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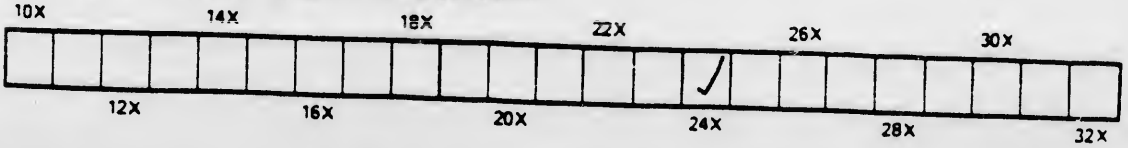

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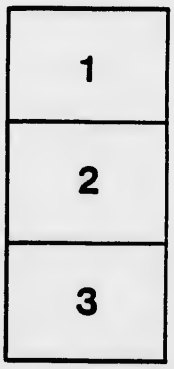

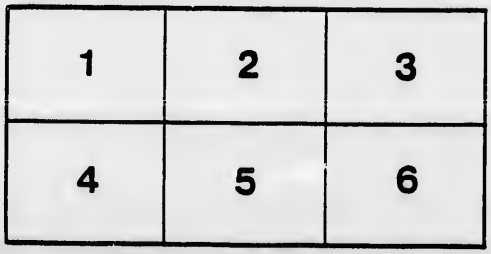

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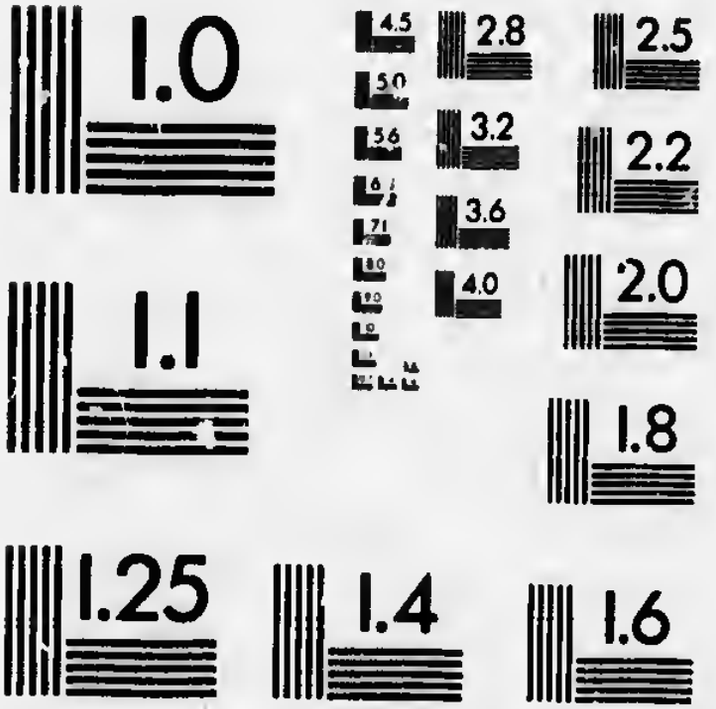

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CASE

CASES IN THE VICE-ADMIRALTY COURT

AT

QUEBEC.

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OF FREQU

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VIC

JOHN

CASES

SELECTED FROM THOSE

HEARD AND DETERMINED IN THE

VICE-ADMIRALTY COURT

AT

QUEBEC,

INVOLVING

Questions of Maritime Law

OF FREQUENT OCCURRENCE IN THE TRADE AND NAVIGATION OF THE RIVER AND GULF OF ST. LAWRENCE.

WITH

AN APPENDIX

CONTAINING THE IMPERIAL STATUTES SPECIALLY RELATING TO VICE-ADMIRALTY COURTS, AND THE RULES OF PRACTICE OBSERVED IN THEM, AS ESTABLISHED BY ORDER-IN-COUNCIL.

EDITED BY

WILLIAM COOK, ESQ., Q.C.

Montreal:
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1885.

PREFACE.

THE present volume contains a full selection, from decisions in Admiralty causes, rendered in the Vice-Admiralty Court at Quebec, by the late Honorable George Okill Stuart, between the years 1873 and 1884, and may thus be regarded as a continuation of the Lower Canada Admiralty Reports, published in London in 1858 and 1875.

Mr. Stuart, who had occasionally acted as Deputy Judge, was, in October, 1873, appointed by the Imperial Government to succeed the late Mr. Black as Judge of the Vice-Admiralty Court at Quebec. In the ten years during which he held this office—eminently to the satisfaction of the public and the Bar—he was called upon to determine many important causes, most of which have been hitherto unreported. It is believed that the present publication of some of the decisions of a learned and accomplished Judge will be of advantage, not only to the profession, but to those of the public who are interested in maritime matters.

While, of late, marked changes have taken place in the character and extent of the trade of the Dominion by the St. Lawrence, even more striking changes have occurred in the vessels by which that trade is carried on. Within the last few years, steamers of great power and capacity have in large measure superseded the sailing vessels of former times. Not a few of the cases reported in this volume will be found to deal, accurately and clearly, with many difficult and novel questions, arising from the application and construction of rules, primarily intended for the guidance of vessels at sea, to the navigation of large steamers in the narrow and confined channels of the inland waters of the Dominion.

For the convenience of the profession, the Imperial Statutes regulating the jurisdiction of the Court, and the Rules of Practice recently introduced, under the Queen's Order-in-Council of the 23rd August, 1883, are given in an Appendix. On account of this change, which assimilates the practice in Vice-Admiralty Courts, to that of the Admiralty Division of the High Court, it has been considered unadvisable to extend this volume by reporting decisions on points of practice arising under a system which has passed away. It may not however be out of place to express the hope, that rules modelled on the simple and efficient procedure now adopted in the High Court of Justice of England, may before long supersede in

the Courts of Common Law of the Province the present antiquated system, which contributes so much to fetter and impede the administration of Justice.

The Editor, lastly, desires to express his great obligation to Mrs. Stuart, for her kindness in placing at his disposal all Mr. Stuart's notes and papers connected with these decisions; thus not only rendering his task an easy one, but enabling him, in almost every instance, to present the judgments in the exact terms in which they were rendered.

QUEBEC, 1*st October*, 1885.

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CASES

IN THE

VICE-ADMIRALTY COURT

FOR

LOWER CANADA.

Tuesday, 3rd June, 1873.

AGDA.—DIETRICHS.
CLYDESDALE.—TORRANCE.

In order to support an action for damages in cases of collision, it is necessary distinctly to prove that the collision arose from the fault of the persons on board the vessel charged as the wrong-doer; or from the fault of the persons on board of that vessel, and of those on board of the injured vessel.

Where the evidence on both sides is conflicting, and there is reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen.

AGDA, CLYDESDALE.

These were cross-actions in respect of a collision which took place in the harbor of Quebec, on the 29th August, 1872. The circumstances under which it occurred are noticed in the following judgment of the Court.

JUDGMENT.—*G. O. Stuart, Esquire, Q.C., Deputy Judge and Surrogate.*

This is a cause of damage promoted by the owners of the barque Agda, a Swedish vessel, against the barque Clydesdale, of Glasgow, in Scotland, and her owners intervening, to recover damages for a collision which occurred between these vessels in the harbor of Quebec; and a cross suit

AGDA, CLYDESDALE.

instituted by the owners of the Clydesdale against the Agda, and her owners intervening, to recover damages which the Clydesdale sustained by the same collision. The Agda was a vessel of 590 tons register and the Clydesdale of 992 tons register. The collision occurred between eight and nine o'clock p.m , on the thirtieth of August last, off the Commissioners' wharf, in the harbor of Quebec. The Agda sailed from Montreal on the 27th August with a full cargo of grain, bound for the port of Hull, in the United Kingdom. From Montreal to Quebec she had been in charge of a licensed pilot for and above the harbor of Quebec, who, on Thursday, the 29th, at one o'clock p.m., brought her safely to anchor opposite the Commissioners' wharf. The master, with a view to the immediate prosecution of his voyage, on his arrival at Quebec, took on board a branch pilot for and below the harbor of Quebec, one François Blouin, who, it is alleged, from the period of his arrival on board, on the 29th, until after the collision, on the evening of the 30th, had charge of the vessel and was fully supported and his orders promptly and efficiently obeyed by the people of the Agda.

The Clydesdale, on her voyage from Glasgow, with a cargo of coals, pig iron and bar iron, arrived at Quebec on the same day, 29th August, in charge of Charles Forgues, a duly licensed pilot for and below the harbor of Quebec; and at about eleven o'clock p.m. she came to anchor, under the pilot's directions, off the Commissioners' wharf, in twenty-two fathoms of water, giving the vessel forty-five fathoms of chain on the port anchor, which, it is alleged, gave her a clear berth, satisfactory to the pilot. All sails were then furled, an anchor watch set, and a lighted lamp, or anchor light, was placed in the fore rigging. The wind being adverse on the Thursday and Friday the Agda did not proceed on her voyage, and she and the Clydesdale continued to lie in their respective berths. The Clydesdale was nearly abreast, and to the southward, on the port bow of the Agda, at a distance variously stated by the witnesses at from one and a half to three cables' lengths, those on the part of the

AGDA, CLYDESDALE.

Agda stating it to be a cable or a cable and a half's length, and those on the part of the Clydesdale stating it to have been at a distance of three cables' length. The vessels had been riding at single anchor and had swung to the tide clear of each other several times without accident, and at the time of the collision were heading westward. Both parties agree that the night was rather dark and rainy, the direction of the wind was north-east and east-north-east, and blowing a strong breeze. The tide had been ebbing for more than two hours when, at about half past eight o'clock p.m. on Friday, the 30th, a collision occurred, which was succeeded by another about half an hour or three quarters later. That these two vessels came into collision, and that each of them sustained considerable damage is certain. On the occasion of the first collision, the Clydesdale's jibboom and bowsprit struck and broke the Agda's fore-top-mast-stay, and the Agda carried away the Clydesdale's jibboom, starboard bowsprit shrouds, and damaged her bulwarks, and, at the same time, broke and extinguished her anchor light. On the second collision the Clydesdale's bow struck the Agda's port side, her jibboom and bowsprit running between the Agda's port foremast shrouds and her foremast; and the Agda carried away the stopper of the Clydesdale, causing the anchor to fall and twenty fathoms of chain to run out round the windlass. The damage sustained by the two vessels in the aggregate approached £1,000.

On the part of the Agda the ground of complaint, as stated in the pleading, is, that from the date of her arrival in the harbor of Quebec she had not drifted or dragged her anchor. That while at anchor, at half-past eight o'clock on the evening of the 30th August, the Clydesdale was seen drifting down the stream towards the Agda's port bow, that all hands at once came on deck, and although everything possible, under the pilot's direction, was done to prevent a collision, one did occur through the fault of the persons on board the Clydesdale. That the two vessels having parted about an hour afterwards a second collision occurred, like-

AGDA, CLYDESDALE.

wise owing to the fault of the people of the Clydesdale, who allowed her to drift upon the Agda.

For the Clydesdale it has been alleged that her master, who had been on shore, returned to his vessel about the hour of eight on the evening of the 30th, and on his way passed a vessel drifting up in shore. That on leaving his vessel he ordered her anchor chain to be lengthened to 70 fathoms abaft the windlass. That a vessel, the Agda, was seen drifting across the bow of the Clydesdale, then stationary; that the latter was struck by the bow of the Agda, and her jibboom was thereby carried away and other damage done. That the Agda then drifted astern, shearing to the north and west, and afterwards returned, and again fell foul of the Clydesdale, in all which the fault was on the part of the people of the Agda.

Upon these conflicting statements very voluminous evidence has been adduced, which may be resolved under the following heads:

1. Whether, previous to the collisions, the vessels had been properly anchored, relation being had each to the situation of the other, and the state of the wind and tide.

2. Whether, after being anchored, one, and which of the two vessels, drifted, or was driven upon the other, and, if so, by the fault of either and which of them.

3. Supposing fault to be imputed to either, were the owners exempted from liability by reason of her being in charge of a pilot.

Upon the first question.—It is in evidence that each of the vessels was brought to anchor by its pilot; the Clydesdale, a vessel of 992 tons, in 22 fathoms of water, and with forty-five fathoms of chain; and the Agda, a vessel of 590 tons, in about fifteen fathoms of water, also with forty-five fathoms of chain, in excellent anchoring ground. The master of the Clydesdale has expressed an opinion that the quantity of chain on the Agda, which he erroneously supposed to be forty, instead of forty-five fathoms, was insufficient to hold her, but his testimony in this particular is

negatived by the fact that both vessels swung clear and safely to all the tides before 8 o'clock in the evening of the 30th of August; and, moreover, the inference is quite fair, that if the Clydesdale were properly anchored, as it is pretended she was, in 22 fathoms of water with forty-five fathoms of chain, the Agda, a much smaller vessel, with the same quantity of chain, in fifteen fathoms, was as well if not better anchored than the Clydesdale; so that the charges made by the owners of these vessels against each other upon the score of a foul berth and insufficient anchorage are not substantiated. But even if it had been made to appear that either of the vessels had been improperly placed and anchored, they were, respectively, under the charge of a pilot at the time, and their owners are thereby relieved from liability on that score. Each vessel being thus safely anchored continued to be so until the hour of eight in the evening of the 30th of August; and proceeding

To the next head of enquiry.—It is to be observed that much difficulty has been encountered in appreciating the evidence on the one hand and on the other. Did the Agda, forced by the wind against the ebb tide, drag her anchor, and in the intervals between heavy squalls of wind, fall down with the tide upon the Clydesdale? or did the Clydesdale drag her anchor and fall down upon the Agda? were the questions submitted at the argument. Unless these questions can be answered in the affirmative, on one side or the other, neither party can recover in these suits, the question of subsequent damage being dependent altogether upon the solution of this difficulty. On the part of the Agda, her master, the pilot, her first and second mate, and her crew have been examined as witnesses. Their statements are clear, in accordance with each other, and positive, that the Agda did not drag her anchor before the first collision, and reasons are assigned by them for their respective statements. Mr. Dick, the Port Warden, in support of their testimony, gives it as his opinion that it is impossible for a vessel like the Agda to be driven up with the wind against the full

AGDA, CLYDESDALE.

strength of the ebb tide in the river St. Lawrence and opposite Quebec, while having her anchor chain down, and a sufficient quantity of chain out.

For the Clydesdale it has been represented that, on the morning of the 3rd of August, the Agda was lying on the starboard side, and almost abreast of the Clydesdale, at about three cables' length nearer to the Commissioners' wharf. That the barque Northumberland lay ahead of these two vessels, about half a mile up the river, between and at an equal distance from each.

That the Agda, on the evening of the 30th of August, was forced up the river by squalls, the wind overpowering the tide; and that, between these squalls, the tide increasing in strength, she sheered and returned with the tide. That the master of the Clydesdale, while returning to her, at about eight o'clock, in the boat of a person of the name of Lacy, saw a barque adrift and sheering very much, and then nearly two cables' length off the Northumberland, and astern of her. That the boat was put about to clear the drifting vessel, then five cables' length higher up the river than the Clydesdale, whose anchor light was visible. The master of the latter, so soon as he was on board of her, ordered seventy-five fathoms of chain to be paid out on the port anchor. That the drifting vessel, afterwards ascertained to be the Agda, approached the Clydesdale, whose helm was hard a starboard, with her head lying south by west. That then the first collision occurred; and afterward, after having parted, the Agda, when distant about a cable's length, broke her sheer, came down a second time upon the Clydesdale, and caused her to drag her anchor. Several of the crew and the master give evidence, equally clear and positive as that of the Agda, tending to show that the Clydesdale did not drag her anchor before the first collision.

After carefully weighing the testimony of the master and men of the Agda, along with that of the master and men of the Clydesdale, this Court would have considered the weight of testimony in favor of the Agda,

AGDA. CLYDESDALE.

particularly when supported by the opinion of the Port Warden, an uninterested witness, were it not that there are three witnesses, namely, Lacy, the boatman who accompanied the master of the Clydesdale, and the first mate and boatswain of the Northumberland, totally unconnected with either party, who testify to the fact stated by the master of the Clydesdale, that a vessel was seen at about a ship's length from the Northumberland at the time stated by him, and that she took a sheer to the south. One of the witnesses observed that the anchor light of the Clydesdale shortly afterwards disappeared, and, at about an hour and a half after, two side lights were visible as those of a vessel coming up the harbor. As it is proved that the anchor light of the Clydesdale was broken by the first collision, and that afterwards her two side lights were put up, the presumption from this is that the Agda was the drifting vessel, and that she drifted down the river and struck the Clydesdale. The evidence of these three persons have, in the opinion of this Court, so equalized the testimony, that it is impossible to say which is the correct account of the collisions, and in the absence of proof shewing conclusively which party was in fault neither party can be condemned in damages.

Upon the third question.—Both parties have contended that these vessels must, each of them, be considered as having been under the control of a pilot, and that in the event of fault in the pilot the owners are, therefore, respectively exempt from liability. On the part of the Clydesdale it is represented that the pilot left her, after she was brought to anchor, on the morning of the 30th of August, without the consent of the master. This is denied by the pilot, but whether he did so or not is of no consequence, as he was not on board the Clydesdale at the time of the collision. In the case of the Mobile (*Swabey*, 71, 128. 10 *Moore*, P. C. R. 471), it was held, that the pilot having left her deck for a few minutes, after giving directions to the mate for the sailing of the vessel, although he

AGDA, CLYDESDALE.

returned before a collision, but too late to avoid it, the owners were liable. The case of the Agda is different. She had commenced her voyage at Montreal for Hull. At Quebec she discharged her pilot, the sphere of whose duties was limited to the river above Quebec, and had there taken another. On the morning of the 30th of August she had on board this pilot waiting for a change of wind to pilot her down the river St. Lawrence to sea. At the time of the collision this pilot had assumed the control and had then directed what was done on board of her. By the Statute of Canada, 12 Vic., c. 114, sec. 53, it is enacted, "That the master of every vessel *leaving* the port of Quebec "for a port out of this Province *shall take* on board a "branch pilot to conduct such vessel, under a penalty," &c.

Under these circumstances it is not improbable that if this Court felt itself justified in finding the Clydesdale in fault, her owners would not have been allowed to throw the responsibility upon the pilot; and, on the other hand, that if the Agda had been found in fault, her owners would have been exempt from liability, as a pilot was in charge of her.

But, as already stated, the evidence on both sides rendering it impossible to determine where the fault lay, whether the master and crew of the Clydesdale, from the want of proper skill and caution, allowed her to drift upon and injure the Agda, or whether the master and crew of the Agda, from a like cause, allowed her to drift upon and injure the Clydesdale, is so much a matter of uncertainty that the case of the promoters, on either side, is not proved; and, accordingly, each suit is dismissed, attended with the usual result, the payment of costs.

William Cook and Charles Pentland, for the Agda.
M. A. Hearn, for the Clydesdale.

Friday, 16th July, 1875.

CZAR.—SCOLLAW.

Where a part of the line of an electro-magnetic telegraph passed under the river St Lawrence, being laid in such a manner, on the bed, as not injuriously to interrupt the navigation. Held:

1. In a case of gross negligence on the part of a sailing ship, causing a wire cable to be broken, that her owners were liable for the damage.

2. Under existing statutory law, the Admiralty has jurisdiction, in case of damage done by any ship, and that consequently proceedings *in rem* against the offending vessel were rightly taken.

CZAR.

This was an action promoted *in rem* against the barque Czar, by the Montreal Telegraph Company, for damage sustained by them through the alleged breaking of one of their sub-marine cables, by the negligent navigation of the barque. The facts appear in the judgment of the Court.

JUDGMENT.—*Hon. G. Okill Stuart.*

The promoters, a body politic and corporate, have a sub-marine wire cable from the north to the south shore of the River St. Lawrence, one extremity of which, on the fifth day of July, of last year, was fastened at Victoria Cove, near the city of Quebec, and the other extremity, near the Chaudière, on the south; and this suit is based upon negligence attributed to the persons in charge of the Czar for having broken it.

The promoters have complained that the Czar, laden with a cargo of timber, was lying close to a wharf known as Rockett's Wharf, within Victoria Cove, where one end of the submarine cable was fastened. That to this wharf she was insufficiently moored, as the persons in charge of her were aware. That, although warned of danger attend-

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ing her being thus moored, no precaution was taken to secure her. That at about eight o'clock in the morning of the fifth of July, the weather being fine and the tide at the flood, she broke away from her fastenings, went adrift and came to anchor at about a cable's length from the wharf. That, although warned that she was again in a dangerous place and likely to take the ground at low water, she remained there and refused the assistance of tug-steamers close at hand, which could have placed her in safe anchorage. That she did take the ground at the fall of the tide, and was then abandoned. That with the rising of the tide she floated, and by dragging her anchors and chains over the submarine cable she broke it ; all of which was owing to the negligence of the persons on board the vessel.

The respondent has denied that this submarine cable was broken by the Czar. He asserts that she was properly moored at her wharf from the 4th of June to the 5th of July, when a heavy squall struck her broadside, which, with the additional force of the flood tide, caused her to break away from her mooring. That the occurrence was an inevitable accident, occasioned by an overpowering, irresistible force ; and, further, that the submarine cable was in an improper place, and that, therefore, the promoters had no right to complain.

That the Czar was moored to Rockett's Wharf, that she broke away from it, that she went aground, floated off, and that the submarine cable of the promoters was broken is not denied, and the questions which the case presents are :

1. Were the promoters authorized by law to place their submarine cable in connection with their telegraph wires at Victoria Cove, where it was broken ?

2. Was the submarine cable broken by the anchors and chains of the Czar ?

3. Was the breaking of the sub-marine cable caused by inevitable accident ?

4. Was every precaution taken and due diligence used

after the Czar came to anchor, on the morning of the fifth of July, to place her in safe anchorage (

The promoters were incorporated in the year 1847, by the 10th and 11th Vict., c. 83, and by that Act they were empowered to maintain and complete the electro-magnetic telegraph, part of which was then constructed, and to cross the line on all bridges and over all rivers from Toronto to Quebec *without hindering the navigation.* By an amendment to this Act, passed in 1855 (the 10th and 11th Vict.), the promoters were authorized to extend their line across any of the waters within the Province of Canada by the erection of the necessary fixtures, including posts for sustaining the cords or wires of the lines, but *so as not injuriously to interrupt the navigation of such waters.*

If the submarine cable of the promoters had interfered with the navigation, and the Czar had been injuriously affected thereby in passing up or down the river, while navigating, as vessels usually do, an injury to the cable done by her would be the result of misconduct on the part of the promoters, and they could not take advantage of their own wrong and ask for indemnity from the respondent; if such were this case the present suit could not be maintained. But this portion of the defence is met by the fact that the post to which the extremity of the cable was fastened has been placed in Victoria Cove, although not always at the same place, for the last eighteen years, and, so far as the evidence goes, it does not appear that it can be placed better elsewhere. If it could be, the presumption is that the promoters, in their own interest, would place it there. A telegraph cable, either above or below the river St. Lawrence is an indispensable necessity not only for the principal cities but for the entire population on the North Shore. In the interest of the public, as well as in that of the promoters, it is necessary that they should have that protection which the law affords against injury to property; and the promoters stand fairly before this Court claiming an indemnity for the loss by them sustained.

