decides, for the appointment of pilots for ships outward-bound from Goole; but it is, to say the least, doubtful if they contain any provision as to ships inward-bound. Is this sufficient to satisfy the terms of the exception? I am not satisfied that it is; it may be or it may not be that it is enough, if for the place in question particular provision is made by charter for the appointment of pilots, when the particular provision does not extend to the particular case in hand.

Bearing of the charters upon s. 59, doubtful.

On this, however, I give no opinion, for I am relieved from the difficulty by another statute which has not hitherto been adverted to,—the General Pilot Act of 1812, 52 Geo. III. c. 39. The 21st section of that Act provides, that "it shall be lawful for the corporation of the Trinity House of the ports of Hull and Newcastle respectively to appoint sub-commissioners of pilotage to examine pilots and give licences for pilots for piloting ships and vessels *into or out of* any ports, harbours or places within the limits of their respective jurisdictions." Now Goole was a

But 52 Geo. III. c. 39, s. 21, satisfies the exception, and takes the case out of the exemption, contained in s. 59 of 6 Geo. IV. c. 125.

(*a*) 3 B. & Ad. 294.

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place, as *Beilby* v. *Raper* decides, within the jurisdiction of the Hull Trinity House. This section, which I have just quoted, was not referred to in *Beilby* v. *Raper*, as sub-commissioners had not then been in fact appointed for Goole, and Goole the pilot had been examined as well as appointed by the Hull Trinity House; it is re-enacted by the 6th section of 6 Geo. IV. c. 125. I am of opinion that this enactment does bring the case within the exception to the exemption, in that Goole is thus a place for which particular provision had been made by Act of Parliament passed before the 6 Geo. IV. c. 125, for the appointment of pilots both for outward and inward-bound ships.

The employment of the pilot was compulsory.

The result is that the employment of the pilot was compulsory, and the owner of the Killarney is not responsible for the damage occasioned by the pilot's default.

With respect to the costs up to the finding of the Trinity Masters, each party must pay their own; but from that time I condemn the defendant in the costs.

Coote, proctor for the plaintiffs.

Cherrill for the defendant.

THE LEO.

Collision—Amount of Freight to be paid in by Owners of Cargo on board Ship sued.

The owner of cargo on board a ship sued for collision is only compellable to pay into Court the freight due from him to the shipowner.

In computing the amount of such freight, deductions, as by charter, from gross freight, will be allowed; and if the cargo is delivered at a place short of destination by reason of the collision, such reasonable reduction as may have been agreed upon between the shipowner and the owner of cargo.

Costs of paying freight into Court may also be deducted.

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THIS was a cause of collision, instituted by the owners of the schooner Peri against the Leo, and "the freight due or to grow due for the transportation of the cargo laden therein." At the time of the collision the Leo was bound to London, laden with lemons, but in consequence of the collision she put into Falmouth to repair damages, and the cargo was then discharged, and was there accepted by the owners of cargo. The cargo

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was afterwards arrested in this cause for the freight, but was released upon the owners paying into the registry the sum of 187*l.* 5*s.* 1*d.*, and filing an affidavit stating that the gross freight as agreed by charter party) amounted to 233*l.*, and claiming the following deductions, which reduced the net freight to the said sum of 187*l.* 5*s.* 1*d.*

	£	*s.*	*d.*
Interest at 5*l.* per cent for two months, on 116*l.* 10*s.* half the amount of freight as per charter . .	0	19	5
Commission as consignee, at 2*l.* per cent. on freight	4	13	2
Allowance by agreement with shipowner, for non-fulfilment of the charter	33	0	0
Costs of paying freight into Court . . .	7	2	4
	45	14	11

The release issued in ordinary course, without the consent of the plaintiffs' proctor, according to Rule 49, which provides that "Cargo arrested for the freight only may be released by filing an affidavit as to the value of the freight, and by paying the amount of the freight into the registry."

The cause proceeded in *pœnam*, and the ship was sold; the proceeds of ship and the freight in the registry were insufficient to meet the damages.

Notice of motion was then given on the part of the plaintiffs, for a monition against the owners of the cargo to bring in "the sum of 45*l.* 14*s.* 11*d.*, the balance of the freight of the said vessel Leo."

The material part of the 504th section of the Merchant Shipping Act 1854, referred to in the argument, is as follows:—

"No owner of any seagoing ship or share therein shall in cases where all or any of the following events occur without his actual fault or privity, (that is to say)—

. . . . . .

(4.) 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 laden 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."

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Tristram now moved for the monition.—The plaintiffs are intitled to have the full freight. In the *Benares* (*a*), where the shipowner claimed limited liability under 53 Geo. III. c. 159, s. 1, the Court required him to pay in the gross homeward freight without deductions. In *Cannan* v. *Meaburn* (*b*), a case decided under the same statute, upon an action brought to recover damages for cargo tortiously sold abroad by the master of the ship, the Court of Common Pleas made the shipowner liable to the value of his ship and all the freight which would have been earned but for the tortious act of the master; though not for the freight which was lost by previous circumstances. That case is still the law, for the terms of the statute of George III. and the 504th section of the Merchant Shipping Act, 1854, are in this respect almost identical: *Abbott on Shipping* (*c*). Applying this rule to the present case, the freight which would have been earned but for the collision is the full freight; for the loss of freight, if any, was caused by the tortious act. [DR. LUSHINGTON:—That may be the measure of the shipowner's liability, but the question here is, what freight shall the owners of cargo be compelled to pay; *they* have done no wrong.] I submit that they must pay in the full freight; they may have their action over against the shipowner. An agreement between the shipowner and the owner of cargo to reduce freight in a case of this kind opens the door to fraud.

Judgment.

On the 26th of February, DR. LUSHINGTON gave judgment.

In this case the owners of the cargo laden on board the ship Leo were called upon by the plaintiffs, who were suing the Leo for damage by collision, to pay the freight into Court. They have paid the sum of 187*l.* 5*s.* 1*d.* The gross freight stipulated to be paid to the owners of the ship was 233*l.*, but the owners of the cargo claim certain deductions, amounting to 45*l.* 14*s.* 11*d.* The question before the court is, whether it ought to allow such deductions.

The owners of cargo have committed no wrong, and are compellable only to pay that freight which is due from them to the owners of the ship.

The owners of a ship, having received damage from another ship, have no claim against the owners of the cargo laden on board the ship doing the damage. They, the owners of the cargo, have been guilty of no tort whatever. On the other hand those who have received the damage are intitled to be indemnified out of the freight, as well as the ship. The freight in all but excepted cases, which I do not notice, being due to the owner

(*a*) 7 N. of C. Suppl. l. (*b*) 1 Bing. 465. (*c*) 10th ed. p. 300.

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of the ship, the Court gives its aid by arresting the cargo for the freight, that what is due to the owner of the ship doing the damage may be secured to those who receive the damage. Then, as the present plaintiffs have no claim against the owners of the cargo, and cannot impose any burden on them for the wrong committed by the ship, what is the proper measure of freight to be recovered? Manifestly that which is due from the owners of the cargo to the owners of the ship. What is that amount? The amount of gross freight, less the deductions agreed to be allowed between them. The plaintiffs have no pretence to alter the original agreement made between the owners of the Leo and the owners of the cargo; neither have they any right to damnify the owners of the cargo by putting them to any expense which they otherwise would not be liable to, as by payment into court instead of to the owners of the ship. I have no doubt, therefore, that the three smaller items must be allowed. Then as to the 33*l.* It is a deduction which has been allowed by agreement between the owners of the Leo and the owners of the cargo, because the cargo was not brought to its port of destination; and it is not alleged that this agreement was not made in good faith. The whole freight was not due from the owners of the cargo. They never did owe it to the owners of the ship, and they cannot be compelled to pay it to the plaintiffs. Whether the shipowners might not, is a question which I am not called upon to decide.

The cargo not having been carried to destination, a deduction from freight to be allowed as by agreement between shipowner and owner of cargo.

Coote, proctor for the plaintiffs.

Lawrie for the owners of cargo.

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THE GANANOQUE.

Master's Wages—Share in Cabin-passage-money-profits—Presumption of Law as to Agreement extending to a subsequent Voyage.

The law will presume that the terms of a master's engagement for one voyage extend to a succeeding voyage performed without a new agreement, express or clearly implied.

The defendant was sole owner of a ship which was equipped as a passenger ship, and chartered for Melbourne, Australia. The plaintiff, a master mariner, bought from him a small share of the ship, and, by a letter referring to the voyage then contemplated, became master, on the terms of receiving 15*l.* a month, and half cabin passage-money profits. The ship performed the voyage to Melbourne, carrying cargo only, and returned home. The defendant, being managing owner, anticipating her arrival, had chartered the ship to carry goods and emigrants to New Zealand, the agreement being, that the charterers guaranteed the owners a lump sum; and if the freight and passage-money (calculated as provided in the charter) should exceed that sum, the surplus should be equally divided between the charterers and the owners; and further appointing (amongst other things) that the master should keep account of the issue of all stores provided by the charterers, and account for all surplus stores, less ten per cent. This agreement was shown by the defendant to the plaintiff, who expressed his general satisfaction. No communication passed between them as to the terms on which the plaintiff should serve on the new voyage, except that the plaintiff would receive a gratuity from the charterers. Under this agreement the ship, under the command of the plaintiff, took out to New Zealand a number of emigrants, including a number of cabin-passengers. The plaintiff also received his gratuity from the charterers.

Held, that the original agreement continued; and that, notwithstanding the altered circumstances, the master was intitled to a share of cabin passage-money profits.

THIS was a cause instituted on behalf of Archibald Morris against Thomas Bailey, for his wages as master of the ship Gananoque. After the conclusion of the pleadings, it was agreed, by a minute of Court, that the question to be decided by the Court should be whether the plaintiff was, as master, intitled to any cabin passage-money profits for the voyage performed in the Gananoque from the port of London to Canterbury, New Zealand, in the year 1860. The material facts were as follow:—

In May, 1858, the defendant being sole owner of the Gananoque, the plaintiff bought one-eighth share of the ship, and became master upon terms of receiving 15*l.* a month, one-third of the gross cabin passage-money, and one-half of the cabin freight, and being found in provisions and necessaries. The ship was equipped as a passenger ship, and was shortly after

chartered to take out a general cargo and passengers to Melbourne, in Australia. Before the ship sailed, the following letter, containing fresh terms of agreement, was handed by the defendant to the plaintiff:— 1862. *February 26.*

"Liverpool, 9th Aug. 1858.

"Dear Sir,—The Gananoque being about to proceed on a voyage to Melbourne, and perhaps other places, I offer you the command of that ship on the following terms:—Your pay being 15*l.* per month, to commence the 1st of this month. The cabin passage-money—the profits, if any, to be equally divided; any light freight you may bring home in the poop, all other parts of the ship being full, you will have one-third freight. All necessary travelling expenses, when on ship's duty, will be paid you. You will use the utmost economy and despatch, &c., &c.

"T. Bailey."

The plaintiff by letter accepted these terms. Eventually, no passengers offering, the ship carried out cargo only. On the 8th of December, 1859, the ship arrived in London from her homeward voyage. On the 11th of November, the defendant being the managing owner of the ship, anticipating her arrival, had entered into the following agreement with Willis, Gann & Co., of London (immaterial parts omitted):—

"London, 11th November, 1859.

"Memorandum of agreement between T. Bailey, for self and other owners of the ship or vessel called the Gananoque, 785 tons, N. M., whereof Morris is master, now on his passage to London, and Arthur Willis, Gann and Company, brokers.

"The said owners undertake that, the said ship being tight, staunch and strong, and every way fitted for the voyage, shall forthwith be made ready and load in the East India Docks, on the berth for one port (say either Canterbury or Auckland, New Zealand), and deliver the cargo from alongside as per bills of lading (proceeding as directed by the said brokers) as is customary for a general ship, and shall receive on board all such lawful goods, passengers, specie, cattle, &c., as the said brokers shall require, not exceeding what she can reasonably stow and carry over and above her tackle and furniture, and for which the master shall sign bills of lading in the usual and customary manner, and at any rate of freight, without prejudice to this agreement.

"The vessel to be consigned to the agents of Arthur Willis,

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Gann and Company at the ports of discharge, and in case of general average the papers for adjustment to be placed in their hands for settlement and collection.

"The ship to take government stores and passengers should they offer, and the owners hereby authorize Arthur Willis, Gann and Company, to sign on their behalf any tender for the same without reference to the rate. The owners also agree to sign the usual passenger bond at the Custom House, and undertake that the ship shall in every respect (except as to provisions, water and joiner's fittings for passengers hereinafter mentioned), duly pass for the conveyance of passengers under the Passengers Act.

"The owners further agree to provide the cabin furniture and necessary attendance, linen and ware for the cabin table, as well as coals, cooking and cooking apparatus for the cuddy passengers only—also lamps and oil for the between-decks, and proper accommodation for the live stock and poultry supplied by Arthur Willis, Gann and Company.

"The master to issue, or cause to be issued, to the several classes of passengers their provisions and other stores according to the scales of victualling furnished for the purpose, and also to such passengers as shall be willing and can legally purchase the same, the wines, spirits or beer put on board by Arthur Willis, Gann and Company, and receive from the said passengers the price thereof at the rates fixed by the said brokers. The master to keep or cause to be kept an accurate daily account of such issues, and to account to the agents of Arthur Willis, Gann and Company, as directed by them, for all surplus stores, less the usual allowance of 10%, fittings, water-casks, &c., as well as for sums of money received by him for the sale of the wines, spirits and beer as aforesaid, according to the forms to be furnished him.

"In consideration whereof the said brokers hereby agree, that if (after deducting cost of victualling, &c., as hereinafter provided,) the freight and passage-money do not amount to so much, they will make up to the owners the sum of 3,350*l.*; and if the said freight and passage-money exceed that sum, it is agreed that one-half shall belong to Arthur Willis, Gann and Company, and the other half to the owners; it being also agreed that Arthur Willis, Gann and Company are to provide victualling, water casks and joiner's and plumber's fittings for the passengers, and to be allowed 19*l.* for each chief cabin passenger, 11*l.* for each second cabin passenger, and 9*l.* for each steerage passenger, such sums to be first deducted from the

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passage-money received, and the balance only to be reckoned in accounting for the sum guaranteed.

"The freight and passage-money to be paid by Arthur Willis, Gann and Company, less their account for disbursements as aforesaid, 800*l.* in cash on sailing—1,000*l.* by bill at three months from date of sailing—700*l.* in the colony, and balance on production of certificate of due performance of voyage.

"T. BAILEY,
"ARTHUR WILLIS, GANN & Co."

This agreement was shown by the defendant to the plaintiff, who expressed his approval; and no communication passed between them touching the terms upon which the plaintiff was to serve upon the new voyage, except that the defendant told the plaintiff that he would receive from Willis and Company a gratuity of forty or forty-five guineas. Pursuant to the agreement, the ship, under the command of the plaintiff, took out to Auckland in New Zealand a number of emigrants, including cabin passengers; and returned home to England in March, 1861. The plaintiff then quitted command of the ship, and, on a settlement of accounts, the defendant refused to allow him cabin passage-money profits on the voyage to New Zealand.

The facts were proved as above; and that the plaintiff had received from Willis and Company a gratuity of 42*l.*: evidence was also given on both sides as to the rate of remuneration of masters in the Australian trade.

Edward James, Q.C., and *Lushington*, for the plaintiff.—The plaintiff relies on the presumption of law, that where a person enters into an employment for a certain time on certain terms, and afterwards the employment is continued without new terms being specified, the former terms continue. Taylor on *Evidence* (*a*), says, "Other presumptions are founded on the experienced continuance or immutability, for a longer or shorter period, of human affairs. When therefore the existence of a person, or personal relation, or a state of things is once established by proof, the law presumes that the person, relation or state of things continues to exist as before, till the contrary is shown, or that a different presumption is raised, from the nature of the subject in question .... So where a tenant holds over after the expiration of the term, he impliedly holds subject to all the covenants in the lease which are applicable to his new situation, and this presumption still remains, though the rent has been

(*a*) Page 164 (2nd edition).

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advanced, and though the original lessor has assigned his interest to a third party; or, being a clergyman, has resigned his living, and a fresh incumbent has succeeded him." There was no express agreement in substitution of the original one, nor can any new agreement be implied: there was nothing in the circumstances under which the last voyage was to be performed to deprive the master of his stipulated share in the cabin passage-money profits, without which, it is clear, he would be inadequately remunerated. It cannot be that the original agreement is to prevail as to the monthly wages of 15*l.*, and not as to the other terms.

Deane, Q. C., for the defendant.—The defendant does not dispute the presumption of law on which the plaintiff relies; but that presumption may be rebutted by the facts; and here it is to be implied from the facts that the master waived his claim for the share in the cabin passage-money profits. The master assented, as part-owner and master, to the agreement with Willis and Company; and by that agreement the voyage was made of a different nature to the preceding voyage, and there were no cabin passage-money profits as such to go to the owners, but only a lump sum, with a contingent share of a further lump sum. The master is paid by his share as part-owner, and by the gratuity from the charterers, of which he had notice before the voyage was commenced.

James, Q. C., replied.

Judgment.

Dr. Lushington:—In this case the question submitted to me is whether the plaintiff, as master of the ship Gananoque, is intitled to receive from the managing owner, the defendant, a share in the cabin passage-money profits earned in a voyage from London to New Zealand. The plaintiff relies on an agreement under which he had served in the same ship on a former voyage.

Presumption of law, that the terms of engagement for one voyage extend to a succeeding voyage, performed without a new agreement, express or implied.

It is admitted that by the agreement for the first voyage the profits of the cabin passage-money, if any, should be equally divided between the master and the defendant; and further, that nothing in conversation or in writing passed between the defendant and the master before the second voyage, directly expressing intention on either part, that the terms of service should undergo any alteration.

Primâ facie under these circumstances, the presumption of law is that the agreement continued. It is manifest that if a

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servant is engaged for a fixed period, as for a year, for certain wages and certain advantages, and he stays over the year, the law will presume that he remains on the same terms, though of course this presumption may be rebutted by evidence of a new agreement. So in this case, and if the presumption is in favour of the continuance of the agreement at all, it is in favour of the continuance of the whole agreement.

This presumption is not denied on behalf of the defendant, but the defence is rested on matters of fact, which it is alleged rebut the presumption; first, the different character of the second voyage from the former voyage; and secondly, the particular terms of the agreement with Willis, Gann & Co.; both which circumstances were known to the master, and which, as the defendant contends, ought to have convinced the master that he could have no claim to any share of cabin passage-money profits. Let me examine these two matters. First, that the second voyage was of a different description from the former one. The former voyage was to Melbourne and other places; no passengers were actually carried; but it was clearly contemplated by the letter which constituted the master's agreement that there might be passengers. On the second voyage the ship was chartered for carriage of goods and passengers, emigrants no doubt being particularly contemplated, and the destination was Canterbury, New Zealand. These may be differences, but they do not necessarily render the antecedent agreement between the master and the managing owner as to cabin passage-money profits inapplicable to the new voyage. The difference of ports is clearly immaterial; nor can I discover in the fact that emigrants were certainly intended to be carried anything to lead the master to conclude that he was to be deprived of his share of the cabin passage-money profits. In such voyages it is very common for the master to take by agreement a share in the cabin passage-money. But if the master was to be so deprived, on whom devolved the duty of making this clear? Certainly upon the defendant; to intimate to the master that he was to command the ship on less favourable terms than on the previous voyage. The master had a right to conclude that the terms were the same unless the agreement with Willis & Co. demonstrated the contrary. Then, secondly, the defendant relies upon a stipulation in the charter (as I may call it) with Willis & Co. (which was shown to the master, and in which he expressed general satisfaction), that if the freight and passage money, calculated in a manner provided for in the charter, did not amount to 3,350*l.*, Willis & Co. should make up that amount to the owners; and that if there was any

In the present case, the facts do not prove any new agreement modifying the origina one.

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surplus of freight and passage-money (so calculated) above 3,350*l.*, it should be divided between the charterers and the owners. But what has this stipulation to do with the agreement between the master and owners; and why should not the master receive his share of cabin passage-money profits, because the charterers were to share in a surplus upon all freight and all passage-money? This is not, in my opinion, such a specific appropriation of the cabin passage-money, which would at once have shown to the master that he was excluded from all share.

As to the forty guineas gratuity received by the master from Messrs. Willis & Co., that has really nothing to do with this question. It was a remuneration for taking care of their stores, their property; not pay or remuneration for performing the ordinary duties of a master. The 10 per cent. allowed to the master in accounting for the stores issued is the ordinary deduction for wastage.

The plaintiff intitled to his share in the cabin passage-money profits, as by the original agreement.

Looking to the agreement between the parties, as to the issue the Court shall decide, I am of opinion that the plaintiff is intitled to a share in cabin passage-money profits on the voyage to New Zealand.

Green and *Allin*, solicitors for the plaintiff.

Brown and *Godwin* for the defendant.

THE COMTE NESSELROOD.

Salvage—Agreement—Certificate for Costs under 17 *&* 18 *Vict. c.* 104, *s.* 460—*Costs up to Time of Tender.*

The plaintiff, one of several salvors, sued for salvage services rendered in the United Kingdom. The defendants tendered, by act of Court, 40*l.*, "with costs up to time of tender," which the plaintiff refused. The defendants then resisted the claim partly on the question of amount, and partly on the ground (which they failed to support) that the plaintiff had been party to a settlement of the whole claim with one of the co-salvors. The Court overruled the tender and gave 100*l.* The Court then *held*, that, notwithstanding the question of agreement, the case was not a fit one to be tried in the superior Court, and accordingly refused to certify for costs, under the 460th section of the Merchant Shipping Act 1854, and *held*, further, that thereby, notwithstanding the form of tender, the plaintiff was not intitled to his costs up to the time of tender.

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SALVAGE. This was a cause of salvage instituted by George Partington for services rendered to the Comte Nesselrood and her cargo in the following circumstances.

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In the evening of the 13th of October, 1861, the brigantine Comte Nesselrood, laden with linseed, and bound to Hull, struck on the shore in rounding Spurn Point, and was immediately abandoned by the master, pilot and crew, who took to the boats and stood out into the channel, where they were picked up by a steamer, and landed at Grimsby, at one A.M., the next morning. They immediately proceeded in a steam-tug to the Spurn, but could not find their vessel. About 3 A.M., John Vickers, a ship's carpenter, sailing in a fishing-boat, with two apprentices, came upon the vessel, driving about under sail, off the Killingholme Lights, and saw her go on shore. Vickers sailed up to a sloop called the Active, which was at anchor at a short distance, and hailed the plaintiff, George Partington, who was the master, and asked him to go to the brigantine. Vickers then went in his boat to the brigantine and was shortly followed by the plaintiff and his mate in the Active's boat. They took joint possession of the vessel, and in the course of the morning engaged two tugs to tow the vessel off, for the sum of 10*l.* each tug. By the assistance of the tugs the vessel came off at high water, and was then towed into one of the docks at Hull. The next day Vickers, as it was afterwards proved, without and against the plaintiff's consent, negotiated with Lloyd's agent for the amount of the reward, and on the following day, the 16th of October, Lloyd's agent paid Vickers 250*l.*, and Vickers gave a receipt on behalf of all parties concerned. The plaintiff, however, on the same day, wrote a letter demanding 1,500*l.*, and on the 18th of October, arrested the property in the sum of 2,000*l.*

The value of the ship, cargo and freight was 4,750*l.* The defendants, the owners of the property, on the 6th of November, paid into court 40*l.*, giving the plaintiff's solicitor the following notice of tender:—

"Take notice, that we have paid into the Bank of England to the account of the Registrar of this Court, the sum of 40*l.*, and we hereby tender you the said sum (together with costs to the present time, to be taxed as between party and party) in full satisfaction of the claim of your party for the services rendered by him to the schooner Comte Nesselrood."

On the hearing of the cause on the 21st of January, 1862, the learned Judge pronounced the tender insufficient, and awarded the plaintiff the sum of 100*l.*

The 460th section of the Merchant Shipping Act 1854, is printed, *ante*, p. 183.

Deane, Q.C., (*Swabey* with him,) then applied to the Court to certify for costs.—The case was not one of simple services undis-

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puted, it involved also a question of agreement, and the Court has held that in such cases the proper tribunal is this Court rather than the local authorities; *Fenix* (*a*).

The *Queen's Advocate* (*Pritchard* with him), contra.—The salvage services were of the most ordinary kind; the witnesses all Hull men, on the spot; the alleged agreement involved no question of law, but one of fact only, and the plaintiff's claim was most exorbitant.

Judgment.

DR. LUSHINGTON:—The Court cannot certify for costs unless conscientiously convinced that the case is a fit one to be tried in a superior Court, and was such in its circumstances that the local magistrates ought not to have been called upon to decide it. One thing only is put forward here as a reason for not taking the case to the magistrates,—the agreement; the agreement alleged to have been made by one of the salvors after the services were performed. Now it is true that I have said, that where the case is mixed up with an agreement,—and I had in my mind informal agreements made at sea and disputed,—difficult questions may arise, which would induce the Court to certify; but I have not said that in every case of an agreement I should on that account certify. I do not think the agreement in this case a sufficient reason for bringing the matter into this Court, and in all other particulars, this is a simple, a very simple case. I decline to certify.

Certificate for costs refused.

Upon this judgment the defendants paid the plaintiff 100*l.*, and on the 18th of February, the *Queen's Advocate* (*Pritchard* with him) applied to the Court to direct that the costs up to the time of the tender should not be allowed the plaintiff.—The tender was made with the offer of costs up to the time of tender, but "costs" are only such costs as are due by law; and the tender having been refused by the plaintiff and overruled by the Court, ceases to have any effect at all. The words of the statute (17 & 18 Vict. c. 104, s. 460) are peremptory, "the claimants shall not recover *any* costs."

Deane, Q.C., contra.—The defendants cannot recede from their offer, which was to give costs up to time of tender. In the circumstances of this case, the phrase in the statute "any costs" may be construed to mean "any costs after tender."

(*a*) Swabey's Reports, p. 16.

On the 28th of February, Dr. Lushington gave judgment. 1862. *February* 28.

This was a cause of salvage for services rendered in the United Kingdom, entered on behalf of the plaintiff in the sum of 2,000*l.* Judgment.

On the 6th of November the proctors for the defendants gave notice to the plaintiff's solicitors that they had paid into the Bank of England 40*l.*, which they tendered in satisfaction of the plaintiff's claim for salvage, together with costs to the date of the tender to be taxed as between party and party. This tender was refused by the plaintiff. Facts of the case.

When the cause came on for hearing, the Court overruled the tender as insufficient, and gave 60*l.* additional, in all 100*l.*, but gave no costs. It gave no costs, in obedience to the 460th section of the Merchant Shipping Act 1854, which enacts that in any case of salvage in the United Kingdom which is tried in the Admiralty Court, if the claimants do not recover more than 200*l.*, they shall not recover any costs, unless the Court certifies that the case was a fit one to be tried in the superior Court. I was of opinion that the circumstances of the case did not justify me in so certifying, and therefore I gave no costs. 17 & 18 Vict. c. 104, s. 460.

On that occasion nothing was said as to the offer included in the tender of costs up to the time of making the tender; but the question now arises whether, as in an ordinary case, the plaintiff is not intitled to such costs—costs up to the time of tender. The words of the statute are that the claimants shall not recover in the Court of Admiralty "*any* costs, charges or expenses incurred by them in the prosecution of their claim." Now I think it clear that the costs up to the time of tender are costs in the prosecution of the claim. The Court therefore cannot enforce the payment of such costs. Costs up to time of tender, refused.

This is, in truth, a penal consequence resulting from the expressed intention of the Legislature, that salvage suits of small importance shall not be brought into the Court of Admiralty, but shall be left to the jurisdiction of the magistrates.

Preston, Turner and *Garrett,* solicitors for the plaintiff.

Pritchard and *Son* for the defendants.

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THE IRONSIDES.

Damage to Goods imported—Goods transshipped—Statute retrospective—24 Vict. c. 10, ss. 3, 6, 35.

The general presumption that a statute is not intended to have a retrospective operation may give way to a contrary inference from the remedial nature of the particular enactment.

The immunity of a *res* from arrest to satisfy a lawful claim on the owner is not a "vested right."

The 6th and 35th sections of the Admiralty Court Act, 1861, which, taken together, give a remedy *in rem* to the owner of imported goods for breach of contract by the foreign shipowner, are remedial, and, subject to equitable considerations applying to proceedings *in rem*, confer jurisdiction over causes of action which accrued *in personam* before the date of the Act coming into operation.

But the remedy conferred is not against any other ship than that in which the goods are carried into England or Wales.

Three hundred bales of cotton were shipped on board vessel A., consigned to the plaintiffs in Liverpool, and a large number of bales was also shipped, consigned to other parties. A fire broke out on board the ship; and in result part of the cargo was destroyed, part was sold abroad, and the residue, consisting of 250 bales, was transshipped and carried on to Liverpool by vessel B. The marks on the bales were there found to be obliterated, and the consignees were called on by advertisement to identify their property. The plaintiffs could identify one bale only, which was in a damaged condition. Vessel A. afterwards came on to Liverpool. *Held*, that the plaintiffs had no right under the statute to arrest vessel A.

THIS was a cause instituted against the American ship Ironsides, under the 6th section of the Admiralty Court Act, 1861. The owners appeared under protest to the jurisdiction.

The following facts appeared upon the proceedings on protest:

The plaintiffs, Messrs. Lucy and Son, of Liverpool, were owners and consignees of 300 bales of cotton, shipped on board the Ironsides at New Orleans. The bills of lading bore date 25th and 26th of March, 1861. On the 4th of April, 1861, the Ironsides left New Orleans, bound for Liverpool, with a cargo of 2,400 bales of cotton, including the 300 bales belonging to the plaintiffs. On the 29th of April, while the ship was crossing the bar of the Mississippi, her cargo took fire. Means were taken to extinguish the fire, and eventually it was put out, but not until the ship had been entirely filled with water. The ship was then taken back to New Orleans, and the cargo was there discharged. Part of the cargo was found to be totally destroyed, and other parts so badly damaged, that the agents of the defendants sold it on or about the 20th of May, as the

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necessity of the case required, for the benefit of whom it might concern. 250 bales only out of the 2,400 shipped were fit for shipment to Liverpool, and they were accordingly put in order and shipped to Liverpool in a ship called the Valentina. The Valentina arrived in Liverpool on the 26th of June, 1861, and the marks on many bales being obliterated, the usual advertisement was published calling upon the consignees of cargo to come forward and identify their property. The plaintiffs attended, but could identify one bale only as their property, and that bale was in a damaged condition. Seventeen other bales were identified by other consignees, and the remaining 232 were sold for the benefit of whom it might concern. The Ironsides came to England in December, 1861, and was then arrested by the plaintiffs in Liverpool, where she remained under arrest for ten days.

The grounds of protest assigned by the petition of the defendants were :—

1. That the damage done to the goods of the plaintiffs was done before the time appointed for the coming into operation of the Admiralty Court Act, 1861.

2. That no part of the goods of the plaintiffs was carried into any port in England or Wales, and that the plaintiffs were estopped from alleging the contrary.

3. That no part of the goods of the plaintiffs was carried into any port in England or Wales in the ship Ironsides.

The plaintiffs alleged non-delivery of the goods, and damage to the goods by the negligence of the defendants.

The 24 Vict. c. 10 (Admiralty Court Act, 1861), enacts,

s. 3. "This Act shall come into operation on the first day of June, 1861."

s. 6. "The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof, by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales: Provided always, that if in any such cause the plaintiff do not recover twenty pounds he shall not be intitled to any co charges or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said Court."

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s. 35. "The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam."

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Milward and *Lushington* in support of the protest.—First. The case is not within the terms of the 6th section of the Admiralty Court Act, 1861, which can alone confer jurisdiction. The section speaks only of damage done to "goods carried into a port in England or Wales." Here no part of the plaintiffs' goods has been "carried into England or Wales," except a single bale, which is immaterial. "Carried" is not to be read as "to be carried;" the remedy is made contingent upon the goods arriving in this country; if actual arrival is not required, why should the jurisdiction be limited to goods to be carried into England or Wales? why should it not extend to breach of any contract to carry over seas?

Secondly. The case is not within the section, because no part of the cargo has been carried into this country by the Ironsides. The section speaks of a breach of contract by the master "of *the* ship," that is to say the ship previously mentioned, the ship in which the goods have been carried into England.

Thirdly. The Act does not apply, because the transaction happened before the 1st of June, 1861, the date of the Act coming into operation. The bill of lading, the fire, the sale, were all before that date, nor does it appear that the reasonable time for delivery of the cargo expired after that date. Not only the contract therefore, but the breach of the contract, dates before the time of the Act coming into operation. The Court of Admiralty is careful to follow the decisions of the Courts of Common Law on statutes, *Earl of Auckland* (*a*); and the rule of interpretation is well settled at common law, that no statute is to be construed so as to have retrospective operation, except the particular language of the statute immediately requires it. No such language is to be found here. The terms of the section will be satisfied by giving it application to future transactions only. In Broom's Legal Maxims, p. 33, the rule is given and illustrated under the maxim "Nova constitutio futuris formam imponere debet, non præteritis," quoted from the 2nd Inst. 292. In *Moon* v. *Durden* (*b*), the leading decision, previous authorities are reviewed; the Court of Exchequer there held that the 18th section of the 8 & 9 Vict. c. 109, enacting that "all contracts or agreements by way of gaming or wagering shall be null and void," did not defeat an action for a wager commenced before the statute passed. The same rule was applied

(*a*) Ante, p. 178. (*b*) 2 Exch. 22.

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by the Privy Council, in the similar case of *Doulubdass Pettamberdass* v. *Ramloll Thackoorseydass* (*a*). So recent decisions on the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97); *Jachson* v. *Woolley* (*b*) upon the 14th section, as to the effect of part-payments by a co-debtor, where the Court of Exchequer Chamber overruled the opinion of Kindersley, V. C., in *Thompson* v. *Waithman* (*c*); *Williams* v. *Smith* (*d*), upon the 1st section, as to the effect of a delivery of a fi. fa. to the sheriff before the date of the Act. So *Wright* v. *Greenroyd* (*e*), on the construction of the 32nd section of the Medical Act, 21 & 22 Vict. c. 90; and *R.* v. *The Inhabitants of St. Sepulchre* (*f*), upon the 1st section of 20 Vict. c. 19. The principle of all these cases is that a statute shall not be construed to deprive any one of a vested right.—[DR. LUSHINGTON:—What vested right do you claim here?]—The right of the owners of the Ironsides that their ship should not be arrested upon a claim of this kind. When they entered into the contract of bailment under the bill of lading, they relied that their ship should not be liable to arrest for any breach of the contract, and that fact may have affected, probably did affect, the rate of freight. The arrest of a foreign ship for a large amount is a serious pecuniary injury; as a matter of fact the Ironsides has already been under arrest some time, and this loss cannot be recovered unless the arrest was made malâ fide, *Evangelismos* (*g*). But the cases also show that the rule not to give a retrospective operation to statutes is applied to statutes relating to procedure, to statutes which merely prescribe new or additional remedies. In *Pinhorn* v. *Souster* (*h*), the Court of Exchequer held that the 51st section of the Common Law Procedure Act, 1852, "No pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer," had reference only to pleadings subsequent to the Act. So in *Hughes* v. *Lumley* (*i*), the Court of Exchequer Chamber held that the 32nd section of the Common Law Procedure Act, 1854, enacting that error may be brought upon a judgment upon a special case, unless the parties agree to the contrary, was prospective only, and did not apply to a judgment pronounced after the Act came into operation, upon a special case stated in pursuance of an agreement made at Nisi Prius before the Act

(*a*) 7 Moore, P. C. 239, 256.
(*b*) 8 E. & B. 784.
(*c*) 3 Drewry, 628.
(*d*) 4 H. & N. 559.
(*e*) 31 L. J., Q. B. 4.
(*f*) 28 L. J., M. C. 187.
(*g*) Swabey, p. 378.
(*h*) 8 Exch. 138.
(*i*) 4 E. & B. 358.

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came into operation. So *Vansittart* v. *Taylor* (*a*), upon a similar point; and there during the argument Parke, B., said (*b*), "In *Mayor of Berwick* v. *Oswald* (*c*), all the Judges in this Court agreed that primâ facie the parties must be taken to contract with reference to the existing law only." The other side may rely on the case of the *Alexander* (*d*), construing the 3 & 4 Vict. c. 65, s. 6; but that case was decided before *Moon* v. *Durden*, and it is submitted cannot prevail against the weight of the other authorities. The defendants contend that the liabilities imposed by the contract ought not to be considered as increased by a statute subsequently coming into operation.

Brett, Q.C., and *Clarkson*, contra.—The defendants appearing under protest are bound to show that the Court has no jurisdiction. As to the facts, the defendants say that the plaintiffs' cotton was burnt in the Mississippi or sold at New Orleans, but it may be that the 232 bales sold at Liverpool subsequently to the date of the Act coming into operation were the plaintiffs.' At any rate one bale of the plaintiffs' cotton has been carried into England, and that is enough to satisfy the terms of the Act. We contend however, further, that the word "carried," is to be read as "to be carried," for otherwise the statute would give a remedy for partial loss of the consignee's goods by the negligence of the ship-owner, and none for their total destruction. Thus there would be no remedy if an entire shipment was broken into and consumed by the master and crew, or if through their negligence a cargo of spirits leaked out of the casks and was totally lost. The Court will incline against so unreasonable a conclusion, according to the well-known rule that a statute is to be construed so as to have a reasonable intendment. In *Perry* v. *Skinner* (*e*), Parke, B. says: "The rule by which we are to be guided in construing Acts of Parliament is to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice; and if it should, so to vary and modify them as to avoid that which it certainly could not have been the intention of the legislature should be done." So in *MacDougall* v. *Paterson* (*f*), per Jervis, C. J.; *R.* v. *Frost* (*g*), per Alderson, B.; *Miller* v. *Salamons* (*h*), per Parke, B. If then "carried" is to be read as "to be carried," which we contend it must be, the Ironsides was "*the* ship"

(*a*) 4 E. & Bl. 910.
(*b*) Page 912.
(*c*) 3 E. & B. 653.
(*d*) 1 W. R. 288.
(*e*) 2 M. & W. 476.
(*f*) 11 C. B. 769.
(*g*) 9 C. & P. 169.
(*h*) 7 Exch. 546.

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referred to in the section, the ship in which the goods were to be carried. But we further contend that though the plaintiffs' cotton was in fact carried to this country in the Valentina, it was in contemplation of law carried in the Ironsides. It was carried under the bill of lading for the Ironsides, and was transshipped for the interest of the owner of the Ironsides, and not on behalf of the consignees of the cargo; *Shipton* v. *Thornton* (*a*); *Grey* v. *Gibbs* (*b*).

The authorities quoted by the other side to show that the Act ought not to have any retrospective operation, only establish the general rule, which is not disputed, that statutes should not be construed so as to take away vested rights. But here there was no vested right. The owners of the Ironsides were clearly liable in an action at common law for their breach of contract, and the only effect of the statute is to make their ship liable too. That is a matter of procedure only, as to which there can be no vested right. The true subject-matter of this enactment is not the contract, or the breach of contract, but the jurisdiction of this Court, "The Court of Admiralty shall have jurisdiction, &c." Construing, therefore, this section to include this case, is to give it, not a retrospective, but a prospective operation. Indeed to construe it otherwise, would be to postpone the jurisdiction of the Act to some undefined time. There is a solid distinction between statutes which affect rights, and statutes which confer jurisdiction or regulate procedure; and remedial statutes are to have a liberal construction. The case of the *Alexander* (*c*) is on all-fours with the present case. That case turned upon the construction of 3 & 4 Vict. c. 65, s. 6: "The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of . . . necessaries supplied to any foreign ship," and the Court, upholding its jurisdiction over a claim for necessaries supplied before the statute, said (*d*), "With respect to the general argument that has been addressed to the Court, I am not aware of any principle or decision which establishes the doctrine, that where a statute affords a new mode of suing, the cause of action must necessarily arise subsequently to the period when the statute comes into operation. On the contrary, where a statute creates a new jurisdiction, the new jurisdiction, I apprehend, takes up all past cases." The same principle was followed in *Wright* v. *Hale* (*e*). Pollock, C. B., says, "I have always understood that there is a considerable difference between laws which affect vested rights, and laws which only

(*a*) 9 A. & E. 334.
(*b*) 2 H. & N. 30.
(*c*) 1 W. R. 288.
(*d*) Page 295.
(*e*) 6 H. & N. 227.

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affect the proceedings of Courts;" and Wilde, B., "Mr. Chambers has put this case on the footing of principle, and I am prepared so to decide it. The principle is this,—that where you are dealing with a right of action, it will not be taken away by a statute passed subsequently; but that it is otherwise where you are dealing with the procedure of Courts; and the words of the statute apply to all cases, whether arising before or after its passing." According to these authorities, this section now under discussion takes up the past cases. Other sections of the Act, as the 8th, 10th, 11th, 17th, &c., also seem to require to be treated in the same manner.

Milward in reply.—As to the terms of the Act, the argument on the other side rests not upon the terms actually used, but upon some supposed intention of the legislature. There is no absurdity in holding that the legislature has not given a remedy *in rem* for matters for which, up to the passing of the Act, there never was any such remedy. The plain terms of the Act are capable of a reasonable construction, and do not include this case. In the *Alexander*, this Court, maintaining its jurisdiction over past cases, said it would protect intermediate equitable rights in the property sued; but since that case, the decision of the Privy Council in the *Bold Buccleugh* (*a*) has determined that the lien *in rem* is absolute, and affects even an innocent purchaser. If, therefore, this statute is applied retrospectively, it may interfere with vested rights of the most palpable kind. *Wright* v. *Hale*, if to be supported at all when compared with the other authorities, is to be distinguished as relating to a matter strictly of procedure, a question of costs. This case deals with a contract, which was entered into by a foreigner in a foreign country, before the statute was passed.

Judgment.

On the 4th of March, Dr. LUSHINGTON gave judgment.

The decision of this case turns upon the construction of the 6th section of the Admiralty Court Act, 1861, "The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the owner, master or crew of the ship, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales." The 35th section enacts,

(*a*) 7 Moore, P. C. 284.

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"The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings *in rem* or by proceedings *in personam*;" and the 3rd section provides that the Act shall come into operation on the 1st of June, 1861.

The Court of Admiralty, how far bound by decisions of Courts of common law on the construction of statutes.

It is quite true that in the construction of Acts of Parliament this Court holds itself bound to adhere to the construction put upon any statute by the Courts of common law. If, therefore, a question upon the construction of a particular statute comes under my consideration, and that very question has already been decided by the judgment of a Court of common law, I should yield to that judgment even if my own opinion did not coincide. But it does not follow from this, that the judgment of the Court is bound down as to another statute on which a Court of common law has said nothing. This Court proceeds, I hope, in the interpretation of Acts of Parliament upon the same principle as the Courts of common law; and if a case arise upon a statute where there has been no decision at common law, it will exercise its own discretion.

Presumption that a statute is to operate prospectively only, may be rebutted by the nature of the enactment and other circumstances.

I entirely agree, that as a general rule all statutes should be construed to operate prospectively, and especially not to take away or affect vested rights. But true as this rule is, and, indeed, admitted on all hands as founded on common justice and ancient authority, no one denies the power of the legislature to pass retrospective statutes if they think fit; and many times they have done so. Bearing in mind the general principle, the question must always be what intention has the legislature expressed in the statute to be construed? The presumption is that a statute is not retrospective; a presumption which is more or less strong, according to the circumstances of the particular case. The qualification of the general rule seems indeed to have operated upon the mind of Baron Parke, when he assented to the opinion of the majority of the judges in the case of *Moon* v. *Durden* (*a*); and, as I think, one of the circumstances intitled to much weight is the consideration whether the statute is remedial or not. I have looked at all the cases cited on both sides, but it is not necessary to examine them particularly. They do not and cannot afford any clear guide to judge of the exceptions from the general principle. The construction must depend upon the words of the particular statute to be construed, and the nature of the subject-matter.

[The learned Judge then stated the facts of the case.]

(*a*) 2 Exch. 42.

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Questions to be determined.

For the purpose of the present argument, a breach of contract must be assumed, and two questions arise. First, whether to affirm the jurisdiction of the Court over this case would be to give a retrospective operation to the statute, and whether such retrospective operation would accord with the intention of the legislature. Secondly, whether the remedy *in rem* given by the statute can be enforced against the Ironsides, which did not bring any part of the plaintiffs' goods to England.

The enactment is remedial,

Antecedently to the passing of the statute, this Court could not have exercised any jurisdiction at all in a case of this kind. I do not say that it had not formerly such a jurisdiction, but it would not have ventured to exercise it. Many foreign ships came into this country and did not deliver the goods according to the bills of lading. The owners and consignees of cargo thus suffered great loss, and had no practicable remedy; for though the ship-owner, if in England, might have been sued for breach of contract, in the very great majority of cases that remedy was wholly unavailable. It appeared too that at least in some cases, if not in nearly all, the owner of a British ship, carrying cargo to a foreign country, was liable to have his ship there seized for any breach of his contract as carrier. To remedy the grievance I have mentioned, and to establish a reciprocity with foreign merchants, this 6th section was inserted in the statute. It does not in any degree alter the contract of the shipowner; it only gives an additional remedy for a breach of the contract; it takes away no vested right, for I think it is a misnomer to call the prior state of things a vested right. I cannot conceive that a power to commit a breach of contract without making compensation, a power to commit injustice with impunity, can be truly denominated a vested right. I am of opinion that, subject to all the equities to which proceedings *in rem* are liable, the statute would operate upon all cases of this description brought before the Court subsequently to the date fixed for the Act coming into operation. In this particular case, I think it is not even shown that the breach of contract took place prior to this date. The fire was not the breach, but the non-delivery of the cargo according to the terms of the contract.

and does not take away any vested right;

and may therefore be construed to apply to antecedent cases.

Semble. Here the cause of action arose subsequent to the statute.

But the words of the statute confine the remedy to arrest of the ship in which the goods are carried into

The second question is, whether the terms of the statute render the ship Ironsides liable, when no part of the plaintiffs' goods was in fact carried into this country in the Ironsides. The section begins by speaking of "the owner or consignee or assignee of a bill of lading of goods carried into a port of England or Wales in

any ship." The plaintiffs are undoubtedly consignees, and one bale of their cotton has been carried into England in a ship—but in what ship? In the Valentina. The section then gives a right of action in this Court to such persons "for any breach of duty or breach of contract on the part of the master of the ship." What does "*the* ship mean? It must refer to the ship antecedently mentioned—namely, the ship in which the goods are carried into England. That ship, in this case, was not the Ironsides. I am of opinion that the jurisdiction conferred upon the Court is confined to the arrest of the ship in which the goods are carried into England or Wales. The terms of the statute appear to require this interpretation, and I do not feel myself at liberty to give it any other meaning.

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England, and the Ironsides is therefore not liable.

The Court must therefore pronounce against its jurisdiction in this case. There will be no order as to costs, the question raised being a new one upon a recent statute, and of considerable difficulty.

Protest pronounced for, but without costs.

The Court on a subsequent day ordered the plaintiffs to pay the marshal's possession fees, incurred whilst the ship was under arrest at Liverpool.

French, proctor for the plaintiffs.

Tebbs, for the defendants.

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THE DON FRANCISCO.

Damage to Goods imported—24 Vict. c. 10, s. 6—Right of Set-off—Interrogatories—Production of Documents.

To a claim for damage to goods imported, instituted under the 6th section of the Admiralty Court Act 1861, a claim of set-off for freight due under the bills of lading will not be allowed.

No set-off is allowed in the Admiralty Court, save in the exceptional case of suits for mariners' wages.

The plaintiff sued as consignee of rum imported from Havannah, for short delivery; the defendants having pleaded that the loss was caused by perils of the seas and by the casks having been of bad quality and condition, were allowed to administer interrogatories to the plaintiff, calling upon him to state what letters relating to the shipment of the rum he had received from his correspondent in Havannah; the plaintiff then admitted certain letters to be in his possession relating to the shipment; but objected to produce them, swearing that they would disclose the private secrets of his business.

The Court ordered the letters to be produced.

THIS cause was instituted under 24 Vict. c. 10, s. 6, by John Meek, merchant of Liverpool, to recover compensation for damage and loss in respect of certain casks of rum imported from Havannah in the Spanish ship Don Francisco, and consigned to him.

The petition set out a charter-party between George Meek of Havannah and the master of the ship, dated 16th December, 1860, under which the rum was shipped, and also bills of lading for the same, dated 5th January, 1861, which contained a clause: "Contents unknown, and not answerable for damage or leakage;" it then alleged, that before the arrival of the ship on the 9th of April, 1861, the damage and loss was occasioned by the negligence and misconduct of the master and crew, and was a breach of contract by the defendants the owners, and their servants, the master and crew of the said ship.

The answer of the defendants, the owners of the ship, pleaded (among other things),

"7. The damage and leakage complained of was occasioned by the perils of the seas, and also by the improper quality of the casks; and was of the character of average and leakage, within the meaning of the bill of lading.

"8. The defendants ought not in this cause to be held liable to the plaintiffs on or according to the terms of the charter-party set out in the said petition, but solely on and according to the terms of the said bill of lading.

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"9. The plaintiff has, without any just cause, claimed to deduct, and has deducted from the freight and primage due from the plaintiff to the defendants according to the said bill of lading in respect of the said cargo, a sum exceeding 20*l.*; and such sum still remains due from the plaintiff to the defendants in respect of such freight and primage. And although the proctor for the defendants denies that they are liable for any part of the damages complained of, yet he submits that it would not be equitable to allow the Admiralty Court Act 1861 to operate in this cause retrospectively, without at the same time allowing the defendants to set off against the amount of the damage so complained of, for which the defendants may be liable, the said sum of 20*l.* so due to the defendants from the plaintiff as aforesaid. And the said proctor says that the amount of such damage, if any, for which the defendants are liable to the plaintiff, does not exceed the sum of 20*l.*"

The defendants had obtained leave at Chambers to deliver the following interrogatories to the plaintiff, on filing their answer:—

"1. Was not the charter-party, which is mentioned in the second article of the petition in this cause, entered into with Mr. George Meek on your behalf?

"2. In settling the amount of freight payable by you as consignee of the cargo of the Don Francisco, did you not claim and have you not deducted from such freight seven and a-half per cent. commission on the freight?

"3. If the charter-party was not entered into on your behalf, on what ground did you, and do you, claim the seven and a-half commission?

"4. Have you received any letters from the aforesaid Mr. George Meek, referring to the shipment of the cargo of the Don Francisco, or otherwise referring to the said cargo and ship; and if yea, state the dates of all those letters, and whether you have any objection, and if so, what objection you have to produce them?"

Notice of motion was then given by the plaintiff, that the 9th article of the answer be struck out, and the interrogatories delivered by the defendants be disallowed.

The 3rd, 6th and 35th sections of the Admiralty Court Act 1861, referred to in the arguments and judgment, are printed, *ante*, p. 459. The 17th section of the same Act is as follows:—

s. 17. "The Judge of the High Court of Admiralty shall have all such powers as are possessed by any of the Superior Courts

1862. *March* 11. of common law, or any judge thereof, to compel either party in any cause or matter to answer interrogatories, and to enforce the production, inspection and delivery of copies of any document in his possession or power."

