

she had been repaired. On the other hand the plaintiff insists on stress of weather to rebut any presumption arising from these facts. There is a point in the evidence which has to some extent affected the judgment in the Court below, and which was urged upon our attention at the argument, that should be disposed of at once. It is that in making the repairs at Sydney, the centre-board was made fast, and that this was an alteration of the risk. The evidence upon this point is very slight, but even were it stronger, it would not avail defendants, for it is not pleaded. The fastening down of the centre-board can then only affect the case in so far as it constitutes unseaworthiness which is fully pleaded, and if it be considered that unseaworthiness, arising after the commencement of the voyage, and not caused by gross negligence or fault of the assured, can affect the recourse against the insurer.

All positive evidence as to the state of the vessel on leaving Mingan is wanting; but it is proved that the vessel was repaired in Montreal, and appeared sound on examination, that she made out her voyage to Mingan and delivered her Montreal cargo in good condition, so far as we know, to the satisfaction of the shippers. From that she proceeded to Cow Bay, where she had a right to go to load, and took in her cargo there. It was only after that there were any signs of leakage. Now can we presume that because the schooner became leaky the day after she sailed from Cow Bay with a cargo, that she was unseaworthy when she left Mingan. If not, there is no evidence of any kind to establish unseaworthiness at Mingan. Now upon this point really the whole case turns, and it may therefore be as well to examine how far the leaky condition of a vessel shortly after its departure from the place where the insurance begins serves as evidence to establish unseaworthiness. It is clearly only presumption, and one very uncertain in its application. In this particular case any such presumption is repelled by other facts proved and already referred to,—namely, that she had just delivered a cargo of provisions in perfect condition, and that she had made one stage of her voyage—from Mingan to Cow Bay—without difficulty. We are not even told by those who now rely on this sort of presumption what the length of time was between the vessel leaving Mingan and becom-

ing leaky. It does not supplement this deficiency to say that she became leaky shortly after leaving Cow Bay. Perhaps if it had been shown that the running on a rock at Bersimis, or Bellesemis, took place before the departure from Mingan, and that this accident was of a serious character, there might have been something to ground the presumption that at Mingan the schooner was not in a fit state to carry freight. But we know nothing of the position of Bersimis, and very specially we know nothing of the nature of the accident, except the confused statement of the extension of protest, which can only be considered as evidence against plaintiff for the purposes for which it was made. I was not prepared for any difficulty on this point when I wrote the notes from which I am now reading, and therefore I must refer to a few authorities I have collected at rather short notice. Phillips, after mentioning an American case which decided that the protest was evidence against the assured, gives Lord Kenyon's ruling in *Christian v. Coomlee*, (2 Esp. 489), deciding it was not evidence; and Phillips adds, that this is the general doctrine, (2 Phillips, 2095). I would also refer to *Senat & Porter* (2 Durnf. & E., p. 158), where the same doctrine is elaborately decided by the whole Court. I understand the argument will be that the master is agent of the assured. We must take care not to be influenced with these slim sayings of general practice. He is his agent as far as may be necessary to make a protest, but he is not his agent to give his *impressions de voyage*. Now the object of the protest is clear and has never varied. It is made for the purposes of notice. In the "*Guidon de la Mer*" we find its object succinctly expressed. "*Perte avenant au navire ou marchandise assurée, le marchand chargeur fera faire son Delais par le Greffier, notaire ou Sergent Royal à ses assureurs avec déclaration qu'il espère estre payé des sommes que chacun aura assuré du dit jour en deux mois.*" p. 206.

It is next argued the captain was dead, and that this admitted the evidence. The death of a witness does not make evidence that which was not evidence before.

Again, we have another pretention as a make-weight. The owner adopted the captain's story in a subsequent protest. I don't think this is a fair argument. Of course, if the assured deli-