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As respects the breaking of the sub-marine cable it is proved that the promoters on the 5th of July had an office in St. Peter street, in Quebec, that the operators there commenced working the telegraph wire at eight o'clock in the evening, and operated upon a line which passed through the sub-marine cable at Victoria Cove, and continued to work until one or two minutes before nine, when it gave out. The evidence of persons at the Cove, including that of one who, in the interests of the promoters, had been watching the motions of the Czar, fearing she would break the cable as she was floating up and down the river over the cable, establishes that almost immediately after the Czar broke from her mooring, between eight and nine o'clock in the evening of the 5th of July, and had passed, they examined the place where the cable had been fastened, and found it wrenched off and gone. Moreover, the period when this took place corresponds with the period when the working of the cable gave out, and, in the absence of any other assigned or assignable cause, there is no doubt that the sub-marine cable was broken by the anchors and chains of the Czar.

With reference to the mooring of this ship, her master, Gilbert Christopher Scollaw, has stated that she was moored at Rockett's wharf, "with five parts of lanyard rope, equal to five ropes, a seven inch warp, a ten inch coil hawser, and a one and one-eighth mooring chain forward, one one-inch and one-eighth mooring chain midships, and a fourteen inch hawser off the quarter; we had also our starboard anchor out, weighing about two tons, crossing the stem to port with about ninety fathoms of chain. I had heard that the tide ran strong there, and, knowing the size of my ship, I was determined to make her as fast as possible." On the morning of the fourth, the day before the injury to the cable, he further states: "I left the ship to pay my bills, sign bills of lading, and clear her at the Custom House; this was about half-past nine o'clock in the forenoon. She was then perfectly safe and secure at her loading berth. After dis-

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posing of the ship's business in the city, it was too late, about half-past eleven o'clock at night, to return to the vessel, and I remained for the night at the residence of the ship's smith, Thomas Doyle, at Diamond Harbor. Next morning, the 5th of July, a little before nine o'clock, the steward came to Mr. Doyle's, and informed me that the ship had broken from her moorings." Although the master of this ship has stated that the mooring gear was sufficient, and there is every reason to believe that it would have been on the morning of the 5th of July if it had been sufficiently attended to on the previous day and night, he also, on cross-examination, says: "I do not think Rockett's wharf is a safe mooring wharf; it is too narrow for a long ship like the Czar to be at. The ring to which the stern moorings are made fast is too far away for a mooring chain of ordinary length to reach to it, and we had to put our best hawsers or tow-lines as after-moorings." If this wharf was not a safe mooring wharf for this vessel in the opinion of her own master, and no one should be considered a better judge as to whether it was or not than himself, the Court must take his opinion upon the subject and be thereby influenced in its judgment. This ship lay at the wharf from the fourth of June until the morning of the fifth of July; she overlapped this wharf by twenty-five feet at her bow and by as much, if not more, at her stern. It is an evidence that the deeper she became with her ingoing cargo the greater became the pressure on her mooring by wind and tide. She had completed loading on Saturday, the fourth of July, as stated by her master, but as far back as the previous Thursday, the second of July, a boomsman at the Cove of the name of Valcourt thought she might break adrift, as she continued to become deeper in the water, and on the third of July, seeing that her stern was lying about fifteen feet out from the wharf, suggested to the mate the placing of a brace or cable to bring her close alongside. The answer of the mate to him was, that there was no danger, that the loading was nearly finished, and that she would

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not be there long. It seems that on the morning of the fifth, Sunday, this same witness feared for the safety of the ship, and on his way to church, seeing that the wind was strong from the north-east and the tide rising, he went to her and asked the mate why he had not tightened the cable during the night; the answer to this was, that he did not wish to wake his men. The witness then said that the ship would be adrift in ten minutes, and the mate replied that the mooring was good and would hold as long as the wharf. At that instant the stern chain broke, she swung into the stream with the flood tide and anchored about 900 feet distant. The manager of the cove informed the mate that if she remained there until the ebb tide she would take the ground, and there being close by a tug steamer called the Ivy, he recommended the employment of her for the purpose of towing her off. It seems that the mate went to the Ivy and asked her master if he would tow the ship to Quebec. The answer he received was that he did not think his tug strong enough to tow her to Quebec among the shipping, but that he would tow her to a safe anchorage. The mate was unwilling to assume the responsibility in the absence of the master, and about two hours were allowed to elapse; the ebb tide had been then running, and when too late, the Ivy was employed, and the steamer Champion passing down the river was hailed, but too late also to tow off the ship which had taken the ground. At noon the Czar was firmly aground and heeling over to starboard. Between five and six o'clock in the evening she was completely on her broadside, and between eight and nine she floated with the tide, drifted with her anchors and chains across the submarine cable and broke it. Upon the morning of the fifth of July, although the wind was strong from the north-east, it does not appear to have been stronger than it had been at times while the ship was taking in her cargo, but at and about the time of finishing this work the ship becoming deeper in the water, and her stern having been allowed to lay out from the wharf, the wind and flood inter-

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vening between the ship and the wharf, which she very considerably overlapped, forced her so hard upon her moorings that she broke them. A perusal of the evidence can lead to no other conclusion than that the Czar was placed at a wharf not suited to a vessel of her size; that when there her mooring, although perhaps strong enough to hold her, was not properly attended to, so as to prevent unnecessary strain upon it; that there was no valid excuse for the master not being on board his ship, either on the evening of the fourth of July, or the morning of the fifth, as he knew her to be at a berth, by his own account, not a safe one, and that the mate, in his absence, was not equal to the emergency by taking upon himself the responsibility of employing proper aid. Under these circumstances, not a case of ordinary but a case of extraordinary and gross negligence, has been established. This ship by floating, as she did, among the shipping, might have done much more damage; fortunately for her the promoters seem to be the only parties who suffered loss by it, and against this they are entitled to be indemnified.

This case is of some importance, as being the first of the kind in this part of the Dominion since the Imperial Statute 26 Vict., cap 24, which extends the jurisdiction of the Admiralty Courts to "claims for damage done by any ship" was passed. The ready recourse afforded by proceeding *ad rem* against the ship when the owners are absent from the country or are foreigners, and which the Admiralty Court affords, has enabled the promoters to obtain a remedy for the injury sustained which the Civil Law Courts of the country could not have afforded. The English cases cited at the argument show that the High Court of Admiralty of England has jurisdiction in such cases (*a*), and the case of the Chase, decided at Halifax, confirmed by their Lordships

(*a*) See the case of the Clara Killam. L. R. 3 Adm. and Eccl. 161; also the case of the Sub-marine Telegraph Company and Dickson, 2 Al. 10, Jurist, p. 1, N. S. 211.

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in Her Majesty's Privy Council, is conclusive as to the Courts of Vice-Admiralty having a like jurisdiction (*b*).

By the judgment now rendered, the Czar is held to have been in fault for injury done to the sub-marine cable, the property of the Montreal Telegraph Company, and she is therefore condemned in damages and costs and the usual order of reference to the Registrar is now made.

R. Alleyn, Q.C., for the Promoters.
M. A. Hearn, Contra.

(*b*) 2 vol. L. C. Adm. R. p. 361.

Friday, 20th August, 1875.

SS. QUEBEC.—BENNETT.

CHARLES CHALONER.—RUSSELL.

Where a steamship did not keep out of the way of a sailing ship, there being risk of a collision, and the sailing ship, by porting her helm instead of keeping her course, contributed to the collision, both held to be in fault, and neither entitled to recover the damage she sustained.

The law imposing compulsory pilotage having been repealed, the liability of ship-owners for acts of pilots in charge of their vessels revived.

JUDGMENT.—*Hon. G. Okill Stuart.*

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On the 30th of October, of the last year, the Charles Chaloner, a ship of 787 tons, in command of Adam Russell, left her berth in the harbor of Quebec on a voyage for Bristol, in charge of Joseph Fortier, a pilot, and at about a quarter after eleven o'clock in the forenoon, under sail, with a fair wind, a fine breeze from the west, in clear weather, she had reached that part of the river St. Lawrence which lies between the west end of the Island of Orleans on the north, and Indian Cove on the south. Inside, but somewhat astern of her, and running along the south shore, was the Princess Alexandra, a ship of 1370 tons, on a voyage for Greenock, in tow of the tug steamer Shannon; at the same time the steamship Quebec, of 1403 tons, commanded by William Lumley Bennett, in charge of Moïse Lachance, a pilot, was coming up the river, and, in attempting to pass between these two ships, a collision occurred between the Charles Chaloner and steamship, followed by another between the steamship and the Princess Alexandra. The first collision has given rise to these two suits, in one of which John Wignall and others, the owners of the Charles

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Chaloner, and in the other the Mississippi and Dominion Steamship Company, owners of the steamship, respectively impute fault the one to the other. For the steamship it is alleged, in the pleadings on her behalf, that the two sailing ships were observed at a distance of more than a mile; that her course lay between them; that her helm was kept steady so as to pass at mid distance on the port side of the Princess Alexandra, and on the starboard side of the Charles Chaloner, but nearer to the former; that the two sailing ships were then a quarter of a mile apart, and there was no difficulty in the way of the steamship maintaining her direct course between them, and she did so; that when the two sailing ships were broad on, the Charles Chaloner three points on her starboard, and the Princess Alexandra two points on her port bow, the starboard side of the Charles Chaloner being then visible from the steamship's deck, the Charles Chaloner changed her course and came round with a port helm to cross the course of the steamship, and, on seeing this, an order to stop and reverse her engines was immediately given and obeyed; that the Charles Chaloner continued to come round to the south more than eight points, and, while her sails were shivering in the wind, she struck the steamship amidships with her stem and port bow between the funnel and mainmast and did the damage complained of.

For the Charles Chaloner it is pleaded, that she was far on the south side of the channel usually taken by vessels, and clear of that part which the steamship should have taken; that the latter, instead of keeping in mid channel or to the north, as was her duty, and as was necessary to avoid the Charles Chaloner, kept a straight course, bow on, on the Charles Chaloner, came into collision, struck her with her stem on the port bow, and did the damage which she complains of. It is further alleged, on the same side, that the Charles Chaloner kept on her way on the south of the channel, and, a few minutes before the collision, she put her helm "hard a-port," and that, by doing so, she did what was required by law and the rules of navigation, and all that was in her power to keep the channel clear for the steamship.

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Upon these complaints respectively—on the one hand, that the steamship should have steered clear of the sailing vessel by keeping to the north; and, on the other, that the sailing ship should have kept her course—very voluminous evidence has been adduced. Twenty-nine witnesses have been examined for the sailing, and nineteen, for the steamship. Their testimony is not only voluminous but conflicting on the material points at issue, and upon it this Court has now to determine.

The sailing regulations made under the Merchant Shipping Act, and adapted to Canadian waters by Dominion legislation (*a*), were imperative and binding upon the persons in charge of these ships. The two particularly so on the steamship are the following:

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

Article 16. Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse, etc.

The case of the steamship is comprised within the following points:

1. Did her course before the collision involve risk?

2. If so, did she keep out of the way? and

3. Did she, when approaching the Charles Chaloner, slacken her speed, or stop and reverse, so as to avoid collision?

The evidence for the steamship is to be found in the depositions of her officers and crew, of her pilot, of the master of the tug steamer Shannon, and of three gentlemen who saw the ships from the shore, two from Quebec and one from Indian Cove. The third officer of the steamship has stated that he was on the forecastle-head at the time of the collision; that, when he first saw the sailing vessels, the

(*a*) 31 Vic., c. 58. See Stuart's A. R., vol. 2, p. 315. App.

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steamship was a little more than a third of a mile from the south shore, proceeding up with the intention of passing between them; that when first seen the Charles Chaloner bore three points on her starboard bow, heading a little to the north side of the river, and that the Princess Alexandra then bore about two points on her port bow. The mate of the steamship has stated that when he first saw the two sailing ships, a good mile and a half off, the steamship's course lay up the river; that she was going in a line with the south shore and parallel to the Princess Alexandra; that the Charles Chaloner was heading down, and bore about three points on the starboard bow of the steamship,—that she was more on the north shore, heading more to it than a line parallel with the steamship, so much so that he could see clear of the starboard leach of the foresail, also the man at the wheel and two or three persons on the poop; that she showed the whole of her starboard side and poop deck distinctly clear of the starboard leach of the foresail; that the Princess Alexandra bore about a point and a half on the port bow of the steamship; that the straight course of the steamship had not been altered until he hailed the bridge of the steamship; that the Charles Chaloner had put her helm "hard a-port," and that until the Charles Chaloner ported she bore on the starboard of the steamship, broad on it, and did not, at any time, bear on her port bow. Her pilot says that the sailing ships were at a distance of not less than half a mile from the Quebec; that the Charles Chaloner bore about three points on the starboard bow; that he could see her starboard side clear off to the house; that the Princess Alexandra bore about two points and a half on the steamship's port bow, and that the helm of the latter was kept as steady as could be to pass between the two ships and that it had not been altered. Seamen on board the steamship give similar testimony.

The evidence for the Charles Chaloner consists of that of her officers and crew, her pilot, of the officers and crew of the Princess Alexandra, of a stevedore and timber-tower on

board of the latter, and of three pilots. The evidence of the man at the wheel is, that he anticipated a collision when the steamship was half a mile off, because she was heading over to the Charles Chaloner all the time from the north shore and came over slantwise, up the river, to where the Charles Chaloner was heading. The master of the Charles Chaloner has stated that the steamship was on his port bow before the helm of his ship was ported, and that his mate feared a collision when the steamship was a half a mile off, seeing her speed as she was coming from the north side of the river; that she was then acting on a starboard helm, and that from the time he first saw her until the collision the steamship had come round about three points on her starboard bow; that the steamship was all the time on the port bow of the Charles Chaloner, before the helm of the latter was put to port; that she was five points on her port bow when he first saw her, and about four when her helm was ported. The boatswain of the Charles Chaloner says that, when on her top-gallant forecastle, he saw the steamship north of mid channel, distant about a mile, come from towards the north shore about five points on her port bow and approaching her. Seamen on board the same vessel give similar testimony.

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If there were no other evidence than that to be found in the depositions of the witnesses from the Charles Chaloner and the steamship, respectively, the scales would be, perhaps, equally balanced, but there are a number of witnesses who were on board of the Princess Alexandra, and whose statements coincide with those from the Charles Chaloner, and, over and beyond this, there have been examined five persons whose testimony furnishes a preponderating influence on the side of the latter. These persons were not on board of either of these vessels, and appear to have been in positions from which the course of the steamship could be seen. The master of the steam tug Shannon, a witness examined for the steamship, and whose own safety required a very close attention to her movements when approaching, observed

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that she was going to the south, and said to the man at the wheel of his tug, "*If the steamship passes between us two, and the man at the wheel of the Charles Chaloner were to put his helm to port, a collision will be inevitable*; and he says, about two minutes afterwards, he did see the man at the wheel of the Charles Chaloner put his helm to port, and then the Quebec came across the Charles Chaloner to pass between her and the Princess Alexandra and his tug. The passage open between the sailing ships this witness believes to have been about four arpents; that is, about seven hundred and twenty feet. Mr. David John Gilmour, a witness also examined for the steamship, was on Long Wharf, at Indian Cove, and he has stated that when he first saw her, "the Quebec was a little nearer the north shore than the south, and after that she was about mid-channel, inclining slightly to the south shore." The remaining three witnesses on this important point are pilots who were on board of a pilot schooner. Their statements quite agree, and a reference to one, that of the master of the schooner, Paul Paquet, will suffice. He was on her deck steering when the Quebec passed northward of him about a mile and a half below the west end of the Island of Orleans. When the steamship so passed she was about a mile from the south shore, and about three times her own length to the north of the schooner. That about ten minutes after the steamship passed him he saw her with her head to the southward and then she was on the south side of the river and among the sailing vessels, that when the Quebec passed the schooner "she was steering a course right up the river, and when she had her head to the southward she was about four points off that course," and he does not know why the Quebec thus altered her course. He states, further, "that when she passed us she was in the usual course of steamships coming up the river, and when I saw her with her head to the southward, she was not in that usual course but four points off it."

This evidence, particularly that of the three pilots, whose

familiarity with the channel as well as the nature of their calling, entitles their evidence to full weight, can leave no doubt but that the steamship's course was not one in a parallel line continually to pass between the sailing ships nearer to the Princess Alexandra, but was a transverse course, slantwise, as stated by the man at the helm of the Charles Chaloner. The steamship therefore must be considered as having held a course, and, according to the pilots, an unusual course, gradually crossing the path of the Charles Chaloner, and, either before, at the time of, or after she had done so, a collision with her occurred. The conclusion from this evidence is that the course of the steamship, in approaching the sailing vessels, involved risk of collision.

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The channel where the collision took place appears by Admiral Bayfield's chart to be five cables in width, a cable being by him stated to be one hundred fathoms. The south side, as far out as the Princess Alexandra and her tug, was closed to the steamship, as the former was as close to a reef there as she could be with safety. The space between the Princess Alexandra and the Charles Chaloner outside, which was the passage the steamship intended to take, so far as the conflicting estimates of the witnesses will enable one to judge, was about seven hundred and twenty feet. More than one half of the channel outside of this space was thus free and open to the steamship. As her course, in approaching the sailing vessels, involved risk, it was her duty to keep out of the way. She had two passages open for selection, the one to the north, which appears to have been circuitous and inconvenient for the reaching of her wharf at Point Levis, but perfectly safe; and the other, to the south, through the space already mentioned, which was convenient and the shortest course to her destination. By passing from the north towards the south, across the path of the ship nearest to her, so as to gain this passage before the Charles Chaloner would reach the steamship, she was certainly not keeping out of her way, and in this respect the fifteenth regulation was disregarded.

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The next enquiry is whether the steamship in approaching the sailing vessels slackened her speed so as to avoid risk of collision in the terms of the sixteenth article. The discordant elements of which the testimony is composed, as to time and distance, make it very difficult to ascertain either with strict accuracy. It is certain that the speed of the steamship was not slackened until after the Charles Chaloner had put her helm "hard-a-port." The words "immediately after" are used by witnesses for the steamship, but it was not done, as appears from her mate's testimony, until after the Charles Chaloner was coming round on her port helm. Her pilot says that she was then twice her own length off, this length by her register being 318 feet. The speed of the steamship had been reduced to about three-fourths by the letting down of her fires. Her master has stated that it was about nine knots, and that the speed of the sailing vessels was between six and seven when the Charles Chaloner ported her helm. Their conjoined speed while approaching would thus have been about a mile in four minutes. The time when, and the distance within which, the speed of the steamship should have been slackened, is a question for nautical skill, and one upon which the opinions of the assessors, whose aid I am favored with, will enable me to decide.

Then, did the steamship stop and reverse, so as to avoid risk of collision? This is also a question for nautical skill, and upon which similar advice will be taken. Her master has stated that it would take two minutes and a half by reversing from "full-speed ahead," to "full-speed astern," to gain stern-way. Her pilot said that he gave an order "full-speed astern," immediately after the Charles Chaloner ported, the effect of which, so far as he knew, was to bring her to a dead stop or to very little headway. This order, he further states, was the only one given by him between the Charles Chaloner's porting and the collision with her. Witnesses vary in their statements as to the effect of this order; those for the steamship say somewhat like her pilot,

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that her speed was reduced to very little headway; and, on the other hand, those from the sailing vessels say that even after she collided with the Charles Chaloner, and when she struck the Princess Alexandra, it was from six to seven knots. Strong confirmatory evidence of the latter is to be found in the severity of the shock and damage done to the Princess Alexandra, when the steamship, after colliding with the Charles Chaloner, struck her, and also in the amount of damage done to the steamship herself. Evidence, not to be contradicted as to these facts, is to be found in the surveys of each of these vessels. Although the master of the Princess Alexandra, in stating that the steamship could not have been going at a less rate than ten knots when the former was struck by her, has overrated her speed, still the survey of his ship corroborates his statement to a certain extent, and that she was cut into her side as far in board as the sixth plank of the deck, and down as much as eighteen feet from the covering board; the gap made was seven feet wide at the top and two at the bottom. The force of the blow was such, he says, that the steamship pushed in our cargo of timber against our midship staunchions and bits, and carried them away. The same witness states. "The Quebec did not appear to me to have stopped her engines or slackened her speed before she struck the Princess Alexandra. Some idea of the rate at which she was coming may be formed from the fact that she broke some of the square logs of timber composing our cargo." He further states that she became water-logged in twenty minutes, and would have sunk if she had not had a timber cargo. The survey of the Quebec shows what, with other damage, was done to her. Her starboard bow just abaft the main stem and the third plate down from the plank sheer were indented, the fourth and fifth plates and frame broken. The eighth plate indented and the ninth plate broken. On her port side near the stem, the eighth, ninth, tenth, eleventh, and twelfth plates from the covering board were bulged outwards, and the tenth, eleventh and twelfth plates on her starboard side

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were bulged inwards, and several rivets in wake of the damaged plates on both sides were started.

Other evidence shows that the pilot's order "full-speed astern" was executed either imperfectly or not until after the Princess Alexandra had been struck by the steamship. The best evidence should have come from the engine room, but what comes from there is not satisfactory. The engineer, called for the steamship, says: "I had just gone down into the engine room, where the second, third and fourth engineers were standing to the wheel, when the bell rang to go 'full-speed astern;' before this we had been going 'full-speed ahead,' according to the telegraph, but not to the actual pressure. The moment the order 'full-speed astern' was received, we put the engines 'full-speed astern;' it takes about five seconds to put them from 'full-speed ahead' to 'full-speed astern.' The engines *made about fifty or sixty revolutions astern, which would take about a minute and a half,* when the telegraph rang 'stop,' and we stopped her for about half a minute; and then the telegraph rang 'go ahead slow,' and before we could get the wheel over to 'go ahead slow,' the bell rang 'stop;' immediately after 'stop' it rang 'go ahead slow' again, and instantly afterwards 'astern half speed.' Just as we had started 'astern half-speed,' the telegraph went to 'full-speed astern.' While she was going 'full-speed astern,' I heard the noise of the collision over my head." This shows that the only order of the pilot, supposing it was the only one, as he says, given by him between the Charles Chaloner porting and the collision, was annulled and others substituted, by whom does not appear. But in another part of his statement the chief engineer, notwithstanding the seven orders which he received and which were obeyed to the extent he has stated, says: "our engines were going 'full-speed astern' from the time the telegraph first rang until I heard the shock of the collision;" and he excuses himself by saying there was not time to execute the intermediate orders, and that he could execute only the one "full-speed astern."

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Between these conflicting statements of the chief engineer I am disposed to think that the first is correct, implying such confusion, when collision was impending and imminent, as to prevent the order of the pilot, if given in time, which is very questionable, from being executed. Then there were the second, third and fourth engineers in the engine room with the chief engineer; they have not been examined, so that the Court has not received such explanations as they might have afforded.

The following questions for the nautical assessors, with their answers, have been submitted and given:

1. On the morning of the 30th October, 1874, were the steamship Quebec and the Charles Chaloner, a sailing ship, proceeding in such directions as to involve risk of collision, and, if so, when did such risk commence, and did the steamship keep out of the way of the sailing ship, and if she did not, what course should she have taken to do so?

2. When the steamship was approaching the sailing ship and the Princess Alexandra and her tug, was it necessary to slacken her speed, and if so, did she do it in proper time?

3. Should the steamship have slackened her speed before the Charles Chaloner ported or before her helm was put "hard a-port," so as to avoid risk of collision?

4. When the steamship was approaching the sailing ship was it necessary for her to stop and reverse, so as to avoid risk of collision?

Answer to the first.—The steamship and the Charles Chaloner, on the 30th October, were proceeding in such directions as to involve risk of collision. The risk commenced when the steamship altered her course to go to the southward, and she was then distant three-quarters of a mile or thereabouts from the Charles Chaloner, that is, when the latter ported her helm. The steamship certainly did not keep out of the way of the Charles Chaloner. She should have kept her course straight up the river passing to the north of the Charles Chaloner, when she would have had more than half of the channel clear.