November 26. *Lushington* now moved on behalf of the plaintiff.—This is an attempt to introduce a right of set-off against the right given by the statute to the consignee of damaged cargo. The section (24 Vict. c. 10, s. 6), which alone gives the Court jurisdiction over the subject-matter, does not give any right of set-off. In the Admiralty Court there is no set-off except in the case of master's wages, where a set-off is expressly given by statute (17 & 18 Vict. c. 104, s. 191), and then under conditions only. In a claim like the present, to allow a set-off as a claim for freight or demurrage, would be to introduce a large class of cases over which the Court has otherwise no jurisdiction. Even in common law there is no set-off except by statute (2 Geo. II. c. 22, s. 13; 8 Geo. II. c. 24, s. 5), and the right is confined within strict limits: the claims must be strictly mutual and of a liquidated kind. There would be no set-off in common law to a claim for unliquidated damages such as the plaintiff claims here. Thus, in *Castelli* v. *Boddington* (*a*), it was held that to a declaration on a marine policy claiming a partial loss, a plea setting off premiums was bad. It is submitted therefore that a right of set-off, as here pleaded, is against authority.

But the defendants, it would seem, found their claim, not upon alleged right alone, but partly upon the plaintiff using the statute retrospectively, for which they conceive they are intitled to some indulgence. The only authority for such a claim is to be found in an observation of the Court in the *Alexander* (*b*), that a new jurisdiction *in rem* conferred by statute will be exercised equitably: but this was only an intimation that rights intervening between the statutory debt and its enforcement would be recognised; for instance, the right of a purchaser without notice. This case is very different, and the *Alexander* is a decision affirming that a remedial statute, like this now sued upon, takes up all past cases, without reservation. The defendants have no equitable right. The right of set-off is open to objection on the ground of expense and delay. The defendants might have detained the goods for the claim now put forward, and may now sue for freight unpaid.

If the attempt to set off fails, the interrogatories which aim at maintaining the set-off must fall also.

(*a*) 1 E. & B. 66; affirmed in Exch. Chamber, *ib.* 879. (*b*) 1 W. R. 294.

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Cohen, for the defendants.—The plea is not intended as claiming a legal right of set-off, but states an equitable right of set-off founded upon all the circumstances of the case. This Court is for many purposes a Court of Equity, and exercising this jurisdiction in the matter of set-off, it may well quit the narrow rules of statute law, and follow the more liberal and more just policy of other Courts of Equity and of the civil law, as expounded in the chapter on Set-off, in Story's *Equity Jurisprudence* (*a*). In *Thompson* v. *Gillespy* (*b*), Lord Campbell said, "It is certainly a reproach to our procedure that we cannot, as is done in other countries, always bring cross-demands to be settled at once;" and Lord Mansfield was clearly of the same opinion; *Green* v. *Farmer* (*c*). In America it appears that there may be a set-off of premiums against a loss on a policy, *Leeds et al.* v. *The Marine Insurance Company* (*d*); and in the very circumstances of this case, a set-off of freight against damage to goods (*e*). [Dr. Lushington:—The Admiralty Courts in America exercise a much wider jurisdiction than the Admiralty Court here. They disregard all the authorities since James I., which have limited the operations of this Court; they claim to do all things set forth in my patent.] Yes; but the right of set-off, I contend, rests upon the equitable jurisdiction of the Court; and this principle was acted on in the *Araminta* (*f*), where, upon a claim for seamen's wages, the owners were allowed to deduct certain payments illegally made to the plaintiffs by the master. Here there are cross-demands arising out of the same matter, the contract of affreightment, and it is proper that they should be settled by one proceeding. The defendants do not directly dispute the jurisdiction of the Court; but it is an additional support of the equity which they claim, that the jurisdiction herein exercised is in effect retrospective, and therefore to be equitably administered, as observed in the case of the *Alexander* (*g*).

As to the right of the defendants to administer these interrogatories, the Court had the power to make the order: and the cases at common law show that it was rightly exercised; *Thöl* v. *Leask* (*h*); *Scott* v. *Zygomala* (*i*).

Lushington replied.

1861.
December 3.
Judgment.

Dr. Lushington:—This action has been instituted by Mr. John Meek, a merchant at Liverpool, for the purpose of reco-

(*a*) Vol. 2.
(*b*) 5 E. & B. 216.
(*c*) 4 Burr. 2220.
(*d*) 6 Wheaton's R. 565.
(*e*) Parsons' Maritime Law, vol. 2, p. 717.
(*f*) 18 Jur. 793.
(*g*) 1 W. R. 294.
(*h*) 10 Exch. 704.
(*i*) 4 E. & B. 483.

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vering compensation for the loss arising from the short delivery of a certain cargo of rum, which he alleges in his petition was occasioned by the default of the master and crew of the vessel called the Don Francisco, which conveyed it to this country. The action is brought under the 6th section of 24 Vict. c. 10, which has conferred jurisdiction upon this Court to proceed in such cases *in rem*; experience having proved that losses of this description were frequently sustained without any practical remedy. To the petition an answer has been given in on behalf of the defendants, the owners of the vessel, and an objection is now raised on the part of the plaintiff to the ninth article of that answer, which in substance pleads that the plaintiff has illegally deducted from the freight and primage due to the defendants, a sum exceeding 20*l.*, being more than the amount of the alleged damage, and the defendants claim to set off that amount. Assuming the fact of this wrongful deduction, the question is, has the Court jurisdiction to try this claim of set-off?

Can the Court entertain a set-off against a claim for damage to goods imported?

No set-off in the practice of the Admiralty Court.

No such jurisdiction is expressly conferred by the 6th section of the statute, which gives the plaintiff his right to sue. If the Court has the jurisdiction at all, it must be by virtue of its general jurisdiction, and what that is must be learnt from precedent and practice, for there is no authority defining its jurisdiction in general, much less as to this particular question, the right of set-off. It was said by Lord Stowell (*a*) (and I could not appeal to higher authority) that the Court of Admiralty was a Court of Equity as well as of law; but to what extent it is a Court of Equity is nowhere defined. In the case of the *Lord Cochrane*, Lord Langdale declared that it was not a Court of Equity in the full extent of that term, *Duncan* v. *M'Calmont* (*b*); and on that ground he, in a case of bottomry, ordered an injunction to issue, and his decision was affirmed by Lord Cottenham; the case, however, ultimately returned to me: *Lord Cochrane* (*c*). The result would seem to be this—that the Court of Admiralty may, in deciding a case, be influenced by equitable considerations, but that its power to invoke matters foreign to the direct issue, though thereby more complete justice might be done, is not acknowledged. In our Admiralty law there is not, to my knowledge, any category of set-off. One case has been cited —the *Araminta* (*d*)—a case of seamen's wages; but suits for seamen's wages are exceptional, and the proceedings are not regulated perhaps by the strictest principles of law, but are equitably adapted to the peculiar circumstances. It has been in

Save in the exceptional case of suits for wages.

(*a*) Semble, *Juliana*, 2 Dods. 521; *Minerva*, 1 Hag. 357.
(*b*) 3 Beav. 417.
(*c*) 2 W. R. 322; and see *Saracen*, 6 Moore, P. C. 74.
(*d*) 18 Jur. 793.

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the case of seamen's wages the invariable practice to adjust the account—that is, to make all just allowance for advances and what are called slops furnished. I may, in the case of the *Araminta*, have, for justice sake, carried the practice to a doubtful extent, but I cannot consider that case a precedent to govern my judgment in cases of a totally different description. Then if, according to the Courts of Equity, the equitable powers of this Court are limited, and if by its own practice the Court has not sufficient authority to take general cognizance of claims of set-off, I clearly have no sanction from the practice of the Common Law Courts, whose procedure so many learned judges have lamented as deficient in this respect. The practice in the Courts of the United States has been more favourable to an equitable adjustment of claims in dealing with Admiralty matters, but the American Courts assume to themselves an extended jurisdiction which (however in former times it might have been exercised here) has, by a series of decisions of the Courts of Common Law, for a very long space of time been denied to the Court of Admiralty of this country.

Another consideration which induces me to reject this claim of the defendants is the length of time which might often elapse before a suit could be determined, if a set-off of this description were entertained. It has been always held that the proceedings of the Court of Admiralty should for divers reasons be summary and expeditious; *velis levatis* is the expression used, and I should be reluctant to admit any practice which would interfere with this wholesome rule.

No injustice to the defendants in holding the statute retrospective.

It has been argued that to hold this statute retrospective against the defendants, and not give them the right of set-off, is a grievance; but I do not think this is so. Assuming for the purpose of this argument that a wrong has been done to the plaintiff, I cannot hold that there is any injustice in giving him a remedy for that ascertained wrong, the defendants being at the same time deprived of no right that they were before intitled to. A plaintiff and defendant are, moreover, in these cases, very differently circumstanced. If the plaintiff is aggrieved, he has no practical remedy save against the ship, for the owner may be in any part of the habitable globe. But if the defendant be wronged, he may at once bring his action against the plaintiff resident here.

Article objected to struck out.

I must accede to the motion and strike out the ninth article. I shall also strike out the second and third interrogatories; the others will be allowed.

1862. *March* 11. The plaintiff thereupon answered the interrogatories which were allowed to stand, answering the fourth interrogatory thus: "I object to produce my correspondence with Mr. George Meek. It has not, in my opinion, any relevancy to the matters in dispute."

On the plaintiff being ordered to give a further answer on oath to the said interrogatory, he answered, "I have received five letters from Mr. George Meek, in which the shipment of the cargo of the Don Francisco is referred to, dated respectively the 22nd, 26th, and 31st December, 1860, and 4th and 7th January, 1861. I object to produce those letters or either of them, because they disclose the private secrets of my business."

March 4. *Cohen* now moved for an order calling on the plaintiff to produce the letters.—The reason given by the plaintiff for non-production of the letters is not sufficient. Wigram on Discovery (*a*) lays down the rule thus: "Where the relevancy of the documents to the plaintiff's case is admitted, the defendant cannot, merely by denying the effect of such documents, protect himself against an order for producing them; or in other words, where the relevancy of documents to the plaintiff's case is admitted, the plaintiff is the party to judge of their effect." The case of *Telford* v. *Ruskin* (*b*), before Kindersley, V. C., shows that the excuse of "private secrets" will not serve; so *Tetley* v. *Easton* (*c*), *Goodall* v. *Little* (*d*).

Lushington, contra.—The purpose of asking for these documents is, taking the most favourable view to the defendants, to extort evidence in support of their averment that the casks in which the rum was shipped were of bad quality and condition; but of this the defendants have the best evidence otherwise in the evidence of their own servants. There is no plea of fraud here, to justify the demand for private letters between the plaintiff and his mercantile correspondent in Havannah. In the cases cited, the party claiming inspection had the right to see the documents independently of the action, or else fraud was directly charged. *Telford* v. *Ruskin* was a partnership case; in *Tetley* v. *Easton*, a patentee claimed accounts from an infringer of his patent; and in *Goodall* v. *Little*, the plaintiffs were assignees in bankruptcy and charged fraud. Here the simple question at issue is a breach of contract; negligence or no negligence.

Cohen replied.

(*a*) 2nd edit. p. 217.
(*b*) 1 D. & S. 148.
(*c*) 18 C. B. 643.
(*d*) 1 Simon (N. S.), 155.

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March 11.
Judgment.

DR. LUSHINGTON:—The only question in this case now to be determined is whether the Court shall direct certain letters in the possession of the plaintiff to be produced.

The cause itself is novel; a suit by the plaintiff to recover damages for the delivery of a cargo in a damaged condition, and brought by him under the 6th section of the Admiralty Court Act, which was only passed in the last session of Parliament. Before that statute the Court could not have exercised any such jurisdiction.

The immediate question too is novel; for before the passing of the same statute, the Court had no such power to order interrogatories to be answered or documents to be produced, as is now given to it by the 17th section. Under such circumstances it behoved the Court to exercise great caution in using the powers so conferred upon it. These powers are such as the Courts of Common Law possess, as to ordering interrogatories and the production of documents; and the Courts of Common Law are by 14 & 15 Vict. c. 99, s. 6, empowered to order the inspection of documents in all cases in which a discovery could have been obtained by proceedings in Chancery. What these cases are, of course it would be in vain to attempt to enumerate, but the general rule is that all documents in any way connected with the case in the hands of one of the parties must be produced. In this case it is admitted in the amended answer to the interrogatories, that the plaintiff has in his custody five letters in which the shipment of the cargo is referred to; according to general rule these letters ought to be produced for inspection; but the plaintiff objects to their production, because, as he alleges, they disclose the private secrets of his business. No case has been cited upon the authority of which it can be contended that this is a legal excuse for non-production, and there are many, with circumstances as fully as cogent, where the production of the documents has been ordered. There is nothing to except this case from the general rule. The letters must be brought into the Registry. If the plaintiff wishes to seal up any of the correspondence as not having reference to the present suit, he may do so on making the usual affidavit.

Production of the letters ordered.

Toller, proctor for the plaintiff.

Pritchard for the defendants.

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THE WARRIOR.

Salvage—Right of Seamen of Ship to be Salvors of Ship or Cargo—Termination of Seamen's Contract in case of Wreck by Abandonment of Ship, or by a Discharge given by the Master.

On the wreck of a ship the seamen are bound by their contract to do their utmost to save ship and cargo; but the seamen's contract of service may be terminated either by final abandonment of the ship or by discharge given by the master.

An abandonment of a ship, which is relied upon as operating a dissolution of the seamen's contract, must be clearly proved.

If, upon a ship being wrecked, the master, improperly disregarding the interests of the owners of ship and cargo, discharges the seamen, the discharge is nevertheless valid, unless the seamen are proved to have fraudulently accepted their discharge; and subsequent services rendered by them to ship and cargo are salvage services.

A ship by accident in calm weather went on a rocky beach in the Canary Islands, beat heavily, and in half an hour filled with water: the master and crew immediately quitted the ship and went on shore. The next day the master discharged all the officers and crew; but it was not proved that they were guilty of fraud in accepting their discharge. On the same day some of the crew, at the suggestion of the mate, returned to the ship, and, working for several days, succeeded in saving part of the ship's stores and a considerable amount of cargo; the ship then broke up:

Held, that there was no abandonment terminating the seamen's contract, but that the contract was terminated by the discharge given by the master; and that, for their subsequent services, the seamen were intitled to salvage reward.

SALVAGE. This was a cause of salvage brought by the mate, second mate, chief engineer, second engineer, carpenter, and fifteen seamen lately belonging to the Warrior, for services to ship and cargo, rendered under the following circumstances.

On the 16th of September, 1860, the Warrior, a steamship, belonging to the Peninsular and North African Steamship Company, and trading between London, Lisbon, Mogador, the Canary Islands, and Teneriffe, arrived at Las Palmas in the Canary Islands with a cargo chiefly of Manchester bale goods. On the 18th of September, the weather being then calm, the Warrior engaged in assisting the launch of a new Spanish vessel; by some accident about 4 P.M. the warp became entangled with her screw, the vessel became unmanageable and drifted on to a rocky beach, beat heavily, and in half an hour filled with water. The master and crew about 10 P.M. all quitted the vessel, taking with them some

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specie which formed part of her cargo and other valuable articles. Two men by the master's orders kept watch on the beach during the night to prevent the ship being robbed. The petition of the plaintiffs went on to state that on the next day, the 19th of September, the master informed all the officers and crew that they were discharged; that on the same day the chief mate, one of the plaintiffs, applied to the remaining plaintiffs and asked them to assist in saving the cargo on board the ship; that under his directions the plaintiffs worked for several days, saving the ship's stores and part of the cargo in the ship's hold; that on the 25th of September a violent gale came on, the ship parted in two, and the remainder of the cargo was dispersed and lost. The petition then stated that the crew subsequently received discharges before the consul, and received wages up to the 18th of September only. Three of the certificates of discharge were annexed to the petition; they were in the following form.

"Las Palmas, 19th October, 1860.

"This is to certify that Walter Jolly, second steward, was discharged from the S. S. Warrior on the 19th September, 1860, the ship having become a wreck. Have found him to be a careful and steady man, and can recommend him to any persons requiring his services.

"HENRY COOPER,
"Ex-Master, Warrior.

"Witness,
"Houghton Houghton,
"H. B. M. Vice-Consul."

The North African Steam-ship Company did not plead, but settled the claim in respect of the ship by a tender of £40, which was accepted, the proceeds of the wreck only amounting to £390. The owners of cargo saved, amounting to about £9,000, pleaded by two proctors. In their answer they alleged,—

(1.) That the vessel did not become a total wreck immediately, and was not abandoned by her crew; (2.) That the crew were not in fact discharged as alleged, and did not receive wages only up to the time of such discharge; (3.) That the crew were not legally discharged; (4.) That the services rendered by the plaintiffs were no more than they were bound to perform by the ship's articles.

Of the plaintiffs, four only were produced as witnesses; on cross-examination they differed considerably as to the time,

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place and circumstances of the verbal discharge and the order to work at the wreck. They swore, however, in accordance with the main facts stated in the petition, and accounted for the absence of the remaining plaintiffs.

No evidence was adduced by the defendants, except the protest signed by the master, the chief mate, and two other of the plaintiffs, which bore date the 26th of September, 1860, and was attested by Mr. Houghton as vice-consul. The material part of the protest was as follows: [after describing the accident on the 18th of September.] "It was then nearly 6 o'clock, P.M. Immediately proceeded to land the mails and specie, and then with part of our clothes the crew left the ship as the sea was breaking over her, and we did not think it safe to remain by her for fear she should break up during the night. The local authorities, at the request of H. B. M.'s vice-consul, sent a guard of soldiers to the beach, and we placed a watch of two men to prevent as far as possible any plunder. On the 19th were employed, when the sea permitted, in sending cargo, ship's stores, &c., on shore. On the 20th, by the captain's orders and directions, two ropes from the shore were made fast to the foremast and mainmast, and by means of sliding gear a considerable quantity of cargo was landed which otherwise would have been lost, as owing to the heavy surf the ship worked so much as not to be expected to last long. During the night of the 24th she broke to pieces; and on the 25th, after having her surveyed by the Spanish authorities, judging that the expenses of salvage would exceed the value of the property preserved, the captain and officers determined on abandoning her, to be sold as she then lay." No evidence was given by the master, though it appeared he was in London when the other witnesses were examined, nor was any evidence produced from Mr. Houghton or any other person at Las Palmas.

The *Queen's Advocate* and *Spinks* for the plaintiffs.—The plaintiffs undoubtedly rendered important services in saving the cargo; and the only ground of objecting to the claim is, that they had been seamen belonging to the ship. The general proposition is not disputed on our part, that seamen are not to be salvors of their own ship or cargo: but if the contract of service is terminated, the seaman is at once severed of all relation to the ship and cargo, and is intitled to become a salvor. Here the contract was terminated in two ways; virtually by the final abandonment of the ship on the 18th of September, actually and formally by discharge of the master on the next day. The *Florence* (*a*), and

(*a*) 16 Jur. 572.

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Mason v. *Blaireau* (*a*), are authorities to show that the seaman's contract ceases on final abandonment of the ship; and the 185th section of the Merchant Shipping Act enacts, "In cases where the service of any seaman terminates before the period contemplated in the agreement by reason of the wreck or loss of the ship, and also in cases where such service terminates before such period as aforesaid, by reason of his being left abroad under a certificate of his unfitness or inability to proceed on the voyage granted as hereinafter mentioned, such seaman shall be intitled to wages for the time of service prior to such termination as aforesaid, but not for any further period." But here the seamen were also actually discharged, whether rightly or wrongly it matters not; the master was their employer, and it was not for them to question his discretion. Fraud there was none, nor is fraud pleaded or attempted to be proved; and the owners of the ship, a large company, who had the means of knowing the facts from the master, have paid salvage for the ship.

Deane, Q. C., and *Wambey*, for owners of cargo.—The principle that seamen cannot sue their own ship as salvors, but are bound on shipwreck to render all services to the property, is thus laid down by Lord Stowell in the *Neptune* (*b*): "What is the obligation which a mariner contracts with the ship in which he engages to serve? It is not only to navigate her in favourable weather, but likewise in adverse weather, inducing shipwreck, to exert himself, as the Chief Justice expresses it, to save as much of the ship and cargo as he can. It is a part of his bounden duty in his character as a seaman of that ship. It is certainly a laborious and probably a dangerous portion of his service, but certainly not less a service, and a meritorious service on those accounts. In performing that duty he assumes no new character. He only discharges a portion of that covenanted allegiance to that vessel which he contemplated, and pledged himself to give in the very formation of that contract which gave him his title to the stipulated wages. I ask is he to have no recompence for this continuation of his service in its most formidable shape, which that service to that ship can assume? Nobody, I think, ventures to say that. But, say they, he should have it by way of salvage, or on a quantum meruit. There are, I think, decisive objections to both these views of the matter. The doctrine of this Court is justly stated by Mr. Holt—that the crew of a ship cannot be considered as salvors. What is a salvor? A person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer

(*a*) 2 Cranch, 268. (*b*) 1 Hag. 236.

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adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship;—not so the crew, whose stipulated duty it is (to be compensated by payment of wages) to protect that ship through all perils, and whose entire possible service for this purpose is pledged to that extent. Accordingly, we see in the numerous salvage cases that come into this Court, the crew never claim as joint salvors, although they have contributed as much as (and perhaps more than) the volunteer salvors themselves. I will not say that in the infinite range of possible events that may happen in the intercourse of men, circumstances might not present themselves that might induce the Court to open itself to their claim of a *persona standi in judicio.* But they must be very extraordinary circumstances indeed; for the general rule is very strong and inflexible that they are not permitted to assume that character. As the law stands, generally they are excluded from it upon just grounds. A proceeding for salvage would be less beneficial and safe for the owners if permitted. In a salvage case you must take into consideration the quantum of personal danger incurred, the value of the property saved, and other circumstances, which may influence the demand of salvage, whereas the rule of wages presents only a stipulated sum, which in no case can be exceeded. By the same rule, every temptation to throw the ship into situations of danger, with a view to an extravagant salvage, is effectually removed; for no increase of danger can bring to the mariner an increase of profit. I may add, from experience in such cases, that such experience does not invite the Court to adopt a rule, which, in the conflict of numerous affidavits,—impossible either to be reconciled, or to receive a decided preference,—too often leads to conclusions founded rather in the conjectures of an honest hope, than in the confidence of a satisfactory judgment. To most of these objections, the rule of quantum meruit is equally obnoxious, and they are both equally exposed to the inconvenience of driving the parties to sue for the unliquidated sum: the one party hardly guessing what is proper for him to ask, and the other equally ignorant what he ought to refuse; and the Court having to find the proper liquidation, often on evidence sworn on both sides with equal intrepidity. On all views of the relative justice between the parties and of the public policy and convenience, there can be no doubt that the rule of wages has the advantage upon the clearest grounds; but take it upon the most naked principles of law applying to it, the contract covers the whole ship, one part as well as another, and no one part more than another, with the mariner's lien. A part separated

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by a storm, is not disengaged by that accident from that lien. If it be recovered, it is recovered as a part of the primitive pledge mortgaged to the mariner. Again, when does the authority of the master cease? His authority does not certainly merge in the misfortune, nor are the seamen at liberty, without staying a reasonable time for the recovery of parts of the ship and cargo, (if there be any prospect, in his judgment, of such recovery,) immediately to disperse themselves over the country, on whose shores they have encountered the mischance, without some discharge from him. No such attempt was made in the present case; they received their discharge, and not till then considered themselves as emancipated from his authority. The duty of service survives as long as the rights of authority exist; their relations are created by the same contract; they have a contemporary origin, and a corresponding termination on all just construction of that contract." We rely on every word of this. This point was again considered in the *Florence* (*a*), where the Court said, "In shipwreck the contract continues so long as a plank can be saved" (*b*). We submit, therefore, that there ought to have been no abandonment of the property, nor discharge of the seamen, upon the stranding of the vessel, so long as there remained means of saving a considerable part of the property; that both abandonment and discharge, if any such took place, were unlawful and void. But the evidence, both of abandonment and discharge, is in itself unsatisfactory, and, when compared with the protest, fails altogether. The claim of salvage is a mere afterthought! The submission of the shipowners to pay 40*l.* to the plaintiffs proves nothing; it was only a small payment to avoid the litigation of a small claim.

The *Admiralty Advocate* was also heard for other owners of cargo.

Dr. Lushington, in delivering judgment, said:—Nothing is further from my disposition than to relax the law as it was laid down by Lord Stowell in the case of the *Neptune*, or by myself in the case of the *Florence*. The question on the present occa- Judgment.

(*a*) 16 Jur. 572.

(*b*) The 183rd section of the Merchant Shipping Act enacts,

"No right of wages shall be dependent on the earning of freight; and every seaman or apprentice who would be intitled to demand and recover any wages if the ship in which he has served had earned freight, shall, subject to all other rules of law and conditions applicable to the case, be intitled to claim and recover the same, notwithstanding that freight has not been earned; but in all cases of wreck or loss of the ship, proof that he has not exerted himself to the utmost to save the ship, cargo and stores shall bar his claim."

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sion is whether the principles there enunciated are decisive of this case when all the circumstances are considered. The Admiralty Advocate has argued that after the disaster that befel this ship, the contract of the seamen bound them to stay by the ship and assist in saving the ship and cargo; and that, I am of opinion, was the effect of the contract according to the clear and decisive terms used by Lord Stowell. But there are two ways in which the contract of seamen may be dissolved. It may be dissolved by final abandonment of the ship, or by the act of the master giving the seamen a discharge. The plaintiffs contend that their contract was, in this case, terminated in both these ways, and that their after services were in the nature of salvage.

Seamen's contract terminable by the final abandonment of the ship, or by discharge given by the master.

The ship in this case was not abandoned.

With respect to the abandonment, I should be sorry to go the length of saying, looking at the facts, that there was such an abandonment of the ship as would have justified the seamen in saying that their contract was at an end, and that they were not bound to render further assistance. If the case rested entirely upon the ship having been finally abandoned, I should be inclined to come to the conclusion that abandonment has not been proved. Where the circumstances are doubtful, the Court will be slow to infer that property of great value has been abandoned, unless it is proved that there was no reasonable hope of recovery. Abandonment is abandonment *sine spe recuperandi.*

The master discharged the seamen, in fact; and the discharge was valid, there being no proof of fraudulent complicity on the part of the seamen.

I now come to the more important point of the case. Was there any dissolution of the contract by the master discharging the men? Was the discharge a *bonâ fide* act on his part, and, if not, are the seamen affected thereby? As a matter at law, I think it cannot be contended that the master had not power to discharge the seamen in such circumstances if he honestly thought fit to do so. Now I have several affidavits, in which it is sworn in most distinct terms that the master did on the 19th of September discharge the men; and in addition to that I have two of the discharges signed by Mr. Houghton, the vice-consul. Against that testimony there is no evidence whatever. I have surmises that it ought not to have been done, and that it was done to the injury of the owners of the cargo, but no evidence; and I must therefore accept the oaths of the plaintiffs as to the fact of the discharge. I admit that I view the discharge of the seamen in these circumstances with some surprise, and perhaps not without some suspicion. I have some doubt whether the master was justified in the step he took; not that I apprehend that the master thought that the ship could be recovered, but I think he must have known that he was intitled by law

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to have the services of the crew to rescue as much of the ship and the cargo as was possible. I do not distinctly see upon what just and legal grounds he discharged the seamen. But admitting this, the seamen are not to be affected by the misconduct of the master, unless they were parties to it; unless both parties joined in a conspiracy to commit fraud. The doctrine of all Courts is never to presume fraud, and even if I could fairly conclude that the master had intended to do wrong to the owners of cargo in thus discharging the seamen, I cannot, I say, bring my mind to consider the discharge invalid as against the seamen simply because of his misconduct, when there is no proof of complicity on their part. Looking to what seamen are, it is not for them to question the master's conduct; generally speaking they are incapable of diving into matters of this description, and ascertaining with what particular view measures are adopted. I am of opinion that in this case the master discharged the seamen, thereby dissolving the contract, and that the seamen were then at liberty to undertake any service of a salvage nature. They did undertake this service at the request of the mate; they seem to have exercised the best means they could under circumstances of a somewhat trying nature, and eventually they brought cargo of considerable value in safety to the shore. I think upon this view of the case I am called upon to give something in the nature of a salvage reward. Looking to all the circumstances, I give the plaintiffs the sum of £400, to be allotted according to their ratings on board the ship.

The contract of service being dissolved, the seamen were intitled to become salvors.

400*l.* given.

J. R. Burchett, proctor for the plaintiffs.

Clarkson and *Son* for ship and freight.

Jenner and *Dyke,* and *Deacon,* for owners of cargo.

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THE OLIVIER.

Bottomry Bond on Ship, Freight and Cargo—Duty of Master to communicate with Owners of Ship and Shippers or Consignees of Cargo—Pleading.

The master of a ship, before giving a bottomry bond on ship, freight and cargo, is bound, as against owners of cargo, to communicate both with the owners of ship and the shippers or consignees of cargo, where such communication is under all the circumstances reasonably practicable; but not otherwise.

The *Bonaparte* (*a*) considered.

A French ship, with a cargo from Hayti, consisting chiefly of mahogany, which was consigned to a single house in Liverpool, was obliged to put into the port of Horta, in the island of Fayal, for repairs. There was no dock there; but by discharging the cargo the ship could be repaired where she lay at anchor. There was no means of transshipping the cargo. The master wrote to the owners of the ship in France, but did not wait a reply; and he did not write to the consignee of cargo at Liverpool. He discharged the cargo and warehoused it; and obtained the repairs of the ship on bottomry of ship, and freight and cargo, by the sanction of the French consul; and eventually, after the lapse of several months, brought the ship and cargo to destination. By the ordinary means of communication between Fayal and France, a reply from France could not have been obtained in less than two months. The amount of the bond considerably exceeded the value of the ship and freight, which the shipowner abandoned to the bondholder.

Held, that in these circumstances, the master was not bound to have waited for a reply from the shipowner, nor to have communicated with either the shipper or consignee of cargo; and that the bond was valid against cargo.

A defence that a bottomry bond is void, for want of communication with the shipowner or the consignee of cargo, must be specially pleaded.

BOTTOMRY. This cause was instituted by the holder of three bottomry bonds granted by the master of the French ship Olivier, upon ship, freight and cargo, under the circumstances hereinafter stated. The cause went by default against ship and freight, but the owners of the cargo appeared and contested the validity of the bonds.

The Olivier belonged to M. Guibert and Son, of Saint Servan in France, shipowners and bankers; on the 30th of August 1860, the vessel being then at the island of St. Thomas, was chartered on behalf of William Lloyd and Company, who had a house in the island of Hayti, and also a house in Liverpool, for a voyage from St. Thomas to Hayti, there to take on board a cargo of mahogany and a small quantity of cotton or coffee, and carry the same to Liverpool. In fulfilment of this charter the Olivier

(*a*) 8 Moore, P. C. 459.

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proceeded to Hayti, and there shipped 632 logs of mahogany, 30 bales of cotton, and 25 tons of logwood, all of which were consigned to the house of William Lloyd and Company of Liverpool, and bills of lading were signed and forwarded accordingly. On the 9th of October, 1860, the Olivier sailed for Liverpool. Meeting with tempestuous weather, whereby she suffered considerable damage, the vessel, on the 8th of November 1860, was obliged to put into the port of Horta in the island of Fayal, for repairs. There was no dock there, and the ship could only be repaired where she lay at anchor near the shore, for which purpose it was necessary to discharge her cargo. The master of the Olivier thereupon caused the cargo to be discharged and warehoused, and, being without funds or credit, he applied to the French vice-consul for authority to hypothecate his ship, freight and cargo, to pay for the repairs necessary for the ship to complete her voyage. This authority he received in writing on the 9th of December. Accordingly on the 14th of December, he gave a bottomry bond on ship, freight and cargo, for 48,400 francs, payable ten days after arrival in Liverpool, with 20*l.* per cent. interest; and subsequently he gave two other bonds on the same security, viz., a bond dated 2nd March, 1861, for 1,634 francs, and a bond dated 10th March, 1861, for 1,410 francs, each carrying 20 per cent. interest. The bonds were in the French form, and executed before the French vice-consul. Considerable delay in completing the repairs was caused by adverse weather, by further damage occasioned by a subsequent collision, and by the want of all convenient appliances. When the repairs were completed, the Olivier reshipped her cargo, and on the 16th of March, 1860, sailed for Liverpool, where she arrived on the 25th of March.

The total amount of the sum secured by the bonds, together with the maritime interest, amounted to 2,100*l.* The ship, on being sold by order of the Court, fetched 690*l.*; the freight amounted to 569*l.* The nett proceeds of the cargo (sold by the owners) were 2,043*l.* The expenses incurred at Fayal in respect of cargo were proved to be about 720*l.*

The petition of the bondholder against the owners of cargo was filed on the 29th of June, 1861; their answer, which was not filed until the 16th of October, 1861, did not allege that the bonds were invalid because the master had not communicated with them before hypothecating their property, or that they were invalid because the cargo could and should have been transshipped; but alleged that the master had had opportunity to communicate with and had actually received a reply from M. Guibert & Son before the 14th of December, the date of the first bond, and that M. Guibert & Son had received intelligence

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from the master of the repairs having been commenced, in time to write a reply which would have reached the master before the date of the two later bonds. The answer further stated that the sum borrowed was 2,100*l.*, and the proceeds of the ship only 690*l.*, and then alleged, that "the master was not warranted by law in borrowing the said amount of money by bottomry bond upon the said vessel, and rendering the cargo liable for the payment of the same; regard being had to the value of the vessel at the time."

The proofs on the part of the plaintiff, the holder of the bond, consisted principally of the evidence of the bottomry lender at Fayal and the official documents. No affidavit was made by the master of the ship, but it was proved that shortly before the trial he was at sea. It was also proved that whilst the Olivier was repairing at Fayal, there was no vessel there by which the cargo might have been transshipped and forwarded to its destination.

With respect to communication, it was proved that the master did not, whilst at Fayal, attempt to communicate with the consignees or shippers of cargo; but that he wrote before the 14th of December (date of letter and contents not given) to his owners, M. Guibert & Son, who, however, did not reply, because, as they informed the consignees, they expected the ship to sail before a reply would reach Fayal. In ordinary course letters were transmitted between Fayal and France by a monthly steamer plying between Fayal and Lisbon, whence there was a daily post overland to France. This steamer usually left Fayal about the 3rd of the month, reached Lisbon about the 15th, and arrived again at Fayal on her return voyage about the 30th. It was also proved that actual intelligence of the ship having put into Fayal in distress was received (though through what means did not appear) at the Underwriters' Association Rooms at Lloyd's in London, on the 26th of November, 1860. The consignees of cargo, the defendants, did not write to the master, but on the 31st of January, 1861, they wrote an inquiring letter to M. Guibert & Son, who, in reply, informed them of the loan on bottomry of the 14th of December.

The *Admiralty Advocate*, for the owners of cargo, was called on to begin.

Wambey for the bondholder.

Besides the cases noticed in the judgment, the following were also cited, *La Ysabel* (*a*), *Lord Cochrane* (*b*), *Gratitudine* (*c*).

(*a*) 1 Dods. 275. (*b*) 2 W. R. 333. (*c*) 3 C. R. 273.

On the 18th of March, DR. LUSHINGTON gave judgment. 1862. *March* 18.

Judgment.

The Court has now to determine whether these three bottomry bonds given upon ship, freight and cargo are valid against the cargo. The owners of the ship have suffered the cause to go by default against their property.

Facts of the case.

The following facts are proved by the evidence. The ship put into Horta, in Fayal, in distress, on the 8th of November, 1860. The master wrote to his owners in France, but they made no reply; and if they had made a reply, the master could not have received it until long subsequent to the 14th of December, the date of the first bond. The ship had sustained serious damage. To transship the cargo was impracticable, and unless the ship was to remain an indefinite time in Horta, which is apparently almost an open roadstead, it was necessary to unload the cargo and to commence the repairs of the ship. The master discharged the cargo and warehoused it, and commenced the repairs of the ship upon an agreement of bottomry on ship, freight and cargo, made under the approval of the French consul. The money was advanced in good faith on this security by the merchant at Fayal.

The owners of the cargo deny the validity of the bonds as against their property. First, they complain that the master has made no affidavit to support the bond. An affidavit by the master may be usual, but when I consider the great delay of the defendants in filing their answer, and that their answer contains no complaint against him for not having communicated with them, which is now made their principal point, and that the master, who is not under the control of the plaintiff, is abroad and at sea, I can find no weight in this objection.

The master was not bound to have waited for a reply from the ship-owner before hypothecating; the need of repairs being urgent, and the time requisite for communication being very considerable.

The defendants then make two points of law. First, they say that the master having written to his owners in France, ought to have waited the receipt of an answer before entering into an engagement of bottomry. But how could the master with any reason have so waited? He could not in ordinary course expect an answer from France for two, or it might even have been three months; and meanwhile his ship, which had sustained great damage, must be kept merely anchored on the shore, for there was no dock in the island. From the evidence I draw this conclusion: that to have delayed so long to repair the ship (for which purpose the discharge of the cargo was necessary), would have been equivalent, looking to the risk of the winter, to an abandonment of ship and cargo. In my

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opinion, therefore, there is not in the objection, that the master was bound to have waited for a reply from the ship-owner (which reply never in fact came, and never was written), any legal ground for impeaching the validity of the bond.

Duty of communicating with consignees of cargo considered.

The defendants then contend, and this is the important question in the case, that the master was bound to have corresponded with the shippers or consignees of the cargo before he executed a bond affecting their property. Now I must observe, in the first place, that this objection ought to have been plainly put forward in the answer to the petition, whereas the answer does not contain the slightest intimation of any such defence, so as to give the bondholder an opportunity of meeting it. I am of opinion that on this ground alone the objection ought to fall, and so thought Lord Cottenham in the case I am about to cite. I will, however, consider the law respecting the alleged duty of a master to communicate with consignees of cargo before hypothecating cargo with ship and freight. I will consider it generally, and in the circumstances of this case.

The want of due communication, &c., ought to have been specially pleaded.

Three authorities require to be noticed; the *Oriental* (*a*) and the *Bonaparte* (*b*), both decided by the Judicial Committee, and *Glascott* v. *Lang* (*c*), decided by Lord Cottenham when Lord Chancellor. In the *Oriental*, the bond was opposed by the owner of the ship, Mr. Wallace of New Brunswick; and the point raised was the conduct of the bottomry lender, Mr. Miln of New York, as against Mr. Wallace. The ship had met with an accident when leaving New York, fully laden. Mr. Miln, who had acted as agent to the owner when the ship was at New York, immediately after the accident, about the 23rd of February, informed Wallace in New Brunswick by telegraph of the occurrence, and the necessity for repairs; some further correspondence then took place by letter with Wallace, who gave no directions as to the repairs, or as to the means of paying for them. On the 12th of March, Miln, without apprising Wallace by telegraph, took the bond, and it appears by the correspondence that he did so, intending to charge eventually, as he thought he could, only the owners of cargo with maritime premium and not the owners of the ship. Their Lordships held the bond invalid. The substance of the decision was this, that to justify an agent of the shipowner in taking a bottomry bond on ship, it is not sufficient for him to inform the owner of disaster to the ship, and the necessity for repairs, but that an express communication as

The Oriental.

(*a*) 7 Moore, P. C. 398. (*b*) 8 Moore, P. C. 459. (*c*) 2 Phillips, 310.

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to taking a bottomry bond must be made to the owner by telegraph, if possible. This is a doctrine which never was laid down before, but, as the doctrine of the Privy Council, it must now prevail. This case however, important as it is, has little bearing on the present case; where the owners of the ship have voluntarily ceded their interest to meet the bond, and where it is the consignees of cargo who are contending that the master should have communicated with them.

Bonaparte.

The *Bonaparte* (*a*) has a much closer reference to the present case. Certainly that judgment went a very long way,—indeed an unprecedented length. The bond was given in a port in Sweden upon ship and freight and a cargo of deals and iron which was consigned to various persons in Hull. The master communicated with the owners of the ship (who were resident in Sweden), and they instructed him to borrow money for the ship's necessary repairs on bottomry of the ship, freight and cargo. He also communicated with the shipper of the cargo, who refused to advance any money. When the case first came before the Judicial Committee, there was no evidence that the master had communicated at all with any of the consignees of the cargo in Hull. Their Lordships declared their opinion that, considering the facility of communication between Sweden and England, and the time which had elapsed between the necessity for raising money and the commencement of the repairs, the bond was void as against the cargo, if no such communication with the consignees had been made or attempted by the master. Fresh evidence was ordered to be taken, when it appeared that the master in fact had, before the repairs were commenced, caused the principal consignee and owner of the cargo (the party opposing the bond), to be informed of the ship's distress; and upon this evidence their Lordships pronounced that the bond was valid against his property.

Glascott v. *Lang.*

The case of *Glascott* v. *Lang* (*b*) had been decided by Lord Cottenham in 1847, but was not noticed either in the *Oriental* or the *Bonaparte*, and it is therefore my belief that it was not then present to the minds of their Lordships. The suit was brought by the mortgagee of a ship to set aside a bottomry bond, which had been given on the ship at Trieste. The owner of the ship was resident in this country. The bondholders admitted that "by the common course of post between Trieste and Great Britain in the months of October and November, 1836, there was between the 9th of October, the day of the ship's arrival at Trieste, and the 16th of November, 1836, the date of the

(*a*) 8 Moore, P. C. 459. (*b*) 2 Phillips, 310.

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bond, sufficient time for the captain to have written to Great Britain, and to have received an answer." The case was an appeal from the Vice-Chancellor Knight Bruce, and Lord Cottenham said:—"I was anxious to know on what ground the Vice-Chancellor proceeded in decreeing the cancellation of this bond, and from a note of his judgment with which I have been furnished, it appears that he proceeded upon this, that the ship remained long enough at Trieste to have enabled the captain to communicate with the owners in England, and that therefore the captain was not in a situation to justify him in taking up money on bottomry. Now, in the first place, that is a ground which has no authority to support it. I asked repeatedly during the argument, whether there was any case to be found in which that circumstance had been considered sufficient to avoid a bottomry bond, and the counsel were unable to produce one, or any case at all like it. A case, I think, was produced, which seemed to imply the contrary, but certainly no case at all supporting that proposition. And even if that proposition could be supported, it would not support the decree, because it is no part of the case made by the bill that the bond was void because the captain, being at Trieste, did not send to England for supplies. The bill contains no such charge, although, if that circumstance was intended to be relied on, it ought to have been distinctly put in issue, that the defendants might have had an opportunity of explaining it." Such was the opinion of Lord Cottenham.

Now, it is evident that these three cases cannot be reconciled. I believe Lord Cottenham was perfectly correct in stating that no case could be found in which a bottomry bond had been pronounced void for want of previous communication with the shipowner, under circumstances similar to those before his Lordship.

Consequences that may arise from requiring previous communication with shippers or consignees before the master may lawfully bind the cargo by bottomry.

Having now stated these conflicting authorities, I will consider the practical consequences of requiring a master before hypothecating cargo, not only to communicate with the owner of the ship, but also with all or some of the shippers or consignees of the cargo. Some of the consequences are described by Lord Stowell in the case of the *Gratitudine* (*a*), often referred to, and many times considered—and some of the difficulties are there set forth. But presume those difficulties to be overcome, and the master to have made the required communications: what if the owner of the ship and the consignees of the cargo give different and conflicting instructions? Is the master to allow

(*a*) 3 C. R. 262, &c.

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the ship to rot and the cargo to perish? Is he to sell the ship and leave the cargo; or is he, if he can, to repair the ship and bring her home in ballast? What is he to do? I think it would be very difficult to say, with instructions from the owner of the ship, and with instructions from the owners of the cargo, clashing against each other, what an unfortunate master ought to do, whether his ship was lying at Fayal, Trieste, or Calcutta. Try the case by another test. The ship comes into port in distress, and the master has no credit. Of course it is of great importance to all concerned to get the repairs done with the greatest expedition. The usual course is to have the surveys made, and to commence the repairs as quickly as possible, and to obtain credit on the undertaking to give a bottomry bond. Now this course of proceeding must be at an end, and the master, before he can commence the repairs, must first communicate with the owner of the ship and the owners of the cargo. Again, look at the obligations already imposed by law on the lender of money, for his interest must be considered. He must satisfy himself that the ship is in distress; that the repairs are necessary; that the master, so far as he can discover, has no personal credit; and that he has communicated with the shipowner. Then the further obligation will now be imposed of a communication passing with one, some, or all of the shippers and consignees of the cargo, and he must judge whether sufficient time has elapsed for such purpose, and if he fails in duly fulfilling this obligation, he loses his money. It is obvious that under such circumstances many and nice inquiries must be made,—indeed doubtful calculations ascertained, before money can safely be advanced on bottomry; and the inevitable result is this, that, in the presence of all these difficulties, the maritime premium must be greatly increased, or no money will be advanced on bottomry at all. Moreover, it is to be recollected that often perfect strangers to the ship and cargo are the lenders, and that it has always been considered a mark of good faith that advertisements be published for the advance of the money on bottomry. I ought also to notice that, if the ship be a British ship, the owner of the cargo can, by action against the owner of the ship, recover all the expenses he may have been put to through the hypothecation of his cargo for ship's expenses; *Duncan* v. *Benson* (*a*). What may be the French law I do not pretend to say.

It is necessary, however, to take a fair view and to look on the other side of the question. It must be admitted that the owners

(*a*) 1 Exch. 557; 3 Exch. 655.

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of the ship and the owners of the cargo should be protected from a sacrifice of their property by an improper and unjustifiable imposition of a bottomry bond; and no doubt there may be cases in which timely information might prevent the necessity of hypothecation. The loss indeed entailed by a bond generally falls ultimately upon the owner of the ship, but not always; and the question seems to be what rule or rules will best advance the mercantile interests not of England merely, but of all the countries engaged in commerce,—will best protect the owners of the ship and the owners of the cargo, and at the same time afford due facility for the security of persons lending on bottomry in order to assist ships in necessity.

I have entered into this detail because, should this case, or one similar, travel to the Superior Court, it might be seen that this Court did not dispose of questions of bottomry without carefully considering not merely the technical rules, but also all the circumstances that affect the great mercantile interests at stake; and further, that the lenders of money on bottomry may be distinctly apprised of the obligations which they must fulfil before they can advance their money with safety.

The rule laid down in the *Bonaparte* binding, if applicable to this case.

I will now state the ground on which I intend to found my decision in this case. I concur, as I have already said, in the observations which fell from Lord Cottenham in *Glascott* v. *Lang*, that there was no authority requiring generally in cases of bottomry previous communication with owners; but I think that the Judicial Committee being a Court of the last resort, and the Court of Appeal from this Court, I am bound to adopt the rule which it has prescribed in the case of the *Bonaparte*, if applicable to the circumstances of this case. That rule appears to be that the master, before giving a bond on ship and cargo, should, if practicable, correspond with the owners of the cargo as well as with the owners of the ship, and receive instructions from them; and that the lender of money on bottomry, before he enters into any engagement to advance, should satisfy himself that such communications have taken place. The whole question then resolves itself into this—Was it reasonably practicable for the master in this case to have any such correspondence with the shippers or consignees of the cargo, either with Hayti or Liverpool? Of the urgent necessity to commence and to effect the ship's repairs I have already spoken. Of the means of communicating with Hayti or Liverpool there is no direct evidence, but it is clear that the time necessary for such communication must have been longer than that required for communication with France, and that

But here communication with the shippers or consignees of cargo was not reasonably practicable.

to have waited that time would have endangered the safety of the ship. As to the cargo, it is true that the bulk of it was wood, and would not easily deteriorate; but what would have been the expense of warehousing, and how was the cargo ever to be conveyed to England unless the ship was repaired? I am clearly of opinion that the decision of the *Bonaparte* does not require me to hold that in the circumstances of this case the master was bound to communicate with the shippers or consignees of cargo. I must therefore pronounce for the validity of the bond, with costs.

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Bond pronounced for.

Goldsmith, proctor for the plaintiff.

Ayrton for the defendant.

THE MALVINA.

Collision—Damage to Barge in body of a County—Jurisdiction —24 Vict. c. 10, s. 7.

By the 7th section of the Admiralty Court Act, 1861, the Court of Admiralty has jurisdiction over a cause of damage done by a sea-going vessel to a barge within the body of a county.

COLLISION. The petition of the plaintiffs stated a collision in Blackwall Reach, in the river Thames, between a barge of the plaintiffs and the Malvina, a screw steam-vessel belonging to the defendants, engaged in the Irish trade.

April 29.

The answer of the defendants pleaded (among other things),

"9. The said barge was not a ship or sea-going vessel, and the said collision took place within the body of a county; and the proctor for the defendants submits that this Honourable Court has no jurisdiction to entertain this cause."

Notice of motion was given on the part of the plaintiffs to have the 9th article of the answer struck out.

The following enactments were referred to in the argument and judgment:—

13 Rich. II. c. 5. "The admirals and their deputies shall not meddle from henceforth of anything done within the realm, but

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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."

3 & 4 Vict. c. 65, s. 6. "The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to, or damage received by, any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered or damage received, or necessaries furnished, in respect of which such claim is made."

Admiralty Court Act, 1861 (24 Vict. c. 10), s. 7. "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." In the interpretation clause (s. 2) of the same Act, "ship" is declared to "include any description of vessel used in navigation not propelled by oars."

Pritchard, in support of the motion.—The 7th section of the Admiralty Court Act, 1861, gives the Court jurisdiction. The act is described as an act to extend the jurisdiction of the Court, and the terms used are sufficient to include this case, "any claim for damage done by any ship." It is indeed difficult to perceive what was the meaning intended, except to supplement the 6th section of 3 & 4 Vict. c. 65.

Lushington, contra.—The jurisdiction, if any, must be given by 24 Vict. c. 10. The Court previously had no jurisdiction over damage done within the body of a county to a vessel not being a sea-going vessel; *Bilbao* (*a*). The ancient statutes of Richard II. were a statutory bar. The new statute does not mention either barge or body of a county; in this respect unlike the former statutes conferring jurisdiction; 3 & 4 Vict. c. 65, s. 6; 17 & 18 Vict. c. 104, s. 476: nor does it mention the statutes of Richard II. There is no necessity for interpreting the Act to include this case. There are a variety of other matters to which it may point; as, for instance, injury done to passengers by a maritime collision; injury done to a vessel towed by improper management of the vessel towing, and so on. In this Court a barge cannot sue a barge. Why, then, should a barge be allowed to sue a ship? The Court of Admiralty is not a

(*a*) Ante, p. 151.

proper Court for adjudicating small claims, such as will arise from allowing claims for damage to barges. 1862. *April* 29.

Pritchard replied.

Dr. LUSHINGTON:—This is an action brought by a barge against a steamer for a collision in the river Thames, within the body of a county. The question is—whether the Court has jurisdiction? And I am clearly of opinion that it was the intention of the Admiralty Court Act, by the 7th section, to give the Court this jurisdiction. Difficulties have continually occurred from the words of the statute of Richard II., but I am of opinion that now all such are wholly removed by these most expressive words:—"The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." The terms "sea-going vessel," and "damage done within the body of a county," are not used; and I am glad they are not, for constant confusion has arisen from them; the utmost jurisdiction is, nevertheless, given to the Court in cases of collision. I am of opinion that the ninth article of the answer must be struck out. Judgment. Jurisdiction affirmed.

