power to grant a new trial. That Act was followed by 12 & 13 Vic. c. 101, and the rules made by Judges of the County Courts, and approved by the Judges of the Superior Courts under sec. 12, afterwards became an Act of Parliament.

There is a well known distinction between clauses directory and obligatory. These rules are merely for practice, and are so to be considered. They are directory, only, and not obligatory.

CROMPTON, J.—The rules of the County Court in this case are very analogous to our rules, as to granting new trials.

*Rule discharged without costs.*

---

[The 84th section of the Division Courts Act of 1850 is taken from the 89th section of the English Act of 9 & 10 Vic. c. 95, but a proviso which is not in the English Act is added in ours, viz.: "Provided that such new trial be applied for at furthest "within 14 days, and good grounds be shewn therefor by the "party so applying."

Division Courts Rule No. 52 appears to have been partly taken from the English rule 141, but does not give any such discretion to the Judge as in the English rule is contained, (indeed the 84th section of the 13th & 14th Vic. ch. 53 is peremptory that the application must be made within 14 days); and the whole tenor of our Rule appears to require notice to the opposite party, &c., as a condition precedent to moving for a new trial.—*Ed. L. J.*]

---

## *Reports from Division Courts.*

(County of Lambton.—Read Burritt, Judge.)

McCART AND ANOTHER *v.* YOUNG.

(Reported by P. T. Poussett, Esq., Clerk of the Peace.)

*Law of average application to inland waters—Action for freight and average.*

[December, 1851.]

The plaintiffs being owners of the schooner "Loyalty," received on board their vessel a quantity of bricks, at Chatham, belonging to the defendant, to be carried thence to Port Sarnia. The vessel on her voyage across Lake St. Clair encountered a fog, ran aground, and the wind rising, the captain was compelled to throw overboard 7,500 of the bricks, in order to save the remainder of the bricks and the vessel from destruction.

The plaintiffs claimed for freight, and also a proportion of the expences incurred in saving the vessel and remainder of the cargo as average, and the particulars of their demand took into account the loss of the defendant's bricks, and made the vessel contribute its average share of the loss.

The plaintiffs having proved their case as stated, and the defendant alleging for defence want of care and unskilfulness in the conduct of the voyage as a bar, the learned Judge charged the jury, and said the case was not new, but rare in this country, where the maritime law was seldom called into requisition; and it had been strongly urged by some, that it was not applicable to inland waters. He, the learned judge, did not hold that opinion. The Court of Queen's Bench, in *Grover* vs. *Bullock*, 5 U. C. R. 297, had held that the maritime law did extend to inland waters and fully sustained the principle of average. That if the jury were of opinon from the evidence that there was no unskilfulness or carelessness, and that the expenses incurred were unavoidable and absolutely necessary for the preservation of the vessel and remainder of the cargo from destruction, they should find for the plaintiff the amount of the claim; if not, then only for freight of the bricks which were delivered at Port Sarnia. That the jury were to be satisfied that there was not a mere fancied apprehension of danger to justify the throwing overboard a portion of the cargo to save the rest, but an absolute and imperative necessity.

The jury gave a verdict for the plaintiffs for the whole amount claimed.

---

(County of Lambton.—Read Burritt, Judge.)

YOUNG *v.* McCART AND ANOTHER.

(Reported by P. T. Poussett, Esq.)

*Estoppel—Owners of vessels navigating the inland lakes not common carriers.*

[February, 1852.]

This was an action of tort to recover damages for the loss of 7,500 bricks of the plaintiff which the defendants had failed to deliver to the plaintiff.

The plaintiff set forth in his particulars of demand that defendants are common carriers by water, &c., and as such plaintiff caused to be delivered to them, on board of their vessel at Chatham, 22,500 bricks to be by them carried and conveyed from Chatham aforesaid to Port Sarnia, for certain reward to be paid, &c. Yet defendants did not, &c., but on the contrary took such little care of same, and behaved so negligently and imprudently about the same, that a large portion, to wit, 7,500 of said bricks, were wholly lost to plaintiff, and he claimed damages, £10.

Defendants put in a written plea, in substance as follows: That plaintiff is not entitled to recover because they say that in this Court, wherein defendants were plaintiffs and the present plaintiff was defendant, the then defendant and now plaintiff claimed by way of set-off the value of the 7,500 bricks for which damages are now claimed by him, in this cause. Moreover, that the subject matter of his demand in this cause, and the value of the 7,500 bricks, whereof the said damages are now claimed, were stated, and allowed by the then plaintiffs in their particulars, by way of credit in adjusting the average. And upon the trial the said matter or claim in this suit was adjudged and allowed, as will appear by the record and proceedings thereof, and which defendants now pray may be brought into Court and inspected by the Court on the trial of this cause.

On the cause being called, the plaintiff's attorney requested a jury to be impanelled. The defendants' agent asked the Judge to read the plea which had been put in, before the jury was called. The Judge, upon reading the plea, refused any submission of merits until the matter of the defendants' plea was disposed of; and after examining the proceedings of the former suit, gave the following judgment:—

The defendants contend by their plea that the subject matter of this suit has been already adjudicated, and that the plaintiff is estopped. Upon reading the record of the proceedings in *McCart & another* vs. *Young*, it appears that the then plaintiffs, in adjusting the average claim, credited the now plaintiff with the value of the bricks thrown overboard, allowing the same number and the same price. When a subject matter has once been litigated and finally adjudicated, their is an end of it, otherwise there would never be finality or end of litigation. The defence in the former suit was negligence, and that was as effectually urged when the plaintiff was defendant as he could now urge it as plaintiff. He submitted his defence to a jury, and that jury found against him, and he now wishes to try his chance as plaintiff with another jury. This I cannot allow even if the amount he now claims as damages had not been allowed by the jury. It would be