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Answer to the second.—The steamship, when approaching the two ships, should have slackened her speed, but she did not do so in proper time; she slackened it when too late.

Answer to the third.—She ought to have done so, and if she had there would have been no collision.

Answer to the fourth.—When the Charles Chaloner's helm was ported the steamship should have stopped and reversed "astern full-speed" continuously, and thereby the collision with the Charles Chaloner would have been avoided.

E. D. ASHE, *Commander R. N.*
F. GOURDEAU, *Harbor Master.*

I concur in these opinions, and find that the course of the steamship was one of risk and danger, and that prompt and efficient action to meet and avoid it was wanting. Her case is based upon the assumption that she was on a course that she had a right to take, and one which, continued, would have carried her safe through. The weight of testimony is against her upon this, but had she been so, it would have made no difference, because, even then, she should have slackened her speed and reversed in time; and although it is possible, perhaps probable, that if the Charles Chaloner had not ported, the steamship would have gone clear, still she was running a hazardous risk in contravention of the fifteenth regulation, and for this the probability of a successful experiment furnishes no excuse. When the joint speed of the approaching vessels, a mile in four minutes, is considered, it should have occurred to the pilot of the steamship that some derangement in some one of their courses might occur from accident or error, and it has so happened that there is evidence to be found in the deposition of the master of the Shannon, adduced for the steamship, that the contingency of a collision of the Charles Chaloner's porting her helm was foreseen by him as the steamship approached, and there is no reason why her pilot should not have anticipated a possibility of the same event.

SS. QUEBEC, CHARLES CHALONER.

I now proceed to the case of the Charles Chaloner against the Quebec.

It was her duty no less than that of the steamship to adhere to the regulations. Those that concerned her are the following:—

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

Art. 19. In obeying and construing these rules due regard must be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary to avoid immediate danger.

The stand taken by the Charles Chaloner is, that "she kept on her way on the south of the channel, and a few minutes before the collision she put her helm "hard a-port," and that, *by doing so, she did what was required by law and the rules of navigation, and all that was in her power to keep the channel clear for the steamship.* It will be observed that she does not justify under the 19th article by stating a necessity for a departure from the rule. On the contrary, she asserts a right to adopt the regulation applicable to sailing vessels meeting "end on" or nearly "end on," when port is the rule. The pilot, most unfortunately, mistook one rule for the other, or, if he did not he certainly misapplied it to the case of a steamship meeting a sailing vessel. Notwithstanding this, I have felt anxious that the Charles Chaloner should have the benefit of the 19th rule if, under the circumstances, porting, instead of keeping her course, was justified by any special circumstance, or necessary to avoid immediate danger, and have submitted to the assessors the following questions:—

1. The sailing ship Charles Chaloner being bound by the 18th sailing regulation to keep her course, was her departure from the rule by "porting her helm," and putting it "hard a-port" afterwards, necessary at the moment of time it took place to avoid immediate danger and collision?

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2. Was the porting of the helm of the Charles Chaloner and the putting of it "hard a-port" reasonably calculated to avoid the danger of collision which took place?

The following are the answers:

To the 1st—She should have kept her course and not ported her helm.

To the 2nd—No.

E. D. ASHE, *Commander R. N.*

F. GOURDEAU, *Harbor Master.*

In these opinions I concur also. Mutual error has caused this collision. The steamship assumed the duty of the sailing ship by keeping her course, and the sailing ship that of the steamship, the keeping of the channel clear, and the consequence was the collision which has given rise to these suits. In such cases the rule of Admiralty law would have divided the damage, but this has been changed by the Dominion Act 31 Vic., c. 58, s. 6, which has enacted "that where the sailing regulations are infringed in cases of collision, the party infringing them shall not be entitled to any recompense whatever." A corresponding provision in the Merchant Shipping Act was repealed in England, and the rule thereby revived. Not so here (*a*). This leaves me no other alternative than that of giving effect to the law, which directs that both these suits must be dismissed without costs to either party (*b*).

I have gone more into detail, perhaps, than was strictly necessary in giving my reasons for these judgments, but I have done so not only because the amount involved in them and in the case of the Princess Alexandra, also before me, is of considerable magnitude, but because it is desirable that the severe losses which must necessarily attend a disregard of the sailing regulations should be known and felt; and at the same time I cannot refrain from mentioning that these

(*a*) See cases of the Arabian-Alma. 2 Stuart's Adm. R. 81; also of the Germany-City of Quebec—Ib., p. 166.

(*b*) See the case of the Agra, L. R. P. C., vol. 1, p. 501.

cases are characterized by the most flagrant errors of the pilots of these vessels—the one for not keeping out of the way, and, again, for not reversing in due time; and the other for not keeping his course. These errors have caused a loss of a very large amount of money, very nearly of life, and it is to be hoped that allusion to them may prevent a repetition.

A recent change in the law of this Dominion, which abrogated compulsory pilotage, has relieved this Court from considering a question hitherto involved in almost every case of collision,—whether the blame attending it was shared by the master and crew (*a*). The law as it stood before the case of the Cumberland, which was decided in this Court, has, in consequence, revived, and owners of vessels are not now exempt from the legal responsibility attending collisions, although they may be at the time in charge of a pilot (*b*).

The judgments dismiss each suit without costs.

Langlois and Cook, for the Quebec.
Alleyn and Chauveau, for the Charles Chaloner.

(*a*) See Stuart's Ad. R., vol. 2, p. 230.
(*b*) Ib., vol. 1, p. 75.

Friday, 20th August, 1875.

SS. QUEBEC.—BENNETT.

Held: In the Vice-Admiralty Court, that, where a steamer having a clear course altered it, to go to the south, and pass between two vessels, and in attempting to do so collided with both, the fact of one of such vessels having improperly altered her helm, and contributed materially to the collisions, will not relieve the steamer from the liability of making good the injuries sustained by the sailing vessel which did not contribute to the accident; and

By the Judicial Committee of the Privy Council,

That the finding of the Court below was, upon full consideration of the evidence, correct.

The Judicial Committee is strongly disinclined to reverse the deliberate opinion of the Court below, when sustained by the advice of nautical assessors, and founded upon a view of the whole of the evidence.

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This was a suit brought by the owners of the ship Princess Alexandra, of 1370 tons, for damages sustained by her from the steamship Quebec having come into collision with her. The collision occurred between the Island of Orleans and Indian Cove, on the morning of the 30th of October, when the steamship was coming up and the Princess Alexandra was going down the river, alongside of the ship Charles Chaloner. The Princess Alexandra was struck amidships, and so much damage done to her that she became waterlogged in about twenty minutes, and would have sunk but for her timber cargo. The defence of the steamship was that the cause of collision was the act of the ship Charles Chaloner, which vessel, by porting her helm and not keeping her course, had come into collision with the steamship, which was the cause of collision with the Princess Alexandra; and that it was owing to the neglect and misconduct of the Charles Chaloner that it occurred. This defence involved several questions under the sailing

rules, which rendered it necessary that the Quebec, before she could avail herself of the defence set up, should establish that, if she were on a course involving risk of collision, it was her duty to keep out of the way, and on approaching the sailing ships slacken or reverse her engines if necessary.

The Court, after observing that the merits of the cases of collision between the Quebec and the Charles Chaloner had been settled in the suits between them, intimated that it had submitted the following questions to nautical assessors:

1. Were the steamship Quebec and the ship Princess Alexandra with her tug, on the morning of the 30th October last, proceeding in such directions as to involve risk of collision, and, if so, when did such risk commence?

2. Did the Quebec keep out of the way of the Princess Alexandra and her tug, and, if not, what course should she have followed to do so?

3. When the Quebec was approaching the Princess Alexandra and her tug, was it necessary for the Quebec to slacken her speed, and, if so, did she do it in proper time?

4. When the Quebec was approaching the Princess Alexandra and her tug, was it necessary for her to stop and reverse, and, if so, did she do it in proper time and sufficiently?

And that the following are the answers:—

To the 1st.—They were; the risk commenced when the steamship altered her course to go to the southward, and she was then distant about three-quarters of a mile from the Princess Alexandra, that is, when the Charles Chaloner ported her helm. The steamship Quebec certainly did not keep out of the way of the Princess Alexandra. She should have kept her course straight up the river, passing to the north of the Charles Chaloner, where she would have had more than half the channel clear.

To the 2nd.—She did not keep out of her way. The rest of this question is answered, in the previous answer.

To the 3rd.—It was necessary, and she did not do so in proper time.

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To the 4th.—When the Charles Chaloner's helm was first ported the steamship should have stopped and reversed astern full-speed continuously, and thereby the collision as well with the Charles Chaloner as with the Princess Alexandra would have been avoided. She did not reverse in proper time.

E. D. ASHE, *Commander R. N.*
F. GOURDEAU, *Harbor Master.*

Per curiam.—The collision with the Princess Alexandra originated and terminated in the acts and conduct of the steamship. In taking a course attended with risk and by not keeping out of the way of it afterwards, she was guilty of a breach of the sailing rules established by law, and it is not for her to say, under such circumstances, that because another vessel either met or interfered with her course, and more or less contributed to a collision between themselves, she can be relieved from her responsibility towards the Princess Alexandra. She was, therefore, to blame for the collision, and a decree accordingly will issue with costs. The damages to be settled upon the usual reference.

This case was appealed to the Privy Council, where it was argued at length. MR. BUTT, Q.C., and MR. CLARKSON, for the appellants, and MR. J. BENJAMIN, Q.C., and MR. BOMPAS, for the respondents. In the result, the Lords of the Judicial Committee of the Privy Council sustained the decree of the Vice-Admiralty Court, in the following judgment delivered by Sir ROBERT PHILLIMORE:

This is an appeal from a decision of the learned Judge of the Vice-Admiralty Court of Lower Canada in a case of collision.

It appears that a vessel called the Princess Alexandra, a large sailing ship of 1,370 tons, about 11 o'clock in the forenoon of the 30th October last, was proceeding down the river St. Lawrence in tow of a tug, and that ahead of her

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at first was another sailing ship of 789 tons, the Charles Chaloner; that as those two vessels were going down the river, a large steamship, the Quebec, whose owners are the Appellants in this case, was coming up the river on the port bow of the Princess Alexandra, and about half a mile off, and that there was between the Princess Alexandra and the Charles Chaloner a distance of about a cable's length. The vessels proceeded, and the result was that the collision took place in this way: the steamship, the Quebec, struck the Princess Alexandra amidships on her port side, with the stem, having previously struck the smaller vessel, the Charles Chaloner.

It is admitted in this case that the interval between the two collisions, namely, that first of all with the Charles Chaloner, and, secondly, with the Princess Alexandra, occupied a very short time indeed, either a few seconds, or, at the outside, a few minutes.

The case of the Charles Chaloner was that the Quebec was to blame upon two grounds: first of all, for trying to force her way between these two vessels, she having plenty of room to go to the northward, and that, if she had adopted that course, the collision would not have taken place; and secondly, when she saw that the other vessel, the Charles Chaloner, was porting her helm, in not immediately stopping and reversing her engines, which also would have prevented the collision from taking place.

The learned Judge in the Court below found that the Charles Chaloner was to blame for porting, because if she had followed the rule of navigation she would have kept her course, and, therefore, that she had by that act contributed to the collision which happened; but what their Lordships are concerned with to-day is whether the Quebec was or was not to blame upon the grounds stated in the case of the Princess Alexandra.

The Appeal is entirely upon the finding as to the facts of the case in the Court below. It is hardly necessary to repeat what often has been said in cases of this description,

SS. QUEBEC. that this Board always entertains a strong disinclination to reverse a sentence founded on the deliberate opinion of the Judge of the Court below, when that opinion has been entirely sustained by the advice of his nautical assessors, and when it has been founded upon a view of the whole of the evidence.

Their Lordships, after listening to the able arguments which have been addressed to them, and after careful consideration of all the evidence in this case, have arrived at the opinion that the sentence of the Court below ought to stand.

With regard to the conduct of the Quebec in passing between these two vessels, their Lordships are of opinion that there is quite sufficient evidence to justify the Court below in finding that the Quebec, being on the north side, and having a clear course to the north, altered her course to go to the south and to pass between the two vessels, the Charles Chaloner and the Princess Alexandra; and although it may be true, and probably was true, that the Charles Chaloner did wrong in porting her helm at the time, yet such an opinion is perfectly consistent with finding that the Quebec was to blame for the alteration of her course described, which must have tended to embarrass and confuse those on board the Charles Chaloner.

With regard to the second point, their Lordships are also of opinion, looking especially to the evidence of the engineer, which is of the most contradictory and confused character, and looking to the variety of orders which it appears were given, that the Court below was justified in finding that for not stopping and continuously reversing her engines the Quebec was to blame, that she did not execute this manœuvre, which it was her duty to execute, in the proper time and in the proper way.

Their Lordships are therefore, on the whole, of opinion that it will be their duty humbly to recommend Her Majesty to affirm the sentence of the Court below, and to dismiss this Appeal with costs.

Friday, 15th October, 1875.

QUEBEC.—THEARLE.

Where one steamship was overtaking another steamship in a shallow channel in the River St. Lawrence and a collision ensued; held, that the former for not keeping out of the way of the latter, by adopting a safe course, was in fault.

JUDGMENT.—*Hon. G. Okill Stuart.*

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This suit arises from a collision that took place at about five minutes before midnight on the 19th of July last, between the mail steamship Nova Scotian, carrying a general cargo and passengers—a vessel of 2081 tons, drawing twenty feet three inches of water, and the steamship Quebec, of 1903 tons, belonging to the Mississippi Dominion Steamship Company. The weather appears to have been clear with a bright moonlight. They had sailed from Liverpool, and, in the early part of the day, had each taken a pilot at Father Point and proceeded up the St. Lawrence. The Quebec had passed Father Point first and continued ahead of the Nova Scotian, but the speed of the latter being about thirteen knots an hour, while that of the Quebec was but twelve and a half, she gained upon the latter gradually, until after the Quebec had reached a narrow part of the channel designated by a black buoy at the east end of the Beaujeu bank, off Crane Island. The channel there is somewhat over half a mile in breadth, and, at low water, the depth is from three and a half to four fathoms. According to the statement of the pilot of the Nova Scotian, it was then low water. As the Nova Scotian was passing the buoy the Quebec was about a quarter of a mile ahead of her and bore about four points on her port bow. The course of the Nova Scotian had been, and continued to be, S. W. $\frac{1}{2}$ W., and

QUEBEC. the Quebec, which had been steering on a similar course and had, nearing more to the bank, touched the ground twice, changed hers to S. W. by W., into deeper water; and then the two vessels, about 500 feet apart, came to be, not upon parallel but upon approximate courses, the distance between them becoming momentarily less. They thus continued along the Beaujeu bank—the Nova Scotian next to it and the Quebec outside of her. They seem to have kept their respective courses without deviation for a couple of miles, perhaps more, and then the Nova Scotian, being in the act of passing the Quebec, the starboard bow of the Quebec took her at the fore part of the mizzen rigging, rubbed along aft, tearing away the mizzen chain-plates, bending the davit of one of the boats, and ripping the half-round on the port quarter. For this damage the present suit is instituted by the owners of the Nova Scotian. Which of these steamships was to blame, is the question in the case.

For the Nova Scotian, the evidence that she kept her course steadily until abreast of the Quebec, is conclusive. Her officers say that she did so, as does also a master mariner, one of her passengers, who had been a few minutes before the collision in consultation with a passenger upon a bet that the Nova Scotian would pass the Quebec before midnight—a circumstance which particularly directed his observation towards the course of the Quebec. The master of the Nova Scotian also states that her course was not altered until he ported her helm just at the moment when collision was inevitable.

It has been proved for the Quebec that she changed her course, when not far from the buoy, from S. W. ½ W., to S. W. by W., and that she did so from having touched the ground twice in shallower water. That as the two vessels were approaching she starboarded her helm twice, and so much so as the fear of again touching the ground would allow, and then reversed her engines full-speed astern, and that it was when falling astern that her bow scraped along the port quarter of the Nova Scotian.

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It is quite true that there is conflicting testimony as to the course of the two vessels when almost at the point of contact; the witnesses for the Nova Scotian, including the master mariner, whose testimony has been alluded to, express their opinions that the Quebec appeared to have come round upon her port helm just then; and, on the other hand, the persons on board of the Quebec, who had the opportunity of knowing, state positively that she did not, but that she starboarded her helm twice, just as the danger of collision was impending, confirmation of which is to be found in the evidence of the boatswain of the Nova Scotian, who says that her master hailed the Quebec to put her helm "Hard a-starboard;" that he himself repeated the hail, and heard the response from the Quebec—"Our helm is hard a-starboard." Witnesses from the Quebec state that the Nova Scotian, just before the collision, seemed to sheer round upon a starboard helm, and they think she did so. These discrepancies as to the one or the other sheering over may, possibly, be reconciled by the fact that these vessels were approaching with great rapidity, and as their bows were converging to a point, their approach to it, in the momentary excitement on each side, may have led each to suppose that the one was sheering over upon the other. Be this, however, as it may, there is evidence, irrespective of this conflicting testimony, to settle the question at issue.

A chart upon record shows the depth of water along the Benujeu bank, opposite to the place where these ships held their respective courses, and at the place of collision, to be from three fathoms and a half to four fathoms. Where vessels of the speed and dimensions of the Nova Scotian and Quebec, run at the rate of eleven to twelve knots an hour, in very dangerous proximity, with from three to four feet of water under their keels,—their safety and the safety of the lives of those on board require a strict compliance with the sailing rules, a departure from which necessarily renders the party chargeable with it answerable for the consequences.

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On behalf of the Nova Scotian, the 13th Regulation has been cited as justifying her course previous to the collision; one which provides that "when two vessels 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." It is therefore supposed that it was the duty of the Quebec to stop and let the Nova Scotian pass; but this is not a case of crossing in the sense of the rule. The Nova Scotian did not intend to cross the course of the Quebec—unless it is to be presumed that she intended to run ashore in the narrow channel—and on being asked if he intended to do so, her master answered "No! never." His intention was to go ahead of the Quebec, place her in his wake as he did subsequently, and continue his voyage to Quebec.

But the regulations which do apply to this case are the 17th, which directs that *every vessel overtaking another shall keep out of her way;* and the 18th, which provides *that where one vessel is to keep out of the way the other shall keep her course.* It is under these articles that I have submitted questions to the nautical assessors who have attentively considered the evidence and presented their answers,—both, as follow:—

1. Was the attempt of the Nova Scotian to pass the Quebec attended with risk and hazardous?

Answer.—It was; having been made in the narrow part of the river, and at a low state of the tide, there was danger in passing the Quebec on the course that the Nova Scotian was steering immediately before the collision.

2. Could the collision have been avoided by the Nova Scotian porting her helm at an earlier moment than she did?

Answer.—Had the Nova Scotian ported her helm in time, she would have avoided the collision, and she could have done so.

3. Could the collision have been avoided by the Nova Scotian abating her speed at any time, and how long before

it; or could she have kept out of the way when overtaking the Quebec in any other manner?

Answer.—By slowing her engines just before she reached the Quebec, until after she had passed the narrow place and the shallow water where the collision occurred, and this would have kept her out of the way of collision.

4. Did the Quebec do all in her power to avoid the collision?

Answer.—Yes, by starboarding her helm and stopping and reversing her engines full-speed, and she could do no more.

In adopting this view of the case, expressed by the assessors,—Commander Ashe, of the Royal Navy, and Mr. Gourdeau, Harbor Master at Quebec, I must, at the same time, state that the Quebec was justified in keeping her course so long as she did; that when she altered it by starboarding and reversing her engines, she relieved the Nova Scotian from a dangerous position into which she had forced herself by persisting in the course that she had adopted, for if she had not done so the Quebec very possibly would have struck the Nova Scotian amidships; the result of which might have been attended with disastrous consequences to the Nova Scotian. The Quebec, moreover, complied with the 19th Rule, which requires due regard to be had to any special circumstances in particular cases which renders a departure from the rules necessary to avoid immediate danger when she reversed her engines. But had there been no sailing regulations at all, the result of modern experience and necessity in navigation, the principle of law by which the decision in this case is to be controlled and governed, has been adopted both in the Common Law Courts and the Courts of Admiralty in England and here also. In the case of Mayhew *vs.* Boyce it was held that "if the driver of a carriage upon a public road-way adopt either of two courses, one of which is safe and the other hazardous, and he elects the latter, he is responsible for the mischief which ensues; and he cannot, in such case, insist upon the fact

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that he kept to his own side of the road;" and Lord Ellenborough then said, "if it be practicable to pursue a course which is safe, and you follow so closely upon the track of another that mischief may ensue, you are bound to adopt the safe course. This is the principle which is always acted upon in cases of injuries done at sea" (*a*).

In this Court the same principle was followed in the case of the John Munn (*b*), and it is the duty of this Court to adopt it on this occasion by stating "that if it be practicable for a vessel which is following close upon the track of another, to pursue a course which is safe, and she adopts one which is perilous, then if mischief ensue she is answerable for all consequences." This suit must consequently be dismissed and with costs.

William Cook, for the Nova Scotian.

Andrews, Caron & Andrews, for the Quebec.

(*a*) 1 Starkie's R. 423. (*b*) 1 Stuart's Ad. R., p. 265

Friday, 12th November, 1875.

UNDERWRITER.—ROBERTSON.
LAKE ST. CLAIR.—COFFEE.

Where there were two sailing ships, one on the starboard and the other on the port tack, and the former by a rule of navigation having the right to keep her luff; *Held*, in the Vice-Admiralty Court, that she was, notwithstanding, in a case of imminent danger, bound to give way; and for not doing so condemned in damages and costs. But *held*, on appeal, by the Judicial Committee of the Privy Council:—

When a port tacked vessel has thrown herself into stays and becomes helpless, she ought nevertheless to execute any practicable manœuvre in order to get out of the way of the starboard-tacked vessel.

A starboard-tacked vessel when apprised of the helpless condition of a vessel which, by the ordinary rule of navigation, ought to get out of her way, is bound to execute any practicable manœuvre which would tend to avoid the collision.

Both vessels were held to blame for the collision, and the damages ordered to be assessed according to the Admiralty rule.

In such a case each party must bear their own costs, both in the Court below and in appeal.

JUDGMENT.—*Hon. G. Okill Stuart.*

UNDERWRITER, LAKE ST. CLAIR.

Two ships, the Lake St. Clair, an iron ship of 1061 tons, laden with a general cargo, with a crew of 31 persons, bound for Montreal, and the Underwriter, a ship of 1439 tons, in ballast, with a crew of 23 persons, bound for Quebec, at half an hour after midnight on the 26th of July last, were off Cape Rosier, in the Gulf of St. Lawrence. The light at the Cape bore about N.W., and was distant somewhat more than ten miles, the wind was north of west and the night clear. A collision then took place between these vessels while the Underwriter was on the starboard tack and while the Lake St. Clair was, as is contended for the Underwriter, on the port tack; but while, as is said for

UNDERWRITER, LAKE ST. CLAIR.

the Lake St. Clair, she was in stays. The rate at which the Underwriter was sailing at the time of the collision was from four to five knots, and that of the Lake St. Clair had been about three and a half. The Lake St. Clair was struck at about right angles, sixty feet from her stern, on her starboard side, abaft the main rigging, by the bow of the Underwriter, which passed between her back-stays doing serious damage. In this damage is included the bulging in of seven plates, the breaking of twelve rivets breaking of the upper plate and another in the bulwa

The Underwriter also sustained considerable damage, in which is comprised that done to the facing piece in front of the stem, which was torn off from 24 down to 8 feet, the breaking of the bowsprit short off at the knightheads, and the topgallantmast sprung.