Pritchard, proctor for the plaintiffs.

Rothery for the defendants.

THE KENT.

Possession — Co-owners — Right of Master and Part-owner against Owner of the greater part of the Vessel.

In a cause of possession brought by the owner of the greater part of a vessel, the master, owning the remaining part, is not intitled to retain possession of the vessel upon an offer of security to the amount of his co-owner's interest.

THIS was a cause of possession instituted by Alfred Chapman, owner of 43 sixty-fourths of the schooner Kent. The vessel having been arrested, an appearance was entered for Henry Humphreys, the master of the vessel, who owned the remaining 21 sixty-fourths, and had acted as ship's husband. *May* 6.

1862. *May 6.* Upon the plaintiff's petition being filed, which alleged that the plaintiff was dissatisfied with the defendant in respect of the possession, the earnings and employment of the vessel,

Tristram, for the defendant, moved the Court to release the vessel, and to allow the defendant to resume possession on his giving the plaintiff security to the value of the plaintiff's interest.—The defendant, being master and part-owner, is intitled to continue in possession, unless upon some special cause shown, which is not the case here. In the *New Draper* (*a*), Lord Stowell says, "In the case of a master and part-owner, something more is required before the Court will proceed to dispossess a person who is also a proprietor in the vessel, and whose possession, therefore, the common law is upon general principles inclined to maintain. It is not, however, by any means unprecedented for this Court to proceed even to this extent; but then some special reason is commonly stated to induce the Court to interpose." The 8th section of the Admiralty Court Act, 1861, gives full equitable jurisdiction to this Court in all such matters, enacting that "the High Court of Admiralty shall have jurisdiction to decide all questions arising between the co-owners or any of them, touching the ownership, possession, employment and earnings of any ship . . . . . and may make such order in the premises as to it shall seem fit." The defendant only desires that the ship, by which he makes his bread, shall not be idle, pendente lite.

Deane, Q. C., contra.—The plaintiff owns a majority of interest, and is intitled to possession, not to mere security for his interest, as the very case of the *New Draper* shows. In the *See Reuter* (*b*), Lord Stowell said:—"In cases of ships belonging to British subjects, the Court has no hesitation in ordering possession to be delivered up on the application of a majority of the owners, without entering very minutely into the causes of dissatisfaction existing between them and the master." Here, however, the plaintiff alleges dissatisfaction with the plaintiff in respect of the possession, earnings and employment of the ship.

Judgment. Dr. Lushington:—This is not a cause of restraint, but a cause of possession. The action is brought by the owner of two-thirds of the vessel, and he has arrested the ship, and he claims possession. I am now asked on behalf of the defendant, who is the

(*a*) 4 C. R. 290. (*b*) 1 Dods. 23.

master and owns the remaining third part of the vessel, to allow him to continue in possession on giving security to the plaintiff to the value of his interest. I am clearly of opinion that I cannot grant this motion. 1862. *May* 6.

In the case of the *New Draper*, which was cited by Dr. Tristram, Lord Stowell granted possession to the persons owning a majority of interest, according to the general rule, which I must now follow. I reject this motion with costs.

Motion rejected, with costs.

Boyle, proctor for the plaintiff.

Brooks for the defendant.

THE OLIVIA.

Collision—Duty of Fishing Vessel to show a Light—Admiralty Regulations, 1st May, 1852, 24th February, 1858, 26th October, 1858—17 & 18 Vict. c. 104, ss. 295, 298—17 & 18 Vict. c. 120, s. 4.

A fishing vessel is not bound to carry coloured lights. A fishing vessel is bound to show a light in reasonable time to an approaching vessel; but this obligation is not statutory, but an obligation of maritime law.

The Admiralty regulations, dated 1st May, 1852, are wholly revoked by the regulations dated 24th February, 1858; and the regulation dated 26th October, 1858, exempts fishing vessels from the obligation to carry the coloured lights prescribed by the regulations of February, 1858.

By the 295th section of the Merchant Shipping Act, 1854, it was provided, that "the Admiralty might make" certain regulations, such regulations to be published in the *London Gazette*, and production of the *Gazette* to be "sufficient evidence of the due making and purport thereof:" and by the 2nd section, "the Admiralty" was defined to mean "the Lord High Admiral, or the Commissioners for executing his office." *Held*, that a notice published in the *Gazette*, purporting to be given by the Lords Commissioners of the Admiralty, but signed only "by command of their lordships, W. G. Romaine," was, by production of the *Gazette*, proved to be duly made by the Admiralty.

THIS was an action brought by the owners of the fishing lugger Safe Return, against the British brigantine Olivia, for a collision, on the 28th of September, 1861, whereby the lugger was lost. The collision took place at night. The lugger was, at the time, returning from a fishing voyage, laden with herrings. *May* 12, 13.

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At the hearing of the cause, the Court found that the collision was partly caused by the negligence of those on board the Olivia, and partly by the default of those on board the lugger, in not showing any light in sufficient time to warn the brigantine.

The question was then argued, whether in these circumstances the plaintiffs were by statute deprived of the right to recover anything, or whether they were intitled to recover half damages by the maritime rule observed in the Court of Admiralty. This depended upon the following enactments and regulations:—

"*Admiralty Notice respecting Lights to be carried by Sea-going Vessels to prevent Collision* (*a*).

By the Commissioners for executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, &c., &c.

By virtue of the power and authority vested in us by the Act 14 & 15 Vict. c. 79, dated 7th August, 1851, we hereby require and direct that the following regulations be strictly observed.

. . . . . .

Steam Vessels.

[When under steam to *exhibit* masthead and coloured lights; when at anchor, a common bright light.]

. . . . . .

Sailing Vessels.

We hereby require that all sailing vessels, when under sail or being towed, approaching or being approached by any other vessel, shall be bound to *show*, between sunset and sunrise, a bright light, in such a position as can be best seen by such vessel or vessels, and in sufficient time to avoid collision.

All sailing vessels at anchor in roadsteads or fairways shall be also bound to *exhibit*, between sunset and sunrise, a constant bright light at the masthead.

. . . . . .

We hereby revoke all regulations heretofore made by us re-

(*a*) Printed at length in Swabey's Reports, Appendix, page i. Regulations for Lights to be carried by steam-vessels had been previously issued under 9 & 10 Vict. c. 100, ss. 10, 11, 12.

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lating to steam vessels exhibiting or carrying lights; and we require that the preceding regulations be strictly carried into effect on and after the 1st of August, 1852.

Given under our hands the 1st day of May, 1852.

HYDE PARKER.
P. HORNBY.

By command of their Lordships,
W. A. B. HAMILTON."

The 4th section of the Merchant Shipping Repeal Act, 1854 (17 & 18 Vict. c. 120) repealed various acts, and amongst them 14 & 15 Vict. c. 79, with the following proviso: "Provided that such repeal shall not affect any appointment, bye-law, regulation or licence duly made or granted under any enactment hereby repealed, and subsisting when this act comes into operation; and the same shall continue in force, but shall be subject to such provisions of the Merchant Shipping Act, 1854, as are applicable thereto respectively."

The 295th section of the Merchant Shipping Act, 1854, which continued the power of the Admiralty to make regulations, and directed the same to be published in the London Gazette, &c., and the 298th section, which deprived a plaintiff in certain cases of the right to recover, are printed, ante, p. 411. The 2nd section of the Act defines "the Admiralty" to mean "the Lord High Admiral or the Commissioners for executing his office."

"*Admiralty Notice respecting Lights and Fog Signals to be carried and used by Sea-going Vessels to prevent Collision* (*b*).

By the Commissioners for executing the Office of Lord High Admiral, &c.

By virtue of the power vested in us, we hereby revoke, as from and after the 30th day of September, 1858, the regulations made and published by us on the 1st day of May, 1852, relating to the lights to be carried by sea-going vessels to prevent collision. And we hereby make the following regulations, and require and direct that the same be strictly observed and carried into effect on and after the 1st day of October, 1858.

. . . . . .

(*b*) Printed at length in Swabey's Reports, Appendix, page vi.

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Steam Vessels.

[The former regulations re-enacted almost in identical terms.]

Sailing Vessels.

1. *All sea-going sailing vessels,* when under way or being towed, shall, between sunset and sunrise, exhibit a green light on the starboard side, and a red light on the port side, &c.

. . . . . .

Given under our hands this 24th day of February, 1858.

CHARLES WOOD.
R. S. DUNDAS.

By command of their Lordships,
W. G. ROMAINE, Secretary."

The London Gazette of 29th October, 1858, produced by the plaintiffs, contained the following

"NOTICE.

Admiralty, October 26th, 1858.

With reference to the Admiralty notice dated the 24th February, 1858, 'respecting lights and fog signals to be carried and used by sea-going vessels to prevent collision,' which appeared in the London Gazette of the 5th March, 1858, my Lords Commissioners of the Admiralty give notice that these regulations, so far as they relate to the lights to be carried, do not apply to open boats, or to vessels usually employed in fisheries.

By command of their Lordships,
W. G. ROMAINE."

The Admiralty Advocate and *Spinks* for the plaintiffs.—There are no statutory regulations as to lights to be either carried or shown by fishing luggers. The Admiralty notice of 26th October, 1858 (duly published in the Gazette as required by 17 & 18 Vict. c. 104, s. 295), exempts vessels usually employed in fisheries from the obligation to exhibit the coloured lights which had been imposed on sailing vessels by the regulations of 24th February, 1858; and those regulations revoke the former regulations of 1st May, 1852.

Twiss, Q. C., and *Clarkson,* for the defendants.—First, the so-called "notice," dated 26th October, 1858, does not appear to be a regulation duly made by the Admiralty: it does not, like the

former regulations, bear the name of any of the Lords of the Admiralty, but only the name of Mr. Romaine. Who is Mr. Romaine? Secondly, the document is not a regulation, but, as its terms show, it is an attempt to give a certain interpretation to the regulations then in force, which the Lords of the Admiralty had no authority to do. Thirdly, even if the document be a valid regulation, the plaintiffs are then remitted to the regulations of 1st May, 1852. Those regulations were maintained by the 4th section of the Merchant Shipping Repeal Act; and the revoking clause of the regulations of 24th February, 1858, we submit, only repeals the regulation as to the lights "to be *carried* by sea-going vessels." The duty of fishing luggers to *show* a due light remains as before a statutory duty; and the plaintiffs, therefore, are by the statute (17 & 18 Vict. c. 104, s. 298) barred of all right to recover.

Judgment.

Dr. Lushington:—I will not finally dispose of this question to-day, except upon the effect of the document dated 26th October, 1858, which the plaintiffs claim, but the defendants deny, to be an Admiralty regulation of binding authority under the provisions of the Merchant Shipping Act. The document is published, as the Merchant Shipping Act directs, in the London Gazette of the 29th October, 1858, and is in these terms:

The regulation of 26th October, 1858, is valid.

"Notice.—Admiralty, October 26th, 1858.

"With reference to the Admiralty notice dated the 24th February, 1858, 'respecting lights and fog signals to be carried and used by sea-going vessels to prevent collision,' which appeared in the London Gazette of the 5th March, 1858, my Lords Commissioners of the Admiralty give notice that these regulations, so far as they relate to the lights to be carried, do not apply to open boats or to vessels usually employed in fisheries.

By command of their Lordships,

W. G. Romaine."

The defendants contend on two grounds, that this is not a binding regulation. First, they say that it is not a regulation duly made, because it is not authenticated by the Lords of the Admiralty, but bears only the signature "By command of their Lordships, W. G. Romaine." The Merchant Shipping Act, however, which empowers the Admiralty to make regulations, and to revoke or vary them, does not impose any conditions as to the form of making or revoking or varying, save by publication in the Gazette; and the Gazette itself is by the statute declared sufficient evidence of the due making and purport of such regulations. I have had to consider cases of this kind, of far greater

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importance. I recollect a case in the Privy Council, where the question was whether a letter sent to one of the Crown colonies, signed by the secretary of state alone, was equivalent to an order in council; it being admitted that the Crown had the power to legislate for all the Crown colonies, and that the usual form of exercising this power was by order in council. Their Lordships held, that as there was no specific manner in which the Crown must legislate, the letter was to be considered a valid order of the Crown. On the same principle it is my duty to hold that this regulation was duly made by the Admiralty.

It is then argued, that if the regulation is in this sense duly made, it is nevertheless not a valid regulation, because it purports in terms not to make a new regulation, but to put a particular interpretation upon the regulations then existing; and such an act, say the counsel for the defendants, was ultra vires. The terms of the document, it is to be admitted, are not well chosen; but I am bound to give them, if I can fairly do so, a construction which shall make the document effectual. Now, if instead of the words "do not apply," the words "shall not apply" had been used, it could hardly have been contended that their Lordships had usurped judicial functions instead of exercising the regulative power which the legislature had intrusted to them. I am satisfied that, although the language is ambiguous, the intention of their Lordships was purely legitimate, and that it is sufficiently expressed; and I have therefore no hesitation in holding this to be a valid regulation, exempting open boats and fishing vessels from the obligation of carrying the lights prescribed by the regulations of February, 1858. On the effect of those regulations on the regulations of 1852, I will give my opinion to-morrow.

On the following day the learned Judge said:—

I will first state the position in which this case stands. With the advice of the Trinity Masters I have declared that the fishing lugger, the Safe Return, ought to have shown a light, and that the omitting to do so contributed to the collision with the Olivia, which was otherwise to blame. The question now to be determined is, whether this culpable omission of the Safe Return to show a light is to be considered as a blameable disregard of ordinary nautical precaution, or a violation of statute law. If the former only, then the plaintiffs will be intitled to recover half their damages: but if the latter, a question may arise whether the plaintiffs are not altogether barred of recovery.

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I decided yesterday that by virtue of the Admiralty regulation of the 26th of October, 1858, the Safe Return was exempted from the duty of carrying the coloured lights, enjoined by the regulations of 24th of February, 1858, on sailing vessels generally; and the dispute is now narrowed to this, whether, after the passing of these regulations of February, 1858, a fishing vessel, like the Safe Return, was still bound by the regulations of 1852 to show a light in sufficient time to avoid collision.

By the regulations of 1852, steamers were required to exhibit fixed masthead and coloured side lights, and all sailing vessels were required to *show* a bright light on another vessel approaching. The latter requirement is in these terms:—"Sailing vessels. We hereby require that all sailing vessels, when under sail or being towed, approaching or being approached by any other vessel, shall be bound to show, between sunset and sunrise, a bright light, in such a position as can be best seen by such vessel or vessels, and in sufficient time to avoid collision." This I ought to assume, and do assume, included fishing vessels; its requirement, it is to be observed, is not to carry but to show a light. Then came the Merchant Shipping Act of 1854, the 295th section of which renewed the power of the Admiralty to make, revoke or vary any regulations respecting lights and fog signals; and by the repeal Act of the same date, the existing regulations (namely, those of 1852) were continued in force. On the 24th of February, 1858, the Admiralty issued new regulations, revoking those of 1852, re-enacting in substance the lights for steamers, and imposing on sailing vessels, for the first time, the obligation to carry fixed coloured side lights. The revoking clause is as follows:—"By virtue of the power vested in us, we hereby revoke, as from and after the 30th day of September, 1858, the regulations made and published by us on the 1st day of May, 1852, relating to the lights to be carried by sea-going vessels to prevent collision." The question is, what is the effect of this revocation, which might appear only to concern lights to be carried or exhibited,—fixed lights,—upon that part of the former regulations, which required a light to be shown? I am satisfied that it was intended to revoke the former regulations altogether. If the obligation to show a light were still to continue under the regulations of 1852, it would apply not to fishing vessels only, but to all sailing vessels, and that in addition to the obligation to carry the fixed coloured lights. It is obvious from this, that it was never intended that the two regulations should co-exist; and the same thing appears clearly also from the further provision, requiring

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the exhibition of the coloured lights, when by reason of bad weather they cannot be fixed.

The regulations of 1852 are wholly revoked.

I am of opinion that all the regulations of 1852 are revoked by the regulations of February, 1858, and that by the regulation of October, 1858, fishing vessels are exempted from the regulations of February, 1858, as to carrying coloured lights (*a*). The result is, there is no Admiralty regulation requiring fishing vessels, like the Safe Return, to show a light, and the Merchant Shipping Act does not apply to this case. The default of the plaintiffs was only a breach of general nautical duty; and I therefore pronounce for a moiety of the damage.

The 298th section of 17 & 18 Vict. c. 104, not applying, the plaintiffs allowed to recover half damages.

Jenner and *Dyke*, proctors for the plaintiffs.

Clarkson for the defendants.

(*a*) By the revoking clause of the Regulations of 24th February, 1858, the Regulations of 1st May, 1852, are revoked under their original title, as published in the Gazette. The Regulation of 26th October, 1858, does not (at least directly) "name the day on which it is to come into operation," as required by 17 & 18 Vict. c. 104, s. 295.

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In the High Court of Admiralty.

THE TEES.
THE PENTUCKET.

Salvage from Fire in a Dock—Distribution.

A vessel lying in a dock, and in danger of catching fire from the surrounding warehouses which were in flames, was towed thence by a steamer to a place of safety. The Court *held*, that salvage was payable; and distributed the salvage money between the owners and crew.

THIS was a case of salvage, arising out of the great fire which took place near London Bridge in June, 1861. When the fire broke out, the steamship Tees and the barque Pentucket were lying in Humphrey's dock; the warehouses surrounding were in a short time burning fiercely; and the fire communicated itself to the upper sails of the vessels. From this position the vessels were rescued by the steamer Undaunted, which, in two successive trips, towed them into the river, and thence to a place of safety. The service was executed at some peril of life. The value of the Tees and her cargo was 12,350*l.*; the value of the Pentucket was 950*l.*; the value of the Undaunted was 400*l.* The crew of the Undaunted consisted of the master, mate, engineer and stoker; the manager of the company to which the Undaunted belonged was in charge superintending; and a waterman named Field, and a licensed publican named Isaac, were also on board, and assisted.

Deane, Q.C., and *Lushington*, for the salvors.

Twiss, Q.C., and *Clarkson*, for the owners.

Dr. LUSHINGTON held that a valuable salvage service had been performed, and decreed the owners of the Tees and her cargo to pay 1,000*l.*, and the owners of the Pentucket to pay 300*l.*

On a suit for distribution of salvage being brought, the learned Judge awarded 300*l.* to the manager, 200*l.* to the master, 100*l.*

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Rothery, proctor for the salvors.

Clarkson for the owners.

THE GUSTAF.

Order of Precedence of Claims against Ship—Maritime and possessory Liens.

The possessory lien of a shipwright is subject to maritime liens attaching to the ship when taken into the shipwright's yard, as salvage and mariners' wages then due; but is intitled to preference over claims for wages earned, or necessaries furnished, subsequently.

THE barque Gustaf, belonging to the port of Nystad, in Russian Finland, when on a voyage to London, laden with timber, on the 21st of September, 1861, struck on the Shipwash Sand, and was assisted by the crews of two smacks into Harwich. On the 9th of October the vessel was placed in the yard of a shipwright, and there continued under repairs, the crew remaining on board. On the 5th of February, 1862, the vessel, whilst still in the shipwright's yard, was arrested by the salvors. Subsequently six other actions were entered against the ship; one by the master, and one by the crew, claiming wages up to the 22nd of February, and four actions for necessaries supplied to the vessel in Harwich, including an action by the shipwright for the price of the repairs. The proceedings in all the actions were in pœnam: the ship was sold, and the proceeds were brought into Court.

On the 29th of April, 1862, the Court awarded to the salvors the sum of 78*l.* 3*s.* 4*d.* in respect of services to the ship: there was no salvage due on freight, the voyage having been abandoned. On the same day the Court pronounced for the other claims against the ship; and the proceeds of the ship being insufficient to meet them all, the question arose in what order the claims should be paid.

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The net proceeds of the ship amounted to 810*l.* The claims (besides costs in each case) were as follows:—

	£	*s.*	*d.*
Salvage	78	3	4
Master's wages	67	3	0
Seamen's wages	245	5	9
Shipwright's claim (necessaries) .	1,000	0	0
Necessaries (three other actions) .	435	4	5

Lushington, for the salvors.—The salvors are intitled to precedence, by reason of the nature of their claim, *Selina* (*a*).

Clarkson, for the shipwright.—The possessory lien of the shipwright is superior to the claim for wages or necessaries, *Perseverante* (*b*).

Tristram, for the seamen and the plaintiffs in the other suits for necessaries, argued,—that the seamen were bound to remain until discharged, and that their lien for wages was intitled to precedence over the claim of the shipwright. The shipwright's claim was, in the Admiralty Court, only a claim for necessaries, and should be paid pari passu with the other claims for necessaries, after wages and salvage.

On the 27th of May, Dr. Lushington gave judgment. Judgment.

The present question, what claims shall be allowed to take preference of the lien by common law of the shipwright, who retains the ship in his possession until the Court of Admiralty lays its hand upon it and orders it to be sold, is not without difficulty. I am not aware that before I occupied this chair, any such question ever arose. Indeed, I may confidently say that none such ever did arise, and consequently I have no authority to resort to, beyond the proposition which is subject to no doubt—that certain liens, such as salvage and wages, attach to the ship.

On consideration, I think that, save in cases which may appear to have a paramount claim, the right of a shipwright—the common law lien—ought not to be infringed upon. The principle which I shall adopt will be to give precedence to such liens only as existed when the ship was put into the yard of the shipwright. I think it may not unreasonably be presumed that

The possessory lien of the shipwright is superior to all claims, except liens actually attaching at the time of the ship coming into his hands.

(*a*) 2 N. of C. 18. (*b*) Unreported.

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he took the ship into his yard *cum onere*, with the existing obligations then complete and due.

Salvage allowed in preference to the shipwright's lien;

The first of these obligations I hold to be the claim for salvage; for, beyond all doubt, from the earliest times, salvage has been deemed a lien on the ship. Without the exertions of the salvors, indeed, the ship itself might never have entered into the shipwright's yard. I therefore shall hold the salvors to be intitled to priority of payment.

and mariners' wages earned before the shipwright's lien accrued;

The next claim for which there was an undoubted lien on the ship when taken into the yard was the mariners' wages; that is to say, the wages up to that time, with the ordinary allowance for the mariners' return to their own country. But I am not prepared to say that, as against the claim of the shipwright, there

but not wages earned subsequently,

was a continuing lien for further wages whilst the ship was in the yard, and therefore the shipwright's claim will take precedence of all such wages.

nor claims for necessaries.

With regard to the claims for necessaries, I am of opinion that they cannot compete with the shipwright's lien. As I have said, no claim not perfected at the time the ship entered the yard can stand against the shipwright; claims for necessaries moreover do not possess, ab origine, a lien; but carry only a statutory remedy against the res, which is essentially different.

I think it right to add, that the chief difficulty I have experienced is in satisfying my own mind that any claim at all could compete with the common law lien, which is, that the shipwright may hold till paid, or until possession is forcibly demanded by this Court. It was under this impression that, in the case of the *Perseverante*, I held the common law right of lien to prevail against all claims, but that case was not fully argued. It was a decision in Chambers; and, moreover, the claims then made were, for the greater part, utterly inadmissible.

Lawrie, proctor for the salvors.

Clarkson for the shipwright.

Brooks for the seamen and other plaintiffs.

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THE ANNIE CHILDS.

Mariners' Wages—Tender and Payment into Court—Practice as to Payment out of Court.

In the Court of Admiralty, where money has been paid into Court, the practice is not to pay it out to the party intitled until the conclusion of the cause.

Where therefore in a cause of foreign mariners' wages, money was paid into Court before answer filed, in full satisfaction of the plaintiffs' demand, and the plaintiffs continued to claim a larger sum as due, motion to have the money paid out of Court to the plaintiffs was refused.

THIS was a cause of mariners' wages, brought by certain seamen belonging to the American vessel Annie Childs. After the petition was filed, and before answer, the defendant, the owner of the vessel, paid into Court the sum of 118*l.* 16*s.* as due to Daniel MacWilliams, one of the plaintiffs, and the sum of 56*l.* 16*s.* as due to William Henry Codd, another of the plaintiffs. These sums were less than the sums respectively claimed for them in the petition.

Lushington now moved that the money so paid into Court should be paid out to the plaintiffs.—The defendant himself admits that this money is due to the plaintiffs for services actually rendered. At present the plaintiffs have received nothing, and are left destitute in a foreign port. In the Courts of Common Law, money paid into Court is payable to the plaintiff or his attorney on demand (15 & 16 Vict. c. 76, s. 72).—[Dr. Lushington. The practice of this Court is, that the money is not paid out until the conclusion of the suit.]—That may be generally the case in fact, but there is no rule to that effect; the only rule is, that money is not to be paid out of Court without an order of the Judge. (Rule 128.) The Court has entire control over the money in Court, and justice here seems to require that it should be paid out to the party admitted to be intitled.

Clarkson, contra, was not called on.

Dr. Lushington.—I cannot alter the ancient practice of the Court; and I must therefore refuse this motion. Motion refused.

Nethersole and *Owen*, solicitors for the plaintiffs.

Rothery for the defendant.

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THE ROUEN.

Taxation of Costs—Counsel's Fee.

In a cause of collision, upon disallowance by the Registrar of a fee to plaintiff's counsel for advising whether the answer was opposable, the Court reviewed the taxation, and directed the allowance of the fee and the costs incident.

THIS was a motion for direction to the Registrar to review his taxation of the plaintiffs' costs. The plaintiffs, who were the owners of the Magyar, had brought an action of collision against the Rouen, and obtained a decree for damages and costs, which was affirmed upon appeal, with costs.

Upon taxation the following items were disallowed by the Deputy Registrar:—

	£	s.	d.
Copy plea for Dr. S.	0	6	0
Attending him therewith, and feeing him to advise if same ought to be opposed .	0	3	4
Paid his fee, and clerk	1	3	6

The plea in question was an answer of the ordinary kind in causes of collision.

The Admiralty Advocate (*Dr. Phillimore*), in support of the motion.—The fee and costs ought to have been allowed. In determining whether a pleading should be opposed questions often arise of such difficulty as to be beyond the proper province of a proctor or solicitor, and of such importance that often the admission or rejection of a pleading is decisive of the cause. For the general interest of suitors therefore, and to save expense in the end, the fee for counsel's preliminary advice on adverse pleadings should in all cases be allowed. Such has been the immemorial practice of all Courts observing the rules of the civil law. Formerly it was the practice in the Ecclesiastical and Admiralty Courts to allow the fees of two counsel to every plea; and the 131st Canon, enjoins that "no judge in any of the said Courts of the Archbishop shall admit any libel or any other matter without the advice of an advocate admitted to practise in the same Court, or without his subscription; neither shall any proctor conclude any cause depending, without the knowledge of the advocate retained and feed in the

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cause; which if any proctor shall do, or procure to be done, or shall by any colour whatsoever defraud the advocate of his duty or fee, or shall be negligent in repairing to the advocate, and requiring his advice what course is to be taken in the cause, he shall be suspended from all practice for the space of six months, without hope of being thereunto restored before the said term be fully complete." By the Admiralty Court Rules, 1859, now in force, every plea is to be settled by counsel (rule 72), and every pleading stands admitted if not objected to within four days from the filing (rule 77). There is no rule from which it can be implied that the ancient practice of allowing counsel's fee for advising on adverse pleadings is no longer in force (*a*).

Deane, Q.C., contra.—The 131st canon is irrelevant; it relates to the conclusion of a suit. The new rules for pleadings were expressly framed with a view to simplicity and to avoid expense; and to allow this fee would be directly contrary to the purpose of these rules. Here the plea in question was an answer of the most simple and elementary kind.—[DR. LUSHINGTON. Do you contend that the fee ought never to be allowed, or that it is a matter for the discretion of the Registrar to allow the fee or not, as he thinks fit?]—I contend that it ought never to be allowed.—[DR. LUSHINGTON. I will put you the case, which happens to be now before the Court, of a plea alleging certain facts, and then an inference from them that the judgment of a Court was obtained by fraud. Supposing that plea had been admitted at once by the proctor without consulting counsel?]—I should say that the proctor would thereby show an unfortunate ignorance of his profession; but the fee for counsel's advice, I submit, is not to be allowed, but ought to be treated like other consultation fees.

The Admiralty Advocate, in reply, stated that a similar fee was allowed in the Courts of Chancery.

DR. LUSHINGTON.—The inclination of my mind is, that the fee ought to be allowed; but as the Registrar and Assistant Registrar have intimated to me that they are of a different opinion, I shall take time to consider my judgment.

On the 3rd of June, DR. LUSHINGTON gave judgment. Judgment.

In this case an objection has been raised to a disallowance by

(*a*) Rule 3. "The practice of the Court in operation before the 1st day of January, 1860, shall continue in force, save in so far as it may be inconsistent with these rules, orders and regulations."

1862. *June 3.* the Assistant Registrar of a fee to counsel for advising as to the admissibility of a plea, and of certain costs attending such fee.

I have considered this question with some care, and it is not without its difficulties. According to the ancient practice, which prevailed when I entered the profession, every plea in a suit, whether in the Admiralty Court or elsewhere, was always laid before counsel, to advise whether it was opposable or not; and certainly according to the ancient practice, such a fee was most proper to be allowed, for it was most important, considering the detailed manner in which those pleas were drawn, that counsel should advise whether they were sufficient in point of law, and whether everything as a matter of fact was correctly laid. It is true that now the mode of pleading has undergone very considerable alteration; but it is questionable whether the change has gone to so great an extent as would require the Court, in justice to the parties, and for the sake of saving expense, to put an end to those fees, and to that security which the proctor had, when every adverse plea was laid before counsel and his advice taken. With regard to the past, I am of opinion that, looking to the practice of the Court as it existed in former times, the proctor was justified in what he did: I shall therefore alter the taxation, and allow him the costs of laying the plea before counsel, the fee to the counsel, and the other incidental expenses; but as to what is to be done in future, I confess I have not yet come to any satisfactory determination. It may be perfectly true that in the great majority of cases a judgment may be easily formed as to whether a petition, answer or reply is opposable or not; but it is also equally true that in other cases it is of the last importance that an adequate judgment should be formed as to whether the plea should be in first instance admitted or opposed. I have difficulty in drawing a line so as to allow the fee where it is expedient, and disallow it where it is unnecessary. I have not been able to arrive at any clear conclusion on this matter at the present moment, and therefore I must content myself with saying that with regard to the proctor's present application, it is granted, and he is intitled to the fee and the expenses.

Fee and costs allowed.

Toller and Son, proctors for the plaintiffs.

Stokes for the defendants.

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THE LADY EGIDIA.

Salvage arising out of Towage.

A ship was being towed by a steam-tug to be docked at high water, when, to make sure of docking that tide, another tug was engaged for the sum of *5l.* to assist in towing her to the pier head. After the second tug made fast, the ship grounded, but was towed off by the tugs in a few minutes, and was then docked. In a claim for salvage brought on behalf of the second tug, the Court *held*, that the ship was not in immediate danger, and that the tug had not "incurred any risk or performed any duty which was not within the scope of her original engagement," and accordingly pronounced against the claim with costs.

The *Minnehaha*, ante, p. 335, applied.

SALVAGE. This was a cause of salvage instituted on behalf of the owners and crew of the steam-tug Speedwell against the ship Lady Egidia, freight and cargo, for services rendered in the Mersey on the 10th of October, 1861, under the following circumstances:—

The Lady Egidia was being towed by a tug called the Lion, to be docked at high water in the Albert Dock. To secure docking in time it became desirable to employ another tug, and a signal having been made accordingly, the Speedwell was engaged to assist the Lion in towing the Lady Egidia to the pier for the sum of *5l.* The Speedwell came to the ship and made fast on the starboard side. Almost immediately afterwards, but (as proved) without any default of the Speedwell, the ship took the Pluckington Bank. The tugs turned back full speed, and in a few minutes the ship came off the bank without sustaining any injury, and was immediately docked at or shortly before high water. The 10th article of the petition alleged, "The Pluckington Bank is a very dangerous bank, and if the Lady Egidia had continued fast thereon for a few minutes longer she must have been left on the bank, and at low water she would have been high and dry; and as the tides were falling and would not again attain the same height until the 16th of October, the chance of getting her off would have been very much reduced, and her danger greatly increased thereby." The answer alleged, that after the ship grounded the tide rose a foot, and that the ship would have come off without the assistance of the Speedwell; and further pleaded, that "all the services rendered

1862. *July 7.* by the Speedwell to the Lady Egidia were within the Speedwell's said contract to tow the Lady Egidia."

The cause was heard on vivâ voce evidence, and the Court was assisted by Captain Bax and Captain Bayly.

Milward and *Lushington*, for the plaintiffs.

Brett, Q.C., and *Clarkson*, for the defendants.

Judgment. DR. LUSHINGTON having summed up to the Trinity Masters, and received their advice, gave judgment:—

Looking to all the circumstances of this case, we are of opinion that the Lady Egidia was not in any immediate danger; and that the service performed by the Speedwell was within the scope of the agreement, which was an ordinary agreement to tow from place to place. To use the language of the Privy Council in the case of the *Minnehaha* (*a*), the Speedwell did not "incur any risk, or perform any duty, which was not within the scope of her original engagement," and she is therefore not intitled to salvage reward. I pronounce against the claim, with costs.

Pritchard and *Son*, proctors for the plaintiffs.

French for the defendants.

(*a*) Ante, p. 347.

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In the Privy Council.

Present—Lord KINGSDOWN.
Lord CHELMSFORD.
Sir JOHN TAYLOR COLERIDGE.

THE EDWARD HAWKINS.

Salvage—Ineffectual Efforts.

A steam-ship, employed under an agreement to tow to a specified place another vessel which was partially disabled, towed for eleven hours, and was then obliged by a gale of wind to quit the vessel in a position of imminent peril. The vessel was subsequently saved by her own resources, and it was not proved that the towing had contributed to her safety:—*Held*, that no salvage was earned.

THIS was an appeal from a decree of the High Court of Admiralty in a cause of salvage, instituted by the General Steam Navigation Company, the owners, and by the master and crew of the steamship City of Hamburg, against the steamship Edward Hawkins.

The circumstances of the alleged salvage service were as follows:—

On the 17th of May, 1860, the Edward Hawkins, a steamer of 798 tons, left Cronstadt for London, with a cargo of tallow and general merchandize. In the course of the voyage all three blades of her propeller broke and were lost; the last blade being lost on the 26th of May. The vessel then proceeded under canvass, using also the broken blades to assist. On the evening of the 27th of May, she was overtaken by the City of Hamburg, a steamer of 332 tons, bound with passengers and a general cargo for London. Some negotiation then took place between the two captains, and in result the City of Hamburg took the Edward Hawkins in tow. The salvors afterwards alleged that the agreement was to tow to the Mouse, the remuneration to be settled on shore; the evidence on the other side was, that the agreement was to tow to Gravesend for the sum of 300*l.*

The Edward Hawkins at the time of being taken in tow was, according to the salvors' statement, about twenty-five miles to the north-west of the Haaks Sand, on the coast of Holland.

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The weather, which had been very stormy, was then moderate; the wind from the W.N.W. The City of Hamburg towed in a W.S.W. course, but in the course of the night the wind increased to a violent gale from the north-west, and at 9 a.m. of the 28th, the hawser broke, and the two vessels parted company. The Edward Hawkins was carried by the gale to the Dutch coast, and on the morning of the 29th was forced to anchor in the height of the tempest off a lee shore. Her anchors held however, and she was assisted into Nieu Diep the next day, and in two days afterwards she was towed to London by two steamers, which had been despatched from London for that purpose.

The case of the salvors was, that the City of Hamburg had towed the Edward Hawkins forty-eight miles to windward, and had thereby saved her from total loss on the Haaks Sand; and in so doing had become herself exposed to the gale, and had suffered damage; and had been delayed on her passage from Hamburg, which, instead of taking 48 or 50 hours, as usual, took 103 hours.

The action of the salvors was instituted in the sum of 4,000*l.*

The learned Judge of the Admiralty Court, in the course of his summing up to the Trinity Masters, said, "The general principle on which salvage is given is, that a salvage service has been performed, and performed effectually. The service must be successful."

With the advice of the Trinity Masters, the learned Judge then held, that at the time of being taken in tow the Edward Hawkins was not in danger; and that the Edward Hawkins was not rescued from danger, or brought into a state of safety, by the City of Hamburg: that therefore no salvage service had been performed. The decree of the Court was, that the salvors' claim be dismissed, with costs.

From this decree the present appeal was made.

Deane, Q.C., and *Hannen*, for the appellants.—The Edward Hawkins had suffered material damage, and was in danger when taken in tow; the appellants are therefore intitled to salvage, and not mere towage reward, *Kingaloch* (*a*); *Reward* (*b*). The salvors were employed by agreement; they rendered valuable service, and the ship was finally saved; their claim is therefore

(*a*) 1 Spinks, 264. (*b*) 1 W. R. 177.

good, notwithstanding they left the ship in danger, *Albion* (*a*); *Undaunted* (*b*); *E. U.* (*c*). 1862. *July* 10.

Karslake, Q.C., and *Clarkson*, for the respondents, were not called on.

Judgment.

Lord Kingsdown.—Their Lordships will not trouble you, Mr. Karslake. The circumstances under which services originally in the nature of towage may be converted into salvage were recently considered by their Lordships, together with the authorities, in the case of the *Minnehaha* (*d*), and to the opinion there expressed they now adhere.

Their Lordships have considered the evidence in this case, and are able to come to a very clear conclusion. It appears that the vessel of the appellants, the City of Hamburg, which was a regular trader between Hamburg and London, fell in with the steamship Edward Hawkins, with her screw crippled, but advancing slowly under sail in her ordinary course. After some chattering between the respective masters, an agreement was made for the City of Hamburg to tow the Edward Hawkins to Gravesend or the Mouse,—whether for a specific sum or a quantum meruit is not clearly established; but it was simply an agreement to tow from one place to another. The ship was then taken in tow, and towed for about eleven hours: at the end of this time the hawser parts in a gale of wind, and the City of Hamburg then leaves the Edward Hawkins in a position of extreme peril. The Edward Hawkins was left to struggle with the gale, and was carried close upon the Dutch coast, and was in great danger of driving upon the shore, but was saved by her own anchors, which held her.

Their Lordships are of opinion that the appellants are utterly destitute of any right to salvage. They have no right to towage, because they did not fulfil their contract; and they have no right to salvage, because they did not save or attempt to save the vessel. Their Lordships will have no hesitation in recommending Her Majesty to affirm the decree of the Court below, with costs.

Appeal dismissed with costs.

Toller and *Son*, proctors for the appellants.

Clarkson and *Son* for the respondents.

(*a*) Ante, p. 282.
(*b*) Ante, p. 90.
(*c*) 1 Spinks, 65.
(*d*) Ante, p. 347.

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In the Privy Council.

Present—Lord CHELMSFORD.
Lord KINGSDOWN.
Sir JOHN TAYLOR COLERIDGE.

THE ATLAS.

Salvage—Right of Salvors who contribute to effect a Salvage Service which is subsequently completed by others—Misconduct or Mistake of Salvors—Responsibility of Salvors for Act of Agent.

Where a salvage is finally effected, those who meritoriously contribute to that result are intitled to a share in the reward, although the part they took, standing by itself, would not in fact have produced it.

The *Jonge Bastiaan*, 5 C. R. 323, confirmed.

Wilful or criminal misconduct on the part of salvors, if clearly proved, may work entire forfeiture of salvage reward. Mere mistake or misconduct other than criminal, occasioning loss or expense to the owners of the property salved, will not work a forfeiture, but only a diminution of reward.

The amount of salvors' reward may be affected by the mistake or misconduct of an agent, such as the master of a steam-tug employed by them to assist, if thereby loss or expense has been occasioned to the owners of the property salved: but, *semble*, only on the ground that the fund of payment has suffered diminution.

Two smacks found a schooner derelict at sea and towed her towards Yarmouth. At some distance from the harbour the smacksmen engaged a steam-tug. By mistake or misconduct on the part of the master of the tug, the schooner in entering the harbour got aground: the smacksmen went in search of assistance; in their temporary absence other salvors took possession of the schooner and got her off. Suits were brought in the Admiralty Court on behalf of both sets of salvors: the judge of the Admiralty Court allowed salvage to the second salvors only:—*Held*, that the first set of salvors were also intitled to salvage reward.

SALVAGE. On the 4th of March, 1861, the smacks Prosperous and Alert fell in with the Atlas, a schooner belonging to the port of Stockton, in the North Sea, about seventy miles from the English coast. The Atlas proved to be derelict, having been recently abandoned by her crew, with three feet water in the hold. The smacksmen having boarded at some peril, took the schooner in tow, and continued towing until 2 p.m. of the 6th of March, when they arrived off Winterton. A steam-tug called the Emperor there came up, and was engaged by the smacksmen to tow the schooner and the smacks up the Cockle into Yarmouth Roads, and thence into Yarmouth Harbour in safety. The steam-tug took the Alert and the Atlas in tow (but not the Prosperous, which proceeded under sail), and towed

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them into Yarmouth Roads, and thence toward the harbour. It was then between 6 and 7 p.m., with the tide ebbing; and according to the evidence of the defendants, the owners of the Atlas, it was under the circumstances an imprudent measure to take the vessel into the harbour, the usual signal for vessels to enter the harbour not being displayed: also the anchors and cables of the Atlas were ready for service, and the vessel, it was alleged, ought to have been anchored in the Roads for the night. In approaching the harbour the smacksmen on board the Alert several times hailed the master of the tug to let the tow-rope be shortened, but the master of the tug, as the smacksmen themselves alleged, made no answer and kept on towing. As the steam-tug and Alert entered the South Pier end, the ebb tide caught the Atlas and forced her and the Alert on the beach, and the tow-rope from the tug then gave way. The smacksmen who were on board the Atlas got into a boat to proceed to the shore, but were driven out to sea by a violent squall; they were picked up by a fishing smack and brought into Lowestoft the next day. The rest of the crew of the Alert, who were on board their own vessel, about two hours after the accident manned their boat, and rowed into the harbour to see the agent of their owner and obtain assistance. Whilst they were on shore so occupied, a large party of Gorleston boatmen, the second set of plaintiffs, launched two of their yawls and proceeded to the Atlas and took possession of her. According to their evidence they experienced considerable danger in so doing from the high sea running: and by laying out anchors, and heaving on them, they were enabled to get the Atlas off the next morning at high tide. The evidence for the defendants and also the first set of salvors was that the Gorleston men were intruders, who had no right under the circumstances to take possession; that the alleged difficulty and danger were fictitious, and that the vessel necessarily came off at the turn of the tide.

The defendants, the owners of the Atlas, to the first action had pleaded—1. That the plaintiffs did not bring the Atlas into safety. 2. That the negligence of those on board the Emperor having occasioned the Atlas and the Alert to go on shore, thereby occasioned all subsequent expenses in respect of the same. 3. That another salvage suit had been brought against the Atlas by the parties who got the Atlas off the ground into Yarmouth Harbour, and was still pending.

On the 26th of November, 1861, both actions in the Court of Admiralty came on to be heard together; the defendants chiefly resisted the seco d action.

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Deane, Q.C., for the first salvors, the owners, masters and crew of the Prosperous and Alert.

Twiss, Q.C., and *Clarkson*, for the Gorleston boatmen.

The *Admiralty Advocate* and *Lushington* for the defendants.

Judgment.

Dr. Lushington.—In this case there is a ship and cargo of small value, 637*l.* or thereabouts, and two actions have been brought by different parties, each claiming salvage. I much regret that there should have been two actions against a property of such small value, but the two cases are, as I think, so contradictory that it was almost impossible to bring them together; and also I consider that the case of the second salvors was hardly fit to be tried before the magistrates, because the magistrates could not determine what was due to them for their services, without fully considering the services of the first salvors.

With regard to the case of the Prosperous and the Alert, it is unfortunate, and I am afraid the parties will find in the judgment that I am about to pronounce that it will be more so than they contemplated. It appears that the smacks found the schooner derelict, and contrived to bring her to the port of Yarmouth. These facts are agreed on all hands, and there was, no doubt, considerable merit in what they did; but an unfortunate circumstance took place after they had performed the greatest part of their task. It appears that in Hasborough Gat a steam-tug called the Emperor came up with the schooner and offered her services, and the smacksmen made an agreement with her master to tow the schooner and their two smacks from the spot where they then lay up the Cockle into Yarmouth Roads, and thence into Yarmouth Harbour in safety, for the sum of 7*l.* What is the effect of this? This is an engagement made by the salvors, whereby they take the steam-tug, the Emperor and her crew, to their assistance, not as co-salvors, but as their own agents. The salvors' petition pleads—"That the schooner and the smack Alert were thereupon taken in tow, the Alert next the steam-tug, and the schooner astern of the Alert, as before, with the Alert's hawser. That by some misconduct on the part of those on board the tug, the schooner took the ground in going within the piers of Yarmouth Harbour, whereupon the tow-rope between the smack and tug broke, and the smack and schooner, being still kept together by the trawl hawser, drove upon the beach in the bight of the north pier." It then proceeds to state what was done by the Alert, which it is not

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necessary to follow up in detail. I am of opinion that the salvors are unfortunately—I repeat that word—entirely responsible for the misconduct of the Emperor. They would have been intitled to any benefit that might have arisen from her services over and above the 7*l.* paid for taking the schooner with greater expedition into the port of Yarmouth, and they must bear the consequences of taking a step, which, though in itself proper, did in fact result in bringing the ship into a state of danger. It is pleaded on behalf of the owners, and not denied, that "the plaintiffs did not bring the Atlas into safety, and that the negligence of those on board the Emperor having occasioned the Atlas and the Alert to go on shore, thereby occasioned all subsequent expenses in respect of the same;" and indeed the ship was left on the North Sand in a state of very considerable peril. Now if the ship was left in this state of peril by what I must consider to have been the fault of the salvors, then, however meritorious their exertions, they are not intitled to a reward for salvage services; for it must be remembered, that, however great the efforts of salvors may be to save a ship, yet if they are not successful, it is not salvage. I must carry out this principle, and I cannot hold that I am intitled to give these persons salvage. Their exertions have been rendered fruitless by the acts of their own agent. I do not condemn them in costs, for I think that would be too severe a measure, but I cannot give them salvage.

With regard to the second set of salvors, I think they are intitled to salvage. Not that the ship was derelict, for she ceased to be derelict when in tow of the Emperor and Alert; and, no doubt, when she was left by the first salvors on the North Sand, there was the *animus recuperandi*. At the same time, I cannot but think that the ship was in a position of very considerable peril at that time, and that the exertions of these Gorleston men contributed to her coming off in the morning. I am of opinion that they are intitled to salvage. It has been contended that there is an arrangement in the port of Yarmouth that no person shall go to assist a ship which is on shore till somebody sends him. I must say that is a matter that I am not inclined to give credence to. I decree the second salvors the sum of 120*l.* and their costs.

From this judgment the plaintiffs in the first action, namely, the owners, masters and crews of the Prosperous and Alert, appealed.

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Deane, Q.C., and *Hannen*, for the appellants.—The judgment of the Court below admits that the appellants rendered meritorious services to a derelict vessel, and brought her into a position of comparative safety; that the appellants properly employed the steam-tug; that it was not by their own personal negligence that the vessel afterwards grounded; that the appellants never abandoned the vessel sine animo recuperandi; and that the vessel was finally salved:—but admitting these facts, it deprives the appellants of all salvage reward, on account of the negligence of the tug-master, whereby the property suffered damage. We submit that this decision cannot be supported.

1. The master of the steam-tug was not the agent of the appellants to commit negligence: he was employed by them to assist in the safety of the vessel. At any rate he did not so far represent the appellants that they should suffer the extreme penalty of entire forfeiture of salvage reward, for a piece of negligence which was his only. The hardship of such a result is apparent; and not less the impolicy, for it would induce salvors to refuse the timely assistance of steam-tugs or co-salvors. The decision is thus opposed to those broad considerations of equity and public policy, on which the whole law of salvage is founded.

2. Assuming the appellants to be responsible for the act of the tug-master as their agent, the utmost that can be said is, that he was guilty of negligence, whereby the property suffered partial loss; for certainly wilful misconduct is not "conclusively proved;" *Charles Adolphe* (*a*). For such mere negligence, as lately argued in the *Minnehaha* (*b*), the penalty should be only a diminution of the salvage reward otherwise due, not an entire forfeiture. Hitherto total forfeiture of salvage has been confined to cases of wilful misconduct, as embezzlement, *Blaireau* (*c*); or wilfully running the ship on shore, *Duke of Manchester* (*d*); or where, as in the *Martha* (*e*), the salvors made a riot on board the ship, and resisted the employment of a steam-tug. Where the fault of the salvors has been want of due judgment only, or misfeasance not of a wilful or grave kind, the penalty has not been more than a deduction from the reward; as in the *Dosseitei* (*f*), where the salvors neglected to avail themselves of the means at hand to get the ship into safe harbour, and thereby kept her in a position of danger longer than was necessary; and the *Perla* (*g*), where the salvors improperly endeavoured to take the ship into Bridlington Harbour, and thereby got her aground. In that case, which was very similar to the

(*a*) Swabey, 156.
(*b*) Ante, p. 343.
(*c*) 2 Cranch, 264.
(*d*) 6 Moore, P. C. 100.
(*e*) Swabey, 491.
(*f*) 10 Jur. 865.
(*g*) Swabey, 230.

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present, except that the negligence was the salvors' own, and not an agent's, Dr. Lushington said, "In a case of this description, it is not the practice to impose on the salvor the whole burden of the loss, but only a part of it, in proportion to the degree of blame which attaches to him" (*a*); and similar language was used by the same learned Judge in the *Cape Packet* (*b*). Applying this principle, the appellants are intitled, if not to a full, at least to very nearly a full reward.

3. It may be argued on the other side that the appellants are not intitled to salvage, because they did not complete their service, but left the ship in danger. But this is an incorrect view of the law of salvage. Thus, in the *Samuel* (*c*), where the ship, whilst in the hands of salvors, was moved by the owner's agent, and got aground, whereby the salvors were obliged to temporarily abandon her, and the property was finally salved by other parties, Dr. Lushington, giving judgment, said, "I am of opinion that the first set of salvors are intitled to salvage;—not for having salved this ship and cargo, for that they did not do,—but for having contributed towards the salvage of what was salved. I take it to be clear beyond dispute, that salvors may be intitled to reward *pro tanto*, for performing part of a salvage service, though others may complete it; as in the case of persons rendering assistance to a ship on a sandbank, which is subsequently towed off by a steamer." So in the *Henry Ewbank* (*d*), Mr. Justice Story says, "It is to me a new doctrine that if salvors themselves fall into a state of distress, they can obtain effectual relief only by a surrender of all their own title to salvage." Here the appellants did not abandon the vessel: they were constructively in possession during the whole period of the services of the second salvors. Looking to all the circumstances of the case, and the substantial services rendered by the appellants, we submit that they are intitled to a substantial salvage reward.