For these injuries suits have been brought by the owners of these vessels respectively to recover an indemnity for the loss sustained, and the question in each suit is, who was to blame? The charge of negligence made against the Underwriter by the Lake St. Clair is preceded by a statement in the libel of an occurrence which took place an hour before the collision, and from which an intent to do a malicious injury to the Lake St. Clair has been inferred. At that time, it is said, the Lake St. Clair was on her previous tack, the starboard, and as the Underwriter was then on the port tack and was approaching, but not giving way, the Lake St. Clair, to avoid a collision, had to put her helm down to go about, and, missing stays, hailed the Underwriter to keep away, and, after so hailing, the answer received from her, while passing close to the port-quarter of the Lake St. Clair, was, "Look out, I will do for you next time." This libel then goes on to assert the facts attending the collision as follows:—

"About a quarter of an hour after midnight, the wind having fallen quite light, the Lake St. Clair put her helm down and went round on the port-tack and had not gathered headway when a flaw of wind took her almost aback, and

UNDERWRITER. LAKE ST. CLAIR.

then the red light of the Underwriter was about three points on the starboard bow about half a mile off. That then, having her helm up (port), she immediately ordered it "hard a-port;" that this was done, all hands being on deck; that her after-yards were squared, and the spanker brailed in, but that she had no headway, was motionless, and would not pay off. Seeing this, the Lake St. Clair hailed the Underwriter, as she was approaching, to put her helm up "starboard" and keep away, as the Lake St. Clair had no way and could not steer, and at the same time the helm of the Lake St. Clair was put down (starboard), her after-yards braced up and her spanker set; but, continuing motionless, the Underwriter, while approaching, answered the warning, "Not a damned inch!" and that the Underwriter, then on the lee beam of the Lake St. Clair, was heard to order her helm down (port), which caused her to luff up and strike the Lake St. Clair stem on."

The answer of the Underwriter is, that about ten minutes or a quarter of an hour after being on the starboard tack, close hauled, the green light of the Lake St. Clair, distant between two and three miles, was seen on the lee bow; that as the vessels approached the Underwriter was kept steady on her course by the wind, and on the green light nearing, the Lake St. Clair was hailed to port her helm; that to this no attention was paid; that the Lake St. Clair held on her course, close hauled, on the port tack, as if to cross the Underwriter's bows, and that when a collision was imminent the helm of the Underwriter was put "hard a-port" to bring her up in the wind, and while her sails were shaking she collided with the Lake St. Clair which was struck on the starboard side abaft the main mast by the bow of the Underwriter, and, in this, negligence is laid to the charge of the Lake St. Clair.

The first question on these pleadings is,—Was the Lake St. Clair in stays while the Underwriter was approaching her on the starboard tack, or was she under such command on the port tack so as to obey her helm?

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The rule of navigation which governs the course of vessels on different tacks admits of no question, that the vessel on the port tack must give way to the vessel on the starboard tack, and if the case be, as represented by the Underwriter, that while she was on the starboard tack the Lake St. Clair, underway on the port tack, was attempting to cross her bows, and thus came into collision, the latter only is liable for the damages done to each vessel; but if the Lake St. Clair had been hove in stays, the situation of a vessel when she is staying or going about from one tack to the other, in another word, stationary, not as yet being able to make progress on her new course, the case comes to be a very different one; and provided she did not willingly place herself in danger by going into stays, the Lake St. Clair is exempt from censure.

According to the evidence on each side the Underwriter had the starboard tack. Her mate says that five minutes before midnight she was put about on that tack, and it took about a quarter of an hour to bring her round, and that then the Lake St. Clair was from two to three miles ahead of her; that as the two vessels approached the Lake St. Clair was on the port tack under full sail; that her sails were not shaking, and that it was in crossing the bows of the Underwriter the collision took place. There are five witnesses who testify to this effect, the master, the first and second mate of the Underwriter and two of her seamen.

On the other hand the officers of the Lake St. Clair, followed by eleven other persons on board of her, testify to her attempting to come round on the port tack; also, while in the act of doing so, the red light of the Underwriter was immediately seen about half a mile or three quarters distant on her starboard bow, that the helm of the Lake St. Clair was immediately put "hard a-port" in order to keep her away and pass astern of the Underwriter; that she also squared in her after-yards and brailed in her spanker, but she had no steerage way and would not pay off. In the

meantime the Underwriter was standing up under the lee of the Lake St. Clair when the helm of the latter was put down (starboard) to keep her to the wind if she got way.

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In weighing this testimony it is certain that the powers of observation of persons on board the Lake St. Clair were better, as to what was passing on board of her, than the opportunity had by persons in another ship somewhat distant. Then, in point of numbers, the weight lies with the Lake St. Clair, and I have not been able to come to any other conclusion, subject of course to such influence as the opinions of the nautical assessors may have with me, than that the Lake St. Clair had gained no headway on the port tack, and had it not in her power to give way to the Underwriter, which she would otherwise have been bound to do under the rule of navigation which has been stated. This aspect of the case would dispose of the responsive allegation of the Underwriter to the libel of the Lake St. Clair. In coming to this conclusion I may say that I have not omitted to notice the testimony of the Port Warden at Quebec, somewhat in the nature of that of an expert, who was brought up to state his opinion from a certain abrasion on the mizzen-mast and from the way in which the bowsprit of the Underwriter was broken it could not have been so broken by the rigging but by the mast, an indication that the Lake St. Clair was in motion. For this evidence to have been of use it should have gone a step further, and if the Port Warden had said that the mark in the mast and the way in which the bowsprit was broken were sure indications not only that the Lake St. Clair was in motion, but that she was so much so as to be under obedience to her helm sailing on the wind, it would be quite a different matter, but even then such an opinion would be received with great caution in opposition to positive testimony of eye-witnesses.

I now approach the consideration of the serious part of these cases wherein a charge beyond negligence has been made against the Underwriter, inferentially, by inserting

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a threat in the libel and, directly, at the argument by the counsel for the Lake St. Clair, who submitted that the collision was not only the result of negligence but the wilful act of the persons who had the command of the Underwriter.

Before adverting to the evidence on this head it is proper to state how the rule of navigation upon which the Underwriter has relied, and under which she was rigidly guided upon the occasion, is to be construed in cases of risk and danger.

In a case of collision tried in the High Court of Admiralty between two vessels, one of which was on the starboard and the other on the port tack, the right of the vessel on the starboard tack to keep her course was fully admitted; but, said Dr. Lushington, "I have yet to learn that, if there be any possible means of avoiding a collision, it is not the duty of the vessel on the starboard tack also to port her helm. The rule has been laid down, over and over again, that if two vessels were approaching each other, it was the duty of both to prevent a collision if possible. No doubt there are certain rules as to what they ought to do under particular circumstances, but the first and primary rule is to avoid a collision and the loss of property and life, if it can be effected with safety." (*a*)

And again, in another case in the same Court, it has been held that, although a rule of navigation is not to be lightly infringed, no vessel is unnecessarily to incur the probability of a collision by a pertinacious strict adhesion to it. (*b*) Guided by these rules, I proceed to the testimony bearing upon the notice to the Underwriter to keep clear and to what was said and done in giving effect to the rule.

At half-past eleven o'clock these vessels passed each other, the Lake St. Clair standing in towards the coast. She was on the starboard tack, and then it was the duty of the

(*a*) The Lady Anne 15, Jurist 20, 7 Notes of cases, 334.

(*b*) The Hope 1 W., Rob, 157.

Underwriter to give way, but in doing so it appears to have been done so closely as within twenty-four feet of the port quarter of the Lake St. Clair; and to avoid the danger attending such close quarters the helm of the Lake St. Clair was put down to go about, which occasioned her to miss stays; and then, as deposed to by persons on board the Lake St. Clair, the master of the latter hailed the Underwriter to "keep off," the answer to which was, "Take your damned ship out of the way!" "You are a Glasgow clipper; are you?" "Look out, and I will do for you next time." This was replied to by the master of the Lake St. Clair by the observation, "My friend, you might find we are as hard as you are." "Go to bed, and take a sleep till you get sober." The spokesman on this occasion from the Underwriter appears to have been Mr. Breeze Williams, the chief mate, then in charge of her, who, on his examination, while denying the language attributed to the Underwriter, has stated what he did say, and also what he meant, in those terms. The words I used were, "*Never mind, I will have the next tack.*" I meant that being on the port tack I had kept away from him, but that on the next tack he would have to keep away from me; that when on the starboard tack I would not give way at all unless I was certain that he would not give way or keep away at the same time." Twenty-five minutes after this occurrence the Underwriter was ordered on the starboard tack, and it took fifteen minutes to bring her about upon it. The Lake St. Clair was then ahead of her, between two and three miles; and, shortly after, she was ordered on the port tack, and, while endeavoring to come round the red light of the Underwriter was seen approaching and bore about half a point or three-quarters on her starboard bow, and then distant about a-half or three-quarters of a mile.

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Presuming that the Lake St. Clair was then in stays, as I have already had occasion to say that the weight of testimony shewed she was, I shall advert to the testimony on the one side and on the other to determine whether a knowledge

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of the helpless condition of the Lake St. Clair was conveyed to the Underwriter in sufficient time to make it imperative upon her to yield and give way by starboarding her helm, or by adopting any other course by which the collision could have been prevented.

The evidence for the Lake St. Clair upon this part of the case is, that while attempting to come round on the port tack, and so soon as the red light of the Underwriter was seen, the helm of the Lake St. Clair was immediately put "hard a-port," in order to keep her away and pass astern of the Underwriter, her after-yards were squared and her spanker brailed in, but she had no steerage-way and would not "pay off." In the meantime the Underwriter was standing up under the lee of the Lake St. Clair, when the helm of the latter was put down (starboard) to keep her to the wind if she got away, the after-yards were braced up, the spanker was hauled out and set so as not to undeceive the Underwriter, and to give her an opportunity of keeping away—the only means of safety and of preventing a collision. When the Underwriter had approached within a quarter of a mile or less the master of the Lake St. Clair hailed her in these words, "put your helm up and keep away a little, our ship is not steering and won't keep away." To this the first answer was "Go to hell," and upon a repetition of the hailing a second answer was, "not a damned inch." The chief mate of the Lake St. Clair then ran down to the starboard waist and hailed the Underwriter three or four times to keep away and he received the same answers. Instead of starboarding as requested, the Underwriter continued on her course, and when within about fifty or sixty feet of the Lake St. Clair, perhaps more, she ported her helm, luffed up and struck the Lake St. Clair, as already stated. As the Underwriter was approaching some one on board of her said "you will see who is the hardest," and again, after she was struck, "now which do you think is the hardest?" alluding, according to the master of the Lake St. Clair, to his answer when

the vessels first met. After the collision the master of the Lake St. Clair, with the view of clearing the vessels, called out to the Underwriter to back her yards, when the voice that had previously come from the Underwriter called out: "I have done for you now, you are going down easily." The Underwriter kept by the Lake St. Clair until after three o'clock, when her second mate was sent on board of the Lake St. Clair, and there stated that he had been on the watch at the time of the collision; and when asked why he had not put his helm up when hailed to do so, answered "that he was afraid by doing so he would strike the Lake St. Clair further forward and do more damage." This testimony is to be found in the depositions of the officers and of eleven other persons on board of the Lake St. Clair; their testimony is concordant and varies only in the exact words attributed to the Underwriter, but is, in the import of it, uniform. From the same testimony it is, moreover, apparent that three minutes after the hailing would have sufficed for the starboarding of the helm of the Underwriter, and that there was double that time to do it before the collision and for her then to go clear; and, further, if instead of luffing, which was done at the last moment, the Underwriter had starboarded, even then she would have gone clear, and some of the witnesses go so far as to say that, if she had kept her course, she would either have cleared the Lake St. Clair or done but comparatively little damage.

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It therefore appears that repeated warnings were given from the Lake St. Clair to the Underwriter for the latter to avoid collision, that the time to do it was sufficient, that the opportunity was not wanting for her to do so, and that these warnings to keep away were not only neglected but treated with contempt.

To oppose this testimony there is that of four persons, not including the master of the Underwriter, who came on deck but a minute before the collision; these are the first and second mate, Sullivan, the man at her wheel, and a

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seaman named Olsen, on the look-out. The first and second mates state they did not hear the hailing from the Lake St. Clair, and so also does the look-out, except after it was too late they heard the call to starboard, that is, after the order to port was given by the first and second mate. But this negative testimony is most materially weakened, intrinsically, by a contradiction between the man at the wheel and the testimony of the second mate, according to which it is apparent that the second mate, who was in charge, not only heard the call to starboard from the Lake St. Clair, but had made up his mind not to comply with it, as the following questions and answers, to and from the man at the wheel, show:—Question.—You have stated that the second mate told you to keep the ship on the course you had got by the wind, and not to mind what any one else said. What did any one else say? Answer.—They were singing out on board the other ship for us to put our helm to starboard, they were singing out forward, but I cannot say whether it was on board the other ship or not.

Question.—About eight or ten minutes previous to the collision did you hear much hailing from the Lake St. Clair or forward of you?—Answer.—Yes, I heard some shouting out to put the helm to starboard.

This man, previous to giving these answers, had stated that he had received orders to keep the ship on the wind, from the second mate, who, as the first mate has said, was enjoined by him, when he gave up his watch, to do so, and after the light of the Lake St. Clair was visible. So determined was the second mate not to change his course that he went aft and repeated the orders while the call to starboard was coming from the other vessel; he had time not only to do this but to go forward and return to the wheel before the vessel ported her helm. It is needless to say that the call to starboard could not have come from the Underwriter as the two mates and the look-out ignore having heard the call at all until after the helm of the Underwriter was put hard a-port. If the man at the

wheel heard the call to starboard eight or ten minutes before the collision, no doubt exists but both the second and first mate who gave orders simultaneously to port, must have heard it also. A knowledge of the condition of the Lake St. Clair has been brought home to the second mate by the evidence of several persons, who have given his answer shortly after the collision when on board the Lake St. Clair, and when the effect of it was not, perhaps, apparent to him, not that he did not hear the call to starboard, or that it was too late, but that he was afraid of striking the Lake St. Clair further forward. And, again, on his cross-examination he has been asked if he heard shouting from the Lake St. Clair, and, after admitting that he did, being further asked if he did not answer, his reply was, "Probably I did, but I don't remember," an answer that can bear but one construction. These witnesses are five in number; their evidence is negative in character, they did not hear. Opposed to them is the evidence of witnesses whose statements are positive, and say they did hear the several calls from the Lake St. Clair, and the answers from the Underwriter, and if this evidence were untrue it is scarcely credible that no one witness out of the three and twenty persons on board the Underwriter would not have been examined to say so by declaring that during the eight or ten minutes before the collision he was in a position to hear, and that no such calls came from the Lake St. Clair, and that if they had, the night being clear, there being but little wind and the sea smooth, he would have heard them.

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This negative testimony, particularly of the two mates whose conduct is in question, affected as it is by the testimony of the man at the wheel, leaves no doubt as to the full credibility of the persons examined on behalf of the Lake St. Clair, and I find myself compelled to sanction the opinions of the nautical assessors which are to be found in the following answers to questions which have been submitted to them, which apply to each suit:

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1. Was the Lake St. Clair in stays, helpless and unmanageable, at and before the time of collision, and how long?

2. Was the Underwriter notified in sufficient time of the Lake St. Clair being in stays, helpless and unmanageable, and, if so, could she have taken any and what steps whereby the collision complained of in this case could and would have been prevented?

3. Was either, and which, of the above vessels to blame for the collision?

ANSWERS.

To the first.—She was, and, according to the evidence, from ten to fifteen minutes before the collision.

To the second.—Yes, and there were two things that she could have done. She could have put her helm a-starboard or hove everything aback. Either of these courses would have prevented the collision.

To the third.—We entertain no doubt of its being owing solely to the negligent and unseamanlike conduct of the officer in charge of the Underwriter, immediately previous to the collision, that it occurred, and that the persons in charge of the Lake St. Clair were in no way to blame for it.

E. D. ASHE, *Commander R. N.*

P. GOURDEAU, *Harbor Master.*

A decree, therefore, must go for the damages and costs sustained by the Lake St. Clair, and also a decree dismissing the suit of the Underwriter with costs; and in rendering these judgments I wish it to be distinctly understood that due regard has been had to the rule of navigation. The right to it has been conceded to the Underwriter, and it is not the use or exercise, but the abuse of it, to the prejudice of another that has taken place, and the wrong thus done must have its remedy. The very ancient but useful maxim, *sic utere tuo ut alienum non laedas* admits of application as well at sea as on land, and the persons who have abused it, and thereby caused this collision, may, per-

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haps, hereafter, recollect it to advantage. And while closing these remarks, I do not think I would be discharging the unpleasant duty I am called upon to perform if I did not characterise as well the conduct as the language of the persons on board of the Underwriter as they deserve.—That the first was negligent, and that the last was disgraceful and intemperate, I am compelled to say; and I have only to add that if, on the occasion of this collision, the wind had been perhaps a breath stronger, and the blow more severe, a heavily-laden iron vessel would perhaps have been instantaneously sunk, valuable lives lost, and, in the latter case, after the language preceding and following the disaster, it might perhaps have been difficult for those using it to resist a charge of another description.

This case was appealed to the Privy Council, where the decrees of the Vice-Admiralty Court were reversed, both vessels held to blame, and the damages divided. Mr. Milward, Q.C., and Mr. Clarkson, for the appellants. Mr. Butt, Q.C., and Mr. Bompas, contra. The judgment of their Lordships was delivered by Sir Robert Phillimore.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

This is an appeal from the Vice-Admiralty Court of Quebec in a case of collision which took place between twelve and one o'clock in the morning of the 26th of July, in the year 1875. The place of the collision seems to have been off Cape Rosier, in the Gulf of St. Lawrence. The ships that collided were two large vessels, the Lake St. Clair, an iron ship of 1,061 tons, with a general cargo and a crew of 31 hands, bound for Montreal, and the Underwriter, a full-rigged ship of 1,481 tons, in ballast, with a crew of 23 hands, bound for Quebec. The nature of the

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damage inflicted was this,—the Lake St. Clair was struck at about right angles, 60 feet from the stern on the starboard side abaft the main-rigging, the bowsprit of the Underwriter passing between her main topmast backstays and mainmast stays. Both these vessels were on tacks beating up the River St. Lawrence, and the learned Judge of the Court below, after consulting his nautical assessors, in a judgment which bears the marks of great pains and care, came to the conclusion that the Underwriter was alone to blame for this collision. With that judgment their Lordships are unable wholly to concur.

In the judgment which their Lordships are about to deliver, they are disposed to assume generally the facts stated on behalf of the Lake St. Clair as the foundation for that judgment; that is to say, they are of opinion that she had not any way upon her at the time of the collision, though they are also of opinion that the Underwriter could not see the state of her canvas, or so discover that she was in that condition. It is unnecessary to go into an earlier part of the history of this case, upon which, though much discussed in the Court below, the determination of this Appeal, it is now admitted, does not depend. The vessels had tacked shortly before the occurrence which led to the collision. At that time the Lake St. Clair had come round upon the port tack, and the other vessel, the Underwriter, was upon the starboard tack, seeing the green light of the St. Clair. Now there is no doubt that, according to the general rule of navigation, it is the duty of the port-tacked ship to get out of the way of the starboard-tacked ship; but her defence in this case was that she had thrown herself into stays, and that she was helpless and unmanageable at the time of the collision; and, therefore, that the other vessel, though, according to the general law, it was her duty to keep her course, seeing, as she ought to have seen, and knowing, as she ought to have known, the helpless state of the Lake St. Clair, ought to have executed some manœuvre herself,—the nature of which will pre-

sently be adverted to,—which would have prevented the collision.

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In this case some nautical questions of considerable difficulty and nicety are raised, and their Lordships have thought it proper to consult very carefully with their nautical assessors and to put to them certain questions, the results of which I am about to state, so far as they have been adopted by their Lordships.

The first question which requires to be decided appears to be the following:—Was the Lake St. Clair, in the circumstances of the case, and having regard to her position relatively to the Underwriter, justified in tacking at all in the face of that vessel? After consultation with the nautical assessors, this question must be answered, their Lordships think, in the affirmative. They think there was then no reason to apprehend that anything would prevent her safely executing that manœuvre at that time.

The next question is whether, if the Lake St. Clair had come round so as to be fairly on the port tack, and had seen the red light of the Underwriter, which is admitted to have been the proper light, and which, according to her own statement, was seen by her at the distance of half to three quarters of a mile, she was right in the manœuvre which she adopted, or whether she might not have taken steps, which would have enabled her to get out of the way of the starboard-tacked vessel. Their Lordships, after consultation with their nautical assessors, are of opinion that the Lake St. Clair ought to have braced her head-yards abox, and not to have hauled her fore-yard, as it is admitted she did, and thus she would have been enabled to give herself stern-way; and, moreover, would have allowed the Underwriter to go safely ahead.

For these reasons their Lordships think the Lake St. Clair is to blame.

In these circumstances their Lordships have to consider whether the Underwriter was not fairly apprised of the condition in which the Lake St. Clair was, and whether, on

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being so fairly apprised, there were not manœuvres which she could have executed which would have, on her part, prevented the collision; it being perfectly clear that, though the port-tacked vessel is to get out of the way of the starboard-tacked vessel, and the starboard-tacked vessel is to keep her course, that rule of navigation does not mean, and never has been construed to mean, that the starboard-tacked vessel is to obstinately continue on her course when she sees that, in the particular circumstances, by a variation from it she can avoid a collision. It has been already mentioned that their Lordships are of opinion that the Lake St. Clair did not apprise the Underwriter of her incapacity to take the proper manœuvres incident to a port-tacked ship by the state of her canvas; for the fair result of the evidence appears to be that the state of her canvas was not visible on board the Underwriter. But it seems to be a fact in the case, which is well established, that those on board the Lake St. Clair did hail to those on board the Underwriter at a sufficient distance to apprise them of the condition they were in; this hailing took place when the vessels were, in their Lordships' judgment, so far apart as to allow a sufficient interval of time to warn the Underwriter, if she had attended to the hailing which reached her. It has been suggested that the Underwriter ought to have starboarded her helm, and could so have avoided the collision. Their Lordships, after consultation with their nautical assessors, are of opinion that that would not have been a proper manœuvre, but that the Underwriter ought to have executed another manœuvre, namely, to have put her helm down at an earlier period than she did, that is, at the moment when the hailing first reached her, which it is clear she did not do, and which, if she had done, would have avoided the collision,—she would have brought her head to the wind and there would have been no collision.

Their Lordships are therefore compelled to find that the Underwriter was also to blame for this collision; and the decree which they will humbly advise Her Majesty to

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make will be as follows: To reverse both the decrees of the Court below, there being cross-suits in this case, and to declare in both suits that both ships are to blame; that the damages be assessed according to the Admiralty rule; and that each party must bear their own costs in the Court below and of this Appeal (*a*).

Langlois, Angers and Colston, for the Lake St. Clair.

William Cook, for the Underwriter.

(*a*) Reported, 36 L. T., n. s. 155. L. R. A. C. vol 2, p. 389.

Friday, 25th February, 1876.

AGAMEMNON.—MARTIN.

To support a plea of inevitable accident the burden of proof rests upon the party pleading it, and he must show before he can derive any benefit from it that the damage was caused immediately by the irresistible force of the winds and waves; that it was not preceded by any fault, act or omission on his part, as the principal or indirect cause; and that no effort to counteract the influence of the force was wanting.

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This was a cause of collision, promoted by the owner of the Marion, under circumstances that occurred in the harbor of Quebec. The following judgment was this day pronounced in the case:

JUDGMENT.—*Hon. G. Okill Stuart.*

On the 28th September last, the Marion, a barque of 703 tons, was ready for sea on a voyage to Greenock, and came to anchor in sixteen fathoms water, nearly abreast of the church at Levis. She continued there in safety until the morning of the 30th.

On the 29th of September, the Agamemnon, a ship of 1,047 tons, likewise ready for sea on a voyage to Greenock, was brought to anchor about half a mile below the Marion, which was then to the north north-west of her. The tide was on the ebb when the Agamemnon was so brought to anchor. The depth of water at the place she anchored was about ten fathoms, and the quantity of chain given to her anchor was about thirty fathoms.

At about eleven o'clock in the night of the 29th, the pilot in charge of the Agamemnon perceiving that the wind, which had been from the west, had changed to the north-east and began to blow strong, had the crew called to give

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more chain upon the port anchor, by which she was held, and in attempting to do so it was found that she would not take chain, because, as the pilot at that moment supposed, the cable was broken. Her starboard anchor was then ordered to be let go, and, after some little delay from the chain not being arranged, it was let go; but so soon as the shackle indicating the thirtieth fathom was reached, the main pawl of the windlass, followed by the others, broke, the chains became foul, and no more chain could be given to the starboard anchor. At the time the starboard anchor was let go the Agamemnon had begun to drift with the rising tide and to cant toward the south. She continued to do so for about a quarter of a mile, and then held on to her anchor or anchors until about half-past eight o'clock in the morning, when it was slack water. The chains were then cleared so as to give more cable in case of need. The master had been, during the night, and was then, on shore; a tug steamer, returning from towing a vessel down the river, was hailed by the pilot of the Agamemnon, and a note sent him to inform him of the condition of his ship, of the necessity of repairing the windlass, and of the danger of the ship's running aground. The carpenter went in the tug with a letter to the master. At this time the Marion lay about a quarter of a mile off from the Agamemnon, riding upon her port anchor to the north of her, and the vessels remained in these positions until ten or half-past ten o'clock. The tide being then upon the ebb, and the wind strong, the Agamemnon began to drive again, and, after doing so for about a quarter of an hour, she came down upon the Marion, striking her with her bow on the port quarter, and then both ships went adrift, and after the Marion had let go her starboard anchor, continued to drag their anchors for some time, when they held, but for about two hours they remained in collision, and the Marion appears to have sustained very serious damage, an indemnity for which is the object of this suit.

The plea of the Agamemnon is inevitable accident, the action of wind and weather, a *vis major*.

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The facts, as they have been stated, are taken from testimony adduced for the Agamemnon, and it may be here noticed that there is no discrepancy of moment in the statements of witnesses, except as respects one, viz., that the Marion drifted upon the Agamemnon, but this was abandoned at the argument. From the evidence derived from the same source, it appears that the wind, before, and at the time of the collision, was not blowing a gale but was a very strong breeze, yet not so strong but that a ship could ride safely upon a single anchor. It was not so strong as to prevent the towing of a vessel, supposed to have been the Dagmar, which had been towed down the river by the returning tug already mentioned. After the vessels were separated it was discovered that the Agamemnon had lost her port anchor, and her windlass was found to have been so defective that the pilot broke out rotten pieces from it with his fingers.

To support a plea of inevitable accident the burden of proof rests upon the party pleading it (*a*)—and in this instance it was for the respondent to shew before he could derive any benefit from it:

1. That the damage was caused immediately by the irresistible force of the wind and waves.

2. That it was not preceded by any fault, act or omission on his part as the principal or indirect cause, and

3. That no effort to counteract the influence of the force was wanting (*b*).

If the persons in charge of the Agamemnon failed in any one of the above particulars, she is liable for the consequences of this collision, as no fault is to be imputed to the Marion. Before deciding upon these points several questions have been submitted to the nautical assessors, with whose assistance the Court has been favored. The questions and answers are as follow:

(*a*) The George, 9 Jurist, 282. 4 Notes of cases, 161.

(*b*) The Despatch, 3 L. T. (N.S.) 220, 1 L. C. Adm. R. The Cumberland, 75. Ib. The Harold Haarfager. Ib. vol. 2, p. 208.

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Question. Was the selection of the berth given to the Agamemnon before she began to drive a proper one and consistent with her safety.

Answer. It was.

Question. Was the quantity of chain allowed to her port anchor, before and after she drove, sufficient, and what may have occasioned the loss of her port anchor?

Answer. Before she began to drive it would have been prudent to have had more than the thirty fathoms, and as much as sixty. When she began to drive, the second anchor should have been let go with sufficient cable to stop her. From the evidence, we believe that the port anchor was parted at the time or before it was attempted to give her chain cable on it, because she would not then take cable. This was about midnight, before the collision.

Question. Did the breaking of the windlass cause or contribute to the collision, and how?

Answer. It did, as it prevented enough cable on the starboard anchor being given to prevent the Agamemnon from driving.

Question. Considering the position of the Agamemnon between eight and nine o'clock on the morning of the collision, when in her power to employ a tug, should the pilot in charge of her, as a matter of prudence, have done so, and thereby could the collision have been prevented?

Answer. Between eight and nine o'clock in the morning, before the collision, the Agamemnon being too near the south shore, the windlass disabled, and her cables foul, the person in charge of her should have employed a steamer to stay alongside until her anchor was weighed, and until she was towed by the steamer into a clear berth.

E. D. ASHE, *Commander R. N.*
F. GOURDEAU, *Harbor Master.*

Under each of the three foregoing propositions the Agamemnon appears to have been in fault. It has been said that the state of her windlass was not visible and was

AGAMEMNON.

unknown to the persons in charge of her. If such were the fact it would afford no legal excuse, but there is strong reason for the belief that they did know it. It had been but recently repaired, and if its insufficiency was not known, the persons who repaired it would, most probably, have been called to prove it, which was not done. The case of the Massachusetts (*a*), determined in the High Court of Admiralty, may be referred to where the insufficiency of weight in an anchor led to a condemnation in damages in a suit of collision. The case of the Peerless, where the catching of a cable in a windlass and the non-employment of a tug were questions, in connection with a plea of inevitable accident, might also be consulted (*b*).

A decree must therefore go against the Agamemnon as alone to blame for the damage done by her to the Marion, to be settled by the Registrar and Merchants, and costs.

Cook, for the Promoters.

Holt, Irvine and Pemberton, for the Respondents.

(*a*) 1 W. Rob, 371. (*b*) 1 Lush, R. 30.

Friday, 28th April, 1876.

N. CHURCHILL.—ROUTCH.

NORMANTON.—LEITCH.

Where a barque and a steamer were proceeding in opposite directions, and the latter when between a quarter and half a mile of the former, which was then keeping her course, ported her helm without slackening her speed, which brought her across the course of the barque, the helm of which was shortly afterwards starboarded, and a collision occurred—

Held: 1. That the action of the steamer in porting her helm, having brought the barque (which otherwise should have kept her course) into instant and most imminent dangor, she was justified in starboarding; and the steamer whose duty, when proceeding in a direction involving risk of collision—was to keep out of the way, and, moreover, to stop and reverse when danger was imminent, was responsible for the collision.

2. That the payment of sums of money to witnesses, considerably larger than those legally allowable to them, even when shown to have been made with no wrong intent, but from an unfounded apprehension that they would leave the country before testifying, will bring such discredit on their testimony as seriously to affect its credibility.

JUDGMENT.—*Hon. G. Okill Stuart.*

N. CHURCHILL, NORMANTON.

A collision between two vessels, one a steam and the other a sailing ship, occurred in the River St. Lawrence about nine miles above Little Metis, between the hours of five and six on the morning of the sixth November last. It has given rise to cross-actions, the first brought by William Ross, of Glasgow, owner of the Normanton, a steamship of 543 tons, then in the employ of the Mitchell Line of Steamships Company, on a voyage from Pictou, laden with a cargo of coal; and the second has been instituted by Robert Curwen and others, owners of the barque N. Churchill, a vessel of 598 tons, laden with a cargo of

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grain. In these suits the parties interested, respectively, impute fault the one to the other, and demand compensation in damages. The Normanton sank in deep water within twenty minutes after the collision, and is a total loss. The N. Churchill had barely time to reach the harbor of Little Metis, without sinking also, and there she was beached. The magnitude of the amount involved renders these cases a matter of more interest than usual in such matters, and no pains have been spared in order to arrive at an accurate determination of each case.

Before adverting to the points on which the parties are at issue it is fitting to state facts admitted by each; or, if not admitted, so plainly proved as to allow of no question. These are, that on the morning of the sixth of November, the weather was moderate; there was no difficulty in navigating the St. Lawrence where the collision occurred; its breadth there was about 25 miles, affording ample sea-room upon its entire breadth; the barque N. Churchill was descending the river on a course east by north, under all plain canvas, at the rate of four knots an hour; at the same time the Normanton, upon an opposite course, was ascending the river, under a full head of steam, at the rate of between eight and nine knots an hour; the combined speed of the two vessels thus exceeding twelve knots: the Normanton when between a quarter and half a mile of the N. Churchill, which was then keeping her course, ported her helm without slackening her speed, which brought her across the course of the barque; the N. Churchill, shortly after, starboarded her helm, and her starboard bow struck the Normanton on the port side forward of the bunkers with the result already stated.

The principal difficulty has been in relation to the green or starboard light of the N. Churchill, and all other questions in these cases are in a measure involved in it. For the Normanton, it is said that the N. Churchill's green light was invisible and that she shewed a white light only, before the collision. If this be true and that the Normanton was

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led into error and mistook the sailing ship for a steamship, for which a masthead white light was the proper one, and which would have justified her porting her helm, then the N. Churchill would be to blame and answerable for the consequences of this collision.

The questions raised by the pleadings are: 1. Had the N. Churchill the regulation side lights, the green on the starboard and the red on her port side, visible at the proper distance before the collision? 2. Should the Normanton have ported her helm? And 3. Had the starboarding of the helm of the N. Churchill any effect upon her course, and, if it had, were there any special circumstances which justified a departure from it in order to avoid immediate danger?

The evidence which is common to the two suits covers much paper but may be compressed into a small compass. Upon the side of the Normanton twelve witnesses have been examined, seven taken by her from the crew of the N. Churchill and five from her own crew. Those from the N. Churchill, including her mate, who at the time of the collision had her in charge, have for the most part testified that her green light was defective because its burner wanted a chimney, because the green glass was cracked and dim, while there was a white light used in the cook's galley; leading to the inference, without it being expressly said, that this white light was the one seen from the Normanton and not the green. To strengthen this statement three persons who were on board the Normanton have been examined; Roy, her "look-out;" Normand, the mate, in charge of her, and the man at the wheel. These testify to seeing a white light only just before the collision when Roy called out a "light ahead," when the mate answered "I see it," and when the helm was instantly ported. The testimony of these three ignores the fact that a light was seen from the Normanton before that, of which the person in charge of her omitted to take the bearings or even to notice. The evidence to this effect is to be found in the depositions of

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the remaining two witnesses brought up for the Normanton. Leonard, a seaman, was pacing her deck forward of the bunkers, and about ten minutes or a quarter of an hour before the look-out Roy hailed a "light ahead" and saw what he took to be a bright white light. He has further said that he heard the "look-out" hail something to the bridge, which he could not understand in the French language, but he looked over the port side and saw the light ahead, distant about a mile and a half or two miles and heard no answer from the bridge. Brown, the cook, heard also the first hailing from the "look-out," but heard no response either. The "look-out" must have seen this light and suppressed this fact, which light, unnoticed further, was allowed silently to approach, until a collision was imminent, and then the steamship ported her helm. Again, the evidence of the seven witnesses already referred to plainly shows that the statement of the three witnesses from the Normanton, so far as it goes to prove that there was only a white light to be seen from the N. Churchill immediately before the collision, is not to be credited, because they all say that the green and red lights were in their places, and could be seen, some say half a mile and others a mile off. One of them, Thompson, who was on the "look-out," and was sent from the forecastle to the foreyard to look at the light of the Normanton when first seen, to ascertain whether she was a steam or sailing ship, was in the best position to see the lights; his own language is, "they were both burning brightly when I saw them that morning, as well as ever they did. I am sure they could both be seen more than a mile off. I know that our starboard light was not as bright a light as the port one, because a green light will never burn as brightly as a red one. The green light shewed a good light, as good as I have seen on a good few vessels that I have been on. I never noticed there was anything wrong with it." If the evidence of these twelve witnesses be alone taken into consideration it is sufficient to determine that the green light of the N. Churchill was visible so as

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to be seen from the Normanton, a mile distant, and that the persons on board of the latter were culpable, either for not seeing it or for not ascertaining what it was. This would preclude the slightest idea that a small hand-light in the cook's galley, kept behind the bulwarks and behind the side-lights, could be taken for a masthead light of a steamer. But the evidence adduced for the N. Churchill in the matter of the lights is most conclusive, as shewing that her green and red lights are of the very best description; that they were so is proved by a certificate from the Secretary of the Board of Trade at Liverpool, and, apart from the testimony of persons on board of her, it is established by witnesses indifferent to the parties that these lights were seen at a distance of five miles from the pilot schooner which took off her pilot the evening preceding the collision. There can be no doubt, therefore, but that the question as to the lights of the N. Churchill being sufficient, must be decided in the affirmative.

The N. Churchill, now being on her course with her side lights bright and visible, the rules of navigation made it the duty of the Normanton, a steamship, while proceeding in a direction to involve risk of collision, to keep out of her way. She was as much as three points upon the starboard bow of the N. Churchill when she ported her helm, a fact sworn to by witnesses for the Normanton, and one which would induce any one to say that if she had kept her course or starboarded she would have gone clear and free of the N. Churchill. And, again, when she ported her helm, another rule required that, danger being then imminent she should have stopped and reversed.

That the Normanton infringed the rules that have been referred to, rules which are prescribed by our own law, and to be found in the Act of the Dominion respecting the navigation of Canadian waters, there can be no doubt; and it is equally clear that there was no circumstance which rendered a departure from them necessary, and therefore she is deemed to have been in fault. But it does not neces-

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sarily follow that this alone would entitle the N. Churchill to a compensation for her loss. This will depend upon the answer to be given to the third of the questions already stated. Her duty was to keep her course, unless special circumstances rendered a departure from it necessary so as to avoid immediate danger; and if she did not do so, and thereby contributed to the collision, she would be in fault also and her owners precluded from recovering in this suit. The evidence on this head is to be found principally in the depositions of the witnesses examined for the Normanton. One of them, the mate of the N. Churchill, after stating that he saw a white light about five miles ahead, goes on to say: "The N. Churchill was then on a course of east by north, the wind was from the same direction as when I went on deck, and we were still under all plain sail. The vessel showing the white light, and which afterwards proved to be the steamship Normanton, appeared to be steering west or west by south; we were making about four knots an hour and the approaching vessel about eight or nine knots, I should say. We kept on the same course for five or ten minutes, and during all that time the Normanton shewed us only her white light. When I first saw it, I took it for a light ashore; about five minutes afterwards I became suspicious of it on account of its altering its bearings. A few minutes afterwards I went forward, and thinking it was a steamer's mast-head light, I sent a man aloft, William Thompson, who was on the 'look-out' to ascertain the fact. He went on the fore-yard, and had been aloft but a short time when he sang out it was a steamer. I went aft, and by the time I got there, I saw myself that it was a steamer shewing her green and white lights about three quarters of a mile off, and bearing about three points or a little over, on our starboard bow. I ordered the man at our wheel to keep his course, that the steamer was all right. Scarcely a minute or half a minute after that I noticed that the steamer had altered her course and was crossing our bow, or attempting to cross it, shewing her red

light and her masthead light. Her hull was then visible, and she was about four or five lengths off, still on our starboard bow. After altering her course, the steamer bore about a point and a half on the same bow. As soon as I saw that the Normanton had altered her course, I ordered the man at the helm of the N. Churchill to put our helm up, that is, to starboard. Before that we had been steering our course of east by north. The helm was immediately put hard to starboard by Peter Johnston, the man at the wheel; it took but a few seconds to put the helm 'hard-a-starboard.' I do not know how many points our ship paid off under this helm. I did not notice that she paid off at all. At this time the Normanton was close upon us and acting as if under a port helm. She continued to shew her mast-head light and red light from the time we starboarded until the collision occurred, which was from half a minute to a minute afterwards. It was our starboard bow near the stem that first came in contact with the steamer's port-side forward of midships as near as I could judge." The mate of the Normanton also seems to have been of opinion that the starboarding of the helm of the N. Churchill was the proper course, as he says that he called out to her when within a distance of about two hundred feet "Hard over on board that ship," and immediately after "Hard a-starboard;" and the "look-out" of the Normanton has said that after the mate of the Normanton hailed her she did not appear to change her course. There evidently could have been little time to do so as appears from the statement of another witness for the Normanton of the name of Hughes, who was on board the N. Churchill, who has said that when the Normanton came heading on to the N. Churchill she opened out both her side-lights, and afterwards showing only her red light; and both her side-lights were visible for "only two or three seconds." Considering the velocity with which these two ships were approaching each other there could not have elapsed more than three minutes from the time that the Normanton ported her helm until her

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attempted transit across the course of the N. Churchill was stopped by the collision. Until within this short period, the N. Churchill, as her mate has stated, was pursuing her course in safety, she was then brought into instant and the most imminent danger, and whether she should have then starboarded her helm is a question more for nautical than legal skill to determine. This, with other questions, has been submitted to the gentlemen with whose aid the Court has been favored. The answers to them are as follows:—

1st Question.—Previous to and at the time of the collision, was there on the starboard side of the N. Churchill, a green light so constructed as to throw an uniform and unbroken light over an arc of the horizon of ten points of the compass so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles, and at the same time was there a red light on the port side of the N. Churchill of similar construction and power to that above mentioned?

Answer.—There was, without the slightest doubt.

2nd Question.—On the morning of the 6th November last how far could the green and red lights of the N. Churchill be seen by the Normanton when approaching, and at what distance should the "look-out" on board of her, with proper vigilance, have seen either and which of them before the collision?

Answer.—According to the evidence they could be seen at a distance of above two miles in the state of the weather at the time, and, with proper vigilance, her green light should have been seen at a distance of at least two miles from the Normanton.

3rd Question.—At the time when the green light of the N. Churchill should have been first seen on board the Normanton, what course should the Normanton have adopted so as to keep out of her way, and at that time was there a proper "look-out" on board the Normanton?

Answer.—She should have starboarded her helm so as to give a wide berth to the N. Churchill, and we are of opinion that a proper "look-out" was not kept by the Normanton before the collision.

4th Question.—When did the risk of collision commence, and what caused it, and what steps should have been taken by the Normanton to prevent it?

Answer.—The moment the Normanton ported her helm the risk of collision commenced, and her porting caused it. She should, at the same moment, have stopped and reversed at full speed, and this, we think, would have prevented the collision.

5th Question.—Had the starboarding of the helm of the N. Churchill the effect of changing her course before the collision so as to contribute towards it, and were it not for such starboarding would the collision have been avoided?

Answer.—The starboarding of the helm of the N. Churchill may have slightly altered her course, but not so as to contribute to the collision. The collision would certainly have occurred without the starboarding.

6th Question.—Was the starboarding of the helm of the N. Churchill a proper course, and would her keeping her course have prevented the collision?

Answer.— Under the circumstances the proper course was to starboard, and we are of opinion that if she had ported or kept her helm steady the only difference would have been to strike the Normanton further aft.

7th Question.—Did the N. Churchill stand by the Normanton after the collision so long as a due regard to her own safety would permit?

Answer.—She did.

8th Question.—Was the Normanton solely to blame for the collision?

Answer.—She was.

E. D. ASHE, *Commander R. N.*

F. GOURDEAU, *Harbor Master.*

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While participating in these opinions and impressed with the conviction that proper vigilance and good seamanship was manifested on board the N. Churchill, and that the reverse was the case on board the Normanton, there is a feature in the case of the Normanton which was forcibly brought under the notice of the Court at the argument, and which this Court cannot pass over without observation. The N. Churchill was forced to abandon the prosecution of her voyage, and returned to Montreal. There difficulties took place between her master and the mate, and also with the six of her crew whose evidence has been referred to. While these difficulties were going on it was supposed that valuable information could be obtained from them by the Mitchell Line of Steamships Company, and the Hon. Peter Mitchell was induced to enter into communication with them for the purpose of obtaining it. These persons were not only placed out at board at the expense of the Company, at a rate of a dollar and a half a day for upwards of three weeks, but other expenses were paid, their litigation with their master was encouraged by the payment of their law costs, gratuities and refreshers were given to the men, and, finally, their passages home was paid. These amounts are far more than were allowable to these persons as witnesses, and although Mr. Mitchell has been examined as a witness and sworn that the payments of these sums were not given to pervert the truth, but from the fear of these witnesses leaving the country, and of the Company being deprived of their evidence if they left, it is to be observed this apprehension was unfounded, as is apparent from the fact that the men were at law with their master, and that from want of means they could not leave. Such is the summary and efficacious mode of proceeding in this Court, that with due diligence at any stage of the suit the depositions of these witnesses might have been taken within four or five days upon a proper application. And if this matter is now noticed it is to prevent its repetition. In any case coming before this Court such practices will

bring such discredit on the testimony as will materially affect its credibility. Another consequence may be that the suitor will be led into error by misrepresentation of facts mysteriously hinted at, made to extort money, and not true, as has occurred in this case, and institute a suit upon the belief of them. That in this way the Company have been imposed upon there can be no doubt; and it is equally certain that if they had been aware of the facts that have been abundantly proved they would not have provoked a litigation necessarily attended with very serious consequences.

The judgment of the Court is, that the suit against the N. Churchill be dismissed with costs, and the suit against the Normanton maintained with costs, the damages of the N. Churchill to be established upon reference to the Registrar and Merchants in the customary manner.

Andrews, Caron and Andrews, for the steamer.

Langlois, Angers and Colston, for the barque.

NOTE. In this cause, leave was granted to appeal to Her Majesty in Her Privy Council; but the appeal asserted was subsequently abandoned.

Tuesday, 2nd June, 1876.

CELESTE—WRIGHT.

A vessel collided with two lighters endeavoring to raise a sunken steam-tug, broke the chains which connected them with the wreck, sent them both adrift, and was condemned in the damages resulting from such collision.

On the reference, the Registrar and Merchants allowed the promoters all expenses incurred in endeavoring to raise the sunken tug, during the four weeks preceding the accident, on proof only that the money had been duly expended.

Upon objection the report was overruled, and it was held that it was necessary for the promoters to go further, and to establish not only the actual expenditure, but that such expenditure was adapted to the purpose for which it was made, and had enured so much to the benefit of the promoters.

When items in a claim are disputed the principles of evidence applicable in ordinary suits come into play.

CELESTE. Appeal from a decision rendered by the Registrar and Merchants, on a reference to them ordered by the Court, for the purpose of assessing damages.