The *Admiralty Advocate* and *Lushington* for the respondents.—The first proposition for which the respondents contend is, that the appellants did not salve this vessel, but only made a long attempt to do so, and therefore are not intitled to claim as salvors. It may be that when they left the vessel, they had an intention of returning; but when their actual services ceased, the ship was on shore in a position of great peril. A salvage service is a saving service, and nothing but a saving service: if

(*a*) Swabey, p. 231.
(*b*) 3 W. R. 125.
(*c*) 15 Jur. 409.
(*d*) 1 Sumner's Reports, p. 415.

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not completed, it is not rendered; and like other undertakings of maritime adventure, if only partially performed, it confers no title to partial reward. The contract of freight is an undertaking of this kind, so the contract of bottomry, and until recent legislation, the contract of the mariner to serve a voyage for wages. Experience seems to recommend conditions of this rigorous kind where success is hazardous and uncertain. The nature of salvage especially requires such a condition, for a salvage claim is a claim for extraordinary reward; and the chance of extraordinary reward must be balanced by many risks of failure. Thus the present claim ought not to be judged by the exertions of the appellants, which are only the apparent, not the real merits of the case. Other successful cases of salvage have paid or will pay for this unsuccessful case. The simple rule "No salvage reward without a perfected salvage service," is thus a good and fair rule; and is one which can be supported by many authorities; *Zephyrus* (*a*); *India* (*b*); *Duke of Manchester* (*c*). The latest opinion of the Court of Admiralty is in this case and the *Edward Hawkins* (*d*); and in both cases this rule was acted upon. So the Court has always opposed a claim of constructive salvage, looking only to the actual salvor; *Thetis* (*e*).

In the second place, we contend that upon the appellants' own evidence, the tug-master was guilty of gross negligence, such as, if committed by the salvors themselves, would enure to a forfeiture of all reward. It must be admitted that precedent upon this point is a little uncertain, but we rely upon the two cases decided in this Court, *Duke of Manchester* (*f*), and the *Minnehaha* (*g*), where Lord Kingsdown said, "If the danger from which the ship has been rescued is attributable to the fault of the tug; if the tug, whether by wilful misconduct, or by negligence, or by the want of that reasonable skill or equipments which are implied in the towage contract, has occasioned or materially contributed to the danger, we can have no hesitation in stating our opinion that she can have no claim to salvage." The wrong of the tug-master was in law the wrong of the appellants, his employers, as put by the Court below; for the appellants, taking the benefit of the employment, must also bear the burden, as other employers do. The negligence of the tug-master has occasioned very great loss to the respondents; they have in consequence already had to sustain the costs of two salvage

(*a*) 1 W. R. 330.
(*b*) 1 W. R. 407.
(*c*) 6 Moore, P. C. 101.
(*d*) Ante, p. 515.
(*e*) 3 Hag. 48.
(*f*) 6 Moore, P. C. 98.
(*g*) Ante, p. 348.

suits, and pay 120*l.* to the second salvors. If now they are sentenced to pay any substantial salvage to the appellants, whose claim they did not harshly oppose in the Court below, the entire value of the property salved will be swallowed up. 1862. *July* 16.

Hannen replied.

Cur. adv. vult.

On the 16th of July, Sir John Coleridge delivered the judgment of their Lordships. *July* 16.

This was an appeal from the judgment of the High Court of Admiralty in a cause of salvage, which the owners, masters and crews of the smacks Prosperous and Alert had instituted against the owners of the schooner Atlas and of her cargo, the claim for compensation having been rejected by the learned Judge of that Court. The allegations of the petition were admitted by the defendants with a single exception, which will be stated hereafter; and the facts appear to be these:—The Prosperous and Alert are two fishing-smacks, and on the 4th of March last were employed in fishing in the North Sea about seventy miles from the English coast, when at a distance of some miles a vessel was discovered, which turned out to be the Atlas, apparently under no command. They proceeded towards her, and found her lying hove-to under her topsail only, rolling in the trough of the sea, which was running heavily and breaking over her fore and aft. The two masters and three men from each smack, with difficulty and at considerable risk, succeeded in boarding her. They found her derelict, her compasses, charts, and some other articles washing about her decks, and about three feet of water or more in her hold. She was laden with iron. With great exertion the pumps were set in motion, the fore-staysail set, and her head veered round. Hawsers were got ready in the smacks, and about 1 p.m. they began to tow her; this continued through that night, during which it was found necessary to keep the pumps constantly going, as she continued to make a considerable quantity of water. On the following day a breeze sprang up, and the wind blew heavily; the sea made a complete breach over her, and it was difficult to stand at the pumps. The gale continued for some hours, but at 2 a.m. of the 6th they made the Newarp light-ship; and about noon of that day reached up with the land a little below Winterton. Judgment. Facts of the case.

When the Atlas had been brought thus far, the steam-tug Emperor, of Yarmouth, came up and offered her services, which

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were accepted, and an agreement was made that she should tow the schooner and the two smacks up the Cockle into Yarmouth Roads, and thence into and up Yarmouth harbour, in safety, for the sum of 7*l*. Accordingly the schooner and the Alert were attached to her; the Prosperous, however, in breach of the agreement, the master of the tug refused to take, and she proceeded under canvas, and reached Yarmouth. The Emperor towed the Atlas and Alert in safety until between 6 and 7 p.m., when they were approaching the piers to enter Yarmouth harbour. The tide was at this time falling; the master of the Alert and the crew on board her doubted whether there were water sufficient to float the Atlas over the bar, and shouted to the master of the tug not to attempt to enter at that time; it does not appear whether he heard them, but, whether he did or not, he persevered in the attempt, and the schooner came to the ground; the tow-rope attached to the smack broke, and both she and the Atlas struck the ground, and drove upon the beach; on which the tug turned round and left them.

The sailors, six in number, who were on board the Atlas, took boat to consult with the master of the smack, who was on board of her, as to the measures to be adopted for getting the vessels off at the flood; a violent squall however drove them out to sea; the squall increased to a hurricane, and their lives were in great peril, but they were providentially picked up by a Ramsgate fishing-smack, and landed at Lowestoft on the following day.

Phillips, the master, when the weather had become calm, went ashore in his boat, and while he was trying to find out his owner's agent for the purpose of procuring assistance for completing the salvage, some strangers without authority boarded the Atlas, and brought her into the harbour at the flood early in the morning, the vessel of course requiring repairs, but the cargo being uninjured.

It has been stated that the defendants admit all the allegations of the petition but the thirteenth, which is as follows: "That the plaintiffs were the means of saving the vessel and cargo from total loss, and at the risk of their lives." They plead also, 1st, that the plaintiffs did not bring the Atlas into safety; 2ndly, that the negligence of those on board the tug having occasioned the Atlas and Alert to go ashore, occasioned all the subsequent expenses; and 3rdly, the pendency of another salvage suit by the ultimate salvors.

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On these pleadings, and under these circumstances, the learned Judge has rejected the claim of the plaintiffs in toto; in his judgment, which he appears to have arrived at with great regret, he makes no question of the great and meritorious exertions of the plaintiffs, and he expressly decides that those exertions were not abandoned when the vessel drove on the beach; but he says they must be entirely responsible for the misconduct of those on board the Emperor, and that owing to that misconduct those exertions were "in no degree successful;" and that, however great the efforts of salvors may be to save a ship, yet if they are not successful there is no salvage.

In a certain sense the general propositions here laid down are undoubtedly true; if the ship or cargo be not saved there can be no salvage, and if this result follow from the miscarriage or the misconduct of an agent employed by those who claim as salvors, however great or meritorious their exertions may have been, they are identified with their agent for this purpose, and their claim entirely fails. But their Lordships are compelled respectfully to differ from the learned Judge in his application of these principles to the facts of the present case. Here the ship and cargo have been saved, and it is not denied that this result is in a great measure attributable to the very meritorious exertions of the plaintiffs; in the course of these exertions, and when the safety of the ship was near its accomplishment, it may be taken, for the sake of argument, that, by their agent's misconduct or mismanagement, an untoward interruption was occasioned; and that the danger of the vessel and cargo to a certain extent temporarily revived; but they never abandoned their endeavours to save her; that which without their authority and against their will was done by others, might and would have been done by themselves, and if it had been, it cannot be conceived that their claim for compensation could have been resisted in its entirety on the ground of the misconduct which has now been held fatal to it.

Where a salvage is finally effected, those who meritoriously contribute to that result are intitled to a share in the reward, although the part they took, standing by itself, would not in fact have produced it.

The course which their Lordships will have to recommend to Her Majesty in this case will rest on two propositions. The first is this: that where a salvage is finally effected, those who meritoriously contribute to that result are intitled to a share in the reward, although the part they took, standing by itself, would not in fact have produced it. There is a case, not cited in the argument, which is a strong and clear illustration of this proposition, and an authority for it if any were needed—the *Jonge Bastiaan* (*a*). There the vessel was found by the salvors stuck

(*a*) 5 C. R. 323.

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fast on a rock, her bottom beaten in, and her rudder lost in a heavy sea; her case was so hopeless that the efforts which they made to save her were made in opposition to the master's opinion; however, they succeeded in warping her off and keeping her afloat long enough to enable him to take out some of her cargo, which was bullion; then she sunk, and the salvors left her for a time; but returned, and in their sight, she was weighed up by others who had intervened, and her whole cargo rescued. Sir William Scott determined that the claimants had not abandoned her, and must be taken to have abstained from interfering in the last stage because they saw the work was being well done by others, and their interference would have been useless. They had, he said, been the immediate instruments of saving her from the original danger, and of bringing her to the place where the other parties were enabled to complete the recovery. That learned Judge made them equal with those other parties in the salvage. This case, which, it may be observed, is mentioned with approbation by Mr. Justice Story in the case of the *Henry Ewbank* (*a*), would have been on all fours with the present but for the alleged misconduct of the agent, assumed to be that of the plaintiffs themselves, which difference for the present purpose is immaterial.

Wilful or criminal misconduct on the part of salvors, if clearly proved, may work entire forfeiture of salvage reward: mere mistake or misconduct other than criminal, occasioning loss or expense to the owners of the property salved, will not work a forfeiture, but only a diminution of reward.

This introduces the second proposition—that where success is finally obtained, no mere mistake or error of judgment in the manner of procuring it, no misconduct short of that which is wilful and may be considered criminal, and that proved beyond a reasonable doubt by the owners resisting the claim, will work an entire forfeiture of the salvage. Mistake or misconduct other than criminal, which diminishes the value of the property salved, or occasions expense to the owners, are properly considered in the amount of compensation to be awarded. Wilful or criminal misconduct may work an entire forfeiture of it; but that must be proved by those who impute it. The presumption, of course, is in favour of innocence, and this rule applies so strongly in favour of salvors that the learned Judge of the Admiralty, in the case of the *Charles Adolphe* (*b*), has laid it down that the evidence must be "conclusive" before they are found guilty; by which he must be understood to mean that it must be such as leaves no reasonable doubt in the mind of the Judge.

It is not disputed that this case falls within the first of these two propositions. The salvage has been effected, and the plaintiffs have meritoriously contributed to producing it. What then

(*a*) 1 Sumner's R. 421. (*b*) Swabey's R. 156.

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are the circumstances which are to bring it within the latter part of the second, so as to justify the entire denial of compensation? Assuming for the present that they are to be responsible for the acts of the master of the Emperor, what is the evidence of any wilful misconduct in him? There is no proof that he heard the voices of those who requested him to anchor for the night, or that he knew or believed there was too little water to float the Atlas over the bar, or that he might not, in the exercise of an honest judgment, have believed that there was. There can be no doubt that it would have been very beneficial to the owners if he could have placed the vessel in perfect safety that night, and he may have been misled by an honest desire to do so. It is not enough to say that there are circumstances which may favour an opposite presumption; the conclusion is still left in reasonable doubt; and on evidence of this character a verdict of guilty could not, according to the decision of the learned Judge in the case last mentioned, be properly pronounced.

Wilful misconduct not proved in this case.

It is therefore unnecessary to consider that which their Lordships have hitherto assumed, whether, namely, the learned Judge correctly held the salvors to be entirely responsible in this case for the misconduct of their agent, nor do their Lordships intend to pronounce any opinion upon that point. There can be no doubt that if by the imprudence or unskilfulness of the agent the value of the property be diminished, the principal, however innocent, or however meritorious as to his own acts, must suffer for it in the diminished amount of his compensation. But when the moral considerations and the considerations of policy, which enter largely into the law of salvage, are taken into account; when also it is remembered in how many instances the salvor cannot select his agent, but is bound to accept on the spur of the moment such offers of service as tend apparently to expedite or secure the completion of the salvage; and also in how many instances the agent's conduct is entirely beyond the control or direction of the principal,—it may perhaps be found that even the limited amount of responsibility just stated may almost exceed the extent warranted by sound policy or strict justice. Their Lordships, however, throw this out merely to guard against the supposition of their having considerately assented to the doctrine of the learned Judge in this case; and they entirely reserve any decision upon it until some case shall make it necessary to pronounce one.

Salvors are responsible for the mistake or misconduct of an agent employed to assist (as the master of a steam-tug), in so far that their reward may be paid out of a fund thereby diminished; but *quære*, if otherwise or further.

Their Lordships will therefore recommend to Her Majesty that the judgment be reversed, with the costs below and the costs of this appeal. They will also recommend that the sal-

Judgment reversed, with costs, and a

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liberal salvage awarded.

vage shall be allowed on the most liberal scale, agreeing as they do entirely with the learned Judge below that the services of the plaintiffs were most meritorious, and they regret that the share of each individual will necessarily be small. The fund appears to have been of the value of 620*l.*, from the half of this (310*l.*) he has already given to the beachmen, who completed the saving, 120*l.* and their costs. Their Lordships will recommend that 190*l.*, the residue of this moiety, be divided equally between the two smacks.

Lawrie, proctor for the appellants.

Lewis and *Watson*, solicitors to the respondents.

In the Privy Council.

Present—Lord CHELMSFORD.
Lord KINGSDOWN.
Sir JOHN TAYLOR COLERIDGE.

THE FLORENCE NIGHTINGALE.
THE MÆANDER.

Time for asserting an Appeal from High Court of Admiralty—24 *Hen. VIII.* c. 12; 25 *Hen. VIII.* c. 19.

The statutes 24 Hen. VIII. c. 12, and 25 Hen. VIII. c. 19, restraining appeals, do not extend to any causes in which an appeal did not at that time lie to the Pope.

The time therefore for appealing from a decree of the Admiralty Court is not regulated by those statutes; but it is by practice limited to fifteen days from the date of the decree. This limit may in special circumstances be extended, upon application to the Court of Appeal.

July 16. THIS was a motion for leave to enter and prosecute an appeal from a judgment of the High Court of Admiralty, under circumstances which appear in the following case for motion filed in the Court of Appeal.

"On the 22nd of February, 1862, a collision took place between the screw steam-ship Mæander and the Florence Nightingale. An action, intitled the 'Mæander,' was instituted in the High Court of Admiralty of England, by the owners of the Florence Nightingale against the Mæander; and the owners of the Mæander brought the present action, intitled the 'Florence Nightingale,' by way of a cross-action.

"In each action it was pleaded, among other defences, that the

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vessel sued was in charge of a pilot employed by compulsion of law.

"The action and cross-action were tried by consent upon the evidence produced in the case of the Mæander, and on the 20th of May, 1862, the learned Judge of the Admiralty Court held that the Mæander was alone to blame for the collision, but for the act of the pilot only, and thereupon dismissed the owners of the Mæander in the principal cause, but without making any order as to costs, and condemned them in the costs of the cross-action.

"From this decree neither party appealed '*apud acta*,' and the owners of the Mæander were for their part ready to abide by the said decree, as determining the action and cross-action.

"On the 13th of June the owners of the Mæander first received notice, by service of inhibition and citation, that the owners of the Florence Nightingale were going to appeal from the decree made in the case of the Mæander.

"The owners of the Mæander thereupon, on the 18th of June, adhered to the said appeal, on the ground that the collision was rightly to be attributed to the improper navigation of the Florence Nightingale; and it is now submitted that they may be allowed to appeal in the cross-action, notwithstanding the expiration of more than fifteen days from the date of the said decree, for the following (among other) reasons:—

"First. That the rule of practice allowing fifteen days and no more for giving notice of appeal from a decree of the Admiralty Court, depends, as decided in the *Ulster* (*a*), on custom, and such custom does not nor ought to apply to a cross-action in circumstances like the present case.

"Second. That it would, in the circumstances of this case, be inequitable that the action of the owners of the Florence Nightingale should be pursued, and the owners of the Mæander be excluded from pursuing their cross-action."

The case turned upon the following statutes:—

The 24 Henry VIII. c. 12, after enacting in the 2nd section, that "all causes testamentary, causes of matrimony and divorces, rights of tithes, oblations and obventions (the knowledge whereof, by the goodness of princes of this realm, and by the laws and customs of the same, appertaineth to the spiritual jurisdiction of this realm), shall be heard and definitively adjudged within the King's jurisdiction in such courts spiritual and temporal of the same as the natures of the cases shall require," enacts in the 7th section, that "if the matter or contention for any of the causes aforesaid be or shall be commenced by any of the King's

(*a*) Ante, p. 424.

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subjects or resiants, before the archdeacon of any archbishop or his commissary, then the party grieved shall or may take his appeal within fifteen days next after judgment or sentence there given to the Court of the Arches, or audience of the same archbishop or archbishops; and from the said Court of the Arches or audience, and within fifteen days then next ensuing after judgment or sentence there given, to the archbishop of the same province, there to be definitively and finally determined, without any other or further process or appeal thereon to be had or sued."

The Act of 25 Henry VIII. c. 19, intitled "The Submission of the Clergy and Restraint of Appeals," enacts, in the 3rd and 4th sections,—

3. And be it further enacted, by authority aforesaid, that from the feast of Easter, which shall be in the year of our Lord God 1534, no manner of appeals shall be had, provoked, or made out of this realm, or out of any of the King's dominions, to the bishop of Rome, nor to the see of Rome, in any causes or matters happening to be in contention, and having their commencement and beginning in any of the courts within this realm, or within any of the King's dominions, of what nature, condition or quality soever they be of; but that all manner of appeals, of what nature or condition soever they be, or what cause or matter soever they concern, shall be made and had by the parties grieved or having cause of appeal, after such manner form and condition as is limited for appeals to be had and prosecuted within this realm in causes of matrimony, tythes, oblations and obventions, by a statute thereof made and established sithen the beginning of this present parliament, and according to the form and effect of the said statute; any usage, custom, prescription, or any thing or things to the contrary hereof notwithstanding.

4. And for lack of justice at or in any of the courts of the archbishops of this realm, or in any the King's dominions, it shall be lawful to the parties grieved to appeal to the King's majesty in the King's Court of Chancery; (2.) and that upon every such appeal a commission shall be directed under the Great Seal to such persons as shall be named by the King's highness, his heirs or successors, like as in case of appeal from the Admiral's Court, to hear and definitively determine such appeals, and the causes concerning the same; (3.) which commissioners, so by the King's highness, his heirs or successors, to be named or appointed, shall have full power and authority to hear and definitively determine every such appeal, with the causes and all circumstances concerning the same; and that such judgment

and sentence, as the said commissioners shall make and decree in and upon any such appeal, shall be good and effectual, and also definitive; and no further appeals to be had or made from the said commissioners for the same. 1862. *July* 16.

Brett, Q.C., and *Lushington*, in support of the motion.—The application of the owners of the Mæander for leave to appeal is equitable and reasonable, and the power of the Court is not restricted by any statute. The conditions of appeal from the Admiralty Court were discussed in the *Ulster* (*a*), and it was there held that at any rate the limit of ten days appointed by the civil law does not obtain. The rule of practice limiting the time to fifteen days is, like other rules of procedure, open to equitable exceptions. The statutes of Henry VIII. (24 Henry VIII. c. 12, s. 7, 25 Henry VIII. c. 19, s. 3), which give a limit of fifteen days for appealing, apply to ecclesiastical causes only.

Serjeant *Shee* and *Potter*, contra.—The application is too late. The time for appealing is limited by the statutes of Henry VIII. to fifteen days. The statute of 25 Henry VIII. speaks of "all manner of appeals, of what nature or condition they be, or what cause or matter soever they concern." That it applies to appeals from the High Court of Admiralty appears from the practice of the Court, and from the case of the *Sally* (*b*), where Sir William Scott, then dealing with an appeal from the Vice-Admiralty Court of New Brunswick, said, "With respect to time, it particularly has never been the practice of this Court to construe the limitation of time for appeals with the same strictness as would be applied to appeals from courts of this country. It has been held that the statute of Henry VIII. does not apply to cases in the plantations, but that it is left to the discretion of the Court to entertain an appeal." The time of appealing from a Vice-Admiralty Court is now fixed at fifteen days by the Order in Council, issued under 2 Will. IV. c. 51, evidently following the statute (*c*).

Lushington, in reply.—The general terms used in 25 Henry VIII. c. 19, s. 3, are to be controlled by the tenor and purpose of the Act, as in other cases; *Hawkins* v. *Gathercole* (*d*).

July 16. On the 16th of July, Lord Chelmsford delivered the following judgment:—

Judgment. It is desirable to adhere with some strictness to the rules which have been established for limiting the time of appealing upon the various matters brought before this Board, but their Lordships are always ready to grant an indulgent relaxation of them where

(*a*) Ante, p. 425.
(*b*) 2 C. R. 229.
(*c*) See the *Aquila*, 6 Moore, P. C. 102.
(*d*) 6 De G., M. & G. 1.

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justice appears to them to demand it, and they are not restrained either by statutory authority or by peremptory practice. If the time of appealing in cases from the Court of Admiralty is fixed by the statutes of the 24th Hen. VIII. c. 12, and the 25th Hen. VIII. c. 19, of course their Lordships have no discretion in the matter. But upon referring to those statutes, they appear to be confined to causes cognizable in the Ecclesiastical Courts, or at all events not to extend to any causes in which an appeal did not at the time lie to the Pope. The 24th Hen. VIII. relates to causes testamentary, causes of matrimony and divorces, rights of tithes, oblations, and obventions, and limits the final appeal in these cases to fifteen days. The 3rd section of the 25th Hen. VIII. c. 19, prohibits appeals to Rome in any causes or matters in any of the Courts within this realm, or within any of the King's dominions, of whatever nature condition or quality soever they be, and enacts that all manner of appeals, of what nature or condition they be, or what cause or matter soever they concern, shall be made and had by the parties aggrieved, or having cause of appeal, after such manner, form and condition as is limited for appeals to be had and prosecuted within this realm, in causes of matrimony, tithes, oblations and obventions, by the preceding statute. It seems clear that, although the words of this section are very general, they must be confined by the context to appeals which, in the words of the statute, "have been provoked or made out of the realm to the Bishop of Rome."

The statutes 24 Hen. 8, c. 12, and 25 Hen. 8, c. 19, restraining appeals, do not extend to any causes in which an appeal did not at the time lie to the Pope.

It is the more necessary that this matter should be understood, because a general impression seems to have prevailed that appeals from the Admiralty Courts are governed by these statutes of Hen. VIII. This appears to have been the opinion of Lord Stowell, for in the case of the *Sally* (*a*), that eminent Judge says:—"With respect to time, it has never been the practice of this Court to construe the limitation of time for appeals" (from the Vice-Admiralty Courts of the colonies) "with the same strictness as would be applied to appeals from Courts of this country. It has been held that the statute of Henry VIII. does not apply to cases in the plantations, but that it is left to the discretion of the Court to entertain an appeal." This language obviously implies that Lord Stowell thought that the statutes applied to appeals from the Admiralty Court of this country. A careful examination of them has led their Lordships' minds to a different conclusion, and they are satisfied that the limitation of the time for appealing in these cases does not depend upon legislative enactment, but upon long-established practice, most probably derived, as to the prescribed limit of fifteen days, from the statutes them-

The time therefore for appealing from a decree of the Court of Admiralty, is not regulated by those statutes;

but by long established practice it is limited to fifteen days from the date of the decree; this limit may, upon cause being shown, be extended in particular cases.

(*a*) 2 C. R. 229.

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selves. That it is a mere rule of practice not incapable of bending to circumstances, appears, amongst other instances, from the case of the *Illeanon Pirates* (*a*), where leave was given to appeal against an interlocutory decree of the Court of Admiralty, the appeal not having been interposed in due time. Other cases might be adduced where, if a similar indulgence was not granted, no doubt appears to have been entertained that it was in the power of their Lordships to grant it if a proper case had been made out. The case of the *Ulster* (*b*) mentioned in the course of the argument is no authority either way. In that case the appeal had been lodged within fifteen, but more than ten days from the date of the sentence. It was insisted that the rule of the civil law limiting the time of appealing to ten days was the one which applied to Admiralty cases, and all that was decided was that the appeal having been interposed within fifteen, but more than ten days from the date of the decree, it was not thereby invalid.

Their Lordships therefore entertain no doubt that they are not precluded either by the statutes referred to, or by any inflexible rule of practice, from granting the indulgence prayed: and the only question to be determined is, whether a proper case has been made out for the exercise of their discretion.

The grounds of the application are shortly these:—Cross-actions were brought by the owners of the Mæander and of the Florence Nightingale respectively, in respect of a collision between the two vessels. The Judge of the Admiralty pronounced a decree that the Mæander was alone to blame, but that the act which caused the collision was that of the pilot who had charge of her; and he dismissed the owners in the cause brought against them, leaving each party to pay his own costs, but condemning the owners of the Mæander in the costs of the cross-action. The owners of the Mæander were satisfied to abide by the decree in all respects, and they supposed that the owners of the Florence Nightingale would also have acquiesced; but, contrary to their expectations, the owners of the Florence Nightingale lodged an appeal, of which the owners of the Mæander were not informed until after the fifteen days from the time of the decree had expired. If they had known of the appeal of the opposite party, they would undoubtedly have presented their cross-appeal. And it appears to their Lordships that acting, as the owners of the Mæander did, under a not unreasonable belief that the matter would rest with the judgment

Special leave to appeal given.

(*a*) 6 Moore, P. C. 471. (*b*) Ante, p. 424.

1862. *July 16.* of the Court of Admiralty, no laches can be justly imputed to them, and that the leave to appeal for which they petition ought to be granted.

Jennings and *Son*, proctors for the owners of the Mæander.

Pritchard and *Son* for the owners of the Florence Nightingale.

In the High Court of Admiralty.

THE ELIZA.

Salvage—Assistance by Advice.

Advice may, in certain circumstances, constitute a salvage service.

A vessel ran on shore by mistaking her course, and being in danger, hoisted a signal of distress. A pilot's cutter came up, and hailed the vessel to adopt certain measures. The vessel acted accordingly and came off the shore:—*Held*, that the service so rendered by the cutter was in the nature of salvage.

July 24 SALVAGE. This was a cause of salvage, instituted on behalf of the owners, master and crew of the pilot-cutter Two Brothers, for services rendered to the brig Eliza, under the following circumstances:—

About 6 p.m. of the 3rd of May, 1862, the plaintiffs were in their pilot cutter cruising outside the Cross Sand, between Caistor and Yarmouth, for vessels requiring pilots for London, when they observed about three miles distant the brig Eliza, under all sail, going before the wind, and steering in a direction for the Cross Sand. The wind was blowing strong from the east, and there was a considerable sea. The plaintiffs thereupon bore down in their cutter, and as they approached hauled their flag up and down from the masthead, in order to warn the brig of her danger. The brig however ran upon the sand, and immediately hoisted her ensign union downwards, as a signal of distress. The plaintiffs' cutter came up, and lay off the edge of the sand, and hoisted out her boat; but as the sea was breaking on the sand, so as to render it dangerous to attempt going alongside the brig, the plaintiffs then hailed the brig to haul in her port braces (the yards had up to this time continued square),

and to starboard her helm. This advice was shortly afterwards complied with, and the brig came off the sand, upon which she had been about an hour, and then hove to for the plaintiffs' boat to come alongside. The plaintiffs boarded with some difficulty, and in doing so stove in their boat. They found the brig making water, and gave the master instructions how to steer, so as to keep clear of the sand. They also offered to take the brig into Harwich, but the master refused any further assistance, and the plaintiffs then left. 1862. *July* 24.

The value of the Eliza and her cargo was 970*l.*

Deane, Q.C., and *Lushington,* for the plaintiffs.

Twiss, Q.C., and *Clarkson,* for the defendants.

The Court was assisted by Captain Owen and Captain Fenwick, Elder Brethren of the Trinity House.

Dr. Lushington, after summing up the facts to the Trinity Masters, concluded,—

The main questions for you to determine are, whether the Eliza was in danger, and if so, whether it was in consequence of the signals made, and the warnings given by the plaintiffs, that the Eliza adopted proper measures and got off the sand. If you are of opinion that the brig was in danger, and that what the plaintiffs did contributed to save her from actual danger, it is a case of salvage, for which they ought to be rewarded. In any case, I may say, whether it is salvage or not, the exertions of the plaintiffs seem to have been very meritorious. Judgment.

After consultation with the Trinity Masters, Dr. Lushington said:—

The gentlemen by whom I am assisted are of opinion that the brig was in a position of danger, and they also think that the advice given by the plaintiffs was the proper advice to be given, and that it contributed to save the brig from the danger she was then in. We must also bear in mind that the signal was made for assistance, and to the plaintiffs' cutter. I am of opinion that the service rendered was a service of some importance, and I shall give the sum of 50*l.* and costs.

Lawrie, proctor for the plaintiffs.

Clarkson and *Son* for the defendants.

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MEMORANDUM.

SIR JOHN DORNEY HARDING having resigned his office as Her Majesty's Advocate, DR. PHILLIMORE, Q.C., was appointed in his stead, and DR. TWISS, Q.C., was appointed Advocate to the Admiralty.

4th November.—DR. PHILLIMORE now applied to the Court to have his patent appointing him Advocate to Her Majesty read, and the same was read accordingly.

Upon application of DR. TWISS, his warrant appointing him Advocate to the Admiralty was also read.

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THE DIANA.

Collision in Foreign inland Waters—Jurisdiction—24 Vict. c. 10, s. 7.

By the 7th section of the Admiralty Court Act, 1861, the Court of Admiralty has jurisdiction in a cause brought for a collision happening between two British ships in foreign inland waters.

THIS was a cause of collision instituted by Albert Scott, the owner of the British brig Prince Albert, against the steamship Diana, belonging to Malcomson & Co., of Waterford.

The plaintiff's petition set forth the circumstances of a collision which took place between the plaintiff's and defendants' vessels in the Great North Holland Canal, two miles from Nieu Diep, upon the 9th of April, 1862. The defendants in the 9th article of their answer denied the jurisdiction of the Court.

The plaintiff thereupon filed a motion to strike out this article of the defendant's answer.

The Admiralty Court Act, 1861 (24 Vict. c. 10), "An Act to extend the jurisdiction and improve the practice of the High Court of Admiralty," enacts, section 7,—

"The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship."

Clarkson, in support of the motion.—The Court has jurisdiction by the 7th section of the Admiralty Court Act, 1861, which is an enabling Act. There is no reason why this Court should not take cognisance of wrongs done in foreign territorial waters, as the Courts of common law would do; *Mostyn* v. *Fabrigas* (*a*); *Scott* v. *Seymour* (*b*).

Lushington, contra.—The statute 13 Rich. II. st. 1, c. 5, which is still in force, except so far as affected by modern statutes, declares that "The admirals and their deputies shall not meddle from henceforth of anything done within the realm, but only of things done upon the sea." The proper jurisdiction of the Admiralty Court is on the high seas; it had no jurisdiction within the body of a county till the passing of 3 & 4 Vict. c. 65. Edwards, in his work on Admiralty Jurisdiction, speaking of the statute of

(*a*) 1 Smith, L. C. 340, 3rd ed. (*b*) 1 H. & C. (Exch.) 219.

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Richard II. says, p. 18, "The superior Courts of law declared, that according to this statute the Admiralty Court was expressly denied the power of determining any cause which arose in any foreign realm, or part beyond the high seas; and accordingly in every case where the plaintiff in the Admiralty Court alleged the cause of the action to have arisen in any foreign country within the jurisdiction of the High Court of Admiralty, the Courts at Westminster sent down a prohibition, to prevent the Admiralty Court from entertaining the question, without reference to its nature, although they could only drag the suit into their own Courts by the most awkward fiction of law." The Admiralty Court Act of 1861 does not repeal the statute of Richard II.; it does not mention it; nor does it expressly extend the jurisdiction of the Court to causes of action arising in foreign realms. This case ought not to be tried here, but in a Dutch Court.

Judgment.

DR. LUSHINGTON:—The decision of this question depends mainly, if not exclusively, upon the construction which the Court ought to give to the 7th section of 24 Vict. c. 10: "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." The object of the Act, as stated in the title and preamble, is "to extend the jurisdiction" of the Court. The 7th section, which deals with the subject of damage, does not particularise any circumstances to which the jurisdiction of the Court is to extend, but gives the Court jurisdiction in the widest and most general terms; and there can be no doubt that the present case falls within those terms.

This case is within the terms,

It has been argued from the former state of the law, that the legislature, though here using these general terms, did not intend to give the Court jurisdiction over matters occurring in foreign territorial waters; but I find no indication of any such exclusion having been intended. It is very true that in former times there were many decisions of the Courts of common law restraining the ancient jurisdiction of this Court; but in the last sixty or seventy years a very different disposition has been manifested; and it is notorious that the American Courts of Admiralty, which have taken all their principles and practice from us, have not considered those decisions binding upon them. But for the Act of Parliament, indeed, I should not feel warranted in disregarding those decisions; but my duty is now to consider what was the intention of the legislature in passing this statute. The words used, I have said, are amply sufficient to give me jurisdiction over cases of this kind, and I can see good reason for the legislature granting such jurisdiction to this Court. It is

and within the purpose of the Act 24 Vict. c. 10, s. 7.

admitted that the Courts of common law have long ago, in furtherance of justice, assumed jurisdiction over causes of action arising, like the present, in foreign realms; and it is obvious that there may be many cases of damage in which the person of the defendant may not be reached, but his ship may, and the plaintiff's only remedy will lie in a proceeding in rem. It is therefore in my mind far from being an objection to the jurisdiction of this Court, that there is in theory a concurrent jurisdiction in the Courts of common law, or that there is a remedy in the foreign Court. I am of opinion that the legislature has committed this jurisdiction into my hands. The 9th article of the answer must therefore be struck out. I do not, however, give costs (*a*). 1862. *November 4.*

Clarkson and *Son*, proctors for the plaintiff.

Rothery for the defendant.

THE COURIER.

*Collision in foreign Waters—Jurisdiction—*24 *Vict. c.* 10, *s.* 7.

By the 7th section of the Admiralty Court Act, 1861, the High Court of Admiralty has jurisdiction over a cause instituted for a collision occurring between foreign vessels in foreign waters.

THIS was a case like the preceding, except that the owners of both vessels were foreigners. The collision happened in the port of Rio Grande. *November 4.*

Clarkson for the plaintiffs.

Lushington for the defendants.

Dr. Lushington:—It is immaterial that the owners of both ships are foreigners: the Court has jurisdiction.

Clarkson and *Son*, proctors for the plaintiffs.

J. W. Nicholson, solicitor for the defendants.

(*a*) The case was afterwards tried, and judgment given for the plaintiff.

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THE NIGHTWATCH.

Vessel in tow of a Steam-tug—Collision—Jurisdiction—24 Vict. c. 10, s. 7—"Damage done by any Ship."

By the improper navigation of a steam-tug which was towing her, vessel A. came in collision with vessel B. and sustained damage:—*Held*, that this was "damage done by the steam-tug," and that the owners of vessel A. could sue the steam-tug in the Admiralty Court.

THIS was a cause instituted by the owners of the barque Prince against the steam-tug Nightwatch in respect of damages which the Prince had, whilst in tow of the Nightwatch, sustained by a collision with the barque Julie in Penarth Roads.

The owners of the Nightwatch appeared and filed a petition protesting against the jurisdiction of the Court.

In objection to the petition, the *Queen's Advocate* (*Sir Robert Phillimore*) and *Pritchard*.—The Court has jurisdiction. By the 7th section of the Admiralty Court Act, 1861, this Court has jurisdiction "over any claim for damage done by any ship." Here the damage was done, as we say, by the negligence of those on board the Nightwatch; and such negligence constitutes a cause of action as laid down in the judgment in the *Julia* (*a*).

Deane, Q.C., and *Lushington*, contra.—This is not an action of collision proper, but an action for a breach of contract; the remedy for which is elsewhere, not in the Court of Admiralty. To found the jurisdiction of this Court it is submitted that the vessel sued must have been in collision with the vessel, the owners of which are suing. That was the case of the *Julia*. In the *Ida* (*b*), which was a peculiar case,—the master of one ship had cut the other ship adrift from her moorings, and thereby capsized a boat containing part of her cargo,—the Court disclaimed jurisdiction, and said, "The Court, it must be remembered, has never exercised a general jurisdiction over damage, but over causes of collision only; and this is no collision in the proper sense of the term. The ship proceeded against had nothing to

(*a*) Ante, 231. (*b*) Ante, p. 6.

do with the damage." That was before the passing of 24 Vict. c. 10, but that Act confines the jurisdiction of the Court to the case of "damage done by any ship." 1862. *November 4.*

Dr. Lushington:—I am of opinion that this protest, which has been filed on behalf of the owners of the Nightwatch, cannot be sustained. I must take it that the Prince was, by the improper navigation of the Nightwatch which was towing her, brought into collision with the Julia. This was damage done by the Nightwatch. But, even apart from the recent statute, I think this Court has jurisdiction, especially after what fell from the Privy Council in the case of the *Julia*. I overrule the protest with costs (*a*). Judgment. Protest overruled with costs.

Pritchard and *Son*, proctors for the plaintiffs.

Toller and *Son* for the defendants.

THE D. H. PERI.

Foreign Plaintiffs—Security for Costs and Damages.

A foreign plaintiff suing in rem will be required to give security for costs, but not security for damages as for a wrongful arrest of the defendant's vessel, although an affidavit be filed by the defendant, that the plaintiff arrested his vessel in mistake for another vessel, and has since had notice of the same.

THIS was a cause instituted by the owners of a foreign vessel against the British vessel D. H. Peri for a collision. On the 15th of October, 1862, the plaintiffs arrested the D. H. Peri without notice to her owners: on the 17th of October the defendants gave notice in writing to the foreign master, to the plaintiffs' attorney in town, and to the plaintiffs' attorney in the country, that the D. H. Peri had never come in collision with the plaintiffs' vessel, and that the plaintiffs would be held liable in the damages occasioned by the wrongful arrest. The plaintiffs however did not release the defendants' vessel, which remained *November 4, 11.*

(*a*) On the trial, the plaintiffs failed to establish negligence against the tug.

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under arrest till the 23rd of October, when she was released on bail.

Upon affidavits by the defendants setting out these facts, and that the D. H. Peri had not been in collision with the plaintiffs' vessel,

Lushington moved the Court to order the plaintiffs to give security for costs and damages, and to stay proceedings till the order should be complied with.—The plaintiffs being foreigners resident out of the jurisdiction, the defendants are intitled to security for costs, as of course. It is submitted that they are likewise intitled to security for damages. The arrest, or at least the continuance of the arrest, was wrongful; and without security the defendants will practically be unable to recover the damages thereby occasioned, which the Court may pronounce for at the hearing of the cause, *Evangelismos* (*a*); although, on the other hand, the plaintiffs have full security for the amount of their damages from the alleged collision.

J. Martin, contra.—This application is unprecedented. It is a sufficient hardship on foreign plaintiffs to give security for costs.

On the 11th of November, Dr. Lushington said:—

Judgment.

I can only grant this motion so far as to order security for costs. To order security for damages as for a wrongful arrest would be an innovation on the practice of the Court, and would form a serious bar to foreigners suing in this Court. I may add that as to the alleged mistake of the plaintiffs, the Court can form no opinion in the present stage of the proceedings, upon affidavits brought in by the defendants: it may be the great question of the cause.

Preston, solicitor to the plaintiffs.

Coote, proctor for the defendants.

(*a*) Swabey, 381.

THE SALACIA.

Precedence of Liens—Seamen's Wages, Master's Wages, and Bottomry Bond—17 *&* 18 *Vict. c.* 104, *s.* 191.

The 191st section of the Merchant Shipping Act, 1854, does not alter the relation of the master of a ship to the seamen.

In rival claims against proceeds of ship, seamen's wages are preferred to master's wages and disbursements.

A master having given a bottomry bond on ship and freight, whereby he has not bound himself personally to pay the bond, but only covenanted that the ship and freight should be at all times liable to pay the bond, is intitled to be paid his wages out of ship and freight in preference to the claim of the bondholder.

THIS was a question of precedence of liens.

In an action brought by A. Castellain and L. Gruning, the holders of a bottomry bond on ship, freight and cargo, the Salacia had been sold for want of appearance by the owners, and the proceeds, 471*l.*, brought into the Registry. Against these proceeds two actions were brought, one by seamen claiming wages to the amount of 681*l.*, the other by John Izat, the master, claiming for wages 285*l.*, and for disbursements 84*l.* The master's claim for disbursements was in respect of certain bills of exchange, which he had drawn to pay seamen's wages, and upon which he had become liable.

The bottomry bond bore date 11th February, 1861. After reciting a loan by Mr. Vincent Marcopoly, &c., it proceeded—"I, the said John Izat, do hereby bind the said barque, the Salacia, the tackle and apparel of the same, as well as the cargo to be shipped in the East Indies, as also the freight thereon . . . . to pay unto Mr. Vincent Marcopoly aforesaid or to his assigns, &c. . . . . and I, the said John Izat, do covenant and grant to and with the said Mr. Vincent Marcopoly, his executors and administrators, by these presents, that I, the said John Izat, at the time of sealing and delivering these presents, am the true and lawful master of the said barque, and have power to charge and engage the said barque as well as the cargo and freight as before said; and that the said barque and the cargo, with the freight, shall at all times after the said voyage be liable and chargeable for the payment of the said 665*l.*, as before specified, according to the true intent and meaning of these presents."

1862. *November* 11. A motion on behalf of the seamen to have the proceeds of the ship paid out in payment of their wages now came on for hearing.

The following enactments were referred to in the argument:—

The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 191, "Every master of a ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages which by this Act or by any law or custom any seaman, not being a master, has for the recovery of his wages."

The Admiralty Court Act, 1861 (24 Vict. c. 10), s. 10, "The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship."

Lushington for the seamen.—Seamen's wages are in all cases payable before a bottomry bond, *Union* (*a*). The seamen are intitled to be paid before the master, for by the common law of the sea the master is personally liable to pay them their wages. The master, as their debtor, should be postponed to their claim, upon the principle which was acted on in the *Jonathan Goodhue* (*b*). The master's right to sue as to wages dates from 1854; as to disbursements, from 1861; the seamen's right is immemorial. On general grounds, also, seamen, as destitute persons, are to be preferred.—[Dr. Lushington. What do you say as to the money which the master has advanced as wages to the other seamen?]—A stranger, who had advanced the money to pay the wages, might claim to come in rateably with the seamen, *William F. Safford* (*c*), but not the master.

Potter for the master.—As to the relative position of the master and the seamen, in the *Princess Helena* (*d*) the Court said, "The legislature have, proceeding step by step, finally manifested their intention to put masters, so far as the recovery of wages, upon the same footing as seamen." With reference to the bondholders, the master has not made himself personally liable on the bond; he is not a debtor to the bondholders; the rule therefore laid down in the *Jonathan Goodhue* (*b*) does not apply; and the master, like the seamen, comes before the bond.

(*a*) Ante, p. 128. (*b*) Swabey, 524. (*c*) Ante, 71. (*d*) Ante, 195.

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Cohen for the bondholders.—I do not dispute the seamen's preferential right, but I dispute the right of the master. The case is really within the principle of the *Jonathan Goodhue;* for though the master has not bound himself to pay the bond, he has covenanted that the ship and freight shall be liable to pay the bond; and it is wholly inconsistent with this covenant that to the prejudice of the bond he should sue the ship and freight for his own wages or disbursements. A distinction is also to be taken between the master's claim for wages and his claim for disbursements, for he has a lien on ship and freight for his wages by the Merchant Shipping Act, 1854; but his lien for disbursements rests on the Admiralty Court Act, 1861, which was not in operation when the bond was executed. The bondholders therefore had a vested interest which ought not to be affected by the statute; *Jackson* v. *Woolley* (*a*), *Cornill* v. *Hudson* (*b*).

Potter replied.

On the 11th of November, Dr. Lushington gave judgment.

Judgment.

This is a case of several rival claims upon the proceeds of the ship which are in the Registry, and the claimants are the master, the seamen, and the holders of a bottomry bond on ship, freight and cargo. The master claims that he is intitled to be paid his wages and disbursements rateably with the seamen's wages. His claim is resisted by the seamen, who if he be intitled to share pari passu with them, will not receive even a moiety of their wages. His claim is also resisted by the bondholders, who, without questioning the priority of the seamen, urge as against the master that by the execution of the bottomry bond he has barred himself from suing the ship or freight to their prejudice; they also contend that the master is not intitled to claim for disbursements, even if he could maintain his claim for wages.

The seamen to come before the master.

The first question to be decided is the claim of the master to be paid rateably with the mariners. There are two grounds on which this claim is made to rest. The first is the 191st section of the Merchant Shipping Act, 1854, which enacts that a master shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages as seamen have for the recovery of their wages. But I am of opinion that this right so conferred upon masters was intended to relate to their claims upon the owners and the owners' property, and that the enact-

(*a*) 8 E. & B. 784. (*b*) 8 E. & B. 429.

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ment does not alter the relation of the master to the seamen. It is an established rule, so ancient that I know not its origin, that the seamen may recover their wages against the master; and that being so, it would be unjust, I think, to allow a master to take, to the detriment of seamen, from a fund upon which they have a lien.

On another ground the master claims to be in part paid rateably with the mariners, as to certain advances made by him in payment of seamen's wages. He gave certain bills of exchange, for which he has become liable, the same not having been paid by his owners. Now though this payment may not have been voluntary, yet the question is, whether the master, who is liable by law to pay the wages, can compete against the seamen, upon a fund which is insufficient to meet the claims of both. I think he cannot; for though he has already paid some of the seamen, he is liable to pay all, and he still remains a debtor to those now suing. The result therefore is, that the seamen are to be preferred to the master.

As the claims of the seamen will more than consume the proceeds of the ship, there is no other question which at present absolutely demands decision; but as the right of the master to sue the freight as against the claim of the bondholders may probably force itself upon the attention of the Court in the course of the proceedings, I will dispose of this question also. The bondholders say that by executing the bond on ship and freight, the master has pledged himself not to touch that fund to the prejudice of their claim. The Court has in previous cases (*a*) decided, that where the master by express words has bound himself to pay the money advanced on bottomry, he cannot compete with the bondholder for his wages against ship and freight. That question is, so far as I can determine it, finally settled. The inquiry now is, whether the rule is applicable to the present case. Here the master has not bound himself personally to pay the bond: his covenant in the bond is that he is master, and that he has authority to charge the barque, cargo and freight, and that the barque, cargo and freight shall at all times after the voyage be liable to the payment of the money. He has not therefore incurred that personal liability, which a master giving a bottomry bond generally incurs in express terms. Then why, in the absence of personal obligation, should the master be held to have ceded his prior right against the ship and freight for his wages? I see no reason for so

The master is not prejudiced by the terms of the bond, and his claim for wages is payable before the bond.

(*a*) *Jonathan Goodhue*, Swabey, 524.

holding, and no reason for extending to the present case the rule which applies in cases where the master has constituted himself a debtor to the bondholder,—a rule which has operated with much severity in former instances. The resistance therefore of the bottomry bondholders to the master's claim for wages cannot be sustained. 1862. *November* 11.

The bondholders have also an objection, which applies only to the master's claim for disbursements. They say that his claim to sue for disbursements depends upon the Admiralty Court Act, which was appointed to come into operation on the 1st of June, 1861; that at that date they had a vested interest in the ship and freight (the bond being dated 11th of February, 1861), and that a retrospective operation ought not to be given to the Act, so as to affect their vested interest. Upon this point however I abstain from giving an opinion.

Tebbs and *Son*, proctors for the master.

Pritchard and *Son* for the bondholders.

Nethersole and *Owen* for the seamen.

THE SARAH.

Collision—Jurisdiction on High Seas.

The Court of Admiralty has original jurisdiction over torts committed on the high seas, and therefore over a collision on the high seas where the vessel doing the damage was a keel, or vessel without masts, usually propelled by a pole.

THIS was a cause instituted by the owners of the schooner Gleaner against the steam-tug Secret, and against the keel Sarah, to recover damages which the Gleaner had sustained by a collision with the Sarah, whilst the latter vessel was being towed by the Secret, on the high seas off Seaham. *November* 11.

The Sarah was a keel, used in the navigation of the river Wear; she had no masts or sails, and was usually propelled or punted by a pole or oar called a "set."

The owners of the Sarah appeared under protest to the jurisdiction.

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Clarkson, in support of the protest.—The Sarah is not a ship or even a boat; the 24 Vict. c. 10, s. 7, which gives the Court jurisdiction over any claim of damage "done by any ship," does not apply; and it is submitted that the Court has not otherwise jurisdiction.

Deane, Q.C., contra.—This is a case of tort on the high seas, and the Court has therefore original jurisdiction ratione loci. Moreover, by the 3 & 4 Vict. c. 65, s. 6, this Court has jurisdiction "to decide all claims and demands whatsoever in the nature of damage received by any ship or sea-going vessel."

Judgment.

DR. LUSHINGTON:—The Court has original jurisdiction, because the matter complained of is a tort committed on the high seas. It is not necessary to refer to any statute; and it is immaterial whether the vessel doing the damage was a sea-going vessel; immaterial also by what means it was navigated. The protest must be dismissed, with costs.

Lawrie, proctor for the plaintiffs.

Clarkson and *Son* for the defendants.

THE ELLORA.

Salvage—Mail Steamer losing her Screw, and being towed to her Destination by another Steamer carrying Cargo.

November 18.

SALVAGE. This was a cause of salvage brought by the owners, master and crew of the Juno, for services rendered to the Ellora, in the following circumstances:—

On the 11th of June, 1862, the Ellora, a screw steamer, of 1,070 tons, belonging to the Peninsular and Oriental Navigation Company, then between Alexandria and Malta, and bound to Malta, Gibraltar and Southampton, carrying passengers and the mail, suddenly lost her screw, by the screw breaking off and sinking. By this accident her steam-power became entirely useless. The

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Ellora, which was in all respects fully equipped as a sailing ship, thereupon made sail. The weather was quite fine, but the wind was light and adverse. Between the time of the accident and the morning of the 14th of June, the Ellora beat up to windward 130 miles. The steam-ship Juno then hove in sight, and signal having been made from the Ellora that she had lost her screw, the Juno bore down. The Juno was bound with cargo to Hull: and it was then agreed between the masters of the two ships that the Juno should tow the Ellora to Malta. The Juno took the Ellora in tow, and on the 17th of June the two ships reached Malta, the weather being throughout quite moderate. During the passage, two outward-bound steamers belonging to the Peninsular and Oriental Company were met, the Ripon on the 15th, and the Vectis on the 16th, and signals were exchanged. At some time of the passage, but when unknown, the Ellora was also passed by the Valetta, another of the Company's steamers, then bound from Alexandria to Malta. On the Ellora arriving at Malta, the mails were, by order of the post-office authorities, transferred from the Ellora to the Juno: the Juno conveyed them to Southampton, and then completed her voyage to Hull.