JUDGMENT.—*Hon. G. O. Stuart.*

A judgment has been rendered in this court against the owner of the barque Celeste in favor of the St. Lawrence Steam Navigation Company for the damages by them sustained as owners of the steam vessel Arctic while she was lying on the bed of the river St. Lawrence at the depth of 120 feet. To settle the amount of these damages a reference to the Registrar and Merchants was ordered. Their report has been made, and is now contested by the respondents.

It appears that tenders to raise the Arctic had been advertised for, and that one made by Pierre Fradet was accepted by the promoters. He accordingly commenced

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work by placing two batteaux, lashed together with pieces of timber, over the sunken steam vessel from which chains were suspended passing under the keel. On the nineteenth of June, 1874, about four weeks had elapsed without a successful result, when the barque Celeste dragged her anchor, and, driving across the batteaux, broke the chains, which were lost, and sent the batteaux adrift. The damage so occasioned is the subject of the report now under consideration.

By an act on petition, objections have been taken to the report generally, and to three items allowed the promoters in particular; these are for expenses incurred in attempting to raise the Arctic during the period above mentioned, four weeks preceding the collision. They are as follows:—

For barge hire.....	$1,118 00
Labor.....	221 45
Steamboat hire.....	162 75
Making a total of.....	$1,502 20

The objections to this sum are, that the work was useless, that it was unattended with any beneficial result, and that by means of it no progress had been made in raising the steam vessel. The answer to these objections is that the money was paid for the barge-hire and labor, and vouchers have been filed which establish that it was paid.

Upon this contestation two questions arise:

The first is whether the steamboat and barge-hire and labor allowed for, has the value which has been assigned to it and, if it had,

Secondly, would it be the proper measure of damages suitable to the case.

The issue raised by the pleadings made it incumbent upon the promoters to establish that the steamboat, barge hire and labor not only had a given value, but that it was adapted to the purpose and enured so much to the benefit of the promoters (*a*). Instead of this, the promoters have

(*a*) The Clarence, 3 W. Rob. 254.

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confined their evidence to the actual payment, and for them it was stated at the argument that the allowance of the same by the Registrar and Merchants was presumptive evidence of its value. No doubt it would have been, if the items in question had not been objected to before them, and in that case they would have been admitted. But so soon as their value was disputed the principles of evidence applicable in an ordinary case came into play, and proof of their value before the Registrar and Merchants was indispensable to the success of the promoters.

In the absence of affirmative testimony there was evidence by the respondents, not only to negative the value of the work, shewing it to have been useless, but also leading to the belief that it would have been better if not done at all.

Before adverting to the statements of witnesses for the respondents, some facts stated by Augustin Gaboury, the secretary of the promoters, may be stated. It appears from these that while Fradet, their contractor, was four weeks at work previous to the collision, several of their directors expressed doubts as to his success, that in that time he had succeeded in passing chains under the Arctic, and in moving her a little; that he had used small chains which broke, and then he had to place larger and stronger ones in their place, and that he had made a first attempt to float her and two or three others afterwards, without success. Then this comes to be more fully explained by evidence of the respondent. Mr. Davie, a ship builder, who has been for many years employed in raising wrecks, appears to have given particular attention to the work of Fradet; he adverts to the light description of batteaux employed by him (of the burthen of a thousand deals), to the fact that after three weeks he had not been able to raise the Arctic to the surface, or to move her in any way perceptible, and, to use his own words: "I always said that the batteaux first employed could not raise the Arctic, they were not fit for it, and I considered their labor use-

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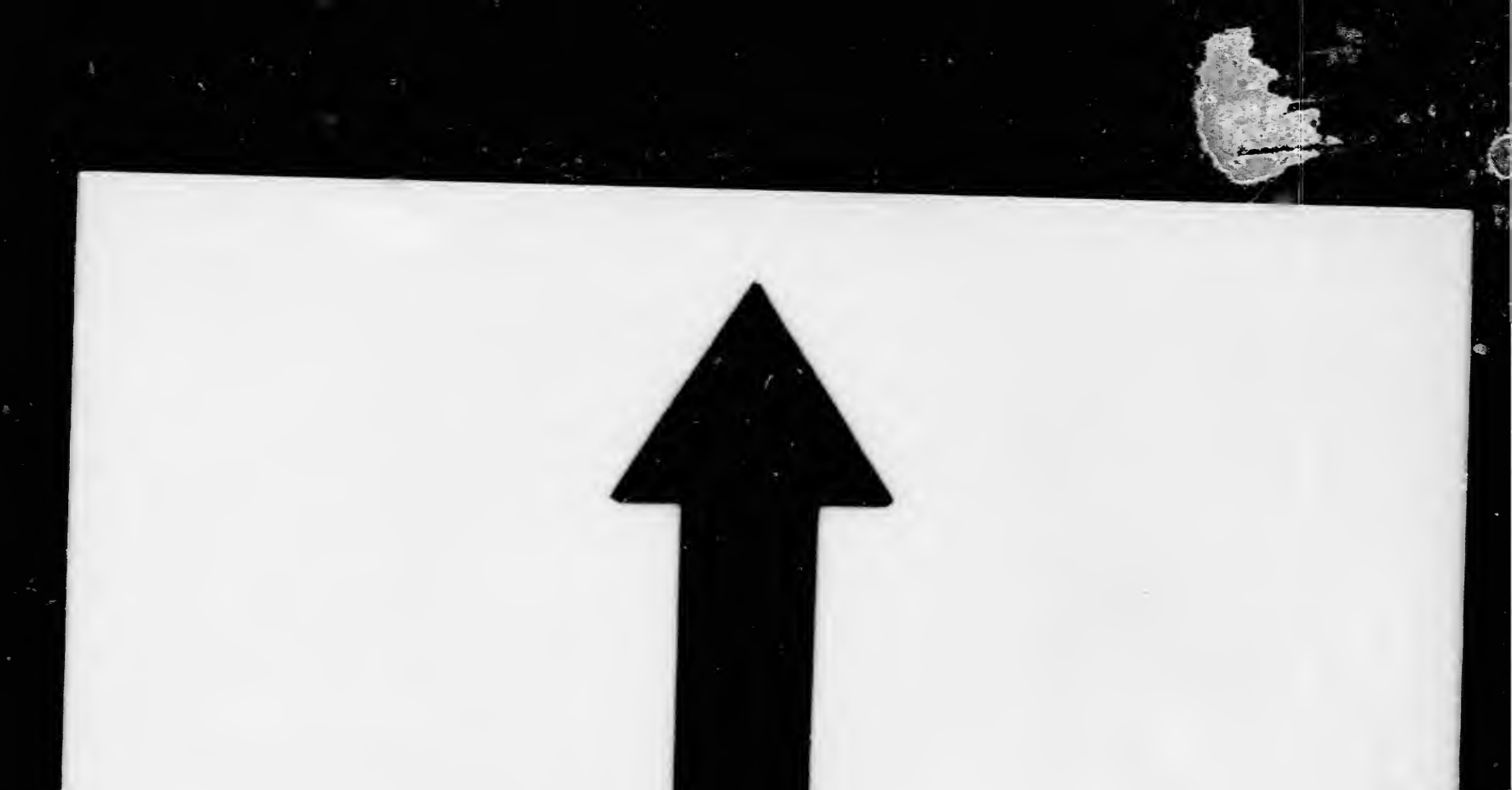
less. I saw the batteaux at work when I cross[illegible] in the ferry steamer from Levis, three or four times a day. I knew that it was blowing a gale on the night of the collision, and I believe that if there had been such a strain on the chains as would be required to raise the Arctic, the batteaux would have been swamped with the swell that was on."

Then there is the evidence of Claude Giguère, who seems to have had some experience in raising vessels. He was employed by the promoters before they a[illegible]d for tenders, and then passed the first chain under he[illegible]h was used by Fradet afterwards. He has sworn as [illegible]ows: "I saw the batteaux employed to raise the Arctic, and just after they began I noticed that the vessel was going out of her position, down into deeper water and up the stream. After that, when four batteaux were working at her, I saw that she had moved, but I cannot say how much, in the same direction," and, further: "I do not think that if there were two batteaux attached to the Arctic when the collision occurred she would have been moved at the bottom by that collision."

The matters to which these persons have testified, the evidence which they have given where skill in their own particular profession was involved—evidence, moreover, not contradicted—leaves no doubt in my mind that the work of Fradet up to the moment of the collision was useless, and, beyond that, detrimental, as having forced the Arctic into a greater depth of water. If with this evidence I were to sanction the three items which have been referred to, it would, in my opinion, amount to a gross injustice upon the respondents.

As the promoters are not entitled to the three items for steamboat, barge hire, and labor, which preceded the collision, it remains to be seen what their indemnity is, or the measure of damage to be awarded. When a collision is not wilful, the rule is "that the owner of the injured vessel is to receive a remuneration which will place him in the

[redacted]



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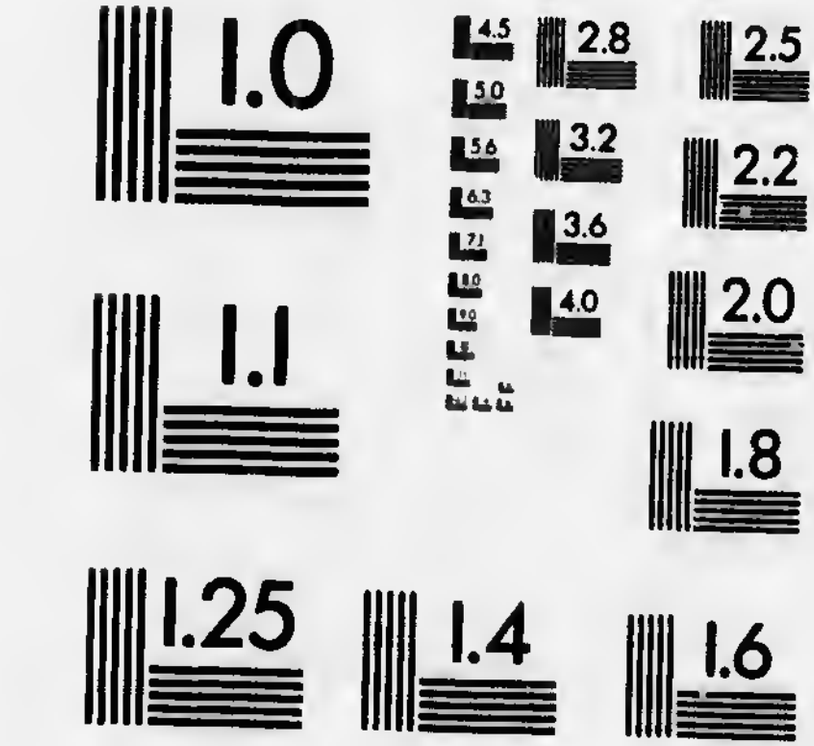

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situation in which he would have been but for the collision," (*a*) or "recover so much as will repair the injury sustained by the misconduct of the defendant." (*b*) Now it has so happened that there has been allowed by the report,—upon the evidence of Fradet, who has sworn that it took eight days to put the chains in the same place as they were before the collision, and two days, or four tides or thereabouts, to put the steamship in the position in which she was before—a sum for that very purpose, viz., $980.80, to which is to be added a sum of $309. 35, upon evidence scarcely sufficient, but which cannot be questioned now, as no opposition seems to have been taken to it; this last sum is made up of items allowed for the bringing the Arctic back into 120 feet of water from 150 feet, into which it is said she was driven by the collision. These sums, with two others for chains that were lost by the collision, and for timber, amounting to $550.52, will be allowed, and the three items already mentioned, which have been contested, amounting to $1502.20, must be expunged. By the report thus altered, the promoters are allowed what it has cost to reinstate them. The report is ordered to be modified so far as rendered necessary upon this change, with costs of the contestation in favor of the respondents.

Holt, Irvine and Pemberton, for owners of Celeste.

Andrews, Caron and Andrews, for the promoters.

(*a*) Pritch, Dig. 694, in Note 51 (*b*). Sedgwick Measure of Dam., p. 30.

Friday, 10*th November*, 1876.

FRANK.—PETERSEN.

Held:—1. A ship sailing seven knots an hour in a fog over fishing ground on the banks of Newfoundland, without adequate means on deck to prevent accident, held to have been in fault, and a plea of inevitable accident overruled

2. Where the blasts of a fog-horn on an American schooner were substituted for the ringing a bell, as required by the sailing regulations, a plea that it was done in accordance with a circular from the Secretary of the Treasury of the United States overruled. But the breach of the regulation not having contributed to the accident, the schooner relieved from liability.

3. An omission to ring a bell in a fog, covered where an anchor light was seen in time to avoid a collision.

This was a cause of damage, promoted by the owners of an American vessel, against the Norwegian barque Frank, under the circumstances noted in the following judgment. FRANK.

JUDGMENT.—*Hon. G. O. Stuart.*

A collision between two foreign vessels, the Norwegian barque Frank, of 340 tons, and the America fishing schooner Job Johnson, of 64 tons, upon the Atlantic ocean, has given rise to two suits, promoted one by the owner of the schooner, and the other by the master and several of the crew. Between the hours of two and three on the morning of the 16th of July last, the Job Johnson, about three-fourths laden, lay at anchor on the Grand Bank of Newfoundland in latitude 45° 43′ north, longitude 50° 51′ west. The wind was moderate and her head was to it S. W. The Frank, on a voyage from Glasgow to Montreal, carrying all sail but the fore-royal and the main-top-gallant staysail, was on the port tack, steering W. N. W. ½ W. She then came into collision, striking the schooner with

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her bow amidships, the master and crew saved themselves by leaping upon the bow of the barque, and the schooner sank in about five minutes after she was struck.

The first suit is brought to recover for the loss of schooner and cargo, the second for the personal effects of the master and men, and the evidence is common to the two.

The master and persons on the barque are charged with negligence in not avoiding the schooner, and this met by a plea of inevitable accident caused by a fog; and another in which fault is imputed to the schooner for sounding a fog-horn instead of ringing a bell as directed by the sailing regulations for a vessel at anchor, which misled the barque, and was the cause of the accident. The charge for not using the bell is met by the schooner: 1. By alleging specially a regulation made by authority in the United States, whereby a general alarm from the fog-horn was substituted for a bell; and 2. That it made no difference whether fog-horn or bell were used, because in either case, the helm of the barque should have been put to port, instead of which it was put to starboard, and thereby the collision was caused.

This Court has thus to consider: 1. Was the collision an inevitable accident. 2. Was a fog-horn a legal substitute for a bell, and, if not, did its use contribute in any way to the accident.

An inevitable accident is where a man is pursuing his lawful avocation in a lawful manner, and something occurs which no ordinary skill or caution could prevent, and as a consequence of that occurrence an accident happens: (*a*) but the highest degree of caution is not required, it is enough if reasonable under the circumstances.

There were twelve persons on board of the barque, the master, the first and second mates and nine others. None of them, except the second mate, the man at the wheel, and the carpenter, acting as a "look-out," were on the deck

(*a*) The Virgil, 2 W. Rob. 202.

so as to see what happened at the critical period before collision. It is true that there was an apprentice on deck, but he does not seem to have been conscious of anything that occurred; he did not even see the collision. The evidence to support the plea of inevitable accident will therefore be that of the three persons referred to. As preceding a reference to their statements, it may be said that, at the time and before the collision, the weather was foggy; the witnesses of the respondent say that the fog was so thick, and the morning so dark, that the length of the barque, 100 feet, could not be seen through it; while, on the other side, it is said to have been thick and hazy but not a dense fog. The speed of the barque is estimated by the second mate to have been six and a half knots an hour; by her look-out and the man at her wheel, at seven. On the other side it is said to have been between seven and eight knots an hour. It appears that a fog-horn in the state of the weather at the time could be heard at the distance of a mile or three quarters. That the barque was in the vicinity of fishing vessels was known on board of her the day before the collision, and the men who were on the schooner saw a good many within a range of about four miles, the day before and the day after it. The schooner had a white light burning brightly, at about ten feet above her deck. The moment at which this was or could be seen from the barque before the collision is variously stated, and will be presently considered.

The evidence of the three persons who were on the deck before the collision, which I shall now bring under notice is, first, that of the "look-out." He was on the top-gallant forecastle deck; he heard a fog-horn's faint sound under the barque's starboard bow, seemingly half a cable's length off. This he reported to the second mate aft. He heard the fog-horn again, apparently, right ahead. This he reported to the second mate also. He blew his fog-horn, and about a minute afterwards saw a very small light which he knew to be that of a vessel at anchor, about a ship and

FRANK. a half's length off, he called out "Hard a-port," and just then the second mate gave an order to starboard, whereupon he ran aft to repeat his order, "Hard a-port." The account of the second mate is that he heard, "right ahead," the faint sound of a fog-horn; he ran to the wheel and ordered the helm "a-port;" he heard it again, apparently on the starboard bow, then he ordered it "Hard a-starboard." When it was about midships the "look-out" called "Hard-up," which he (the second mate) did not repeat until the helmsman said, "I see a bright light;" then the "look-out" came running aft as fast as he could, calling "Put your helm hard up," when an order to port again was given. Upon this being done the second mate ran to the master's cabin to call him, and it was upon his return to the wheel that he saw the white light half a ship's length off. The man at the wheel has also said that he heard the faint sound of a fog-horn, as if on the starboard bow, a cable's length off; that he heard it a second time "right ahead," sixty or seventy fathoms; about a minute after he heard the "look-out" call, "Put your helm hard a-port," and it was put "to port" or "hard a-port." Then the second mate ordered it to starboard; and as this was being done, he (the man at the wheel) saw a white light a little on the port bow, about a ship's length off. This he reported to the second mate who at once ordered the helm "hard a-port," but before she could pay off the collision happened. From the same witness it appears that the "look-out" had reached the helm before the collision, and as soon as the helm was turned from starboard to port he ran forward again.

On the side of the schooner, the principal witness was the anchor watch. He saw the barque's green light off the port side of the schooner, distant about three-quarters or half a mile, he then blew his fog-horn, and continued to do so as she approached, at a rate of seven or eight knots, until the collision. His fog-horn was a good one, and could be heard as far as a mile. From the others on the same

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side it would appear that the schooner's light in the state of the atmosphere could be seen half a mile off. The distance at which fog-horns could be heard in the state of the weather the look-out in each vessel has fixed at a mile or three-quarters; the barque, from which the schooner's horn was first heard faint, knew, or should have known, that there was a vessel ahead at about that distance, and she knew also that she was on a fishing-ground. The witnesses for the barque represent that the fog was so thick, and that it was so dark, an object could not be seen her own length, one hundred feet. There was, therefore, a necessity for the greatest care and caution. The look-out saw and reported a vessel ahead, information which required that the second mate should order her helm to "port"; instead of that, trusting to his own eye and ear, which deceived him, and it is not surprising that they did, as he was nearly one hundred feet from the bow, with fog and sail intervening, he starboarded the helm and thus caused the collision. The maritime law has imposed no fixed rate for a vessel to sail in a fog; it is to be regulated by the exercise of a sound discretion, governed by proper means at command to stop or check it upon a sudden emergency. Whatever the rate may be, there must always be a good look-out, and between him and the officer in charge there should be an immediate means of communication. On this occasion the look-out did give information to the officer; it was disregarded and, as a consequence, the schooner was sunk. Then, as to the rate of sailing, the language of Dr. Lushington in the case of the Pepperell, which ran down a fishing cutter with her trawl out on the North Sea, may be advantageously stated: "The ground on which my judgment will be founded is this, the Pepperell was going six and a half knots an hour, stating at the same time that the night was so dark that she could only see vessels at the distance of 100 or 200 yards off. She ought to have known that she was crossing a fishing-ground, and indeed she did know it, for she states that shortly before the accident she

FRANK. saw many lights. From that circumstance alone that she was going through the water at that rate, at that season of the year, the Court will pronounce for the damage." (*a*)

Again, the same distinguished Judge, in the case of the Juliet Erskine, where inevitable accident from the darkness of the night was pleaded, observed: "It is said that this is a case of inevitable accident arising from the darkness of the night. Let us consider how that stands. The night was either very dark or it was not; if the night was not dark, I see no reason why the Juliet Erskine should not have seen the Rosebud in due time to have ported her helm and thus have avoided the collision. But, assuming the night to have been as dark as stated, the question then is this: Was the Juliet Erskine justified in proceeding under the quantity of sail she carried at that time and at the rate at which she was sailing. I am not competent to say what is a proper quantity of sail, but I am competent to form this opinion: that if, on a dark night, the vessel is proceeding at such a rate that those on her deck have not sufficient command over her, so as to avoid all reasonable chance of accident—then, that is too expeditious a rate to sail at, because it is the duty of those who navigate the commercial marine of the country to take care that they do not, for the sake of expedition, injure the property of other people." (*b*)

With respect to the rate at which the barque Frank was sailing, I shall express no opinion until that of the assessors is given, but I hesitate not to say, apart from the fact that the conflicting orders of the look-out and second mate led to the collision; that, before this, there was not on deck adequate means to avoid danger reasonably to be expected. The master and first officer were in their berths, the starboard watch, whose turn it was, were not on deck; and it scarcely requires nautical knowledge to reach the conclusion that there was fault in the management of the barque.

(*a*) The Pepperell, Swabey 12. (*b*) 6 Notes of Cases 633.

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The master, when he came on deck, immediately ordered the yards to be braced back, an order which, if given when the faint sound of the fog-horn was heard the first time, or even a second time, or when the schooner's light was seen, might have saved the schooner.

I now take up the charge against the schooner for not ringing a bell, which the second mate of the barque has said would have enabled him to avoid the schooner, as he would then have ported his helm and have kept it to port. The fog-horn's blasts were thus, according to him, the cause of the accident.

By Orders in Council, issued in pursuance of the 58th section of the Merchant Shipping Act Amendment Act, 1862, the regulations for preventing collisions at sea, appended to an Order in Council dated 9th January, 1863, have, with the assent of the United States of America, been made to apply not only to sea-going ships of that country, but to ships of the United States when navigating the inland waters of North America, whether within British jurisdiction or not. (*a*) The same regulations have likewise been made applicable to Norwegian ships. (*b*) The 10th artiele, governing fog signals, provides that sailing ships under weigh shall use a fog-horn, and when not under weigh shall use a bell.

To relieve the schooner from the observance of this rule, a regulation, said to proceed from the United States Government at Washington, has been produced. It is in the form of a circular addressed to the Collectors of Customs, signed by Mr. Richardson, the Secretary of the Treasury at Washington; it bears date the 18th October, 1873, and is as follows:—

"You are instructed to issue to each sailing vessel with its proper regulation papers two copies of this circular, and to endeavor to enforce the provisions contained in the reso-

(*a*) See App. to Lush., R. 72; B. and B Lush, 482.

(*b*) 2 Stuart's Adm. R., App. p. 325.

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"Be it resolved, that the President of the Board of Supervising Inspectors respectfully requests the Secretary of the Treasury to instruct Collectors of Customs on the seaboard and lakes to issue to each sailing vessel with its proper regular papers two copies of the fog-horn signal rules adopted by this Board, to be framed under glass and hung in some conspicuous place on said vessels. The rules referred to are as follows : —

"1. Whenever there is a fog, by day or by night, the fog signal described below shall be sounded.

"2. Sailing vessels and every craft propelled by sails upon the ocean, lakes and rivers shall, when on the starboard tack, sound one blast of their fog-horns ; when on the port tack they shall sound two blasts of their fog-horns; when with the wind free or running large, they shall sound three blasts of their fog-horns; *when lying-to or at anchor, they shall sound a general alarm.* In each instance the above signals shall be sounded at intervals of not more than two minutes."