The value of the Ellora was 50,000*l.*; the net passage money about 500*l.*; the mail money about 950*l.* The value of the Juno and her cargo was 35,000*l.*

Twiss, Q.C., and *Clarkson*, for the plaintiffs.

Deane, Q.C., and *Lushington*, for the defendants.

Judgment.

Dr. Lushington, after reviewing the facts of the case, awarded the plaintiffs the sum of 1,200*l.*

Clarkson, proctor for the plaintiffs.

Rothery for the defendants.

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THE TWO FRIENDS.

Collision—Preliminary Acts.

Where in a cause of collision, after petition and answer filed, the crew of the plaintiff's ship are upon application examined immediately in open Court, the Court will order the preliminary acts to be exchanged.

COLLISION. This was a cause of collision brought by the owners of the barque Enterprise, belonging to the Isle of St. Vincent, against the schooner the Two Friends, belonging to the Isle of Guernsey.

On the petition and answer being filed, the crew of the Enterprise were appointed to be examined immediately in open Court.

On the production of the witnesses,—

Deane, Q.C., (*Lushington* with him,) counsel for the defendants, applied to have the preliminary acts opened.

Twiss, Q.C., and *Clarkson*, for plaintiffs.

Judgment. DR. LUSHINGTON made the order accordingly.

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THE WILD RANGER.

Collision on High Seas between a British Ship and a Foreign Ship—Limited Liability under 17 *&* 18 *Vict. c.* 104, *s.* 504; 24 *Vict. c.* 10, *s.* 13—*Reciprocity—Security for Costs.*

The owners of a foreign ship found to blame for a collision on the high seas with a British ship are not intitled to limited liability under the 504th section of the Merchant Shipping Act, 1854.

The ancient maritime law renders the owner of a ship, by the negligent navigation of which damage has been done to another vessel on the high seas, liable to the full extent of the damage done: and the right under this law of a British plaintiff against the owner of an American ship for damage done on the high seas is not abridged by any joint operation of a British statute limiting the liability of British shipowners, and an American statute according a right of of limited liability to shipowners generally.

Cope v. *Doherty*, 4 K. & J. 367; 2 De G. & J. 614, followed.

Observations in *Carl Johan*, 3 Hag. 187, dissented from.

A foreign shipowner resident out of the jurisdiction, who has been condemned as a defendant in a cause of damage, will be required to give security for costs on filing a petition praying for a declaration of limited liability.

THIS case arose out of a petition filed on behalf of Paul Sears, the managing owner of the American ship Wild Ranger, for a declaration of limited liability according to the Merchant Shipping Act, 1854.

The petition pleaded:—

"1. That the said ship Wild Ranger is an American vessel belonging to the said Paul Sears (the managing owner) and others, all of Boston, in the state of Massachusetts, in the United States of America.

"2. That on the 3rd day of January, 1862, a collision took place between the said ship Wild Ranger and the British ship Coleroon, on the high seas, about 30 miles S.S.W. of the Scilly Isles, whereby both vessels sustained considerable damage.

"3. That on the 11th day of January, 1862, a cause of damage was instituted on behalf of the owners of the Coleroon, against the Wild Ranger and her freight, in the sum of 3,500*l.*

"4. That on the 14th day of January, 1862, bail was given on behalf of the owner of the Wild Ranger to answer the said action, and the Wild Ranger, which had been arrested in the said action, was thereupon released.

"5. That on the 18th day of January, 1862, an action was

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entered against the Wild Ranger and her freight in the sum of 9,000*l.*, on behalf of the owners of the cargo laden on board the Coleroon at the time of the said collision, and the Wild Ranger was thereupon again arrested, and still remains under arrest in the said action.

"6. That no freight was earned by the Wild Ranger during the voyage which was in prosecution at the time of the said collision.

"7. That the said sums of 3,500*l.* and 9,000*l.* together far exceed the value of the Wild Ranger.

"8. That the Right Honorable the Judge of this Court, by his judgment pronounced on the 27th day of February, 1862, held that the Wild Ranger was solely to blame for the said collision.

"9. That by section 504 of the Merchant Shipping Act, 1854, the owners of the Wild Ranger are not answerable in damages to the plaintiffs in the above-mentioned actions to an extent beyond the value of their said ship the Wild Ranger."

The petition then prayed the Judge to dismiss the bail, and to pronounce that the owners of the Wild Ranger were not liable in law for the damages sustained by the said plaintiffs in consequence of the said collision, to an extent beyond the value of their said ship the Wild Ranger: and further, that a rateable distribution of the proceeds of the Wild Ranger should be made among the said plaintiffs.

This petition was filed in both actions. The owners of the Coleroon and the owners of the cargo severally pleaded by way of answer, that the owners of the Wild Ranger were not intitled to a limitation of liability by the 504th section of the Merchant Shipping Act.

The owners of the Wild Ranger then amended their petition by adding the following paragraphs:—

"By section 3 of the statute, chapter 43, passed by the Congress of the United States of America, in the year 1851, it was enacted as follows, to wit:—'That the liability of the owner or owners of any ship or vessel for any embezzlement, loss or destruction by the masters, officers, mariners, passengers, or any other person or persons, of any property, goods or merchandise shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the

amount or value of the interest of such owner or owners respectively in such ship or vessel and her freight then pending.' 1862. December 2.

"From the year 1851 up to the present time the provisions of the said statute have been in force in the state of Massachusetts, and in the other states of the Union."

The plaintiffs answered, setting out the whole of the American statute (*a*), and alleging that notwithstanding the said statute the defendants were liable to the plaintiffs to the full amount of the damage occasioned to the plaintiffs by the collision.

Upon the filing of the petition, *Clarkson*, on behalf of the plaintiffs, owners of cargo, moved the Court to order the defendants to give security for costs.—This petition is filed in pursuance of the 13th section of the Admiralty Court Act, 1861, which enacts, "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." In the Court of Chancery a declaration of limited liability can only be obtained by the shipowner filing a bill as plaintiff, and if he is a foreigner he is obliged to give security for costs. Such security was in fact given in the case of *Cope* v. *Doherty* (*b*), and as a matter of course. This is the first case of the kind in this Court; and though the form of proceedings here may not compel the defendants to institute a new suit as plaintiffs, their present petition represents a fresh proceeding solely for their own benefit, and quite distinct from the original suit of the plaintiffs. The defendants have virtually become plaintiffs, and being foreigners out of the jurisdiction, ought to give security for costs.

Wambey, contra.—The owners of the Wild Ranger have not lost the character of defendants by filing this petition. A defendant resident abroad is not required to give security for costs, even as the price of compelling the plaintiff to give such security; *Baxter* v. *Morgan* (*c*).

On the 26th of March, Dr. Lushington said, *March* 26.

In the exercise of this new jurisdiction I am anxious to tread in the steps of the Court of Chancery. I understand that in one precedent, *Cope* v. *Doherty* (*b*), the party applying for a declaration of limited liability, being a foreigner out of the juris- Judgment.

(*a*) See Statutes, Minot's edition, Vol. IX., p. 635.

(*b*) 4 K. & J. 367.

(*c*) 6 Taunt. 379.

1862. *December* 2. Security for plaintiffs' costs ordered.

diction, was ordered to give security for costs. I shall accordingly order the present defendants to give security for the plaintiffs' costs in the sum of 100*l.*

The Court, on a subsequent day, made a similar order in the action brought by the owners of the Coleroon.

November 18. On the 18th of November the case came on to be argued on the main point.

The following is the enactment referred to in the argument:—

Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104).

" Part IX.

" Liability of Shipowners.

" 502. The ninth part of this Act shall apply to the whole of Her Majesty's dominions.

" 504. No owner of any sea-going ship or share therein shall in cases where all or any of the following events occur without his actual fault or privity, (that is to say)—

. . . . . .

(4.) Where any loss or damage is by reason of any such improper navigation of such sea-going 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 fifteen pounds per registered ton."

Cleasby, Q.C., and *Wambey*, for the owners of the Wild Ranger.—We contend, first, that the defendants are within the beneficial operation of the 504th section of the Merchant Shipping Act, 1854. The previous Act of 53 Geo. III. c. 159, giving limited liability, was by the 5th section expressly confined to ships duly registered. But here the terms used are general, " No owner of any sea-going ship shall be answerable, &c.," and

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there is no restrictive proviso: these general terms ought therefore to be held to apply to foreign as well as to British ships; though it must be admitted it was otherwise adjudged in *Cope* v. *Doherty* (*a*). Like general terms in other sections of the Act have been applied to foreign ships in this Court: thus the 191st section, which gives masters a right to sue ship for wages, *Milford* (*b*); and the 388th section, which takes away from the shipowner liability for the act of a pilot compulsorily employed; *General de Cuen* (*c*). These sections, like the 504th, relate to remedy, and may thus be distinguished from sections 296, 297, which, prescribing rules for the conduct and navigation of vessels, may properly be confined to British vessels only, and are so confined; *Zollverein* (*d*); *Saxonia* (*e*). We say that the present is a question of remedy, in the same liberal sense that questions as to the right of set-off, and questions as to the applicability of statutes of limitation, are questions of remedy, and is like them to be determined by the lex fori, which is here the Merchant Shipping Act; *Story on the Conflict of Laws* (*f*). In *Ruggles* v. *Keeler* (*g*), Chancellor Kent said, "The lex loci applies only to the validity or interpretation of contracts, and not to the time, mode or extent of the remedy." So in the *Vernon* (*h*), it was held that the shipowner's right to exemption from liability for the pilot's act, given by 6 Geo. IV. c. 125, s. 55, was a matter of remedy, and might be inforced against a foreign plaintiff. That this is a question of remedy further appears from the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), which, in the 54th section, expressly extends the right of limited liability to foreign ships; but, in the 58th section, leaves the extension of rules of navigation to foreign ships on the high seas to be dealt with by Order in Council. The 54th section, we submit, was expressly intended to set right the law, which had been laid down in *Cope* v. *Doherty* (*a*).

But secondly, we contend that the defendants are intitled to a limited liability on a principle of reciprocity, inasmuch as the American and the British municipal laws agree in limiting the shipowner's liability. This principle received a striking illustration in the *Zollverein* (*d*), a case of collision on the high seas, where this Court refused to hold the statutory rule of navigation binding on the British ship, because it was not binding on the foreign ship. The following passage from *Story on the Conflict*

(*a*) 4 K. & J. 367.
(*b*) Swabey, 362.
(*c*) Swabey, 9.
(*d*) Swabey, 96.
(*e*) Ante, p. 421.
(*f*) Sects. 575, 576, 577, 578.
(*g*) 3 Johnson's Reports, p. 267.
(*h*) 1 W. R. 316.

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of Laws (*a*) is much in favour of the defendants' contention. "In cases of torts committed on the high seas, and in other extra-territorial places, by the subjects of one nation upon vessels, or other moveable property, belonging to the subjects of another nation, where the laws of these nations are different, touching either the nature and character and consequences of the tort, or the rule of damages applicable thereto.—It is not easy to say, in such cases, what laws ought to govern. The most that can with any probability be stated is, that in the absence of any general doctrine to the contrary, either each nation would, in respect to the case when pending in its own tribunals, follow its own laws; or would apply the rule of reciprocity, granting or refusing damages, according as the law of the foreign country, to which the injured ship belonged, would grant or withhold them in case of an injured ship belonging to the other nation. The rule of reciprocity is often applied in cases of the recapture of ships from the hands of a public enemy." In the *Carl Johan*, the judgment of which is quoted by Sir John Nicholl in the *Girolamo* (*b*), Lord Stowell, speaking of the limited liability given to shipowners by 53 Geo. III. c. 159, said, "that the new rule was one of domestic policy, and that with reference to foreign vessels, it only applied in cases where the advantages and disadvantages of such a rule were common to them and to British vessels; that if all states adopted the same rule, there would be no difficulty, but that no such general mutuality was alleged; that if the law of Sweden adopted such a rule, it would apply to both countries, but that Sweden could not claim the protection of that statute without affording a similar protection to British subjects in similar cases." That is a direct authority in our favour: and Sir John Nicholl, in delivering his own judgment in the *Girolamo* (*c*), said, "Reciprocity, or mutuality, has always been considered as one of the leading principles of justice in questions arising between nation and nation. For example, by our municipal law, this country established the principle of restitution upon payment of salvage in cases of the recapture of British property from the enemy, notwithstanding pernoctatio infra præsidia, or any of those old general rules by which the property of the former owner was held to be extinguished: but the application of this rule to the property even of our allies in the late war was held to depend entirely upon its reciprocity. Thus in the case of the *St. Jago*, cited in the *Santa Cruz* (*d*), the property was condemned as prize to the recaptors, on the ground of its not being shown that restitution of the property of

(*a*) Sect. 423 h.
(*b*) 3 Hag. 187.
(*c*) 3 Hag. 185.
(*d*) 1 C. R. 63.

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an ally, upon payment of salvage, was the rule of Spanish law; and in the case of the *Santa Cruz* itself, the same principle was applied with respect to Portugal; but upon that country afterwards engaging prospectively to restore upon payment of salvage British property recaptured by Portuguese subjects, the rule was made mutual." Vice-Chancellor Wood, at the close of his judgment in *Cope* v. *Doherty* (*a*), intimates that proof of the American law corresponding with British law might effect an important change in the rights of the parties. That proof is given here; and we contend that by each of the two states enacting the same law as to liability in maritime torts, such law becomes, as between the subjects of those two states, part of the maritime law. In the *Duchesse de Brabant* (*b*), this Court in effect gave limited liability to a foreign shipowner, when sued for a collision by British subjects, for the foreign ship having been released on bail given to the full amount of the action, the Court ordered the bail to be reduced to the value of ship and freight; and in that case the identity of the foreign (Belgian) law with the British law had been pressed upon the Court in argument. On every ground of policy the prayer of the defendants for limited liability should be allowed. It is not only important for the interests of foreign shipowners sued here, but equally important for British shipowners who may be sued abroad.

Aspinall, Clarkson and *Lushington*, contra.—The plaintiffs rely upon the maritime law, which gives them a remedy up to the full extent of their damage; *Dundee* (*c*); *Carl Johan* (*d*); *Cope* v. *Doherty* (*e*). That law, so far as foreigners are concerned, has not been displaced by any British statute. Vice-Chancellor Wood has, on two occasions, stated his opinion, that in a case like the present of a collision on the high seas, the foreign shipowner would have his full right against the British shipowner, notwithstanding the Merchant Shipping Act, 1854 (*f*). The argument of the defendants upon that statute is directly opposed to the decisions in *Cope* v. *Doherty*, and the *General Iron Screw Collier Company* v. *Schurmanns* (*g*). They decide that the 9th part of the Act, by reason of the terms used, applies to British ships only, and that the right to limited liability relates to the substance of the remedy, and is not a question for the lex fori, which regulates procedure only (*h*). The enactment may be compared

(*a*) 4 K. & J. 391.
(*b*) Swabey, 264.
(*c*) 1 Hag. 120.
(*d*) 1 Hag. 113.
(*e*) 4 K. & J. 377.
(*f*) 4 K. & J. 379; 1 J. & H. 193.
(*g*) 1 J. & H. 190.
(*h*) 4 K. & J. 380, 384; 2 De G. & J. 622, 626; 1 J. & H. 196.

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to those statutes of limitation referred to in *Story's Conflict of Laws* (*a*), which extinguish the title itself as well as the right of action: it destroys part of the claim itself. Other cases show that general terms in a British statute do not apply to foreigners out of the jurisdiction; *Zollverein* (*b*); *Jefferies* v. *Boosie* (*c*). The inference from 25 & 26 Vict. c. 63, that hereafter foreigners will in all cases be intitled by British statute to limited liability, is unsound; for it appears that sect. 54 of that Act is controlled by sect. 502 of the Act of 1854, so that its operation is limited to Her Majesty's dominions. But at any rate, the 2nd section of the Act expressly reserves liabilities previously incurred, that is to say, liabilities incurred whilst the 504th section of the Merchant Shipping Act, as interpreted in *Cope* v. *Doherty*, was in force.

The defendants' other ground of contention, viz., on the principle of reciprocity, is met in two ways. In the first place the British and American statutes differ in important respects. By the American statute the shipowner apparently escapes all liability by abandoning ship and freight; *Parsons on Maritime Law* (*d*). By the British statute the shipowner is liable up to the value of his ship and freight before the accident; and if there are several accidents, he may be liable so many times over. The British statute includes liability for loss of life, but it does not appear that there is any such liability by the American law. Nor does it appear that the American Courts would consider a British shipowner intitled to limited liability. The defendants have simply pleaded the coexistence of the two statutes, and nothing more. In point of fact there is not reciprocity. But even supposing the provisions of the two statutes to be identical, that will effect nothing. It cannot make the British statute apply, if it does not otherwise apply; and there is no authority to show that a new law, a tertium quid, can be created out of the statute books of two different nations. The *Zollverein* simply determines that in certain cases a certain British statute does not apply. The observations of Lord Stowell in the *Carl Johan* (*e*) are obiter dicta. The principle of reciprocity may be invoked, when there is no common law to appeal to, as in the *Santa Cruz* (*f*); but it cannot abolish an existing law; here the ancient maritime law is binding on both parties.

Cleasby replied.

(*a*) Sect. 582.
(*b*) Swabey, 96.
(*c*) 4 H. of L. 955.
(*d*) Vol. I., p. 403.
(*e*) 3 Hag. 187.
(*f*) 1 C. R. 63.

On the 2nd of December, DR. LUSHINGTON delivered judgment:— 1862. *December 2.*

Judgment.

The material facts of this case are clearly stated in the petition filed on behalf of the owners of the Wild Ranger. [His Lordship then read the petition.] The question therefore for the decision of the Court is this, whether the owners of a foreign ship, which has been found to blame by a British Court of Admiralty for a collision on the high seas with a British ship, are intitled by virtue of the 504th section of the Merchant Shipping Act, 1854, to be relieved from all responsibility in respect of such collision beyond the value of their ship and freight. This is a question of considerable importance, and it has been carefully and ably argued at the bar.

I propose, in the first instance, to state the effect of the decisions which have been cited to the Court. The general principles with reference to the operation of British statutes on foreigners out of British jurisdiction have been amply discussed on former occasions, and especially in the case of *Cope* v. *Doherty* (*a*), and I do not intend to go over that ground again. But as reference has been made to the case of the *Girolamo* (*b*), which was decided by Sir John Nicholl on the General Pilot Act, 6 Geo. IV. c. 125, I must observe, as I have done on former occasions (*c*), that from special considerations Pilotage Acts require an extensive operation, and therefore bear differently upon foreigners from other enactments, such, for instance, as those which limit the shipowner's liability. I must also repeat, what I have also said on a former occasion (*d*), that the judgment in the *Girolamo* was in great measure founded upon the mistaken notion that Lord Stowell, in the case of the *Neptune the Second* (*e*), had come to the conclusion that the statute of 52 Geo. III. c. 39, the 30th section of which exempted the owners of ships from liability for the default of licensed pilots, did not apply to foreign ships, whereas in truth, as I know from my own knowledge, for I was counsel in the cause, Lord Stowell gave his judgment in ignorance that the statute had passed. Sir John Nicholl's judgment in the *Girolamo* has now been in all important particulars overruled.

Girolamo.

I will now refer to the cases which approach more closely to the present case.

(*a*) 4 K. & J. 367.
(*b*) 3 Hag. 169.
(*c*) See ante, p. 308.
(*d*) See 1 W. R. 48.
(*e*) 1 Dodson, 467.

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Cope v. *Doherty.*

In *Cope* v. *Doherty* (*a*), where the judgment originally given by Vice-Chancellor Wood was confirmed by the Lords Justices of Appeal (*b*), it was decided that where a collision had taken place on the high seas between two foreign ships, the owner of the foreign ship which was to blame was not intitled to limited liability under the Merchant Shipping Act.

The General Iron Screw Collier Company v. *Schurmanns.*

In *The General Iron Screw Collier Company* v. *Schurmanns* (*c*), it was determined by the same learned Judge, Vice-Chancellor Wood, that where a collision had taken place between a British ship and a foreign ship within three miles from the British coast, the owner of the British ship was intitled to the benefit of the statute. It has not been decided, that if a collision takes place between a British ship and a foreign ship on the high seas at a greater distance than three miles from the British shore, the owner of the British ship can claim, as defendant, the benefit of the statute against the foreign plaintiff; nor is the present question, as to the right of the foreign shipowner as defendant in such circumstances, exactly covered by any previous decision.

Carl Johan.

The *Carl Johan* (*d*) is an authority of great importance on the present occasion. I have examined the original proceedings, and I find that a similar question to the present, but upon the statute of 53 Geo. III. c. 159, was distinctly brought under the consideration of Lord Stowell. In that case the Carl Johan, a Swedish ship, had been sued by the owners of a British ship for a collision, and had been released on bail being given in the sum of 1,500*l.* On the cause being heard, the Carl Johan was found solely to blame, and the usual decree passed condemning her owners and their bail in the damages. The amount of damages was then referred to the Registrar and Merchants, who reported the damages at 1,000*l.* To this report the owners of the Carl Johan objected by an act on petition, which set out the facts I have stated, and alleged that the amount of damages exceeded the value of the Carl Johan and her freight. It then alleged that the owners of the Carl Johan, by the 53 Geo. III. c. 159, were not liable beyond the value of their ship and freight. This allegation was directly denied by the plaintiffs in these words:—"The statute referred to has no legal application to the present cause, nor has any reference whatsoever to foreign ships and cargoes and the owners thereof." Lord Stowell held that the statute did not apply; and this decision, so far as it goes, is directly in

(*a*) 4 K. & J. 367.
(*b*) 2 De Gex & Jones, 614.
(*c*) 1 J. & H. 180.
(*d*) See 3 Hag. 186.

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point; but it was a decision upon a statute which, as Vice-Chancellor Wood has remarked, contains an express provision that it should not extend to any vessel not duly registered according to law (*a*). And, on the other hand, great stress has been laid upon the observations which Lord Stowell made in delivering judgment. The case is unfortunately not reported in its proper place, but is to be found quoted by Sir John Nicholl in the case of the *Girolamo* (*b*), upon the authority of the notes of Dr. Arnold, who was in general a very careful practitioner. These observations were as follow:—"That the new rule introduced by the 53rd Geo. III. was one of domestic policy, and, with reference to foreign vessels, only applied in cases where the advantages and disadvantages of such a rule were common to them and British vessels; that, if all states adopted the same rule, there would be no difficulty, but that no such general mutuality was alleged; that if the law of Sweden adopted such a rule, it would apply to both countries, but that Sweden could not claim the protection of the statute without affording a similar protection to British subjects in similar cases." Now these words certainly go a considerable length in supporting the claim which is now preferred by the defendants in this case for limited liability; but I do not think that, if the case had been fully reported, it would appear that Lord Stowell laid down that that British statute would have applied to Swedish vessels, if the Swedish law had granted limited liability to British vessels; and, at any rate, I cannot assent to any such doctrine.

Saxonia.

The decision of the Privy Council in the *Saxonia* (*c*) is also important. Their Lordships there held that a collision, which had taken place between a British ship and a foreign ship in the Solent, must be considered as having taken place on the high seas, 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; and they add, "This being so, it follows that the Merchant Shipping Act has no application to this case, as it has been fully determined that when a British and foreign ship meet on the high seas, the statute is not binding on either." It is true that this decision referred especially to the rules of navigation prescribed by the Merchant Shipping Act, and not to a question of limited liability; but still, as both these matters are treated of in the same Act, and as many of the expressions used are nearly identical, it is a decision to be borne in mind in the consideration of the present case.

(*a*) Sect. 5. (*b*) 3 Hag. 186. (*c*) Ante, p. 421

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Duchesse de Brabant.

I pass by the *Zollverein* (*a*), as it is a decision of my own, and because it was confirmed by the superior authority of the Judicial Committee in the *Saxonia*. I think it necessary, however, to explain the decision in the *Duchesse de Brabant* (*b*). The principle upon which I proceeded was this. When a ship is arrested, the owners have, according to the established practice of the Court, a right to have her released upon giving bail to the value of ship and freight; and it often happens that the release of a vessel is a matter of great urgency. In strictness, the proper mode of ascertaining the value of the ship is by an appraisement made by order of the Court; but this is a proceeding which requires some little time, and occasions some expense, and is therefore not often resorted to. In the case of the *Duchesse de Brabant*, bail having been given for a larger amount than the value of ship and freight, I was of opinion that it ought to be reduced to that sum at which it must have been fixed if an appraisement had taken place, and I made an order to that effect, being very desirous to facilitate the giving bail at the smallest expense and the least possible delay, without in any degree prejudicing the rights of any party. I expressly avoided putting any construction on the Merchant Shipping Act, as in my judgment the case turned upon the considerations I have stated.

Having thus briefly adverted to the cases which have been cited, I will now directly consider the main question. The Court has found that the Wild Ranger, an American vessel, by improper navigation came in collision on the high seas with a British ship; and the ordinary decree has passed condemning the owners of the American vessel in the damages. Under such circumstances, according to the ancient law, as stated by Lord Stowell in the case of the *Dundee* (*c*), the owners of the wrong-doing ship are responsible for all the damage occasioned. It is manifest therefore that the burden of showing that in this case that full responsibility is restricted, lies upon the defendants who assert the restriction. Accordingly they contend that by virtue of the provisions of the Merchant Shipping Act they are relieved from all responsibility beyond the value of their ship and freight; or, in other words, they say that the statute applies in terms to foreign ships: and they further say, that the American law is to the same effect, and that by reason thereof, on a principle of reciprocity, our Merchant Shipping Act should be held to apply.

(*a*) Swabey, 96. (*b*) Swabey, 264. (*c*) 1 Hag. 120.

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Now a judicial construction has been already put upon that part of the statute to which appeal is made, by the Court of Chancery in *Cope* v. *Doherty* (*a*); where, as I have before said, it was held that upon a collision taking place on the high seas between two foreign ships, the owner of the foreign ship found to blame was not intitled to the benefit of limited liability under the statute. The ground of that decision was, that the statute did not apply to foreign ships on the high seas. Now what difference can it make, in the construction of the statute, whether the foreign ship comes in collision with another foreign ship, as in *Cope* v. *Doherty*, or as here with a British ship? There is nothing whatsoever in the statute itself that permits, or even suggests, such a mutable construction. The statute applies to all foreign ships on the high seas, or it applies to none.

The construction of the statute is determined by *Cope* v. *Doherty*.

It is said that if in the present case the British ship had been found delinquent, her owners would have been intitled to limited liability under the statute. Vice-Chancellor Wood was not of that opinion, for he said, in *The General Iron Screw Collier Company* v. *Schurmanns* (*b*), "I adhere to the opinion which I expressed in *Cope* v. *Doherty* (*c*), that a foreign ship, meeting a British ship on the open ocean, cannot properly be abridged of her rights by any act of the British legislature." But however this may be, and I express no opinion upon it, it is enough for me to say that there is no authority for the construction of the statute now prayed for, and that against it is the judgment of Vice-Chancellor Wood, in *Cope* v. *Doherty*, affirmed by the Lords Justices. I concur in the conclusion of that judgment, and I concur also in the reasons on which it is founded, referring more particularly to the judgment given by Lord Justice Turner.

The argument of reciprocity considered. The American law is immaterial.

I have now only to notice, in a few words, the argument founded upon the doctrine of reciprocity. It is said that the United States have passed a law, whereby in cases of collision the owners of a British ship found delinquent are intitled to the benefit of limited liability; and it is argued that therefore this Court ought to accord in this case the like privilege to the American vessel. Now this is apparently a very equitable proposition,—to do as you have been done by. But consider what this Court is asked to do. By the ancient law this Court was bound to enforce liability to the extent of the injury. As to certain cases this law has been relaxed by statute, and a limited liability appointed. Now, if the statute empowers me to grant the present application for limited liability, well and

(*a*) 4 K. & J. 367; 2 De G. & J. 614.

(*b*) 1 J. & H. 193.

(*c*) 4 K. & J. 379.

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good: but if not, by what authority can I grant it? The statute has been held not to apply to the owners of foreign ships on the high seas, and surely I cannot put a different construction upon it, and declare it applicable to a shipowner belonging to a particular foreign state, when sued by a British shipowner, simply because that foreign state has by its own laws ordained limited liability for shipowners. The statute does not authorize me, and, except as authorized by the legitimate construction of the statute, I cannot alter the ancient law of the Court and declare a limited liability. This is no case for my discretion. It is a case of positive law, modified by statute. It is therefore immaterial that the American law would give a British shipowner limited liability if placed in similar circumstances in an American Court. I have assumed the American law to be as argued by the defendants, but I must not be understood to have declared an opinion that such a law has been satisfactorily proved in this case.

Defendants' prayer refused, with costs.

For the reasons I have stated, I am under the necessity of refusing the present application of the defendants, with costs.

Thomas and *Capes*, proctors for the owners of the Wild Ranger.

Rothery, proctor for owners of the Coleroon.

Clarkson and *Son* for the owners of cargo.

THE ATLANTIC.

Master's Wages—Forfeiture of Wages.

The master of a ship does not forfeit his wages by occasional drunkenness; nor by mere errors of judgment in the performance of his duty.

THIS was a cause instituted on behalf of Isabella Brock, widow and executrix of John Brock, master mariner, deceased, to recover 30*l.* 6*s.*, the wages due for his services as master of the British barque Atlantic, from the 30th of September, 1861, to the 8th of January, 1862. The petition stated the facts relative to the services, and that application to obtain a settlement of the claim had been made to two magistrates sitting in the Thames Police Court, who had declined to adjudicate it.

The defendant, the owner of the vessel, alleged in his answer that the master, whilst in charge of the vessel, had been frequently

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in a state of intoxication, and had neglected his duties; that, on the 4th of December, 1861, the barque, being at Dantzig, laden and ready for sea, and with a fair wind blowing for her homeward voyage, was detained there three days entirely through the intemperance and misconduct of the master, whereby the voyage was protracted at least one month, at a loss to the defendant of 200*l.* It also alleged that the master had come by his death by being upset out of a boat when intoxicated, on which occasion the boat was lost, and the defendant incurred a loss of 23*l.*

These charges were only partly proved, as appears in the judgment below.

Tristram, for the plaintiff, referred to the *Camilla* (*a*).

Clarkson for the defendant.

Judgment.

Dr. Lushington, in the course of his judgment, said:—I am of opinion that the charge of occasional drunkenness is proved against the master. Occasional intoxication however, whether on the part of a seaman or master, does not work forfeiture of wages; though constant drunkenness may, and a non-performance of duty in consequence. In the present case I cannot pronounce that the master forfeited his wages by drunkenness.

A master does not forfeit his wages by occasional intoxication,

The charge that the master solely in consequence of his own intoxication detained the vessel at Dantzig, would, if fully proved, have been a very serious charge: but it is not proved. The utmost extent the evidence enables me to go is, that there was error of judgment on the master's part in not leaving the port of Dantzig as soon as he might have done. An error of judgment of this kind cannot, as I said in the *Camilla* (*a*), work a forfeiture of wages.

nor by mere error of judgment.

As to the last charge, the evidence shows that the master was to some degree intoxicated when he met his death, but it is not proved that it was in consequence of his intoxication that the boat was lost.

Looking to all the circumstances, I think it is my duty to hold that no case of forfeiture has been made out. I pronounce therefore for the plaintiff's claim, with costs.

Brooks and *Dubois,* proctors for the plaintiff.

Young, solicitor for the defendant.

(*a*) Swabey, 312.

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THE BLACK PRINCE.

Collision—Measure of Damages—Demurrage—Costs of Appeal from Registrar's Report.

The true measure of the length of demurrage caused by a collision is the length of time which, by reason of the collision, the vessel has been thrown out of her usual employment.

The plaintiff's vessel was one of a line of steamers belonging to different owners, which took turns for sailing at fixed intervals: in the ordinary course of business each vessel on returning home was a certain time idle in port. By reason of a collision with the defendant's vessel (for which the defendant had been found to blame) the plaintiff's vessel was obliged to undergo repairs, and lost her turn, which was taken by another steamer on the line: the plaintiff's vessel, as soon as repaired, took the next turn:

Held, that the measure of demurrage was not the length of time the plaintiff's vessel was undergoing repairs, nor the difference between the usual time of her being in port, and the actual time she was in port, but the number of days she was detained beyond the date on which, but for the collision, she would have sailed in her regular turn.

The costs of an appeal from a report of the Registrar follow the result, and do not depend upon the proportion of the plaintiff's original claim which is finally disallowed.

THIS was an appeal to the Court to vary a report made by the Registrar and Merchants.

A cause had been instituted by the plaintiffs, the owners of the steam-ship Araxes, against the owners of the Black Prince, for a collision which had taken place on the 18th day of November, 1860, between the Black Prince and the Araxes, when the latter was on an outward voyage. On the 16th day of April, 1861, the damage was pronounced for by the decree of the Court, and referred to the Registrar and Merchants.

The case arose out of the following facts:—

The Araxes was one of five vessels, forming a line of steamers plying between the port of Liverpool and the Mediterranean, the line itself being held conjointly by the firm of the plaintiffs and two other firms, but each of the vessels having a different set of owners. The following list represents the order in which

the five steamers were intitled to despatch under an arrangement made by the three firms. 1862. *December* 9.

1.	Sept. 29, 1860	Orontes.
2.	Oct. 20, „	Arcadia.
3.	Oct. 31, „	Araxes.
4.	Nov. 13, „	Atlantic.
5.	Nov. 27, „	Pactolus.

This order was actually observed.

The succeeding turns of the steamers were to have been as follow :—

1.	1860. Dec. 10	Orontes.
2.	„ Dec. 28	Arcadia.
3.	1861. Jan. 16	Araxes.
4.	„ Jan. 29	Atlantic.
5.	„ Feb. 13	Pactolus.

This arrangement was kept so far as that on each of the days fixed one of the steamers did start, but the order was changed; the Araxes took the 5th instead of the 3rd turn, the Atlantic and Pactolus taking respectively the 3rd and 4th. This change took place owing to the collision of the Araxes with the Black Prince. The Araxes had duly sailed on October 31, 1860, but on the 18th of November, whilst between Lisbon and Cape St. Vincent, she came into collision with the Black Prince; on the same day she put into Gibraltar, and was there temporarily, though very solidly, repaired. The repairs occupied ten days, viz., from November 10 to November 20; coaling and discharging occupied an additional day, and on November 21 the Araxes left Gibraltar to pursue her voyage. On the 6th day of January she returned to Liverpool, discharged cargo, and on the 12th day of January, the final repairs which were necessary were commenced. The use of the graving-dock was engaged for her for one neap or twenty-four tides, from January 14 to January 25, a period which was thought at that time sufficient for the completion of the repairs. The event however proved otherwise: and the plaintiffs were therefore obliged, by the rules of the Mersey Docks and Harbour Board, to engage the graving-dock for another full neap, and also to pay dock dues for the second neap incurred by another vessel, called the Voyageur de la Mer, which was ready to go out at the end of the first neap, but was prevented doing so, because she lay inside the Araxes. The Araxes was not ready for loading till February 9, and she finally cleared February 13, the day when the Pactolus had been timed to sail. In the mean-

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time, as before said, the Atlantic had taken the turn of the Araxes on January 16, and the Pactolus that of the Atlantic on January 29.

The above lists show that the ordinary interval between the day when the Araxes sailed from Liverpool and the day when she should sail again (as, e. g., between October 31, 1860, and January 16, 1861,) was seventy-eight days. These seventy-eight days, it appeared from the evidence, were usually thus spent:—

Voyage out and back		42 days.
In Liverpool:		
Discharging . . .	3	
Loading . . .	7	
Unemployed . . .	26	
		36
		78 days.

On the present occasion the interval between the 31st of October, 1860, when the Araxes sailed from Liverpool, and the 13th of February, when she actually sailed again, amounted to 106 days, or 28 days beyond the usual period of 78 days. These 106 days were thus occupied:—

From Liverpool (from Oct. 31, 1860, to Jan. 6, 1861,)		
On the voyage	58 days.	
Detention at Gibraltar, Nov. 10 to 20 .	10	
		68 days.
In Liverpool (from Jan. 6, 1861, to Feb. 13, 1861,)		
Discharging, &c. Jan. 6 to 12 . .	6 days.	
In dock, Jan. 12 to Feb. 9 . .	28	
Loading, Feb. 9 to 13 . . .	4	
		38
		106 days.

The plaintiffs claimed, at the reference before the Registrar and Merchants, the costs of the repairs, and demurrage at the rate of 30*l.* per diem for thirty-eight days, namely, for ten days at Gibraltar, and twenty-eight days at Liverpool; the total amount being 1,749*l.* 1*s.* 5*d.*

The Registrar, by his report, allowed the plaintiffs in all the sum of 910*l.* 8*s.* 4*d.* The schedule to the report gave the items

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in detail as claimed and allowed; but it is necessary to state only the following:—

	Claimed.			Allowed.		
	£	s.	d.	£	s.	d.
2. Messrs. Forrester & Co., repairing stem	280	10	2	234	5	5
8. Paid the Mersey Docks and Harbour Board, for graving-dock dues	44	0	0	22	0	0
13. Demurrage of vessel whilst at Gibraltar, Nov. 10 to Nov. 21, 1860, 10 days at 30*l.* per day	300	0	0	200	0	0
14. Ditto at Liverpool, Jan. 12 to Feb. 9, 1861, 28 days at 30*l.* per day	840	0	0	180	0	0

The Registrar stated the following reasons for the allowance made by himself and the Merchants on items Nos. 13 and 14 of the plaintiffs' claim:—

"As regards the detention at Gibraltar, we thought no time had been lost at that place in effecting the temporary repairs, and accordingly we allowed the full period claimed, namely, ten days: we considered however that 30*l.* a day was too much to claim, and that 20*l.* a day would be a sufficient remuneration to the owners.

"As to the demurrage to be allowed at Liverpool, it was admitted at the reference that the stay of the vessel at Liverpool on each voyage was from twenty to thirty days discharging and taking in cargo and doing necessary repairs, and that on the voyage when the substantial repairs were effected, her stay at Liverpool was thirty-nine days. It was admitted also that the vessel had received certain injuries to her rudder, not occasioned by the collision, for which it was necessary that she should go into dock. It was further admitted that, even had the collision not occurred, she would on this voyage have been painted by her owners. It appeared to the Merchants and myself, on a review of all the facts of the case, that twelve days would have been sufficient to repair all the injuries occasioned by the collision, and we consequently allowed demurrage for that period. It was on this ground that we took off the 31*l.* charged on the shipwright's account for the graving-dock dues of a vessel called the Voyageur de la Mer, for if the repairs had been completed in twelve days the Araxes would have remained only one neap instead of two neaps in the dock.

"As to the rate of demurrage to be allowed during the detention at Liverpool, we were of opinion that the owners either did

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discharge or might have discharged the greater part of the crew, although we admitted that they probably would retain the officers and engineers during the repairs. Had they discharged the whole of the crew, officers, engineers and all, we should have allowed only 10*l.* a day, half the demurrage of a vessel with a full crew. Admitting, however, that the officers and engineers were retained in her service during the repairs, we thought that 15*l.* a day would be a proper sum to allow, so that the demurrage for twelve days would amount to the sum of 180*l.*"

In objection to this report the plaintiffs presented their petition, objecting to the disallowance of several items, and brought in a number of fresh affidavits supporting their claim. It is not necessary to specify the contents of these, beyond stating that they went much more fully into the case than the original evidence before the Registrar, that several of the affidavits stated the opinion of the deponents, steam-shipowners, that 30*l.* was a fair rate of demurrage for the Araxes, and that one of the affidavits corrected a mistake of the Registrar's report as to certain admissions supposed by him to have been made by the plaintiff's proctor at the reference.

July 29. *Brett*, Q.C., and *Lushington*, for the plaintiffs.

Deane, Q.C., for the defendants.

On the 9th of December DR. LUSHINGTON gave judgment:—

Judgment. The presumption in cases like the present is, as I have frequently had occasion to say, always in favour of the report of the Registrar and Merchants, on account of their special knowledge of mercantile affairs, particularly as to the usual gains made by ships, the losses arising from detention, and the amount of expenses necessary to be incurred in making good damage received. Still a right of appeal exists to this Court, and my duty is to pass an independent judgment upon the case submitted to me. There is another consideration not to be lost sight of. According to the practice of this Court fresh evidence may be brought upon appeal, and consequently the Court may have to pronounce judgment upon a case different, perhaps materially so, from that before the Registrar and Merchants. This practice has its advantages and disadvantages. The proceedings before the Registrar and Merchants are summary, not bound by the strict rules of evidence, but in the majority of cases they lead to conclusions satisfactory to the suitors. The advantage of appeal is, that where *per incuriam* or from the hurry of business any question may have been imperfectly considered, or not made sufficiently clear by evidence, a rehearing before the Court, with

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fresh evidence, may correct the results of the original inquiry. The disadvantage is that when fresh evidence is adduced, the Court is giving its opinion upon a new case, unassisted by a previous investigation. In the present instance some of the facts brought out by the evidence adduced in support of the petition were unknown to the Registrar and Merchants, and are of material importance.

The rule upon which compensation shall be assessed has long been settled,—it is restitutio in integrum. Here there are two grounds for which the plaintiffs demand compensation,—demurrage and expenses for repairs.

As to the demurrage.

Demurrage is the chief matter at issue; the amount will depend upon two points:—1. The number of days for which demurrage is payable. 2. The rate per diem of the demurrage.

As to the number of days. There is no dispute as to the time the Araxes was detained at Gibraltar. It is admitted that she was detained there ten days. As to Liverpool it is otherwise. Not indeed that the defendants dispute the fact of the Araxes having undergone repairs at Liverpool from January 12 to February 9, but they deny that the whole of this time was occupied, or ought to have been occupied, by repairs made necessary by the collision. They allege that so long a delay is, in part, to be attributed to other causes; viz., to repairs for other damages than those arising from the collision, and to want of due diligence. I think, however, the evidence conclusively establishes that these allegations are unfounded, and that the whole of the time was necessarily occupied in making good the damages occasioned by the collision.

Plaintiffs' argument.

But besides the dispute as to these facts, the parties are at issue as to the mode of calculating the period for which demurrage is payable. The plaintiffs in effect contend as follows:—The true principle is, that we should be paid for every day during which our ship lay disabled, owing to the collision. It is true that, according to the usual arrangement, if there had been no collision, a short period would have elapsed after the return of the Araxes, and before she started on a fresh voyage, during which she would have lain idle at Liverpool; but that arrangement was a mere matter of our own convenience, for the purpose of securing in all emergencies a sufficient supply of packets for the line; it should not prejudice us in our claim against others for compensation. For during that period, if there had been no

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collision, the Araxes would have been ready at least for employment for any purpose, and *non constat* that she would not have been employed. The Araxes was really disabled thirty-eight days; viz.—

In Gibraltar, Nov. 10 to 20 . .	10 days
In Liverpool, Jan. 12 to Feb. 9 . .	28
	38 days;

and therefore we are intitled to demurrage for thirty-eight days.

Defendants' argument.

The defendants adopt a different measure of demurrage; viz., the number of days the Araxes was thrown out of her usual employment. They do not deny that she started twenty-eight days later than she had been appointed to start, or that for ten of those days—the ten days spent at Gibraltar—demurrage should be paid; but they deny that the remaining eighteen days should be the subject of demurrage at Liverpool. For, they say, the period the Araxes stayed at Liverpool was only two days longer than usual; was thirty-eight days instead of thirty-six; and the fact that during twenty-eight of those days she was disabled and undergoing repairs occasioned by the collision, affects only in a very small degree the amount of compensation; for if there had been no collision, still the Araxes would have lain idle for twenty-six days. The delay of twenty-eight days in starting is to be accounted for mainly by the extraordinary duration of her voyage, which occupied fifty-eight days instead of forty-two, the usual number; and the duration of the voyage has not been shown to have been occasioned by the collision, and therefore the defendants are not answerable for the consequences. Moreover, the plaintiffs were not injured by the Araxes not sailing on the day fixed; because the Atlantic, one of the vessels which were regularly employed on the same line to Alexandria, took her place, and the place of the Atlantic was in turn supplied by the Pactolus, and that of the Pactolus by the Araxes. On the whole the defendants submit that they ought to pay demurrage only for ten days at Gibraltar and for two at Liverpool, in all for twelve days.

The true measure of demurrage is the length of time the vessel has been thrown out of her usual employment.

I am of opinion that the principle contended for by the plaintiffs is erroneous. The damage must be compensation for those gains which in the ordinary course of the employment of the ship would have been made, and which, under the actual circumstances, have been lost; they must not be assessed according to the extreme standard of mere possibility, by the supposition of facts not ordinarily occurring. No claim therefore can be sus-

tained for demurrage for time during which the Araxes, according to the ordinary course, would have lain idle and unemployed. 1862. *December 9.*

The right principle is that put forward by the defendants; viz., to calculate the number of days the Araxes was thrown out of her usual employment. But the defendants apply this principle erroneously. And their error consists in this, that in order to fix what is to be taken as the usual course of the Araxes, which she was prevented by the collision from following, they look to the number of days she usually stayed at Liverpool, instead of to the day when she was appointed to sail again. The latter of course is the true standard. According to this she clearly lost twenty-eight days; for supposing that there had been no collision, but that it was from other circumstances that her voyage had been protracted to fifty-eight days, still the Araxes would have reached Liverpool on December 27th; and between December 27 and January 16, when she was appointed to sail again, are twenty-one days; and discharging and loading could have been done in ten of those days, or, as the evidence shows, even in less time; so if there had been no repairs to be done, the Araxes might, in spite of her long voyage, have nevertheless been got ready to meet her engagement on January 16. It is true that by custom she usually lay idle twenty-six days at Liverpool; but that, as the plaintiffs have shown, was clearly not necessary, was only a matter of convenience, and might, under such circumstances as I have supposed, have been dispensed with. It follows from what I have said, that even if the unusual length of the voyage was not the result of the collision, yet it was not the length of the voyage, but the delay for the repairs caused by the collision, that prevented the Araxes from fulfilling her engagement. Nor do I think that the plaintiffs are precluded from the right of compensation, because the Atlantic took the place of the Araxes, for the Atlantic and Araxes belong in part at least to different owners.

The defendants therefore must pay demurrage for the number of days the Araxes lost by the collision. This is clearly twenty-eight; she started twenty-eight days behind time, viz., on February 13 instead of January 16. In other words, whereas under ordinary circumstances between October 31, 1860, and February 13, 1861, she would have made one whole voyage and twenty-eight days towards a second voyage; under the actual circumstances, owing to the collision, she did no more than complete a single voyage. She is accordingly intitled to receive

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from the defendants demurrage for twenty-eight days, and this will be full demurrage. In the view I have taken of this matter no question arises whether a reduction in the rate of demurrage allowed for Gibraltar should be made in estimating the demurrage for the time at Liverpool. For I take a combined view of the demurrage at Gibraltar and of that at Liverpool. In the whole the Araxes lost twenty-eight days.

As to the rate of demurrage.

As to the rate of demurrage. In order to fix this some estimate must be formed of the value of the ship. I think it is clearly proved that the value of the Araxes was 25,000*l.* or thereabouts. She had cost, when fitted for sea in 1856, rather over 30,000*l.*, and the presumption is she was kept in fair repair. I think, therefore, that at the expiration of five years, 5,000*l.* was a fair deduction to make from her original value. I shall allow demurrage at the rate of 25*l.* per diem; this will be tantamount to interest rather exceeding 36*l.* per cent. per annum upon the value of the ship, assuming that value to be 25,000*l.* Demurrage at this rate for twenty-eight days would make an aggregate of 700*l.*

Repairs.

There remain to be noticed the minor questions as to the amount to be allowed for repairs. Now these repairs, it is important to recollect, were done immediately on the return of the vessel to Liverpool, at a time when however confident the plaintiffs might be in the merits of their own case in the suit commenced against the Black Prince, it had not been determined upon whom the liability of the repairs would ultimately fall. It was at this time that the item I now notice, the charge for repairs by Messrs. Forrester, was incurred; the bill was paid, and is sworn to be correct, and there is no contradictory evidence. I must allow the full amount. I shall do the same as to the graving-dock dues, as I am satisfied that the expense was necessary, and occasioned by the collision. I think that in this respect the Registrar and Merchants were misled by the unfounded statements made on behalf of the defendants as to the painting of the ship, and the repairs to the rudder.

I shall make no further alteration.

As to costs. The plaintiffs have succeeded in altering the report by an appeal, but on the appeal they produced fresh evidence; I will therefore, if the defendants insist upon it,

reserve the question of costs. But I think the defendants will only be the losers by such a course. 1862. *December 9.*

On a subsequent day, *Deane*, Q.C., moved for an order as to costs.—As to the original reference, the plaintiffs ought to pay the costs, because they brought forward an excessive claim, and did not produce sufficient evidence to establish that claim which the Court has since pronounced them intitled to; *Matchless* (*a*). As to subsequent proceedings, in result more than one-fourth has been struck off the total of the plaintiffs' original claim, and therefore, by the ordinary rule, each party ought to pay his own costs.

Brett, Q.C., and *Lushington*, contra.

Dr. Lushington:—At the original reference both parties were in the wrong, and therefore each party must bear his own costs. As to the subsequent costs, the plaintiffs have been substantially successful in their appeal, and they are intitled to their costs. The rule that each party pays his own costs, when more than one-fourth and less than one-third has been struck off the plaintiffs' claim at the reference, does not apply to the case where the Registrar's report has been appealed from and overruled. The defendants must pay all the costs subsequent to the first reference, including the costs of this application. Judgment.

Pritchard and *Son*, proctors for the plaintiffs.

Deacon and *Son*, proctors for the defendants.

(*a*) 10 Jur. 1017.

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THE SALACIA.

Bottomry Bond on chartered Ship and Freight—Advances of Charterers—Sale of Charterers' Goods by Master—Amount of Freight payable by Charterers.

A ship was chartered to go to a port of loading, there to load and return: freight payable, as per tale. On the voyage out, the master hypothecated the ship and the cargo to be shipped, and the freight as per charter. Subsequently, at the port of loading, advances for ship's expenses were made to the master by the charterers' agent, with notice of the bond; and on the voyage home the master sold part of the charterers' goods to pay other expenses of the ship:

Held, that in computing the amount of freight to be paid into Court by the charterers, to answer the bond,

1st. The charterers might deduct advances made abroad by their agent according to the charter, and by the charter to be deducted on settlement of the freight.

2ndly. That they should not be required to pay the sum which would have been payable as freight upon the goods sold, had the goods arrived.

3rdly. That the charterers should not deduct from the freight, as per tale, advances by their agent, which were not authorized by the charter to be made and deducted.

4thly. That they should not deduct the value of their goods sold by the master.

THIS cause was instituted by A. Castellain and L. Gruning, to enforce a bottomry bond, of which they were the legal holders, upon the Salacia, her cargo and freight.

Messrs. Frühling & Göschen, the consignees of the cargo, and also charterers of the ship, upon a monition calling upon them to bring the freight into the Registry, or to show cause why they should not do so, filed a petition, declaring that under the circumstances no freight was due.