Mr. Howells, Consul of the United States at Quebec, has given a certificate that this circular would be received by any Collector of Customs or similar officer of the United States as a genuine and authoritative order from the Department of the Treasury. He has been examined also to prove the signature of the Secretary of the Treasury at Washington, and has said that this regulation was made by a Board of Supervising Inspectors under an Act of Congress, which, he believes, is the same as stated in Nos. 4404 and 4405 of the Revised Statutes of Congress, 1873-4. I have looked at this citation, and do not find any power there delegated to inspectors to alter the sailing regulations established between England and the United States, but I see there a power given to inspectors to regulate steam vessels. I do not think, therefore, that the schooner Job Johnson was relieved by this circular from

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the ringing of a bell. Great Britain and the United States, as well as this Dominion, have adopted the sailing regulations. They have been made to apply not only to sea-going vessels, but also to the great lakes bordering on the United States and Canada. Norway has assented to them, with many other European powers; and it is very much to be regretted if the fishermen on the banks of Newfoundland have been misled by the circular. It has been proved in this case that the fog-horn is in use on the banks, and men of long experience there, as fishermen, say that they have never known the bell to be used. The term "general alarm" directed by the circular, as applied to a small fishing schooner, to be created every two minutes upon the Atlantic Ocean, is a term of doubtful meaning. I should hardly imagine it to be a fog-horn, unless accompanied by other sounds, perhaps not within the power of a small vessel to make. If I have particularly alluded to this part of the case, it is because a departure from any one of the sailing regulations, no matter what, whether for a better one or an equivalent, may mislead other vessels. If other vessels are misled, and it is easy to conceive such a case, where a bell is not rung and a blast of a fog-horn substituted, the deviation may have a disastrous effect upon important interests. A more lamentable case than the present cannot be found, if the persons interested are to be deprived of their remedy in consequence. If there is a class of men whose industry, attended with constant exposure of their lives, furnishes an indispensable article of food to a large portion of the human race, who require protection, it is the fishermen of Newfoundland; and it is to be hoped that if they are laboring under ignorance of the law that they will be informed of it.

If the use of the fog-horn contributed to the collision, the loss would be divided. But the second mate of the barque has said he mistook one signal for another, while he states that the course which he would have followed in the one case and the other would have been identical.

FRANK. Unfortunately, he adopted neither the one nor the other. The schooner was ahead of the barque, and his duty was to put the helm to port, and yet he starboarded. I cannot see, therefore, that the sounding of a fog-horn instead of the ringing of the bell made any difference, or in the least degree contributed to the collision.

But could doubt be entertained as to this view of the case, there is another aspect under which it may be regarded as conclusive, irrespective of fog-horn or bell, and that is under the sailing regulation respecting lights. The 7th article provides that a white light, not exceeding twenty feet above the hull, shall designate a vessel at anchor. It is proved that the schooner had a white light, as prescribed by this article, in the proper place. The look-out on the barque knew it at once to be the light of a vessel at anchor; the exclamation of the man at the wheel shows that he knew it was also. At that moment it was imperative upon the barque to steer clear of the schooner, *(a)* provided there was time to do it. The green light of the barque was seen by the anchor watch of the schooner half a mile or three-quarters off. If this be true, there is no reason why the white light of the schooner should not have been seen at the same distance from the barque; and again, in the state of the weather, the men on board of the schooner testify that her light could be seen half a mile distant. This space certainly afforded sufficient time for the barque, by keeping off two or three points, to clear a small vessel of 64 tons. But if the testimony in this particular were attended with any doubt, I may refer to that from the barque to remove it—not to opinions but facts. When the look-out of the barque saw the light, knowing it to be that of a vessel at anchor, he called out "hard a-port;" the wheel was then, as the man at it has said, put "hard a-port;" the look-out had time to see that the helm of the barque was put "hard a-port," and that

(a) The Oriental, 2 Stuart's L. C. Adm. R., 144.

again she was checked by the starboard helm, as ordered by the second mate. He had time to see that the latter order would be destruction to the schooner. He had time to run to the helm, nearly one hundred feet, then to have the helm reversed, after that the second mate had time to go to the master's cabin and return to the helm, finding the schooner even then half a ship's length off. This confirms the testimony for the schooner that the light from her could be seen half a mile distant, or, if not so far, quite far enough to steer clear. It is in evidence that the barque yields very readily to her helm, and a very slight turn of the wheel at that distance, the light being "right ahead," would have spared the schooner. If any erroneous impression rested on the second mate's mind produced by the fog-horn, there was reasonable time, if he had been equal to the occasion, for its removal after the light was seen. He was then in the position that he would be in clear weather, and by not steering clear of the schooner, the barque on this ground alone would be liable for the consequences.

The following questions submitted to the nautical assessors, Commander Ashe, R. N., and Mr. Gourdeau, the Quebec Harbor Master, enable me to dispose of this case in accordance with the views which I have expressed.

1. Was the quantity of sail carried by the barque Frank and her speed before the collision with the schooner Job Johnson, on the morning of the 16th of July last, too much, considering the state of the atmosphere, and the place where the collision happened?

Answer.—We think it would have been prudent, as the weather was foggy, for her to have shortened sail, there being usually fishing schooners on the banks of Newfoundland.

2. After the fog-horn from the Job Johnson was heard on board the barque the first time, or after it was heard the second time, or after the Job Johnson's light was seen from the barque, was there sufficient vigilance shown on board

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of the barque under the circumstances; and could any precaution required by the ordinary practice of seamen, or by the special circumstances of the case, have been adopted on board of her so as to prevent a collision?

Answer.—No, there were not proper precautions taken. When the fog-horn of the schooner was heard the first time, the watch of the barque should have been called on deck to shorten or trim the sails. When the schooner's fog-horn was heard a second time ahead, the helm of the barque should have been ported, and after her light was seen, her helm should have been kept "hard a-port." After the light of the schooner, which designated a vessel at anchor, was seen, there was time to have avoided the collision by porting her helm.

3. Did the use of a fog-horn instead of a bell on board the schooner cause or contribute to the collision?

Answer.—No, if there had been a bell rung and heard "ahead" or "right ahead" the course of the barque should have been the same.

4. Was the Frank to blame entirely or in part for the collision?

Answer.—The barque Frank was entirely to blame for the collision.

Per Curiam. I agree with the opinions thus expressed, and pronounce for the damage sustained by the promoters in each case with costs.

R. J. Bradley, for the Job Johnson.

R. Alleyn, Q.C., Counsel.

Blanchet and Pentland, for the Frank.

Friday, 15th December, 1876.

ROSA—GILL.

RANGER—TOPPING.

1. A steam tug proceeding the river St. Lawrence met two barques, and, in passing between them, came into collision with one, which ported her helm. Held. that the tug was in fault for not keeping out of the way :—And the barque to have been to blame for not keeping her course.

2. Admissions of a master of a ship respecting a collision being pertinent to evidence against the owners, although made after the collision and extra-articulate ; but the party affected may give counter evidence.

JUDGMENT.—*Hon. G. Okill Stuart.*

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A collision between the tug steamer Ranger, of 152 tons and 75 horse-power, owned by the St. Lawrence Steam Navigation Company, and the Rosa, a Norwegian barque of 710 tons, belonging to Andreas H. Kiar, has occasioned cross-actions now to be decided on their respective merits.

On the 3rd of June last, between five and six o'clock in the afternoon, the Ranger appears to have been in search of vessels from sea to tow them. With this object, proceeding under steam at the rate of between seven and eight knots an hour, she was about a mile above the St. Lawrence Point wharf, about nine miles below the city of Quebec, on the south side of the Island of Orleans. The wind was strong from the N. E., the tide was flood in the stream and had begun to ebb along the shore. Two barques were, at the same time, sailing up the river, and were about the same distance below the wharf as the Ranger was above it. They had all their sails set, and, with a fair wind, their speed was from ten to eleven knots an hour. One of these barques,

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the Svadilfare, was in advance of and nearer to the shore than the Rosa. The Ranger outside passed the Svadilfare about half a cable's length abreast of her, and continuing her course about the fourth part of a cable's length, until about opposite the wharf, her stem came into collision with the port bow of the Rosa, the result of which was that both bows of the Ranger were carried away, and an opening made in the bow of the Rosa 9 feet square. The former sank near, but before she could reach, the shore, but the latter reached the city of Quebec. The damage done was so serious as to make the decision of these suits of considerable interest to the parties. The Rosa is said to have been damaged to the extent of $12,000 and the Ranger perhaps more, if one may judge from the report of survey upon her after the collision.

The case, as relied upon for the Ranger is, that she had been put upon a course to pass between the two barques where there was sufficient room for her to do so, but that the Rosa, when bearing several points on her starboard bow, and several cable's lengths off, suddenly changed her course to the north, and was crossing the Ranger's bow, when the collision occurred, which was caused by the Rosa's not keeping her course.

The case as stated for the Rosa is, that the two vessels were each keeping a steady course, the Ranger down, and the Rosa up the river; that for a distance of about two miles the Ranger bore straight upon the Rosa's bow until, when between two or three of her own lengths from the Rosa, the pilot of the latter, to avoid immediate danger, ported her helm, but before she could pay off two points, the Ranger, without slackening her speed or reversing her engines, with full steam on ran into her, an accident which could have been avoided if the Ranger had passed to the port side of the Rosa to the south.

The issues between the parties to these suits then are: 1. That the Ranger did not keep out of the way of the Rosa, which, as a steamship, she should have done; and 2.

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That the Rosa, a sailing vessel, did not, as was her duty, keep her course, which would have avoided the collision. In the first proposition is involved the case of the owners of the Ranger; and in the second, that of the owners of the Rosa.

One of the rules of navigation imposes upon a steamship the duty of keeping out of the way of a sailing ship when proceeding in such directions as to involve risk of collision. As the mode of doing so cannot be prescribed for every case, the responsibility of adopting the proper one must rest with the steamship. Another rule is, that every steamship, when approaching another ship so as to involve risk of collision, must slacken her speed, or, if necessary, stop and reverse. Upon the observance or non-observance of these rules the suit against the Rosa must depend.

Then there is a third rule applicable to the suit against the Ranger: that, where, by the above rules, one of two ships shall keep out of the way, the other shall keep her course, and upon the application of this rule the suit against the Ranger will depend.

I shall apply the two first rules in the case against the Rosa, and the third in that against the Ranger. The result will be the judgment in each case.

The witnesses of the Ranger, fifteen in number, for the most part persons on shore, have expressed opinions as to the bearing of the Rosa upon the Ranger when she ported her helm, the critical moment which preceded the collision. They vary in their statements, not only as to this but also upon the distance between the two vessels at the time. The persons on board of the Ranger may be supposed to be most accurate upon these points, and therefore their testimony requires particular attention. The master has said that he saw the Rosa a mile ahead about four points on his starboard bow, he was steering a straight course down the river to pass between the barques, that, when four cable lengths off, the Rosa steamed a little to the south, when the Ranger's helm was put a little to the north; the Rosa then

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steamed to the north until she was about two cable's lengths off the Ranger and eight points on her starboard bow, that the helm of the latter was then put "hard a-port," and her engine stopped and reversed. He then ran to an opening in the deck and called out to the engineer, "*donnez toute la steam ;*" put on all the steam.

The statement given by the pilot of the Ranger is, that the Rosa, when a little less than a cable's length off (720 feet), and the length of a cable and a-half to the south, came up as on a port helm, in his opinion, bearing four or five points upon the Ranger's starboard bow, when her master rang to stop, and not a second after, to reverse. This witness also ran to the opening over the engines and called out to the engineer to put them back, the answer to which was, "we are backing all we can." Then the action of the engines reversed neutralized the power of the helm, which had been put "hard a-port," and the head of the Ranger did not vary until the collision.

The second pilot of the Ranger has testified that he was at her wheel, that she was steaming from seven to eight knots an hour, that before her helm had been placed so that she might go to the north of the Rosa, as the master has said, the pilot was desirous of going to the south, and ordered him to go to the south, in other words, to port his helm, which he did ; that with the sea going she would not steer so as to go to the south ; that she steered very badly that afternoon, owing to the swell that was on ; that it was next to impossible to steer her with two men at the wheel. After he received the order to go to the south, and before the master's order to go to the north, the pilot had ordered the course straight between the two barques ; that when the master ordered the course of the Ranger to the north the Rosa was about two arpents (360 feet), half a cable's length from the Ranger, and then her wheel was put completely to the north, which would be hard a-starboard ; immediately afterwards the Rosa took a sheer to the north towards the Ranger, then about an arpent (a quarter of a cable's length

distant), and then the master ordered the engines to stop and rang to reverse. The engines were stopped and began to go back at the moment of collision.

Opposed to this testimony is that of the persons in charge of the Rosa. Her master has said that he did not take much notice of the Ranger, until within a mile, coming bow on, as near as he could see. He kept his eye on her because she was sheering about, either from steering badly or from being badly steered. She would steer a little to port, come up again, and then sheer a little to starboard, and come up again. The Rosa was keeping a steady course, and this witness was expecting that the Ranger would keep out of his way by porting her helm and going to the south; instead of that she kept playing before his bow rather a little on his port side as if she wanted to speak him. "Seeing that a collision was likely to take place if we both continued our respective courses," he has said, "I considered that the only thing we could do to break the blow was to luff our ship up to the north by porting our helm, as the Ranger did not port her helm." This done he has added: "We had hardly time to sheer two points to the northward when the collision occurred." On cross-examination he has said that if the Rosa had not ported her helm the two vessels would have met "bow on."

The pilot of the Rosa first saw the Ranger about a mile distant; the course of the Rosa was then west, she was about three arpents lower than the light on the wharf, and about 110 fathoms from the shore. The Ranger appeared to be coming down at the rate of nine or ten knots an hour, then a point on the Rosa's port bow. Previous to the collision he lost sight of her as she was hidden by the sails of the Rosa, and lower in the water. If the Ranger had continued her course, as when he first saw her, she would have gone three arpents clear to the south of the Rosa, where there was a good half mile of channel for her to do so.

The man at the wheel also lost sight of the Rosa a short time before the collision; the order to port he received

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"just previous to the collision; it was obeyed some seconds, not quite a minute, before the collision." Before this the Rosa was steering straight up the river, and did not sheer.

Upon a comparison of these conflicting statements the truth can be so far discovered, that when at a distance of about a mile apart the safest and best course for the Ranger to adopt was to port her helm and go to the south; that her pilot endeavored to do so and could not, that for the purpose her helm was unmanageable; that the master then determined to starboard her helm to pass to the north, and afterwards almost simultaneously, the helm of the Rosa was ported. The evidence of the second mate of the Ranger, who was at the wheel, which is a medium between extreme statements, appears to have been given with impartiality, so much so that, although in the employ of the Ranger, he has declined to give his opinion as to which vessel was in fault. The distance at which he states the vessels were apart when the Rosa ported her helm was about an arpent, or 180 feet. Whether under these circumstances the Ranger kept out of the way of the Rosa, the two vessels meeting upon a combined speed of a mile in less than four minutes, is a matter involving questions of nautical skill for nautical men to decide.

Then did the Ranger slacken her speed or stop and reverse her engines in due time? The statement made by her second pilot, in no way contradicted, that she was ungovernable upon her port helm rendered a greater degree of caution necessary on her part. Her master, and several of the witnesses on her side, have said that the Rosa was not steering well either. Taking this for granted, although disproved, it would be an additional reason for the greater care on the part of the Ranger and for feeling her way so gently that she could upon the instant slacken or reverse her speed. The evidence on this part of the case must come from the engine room. It is certain that after the bell rang to stop and instantly after to reverse there was danger of immediate collision. This is manifest from the master first, and the pilot

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afterwards, running to order verbally that which had been already done by bell. It is said for the Rosa that when the order to reverse, either by bell or word of mouth, was given, the second engineer was confused, and understood the order "Donnez toute la steam" to mean full-speed ahead, and not astern, and by acting on it caused or accelerated the collision. This the second engineer has denied, and has said that he was not confused. The chief engineer, who went into the engine room afterwards and helped him to reverse, also denied that the second engineer made the mistake, although, he says, that he was confused, and would have done so if he had not prevented him. Then, there is the evidence of the master who has said that the order to reverse was given and afterwards "*Donnez toute la steam,*" which meant "full-speed astern." The following question to this witness and his answer to it are upon record.

Question.—Is it not true that you, on the Island of Orleans, in the presence of a number of persons, on the evening of the day upon which the collision occurred, or the following evening, stated that you had given the order to reverse "full-speed astern," but that the engineer, or whoever was in charge of the engine, either through ignorance or confusion, mistook the order, and put the engine "full-speed ahead?"

Answer.—No, nor anything of the kind.

To discredit the testimony of this witness a number of persons who were on the island have been examined, and asked if they had had any conversation with the master of the Ranger in which he stated how the collision occurred. A witness of the name of Damase Pouliot was in the house of Mr. Grenier between four and six o'clock on the evening that the accident occurred, and has sworn that Grenier asked Captain Topping, in the presence of several persons whose names he states, how the collision happened, to which he answered "I rang the bell to reverse, the first engineer was not there, but the second engineer was and he did not understand me; instead of reversing he sent ahead"

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(I think he said full-speed). "When I saw that he did not understand me I ran quickly to tell him by word of mouth, but it was too late." On the same evening, in the store of a person of the name of Laprise, where some of the effects of the Ranger were put, at about ten o'clock a person of the name of Delisle has sworn that the master of the Ranger, when asked as to the collision in the presence of several persons whose names he has given, answered "the ship was coming with a fair wind, that the wind was very strong, that when it blew strong he could not steer his steamer as he wanted, that he rang to reverse and he sent her ahead," without saying who, when François Pouliot said "You were then in the wrong," to which the answer was "yes, I think I was in the wrong, because he was on the right side (bon bord)." Again Francois Pouliot has sworn that on the night of the collision, on board of the Ranger when the master had brought together several persons to stop the hole in the Ranger, the master, in answer to a question from him, said:—"It was the movement which failed me, I wished to speak to the ship. For that purpose I stopped the steamer; when I saw the steamer a little near I rang to reverse, the second engineer did not understand me, and went ahead full-speed, and when I saw that he did not understand me, I called out to him to send her back and he had no time to do it before the collision. I should like to know what pilot was on board the barque." I asked him "why," he replied "on account of his sheer to the north." I then said "was it on that side he should have sheered," and he answered "yes, and that makes the matter worse." And then a witness of the name of Grenier, the day after the collision, was told by the master of the Ranger that he rang to reverse, that even then it was too late, and he was not understood.

These declarations of the master of the Ranger on four different occasions have been objected to as not binding on her owners, as being extra articulate, and because they were made after the collision. They were received by the

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Registrar to discredit the evidence of the master, but it is the duty of this Court to admit them not only for that purpose, but also as evidence binding on the owners (*a*), on the principle that the declarations of an agent are evidence against his principal." Subject, however, to this limitation that this Court in receiving evidence of such admissions, if pertinent to the issue, extra articulate, will afford an opportunity to the party who may have been surprised and desires an opportunity of meeting the extra articulate evidence to counter-plead and produce evidence on the counter-plea. Had it been demanded in this case the opportunity would have been allowed.

Before submitting to the assessors the questions that suggest themselves upon this testimony, I shall advert to the case of the Rosa against the Ranger.

Of the fifteen witnesses examined on the side of the Ranger quite a number, as well those on the wharf as those on board of her, give it as their opinion that the Rosa, if she had kept her course, would have passed clear without accident. Then there is the evidence of the pilot on board of the Svadilfare, who had but passed the Ranger when the collision occurred. His statement is "when the Rosa and the Ranger came into collision the latter was three and a half or four points to the north of her course direct going up the river, and the Ranger was at the same time following a straight course going down," and being asked to what he attributed the collision, his answer is, "In my opinion if the Rosa had kept a straight course there would have been no accident. When I saw the Rosa sheer to the north it was then too late for the Ranger to avoid her." Opposed to this there is a statement of the master of the Rosa, who stands alone in his opinion, that if he had not sheered, the Rosa would have struck the Ranger "bow on." If it be true, as he has stated, that at a mile distant, that is, within about four minutes of the collision,

(*a*) The Manchester, 1 W. Robb 62.—The Neptune the 2nd, 1 Dod 469.

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the Ranger was but a little on his port-bow and was dancing occasionally from port to starboard and from starboard to port, he knew, or should have known, that he had the choice of going to port or starboard. Had the Rosa waited a few seconds longer before porting her helm, the Ranger would, in the opinion of a large number of persons, derived from personal observation, have passed clear of her. If the Rosa, by porting her helm in any degree contributed to the collision, which she certainly did if by keeping her course she would have avoided it, she would be in fault, although the Ranger might be equally or more so, for approaching too near without proper precaution.

The questions which I have submitted to the assessors—Commander Ashe, of the Royal Navy, and Mr. Gourdeau, Quebec Harbor Master, with their answers, are as follow:—

1*st Question.*—Considering the statements of the second pilot at the wheel of the Ranger: 1—That the course first given by Lachance, her pilot, was to pass between the two barques, and that her helm was steady for that purpose. 2—That the intention of the pilot was afterwards changed, and the helm was placed to go to the south of the Rosa, and 3—That the Ranger steered so badly that she would not obey her helm to go to the south of the Rosa; was there not time and space for the Ranger, when her helm was ported, to have gone south of the Rosa without a collision, if she had obeyed her helm, and the Rosa had kept her course?

Answer.—Certainly there was.

2*nd Question.*—It appearing in evidence on the side of the Ranger, that when she was distant about two arpents from the Rosa, then almost straight ahead of her, but a shade (*un petit peu*) on the starboard bow, which would be nearly "end on," could the Ranger, if the Rosa had kept her course, have gone clear of her, if the Ranger had persisted in passing to the southward of the Rosa, and had obeyed her helm?

Answer.—Yes.

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3rd Question.—Taking into consideration the combined speed with which the two vessels were approaching each other, and the defective helm of the Ranger, was it consistent with a due regard to safety, that the Ranger should have approached so near the Rosa, nearly "end on," before she starboarded her helm to go to the north, without slackening her speed?

Answer.—Certainly not, it was running the greatest risk.

4th Question.—After the bell rang on board the Ranger to stop or reverse the engines, was there such a mistake in executing the order to reverse that the Ranger was sent full-speed ahead instead of full-speed astern?

Answer.— We are of opinion, according to the evidence, that such a mistake did occur.

5th Question.—If there was such a mistake, was the collision caused thereby?

Answer.—Considering the short space of time within which steam tugs with paddles can stop their speed, and, in this case, the strong easterly wind against the Ranger, we think, according to the evidence, that if the mistake had not been made at the time it was made, the collision would not have happened.

6th Question.—Was it in the power of the Ranger to have kept out of the way of the Rosa and to have avoided the collision which took place?

Answer.—It was.

7th Question.—Should the Rosa have kept her course, or were there any special circumstances which rendered it proper for her to deviate from it to avoid immediate danger?

Answer.—We think she ought to have kept her course, as it was impossible for her to see on which side the steamer intended to pass, although we consider it doubtful whether the collision would not have happened if she had done so, and we do not see any special circumstances to justify the deviation from it.

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8th Question.—Was the Ranger or the Rosa, and which, or both, to blame for the collision?

Answer.—We are of opinion that the Ranger was to blame for not keeping out of the way of the Rosa, and that the Rosa was to blame for not keeping her course.