It appeared that on the 2nd of May, 1860, the Salacia, being then on a voyage from the Tyne to Suez, was chartered by her owner to Messrs. Frühling & Göschen. The terms were, that the vessel, after discharging her outward cargo at Suez, should proceed to Amherst for orders to load at Moulmein or Rangoon, there to take on board a full cargo of teak, and proceed therewith to Cork or Falmouth for orders to a port of discharge in the United Kingdom, and should deliver the same on being paid freight as follows; viz., "at and after the rate of 72 shillings and sixpence per load of 50 cubic feet, customs calliper measure, for all timber and planks of 23 feet in length and upwards; two-thirds of said rate for all timber or planks of 18 and under

1862. December 23.

23 feet in length, and half of the said rate for all under, shipped for broken stowage."—"The freight to become due and to be paid as follows; viz., on unloading and right delivery of the cargo, one-third in cash, and the remainder by approved bill on London at three months' date from final delivery, or cash, less discount at the rate of 5 per cent. per annum."—"Charterers' agents to advance the master what money he requires for the *necessary ordinary disbursements* of the ship at Moulmein or Rangoon, at current rate of exchange (for the due appropriation of which they shall not be held responsible); the amount to be deducted on settlement thereof, together with interest and the cost of insurance."

On February 11th, 1861, whilst the vessel was at Suez, the master found it necessary to borrow money for ship's expenses; and Mr. Vincent Marcopoly advanced 350*l.*, and took the bottomry bond, now in the hands of the plaintiffs, whereby the sum 650*l.* was to be repaid on the termination of the homeward voyage, secured upon the Salacia, her cargo which was to be shipped in the East Indies, and also "the freight thereon to the United Kingdom or continent, which shall become due for the aforesaid (as per charter-party signed by Messrs. Frühling & Göschen, of London, merchants, dated London, 2nd of May last)."

The vessel proceeded to Amherst for orders, and thence to Moulmein to load teak home. At Moulmein the charterers' agents, having (or at least for the purpose of this case having) full notice of the bottomry bond, advanced to the master, for ship's expenses, sums amounting to 926*l.* 11*s.* 6*d.*, and paid 117*l.* 1*s.* 7*d.* as premium for insurance thereof. On arriving at the Cape of Good Hope, in the course of the voyage home, the master sold a portion of the cargo belonging to the charterers, and applied the proceeds to pay ship's repairs.

On arrival in England the full freight (*a*) amounted to 1,262*l.* 13*s.* 8*d.* The charterers now claimed to deduct therefrom,—1st, the advances made by their agent, whether made for necessary ordinary or for extraordinary disbursements of the ship, and the insurance premium for the same; 2ndly, the value (or proceeds) of the goods sold.

If these deductions were allowed, not only would no freight be payable, but a balance would be due from the owner of the vessel to the charterers.

(*a*) Probably the full freight for the goods actually delivered.

1862. *December 23.* There was some dispute as to the facts, and it was agreed between the parties that the opinion of the Court should first be taken whether by law the charterers were intitled, as against the plaintiffs, to make such deductions as aforesaid.

November 25. *Deane*, Q.C., for the charterers.—Any sums which were advanced "for the ship's necessary ordinary disbursements" are clearly to be allowed, for by the charter they are to be deductions from the freight; *Catharine* (*a*); *John* (*b*). But I also contend that any other sums advanced by the charterers' agents for the ship's necessary expenses—extraordinary if you will—if so, so much the more necessary—are to be considered advances on security of freight, and ought now to be allowed as deductions from freight. But for such advances, the master would have been obliged to raise money by a second bottomry bond, to the injury of all persons concerned, the present bondholders, the charterers, and the shipowner: to prevent this, the charterers advanced money; and so advanced, I say, upon the security of the freight. The *Constantia Harlessen* (*c*) is an authority for this position. In that case the master of a vessel had written to the consignees of the cargo, stating that a general average had been occasioned by damage at sea, which would reduce him to the necessity of taking up monies on bottomry to enable him to proceed on the voyage. The consignees accordingly advanced him the necessary money, and when it turned out that no general average had been sustained, Lord Stowell held that it was to be taken as an advance of freight, and allowed it to be deducted from the freight, as against the Crown, who by capture had succeeded to the rights of the shipowner.

As to the remaining point, the charterers are intitled to deduct from the freight the value of their goods sold by the master. In *Smith's Mercantile Law* (*d*) it is said, if the master sells part of the cargo, "the merchant, on the ship's safe arrival at the place of destination, will have a right to receive what the goods would have fetched if brought thither, or may elect to take the sum they actually sold for, and may in that case, if he please, deduct it from the freight." The bondholder is not in a better position than the shipowner, from whom he derives his right; nor ought the charterers to be prejudiced by the bond.

Cohen for the bondholders.—I do not dispute the right to deduct the advances for the ship's "necessary ordinary disburse-

(*a*) Swabey, 263.
(*b*) 3 W. R. 170.
(*c*) Edwards, 232.
(*d*) 5th edition, 305.

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ments," as such were provided for by the charter: that point was determined in the *Standard* (*a*). But I submit that any other advances, as for extraordinary expenses, are not to be allowed as deductions from freight, but are to be treated as a mere loan. All such advances were outside the contract of the charter, and were voluntary only; and they were not made with any authority from the shipowner that they should be made as advances on freight. The authority of the master to accept advances from the charterer on freight is limited by the charter-party. The cases cited, the *John* and the *Catharine*, as also the *Standard*, are really in my favour, as showing that, to constitute deductions from freight, the advances must be advances on freight according to positive stipulations in the charter-party. The question here is, what is freight? which must be determined by reference to the charter only.

The same rule will show that the value of the goods sold cannot be deducted from the freight, however good a debt it may create as between the charterers and the shipowner. The owners of cargo so sold by the master have no lien upon the ship; *La Constancia* (*b*); *North Star* (*c*); nor have owners of cargo any lien on freight as against a bondholder; *Lord Cochrane* (*d*). So damage to goods delivered, although occasioned by the default of the master and crew, is no answer to a demand for freight, but is only subject of a cross-action for damages; *Maclachlan on Shipping* (*e*).

Deane replied.

Cur. ad. vult.

December 23.

On the 23rd of December, Dr. Lushington gave judgment.

Judgment.

[After stating the facts of the case as above.] There are three questions for decision. The first relates to so much of the advances as were made for the "necessary ordinary disbursements" of the ship. Such advances were, by the terms of the charter-party, authorized not only to be made, but to be deducted on settlement of freight; and the bond made afterwards, without the knowledge of the charterers, cannot prejudice the charterers' anterior rights. This deduction therefore must be allowed. The point, indeed, has been already determined; *Standard* (*a*).

Advances authorized by the charter to be made and deducted from the freight, may be deducted;

(*a*) Swabey, 267.
(*b*) 2 W. R. 487.
(*c*) Ante, p. 45.
(*d*) 1 W. R. 315.
(*e*) Page 397.

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but not any other advances.

The second question relates to so much of the advances as were made by the charterers' agent *expressly* for extraordinary disbursements of the ship. I say expressly, for by the charter-party the charterers were not to be responsible for the appropriation of sums advanced for necessary disbursements. Now an advance for extraordinary disbursements was not authorized in any way by the charter-party, and was therefore not an advance of freight, which can only be in virtue of stipulation in the charter-party, but was a mere loan. The difference is important. An advance of freight is an insurable interest, because the liability of the shipowner to repay it is dependent upon the same contingencies as the shipowner's claim to freight itself. A loan, on the other hand, is not freight, is not an insurable interest, for whatever happens to the ship, the loan may be recovered by action against the shipowner. The difference is well shown in *Manfield* v. *Maitland* (*a*). That was an action against underwriters for an advance which had been insured; and it appeared that the charter-party authorized an advance to be made, but was silent as to whether it should be allowed as a deduction on settlement of freight. In consequence of the absence of the latter provision, the Court held that the advance was not an insurable interest. Accordingly, so much of the advance as was made by the charterers' agent for extraordinary disbursements of the ship cannot be allowed.

The value of the goods sold by the master cannot be deducted from freight;

As to the third question. The charterers cannot be allowed to deduct the value of their goods sold at the Cape. Such loss might properly be made the subject of a personal action against the shipowner; but could not be used to reduce the amount of freight for which the shipowner had his lien, which amount is strictly to be determined by the charter-party. In *Campbell* v. *Thompson* (*b*) this point seems, indeed, to have been otherwise decided; but that appears to be a solitary case, contrary to the uniform tenor of a long series of decisions.

but in respect of the goods so sold, no freight is payable by the charterers.

But the charterers, though they cannot be allowed to deduct the value of the goods sold, cannot be compelled to pay the sum which would have been payable by them as freight for the same, had the goods been actually delivered at the port of destination.

Deacon and *Son*, proctors for the charterers.

Pritchard and *Son* for the bondholders.

(*a*) 4 B. & A. 582. (*b*) 1 Starkie, 490.

1862.
Deeember 13.

THE CRUS. V.

Salvage—Duty of Vice-Consul—Corrupt Agreement.

A Portuguese vessel came on shore at Dungeness. The master, not being able to speak English, accepted the services of the district agent of the Portuguese Vice-Consul, who entered into an agreement for the assistance of a steam-tug, for the sum of 600*l.*, on the condition that 50*l.* should be returned. The steamer got the vessel off, and brought her into a place of safety. On the ship being sued in the Admiralty Court, the owners disputed the agreement, and tendered 250*l.* The Court set aside the agreement as corrupt, and pronounced for the tender.

THIS was a cause of salvage. The circumstances material to this report are stated in the judgment.

Deane, Q.C., and *Raymond*, for the plaintiffs.

Serjeant *Shee* and *Clarkson* for the defendants.

Judgment.

DR. LUSHINGTON:—This is a proceeding on the part of the owners, master and crew of the steam-tug Uncle Sam to recover for salvage services rendered to the Portuguese barque the Crus. V., and her cargo; and the plaintiffs rely upon an agreement, whereby they allege they are intitled to the sum of 600*l.* The defendants, on the other hand, allege that the agreement was inequitable, and under the circumstances is not binding; and they have tendered 250*l.* It is necessary for me therefore to advert, with some minuteness, to the circumstances of the case.

The Crus. V. was a Portuguese vessel, bound from Altona for Oporto, and from some cause—there is no evidence to show how—she came on shore in the East Bay of Dungeness, between the night of the 21st and the morning of the 22nd of September. The master was a Portuguese, and, according to the evidence, was utterly incapable of expressing anything in the English language, knowing the Portuguese only. It appears that somehow or other information was speedily given to the gentleman acting for Messrs. Hodges & Co., of Ramsgate, as their district agent in Dungeness, Mr. Hodges being the Portuguese vice-consul. Information was also sent to the person who acted as Messrs. Hodges' managing clerk at Dover. These two gentlemen repair, and very properly, to the assistance of this Portu-

1862. *December* 13.

guese vessel; for I apprehend it to be one of the duties of the Portuguese vice-consul, and of those who act under him, to afford all the assistance in their power to any Portuguese vessel which gets in jeopardy on their coast They come, and some conversation takes place between the managing clerk, who could speak the Portuguese language, and Sampaio, the master of the barque, who could not express himself in English; and the result is clear, that Sampaio accepted the services of the district agent and representative of the Portuguese vice-consul. In these circumstances, these gentlemen, I admit, were proper persons to make a salvage agreement binding upon the Portuguese owners. Undoubtedly the person who has the whole authority over a vessel is the master, but when he cannot act, from not knowing enough of the requisite language, and applies to the vice-consul of the flag to which he belongs, or to his agents, I am prepared to say that any agreement made by them for the benefit of the owners, if it is a just and equitable agreement, ought to be upheld. But I also say that it is the duty of such persons, upon accepting the duty as agents, to look to the interests they represent, and be careful that full justice shall be done to the master and owners. What took place? The ship was fast aground, and had suffered considerable damage. It was right to try to take her off the ground and get her to a place of safety; and no doubt the proper means was to obtain the assistance of a steam-tug. A negotiation took place between the master of the steam-tug Uncle Sam and the gentlemen acting for Messrs. Hodges & Co.; and the following agreement, it appears, was entered into in writing: "Memorandum of agreement made and entered into on the 22nd day of September, 1862, between William Bennett, of Blackwall, captain of the steam-tug Uncle Sam, of London, on the one part, and Edward Hodges & Co., agents for the Portuguese barque Crus. V., on the other part. The said William Bennett agrees to take the Portuguese barque off the shore for the sum of 600*l.*, and the said William Bennett agrees to give back 50*l.*" The account given of the transaction by the plaintiffs in their petition is that, after various attempts had been made to arrange with the master of the tug for 400*l.*, and then 500*l.*, and so on, the sum of 600*l.* was mentioned, and the managing clerk said that he would give that sum, if on the money being paid, 50*l.* was returned. Now, is this agreement one that this Court can support? I do not now speak of the amount compared with the value I myself put upon the services required, but I look to this, whether persons, such as these representing Messrs. Hodges & Co., who are to protect the master's interest,

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December 13.

when they are bargaining for the sum they are to pay for salvage services, may make an agreement, not for the amount, which according to their own statement it ought to be, 550*l.*, but for 600*l.*, out of which they bargain to put into their own pockets 40*l.*, for by a subsequent arrangement 10*l.* was to be taken by the master of the tug. It is impossible that this agreement can be supported by the Court: it is a corrupt agreement.

[The learned Judge then examined the circumstances of the service; and finally pronounced for the tender, with costs.]

Deacon, proctor for the plaintiffs.

Clarkson and *Son* for the defendants.

1861.
May 8.

[BEFORE THE REGISTRAR OF THE HIGH COURT OF ADMIRALTY.]

THE CANADA.

Collision—Total Loss—Measure of Loss of Freight.

Where ship and cargo are totally lost in a collision, the measure of the loss of freight is the gross freight contracted for at the time of the accident, less the charges which would have been necessarily incurred in earning it, and which were saved to the owner by the accident.

THE Canada carrying cargo from Cadiz to St. John's, and under a charter to carry timber from Quebec to England, was on the 22nd of May, 1860, totally lost by a collision on the voyage to St. John's. The owners obtained a judgment in the Court of Admiralty, and the damages were referred to the Registrar and Merchants. The Registrar in his reasons annexed to his report, stated,—

"The principle which has always governed our decisions in cases of this description is to allow the gross freight, less the charges which would have been necessarily incurred in earning such freight, and which were saved to the owner by the accident; charges actually paid, or for which the owner has become legally responsible, cannot of course be deducted, as that would in effect be deducting them twice over. Acting on this principle the port charges at Cadiz, which must have been paid or incurred, cannot properly be deducted from the freight; and as by the 185th section of the Merchant Shipping Act, 1854, seamen are entitled to their wages up to the time of the ship being lost, but not afterwards, the wages of the crew up to the 22nd of May cannot be deducted, but all wages which would have accrued subsequently to that time, had the voyage not been broken up, are of course to be deducted from the freight. We allow interest from the 1st of October, 1860, the probable termination of the voyage in England."

APPENDIX.

ADMIRALTY COURT.

NOTICE.

MUCH inconvenience having been experienced from the practitioners requiring to consult minute books, while the minutes are being entered, the following directions are issued with a view both to expedite the entry of the minutes, and to afford greater facilities to the public and the practitioners:—

(1.) There shall be kept in the registry, for the use of the practitioners and the public, a copy of the minute books, and such copy shall be made up day by day from the original minute books after the usual hours of business ready for use on the following morning.

(2.) All Court minutes not given in during the sitting of the Court, or not brought into the registry before four o'clock on the day on which they purport to have been done, shall be subject to an additional stamp of 2*s.* 6*d.* to be affixed thereto, the amount of which shall not be allowed on taxation.

By order of the Judge.

H. C. ROTHERY, *Registrar.*

Admiralty Registry, Doctors' Commons,
12th May, 1859.

APPENDIX.

REGULATIONS

FOR

PREVENTING COLLISIONS AT SEA,

Issued in pursuance of the Merchant Shipping Act Amendment Act, 1862, and of an Order in Council dated 9th January, 1863.

NOTICE.

1. By virtue of the "Merchant Shipping Act Amendment Act, 1862," and of an Order in Council dated 9th January, 1863, the following regulations, containing certain verbal Amendments, are substituted for the Regulations contained in the Schedule to the Act.

2. The following Regulations come into operation on the 1st of June, 1863.

3. The following Regulations apply to all Ships, whatever their Nationality, within the limits of British Jurisdiction, and to British and French Ships whether within British Jurisdiction or not.

4. The Order in Council containing these Regulations is published in the London Gazette of the 13th January, 1863.

5. The French Copy of the Regulations in the following pages is reprinted from the French Version, as published in France under the Authority of the French Government.

T. H. FARRER,
Assistant Secretary,
Marine Department.

Board of Trade,
January, 1863.

THESE REGULATIONS COME INTO OPERATION ON THE 1ST JUNE, 1863.

CONTENTS.

REGULATIONS

FOR

PREVENTING COLLISIONS AT SEA, &c.

Preliminary.

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. Sea-going steam ships when under way shall carry:

(*a.*) *At the Foremast Head*, a bright White Light, so fixed as to show an uniform and unbroken light over an arc of the horizon of 20 points of the compass; so fixed as to throw the light 10 points on each side of the ship, viz., from right ahead to 2 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 an uniform and unbroken light over an arc of the horizon of 10 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 show an uniform and unbroken light over an arc of the horizon of 10 points of the compass; so fixed as to throw the light from right ahead to 2 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 Mast-head Lights vertically, in addition to their Side Lights, so as to distinguish them from other steam ships. Each of these Mast-head Lights shall be of the same construction and character as the Mast-head 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 Mast-head Lights, which they shall never carry.

RÈGLES À SUIVRE
POUR
PRÉVENIR LES ABORDAGES EN MER.

Préliminaire.

Art. 1. Dans les règles qui suivent, tout navire à vapeur qui ne marche qu'à l'aide de ses voiles est considéré comme navire à voiles; et tout navire dont la machine est en action, quelle que soit sa voilure, est considéré comme navire à vapeur.

Règles relatives aux feux et aux signaux en temps de brume.

Art. 2. Des feux mentionnés aux articles suivants doivent être portés, à l'exclusion de tous autres, par tous les temps, entre le coucher et le lever du soleil.

Art. 3. Les navires à vapeur, lorsqu'ils sont en marche, portent les feux ci-après:

(*a.*) *En tête du mât de misaine,* un feu blanc placé de manière à fournir un rayonnement uniforme et non interrompu dans tout le parcours d'un arc horizontal de 20 quarts du compas, qui se compte depuis l'avant jusqu'à 2 quarts en arrière du travers de chaque bord et d'une portée telle qu'il puisse être visible à 5 milles au moins de distance, par une nuit sombre, mais sans brume:

(*b.*) *A tribord,* un feu vert établi de façon à projeter une lumière uniforme et non interrompue sur un arc horizontal de 10 quarts du compas, qui est compris entre l'avant du navire, et 2 quarts sur l'arrière du travers à tribord, et d'une portée telle qu'il puisse être visible à 2 milles au moins de distance, par une nuit sombre, mais sans brume:

(*c.*) *A bâbord,* un feu rouge construit de façon à projeter une lumière uniforme et non interrompue sur un arc horizontal de 10 quarts du compas, qui est compris entre l'avant du navire, et 2 quarts sur l'arrière du travers à bâbord, et d'une portée telle qu'il puisse être visible à 2 milles au moins de distance, par une nuit sombre, mais sans brume:

(*d.*) Ces feux de côté sont pourvus, en dedans du bord, d'écrans dirigés de l'arrière à l'avant, et s'étendent à $0^{m}.90$ en avant de la lumière, afin que le feu vert ne puisse pas être aperçu de bâbord avant, et le feu rouge de tribord avant.

Art. 4. Les navires à vapeur, quand ils remorquent, doivent, indépendamment de leurs feux de côté, porter deux feux blancs verticaux en tête de mât, qui servent à les distinguer des autres navires à vapeur. Ces feux sont semblables au feu unique de tête de mât que portent les navires à vapeur ordinaires.

Art. 5. Les bâtiments à voiles, lorsqu'ils font route à la voile ou en remorque, portent les mêmes feux que les bâtiments à vapeur en marche, à l'exception du feu blanc du mât de misaine, dont ils ne doivent jamais faire usage.

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.

Rules concerning Fog Signals.

Fog Signals.

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.

Art. 6. Lorsque des bâtiments à voiles sont d'assez faible dimension pour que leurs feux verts et rouges ne puissent pas être fixés d'une manière permanente, ces feux sont néanmoins tenus allumés sur le pont à leurs bords respectifs, prêts à être montrés instantanément à tout navire dont on constaterait l'approche, et assez à temps pour prévenir l'abordage.

Ces fanaux portatifs pendant cette exhibition sont tenus autant en vue que possible, et présentés de telle sorte que le feu vert ne puisse être aperçu de bâbord avant, et le feu rouge de tribord avant.

Pour rendre ces prescriptions d'une application plus certaine et plus facile, les fanaux sont peints extérieurement de la couleur du feu qu'ils contiennent, et doivent être pourvus d'écrans convenables.

Art. 7. Les bâtiments, tant à voiles qu'à vapeur, mouillés sur une rade, dans un chenal ou sur une ligne fréquentée, portent, depuis le coucher jusqu'au lever du soleil, un feu blanc placé à une hauteur qui n'excède pas 6 mètres au-dessus du plat-bord et projetant une lumière uniforme et non interrompue tout autour de l'horizon à la distance d'au moins un mille.

Art. 8. Les bateaux-pilotes à voiles ne sont pas assujettis à porter les mêmes feux que ceux exigés pour les autres navires à voiles; mais ils doivent avoir en tête de mât un feu blanc visible de tous les points de l'horizon, et de plus montrer un feu de quart d'heure en quart d'heure.

Art. 9. Les bateaux de pêche non pontés et tous les autres bateaux également non pontés ne sont pas tenus de porter les feux de côté exigés pour les autres navires; mais ils doivent, s'ils ne sont pas pourvus de semblables feux, se servir d'un fanal muni sur l'un de ses côtés d'une glissoire verte, et sur l'autre d'une glissoire rouge, de façon qu'à l'approche d'un navire ils puissent montrer ce fanal en temps opportun pour prévenir l'abordage, en ayant soin que le feu vert ne puisse être aperçu de bâbord, et le feu rouge de tribord.

Les navires de pêche et les bateaux non pontés qui sont à l'ancre, ou qui ayant leurs filets dehors sont stationnaires, doivent montrer un feu blanc.

Ces mêmes navires et bateaux peuvent, en outre, faire usage d'un feu visible à de courts intervalles, s'ils le jugent convenable.

Signaux en temps de brume.

Art. 10. En temps de brume, de jour comme de nuit, les navires font entendre les signaux suivants toutes les cinq minutes au moins, savoir:

(*a.*) Les navires à vapeur en marche, le son du sifflet à vapeur qui est placé en avant de la cheminée à une hauteur de $2^{m}.40$ au-dessus du pont des gaillards:

(*b.*) Les bâtiments à voiles, lorsqu'ils sont en marche, font usage d'un cornet:

(*c.*) Les bâtiments à vapeur et à voiles, lorsqu'ils ne sont pas en marche, font usage d'un cloche.

Steering and Sailing Rules.

Two Sailing Ships meeting.

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.

Two Sailing Ships crossing.

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

Two Ships under Steam meeting.

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 the other.

Two Ships under Steam crossing.

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.

Sailing Ship and Ship under Steam.

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.

Ships under Steam to slacken Speed.

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.

Vessels overtaking other Vessels.

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

Construction of Articles 12, 14, 15, and 17.

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.

Proviso to save special Cases.

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.

No Ship, under any Circumstances, to neglect proper Precautions.

Art. 20. Nothing in these Rules shall exonerate any ship, or the owner, or master or crew thereof, from the consequences of any neglect to carry Lights or Signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Règles relatives à la route.

Art. 11. Si deux navires à voiles se rencontrent courants l'un sur l'autre, directement ou à-peu-près, et qu'il y ait risque d'abordage, tous deux viennent sur tribord, pour passer à bâbord l'un de l'autre.

Art. 12. Lorsque deux navires à voiles font des routes qui se croisent et les exposent à un abordage, s'ils ont des amures différentes, le navire qui a les amures à bâbord manœuvre de manière à ne pas gêner la route de celui qui a le vent de tribord; toutefois, dans le cas où le bâtiment qui a les amures à bâbord est au plus près, tandis que l'autre a du largue, celui-ci doit manœuvrer de manière à ne pas gêner le bâtiment qui est au plus près. Mais, si l'un des deux est vent arrière ou s'ils ont le vent du même bord, le navire qui est vent arrière ou qui aperçoit l'autre sous le vent manœuvre pour ne pas gêner la route de ce dernier navire.

Art. 13. Si deux navires sous vapeur se rencontrent courant l'un sur l'autre, directement ou à-peu-près, et qu'il y ait risque d'abordage, tous deux viennent sur tribord, pour passer à bâbord l'un de l'autre.

Art. 14. Si deux navires sous vapeur font des routes qui se croisent et les exposent à s'aborder, celui qui voit l'autre par tribord manœuvre de manière à ne pas gêner la route de ce navire.

Art. 15. Si deux navires, l'un à voiles, l'autre sous vapeur, font des routes qui les exposent à s'aborder, le navire sous vapeur manœuvre de manière à ne pas gêner la route du navire à voiles.

Art. 16. Tout navire sous vapeur, qui approche un autre navire de manière qu'il y ait risque d'abordage, doit diminuer sa vitesse ou stopper et marcher en arrière, s'il est nécessaire. Tout navire sous vapeur doit, en temps de brume, avoir une vitesse modérée.

Art. 17. Tout navire qui en dépasse un autre gouverne de manière à ne pas gêner la route de ce navire.

Art. 18. Lorsque, par suit des règles qui précèdent, l'un des deux bâtiments doit manœuvrer de manière à ne pas gêner l'autre, celui-ci doit néanmoins subordonner sa manœuvre aux règles énoncées à l'article suivant.

Art. 19. En se conformant aux règles qui précèdent, les navires doivent tenir compte de tous les dangers de la navigation. Ils auront égard aux circonstances particulières qui peuvent rendre nécessaire une dérogation à ces règles, afin de parer à un péril immédiat.

Art. 20. Rien dans les règles ci-dessus ne saurait affranchir un navire, quel qu'il soit, ses armateurs, son capitaine ou son équipage, des conséquences d'une omission de porter des feux ou signaux, d'un défaut de surveillance convenable, ou, enfin, d'une négligence quelconque des précautions commandées par la pratique ordinaire de la navigation ou par les circonstances particulières de la situation.

DIAGRAMS

To illustrate the use of the Lights carried by vessels at sea, and the manner in which they indicate to the vessel which sees them the position and description of the vessel that carries them:—

When both Red and Green Lights are seen:

A sees a Red and Green Light ahead;—A knows that a vessel is approaching her on a course directly opposite to her own, as B;

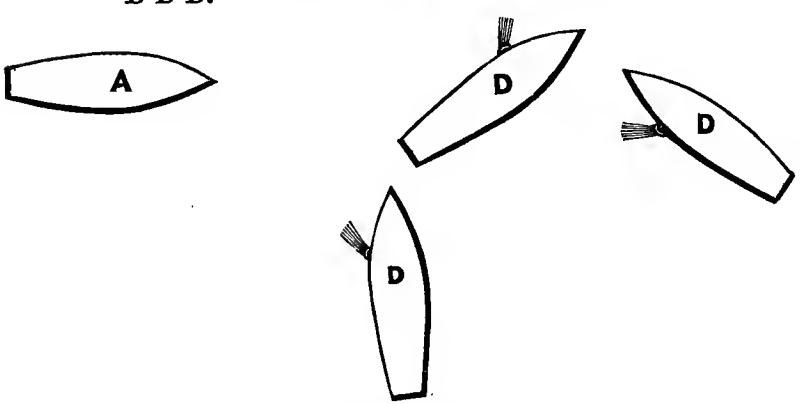
If A sees a White Mast-head Light above the other two, she knows that B is a steam-vessel.

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.



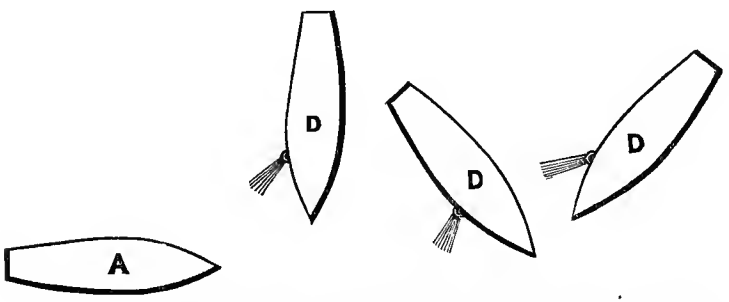
If A sees a White Mast-head Light above the Red Light, A knows that the vessel is a steam-vessel, and is either approaching her in the same direction, as B, or is crossing to port in some direction, as D D D.

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 Mast-head 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.

Rules, Orders and Regulations

FOR THE

HIGH COURT OF ADMIRALTY OF ENGLAND.

MADE IN PURSUANCE OF THE PROVISIONS OF THE ACTS OF THE 3 & 4 VICT. C. 65 AND 66, AND 17 & 18 VICT. C. 78.

WITH FORMS AND TABLES OF FEES.

At the Court at Windsor, the 29th day of November, 1859.

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS the Judge of the High Court of Admiralty of England has, under the provisions of two acts passed in the session of parliament held in the third and fourth years of Her Majesty's reign, intituled (cap. 65), "An Act to improve the practice and extend the jurisdiction of the High Court of Admiralty of England," and (cap. 66), "An Act to make provision for the Judge, Registrar and Marshal of the High Court of Admiralty of England," and of another act passed in the session of parliament held in the seventeenth and eighteenth years of Her Majesty's reign, intituled (cap. 78), "An Act to appoint persons to administer Oaths, and to substitute Stamps in lieu of Fees and for other purposes in the High Court of Admiralty of England," made and submitted certain Rules, orders and regulations for the said Court, together with certain forms and tables of fees annexed thereto: AND WHEREAS the same have been this day laid before Her Majesty in council:

NOW, THEREFORE, HER MAJESTY, having taken the said Rules, orders and regulations and forms and tables of fees into consideration, is pleased, by and with the advice of her privy council, to approve of and confirm the same; and the said Rules, orders and regulations, with forms and tables of fees (a copy whereof is hereunto annexed), are hereby approved and confirmed accordingly. And Her Majesty is further pleased to direct that the said Rules, orders and regulations, with the forms and tables of fees annexed, shall be Rules, orders and regulations, and forms and tables of fees, for the said High Court of Admiralty of England, accordingly.

Whereof the Judge, the Registrar and other officers of the said Court, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

WM. L. BATHURST.

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TO

THE RULES, ORDERS AND REGULATIONS, 1859.

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RULES, ORDERS AND REGULATIONS

FOR THE

HIGH COURT OF ADMIRALTY OF ENGLAND.

MADE IN PURSUANCE OF THE PROVISIONS OF THE ACTS OF THE
3 & 4 VICT. c. 65 AND 66, AND 17 & 18 VICT. c. 78.

1. IN the construction of these rules, orders and regulations, the following terms shall (if not inconsistent with the context or subject-matter) have the respective meanings hereinafter assigned to them; that is to say:—

"Judge" shall mean the judge of the High Court of Admiralty of England, or any person lawfully authorized to sit in the said Court as judge.

"Registrar" shall mean the registrar of the High Court of Admiralty of England, or any deputy or assistant registrar of the said Court.

"Marshal" shall mean the marshal of the High Court of Admiralty of England, or any deputy or assistant marshal of the said Court.

"Counsel" shall mean any advocate, serjeant-at-law, or barrister-at-law, entitled to plead in the said Court.

"Proctor" shall mean any proctor, attorney, or solicitor, entitled to practise in the said Court, or the party himself if conducting his cause in person.

"Registry" shall mean the registry of the High Court of Admiralty of England.

"Cause" shall mean any suit, action, appeal from award of justices, or other proceeding instituted in the said Court.

"Name" of any person shall mean both the christian name and surname of such person.

2. These rules, orders and regulations shall, if previously confirmed by Her Majesty in council, come into operation on the first day of January, 1860, and shall apply to all causes instituted on and after that day.

3. The practice of the Court in operation before the first day of January, 1860, shall continue in force, save in so far as it may be inconsistent with these rules, orders and regulations.

4. The following are hereby repealed, save in regard to causes instituted before the first day of January, 1860:—

(1.) Her Majesty's order in council, bearing date the third day of July, 1854, relative to the appointment of additional and extra Court days.

(2.) Her Majesty's order in council, bearing date the eleventh day of December, 1854, establishing certain fees to be taken in the Court.

(3.) Rules and regulations established by the judge, bearing date the twelfth day of December, 1854, relative to the mode of collecting the stamps due in respect of such fees.

(4.) Her majesty's order in council, bearing date the seventh day of December, 1855, establishing certain rules, orders and regulations respecting the practice and mode of proceeding in the Court.

(5.) Her majesty's order in council, bearing date the seventh day of December, 1855, establishing certain other fees to be taken by the officers and practitioners of the Court.

(6.) Directions issued by the judge, bearing date the thirty-first day of December, 1855, in regard to printing the proceedings in instance causes.

Institution of Cause.

5. A proctor desiring to institute a cause, shall file in the registry a præcipe, and thereupon the cause shall be entered for him in a book to be kept in the registry, called the "Cause Book."

6. All causes shall be numbered in the order in which they are instituted, and the number given to any cause shall be the distinguishing number of the cause, and shall be written on all instruments and other documents in the cause.

7. The præcipe to lead the institution of a cause shall contain the name of the proctor, and an address within three miles of the General Post Office, London, at which it shall be sufficient to leave all instruments and other documents in the cause.

Warrants.

8. If the cause is in rem, the proctor may, on filing a præcipe and an affidavit, take out a warrant for the arrest of the property proceeded against.

9. The affidavit shall set 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.

10. In a cause of necessaries, and in a cause of wages, the national character of the vessel proceeded against shall be stated in the affidavit. And in a wages cause against a foreign vessel, notice of the institution of the cause shall be given to the consul of the state to which the vessel belongs, if there be one resident in London; and a copy of the notice shall be annexed to the affidavit.

11. In a cause of bottomry, the bottomry bond in original, and if in a foreign language a notarial translation thereof, shall be produced for the inspection and perusal of the registrar; and a copy of the bond, or of the translation thereof, certified to be correct, shall be annexed to the affidavit.

12. In a cause of restraint, and in a cause of possession, it shall not be necessary to obtain a decree of the Court for the issue of the warrant, but the warrant shall be allowed to issue on the requisite affidavit being filed.

13. 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. In a wages cause he may also waive the service of the notice, and in a cause of bottomry the production of the bond.

14. Every warrant shall be served by the marshal 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 shall, within six days from the service thereof, file the same in the registry.

Detainers.

15. A proctor desiring to detain any property which he has reason to believe will be removed out of the jurisdiction of the Court before the warrant can be served, 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 thereof, exclusive of the day of such date, nor after service of the warrant.

Citations in Rem.

16. If, when any property is under arrest of the Court, a second or subsequent cause is instituted against the same property, it shall not be 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 præcipé 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" hereinafter mentioned.

17. Rules 9, 10, 11, 12, 13 and 14 shall apply as well to citations in rem as to warrants.

Causes in Rem by Default.

18. The practice in causes in rem in regard to defaults, first decrees, perishable monitions and affidavits as to the perishable state of the property, is hereby repealed, and the course of proceeding shall be as follows:—

19. After the expiration of twelve days from the filing of a warrant,

if an appearance has not been entered, the proctor may, on filing in the registry a præcipe, take out a notice of sale, to be advertised by him in two or more public journals to be from time to time appointed by the judge.

20. After the expiration of six days from the advertisement of the notice of sale in the said journals, if an appearance has not been entered, the proctor shall file in the registry an affidavit to the effect that the said notices have been duly advertised, with copies of the journals annexed, as also such proofs as may be necessary to establish the claim, and a notice of motion to have the property sold.

21. If, when the cause comes before the judge, he is satisfied that the claim is well founded, he may order the property to be appraised and sold, and the proceeds to be paid into the registry.

22. If there be two or more causes by default pending against the same property, it shall not be necessary to take out a notice of sale in more than one of the causes; but if the proctor in the first cause do not, within eighteen days from the filing of the warrant in that cause, take out and advertise the notice of sale, the proctor in the second or any subsequent cause may take out and advertise the notice of sale, if he shall have filed in the registry a citation in rem in such second or subsequent cause.

23. Within six days from the time when the proceeds have been paid into the registry, the proctor in each cause shall, if he has not previously done so, file his proofs in the registry, and have the cause placed on the list for hearing.

24. In a cause of possession, after the expiration of six days from the filing of the warrant, if an appearance has not been entered, the proctor may, on filing in the registry a præcipe, take out a notice of proceedings in the cause, to be advertised by him in two or more public journals to be from time to time appointed by the judge.

25. After the expiration of six days from the advertisement of the notice of proceedings in the said journals, if an appearance has not been entered, the proctor shall file in the registry an affidavit to the effect that the notice has been duly advertised, with copies of the journals annexed, as also such proofs as may be necessary to establish the claim, and shall have the cause placed on the list for hearing.

26. If, when the cause comes before the judge, he is satisfied that the claim is well founded, he may pronounce for the same, and decree possession of the vessel accordingly.

Citations in Personam.

27. If the cause is in personam, the proctor may, on filing a præcipe and an affidavit, take out a citation in personam.

28. A citation in personam shall include the instrument, heretofore called a monition to appear and defend suit, issued under the provisions of the 17 & 18 Vict. c. 78.

29. Rules 9, 10, 11, 12 and 13 shall, so far as the same are applicable, apply to the issue of citations in personam.

30. In a cause of distribution of salvage, the affidavit to lead the citation shall state the amount of salvage money awarded or agreed to be accepted, and the name, address, and description of the party holding the same.

31. In an appeal from an award of salvage a copy of the notice of appeal, if required to be served, shall be annexed to the affidavit to lead the issue of the citation.

32. A citation in personam may be served by the proctor, his clerk or agent, and shall within six days from the service thereof be filed in the registry by the proctor taking out the same.

Causes in Personam by Default.

33. In causes in personam, after the expiration of twelve days from the filing of the citation, if an appearance has not been entered, the proctor shall file in the registry such proofs as may be necessary to establish the claim, and have the cause placed on the list for hearing.

34. If, when the cause comes before the judge, he is satisfied that the claim is well founded, he may pronounce for the amount which appears to him to be due, and may enforce the payment thereof by monition and attachment against the party cited.

Entry of Appearance.

35. A proctor, desiring to enter an appearance in any cause, shall file in the registry a præcipe, a copy of which shall have been previously served on the adverse proctor, and an appearance in the cause shall thereupon be entered for him in the "Cause Book."

36. The præcipe to lead the entry of an appearance shall contain the name of the proctor, and an address within three miles of the General Post Office, London, at which it shall be sufficient to leave all instruments and other documents in the cause.

37. If the proctor intends to object to the jurisdiction of the Court, the appearance may be entered under protest.

38. A party, who shall not enter an appearance until after the expiration of six days from the service of the warrant or citation, shall pay all costs that may have been occasioned by his default.

Bail.

39. If bail is to be given in the registry, the proctor shall, on filing in the marshal's office a præcipe, receive a notice of bail, a copy of which shall be served on the adverse proctor.

40. After the expiration of twenty-four hours from the time when the notice of bail shall have been so served, if the marshal has

reported as to the sufficiency of the sureties, the proctor shall be entitled to take up the marshal's report. He shall then file in the registry a præcipe with the notice of bail and the marshal's report, and shall be informed at what hour the sureties may attend.

41. The bail bond shall be signed by the sureties, and shall be taken either before the registrar, or, by the registrar's directions, before one of the clerks in the registry.

42. Bail may also be taken under a special commission, or before standing commissioners to be appointed by the judge; but in every such case the sureties shall justify.

43. A bail bond taken before a commissioner, appointed under a special or standing commission, shall not be filed in the registry until after the expiration of twenty-four hours from the time when a notice, containing the names and addresses of the sureties and of the commissioner before whom the bail was taken, shall have been served upon the adverse proctor; and a copy of the notice, verified by affidavit, shall be filed with the bail bond.

44. A commissioner, appointed under a special or standing commission, shall not take bail on behalf of any person, for whom he or any person in partnership with him is acting as proctor, attorney, solicitor or agent.

45. The delays required by the preceding rules in regard to the taking of bail may be dispensed with by consent of the proctors in the cause.

Releases.

46. Property arrested by warrant shall only be released under the authority of an instrument issued from the registry, to be called a release.

47. A proctor, at whose instance any property has been arrested, may, before an appearance has been entered, obtain the release thereof by filing a præcipe to withdraw the warrant.

48. A proctor may obtain the release of any property by paying into the registry the sum in which the cause has been instituted.

49. Cargo, arrested for the freight only, may be released by filing an affidavit as to the value of the freight, and by paying the amount of the freight into the registry.

50. In a cause of salvage, the value of the property under arrest shall be agreed, or an affidavit of value filed, before the property is released.

51. A proctor, who shall have filed a bail bond in the sum in which the cause has been instituted, or paid such sum into the registry, and, if the cause be one of salvage, shall have also filed an affidavit as to the value of the property arrested, shall be entitled to a release for the same, unless there be a caveat against the release thereof, outstanding in the "Caveat Release Book."

52. The release, when obtained, shall be left with a præcipe in the marshal's office by the proctor taking out the same, who shall also at

the same time pay all costs, charges and expenses attending the care and custody of the property whilst under arrest; and the marshal shall thereupon release the property.

Caveat Release Book.

53. A proctor in a cause, desiring to prevent the release of any property under arrest, shall file in the registry a præcipe, and thereupon a caveat against the release of the property shall be entered in a book to be kept in the registry, called the "Caveat Release Book."

54. A party, delaying the release of any property by the entry of a caveat, shall be liable to be condemned in costs and damages, unless he shall show to the satisfaction of the judge good and sufficient reason for having so done.

Caveat Warrant Book.

55. A party, desiring to prevent the arrest of any property, may cause a caveat against the issue of a warrant for the arrest thereof to be entered in the registry.

56. For this purpose he shall cause to be filed in the registry a præcipe, signed by himself or his proctor, undertaking to enter an appearance in any cause that may be instituted against the said property, and to give bail in such cause in a sum not exceeding an amount to be stated in the præcipe, or to pay such sum into the registry; and a caveat against the issue of a warrant for the arrest of the property shall thereupon be entered in a book to be kept in the registry, called the "Caveat Warrant Book."

57. A proctor, instituting a cause against any property in respect of which a caveat has been entered in the "Caveat Warrant Book," shall, before filing the præcipe to lead the institution of the cause, serve a copy thereof upon the party on whose behalf the caveat has been entered, or upon his proctor.

58. Within three days from the filing of the præcipe, the party on whose behalf the caveat has been entered shall, if the sum in which the cause is instituted does not exceed the amount for which he has undertaken, give bail in such sum, or pay the same into the registry.

59. After the expiration of twelve days from the filing of the præcipe, if the party on whose behalf the caveat has been entered shall not have given bail in such sum, or paid the same into the registry, the plaintiff's proctor may proceed with the cause by default, and on filing his proofs in the registry may have the cause placed on the list for hearing.

60. If, when the cause comes before the judge, he is satisfied that the claim is well founded, he may pronounce for the amount which appears to him to be due, and may enforce the payment thereof by

monition and attachment against the party on whose behalf the caveat has been entered, and by the arrest of the property, if it then be or thereafter come within the jurisdiction of the Court.

61. The preceding rules shall not prevent a proctor from taking out a warrant for the arrest of any property, notwithstanding the entry of a caveat in the "Caveat Warrant Book;" but the party at whose instance any property, in respect of which a caveat is entered, shall be arrested, shall be liable to be condemned in costs and damages, unless he shall show, to the satisfaction of the judge, good and sufficient reason for having so done.

Preliminary Acts.

62. In causes of damage, unless the judge shall otherwise order, each proctor shall, before any pleading is given in, file a document, to be called a preliminary act, forms of which may be obtained in the registry, containing a statement of the following particulars:—

(1.) The names of the vessels which came into collision, and the names of their masters.
(2.) The time of the collision.
(3.) The place of the collision.
(4.) The direction of the wind.
(5.) The state of the weather.
(6.) The state and force of the tide.
(7.) The course and speed of the vessel when the other was first seen.
(8.) The lights, if any, carried by her.
(9.) The distance and bearing of the other vessel when first seen.
(10.) The lights, if any, of the other vessel which were first seen.
(11.) Whether any lights of the other vessel, other than those first seen, came into view before the collision.
(12.) What measures were taken, and when, to avoid the collision.
(13.) The parts of each vessel which first came in contact.

63. The preliminary acts shall be delivered into the registry sealed up, and shall not be opened, save by order of the judge, until the proofs are filed.

64. If both proctors 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.

Pleadings.

65. The modes of pleading hitherto used, as well in causes by act on petition as by plea and proof, are hereby abolished.

66. There shall be but one mode of pleading in the Court. The first pleading shall be called the petition, the second the answer, the third the reply, and the fourth the rejoinder; and the subsequent pleadings, if any, shall be called as they have heretofore been called in causes by act on petition.

67. Every pleading shall be divided into short paragraphs, numbered consecutively, which shall be called the articles of the pleadings, and shall contain brief statements of the facts material to the issue.

68. Within twelve days from the entry of an appearance the plaintiff's proctor shall file his petition, and within twelve days from the time when the petition shall have been filed the defendant's proctor shall file his answer; and six days from the filing of the previous pleading shall be allowed for filing any subsequent pleading.

69. It shall not be necessary in the first pleading to aver the jurisdiction of the Court, or the identity of the property proceeded against.

70. When an appearance has been given under protest, the defendant's proctor shall, within twelve days from the entry of such appearance, file his petition on protest, and the same rules shall apply to the pleadings on a protest as to the pleadings in a cause on its merits.

71. Before any pleading is filed in the registry, a copy thereof shall be served on the adverse proctor.

72. Every pleading shall be signed by counsel and proctor.

73. The fees of only one counsel shall be allowed on taxation for settling any pleading.

74. The proctor who has the right to plead further, may, if he think fit, file a conclusion to the pleadings, and thereupon the pleadings shall be concluded, and no further pleading shall be filed by either proctor, save by permission of the judge. The conclusion shall be signed by counsel and proctor, a copy thereof served upon the adverse proctor, and the original filed in the registry, in the same manner and under the same conditions as the petition or other pleading.

75. If the proctor who has the right to plead further do not file his pleading or the conclusion within the time allowed for so doing, the adverse proctor may himself file the conclusion, and thereupon no further pleadings shall be filed by either proctor, save by permission of the judge.

76. Any petition or other pleading may be altered or amended, either by consent of proctors or by permission of the judge.

77. Every petition or other pleading shall stand admitted, if within four days from the filing thereof, the adverse proctor does not file a notice of motion objecting to the admissibility thereof.

Proofs.

78. 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.

79. 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 the mode or modes in which the proofs shall be taken.

80. After the conclusion has been filed, either proctor may apply to the judge to fix a time within which all the written proofs shall be filed; and after the expiration of that time no written proof shall be received into the registry, save by permission of the judge.

81. Either proctor in the cause may apply to the judge to order the 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 in the cause.

Affidavits.

82. Every affidavit filed in any cause shall be divided into short paragraphs, numbered consecutively, and shall be in the first person.

83. The name, address and description of every person making an affidavit shall be inserted therein.

84. The names of all the persons making the affidavit, and the dates when and the places where sworn, shall be inserted in the jurat.

85. Where an affidavit is made by any person who is blind, or who, from his signature thereto or otherwise, appears to be illiterate, the person before whom the affidavit is made shall state in the jurat that the affidavit was read to the witness in his presence, and that the witness appeared to understand the same, and made his mark or wrote his signature in the presence of the person before whom the affidavit was made.

86. No affidavit shall be received, which has been sworn before the party on whose behalf the same is offered, or before his proctor or a partner or clerk of the same.

Written Depositions.

87. Written depositions may be taken either before an examiner of the Court, or before a commissioner appointed under a commission.

88. Witnesses may be produced for examination before an examiner within three miles of the General Post Office, London; but the proctor producing him shall, twenty-four hours at least before the witness is examined, serve a notice upon the adverse proctor, stating the title and number of the cause, the name and address of the wit-

ness, the articles of the pleadings to which he is to be examined, the name of the examiner, the name of the interpreter, if any, and the day, hour and place appointed for the examination.

89. No witness shall be produced, either before an examiner or before a commissioner, at a greater distance than three miles from the General Post Office, London, save by order of the Court.

90. The examination in chief, cross-examination and re-examination of witnesses examined before an examiner or a commissioner shall be conducted either by counsel or by the proctors, or their substitutes; or the examination in chief may, on the application of the proctor producing the witnesses, 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.

91. The fees of one counsel may be allowed by the registrar on taxation for attending the examination of witnesses before an examiner or commissioner.

92. When the examination of any witness is completed, the examiner or commissioner shall read over the deposition to the witness, who shall thereupon sign the same; and the examiner or commissioner shall certify at the foot thereof that the deposition has been read over audibly and distinctly to the witness, and that he has acknowledged the same to be true.

93. If the witness refuse to sign his deposition, the examiner or the commissioner shall certify at the foot of the deposition that the witness has so refused, and that the deposition is in accordance with the evidence given by the witness; and the deposition of the witness may thereupon be used at the hearing of the cause.

94. The judge may, on the application of either proctor in the cause, but at the expense in the first instance of the party on whose behalf the application is made, direct the evidence of the witnesses to be taken down by a short-hand writer or reporter appointed by the Court, who shall be previously sworn faithfully to report the evidence; and a transcript of the short-hand writer's or reporter's notes, certified by him to be correct, shall be admitted to prove the oral evidence of the witnesses.

95. When the examinations of the witnesses have been completed, the examiner or commissioner shall file the depositions of the witnesses in the registry, with a special return setting forth the whole of his proceedings.

Printing.

96. In all contested causes the whole of the pleadings and written proofs on which the parties intend to rely at the hearing shall, unless the judge shall otherwise order, be printed before the hearing; and the printing thereof shall be in such manner and form as the judge shall from time to time direct.

97. In an appeal from an award of salvage, if the cause is to be heard without any pleadings, and without any evidence other than that which was adduced before the justices, magistrates or commissioners appealed from, the proctor for the appellant shall, within six days from the filing of the proceedings and award, leave in the registry printed copies thereof; and, if he shall not do so, the proctor for the respondent may move to have the cause dismissed with costs.

98. In causes in which there have been pleadings, within ten days from the conclusion being filed the plaintiff's proctor shall leave in the registry printed copies of the whole of the pleadings; and, if he shall not do so, the defendant's proctor may move to have the cause dismissed with costs.

99. If the written proofs in the cause consist of affidavits only, each proctor shall, within six days from the expiration of the time allowed for filing the proofs, leave in the registry printed copies of his proofs.

100. If the written proofs in the cause consist of depositions only, or partly of depositions and partly of affidavits, each proctor shall, within twelve days from the expiration of the time allowed for filing the proofs, leave in the registry printed copies of his proofs.

101. Where pleadings or proofs are required by these rules to be printed, one hundred and fifty copies thereof shall be struck off, of which seventy shall be left in the registry, and forty shall be given to the adverse proctor.

102. Of the seventy copies left in the registry, sixty shall, within six days after a monition for process from the Court of Appeal has been served upon the registrar, be transmitted by him to the registry of the Court of Appeal.

List for Hearing.

103. A proctor entitled to have a cause placed on the list for hearing shall file a notice in the registry, and thereupon the cause shall be placed on the list for hearing.

104. When a cause is to be proved wholly by the oral examination of witnesses in open Court, either proctor may, as soon as the required number of the printed copies of the pleadings has been left in the registry, have the cause placed on the list for hearing.

105. When a cause is to be proved wholly or in part by written evidence, either proctor may, as soon as the required number of the printed copies of the written proofs has been left in the registry, have the cause placed on the list for hearing.

106. Any proctor, who shall have left in the registry the required number of printed copies of his proofs, may, as soon as the time allowed for so doing by Rule 99 or Rule 100, as the case may be, has expired, have the cause placed on the list for hearing, notwithstanding that the adverse proctor may not have filed all or any of his proofs, or left all or any of the printed copies thereof in the registry.

References.

107. The following rules shall apply to references by the judge to the registrar, whether the reference be to the registrar alone, or to the registrar assisted by one or by two merchants.

108. Within twelve days from the day when the order for the reference is made, the proctor for the claimant shall file the claim and affidavits; and within twelve days from the day when the claim and affidavits are filed, the adverse proctor shall file his counter affidavits.

109. From the filing of the counter affidavits six days only shall be allowed for filing any further affidavits by either proctor, save by order of the judge, or by permission of the registrar.

110. Within three days from the expiration of the time allowed for filing the last affidavits, the proctor for the claimant shall file in the registry a notice, with the stamps for the reference affixed thereto, praying to have the reference placed on the list for hearing; and, if he shall not do so, the adverse proctor may apply to the Court to have the claim dismissed with costs.

111. At the time appointed for the reference, if either proctor be present, the reference may be proceeded with; but the registrar may adjourn the reference from time to time, as he may deem proper.

112. Witnesses may be produced before the registrar for examination, and the evidence shall, on the application of either proctor, but at the expense in the first instance of the party on whose behalf the application is made, be taken down by a short-hand writer or reporter appointed by the Court, who shall be sworn faithfully to report the evidence; and a transcript of the short-hand writer's or reporter's notes, certified by him to be correct, shall be admitted to prove the oral evidence of the witnesses in an objection to the registrar's report.

113. Counsel may attend the hearing of any reference, but the expenses attending the employment of counsel shall not be allowed on taxation, unless the registrar shall be of opinion that the attendance of counsel was necessary.

114. The registrar may, if he think fit, report whether any and what part of the costs of the reference should be allowed, and to whom.

115. The proctor for the claimant shall, within six days from the time when he has received a notice from the registry that the report is ready, take up and file the same in the registry.

116. If the proctor for the claimant shall not take the steps prescribed in the next preceding rule, the adverse proctor may take up and file the report, or may apply to the Court to have the claim dismissed with costs.

117. A proctor intending to object to the registrar's report shall, within six days from the filing of the report, file in the registry a notice, a copy of which shall have been previously served on the adverse proctor; and within a further period of twelve days he shall file his petition in objection to the report.

118. All the rules hereinbefore prescribed respecting the pleadings and proofs in a cause, and the printing thereof, shall, so far as they are applicable, apply to the pleadings, proofs and printing in an objection to a report of the registrar.

Taxation of Costs.

119. A proctor entitled to have his bill of costs taxed by the registrar shall file the same in the registry, a copy thereof having been previously served upon the adverse proctor (if any); and a notice shall be sent from the registry of the time appointed for the taxation.

120. At the time appointed for the taxation the registrar may proceed to tax the bill, if only one of the proctors in the cause be present.

121. The practice in regard to porrecting bills of costs is hereby abolished, and in lieu thereof the registrar shall certify at the foot of the bill the amount at which he has taxed it, and the proctor may then apply to the judge for an order for the payment thereof.

122. A proctor intending to object to the taxation shall, within six days from the completion of the taxation, file a notice in the registry, a copy of which shall have been previously served on the adverse proctor.

123. An objection to the taxation of the registrar shall, unless the judge shall otherwise order, be heard on motion, but either proctor may apply to the judge to have it heard by petition in the same manner as an objection to a report of the registrar.

Sales by Order of the Court.

124. Every commission for the appraisement or sale of property under the decree of the Court shall, unless the judge shall otherwise order, be executed by the marshal or his substitutes.

125. The marshal shall pay into Court the gross proceeds of sale of any property which shall have been sold by him, and shall at the same time bring into the registry the account of sale, with vouchers in support thereof, for taxation by the registrar.

126. Any person interested in the proceeds may be heard before the registrar on the taxation of the marshal's account of expenses, and an objection to the taxation shall be heard in the same manner as an objection to the taxation of a proctor's bill of costs.

Payment of Monies.

127. All monies paid into Court shall be paid to the account of "the Registrar of the High Court of Admiralty" at the Bank of England, upon receivable orders to be obtained in the registry.

128. All orders for the payment of money out of Court shall be signed by the judge.

129. Bail for latent demands shall not, unless the judge shall otherwise order, be required on the payment of money out of the registry.

130. A proctor desiring to prevent the payment of money out of the registry shall file a præcipe, and thereupon a caveat shall be entered in a book to be kept in the registry, called the "Caveat Payment Book."

Claims in respect of Volunteers into the Royal Navy.

131. A proctor desiring to obtain repayment, under the provisions of the Merchant Shipping Act, 1854, of the excess of wages paid to a substitute hired in the place of a seaman volunteering into the Royal Navy, shall file a claim, form of which may be obtained in the registry.

132. If the claim be correct, he shall, on providing the proper stamp, receive a certificate for payment of the sum due.

133. If the claim be incorrect, he shall, on providing the proper stamp, receive the registrar's opinion in writing.

134. If the proctor be dissatisfied with the opinion of the registrar, he may apply to the judge on motion to review the same, as prescribed by the Merchant Shipping Act, 1854.

Naval Prize.

135. Proctors, navy agents, and other persons, having claims against the proceeds of any prize, salvage, bounty or other monies payable and distributable to and amongst the officers and crews of Her Majesty's ships and vessels of war, and which may have been paid to the account of the Paymaster General at the Bank of England on account of Naval Prize under the provisions of the act of the 17 Vict. c. 19, shall file such claims in the registry for taxation by the registrar.

136. They may apply to the judge on motion to review the registrar's taxation.

137. Orders for the payment of the sums which shall be found due in respect of such claims shall be signed by the registrar, and forwarded by him to the accountant-general of the navy.

Motions.

138. Motions may be made to the judge either in Court or in chambers.

139. Notice of motion, together with the proofs, if any, in support thereof, shall be filed in the registry three days at least before the hearing of the motion.

140. A copy of the notice of motion, and of the proofs, if any, shall be served on the adverse proctor before the originals are filed.

141. No motion shall be made to the judge in Court save by counsel, or by a party conducting his cause in person.

142. Proctors may be heard on any motion before the judge in chambers.

143. Counsel also may be heard on any motion before the judge in chambers, if notice thereof has been given to the adverse proctor two days at least before the hearing of the motion.

Summonses.

144. Either proctor in a cause may, on filing a præcipe, together with the proofs on which he intends to rely, take out a summons against the adverse proctor to appear before the judge in chambers in regard to any matter arising in the cause.

145. Every summons shall be prepared in the registry, and shall be signed by the registrar, and a copy thereof shall be served on the proctor summoned three days at least before the day named in the summons.

146. If the proctor summoned do not appear at the time named in the summons, the cause shall be called on, and the judge shall thereupon make such order as to him shall seem fit.

147. If the proctor by whom the summons has been taken out do not appear to support the same at the time named in the summons, the judge may, on the application of the proctor summoned, dismiss the summons with costs.

148. If, before the time named in the summons, the summons be filed in the registry, with an indorsement thereon signed by the proctor summoned, consenting to an order being made in the terms and to the effect of the summons, the registrar may, if he shall think it reasonable and such as the judge would under the circumstances allow, make the order, and such order shall have the same force and effect as if the same had been made by the judge in person.

149. Either proctor may employ counsel at the hearing of any summons before the judge in chambers, if notice thereof has been given to the adverse proctor two days before the hearing of the summons.

Notices.

150. All notices required by these rules or by the practice of the Court shall be in writing or printed, or partly in writing and partly printed.

151. The service of a notice by a proctor may be effected by his clerk or agent, and, if required to be verified, shall be verified by affidavit.

152. Notices required to be left in the registry shall be signed by the proctor, or by his clerk for him.

153. Notices sent from the registry may be sent by post, and the day on which the notice is posted shall be considered as the day of

the service thereof, and the posting thereof shall be a sufficient service.

Consent of Proctors.

154. Service of a notice by one proctor on another may be waived by consent.

155. Any agreement between the proctors in a cause, if in writing dated and signed by both proctors, may, if the registrar think it reasonable and such as the judge would under the circumstances allow, be filed, and shall thereupon become an order of Court, and such order shall have the same force and effect as if the same had been made by the judge in person.

Filing Documents.

156. No document shall be filed, unless properly indorsed and stamped.

157. No document, of which a copy is required to be served on the adverse proctor, shall be filed in the registry without a certificate indorsed thereon, signed by the proctor or by his clerk for him, to the effect that the document has been duly served.

158. If, before the expiration of the time allowed for filing any document, application cannot be made to the judge for an extension thereof, the registrar may, upon reasonable cause being shown, extend the time for filing the same; but the time shall in no case be extended beyond the day upon which the judge shall next sit in chambers.

159. If a proctor, save by permission of the judge or registrar, do not file or serve on the adverse proctor, as may be required of him, any document within the time allowed by any of these rules, the adverse proctor shall not be compelled to receive the same, save by order of the judge.

Minutes.

160. On filing any instrument or document, the proctor shall state, in writing, on a printed form to be obtained in the registry, called a minute, the nature of the instrument or document filed, and the date of the filing thereof.

161. A record of all minutes, and of all causes instituted and appearances entered, and of all decrees and orders of the Court, shall be entered in a book to be kept in the registry, called the "Minute Book."

Præcipes.

162. Forms of the præcipes, required to be filed in the registry or the marshal's office, may be obtained on application in the registry or the marshal's office respectively. They may be varied or altered by the judge at his discretion.

163. Every præcipe shall be signed either by the party, or by his proctor, or by a clerk of the latter for him.

164. If a præcipe be not properly filled up and stamped, the registrar or marshal, as the case may be, may refuse to receive the same or to act thereon.

Instruments, and the Service thereof.

165. Every instrument, which is signed by the registrar and issued under the seal of the Court, shall be prepared in the registry, on a præcipe filed by the proctor applying for the same, and shall bear date on the day on which it is issued.

166. Every instrument shall be served within six months from the day on which it bears date, otherwise the service thereof shall not be valid.

167. No instrument except a warrant shall be served on a Sunday, Good Friday or Christmas Day; and a warrant served on any of those days shall be deemed to have been served on the next following day.

168. Every warrant or other instrument required to be served by the marshal shall be left by the proctor taking out the same with a præcipe in the marshal's office.

169. Instruments not required to be served by the marshal may be served by the proctor, his clerk or agent.

170. Where the personal service of a citation in personam cannot be effected, application may be made to the judge to substitute some other mode of service, or to dispense with the service altogether.

171. Where a party is suing in a damage cause, and a cross cause in personam is instituted, the service of the citation in the cross cause may be made on the proctor of the party suing in the original cause, and such service shall be sufficient.

172. The service of any instrument by the marshal shall be verified by his certificate. The service of any instrument by a proctor, his clerk or agent, shall be verified by an affidavit.

Subpœnas.

173. Subpœnas may be issued under the seal of the Court with the names of the witnesses in blank; and any subpœna may contain the names of any number of witnesses.

Caveats.

174. A caveat, whether against the issue of a warrant, the release of property, or the payment of money out of the registry, shall not remain in force for more than six months from the day of the date thereof.

175. A caveat may be withdrawn by the party on whose behalf it

has been entered or by his proctor; but the præcipe to lead the withdrawal thereof shall, save by permission of the registrar, be signed by the same person who signed the præcipe to lead the entry of the caveat.

176. Application may be made to the judge on motion or by summons to overrule any caveat.

Copies.

177. All copies of documents, whether issued from the registry or otherwise, shall be counted and charged for at the rate of seventy-two words per folio; and every numeral, whether contained in columns or otherwise written, shall be counted and charged for as a word.

178. Office copies of documents furnished from the registry shall not be collated with the originals from which the same are copied, unless specially required.

Searches.

179. The parties and proctors in a cause, and their clerks, may, while the cause is pending, and for a period of three months from the termination thereof, inspect free of charge all the acts, minutes and documents filed therein.

180. Other persons may inspect the Court books on payment of the proper fee.

181. No person, except a party or proctor in the cause or a clerk of the latter, shall be allowed, save by permission of the judge, to inspect any of the documents in a pending cause.

Seal of the Court.

182. All instruments and orders or decrees of Court, office copies, and other documents issued from the registry, shall be sealed with the seal of the Court.

Office Hours and Holidays.

183. Save on the holidays mentioned in the next following rule, the registry shall be open for the despatch of business on every day throughout the year from 10 A.M. to 4 P.M., the marshal's office from 10 A.M. to half-past 4 P.M.

184. The holidays on which the registry and the marshal's office shall be closed, shall be Sundays, New Year's Day, Good Friday, Easter Monday and Easter Tuesday, Whit Monday and Whit Tuesday, the Queen's Birthday, Christmas Day, and all days appointed by proclamation to be observed as days of general fast or thanksgiving.

Computation of Time.

185. In computing the time within which an appearance shall be given to any instrument, summons, notice or other process, neither

the day of the service thereof, nor any of the holidays mentioned in the preceding rule, shall be included; and the same rule shall be observed in regard to the service and filing of any document.

Forms.

186. The forms annexed to these Rules, Orders and Regulations shall be followed as nearly as the circumstances of each case will allow.

Fees.

187. The fees to be paid to the officers and practitioners in causes in the Court are set forth in the schedules hereto annexed.

FORMS.

In filling up the Forms the following Directions shall be observed:—

DISTINGUISHING NUMBER OF THE CAUSE.—*The distinguishing number of the cause referred to in Rule No. 6 shall be written in the margin of the several documents.*

TITLE OF CAUSE.—*If the cause is instituted against a ship only, or against a ship and cargo, or against a ship, cargo and freight, the title of the cause shall be the name of the ship only.*

If the cause is instituted against the cargo only, the title of the cause shall be "Cargo ex [*state name of ship on board which the cargo is now or was lately laden*]."

If the cause is against proceeds, the title of the cause shall be "Proceeds of the *&c.*"

NAME AND NATURE OF THE PROPERTY.—*If the cause is against the ship only, the description of the property shall be* "the [*state description of vessel*] or vessel called the (whereof now is or lately was master), her tackle, apparel and furniture."

If against ship and freight, the description shall be, "the or vessel called the (whereof now is or lately was master), her tackle, apparel and furniture, and the freight due for the transportation of the cargo now or lately laden therein."

If against ship, cargo and freight, the description shall be, "the or vessel called the (whereof now is or lately was master), her tackle, apparel and furniture, and the cargo now or lately laden therein, together with the freight due for the transportation thereof."

If the cause is against proceeds, the description shall be, "the proceeds arising from the sale of the *&c.*"

NAME OF THE PARTY.—*If a firm, state the names in full of the persons composing the same, and add* "trading under the firm of [*state style of firm*] at [*state address*]."

No. 1.—*Præcipe to institute a Cause.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., proctor, hereby institute a cause of [*state the nature of the cause*] on behalf of [*state name, address and description of plaintiff*], against [*if in rem, state the name and nature of the property proceeded against; if in personam, state name, address and description of party to be cited*], in the sum of [*state sum in letters*] pounds. And I consent that all instruments and other documents in the said cause may be left for me at [*state address required by Rule No. 7*].

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

No. 2.—*Affidavit to lead Warrant in a Cause of Restraint.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., make oath and say as follows:—

1. I am the lawful owner of [*state number*] sixty-fourth shares of the or vessel , belonging to the port of ; and the

value of my said shares amounts to the sum of pounds or thereabouts.

2. The said vessel is now lying at and is in the possession or under the control of the owner of [*state number*] sixty-fourth shares thereof, and is about to be despatched by him on a voyage to against my consent.

3. I am desirous that the said vessel be restrained from proceeding to sea until security be given to the extent of my interest therein for her safe return to the said port of [*the port to which the vessel belongs*], and the aid and process of the High Court of Admiralty are necessary in that behalf.

On the day of 18 the said was duly sworn to the truth of this affidavit at . } A. B.

Before me, C. D., &c.

No. 3.—*Affidavit to lead Warrant in a Cause of Possession.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., make oath and say as follows:—

1. I am the lawful owner of [*state number*] sixty-fourth shares of the or vessel , belonging to the port of .

2. The said vessel is now lying at and is in the possession or under the control of [*state name, address and description of the person retaining possession, and state whether he is the master or part owner, and, if owner, of how many shares*]; and the said refuses to deliver up the same to me; [and the certificate of registry of the said vessel is also unlawfully withheld from me by the said who is in possession thereof].

3. The aid and process of the High Court of Admiralty are necessary to enable me to obtain possession of the said vessel [and of the certificate of registry].

On the day of 18 the said was duly sworn to the truth of this affidavit at . } A. B.

Before me, C. D., &c.

No. 4.—*Præcipe for Warrant.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., proctor for the plaintiff, pray a warrant to arrest [*state name and nature of property*].

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

No. 5.—*Warrant.*

In the High Court of Admiralty of England.

No.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To the marshal of the High Court of our Admiralty of England, and to all and

singular his substitutes, greeting. Whereas a cause of has been instituted in our said Court on behalf of against in the sum of pounds: We therefore hereby command you to arrest the said and to keep the same under safe arrest until you shall receive further orders from us; and to cite all persons who have or claim to have any right, title or interest in the said to enter within six days from the service hereof (exclusive of the day of such service), in the registry of our said Court an appearance in the said cause. We further command you to warn all the said persons that, if they do not enter an appearance as aforesaid, the judge of our said Court will proceed to determine the said cause, or make such order therein as to him shall seem right.

Given at London, under the seal of our said Court, the day of in the year of our Lord 18 .

E. F., Registrar.

Warrant .

£ .

Taken out by .

No. 6.—*Præcipe for Service of Warrant by the Marshal.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., proctor for the plaintiff, pray that the warrant herewith left be duly served on the [*state name and nature of the property to be arrested*], now lying [*state where situate*].

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

No. 7.—*Præcipe for Detainer.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., proctor for the plaintiff, pray a detainer against [*state name and nature of property*].

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

No. 8.—*Detainer.*

In the High Court of Admiralty of England.

No.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To all and singular our officers and others whomsoever, greeting. Whereas a cause of has been instituted in the High Court of our Admiralty of England on behalf of against the in the sum of pounds: We therefore hereby command you to detain the said until the same has been arrested by the marshal of our said Court, or by one of his substitutes, or until you shall receive further orders from us.

Given at London, under the seal of our said Court, the day of in the year of our Lord 18 .

E. F., Registrar.

Detainer .

£ .

Taken out by .

[This detainer to continue in force for not more than three days from the date hereof, exclusive of the day of such date.]

No. 9.—*Præcipe for Citation in Rem.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., proctor for the plaintiff, pray a citation against all persons who have or claim to have any right, title or interest in [*state name and nature of property*].

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him*].

No. 10.—*Citation in Rem.*

In the High Court of Admiralty of England.

No.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To the marshal of the High Court of our Admiralty of England, and to all and singular his substitutes, greeting. Whereas a cause of has been instituted in our said Court on behalf of against in the sum of pounds: And whereas the said is now under arrest by virtue of a warrant issued from the registry of our said Court: We therefore hereby command you to cite all persons, who have or claim to have any right, title or interest in the said to enter, within six days from the service hereof (exclusive of the day of such service), in the registry of our said Court an appearance in the said cause. We further command you to warn all the said persons that, if they do not enter an appearance as aforesaid, the judge of our said Court will proceed to determine the said cause, or make such order therein as to him shall seem right.

Given at London, under the seal of our said Court, the day of in the year of our Lord 18 .

E. F., Registrar.

Citation in rem.

£ .

Taken out by .

No. 11.—*Præcipe for Notice of Sale.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., proctor for the plaintiff, pray a notice of sale of the [*state name and nature of property*], now lying [*state where situate*] under arrest by virtue of a warrant issued from the registry of this Court, which was filed on the day of 18 .

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

No. 12.—*Notice of Sale.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

Whereas a cause of has been instituted in the High Court of Admiralty of England, on behalf of against now lying under arrest, by virtue of a warrant issued from the registry of the said Court, and no appearance has been entered in the said cause: This is to give notice to all persons who have or claim to have any right, title or interest in the said , that if an appearance in

the said cause be not entered in the registry of the said Court within six days from the publication of this notice, the judge of the said Court will order the said to be sold to answer the claims instituted or to be instituted against the same, or make such order in the premises as to him shall seem right.

Dated the day of 18 .

E. F., Registrar.

Notice of sale of .
Taken out by .

No. 13.—*Præcipe for Notice of Proceedings in a Cause of Possession.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., proctor for the plaintiff, pray a notice of proceedings against the or vessel called the [*state name*], now lying [*state where situate*] under arrest by virtue of a warrant issued from the registry of this Court, which was filed on the day of 18 .

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

No. 14.—*Notice of Proceedings in a Cause of Possession.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

Whereas a cause of possession has been instituted in the High Court of Admiralty of England on behalf of against the or vessel called the now lying under arrest by virtue of a warrant issued from the registry of the said Court, and no appearance has been entered in the said cause: This is to give notice to all persons who have or claim to have any right, title or interest in the said , that if an appearance in the said cause be not entered in the registry of the said Court within six days from the publication of this notice, the judge of the said Court will decree possession of the said or vessel, her tackle, apparel and furniture, to the said or make such order in the premises as to him shall seem right.

Dated the day of 18 .

E. F., Registrar.

Notice of proceedings in a cause of possession.
Taken out by .

No. 15.—*Decree of Possession.*

In the High Court of Admiralty of England.

No.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To the marshal of the High Court of our Admiralty of England, and to all and singular his substitutes, greeting. Whereas in a cause of possession instituted in our said Court on behalf of against the or vessel called the her tackle, apparel and furniture [and against intervening], the judge of our said Court has decreed possession of the said or vessel to be delivered up to the said

or to his lawful attorney for his use: We therefore hereby command you to release the said vessel, her tackle, apparel and furniture, from the arrest made by virtue of our warrant in that behalf, and to deliver possession thereof to the said or to his lawful attorney for his use.

Given at London, under the seal of our said Court, the day of in the year of our Lord 18 .

E. F., Registrar.

Decree of possession.
Taken out by .

No. 16.—*Præcipe for Citation in Personam.*

No. In the High Court of Admiralty of England.

The [*state title of cause*], master.

I, A. B., proctor for the plaintiff, pray a citation against [*state name, address and description of the party to be cited*].

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

No. 17.—*Citation in Personam.*

No. In the High Court of Admiralty of England.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To greeting. Whereas a cause of has been instituted in the High Court of our Admiralty of England against you on behalf of in the sum of pounds: We therefore hereby command you the said to enter, within six days from the service hereof (exclusive of the day of such service), in the registry of our said Court an appearance in the said cause. And we hereby warn you that, if you do not enter an appearance as aforesaid, the judge of our said Court will proceed to determine the said cause, or make such order therein as to him shall seem right.

Given at London, under the seal of our said Court, the day of in the year of our Lord 18 .

E. F., Registrar.

Citation in personam.
£ .
Taken out by .

No. 18.—*Citation in an Appeal from an Award of Salvage.*

No. In the High Court of Admiralty of England.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To greeting. Whereas a cause of appeal from an award of salvage made the day of 18 has been instituted in the High Court of our Admiralty of England against you on behalf of : We therefore hereby command you the said to enter, within six days from the service hereof (exclusive of the day of such service), in the registry of our said Court an appearance in the said cause. And we hereby warn you that, if you do not enter an appearance as aforesaid, the judge of our said Court will proceed to

determine the said cause, or make such order therein as to him shall seem right.

Given at London, under the seal of our said Court, the day of in the year of our Lord 18 .

E. F., Registrar.

Citation in personam.
(Appeal from an award of salvage).
Taken out by .

No. 19.—*Præcipe to enter an Appearance in a Cause.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., proctor, hereby enter an appearance on behalf of [*state name, address and description of party*] in the cause of [*state nature of cause*], which has been instituted in the High Court of Admiralty of England on behalf of [*state name, address and description of plaintiff*] against [*state against what or whom the cause is instituted*]. And I consent that all instruments and other documents in the cause may be left for me at [*state address required by Rule* 36].

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

No. 20.—*Præcipe for Notice of Bail.*

In the High Court of Admiralty of England.

No.

£——.

The [*state title of cause*], master.

I, A. B., proctor for the [*state whether plaintiff or defendant*], tender the under-mentioned persons as bail on behalf of [*state the name, address and description of the party for whom bail is to be given*], in the sum of [*state the sum in letters*] pounds to answer judgment in this cause (*if for costs add,* so far as regards costs).

Names, Addresses and Descriptions of

Sureties.	Referees.
1.	
2.	

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

[*The names of bankers should, if possible, be given as referees.*]

No. 21.—*Notice of Bail.*

In the High Court of Admiralty of England.

No.

£——.

The [*state title of cause*], master.

Take notice, that A. B., proctor for the [*state whether plaintiff or defendant*], tenders the under-mentioned persons as bail on behalf of [*state name, address and description of the party for whom bail is to be given*], in the sum of [*state the sum in letters*] pounds, to answer judgment in this cause (*if for costs add,* so far as regards costs).

Names, Addresses and Descriptions of

Sureties.	Referees.
1.	
2.	

Dated the day of 18 .

G. H., Marshal.

No. 22.—*Marshal's Report as to the Sufficiency of Proposed Bail.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I hereby report that I have made diligent inquiry and certified myself that [*state names, addresses and descriptions of the two sureties*] the proposed bail on behalf of [*state name, address and description of the party for whom bail is to be given*] to answer judgment in this cause (*if for costs add*, so far as regards costs) are respectively sufficient sureties for the sum of [*state the sum in letters*] pounds.

£——.

Dated the day of 18 .

G. H., Marshal.

No. 23.—*Præcipe for Bail Bond.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., proctor for the [*state whether plaintiff or defendant*], pray a bail bond for the signature of the sureties named in the annexed notice of bail and report of the marshal.

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

No. 24.—*Bail Bond.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

Whereas a cause of has been instituted in the High Court of Admiralty of England on behalf of against [and against intervening]: Now therefore we and hereby jointly and severally submit ourselves to the jurisdiction of the said Court, and consent that, if he the said shall not pay what may be adjudged against him in the said cause with costs, execution may issue forth against us, our heirs, executors and administrators, goods and chattels, for a sum not exceeding pounds.

[*Signatures of sureties.*]

This bail bond was signed by the said and the sureties, the day of 18 , Before me .

[*To be signed before the registrar, or one of the clerks in the registry, or before a commissioner.*]

No. 25.—*Præcipe for Commission to take Bail.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., proctor for the [*state whether plaintiff or defendant*], pray a commission to take bail on behalf of [*state name, address and description of the person for whom bail is to be given*], in the sum of [*state the sum in letters*] pounds, to answer judgment in this cause (*if for costs add*, so far as regards costs); the said commission to be addressed to .

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

No. 26.—*Commission to take Bail.*

In the High Court of Admiralty of England.

No.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To greeting. Whereas in a cause of instituted in the High Court of our Admiralty of England on behalf of against [and against intervening], bail is required to be taken on behalf of in the sum of pounds to answer judgment in the said cause (*if for costs add*, so far as regards costs): We therefore hereby authorize you to take such bail on behalf of the said from two sufficient sureties, who may be produced before you for that purpose, upon the bail bond hereto annexed, and to swear the said sureties to the truth of the annexed affidavits as to their sufficiency. And we command you, upon the said bail bond and affidavits being duly executed and signed by the said sureties, to transmit the same, attested by you, into the registry of our said Court.

Given at London, under the seal of our said Court, the day of in the year of our Lord 18 .

E. F., Registrar.

Commission for bail.
Taken out by .

The Form of Oath to be indorsed on the Commission, and to be administered to each of the Sureties.

You swear that the contents of the affidavit, to which you have signed your name, are true.

So help you God.

No. 27.—*Standing Commission to take Bail.*

In the High Court of Admiralty of England.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To greeting. Whereas the judge of the High Court of our Admiralty of England has decreed a commission to be issued unto you authorizing you to take bail in any cause in our said Court: We therefore hereby authorize you, until this commission be revoked, to take bail in any cause or causes in our said Court from any sufficient sureties who may at any time be produced before you for that purpose, and to swear them to the truth of the affidavits as to their sufficiency in that behalf. And we command you, upon the bail bond and affidavits as to the sufficiency of the sureties in any cause being duly executed and signed by the sureties, to transmit the same attested by you into the registry of our said Court.

Given at London, under the seal of our said Court, the day of in the year of our Lord 18 .

E. F., Registrar.

Standing commission to take bail.
Issued to .

No. 28.—*Affidavit of Justification.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I [*state name, address and description*], one of the proposed sureties for [*state name, address and description of the person for*

whom bail is to be given], make oath and say, that I am worth more than the sum of [*state the sum in letters in which bail is to be given*] pounds after the payment of all my debts.

On the day of 18 , the said was duly sworn to the truth of this affidavit, at . } *Signature of surety.*

Before me , commissioner.

No. 29.—*Præcipe for Release.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., proctor for the [*state whether plaintiff or defendant*], in a cause of [*state nature of cause*], instituted on behalf of against the [*state name and nature of property*], now under arrest by virtue of a warrant issued from the registry of this Court, pray a release of the said [bail having been given, *or* the cause having been withdrawn by me before an appearance was entered therein, &c. *as the case may be*], and there being no caveat against the release thereof outstanding.

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

No. 30.—*Release.*

In the High Court of Admiralty of England.

No.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To the marshal of the High Court of our Admiralty of England, and to all and singular his substitutes, greeting. We hereby command you to release the , now under arrest of our said Court by virtue of our warrant.

Given at London, under the seal of our said Court, the day of in the year of our Lord 18 .

E. F., Registrar.

Release .

Taken out by .

No. 31.—*Præcipe for Caveat Release.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., proctor for the plaintiff in a cause of [*state nature of cause*] instituted on behalf of [*state name, address and description of plaintiff*], against [*state name and nature of property*], pray a caveat against the release of the said [*state name and nature of property*].

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

No. 32.—*Præcipe for Caveat Warrant.*

In the High Court of Admiralty of England.

The [*state title of cause*], master.

I [*state name, address and description*] hereby undertake to enter an appearance in any cause that may be instituted in the High Court of Admiralty of England against [*state name and nature of the property*], and within three days after I shall have been served with a notice of the institution of any such cause to give bail therein in a sum not exceeding [*state amount for which the undertaking is given*] pounds, or to pay such sum into the registry. And I consent that all instruments and other documents in such cause may be left for me at [*state address required by Rule No.* 36].

Dated the day of 18 .

[*To be signed by the party, or by his proctor.*]

No. 33.—*Petition.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

A. B., proctor for the plaintiff in a cause of [*state nature of cause*] instituted on behalf of [*state name, address and description of plaintiff*] against [*state name and nature of property*] and against intervening, says as follows: [*here make the necessary statements, in short paragraphs, numbered consecutively*].

And the said A. B. prays [*here state the plaintiff's prayer*].

Dated the day of 18 .

[*To be signed by the counsel and proctor.*]

No. 34.—*Answer.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

C. D., proctor for [*state name, address and description*], the defendant in this cause, says as follows: [*here make the necessary statements, in short paragraphs, numbered consecutively*].

And the said C. D. prays [*here state the prayer of the defendant*].

Dated the day of 18 .

[*To be signed by the counsel and proctor.*]

No. 35.—*Reply or any subsequent Pleading.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

A. B., proctor for the [*state whether plaintiff or defendant*], further says as follows: [*here make the necessary statements, in short paragraphs, numbered consecutively*].

Dated the day of 18 .

[*To be signed by the counsel and proctor.*]

No. 36.—*Conclusion.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

A. B., proctor for the [*state whether plaintiff or defendant*], says that he does not plead further, and prays that the pleadings be concluded.

Dated the day of 18 .

[*To be signed by the counsel and proctor.*]

No. 37.—*Return as to Witnesses examined in London.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., examiner, hereby certify as follows:—

(1.) On the day of 18 , in the presence of the proctors for the plaintiff and defendant [*or in the absence of one or other of them, as the case may be*], I administered an oath to and caused to be examined the following witnesses, who were produced before me on behalf of the [*state whether plaintiff or defendant*] to give evidence in this cause, viz.

John Thomas,
William Roe,
&c. &c.

(2.) On the day of 18 , in the presence of the said proctors [*or in the absence of one or other of them, as the case may be*], I administered an oath to and caused to be examined the following witnesses, who were produced before me on behalf of the [*state whether plaintiff or defendant*] to give evidence in this cause, viz.

William Thomas,
&c. &c.

Dated the day of 18 .

G. H., Examiner.

No. 38.—*Præcipe for Commission to examine Witnesses.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., proctor for the [*state whether plaintiff or defendant*], pray a commission for the examination of witnesses in this cause, decreed by the judge to be opened at on the day of 18 , and to be addressed to [*state name of the examiner or commissioner*].

[*To be signed by the proctor, or by his clerk for him.*]

No. 39.—*Commission to examine Witnesses.*

In the High Court of Admiralty of England.

No.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To [*state name and address of examiner or commissioner appointed*], greeting. Whereas in a cause of instituted in the High Court of our Admiralty of England on behalf of against [and against intervening], the judge of our said Court has decreed

a commission to be issued for the examination of witnesses concerning the truth of the matters at issue in the said cause. We therefore hereby authorize you, upon the day of 18 at , in the presence of the proctors in the said cause, or in the presence of their or either of their lawfully appointed substitutes, or otherwise notwithstanding the absence of either of them, to swear the witnesses who shall be produced before you for examination in the said cause, and cause them to be examined, and their depositions to be reduced into writing. We further authorize you to adjourn (if necessary) the said examinations from time to time and from place to place, as you may find expedient. And we command you, upon the examinations being completed, to transmit the depositions, and the whole proceedings had and done before you, together with this commission, to the registry of our said court.

Given at London, under the seal of our said Court, the day of in the year of our Lord 18 .

E. F., Registrar.

Commission to examine witnesses.
Taken out by .

No. 40.—*Return to Commission to examine Witnesses.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., the examiner [*or* commissioner] named in the commission hereto annexed, bearing date the day of 18 , hereby certify as follows:

(1.) On the day of 18 , I opened the said commission at , and in the presence of the proctors for the plaintiff and defendant [*or in the absence of one or other of them, as the case may be*] administered an oath to and caused to be examined the following witnesses, who were produced before me on behalf of the [*state whether plaintiff or defendant*] to give evidence in this cause, viz.:

John Thomas,
William Roe,
&c. &c.

(2.) On the day of 18 , I proceeded with the examinations at the same place [*or at some other place, as the case may be*], and in the presence of the said proctors administered an oath to and caused to be examined the following witnesses, who were produced before me on behalf of the [*state whether plaintiff or defendant*] to give evidence in this cause, viz.:

William Thomas,
&c. &c.

Dated the day of 18 .

G. H., Examiner *or* Commissioner.

No. 41.—*Præcipe for Subpœna to appear before the Judge.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., proctor for the [*state whether plaintiff or defendant*], pray a subpœna, commanding to appear before the judge of the High Court of Admiralty of England in situate on the day of 18 , at of the clock in the noon

of the same day, to give evidence in this cause [and to produce (*describe the papers to be produced, if any*)].

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

No. 42.—*Subpœna to appear before the Judge.*

In the High Court of Admiralty of England.

No.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To greeting. We command you (and every of you) that, all other things set aside, and ceasing every excuse, you (and every of you) be and appear in person before the judge of the High Court of our Admiralty of England in situate on the day of 18 , at of the clock in the noon of the same day, and so from day to day as may be required, and give evidence in a cause of , which has been instituted in our said Court on behalf of against and against intervening [and then and there produce (*describe the papers to be produced, if any*)]; and this you shall not (nor shall any of you) in anywise omit, under pain of the law and contempt thereof.

Given at London, under the seal of our said Court, the day of in the year of our Lord 18 .

E. F., Registrar.

Subpœna to appear in Court.

Taken out by .

No. 43.—*Præcipe for Subpœna to appear before an Examiner or Commissioner.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., proctor for the [*state whether plaintiff or defendant*], pray a subpœna, commanding to appear before [*state name*] an examiner [*or* commissioner appointed under a commission issued from the registry] of the High Court of Admiralty of England in situate on the day of 18 , at of the clock in the noon of the same day, to give evidence in this cause [and to produce (*describe the papers to be produced, if any*)].

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

No. 44.—*Subpœna to appear before an Examiner or Commissioner.*

In the High Court of Admiralty of England.

No.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To greeting. We command you (and every of you) that, all other things set aside, and ceasing every excuse, you (and every of you) be and appear in person before an examiner [*or* commissioner] of the High Court of our Admiralty of England in situate on the day of 18 , at of the clock in the noon of the same day, and so from day to day as may be required, and give evidence

in a cause of , which has been instituted in our said Court on behalf of against and against intervening [and then and there produce (*describe the papers to be produced, if any*)]; and this you shall not (nor shall any of you) in anywise omit, under pain of the law and contempt thereof.

Given at London, under the seal of our said Court, the day of in the year of our Lord 18 .

E. F., Registrar.

Subpœna to appear
before Examiner [*or* Commissioner].
Taken out by .

No. 45.—*Præcipe for Summons.*

No.

In the High Court of Admiralty of England.

The [*state title of cause*], master.

I, A. B., proctor for the [*state whether plaintiff or defendant*] in this cause, pray a summons against [*state whether defendant's or plaintiff's proctor*] to appear before the judge in Chambers to show cause why [*state the cause of summons*].

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

No. 46.—*Summons.*

No.

In the High Court of Admiralty of England.

The [*state title of cause*], master.

Let C. D. [*state whether plaintiff's or defendant's proctor*] attend before the judge in Chambers at on the day of 18 , at o'clock in the noon, to show cause why .

Dated the day of 18 .

E. F., Registrar.

Summons.
Taken out by .

No. 47.—*Minute on filing any Document.*

No.

In the High Court of Admiralty of England.

The [*state title of cause*], master.

I, A. B., proctor for the [*state whether plaintiff or defendant*], file the following documents; viz. [*here describe the documents.*]

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

No. 48.—*Præcipe for Commission of Appraisement and Sale.*

No.

In the High Court of Admiralty of England.

The [*state title of cause*], master.

I, A. B., proctor for the [*state whether plaintiff or defendant*], pray a commission for the appraisement and sale of the [*state name and nature of property*], which was decreed by the Court on the day of 18 .

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*

No. 49.—*Commission of Appraisement and Sale.*

In the High Court of Admiralty of England.

No.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To the marshal of the High Court of our Admiralty of England, and to all and singular his substitutes, greeting. Whereas in a cause of , instituted in our said Court on behalf of against [and against intervening], the judge of our said Court has decreed the said to be appraised and sold. We therefore hereby authorize and command you, to reduce into writing an inventory of the said , and having chosen one or more experienced person or persons, to swear him or them to appraise the same according to the true value thereof, and upon a certificate of such value having been reduced into writing to cause the said to be sold by public auction for the highest price, not under the appraised value thereof, that can be obtained for the same. And we further command you, immediately upon the sale being completed, to pay the proceeds arising therefrom into the registry of our said Court, and to file the certificate of appraisement signed by you and the appraiser or appraisers, and an account of the sale signed by you, together with this commission.

Given at London, under the seal of our said Court, the day of in the year of our Lord 18 .

E. F., Registrar.

Commission of appraisement and sale.
Taken out by .

No. 50.—*Præcipe for Order for Payment of Money out of Court.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., proctor for the [*state whether plaintiff or defendant*], pray an order for the payment out of Court to [*state to whom*] of the sum of [*state the sum in letters*], being the [*state the nature of the claim*] decreed to be paid to .

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

No. 51.—*Order for Payment of Money out of Court.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, J. K., judge of the High Court of Admiralty of England, hereby order payment of the sum of , being the amount of , to be made to , out of the now remaining in the registry of the said Court.

Dated the day of 18 .

J. K., Judge.

Witness, E. F., Registrar.

No. 52.—*Præcipe for Monition to pay.*

No.

In the High Court of Admiralty of England.

The [*state title of cause*], master.

I, A. B., proctor for the [*state whether plaintiff or defendant*], pray a monition against [*state name, address and description*], to pay to [*state name, address and description of person to whom payment is to be made*] the sum of [*state the sum in letters*], being [*state nature of claim*], decreed by order of the judge in this cause.

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

No. 53.—*Monition to pay.*

No.

In the High Court of Admiralty of England.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To greeting. Whereas in a cause of instituted in the High Court of our Admiralty of England on behalf of against [and against intervening], the judge of our said Court has decreed a monition to be issued against you to pay the sum of to , the said sum being . We therefore hereby command you the said to pay, within six days from the service hereof (exclusive of the day of such service), the said sum of to the said accordingly, and hereof fail not.

Given at London, under the seal of our said Court, the day of in the year of our Lord 18 .

E. F., Registrar.

Monition to pay the sum of £ .

Taken out by .

No. 54.—*Præcipe for Monition to bring in Certificate of Ship's Register.*

No.

In the High Court of Admiralty of England.

The [*state title of cause*], master.

I, A. B., proctor for the [*state whether plaintiff or defendant*], pray a monition against [*state name, address and description*] to bring into the registry of the Court the certificate of registry belonging to the above-named or vessel .

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

No. 55.—*Monition to bring in Certificate of Ship's Register.*

No.

In the High Court of Admiralty of England.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To greeting. Whereas in a cause of instituted in the High Court of our Admiralty of England on behalf of against the or vessel [whereof now is or lately was master], her tackle, apparel and furniture, the judge of our said Court has decreed a monition to be issued against you to bring in the certificate of registry belonging to the said or vessel, which is in your possession or

under your control: We therefore hereby command you the said to bring, within six days from the service hereof (exclusive of the day of such service), the said certificate into the registry of our said Court, to abide the judgment of our said Court concerning the same.

Given at London, under the seal of our said Court, the day of in the year of our Lord 18 .

E. F., Registrar.

Monition to bring in ship's register.
Taken out by .

No. 56.—*Præcipe to withdraw Caveat.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., proctor for the [*state whether plaintiff or defendant*], pray that the caveat against [*state tenor of caveat*], entered by me on the day of 18 , on behalf of [*state name*] may be withdrawn.

Dated the day of 18 .

[*To be signed by the person by whom the præcipe for the entry of the caveat was signed.*]

No. 57.—*Præcipe for Service by the Marshal of any Instrument in Rem other than a Warrant.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., proctor for the [*state whether plaintiff or defendant*], pray that the [*state nature of instrument*] left herewith be duly executed.

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

No. 58.—*Præcipe for Service by the Marshal of any Instrument in Personam.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., proctor for the [*state whether plaintiff or defendant*], pray that the [*state nature of instrument*] left herewith be duly served on [*state name, address and description of person on whom the same is to be served*].

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

No. 59.—*Præcipe for Attachment.*

In the High Court of Admiralty of England.

No.

The [*state title of cause*], master.

I, A. B., proctor for the [*state whether plaintiff or defendant*], pray an attachment against [*state name, address and description*], for *his* contumacy and contempt in [not having obeyed the monition, bearing date the day of 18], for payment of the sum of [*state the sum in letters*], which was served upon *him* on the day of 18]. The commitment indorsed on the said attachment to be addressed to [*the keeper or jailer of Her Majesty's jail or prison at as the case may be*].

Dated the day of 18 .

[*To be signed by the proctor, or by his clerk for him.*]

No. 60.—*Attachment.*

In the High Court of Admiralty of England.

No.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To all and singular our justices of the peace, mayors, sheriffs, bailiffs, marshals, constables, and to all our officers, ministers, and others whomsoever, greeting: Whereas, in a cause of instituted in the High Court of our Admiralty of England on behalf of against [and against intervening], the judge of our said Court has decreed to be attached for manifest contumacy and contempt in : We therefore hereby command you to attach and arrest the said , and to keep under safe and secure arrest, until you shall receive further orders from us [*or* until shall have obeyed the said monition by].

Given at London, under the seal of our said Court, the day of in the year of our Lord 18 .

E. F., Registrar.

Attachment.
Taken out by .

Indorsed on the above.

To .

High Court of Admiralty of England. } Receive into your custody the bod of herewith sent you, for the cause hereunder written; that is to say,

For manifest contumacy and contempt (*in not having obeyed the within-mentioned monition*).

J. K., Judge.

FEES to be taken in the High Court of Admiralty of England, by the Officers and Practitioners therein.

SCHEDULE I.

FEES TO BE TAKEN BY THE OFFICERS, AND TO BE COLLECTED BY MEANS OF ADMIRALTY COURT STAMPS.

In the Registry.

		£	*s.*	*d.*
1.	On every præcipe	0	5	0
2.	„ warrant or citation	0	10	0
3.	„ detainer	1	0	0
4.	„ release	0	10	0
5.	„ commission, monition, decree, requisition, attachment or other instrument for which a fee is not specially provided	1	0	0
6.	„ bail bond	0	7	6
7.	„ affidavit of justification	0	2	6
8.	„ subpœna	0	10	0
9.	„ minute, including the entry of the order, if any	0	5	0
10.	„ summons, including the entry of the judge's or registrar's order	0	10	0
11.	„ notice of sale, or notice of proceedings in a cause of possession	0	10	0
12.	„ notice of motion, including the entry of the judge's order	0	10	0
13.	„ notice to have a cause placed on the list for hearing, including the entry of judge's order, if the cause be by default	0	10	0
14.	„ ditto ditto if the cause be contested	2	0	0
15.	„ notice to have a reference placed on the list for hearing	0	10	0
16.	On writing for the attendance of Trinity Masters at the hearing of any cause	0	10	0
17.	On the examination of any witness vivâ voce, either in Court or before the registrar	0	10	0
18.	On administering an oath, for each deponent	0	1	0
19.	On affixing the seal of the Court to any instrument on parchment	0	2	6
20.	Ditto ditto to any other document	0	1	0
21.	On every pleading, conclusion, proof, notice, agreement or other document, on the same being filed, save an exhibit or any instrument or document previously issued from the registry or the marshal's office	0	5	0

	£	s.	d.
22. On every exhibit, including the marking thereof ..	0	1	0
23. For every office copy of a document in the English language, per sheet, not exceeding 10 folios, including the registrar's signature	0	5	0
24. If required to be collated in the registry, per sheet, not exceeding 10 folios, in addition to the above ..	0	2	6
25. For office copies of papers in a foreign language, or of short-hand writers' or reporters' notes, or of abstracts or translations made in the registry, in addition to the above fees, the charges of the copyist, short-hand writer, reporter or translator.			
26. On collating original documents with the proof sheets of printed matter, if done with a clerk or clerks of the proctor or proctors, per sheet demy of printed matter, whether of four pages folio, or eight pages quarto	0	10	0
27. If done wholly in the registry, per sheet demy ..	1	0	0
28. On a reference to the registrar	5	5	0
29. If the attendance of one or two merchants is required, to each merchant	5	5	0
30. In cases of great intricacy and large amount, to the registrar and to each merchant	10	10	0
31. When the accounts to be investigated do not amount to 300*l.*, to the registrar and to each merchant, from	2 to 5	2 to 5	0 to 0
32. When the accounts to be investigated do not amount to 100*l.*, to the registrar and to each merchant, from	1 to 3	1 to 3	0 to 0
33. On drawing the report and schedule in cases in which the claim exceeds 100*l.*	1	0	0
34. Ditto ditto where the claim does not exceed 100*l.*	0	10	0
35. On taxing any bill of costs, per sheet not exceeding 10 folios, from each party to the taxation	0	5	0
36. Ditto ditto if but one party attends the taxation	0	10	0
37. On a receivable order	0	2	6
38. On a receipt for money or for papers	0	2	6
39. On every order for payment of money out of the registry	0	5	0
40. Poundage on monies paid out of the registry in any cause, if the sum does not exceed 50*l.*	0	5	0
41. Ditto ditto if it exceeds 50*l.*, but does not exceed 100*l.*	0	10	0
42. Ditto ditto if it exceeds 100*l.*, but does not exceed 200*l.*	1	0	0
43. For every additional 100*l.*	0	10	0
44. No poundage is payable on the transfer of money from the registry to the naval prize account, or on transmitting it to the Court of Appeal in pursuance of a monition.			
45. From a person who is not a party in the cause, nor his proctor, nor the clerk of the proctor, on examining the Court books in respect of any cause	0	1	0
46. On examining the documents in a cause in which no proceedings are pending, and which has been terminated within the last two years	0	2	6
47. Ditto ditto if beyond that period	0	5	0

	£	s.	d.
48. Attendance at the Bank to receive dividends, transfer, sell or purchase stock or exchequer bills, or convert bills of exchange for suitors	1	0	0
49. Attendance of a clerk out of the profession or in any Court of law or equity, besides the expenses of travelling, for every day	1	0	0
50. On every appointment of a standing commissioner to take bail	5	0	0
51. On every appointment of a commissioner to administer oaths in Admiralty	1	0	0
52. On filing a claim for repayment of the excess of wages paid to a substitute hired in the place of a volunteer into the royal navy, including copy sent to the Admiralty	0	10	0
53. On the opinion of the registrar objecting to the claim	0	10	0
54. On certificate ordering payment of amount due, including the copy to be sent to the accountant-general of the navy	0	10	0
55. On registering power of attorney for a Queen's ship generally, and copy thereof for Somerset House ..	1	10	0
56. On registering ditto specially	0	10	0
57. Poundage on monies paid to the naval prize account, the same as on payment of monies out of the registry in causes.			
58. On taxing accounts in naval prize matters the same as on taxing bills in causes.			
59. On writing letters in regard to naval prize matters ..	0	10	0
60. On letters patent to a vice-admiral, or judge of a Vice-admiralty Court, issued under seal of the Court, besides the stamp duty, if any	5	0	0
61. Ditto ditto to an advocate, registrar or marshal of a Vice-admiralty Court, besides the stamp duty, if any	2	10	0
62. On every appointment of a coroner	2	0	0

In the Marshal's Office.

63. On every præcipe	0	5	0
64. On the execution of every warrant	2	0	0
65. On the execution of every citation in rem	0	10	0
66. On the execution of every attachment, for every person attached	1	0	0
67. On the execution of every decree or commission of unlivery, appraisement or sale	1	0	0
68. On the execution of any other instrument for which a fee is not specially provided..	1	0	0
69. On attending, appointing and swearing appraisers ..	1	0	0
70. On delivering up ship or goods to the purchaser agreeably to the inventory	1	0	0
71. On attending the unlivery of the cargo, or sale of ship or goods, per day	2	0	0
72. On retaining possession of a ship, or of a ship and goods, to include the cost of a ship keeper, if required, per day	0	5	0
73. On every report as to the sufficiency of sureties ..	0	10	0
74. If the marshal or any of his substitutes is required to go a greater distance than five miles from his office to perform any of the above duties, he will be entitled			

	£	s.	d.
to his reasonable expenses for travelling, board and maintenance.			
75. Poundage on the proceeds of any vessel or goods sold under the decree of the Court, if the same do not exceed 50*l.*	0	10	0
76. Exceeding 50*l.*, but not exceeding 100*l.*	1	0	0
77. For every additional 100*l.* or part thereof	1	0	0

SCHEDULE II.

FEES TO BE TAKEN BY EXAMINERS AND COMMISSIONERS FOR THEIR OWN USE.

	£	s.	d.
1. For examining witnesses vivâ voce on a pleading, according to the length of time occupied, per day ..	From 2	2	0 to 4 4 0
2. If the examination takes place at a greater distance than three miles from the General Post Office, London, the examiner or commissioner will be entitled in addition to his proper and reasonable expenses for travelling, board and maintenance.			
3. For drawing and engrossing a return of the witnesses examined in London..	1	1	0
4. Ditto ditto of the witnesses examined under a commission..	1	1	0
5. On taking bail, whether under a standing or special commission	1	1	0

SCHEDULE III.

FEES TO BE TAKEN BY PRACTITIONERS FOR THEIR OWN USE.

Attendances.

	£	s.	d.
1. Attendance in the registry, filling up and leaving præcipe	0	6	8
2. Subsequent attendance on obtaining the document or instrument for which the præcipe was required, including the getting the seal of the Court affixed ..	0	6	8
3. Attendance in the registry, filing any document or instrument, including the minute	0	6	8
4. Attendance in the registry, filing notice of motion ..	0	6	8
5. Attendance in the registry, procuring a cause to be set down on the list for hearing	0	6	8
6. Attendance in the marshal's office, filling up præcipe, and leaving with him any instrument required to be served by him	0	6	8

	£	s.	d.
7. Attendance on counsel, leaving with him a case, pleading or brief, and paying him his fee thereon, if the fee do not exceed 1 guinea	0	3	4
8. If above 1 guinea, but not exceeding 5 guineas ..	0	6	8
9. If above 5 guineas, but not exceeding 10 guineas ..	0	13	4
10. And for every additional 10 guineas or part thereof ..	0	6	8
11. Attendance at a conference	0	6	8
12. Attendance at a consultation	0	13	4
13. Attendance serving notice or summons on adverse proctor, including copy of such notice or summons	0	6	8
14. Attendance on adverse proctor, serving him with copies of any pleading or affidavits	0	6	8
15. Attendance at the office of a public journal, procuring the insertion of an advertisement	0	6	8
16. Attendance before the judge in chambers on a motion or summons	0	6	8
17. Attendance on a motion in Court	0	13	4
18. Attendance in Court at the hearing of a cause, according to the time occupied, per day, from	1	1	0
	to		
	2	2	0
19. If the cause be by default	0	13	4
20. Attendance upon a witness taking instructions for his examination	0	6	8
21. Attendance at the examination of witnesses where the proctor is assisted by counsel, according to the time occupied, per day, from	1	1	0
	to		
	2	2	0
22. Ditto ditto where the examination is conducted by the proctor alone, according to the time occupied, per day, from	1	1	0
	to		
	4	4	0
23. If required to go beyond three miles from the General Post Office to attend the examination of witnesses, the reasonable expenses of travelling, board and maintenance will be allowed in addition.			
24. Attendance before the registrar, or before the registrar and merchants, on a reference according to the time occupied, per day, from	1	1	0
	to		
	4	4	0
25. If counsel attend the hearing of the reference, from ..	1	1	0
	to		
	2	2	0
26. Where the accounts to be investigated do not exceed 300*l.*, a smaller fee shall be allowed at the discretion of the registrar.			
27. Attendance on taxing a bill of costs, per sheet, not exceeding 10 folios	0	3	4
28. All other necessary attendances, either before the judge in chambers, before the registrar or a commissioner, or upon the adverse party or proctor, and for which a fee has not been specially provided	0	6	8
Instructions.			
29. Instructions for any petition or answer	0	13	4
30. Instructions for any reply, rejoinder or subsequent pleading	0	6	8
31. Instructions for any special affidavit	0	6	8
Pleadings and Affidavits.			
32. Drawing any petition or answer, if not exceeding 20 folios	1	0	0

	£	s.	d.
33. If exceeding 20 folios, for every additional folio ..	0	1	0
34. Drawing any reply or subsequent pleading, if not exceeding 10 folios	0	10	0
35. If exceeding 10 folios, for every additional folio ..	0	1	0
36. Drawing and engrossing the conclusion	0	6	8
37. Drawing any affidavit, if not exceeding 5 folios ..	0	5	0
38. If exceeding 5 folios, for every additional folio ..	0	1	0
39. Drawing, engrossing and swearing any affidavit in verification of the service of any summons, notice, &c., besides the fee paid on being sworn	0	2	6
40. Drawing any notice of motion	0	10	0
41. Drawing any brief, case for hearing, bill of costs, or other document not before specified, per folio ..	0	1	0
42. Perusing and abstracting any pleading, affidavit or other document filed in the cause, per folio ..	0	0	4

Copies.

43. Engrossed copies of every pleading, affidavit or other proof, and of any document to be filed and left in the registry, including the carefully collating the same, per folio	0	0	6
44. Every other copy of any document, per folio ..	0	0	4
45. Collating any copy, per folio	0	0	2
46. Correcting the press, per sheet demy, whether of four pages folio or eight pages quarto	0	10	0

Letters, Messengers, &c.

47. Every necessary letter during the dependence of the cause	0	3	6
N.B.—No fee to be allowed for perusing letters.			
48. Term fee, for letters, messengers, &c., during each Term in which any business is done	0	15	0

SCHEDULE IV.

FEES TO BE TAKEN BY THE PRACTITIONERS FOR THE USE OF OTHER PERSONS.

Counsel's Clerks' Fees.

Not to exceed as under:	£	s.	d.
Upon a fee to counsel under 5 guineas	0	2	6
5 guineas and under 10 guineas	0	5	0
10 guineas and under 20 guineas	0	10	0
20 guineas and under 30 guineas	0	15	0
30 guineas and under 50 guineas	1	0	0
50 guineas and upwards, for every guinea paid ..	0	0	6
On consultations:			
Senior's clerk	0	7	6
Junior's clerk	0	2	6
On general retainer	0	10	6
On common retainer	0	2	6
On conference	0	2	6

Witnesses' Expenses.

	£	s.	d.
Allowance to witnesses, including their board and lodging, as between party and party:			
Common witnesses, as labourers, journeymen, sailors, &c. &c.:			
If required to come a distance not exceeding five miles, per diem	0	5	0
If a greater distance, per diem	0	7	6
Master tradesmen, yeomen, farmers, masters and mates of vessels, &c.:			
If required to come a distance not exceeding five miles, per diem	0	10	0
If a greater distance, per diem	0	15	0
Bankers, merchants, professional men, notaries, engineers and surveyors, auctioneers and accountants, &c., per diem, from	1	1	0
	to		
	3	3	0
Clerks to bankers, merchants, professional men and others:			
If required to come a distance not exceeding five miles, per diem	0	10	6
If a greater distance, per diem	1	1	0
Esquires and gentlemen, per diem	1	1	0
Females according to station in life:			
If required to come a distance not exceeding five miles, per diem, from	0	5	0
	to		
	0	10	0
If a greater distance, per diem, from	0	7	6
	to		
	1	0	0

The travelling expenses of witnesses shall be allowed according to the sums reasonably and actually paid; but in no case shall there be an allowance for such expenses of more than 1*s.* per mile one way.

Printing.

	£	s.	d.
Not to exceed as under:			
Per sheet demy, whether of four pages folio or eight pages quarto	2	2	0
Extra for table work, per page folio or two pages quarto:			
If in pica type	0	5	0
If in small pica	0	7	6
If in long primer	0	10	6

Where pica or small pica can be used for table work, a smaller type shall not be allowed on taxation.

The paper employed for the printing shall be fine demy, weighing not less than 24 lbs. to the ream; and the prices mentioned above shall include all charges for printing, paper, folding and stitching.

No charge shall be allowed on taxation for corrections.

24 Vict. Cap. 10.

An Act to extend the Jurisdiction and improve the Practice of the High Court of Admiralty. [17th May, 1861.]

Whereas it is expedient to extend the jurisdiction and improve the practice of the High Court of Admiralty of England: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited for all purposes as "The Admiralty Court Act, 1861."

Interpretation of terms.

2. In the interpretation and for the purposes of this Act (if not inconsistent with the context or subject) the following terms shall have the respective meanings hereinafter assigned to them; that is to say,

"Ship" shall include any description of vessel used in navigation not propelled by oars:

"Cause" shall include any cause, suit, action, or other proceeding in the Court of Admiralty.

Commencement of Act.

3. This Act shall come into operation on the first day of June, one thousand eight hundred and sixty-one.

As to claims for building, equipping, or repairing of ships.

4. The High Court of Admiralty shall have jurisdiction over any claim for the building, equipping, or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the Court.

As to claims for necessaries.

5. The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales: Provided always, that if in any such cause the plaintiff do not recover twenty pounds he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the Judge shall certify that the cause was a fit one to be tried in the said Court.

As to claims for damage to cargo imported.

6. The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the Court that, at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales: Provided always, that if in any such cause the plaintiff do not recover twenty pounds he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the Judge shall certify that the cause was a fit one to be tried in the said Court.

As to claims for damage by any ship.

7. The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship.

High Court of Admiralty to decide questions as to ownership, &c. of ships.

8. The High Court of Admiralty shall have jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment, and earnings of any ship registered at any port in England or Wales, or any share thereof, and may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the said ship or any share thereof to be sold, and may make such order in the premises as to it shall seem fit.

Extending 17 & 18 Vict. c. 104, as to claims for salvage of life.

9. All the provisions of "The Merchant Shipping Act, 1854," in regard to salvage of life from any ship or boat within the limits of the United Kingdom, shall be extended to the salvage of life from any British ship or boat, wheresoever the services may have been rendered, and from any foreign ship or boat, where the services have been rendered either wholly or in part in British waters.

As to claims for wages and for disbursements by master of a ship.

10. The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship: Provided always, that if in any such cause the plaintiff do not recover fifty pounds, he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said Court.

3 & 4 Vict. c. 65, in regard to mortgages extended to Court of Admiralty.

11. The High Court of Admiralty shall have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of "The Merchant Shipping Act, 1854," whether the ship or the proceeds thereof be under arrest of the said Court or not.

Sections 62 to 65 of 17 & 18 Vict. c. 104, extended to Court of Admiralty.

12. The High Court of Admiralty shall have the same powers over any British ship, or any share therein, as are conferred upon the High Court of Chancery in England by the sixty-second, sixty-third, sixty-fourth, and sixty-fifth sections of "The Merchant Shipping Act, 1854."

Part 9 of 17 & 18 Vict. c. 104, extended to Court of Admiralty.

13. 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."

Court to be a court of record.

14. The High Court of Admiralty shall be a Court of Record for all intents and purposes.

Decrees and orders of Court of Admiralty to have effect of judgments at Common Law.

15. All decrees and orders of the High Court of Admiralty, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the same effect as judgments in the superior Courts of Common Law, and the persons to whom any such monies, or costs, charges, or expenses, shall be payable, shall be deemed judgment creditors, and all powers of enforcing judgments

possessed by the superior Courts of Common Law, or any Judge thereof, with respect to matters depending in the same Courts, as well against the ships and goods arrested as against the person of the judgment debtor, shall be possessed by the said Court of Admiralty with respect to matters therein depending; and all remedies at common law possessed by judgment creditors shall be in like manner possessed by persons to whom any monies, costs, charges, or expenses are by such orders or decrees of the said Court of Admiralty directed to be paid.

As to claims to goods taken in execution.

16. If any claim shall be made to any goods or chattels taken in execution under any process of the High Court of Admiralty, or in respect of the seizure thereof, or any act or matter connected therewith, or in respect of the proceeds or value of any such goods or chattels, by any landlord for rent, or by any person not being the party against whom the process has issued, the registrar of the said Court may, upon application of the officer charged with the execution of the process, whether before or after any action brought against such officer, issue a summons calling before the said Court both the party issuing such process and the party making the claim, and thereupon any action which shall have been brought in any of her Majesty's Superior Courts of Record, or in any local or inferior Court, in respect of such claim, seizure, act, or matter as aforesaid, shall be stayed, and the Court in which such action shall have been brought, or any Judge thereof, on proof of the issue of such summons, and that the goods and chattels were so taken in execution, may order the party bringing the action to pay the costs of all proceedings had upon the action after issue of the summons out of the said Admiralty Court, and the Judge of the said Admiralty Court shall adjudicate upon the claim, and make such order between the parties in respect thereof and of the costs of the proceedings, as to him shall seem fit, and such order shall be enforced in like manner as any order made in any suit brought in the said Court. Where any such claim shall be made as aforesaid the claimant may deposit with the officer charged with the execution of the process either the amount or value of the goods claimed, the value to be fixed by appraisement in case of dispute, to be by the officer paid into Court to abide the decision of the Judge upon the claim, or the sum which the officer shall be allowed to charge as costs for keeping possession of the goods until such decision can be obtained, and in default of the claimant so doing the officer may sell the goods as if no such claim had been made, and shall pay into Court the proceeds of the sale, to abide the decision of the Judge.

Powers of superior courts extended to Court of Admiralty.

17. The Judge of the High Court of Admiralty shall have all such powers as are possessed by any of the superior Courts of Common Law or any Judge thereof to compel either party in any cause or matter to answer interrogatories, and to enforce the production, inspection, and delivery of copies of any document in his possession or power.

Party in Court of Admiralty may apply for an order for inspection by Trinity Masters.

18. Any party in a cause in the High Court of Admiralty shall be at liberty to apply to the said Court for an order for the inspection by the Trinity Masters or others appointed for the trial of the said cause, or by the party himself or his witnesses, of any ship or other personal or real property, the inspection of which may be material to the issue of the cause, and the Court may make such order in respect of the costs arising thereout as to it shall seem fit.

Admission of documents.

19. Any party in a cause in the High Court of Admiralty may call on any other party in the cause by notice in writing to admit any document, saving all just exceptions, and in case of refusal or neglect to admit, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the trial the Judge shall certify that the refusal to admit was reasonable.

Power to Court of Admiralty, when personal service of citation has not been effected, to order parties to proceed.

20. Whenever it shall be made to appear to the Judge of the High Court of Admiralty that reasonable efforts have been made to effect personal service of any citation, monition, or other process issued under seal of the said Court, and either that the same has come to the knowledge of the party thereby cited or monished, or that he wilfully evades service of the same, and has not appeared thereto, the said Judge may order that the party on whose behalf the citation, monition, or other process was issued be at liberty to proceed as if personal service had been effected, subject to such conditions as to the Judge may seem fit, and all proceedings thereon shall be as effectual as if personal service of such citation, monition, or other process had been effected.

As to the service of subpœna out of England and Wales.

21. The service in any part of Great Britain or Ireland of any writ of subpœna ad testificandum or subpœna duces tecum, issued under seal of the High Court of Admiralty, shall be as effectual as if the same had been served in England or Wales.

Power to issue new writs or other process.

22. Any new writ or other process necessary or expedient for giving effect to any of the provisions of this Act may be issued from the High Court of Admiralty in such form as the Judge of the said Court shall from time to time direct.

Judge and Registrar to have same power as to arbitration as Judges and Masters at Common Law.

23. All the powers possessed by any of the superior Courts of Common Law or any Judge thereof, under the Common Law Procedure Act, 1854, and otherwise, with regard to references to arbitration, proceedings thereon, and the enforcing of awards of arbitrators, shall be possessed by the Judge of the High Court of Admiralty in all causes and matters depending in the said Court, and the Registrar of the said Court of Admiralty shall possess as to such matters the same powers as are possessed by the Masters of the said superior Courts of Common Law in relation thereto.

Section 15 of 17 & 18 Vict. c. 104, extended to Registrar of Court of Admiralty.

24. The Registrar of the High Court of Admiralty shall have the same powers under the fifteenth section of the Merchant Shipping Act, 1854, as are by the said section conferred on the Masters of her Majesty's Court of Queen's Bench in England and Ireland.

Powers of Registrar and of deputy or assistant Registrar.

25. The Registrar of the High Court of Admiralty may exercise, with reference to causes and matters in the said Court, the same powers as any surrogate of the Judge of the said Court sitting in chambers might or could have heretofore lawfully exercised; and all powers and authorities by this or any other Act conferred upon or vested in the Registrar of the said High Court of Admiralty may be exercised by any deputy or assistant Registrar of the said Court.

False oath or affirmation deemed perjury.

26. The Registrar of the said Court of Admiralty shall have power to administer oaths in relation to any cause or matter depending in the said Court; and any person who shall wilfully depose or affirm falsely in any proceeding before the Registrar or before any deputy or assistant Registrar of the said Court, or before any person authorized to administer oaths in the said Court, shall be deemed to be guilty of perjury, and shall be liable to all the pains and penalties attaching to wilful and corrupt perjury.

Appointment of Registrar and of deputy or assistant Registrar.

27. Any advocate, barrister-at-law, proctor, attorney, or solicitor of ten years' standing may be appointed Registrar or assistant or deputy Registrar of the said Court.

Appointment of Examiners.

28. Any advocate, barrister-at-law, proctor, attorney, or solicitor may be appointed an examiner of the High Court of Admiralty.

Stamp duty not payable on subsequent admissions of proctors or solicitors.

29. Any person who shall have paid on his admission in any Court as a proctor, solicitor, or attorney the full stamp duty of twenty-five pounds, and who has been or shall hereafter be admitted a proctor, solicitor, or attorney, (if in other respects entitled to be so admitted,) shall be liable to no further stamp duty in respect of such subsequent admission.

Proctor may act as agent of solicitors.

30. Any proctor of the High Court of Admiralty may act as agent of any attorney or solicitor, and allow him to participate in the profits of and incident to any cause or matter depending in or connected with the said Court; and nothing contained in the Act of the fifty-fifth year of the reign of King George the Third, chapter one hundred and sixty, shall be construed to extend to prevent any proctor from so doing, or to render him liable to any penalty in respect thereof.

2 Hen. 4, c. 11, repealed.

31. The Act passed in the second year of the reign of King Henry the Fourth, intituled "A Remedy for him who is wrongfully pursued in the Court of Admiralty," is hereby repealed.

Power of appeal in interlocutory matters.

32. Any party aggrieved by any order or decree of the Judge of the said Court of Admiralty, whether made *ex parte* or otherwise, may, with the permission of the Judge, appeal therefrom to her Majesty in Council, as fully and effectually as from any final decree or sentence of the said Court.

Bail given in the Court of Admiralty good in the Court of Appeal.

33. In any cause in the High Court of Admiralty bail may be taken to answer the judgment as well of the said Court as of the Court of Appeal, and the said High Court of Admiralty may withhold the release of any property under its arrest until such bail has been given; and in any appeal from any decree or order of the High Court of Admiralty the Court of Appeal may make and enforce its

order against the surety or sureties who may have signed any such bail bond in the same manner as if the bail had been given in the Court of Appeal.

As to the hearing of causes and cross causes.

34. 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 the cross cause.

Jurisdiction of the Court.

35. The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam.

APPENDIX—(*Continued.*)

25 & 26 Vict. Cap. 63.

[*Extract.*]

An Act to amend "The Merchant Shipping Act, 1854," *"The Merchant Shipping Act Amendment Act*, 1855," *and "The Customs Consolidation Act*, 1853." [29th July, 1862.]

Whereas it is expedient further to amend "The Merchant Shipping Act, 1854," "The Merchant Shipping Act Amendment Act, 1855," and "The Customs Consolidation Act, 1853:" Be it enacted— 17 & 18 Vict. c. 104. 18 & 19 Vict. c. 91. 16 & 17 Vict. c. 107.

1. This Act may be cited as "The Merchant Shipping Act Amendment Act, 1862," and shall be construed with and as part of "The Merchant Shipping Act, 1854," hereinafter termed the Principal Act. Short title.

2. The enactments described in Table (A) in the schedule to this Act shall be repealed as therein mentioned, except as to any liabilities incurred before such repeal. Enactments in Table (A) repealed.

Registry and Measurement of Tonnage (Part II. of Merchant Shipping Act, 1854).

3. It is hereby declared that the expression "beneficial interest," whenever used in the second part of the principal Act, includes interests arising under contract and other equitable interests; and the intention of the said Act is that, without prejudice to the provisions contained in the said Act for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the said Act on registered owners and mortgagees, and without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property. Equities not excluded by Merchant Shipping Act.

Masters and Seamen (Part III. of Merchant Shipping Act, 1854).

13. The following vessels; that is to say,

(1.) Registered seagoing ships exclusively employed in fishing on the coasts of the United Kingdom; Third part of Act to apply to fishing boats,

light-house vessels and pleasure yachts, with certain exceptions.

(2.) Seagoing ships belonging to any of the three general light-house boards;

(3.) Seagoing ships being pleasure yachts;

Shall be subject to the whole of the third part of the principal Act; except,—sections 136, 143, 145, 147, 149, 150, 151, 152, 153, 154, 155, 157, 158, 161, 162, 166, 170, 171, 231, 256, 279, 280, 281, 282, 283, 284, 285, 286, and 287.

Construction of sect. 182 of principal Act. Stipulations concerning salvage.

18. It is hereby declared that the 182nd section of the principal Act does not apply to the case of any stipulation made by the seamen belonging to any ship, which according to the terms of the agreement is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship or ships.

Payment of wages to seamen abroad under section 209 of principal Act.

19. The payment of seamen's wages required by the 209th section of the principal Act shall, whenever it is practicable so to do, be made in money and not by bill; and in cases where payment is made by bill drawn by the master, the owner of the ship shall be liable to pay the amount for which the same is drawn to the holder or indorsee thereof; and it shall not be necessary in any proceeding against the owner upon such bill to prove that the master had authority to draw the same; and any bill purporting to be drawn in pursuance of the said section, and to be indorsed as therein required, if produced out of the custody of the Board of Trade or of the Registrar General of Seamen, or of any superintendent of any mercantile marine office, shall be received in evidence; and any indorsement on any such bill purporting to be made in pursuance of the said section, and to be signed by one of the functionaries therein mentioned, shall also be received in evidence, and shall be deemed to be *primâ facie* evidence of the facts stated in such indorsement.

Wages and effects of deceased seamen.

20. The 197th section of the principal Act shall extend to seamen or apprentices who within the six months immediately preceding their death have belonged to a British ship; and such section shall be construed as if there were inserted in the first line thereof after the words "such seaman or apprentice as last aforesaid" the words "or if any seaman or apprentice who has within the six months immediately preceding his death belonged to a British ship."

Recovery of wages, &c. of seamen lost with their ship.

21. The wages of seamen or apprentices who are lost with the ship to which they belong shall be dealt with as follows; (that is to say,)

(1.) The Board of Trade may recover the same from the owner of the ship in the same manner in which seamen's wages are recoverable:

(2.) In any proceedings for the recovery of such wages, if it is shown by some official return produced out of the custody of the Registrar General of Seamen or by other evidence that the ship has twelve months or upwards before the institution of the proceeding left a port of departure, and if it is not shown that she has been heard of within twelve months after such departure, she shall be deemed to have been lost with all hands

on board, either immediately after the time she was last heard of or at such later time as the Court hearing the case may think probable:

(3.) The production out of the custody of the Registrar General of Seamen or of the Board of Trade of any duplicate agreement or list of the crew made out at the time of the last departure of the ship from the United Kingdom, or of a certificate purporting to be a certificate from a consular or other public officer at any port abroad, stating that certain seamen or apprentices were shipped in the ship from the said port, shall, in the absence of proof to the contrary, be sufficient proof that the seamen or apprentices therein named were on board at the time of the loss:

(4.) The Board of Trade shall deal with such wages in the manner in which they deal with the wages of other deceased seamen and apprentices under the principal Act.

Relief of distressed seamen to be regulated by Board of Trade.

22. Whereas under the 211th and 212th sections of the principal Act, and the 16th section of "The Merchant Shipping Act Amendment Act, 1855," provision is made for relieving and sending home seamen found in distress abroad: and whereas doubts are entertained whether power exists under the said sections of making regulations and imposing conditions which are necessary for the prevention of desertion and misconduct and the undue expenditure of public money: be it enacted, and it is hereby declared, that the claims of seamen to be relieved or sent home in pursuance of the said sections or any of them shall be subject to such regulations and dependent on such conditions as the Board of Trade may from time to time make or impose; and no seaman shall have any right to demand to be relieved or sent home except in the cases and to the extent provided for by such regulations and conditions.

Safety (*Part IV. of Merchant Shipping Act*, 1854).

Enactment of regulations concerning lights, fog signals, and sailing rules in Schedule, Table (C).

25. On and after the first day of June one thousand eight hundred and sixty-three, or such later day as may be fixed for the purpose by order in council, the regulations contained in the Table marked (C) in the schedule hereto shall come into operation and be of the same force as if they were enacted in the body of this Act; but 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 therefor; and any alterations in or additions to such regulations made in manner aforesaid shall be of the same force as the regulations in the said schedule.

Regulations to be published.

26. The Board of Trade shall cause the said regulations and any alterations therein or additions thereto hereafter to be made to be printed, and shall furnish a copy thereof to any owner or master of a ship who applies for the same; and production of the Gazette in which any order in council containing such regulations or any alterations therein or additions thereto is published, or of a copy of such

regulations, alterations, or additions, signed or purporting to be signed by one of the secretaries or assistant secretaries of the Board of Trade, or sealed or purporting to be sealed with the seal of the Board of Trade, shall be sufficient evidence of the due making and purport of such regulations, alterations, or additions.

Owners and masters bound to obey them.

27. All owners and masters of ships shall be bound to take notice of all such regulations as aforesaid, and shall, so long as the same continue in force, be bound to obey them, and to carry and exhibit no other lights, and to use no other fog signals than such as are required by the said regulations; and in case of wilful default, the master, or the owner of the ship if it appear that he was in such fault, shall, for each occasion upon which such regulations are infringed, be deemed to be guilty of a misdemeanor.

Breaches of regulations to imply wilful default of person in charge.

28. In case any damage to person or property arises from the non-observance by any ship of any regulation made by or in pursuance of this Act, such damage shall be deemed to have been occasioned by the wilful default of the person in charge of the deck of such ship at the time, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the regulation necessary.

If collision ensues from breach of the regulations, ship to be deemed in fault.

29. If in any case of collision it appears to the Court before which the case is tried that such collision was occasioned by the non-observance of any regulation made by or in pursuance of this Act, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the regulation necessary.

Inspection for enforcing regulations.

30. The following steps may be taken in order to enforce compliance with the said regulations; that is to say,

(1.) The surveyors appointed under the third part of the principal Act, or such other persons as the Board of Trade may appoint for the purpose, may inspect any ships for the purpose of seeing that such ships are properly provided with lights and with the means of making fog signals in pursuance of the said regulations, and shall for that purpose have the powers given to inspectors by the 14th section of the principal Act:

(2.) If any such surveyor or person finds that any ship is not so provided, he shall give to the master or owner notice in writing, pointing out the deficiency, and also what is, in his opinion, requisite in order to remedy the same:

(3.) Every notice so given shall be communicated in such manner as the Board of Trade may direct to the collector or collectors of customs at any port or ports from which such ship may seek to clear or at which her transire is to be obtained; and no collector to whom such communication is made shall clear such ship outwards or grant her a transire, or allow her to proceed to sea, without a certificate under the hand of one of the said surveyors or other persons appointed

by the Board of Trade as aforesaid, to the effect that the said ship is properly provided with lights and with the means of making fog signals in pursuance of the said regulations.

Rules for harbours under local Acts to continue in force.

31. Any rules concerning the lights or signals to be carried by vessels navigating the waters of any harbour, river or other inland navigation, or concerning the steps for avoiding collision to be taken by such vessels, which have been or are hereafter made by or under the authority of any local Act, shall continue and be of full force and effect notwithstanding anything in this Act or in the schedule thereto contained.

In harbours and rivers where no such rules exist, they may be made.

32. In the case of any harbour, river, or other inland navigation for which such rules are not and cannot be made by or under the authority of any local Act, it shall be lawful for Her Majesty in Council, upon application from the harbour trust or body corporate, if any, owning or exercising jurisdiction upon the waters of such harbour, river, or inland navigation, or, if there is no such harbour trust or body corporate, upon application from persons interested in the navigation of such waters, to make rules concerning the lights or signals to be carried, and concerning the steps for avoiding collision to be taken by vessels navigating such waters; and such rules, when so made, shall, so far as regards vessels navigating such waters, have the same effect as if they were regulations contained in Table (C) in the schedule to this Act, notwithstanding anything in this Act or in the schedule thereto contained.

In case of collision one ship shall assist the other.

33. 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 and crew, 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:

In case he fails so to do, and no reasonable excuse for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default; and such failure shall also, if proved upon any investigation held under the third or the eighth part of the principal Act, be deemed to be an act of misconduct or a default for which his certificate (if any) may be cancelled or suspended.

Surveys of steamers.

34. Notwithstanding anything in the 311th section of the principal Act contained, it shall not be necessary for the surveys of passenger steamers to be made in the months of April and October; but no declaration shall be given by any surveyor under the fourth part of the said Act for a period exceeding six months, and no certificate issued by the Board of Trade shall remain in force more than six months from the date thereof.

Provisions as to carrying dangerous goods.

38. The provisions of the 329th section of the principal Act shall extend to foreign ships when within the limits of the United Kingdom.

Pilotage (*Part V. of Merchant Shipping Act*, 1854).

Power of pilotage authorities to exempt from compulsory pilotage.

39. Whereas it is enacted by the principal Act that every pilotage authority shall have power, in manner and subject to the conditions therein mentioned, to do the following things; (that is to say,)

To alter and reduce rates of pilotage.

To exempt the masters of any ships or of any classes of ships from being compelled to employ qualified pilots:

To lower and modify the rates and prices or other remuneration to be demanded and received for the time being by pilots licensed by such authority:

To arrange the limits of pilotage districts.

To make arrangements with any other pilotage authority for altering the limits of their respective districts, and for extending the powers of such other authority, and transferring its own powers to such last-mentioned authority:

And whereas it is expedient that increased facilities should be given for effecting the objects contemplated by the said recited enactments, and for further amending the law concerning pilotage, and that in so doing means should be afforded for paying due regard to existing interests and to the circumstances of particulars cases: Be it enacted, that it shall be lawful for the Board of Trade, by provisional order, to do the following things; that is to say,

Power by provisional order,—

To transfer pilotage jurisdiction.

(1.) Whenever any pilotage authority residing or having its place of business at one port has or exercises jurisdiction in matters of pilotage in any other port, to transfer so much of the said jurisdiction as concerns such last-mentioned port to any harbour trust or other body exercising any local jurisdiction in maritime matters at the last-mentioned port or to any body to be constituted for the purpose by the provisional order, or, in cases where the said pilotage authority is not the Trinity House of Deptford Strond, to the said Trinity House; or to transfer the whole or any part of the jurisdiction of the said pilotage authority to a new body corporate or body of persons to be constituted for the purpose by the provisional order, so as to represent the interests of the several ports concerned:

And to make consequent arrangements.

(2.) To make the body corporate or persons to whom the said transfer is made a pilotage authority within the meaning of the principal Act, with such powers for the purpose as may be in the provisional order in that behalf mentioned:

To determine the limits of the district of the pilotage authority to which the transfer of jurisdiction is made:

To sanction a scale of pilotage rates to be taken by the pilots to be licensed by the last-mentioned pilotage authority:

To determine to what extent and under what conditions any pilots already licensed by the former pilotage authority shall continue to act under the new pilotage authority:

To sanction arrangements for the apportionment of any

pilotage funds belonging to the pilots licensed by the former pilotage authority between the pilots remaining under the jurisdiction of that authority and the pilots who are transferred to the jurisdiction of the new authority:

To provide for such compensation or superannuation as may be just to officers employed by the former pilotage authority and not continued by the new authority:

(3.) To constitute a pilotage authority and to fix the limits of its district in any place in the United Kingdom where there is no such authority; so, however, that in the new pilotage districts so constituted there shall be no compulsory pilotage, and no restriction on the power of duly qualified persons to obtain licences as pilots: To constitute new authorities.

(4.) To exempt the masters and owners of all ships, or of any classes of ships, from being obliged to employ pilots in any pilotage district or in any part of any pilotage district, or from being obliged to pay for pilots when not employing them in any district or in any part of any pilotage district, and to annex any terms and conditions to such exemptions: To exempt from compulsory pilotage in any district.

(5.) In cases where the pilotage is not compulsory, and where there is no restriction on the power of duly qualified persons to obtain licences as pilots, to enable any pilotage authority to license pilots and fix pilotage rates for any part of the district within the jurisdiction of such authority for which no such licences or rates now exist: To enable existing authorities to grant licences and fix rates.

(6.) In cases where the pilotage is not compulsory, and where there is no restriction on the power of duly qualified persons to obtain licences as pilots, to enable any pilotage authority to raise all or any of the pilotage rates now in force in the district or any part of the district within the jurisdiction of such authority: To raise rates.

(7.) In cases where the pilotage is not compulsory, and where there is no restriction on the number of pilots, or on the power of duly qualified persons to obtain licences as pilots, to give additional facilities for the recovery of pilotage rates and for the prevention of the employment of unqualified pilots: To facilitate recovery of rates in certain cases.

(8.) To give facilities for enabling duly qualified persons, after proper examination as to their qualifications, to obtain licences as pilots. To facilitate grants of licences.

40. The following rules shall be observed with respect to provisional orders made in pursuance of this Act. Regulations with respect to manner of making and confirming provisional orders.

1. Application in writing for such order shall be made to the Board of Trade by some persons interested in the pilotage of the district or in the operation of the laws or regulations relating to such pilotage:

2. Notice of such application having been made shall be published once at the least in each of two successive weeks in the

month immediately succeeding the time of such application in the Shipping Gazette, and in some newspaper or newspapers circulating in the county, or, if there are more than one, in the counties adjacent to the pilotage district to be affected by the order:

3. The notice so published shall state the objects which it is proposed to effect by the provisional order:

4. The Board of Trade on receiving the application shall refer the same to the pilotage authority or authorities of the district, and shall receive and consider any objections which may be made to the proposed provisional order, and shall for that purpose allow at least six weeks to elapse between the time of referring the application to the pilotage authority and the time of making the provisional order:

5. The Board of Trade shall, after considering all objections, determine whether to proceed with the provisional order or not; and shall, if they determine to proceed with it, settle it in such manner and with such terms and conditions, not being inconsistent with the provisions of this Act, as they may think fit; and shall, when they have settled the same, forward copies thereof to the persons making the application and to the pilotage authority or authorities of the district or districts to which it refers:

6. No such provisional order shall take effect unless and until the same is confirmed by Parliament; and for the purpose of procuring such confirmation the Board of Trade shall introduce into Parliament a public General Bill, or public General Bills, in which, or in the schedule to which, the provisional order or provisional orders to be thereby confirmed shall be set out at length:

7. If any petition is presented to either House of Parliament against any such provisional order as aforesaid in the progress through Parliament of the Bill confirming the same, so much of the Bill as relates to the order so petitioned against may be referred to a select committee, and the petitioner shall in such case be allowed to appear and oppose as in the case of Private Bills.

Extension of exemptions from compulsory pilotage.

41. 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.

Wreck and Salvage (Part VIII. of Merchant Shipping Act, 1854).

Extension and amendment of summary jurisdiction in small salvage cases.

49. The provisions contained in the eighth part of the principal Act for giving summary jurisdiction to two justices in salvage cases, and for preventing unnecessary appeals and litigation in such cases, shall be amended as follows; (that is to say,)

(1.) Such provisions shall extend to all cases in which the value of the property saved does not exceed one thousand pounds, as well as to the cases provided for by the principal Act:

(2.) Such provisions shall be held to apply whether the salvage service has been rendered within the limits of the United Kingdom or not:

(3.) It shall be lawful for one of Her Majesty's principal secretaries of state, or in Ireland for the lord lieutenant or other chief governor or governors, to appoint out of the justices for any borough or county a rota of justices by whom jurisdiction in salvage cases shall be exercised:

(4.) When no such rota is appointed, it shall be lawful for the salvors, by writing addressed to the justice's clerk, to name one justice, and for the owner of the property saved in like manner to name the other:

(5.) If either party fails to name a justice within a reasonable time, the case may be tried by two or more justices at petty sessions:

(6.) It shall be competent for any stipendiary magistrate, and also in England for any County Court judge, in Scotland for the sheriff or sheriff substitute of any county, and in Ireland for the recorder of any borough in which there is a recorder, or for the chairman of quarter sessions in any county, to exercise the same jurisdiction in salvage cases as is given to two justices:

(7.) It shall be lawful for one of Her Majesty's principal secretaries of state to determine a scale of costs to be awarded in salvage cases by any such justices or Court as aforesaid:

(8.) All the provisions of the principal Act relating to summary proceedings in salvage cases, and to the prevention of unnecessary appeals in such cases, shall, except so far as the same are altered by this Act, extend and apply to all such proceedings, whether under the principal Act or this Act, or both of such Acts.

Receiver may appoint a valuer in salvage cases.

50. Whenever any salvage question arises the receiver of wreck for the district may, upon application from either of the parties, appoint a valuer to value the property in respect of which the salvage claim is made, and shall, when the valuation has been returned to him, give a copy of the valuation to both parties; and any copy of such valuation, purporting to be signed by the valuer, and to be attested by the receiver, shall be received in evidence in any subsequent proceeding; and there shall be paid in respect of such valua-

tion, by the party applying for the same, such fee as the Board of Trade may direct.

Jurisdiction of Court of Session in salvage cases.

51. The words "Court of Session" in the four hundred and sixty-eighth section of the principal Act shall be deemed to mean and include either division of the Court of Session or the lord ordinary officiating on the bills during vacation.

Delivery of wreck by receiver not to prejudice title.

52. Upon delivery of wreck or of the proceeds of wreck by any receiver to any person in pursuance of the provisions of the eighth part of the principal Act such receiver shall be discharged from all liability in respect thereof, but such delivery shall not be deemed to prejudice or affect any question concerning the right or title to the said wreck which may be raised by third parties, nor shall any such delivery prejudice or affect any question concerning the title to the soil on which the wreck may have been found.

Liability of Shipowners (Part IX. of Merchant Shipping Act, 1854).

Shipowners' liability limited.

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, merchandise, 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, merchandise, 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, goods, merchandise, or other things, to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding eight pounds 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:

In the case of any foreign ship which has been or can be measured according to British law, the tonnage as ascertained by such measurement shall, for the purposes of this section, be deemed to be the tonnage of such ship:

In the case of any foreign ship which has not been and cannot be measured under British law, the surveyor-general of tonnage in the United Kingdom, and the chief measuring officer in any British possession abroad, shall, on receiving from or by direction of the

Court hearing the case such evidence concerning the dimensions of the ship as it may be found practicable to furnish, give a certificate under his hand, stating what would in his opinion have been the tonnage of such ship if she had been duly measured according to British law, and the tonnage so stated in such certificate shall, for the purposes of this section, be deemed to be the tonnage of such ship.

Limitation of invalidity of insurances.

55. Insurances effected against any or all of the events enumerated in the section last preceding, and occurring without such actual fault or privity as therein mentioned, shall not be invalid by reason of the nature of the risk.

Proof of passengers on board lost ship.

56. In any proceeding under the 506th section of the principal Act or any Act amending the same against the owner of any ship or share therein in respect of loss of life, the master's list or the duplicate list of passengers delivered to the proper officer of customs under the 16th section of "The Passengers Act, 1855," shall, in the absence of proof to the contrary, be sufficient proof that the persons in respect of whose death any such prosecution or proceeding is instituted were passengers on board such ship at the time of their deaths.

Arrangements concerning Lights, Sailing Rules, Salvage, and Measurement of Tonnage in the Case of Foreign Ships.

Foreign ships in British jurisdiction to be subject to regulations in Table (C) in schedule.

57. 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.

Regulations, when adopted by a foreign country, may be applied to its ships on the high seas.

58. 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 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.

Provisions concerning salvage of life may, with the consent of any foreign country, be applied to

59. Whenever it is made to appear to Her Majesty that the government of any foreign country is willing that salvage shall be awarded by British Courts for services rendered in saving life from any ship belonging to such country when such ship is beyond the limits of British jurisdiction, Her Majesty may, by order in council,

its ships on the high seas.

direct that the provisions of the principal Act and of this Act, with respect to salvage for services rendered in saving life from British ships, shall in all British Courts be held to apply to services rendered in saving life from the ships of such foreign country, whether such services are rendered within British jurisdiction or not.

Ships of foreign countries adopting the rule for measurement of tonnage need not be re-measured in this country.

60. Whenever it is made to appear to Her Majesty that the rules concerning the measurement of tonnage of merchant ships for the time being in force under the principal Act have been adopted by the government of any foreign country, and are in force in that country, it shall be lawful for Her Majesty by order in council to direct that the ships of such foreign country shall be deemed to be of the tonnage denoted in their certificates of registry or other national papers; and thereupon it shall no longer be necessary for such ships to be re-measured in any port or place in Her Majesty's dominions, but such ships shall be deemed to be of the tonnage denoted in their certificates of registry or other papers, in the same manner, to the same extent, and for the same purposes in, to, and for which the tonnage denoted in the certificates of registry of British ships is deemed to be the tonnage of such ships.

Effect of order in council.

61. Whenever an order in council has been issued under this Act, applying any provision of this Act or any regulation made by or in pursuance of this Act to the ships of any foreign country, such ships shall in all cases arising in any British Court be deemed to be subject to such provision or regulation, and shall for the purpose of such provision or regulation be treated as if they were British ships.

Orders in council may be limited as to time, and qualified.

62. In issuing any order in council under this Act Her Majesty may limit the time during which it is to remain in operation, and may make the same subject to such conditions and qualifications, if any, as may be deemed expedient, and thereupon the operation of the said order shall be limited and modified accordingly.

Orders in council may be revoked and altered.

63. Her Majesty may by order in council from time to time revoke or alter any order previously made under this Act.

Orders in council to be published in London Gazette.

64. Every order in council to be made under this Act shall be published in the London Gazette as soon as may be after the making thereof; and the production of a copy of the London Gazette containing such order shall be received in evidence, and shall be proof that the order therein published has been duly made and issued; and it shall not be necessary to plead such order specially.

Legal Procedure.

20 & 21 Vict. c. 43, s. 3, not to apply to proceedings under Board of Trade or this Act, &c.

65. Nothing in the third section of the Act passed in the twentieth and twenty-first years of the reign of Her present Majesty, chapter forty-three, except so much thereof as provides for the payment of any fees that may be due to the clerk of the justices, shall be deemed to apply to extend to any proceeding under the direction of the Board of Trade, or under or by virtue of the provisions of the principal Act or this Act, or any Act amending the same.

The SCHEDULE referred to in this Act.

TABLE (A). *See* SECT. 2.

Enactments to be repealed.

Reference to Act.	Title of Act.	Extent of Repeal.
8 & 9 Vict. c. 91 ..	An Act for the Warehousing of Goods.	Section 51 to be repealed immediately on the passing of this Act.
16 & 17 Vict. c. 107..	Customs Consolidation Act, 1853.	The last proviso in Section 74 and Sections 170, 171, and 172, to be repealed immediately on the passing of this Act.
17 & 18 Vict. c. 104..	Merchant Shipping Act, 1854.	Sections 295, 296, 297, 298, 299, to be repealed from the date at which the Regulations contained in Table C in this Schedule come into operation. Sections 300, 322, 323, 504 and 505, to be repealed immediately on the passing of this Act.
19 & 20 Vict. c. 75 ..	An Act for the further Alteration and Amendment of the Laws and Duties of Customs.	Section 8 to be repealed immediately on the passing of this Act.

TABLE (C). *See* SECT. 25.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA.

[*These Regulations are modified by Order in Council, dated 9th January*, 1863. (*See next page.*)]

ORDERS IN COUNCIL,

PASSED IN PURSUANCE OF

THE MERCHANT SHIPPING ACT AMENDMENT ACT, 1862, s. 25.

ORDER IN COUNCIL, dated 9th January, 1863.

(*Published in Gazette, 13th January, 1863.*)

WHEREAS the rules and practice observed for preventing collisions at sea, which were formerly adopted by maritime nations, have proved insufficient to satisfy the requirements of modern navigation; and whereas various alterations in such rules and practice have from time to time been made by different nations, but the rules so altered have been found to be in some cases inconsistent with each other, and in other cases to have the force of municipal law only; and whereas, in consequence of communications from the Government of the Emperor of the French inviting Her Majesty's Government to consider the expediency of making the said rules uniform and international, Her Majesty's Government prepared a project of Regulations for preventing collisions at sea, and submitted it to the Government of the Emperor of the French; and the project so prepared by Her Majesty's Government was approved by the Government of the Emperor of the French with certain modifications, which were assented to by Her Majesty's Government; and whereas the said Regulations so modified have been sanctioned by the "Merchant Shipping Act Amendment Act, 1862," and are contained in Table (C) in the schedule to that Act: and whereas by the said Act it is provided that Her Majesty may from time to time, on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council modify any of the said Regulations or make new regulations in substitution therefor: and whereas certain clerical errors have been discovered in the Regulations contained in the schedule to the said Act and the Admiralty and the Board of Trade have jointly recommended Her Majesty to modify the said Regulations for the purpose of correcting the said clerical errors; and the Regulations so modified are appended to this Order: and whereas by virtue of the said Act and of this Order the said Regulations appended hereto will, so far as relates to British ships and also so far as relates to foreign ships when within British jurisdiction, come into operation on the 1st day of June, 1863: and whereas it is provided by the same Act 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 Table (C) in the schedule to the said Act, or such other regulations for preventing collision as are for the time being in force under the said Act, 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 shall apply to the ships of the said foreign country whether within British jurisdiction or not: and it is further provided by the said

Act that whenever an Order in Council has been issued applying any Regulation made by or in pursuance of the said Act to the ships of any foreign country, such ships shall in all cases arising in any British Court be deemed to be subject to such Regulation, and shall for the purpose of such Regulation be treated as if they were British ships: and whereas it has been made to appear to Her Majesty that the Government of the Emperor of the French is willing that the said Regulations appended to this Order should on and after the 1st day of June, 1863, apply to French ships when beyond the limits of British jurisdiction:

Now therefore Her Majesty by virtue of the power vested in Her by the said recited Act, and by and with the advice of Her Privy Council, is pleased to direct:—

First,—That the Regulations contained in the schedule to the said Act shall be modified by the substitution for such Regulations of the Regulations appended to this Order.

Secondly,—That the said Regulations appended to this Order shall on and after the said 1st day of June, 1863, apply to French ships whether within British jurisdiction or not.

REGULATIONS REFERRED TO IN THE FOREGOING ORDER.

Regulations for Preventing Collisions at Sea.

CONTENTS.

Preliminary.

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. Sea-going steam ships when under weigh shall carry:

(*a*) *At the Foremast Head,* a bright White Light, so fixed as to show an uniform and unbroken light over an arc of the horizon of 20 points of the compass; so fixed as to throw the light 10 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 an uniform and unbroken Light over an arc of the horizon of 10 points of the compass; so fixed as to throw the light from right ahead to 2 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 show an uniform and unbroken light over an arc of the horizon of 10 points of the compass; so fixed as to throw the light from right ahead to 2 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 Mast-head Lights vertically, in addition to their side lights, so as to distinguish them from other Steam Ships. Each of these Mast-head Lights shall be of the same construction and character as the Mast-head 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 Mast-head 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.

RULES CONCERNING FOG SIGNALS.

Fog Signals.

Art. 10. Whenever there is a 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.

STEERING AND SAILING RULES.

Two Sailing Ships meeting.

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.

Two Sailing Ships crossing.

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 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 close-hauled 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 shall keep out of the way of the ship which is to leeward.

Two Ships under Steam meeting.

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 the other.

Two Ships under Steam crossing.

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.

Sailing Ship and Ship under Steam.

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.

Ships under Steam to slacken speed.

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.

Vessels overtaking other Vessels.

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

Construction of Articles 12, 14, 15, *and* 17.

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.

Proviso to save special cases.

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.

No Ship, under any circumstances, to neglect proper Precautions.

Art. 20. Nothing in these Rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

ORDER IN COUNCIL, dated 28th April, 1863.

(*Published in Gazette, 1st May, 1863.*)

[Reciting "The Merchant Shipping Act Amendment Act, 1862," and the Regulations appended to the Order in Council, of the 9th of January, 1863, and that the Governments of the countries hereinafter named are willing that the said Regulations should, on and after the 1st of June, 1863, apply to ships belonging to their respective countries when beyond the limits of British jurisdiction, directs]—

"That the said Regulations appended to the said Order in Council, bearing date the 9th day of January, 1863, and to this Order, shall, on and after the said 1st day of June, 1863, apply to ships belonging to the following countries: that is to say,—

Austria,
Belgium,
Hanover,
Hayti,
Italy,
Mecklenburg-Schwerin,
Oldenburg,
Portugal,
Prussia,

whether within British jurisdiction or not."

ORDER IN COUNCIL, dated 27th July, 1863.

(*Published in Gazette, 28th July, 1863.*)

[After reciting as the foregoing Order, directs]—

"That the said Regulations appended to the said Order in Council, bearing date the 9th day of January, 1863, and to this Order, shall, from the date of this Order, apply to ships belonging to the following countries and states: that is to say,—

Spain,
Brazil,
The Free Hanseatic City of Hamburg,
The Free Hanseatic City of Lubeck,

The Free Hanseatic City of Bremen,
Morocco,
The Republic of the Equator,
The Oriental Republic of the Uruguay,
The Republic of Peru,
The Republic of Hayti (erroneously described in the Order in Council of the 28th of April, 1863, as the Kingdom of Hayti),

whether within British jurisdiction or not;

And shall also, on and after the 1st day of July, 1863, apply to ships belonging to

Russia,

whether within British jurisdiction or not;

And shall also, on and after the 1st day of August, 1863, apply to ships belonging to

Sweden,

whether within British jurisdiction or not."

ORDER IN COUNCIL, dated the 12th of September, 1863.

(*Published in Gazette, 15th September*, 1863.)

[After reciting, &c., directs]—

"That the said Regulations appended to the said Order in Council, bearing date the 9th day of January, 1863, and to this Order, shall, from the date of this Order, apply to ships belonging to the following countries: that is to say,—

The Netherlands,
The Argentine Republic,
and
Norway,

whether within British jurisdiction or not."

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TOWAGE.

The master of a vessel agreed with a tug for towage from Sea Reach in the Thames to a London wharf, and agreed to pay 6*l.* and give an order upon the owner of the wharf for the amount usually allowed by him (under the name of towage) as a premium to vessels of the kind coming to his wharf. The service was performed by the tug, and the master paid the 6*l.*, but refused to give the order on the owner of the wharf. The amount actually paid by the owner of the wharf according to his practice was proved; and it was also proved that if an order signed by the master of the vessel towed was presented by the master of the tug, the money would be (as a matter of practice) paid to him:—*Held*, that the master of the vessel had no authority to agree to transfer to the master of the tug an uncertain sum payable to the owners of the vessel; and that the Court had no authority to enforce such a contract or give damages for the breach of it. *Martha.* Page 314

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WILFUL TORT OF AGENT.

LONDON:

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