It remains with this Court but to assent to the conclusion at which the assessors have arrived, and in doing so I must say that, after the most attentive consideration of the evidence, I have been led to a thorough conviction that the Rosa would have avoided the collision by keeping her course, and have to add that if there were any doubt upon the subject, I do not think that this Court would be justified in giving the benefit of it to the Rosa. To recover for her loss all doubt as to her exemption from fault must be removed, and the slightest contribution to the collision would preclude her from recovering an indemnity from the owners of the Ranger. The judgment which the law directs where each party is in fault, is to dismiss each suit without costs (*b*)—the course adopted in the case of the Charles Chaloner and the Quebec, which is very analogous to the case of the Rosa against the Ranger.

Andrews, Caron and Andrews, for the Ranger.

Blanchet and Pentland, for the Rosa.

(*a*) The Schwalbe.—Swabey Adm. R. 521.

(*b*) The Arabian—Alma—2 Stuart L. C. A. R. p. 72. *Ib* 166.

Friday, 16th March, 1877.

FRANK.—PETERSEN.

The promoters having stated and proved their loss in United States currency, the Registrar and Merchants reported an equivalent amount in gold, not at the current rate of exchange, but at the rate as on the day of the collision. The Court upon contestation maintained the report.

FRANK.

Per Curiam.—In this case judgment was rendered against the Frank for having sunk the schooner Job Johnson on the banks of Newfoundland. The damages have been reported upon by the Registrar and Merchants as follows:—For the schooner, her tackle, apparel and furniture and cargo, $9,929.70, from which is to be deducted discount on United States currency on 16th July, 1876, date of loss, at 10 per cent., $992.97 which leaves a sum of $8,936.73. To this allowance the owners of the Job Johnson have taken exception, so far as respects the discount on the United States currency, and, in a contestation of the report, have pleaded that the amount of $9,929.70, should be paid at the rate of exchange at the time of payment. That the rate of exchange having fallen five per cent. since the collision, the owners of the Job Johnson and cargo will lose nearly $500.00 by the deduction, and they have, therefore, prayed that the deduction be struck out of the report, and that they be allowed the amount at the current rate of exchange.

The answer is, that the promoters have the right to recover in gold, and that the damage must be estimated by a gold standard as they were at the time of loss, and not in a depreciated and fluctuating currency.

This claim comes under the class of consequential damages. Cases in the Common Law Courts have been referred to (*a*) but differences of opinion have prevailed there,

(*a*) Delegal *vs.* Naylor, 7 Bing. 460; Pollard *vs.* Harries, 3 B. & P. 335, 378; Mellish, *vs.* Simeon, 2 H. B. 378; Cuning *vs.* Monro, 5 T. R. 87, per Buller, J.; Maunsell *vs.* Massarene, *Ib.*

FRANK. as to whether the amount of a debt due in one country and sued for in another is to be ascertained at the nominal or par value of the eurreneies of the two countries, or according to the rate of exchange at the particular time existing between them. Although in this case the question may not have been properly raised by the claim as submitted to the Registrar and Merchants, it is, perhaps, well to state upon the merits of this contestation that Admiralty Courts act upon the prineiple of an indemnity to the party injured. The loss sustained by the owners of the Job Johnson and her eargo, at the time of the collision, is just so much as it would have cost them to reinstate themselves at that time. If the recovery of debts due in this country were made to depend upon the fluctuating paper currency of the United States, manifest injustice would be the consequence. It might have happened that the currency, instead of improving, had fallen off in valuation to gold, and then, with as much reason might the owners of the Frank have claimed a deduction of more than ten per cent. The rule in this Court is, "that if a vessel and eargo are lost, the true measure of damage is their actual value, with interest from the time of the trespass." The English and American cases are in accordance with this rule. The value of the schooner and cargo at the time of the accident is allowed in gold in the currency of this country. The owners of the Job Johnson have been allowed just so much of American currency as would have sufficed to purchase this quantity of gold, and to reinstate them as at the time of the loss, and this Court cannot do otherwise than overrule the act on petition and reject the contestation of this item in the report with costs. *(a)*

Blanchet and Pentland, for the Frank.

Bradley, for the Promoters.

(a) See the Case of the *Levin Lauk*, 10 Moore, P. C. C. 224. The Appollon, 9 Wheat. 362. The New Jersey, 2 Prit. 704, note.

Friday, 6th April, 1877.

ELIZA KEITH.—HEALEY.

LANGSHAW.—BAIN.

Where two ships were each to blame for a collision in Canadian waters, an Act of the Parliament of Canada, which precludes either from recovering its damage, held to be operative, although the Admiralty rule which divides the loss prevails in England, and has been recently applied in a case of collision on Canadian waters, on an appeal to the Privy Council, but without the act apparently having been brought under special notice there.

In a case of collision, the fault being mutual, the Admiralty rule will apply, as between the owners of cargo and the delinquent ships, dividing the loss, each ship answerable for a moiety.

On an appeal to the Privy Council, where their Lordships named assessors, an opinion on a nautical point given by Canadian assessors may be overruled.

JUDGMENT.—*Hon. G. Okill Stuart.*

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A collision between the steamship Langshaw, an iron vessel of 1186 tons, laden with a grain cargo, and the Eliza Keith, a barque of 540 tons, in ballast, on the river St. Lawrence below Quebec, about four miles N. E. of Grand Island light, between Kamouraska and the Pilgrims, near midnight, on the 15th of August last, is a subject of litigation in three suits; the first is by the owner of the Langshaw; the second by the owner of her cargo, each against the Eliza Keith; and the third is a cross suit by the owner of the Eliza Keith against the Langshaw. Blame is laid by the promoter in each suit for a departure from the sailing regulations.

About a quarter of an hour before the collision, the Langshaw, and a steam tug, the Conqueror, were on their way down the river, the tug about three-quarters of a mile in advance, the Langshaw inclining somewhat to the north.

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The speed of the steamship was eight and a half knots an hour, her course N. E. ½ E., the weather clear, the tide in the last quarter of the flood, and the channel a mile and a half broad. Ascending the river on an opposite course of S. W. ½ W., the barque Eliza Keith, under all plain sail, was making from five to six knots an hour. As the steam vessels approached the barque, their lights were seen, distant three miles, and a point on her starboard bow. About the same time the barque was seen from the steamship a point on her starboard bow. While the steamship and the barque were nearing each other, the tug, still in advance, passed clear on the port side of the barque, the latter ported her helm, the steamship starboarded her's, and, without any abatement of speed by either, they came into collision. The stem and bow of the barque struck the steamship's main rigging and mainmast, which compelled her to run into shallow water for safety and throw overboard part of her cargo. The barque was also seriously damaged.

In the two suits against the Eliza Keith she is charged with having had no lights visible until within a cable's length; that then only she showed her red light on the steamship's starboard beam, and ported her helm instead of keeping her course, which caused the steamship to starboard her's to avoid a collision.

In the cross-action the steamship is said to have crossed the bow of the barque about half a point, and danger being then imminent, her helm was put to "port" and "hard a-port" to avoid it. It is further alleged that it was the duty of the steamship to keep out of the barque's way.

The Langshaw, as a steam vessel, under the 15th sailing regulation of the Act respecting Canadian waters, was bound to keep out of the way of the Eliza Keith, a sailing vessel, and the latter, under the 18th, to keep her course, unless there were special circumstances to render a departure from these rules necessary to avoid immediate danger.

A preliminary question to be settled is, had the Eliz

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Keith proper lights burning and visible at the right distance? The look-out of the steamship, from the top-gallant forecastle head, saw the barque two or three miles distant; he then reported her as "a vessel on our starboard bow with no lights," to which the chief officer, on duty on the bridge, answered "all right." He took no more notice of her until a ship's breadth off, when he saw her red light for the first time, and the reason he has given for not doing so is, "I had nothing to do with her after reporting her." The chief officer also saw the barque when reported, he saw her hull and sails, and that she was bound up the river, but no lights; and the reason he has assigned for not again seeing her until a hundred feet off showing her red light, is, that "the pilot was looking at her through the glasses." Her pilot, thus referred to, did not see the barque's green light at any time, and her red one only at the distance of half a mile "coming right" for the Langshaw. He then ordered her helm to starboard.

This evidence, negative and imperfect, is met by testimony direct and positive. Many persons on board the barque have testified that her lights, green and red, were in their screens and could be seen from two to three miles off. The man who placed them has sworn that he did so and that they were in good order, and what leaves no doubt upon the subject is, that the pilot of the tug saw them as he approached the barque from two to three miles.

The question as to the lights being settled, the evidence of the pilot of the Langshaw is that she had been on a course N. E. ½ E., before and at the time the barque was reported; at first, the red light of the latter appeared to him very small, as he states, "coming right for us, not quite half a mile off, getting broader on our starboard beam," and then, with the engines at full speed, he starboarded the steamship's helm to pass ahead, and get away from the barque, and he thought "a little more would have done it." Other witnesses from the steamship agree in stating that her helm had not been altered from the time the barque was seen until the steamship starboarded her helm.

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According to the pilot of the barque, the steamship, at the distance of a mile, first showed her red light on the starboard bow of the barque, then on the port bow; at about three or four cables' length her green and red light appeared; afterwards her red, and at the distance of a cable and a half he has said, "I made sure that she was going to pass to port of us, and then I ordered our helm to port to give her more room." This statement does not agree with the other evidence given by people on board of the barque on the very material point as to the time when the helm of the barque was put to port. The man at the wheel, under the orders of this pilot, was looking with him under the mainsail at the steamship's red light, half a point on the port bow, not quite half a mile off. The pilot then ordered him to port his helm, which he did, and the pilot went to speak to the captain or second mate on the main deck,—and this agrees with the evidence of the pilot of the steamship, where he has said that at about half a mile he saw the red light of the barque coming round upon the steamship's beam before he starboarded her helm. Upon this evidence alone it may be said that the helm of the barque was placed to port before that of the steamship was placed to starboard, but there is other evidence which leaves no occasion for doubt to be found in the statement of the second mate of the barque, that the steamship had shut out her red light and had shown her green for a couple of minutes, when the pilot of the barque, looking at her under the foot of the mainsail, when she was under the stem of the barque, about a cable's length off, said, "What does that ship intend to do?" and just then the steamship apparently starboarded her helm. According to this evidence it would appear that the barque had been coming round on her port helm from the distance of about half a mile, unobserved from the steamship until within a cable's length, and then, but too late, the latter starboarded her helm.

The testimony in these cases is not of the conflicting nature I imagined from what was said at the argument. It

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appears to me much less so than usual in collision cases. With the exception of the testimony of the pilot as to the time of porting, and it is well known that error in computation of time accompanies circumstances of great danger, there is very little difference in the statements of witnesses.

As respects the lights of the barque, the people of the steamship on duty do not say that she had none, they but say they did not see them, and two of them, the chief officer and the look-out, evidently did not care whether they saw them or not. So that there can scarcely be said to exist any contradiction in this respect. The relative positions of these vessels when first seen is not disputed. Each side admits that the one was about a point on the starboard bow of the other; that thus approaching, the steamship does not deny but admits that she did not see the barque. On the other hand the evidence of the barque leaves no doubt that she ported her helm when immediate danger did not require it, and her pilot has admitted as much, as he did it to give more room. If a vessel has seen another, and has good reason to believe that she is in her vicinity, she ought to have a look-out, not only ahead, but in that direction which the vessel so seen may be expected to be in, and in a case of collision arising from her negligence in this respect, she will be condemned in damages. (*a*) And, again, a vessel will be held responsible for the collision on the ground of want of a sufficient look-out, there being a possibility, had a better look-out been kept, the collision might have been prevented. (*b*) Even if there had been no lights visible from the barque she herself was seen on an opposite course from the steamship. There was therefore the greater reason for looking after her, it being well settled that the negligence of one party is no excuse for the imitating of it by the other.

(*a*)—The Carlota 4 (Irish) Jurist 237 a.

(*b*)—The Miltona, 11 Jurist 783—3 W. Rcb. 13. 5 notes of cases, 450, the Germany 2 L. C. 158.

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As respects the barque, her own people say that she had come round on her port-helm from three to four points at the moment of contact. Had she not done so, it is quite probable, perhaps certain, that the "little more" to clear the steamship, as required by her pilot, would not have been wanting. So far from the porting of the helm being calculated to avoid immediate danger having been made to appear, the presumption is quite the other way.

The valuable assistance upon nautical points which these cases involve, derived from the long experience of Commander Ashe in Her Majesty's Navy, and of Mr. Gourdeau, the Quebec Harbor Master, in all matters connected with the navigation of the river and gulf, is to be found in the following questions and answers:—

1. Was there a sufficient "look-out" by the people of the Langshaw after she was reported to the pilot and chief officer by the man on the "look-out"?

Answer. —Certainly not.

2. Could the proper lights of the Eliza Keith, green and red, have been seen from the Langshaw, before the collision, so as to have indicated her course and so as to enable the Langshaw to keep out of the way?

Answer. —They could.

3. Was the porting of the helm of the Eliza Keith necessary to avoid immediate danger, or would it have been prudent for her to have kept her course?

Answer.—She should have kept her course, and the immediate danger did not require that she should port.

4. Did the porting of the helm of the Eliza Keith by possibility cause or contribute to the collision?

Answer.—We are of opinion that it did.

5. Were either, and which, of the parties in charge of the Langshaw and the Eliza Keith, or both, to blame for the collision?

Answer.—Each is to blame; the Langshaw for not keeping a proper "look-out," and the Eliza Keith for porting her helm.

Each vessel being to blame, it rests with this Court to apply the law. Before the passing of the Merchant Shipping Act, 1854, by the Imperial Parliament, the rule in the Admiralty was to divide the loss between the parties in cases of mutual fault, but by that statute in section 298, it is enacted "that when a collision appears to the Court to have been occasioned by the non-observance of the rules therein referred to, (including two the same as those above stated,) the owner of the ship by which they are infringed shall *not* be entitled to recover any recompense whatever for any damage by such ship in such collision." Under this enactment the case of the James (*a*) came under the revision of the Privy Council in 1856. Dr. Lushington, Judge of the High Court of Admiralty, had in that case allowed a moiety of the damage, but their Lordships reversed the decision. The late Lord Kingsdown in delivering the judgment said. "If the neglect contributes to the collision, the penalty for the breach of it is, that the vessel shall not recover (what otherwise she might in the Admiralty Court have recovered), any portion of the damage from a vessel also in default." After this judgment an Imperial Act (Merchant Shipping Act, 25 and 26 Vic. c. 63) was passed, and another clause substituted for the above provision in the Merchant Shipping Act, 1854, the effect of which seems to have been the revival of the Admiralty rule in England. Subsequent to these statutes the British North America Act, 1867 was passed. This conferred upon the Parliament of Canada legislative authority over all matters occurring in Canadian waters coming within the subject of navigation and shipping, and in 1868 its co-operation was required to give effect to the same rules of navigation as had been in use in England. The Act respecting the navigation of Canadian waters, (31 Vic. c. 58) was accordingly passed, and contains the same provision and the same rules as referred to in the above 298th section

(*a*) 10 Moore P. C. C. 162.

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of the Merchant Shipping Act, 1854, viz.: "that the owner of such vessel shall not be entitled to recover *any recompense whatever* for any damage sustained by such vessel in such collision." This provision remains in full force, and the decisions in this Court under it have been uniformly in accordance with that of the James, and no party has since recovered in this Court when in collision the fault has been mutual. (*a*) The last judgments in this sense were rendered very recently in the cases of the Ranger and the Rosa.

Since these cases have been argued there has been transmitted to me as judge of this Court, by order of the Judicial Committee of the Privy Council, a decision very recently given by them in the cases of the Underwriter and the Lake St. Clair. These were cross-actions arising from a collision at Cape Rosier, near Gaspé, in the Gulf of St. Lawrence. In those cases this Court was assisted by the same assessors as now attend in these, and in their opinion the Underwriter was alone to blame for the collision, because the Lake St. Clair was in stays, motionless, and could not get out of the way of the Underwriter, which could have passed her, but assessors named by their Lordships were of a different opinion upon this question of fact, viz.: that the Lake St. Clair should have braced her head yards abox so as to gather sternway, and the judgment of this Court was so far altered as to declare not only the Underwriter, but also the Lake St. Clair, to be in fault. Now, as to the division of the damage. Their Lordships have adopted the Admiralty rule, and charged each vessel with the moiety, the amount of damage to be settled on the usual reference. It does not appear from the report of the cases or the judgment that the fact of this collision, having happened in Canadian waters, was brought under notice, or any opinion given on it. A series of cases have in the last few years been determined under the Act respecting Canadian waters

(*a*) The Arabian—Alma, 2 L. C. of Quebec, Ib. 158. Ad. R. 72. The Germany—City

in this Court in the same sense as in the case of the James, and in all of them, where there was mutual fault, the cross-suits have been dismissed without costs to either. So long as the Act respecting Canadian waters is not repealed, or is declared by her Majesty in the Privy Council to be inoperative, I shall consider it to be binding on this Court, and decide accordingly in cases of collision upon Canadian waters. This Act has been already under consideration by the same tribunal. I refer to the case of the Hibernian, involving a collision on the river St. Lawrence. It was an appeal from the judgment of this Court, and Counsel at the English Bar attempted to impugn its validity and that of another Canadian statute; it was argued that the general maritime law was alone applicable, that the Canadian Statutes were without authority, and that the suit might have been brought in the High Court of Admiralty, but Sir Robert Phillimore, who delivered the judgment of their Lordships, which confirmed the judgment of this Court, while admitting that the suit might have been brought in such Court, added: "It is also said at the Bar, the High Court of Admiralty would not have taken cognizance of the statutes, and in support of this startling proposition the case of the Halley, decided by this tribunal, was cited. Their Lordships are wholly unable to follow the reasoning of Counsel on this point. In the case of the Halley, the judgment turned upon a question as to the partial or entire adoption or rejection of the law of a foreign country. In the present case, the law invoked is contained in an Act of the Legislature of a colony belonging to the Crown and ratified by the express sanction of her Majesty. Their Lordships have no doubt whatever that this law in every case to which it is applicable is of binding authority, equally in the Queen's High Court of Admiralty and in the Admiralty Court of Canada."

The Canadian waters cover a vast space; their extent is to be measured not by hundreds but by thousands of miles; they reach from the head of Lake Superior to Cape

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North in the Gulf of St. Lawrence. At Quebec, the seat of this jurisdiction, the waters of the great lakes, as the River St. Lawrence, are compressed to within the breadth of a mile. There the river begins to expand to a breadth of from twenty to thirty miles; then surrounded by Canadian territory, their expansion in and through the Gulf continues until they reach the Atlantic by the Straits of Belle Isle, the passage between Capes Ray and North and the Gulf of Canso. American vessels now make voyages between Chicago on Lake Michigan and European ports. From abroad British and foreign vessels also pass through them. That all vessels while in these waters should be governed by the same rule as that adopted in the High Court of Admiralty is no doubt much to be desired. Whether the loss from mutual carelessness is to be divided, or whether each party should bear his own, may possibly be a matter of indifference in an equitable point of view, but in their results there is sometimes a wide difference. All this Court has to do is to administer the law as it finds it.

As respects the owners of the cargo the case is different, and there the rule dividing the damage must apply. In the case of the Milan (*a*) it was held that the 298th section of the Merchant Shipping Act, 1854, above referred to, which enacts that in certain cases of collision, the owner of a ship shall not be entitled to recover, *does not apply* to the owner of cargo suing. The suit of the owners of the cargo is against but one of two delinquent ships. They have been guilty of no negligence, either by themselves or their agents, for the master and crew were not under their control. By the common law of England the owners of the cargo on board the Langshaw might, perhaps, have recovered from the owners of the Eliza Keith their entire loss, but the Admiralty law is not so; it endeavors to administer more equitable justice, and generally when both vessels are to blame it makes the owner of each bear a moiety only of the loss.

(*a*) 1 Lush. 404

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The decrees in these three cases are, that the cross suits between the owners of the Langshaw and the Eliza Keith be dismissed, without costs to either, and that the plaintiffs, owners of the cargo of the Langshaw, do recover a moiety of the damage only from the owners of the Eliza Keith, with costs. There being no suit against the owners of the Langshaw by the owners of the cargo for the other moiety, nothing is said on that head.

This case was appealed to the Privy Council. The following judgment was pronounced by the Lords of the Judicial Committee, on the 9th of May, 1878.

This is an appeal from a judgment given by the learned Judge of the Vice-Admiralty Court of Quebec in a case of collision. The collision took place in the River St. Lawrence, between two places called Kamouraska and the Pilgrims, at about 11.30 on the evening of the 15th of August, 1876. The vessels that came into collision were the Eliza Keith, a sailing vessel of 540 tons or thereabouts, and the steamer Langshaw, of the burden of 1186 tons. The parts of the vessels which came into collision were the jibboom and bowsprit of the Eliza Keith with the mainmast of the Langshaw.

There was a claim and a counter-claim, or an action and a cross-action, in this case. The narrative of the Eliza Keith, so far as it is necessary to refer to it, will be found in the fifth paragraph of the libel. The Eliza Keith says: "About quarter-past ten o'clock p.m. on the evening of the "15th of August, when between the Pilgrims and Kamour- "aska, as aforesaid, the look-out of the Eliza Keith reported "two lights about a point on the starboard bow. These "lights were found to be the lights of two steamers, which "were subsequently ascertained to be the tug-steamer "Conqueror and the steamship Langshaw, now proceeded "against. When first seen, the steamers were at a dis-

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"tance of about three or four miles off, with a distance of "about three-quarters of a mile between each steamer. "The Eliza Keith was then steering a course of south-west "half-west. The steamers came on until they were both "a little on the port bow of the Eliza Keith, apparently "intending to pass the said barque on her port side. At "about half-past ten p.m. the tug steamer passed the Eliza "Keith on the port side. The steamship Langshaw fol- "lowed the tug at about three-quarters of a mile, and was "then observed to be nearing the Eliza Keith very fast. "The Langshaw had crossed the bow of the Eliza Keith and "was about half a point on her port bow, and steering down "the river, heading for the Eliza Keith. The Langshaw "then showed her green light for a few moments, then "hiding it again, and the people of the Eliza Keith hailed "her, but she still continued as if to cross the bow of the "Eliza Keith. The danger of a collision was then immi- "nent, and the only means to avoid or lessen the said "collision was to port the helm of the Eliza Keith, which "was done, but the Langshaw was then too close to the "barque, and the Langshaw struck the Eliza Keith's jib- "boom and bowsprit, carrying away the said jibboom, bow- "sprit, and all the headgear, and causing great damage to "the said barque," and the Eliza Keith alleged that the collision was caused by the carelessness and bad navigation of the steamer, and especially by her improper endeavor to cross the bow of the barque by starboarding her helm. On the other hand, the material statement on the part of the steamer was: "That at thirty-five minutes past eleven "p.m., or thereabouts, the man on the look-out on the "forecastle reported a ship a little on the starboard bow, "which said ship proved afterwards to be the Eliza Keith, "showing no lights, the Langshaw being then about four "miles north-east of Grande Island light, Kamouraska, in "the River St. Lawrence, the tide running up with a fresh "breeze from the north-east, the weather cloudy, though "clear, the Langshaw going about eight knots an hour. "That all at once, when within a cable's length, the said

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"vessel shewed a red light on the Langshaw's starboard "beam, it being then too late to avoid the collision. The "Eliza Keith ran into the Langshaw at the starboard main-"rigging, carrying all away, and cutting the said steamer "down to below the water's edge," and the steamer alleged that this collision was caused by the mismanagement and carelessness of the Eliza Keith, and in no degree by the bad navigation of the Langshaw or those on board of her.

The learned Judge of the Court below, assisted by nautical assessors, after a considerable amount of evidence had been taken, came to the clear conclusion that the steamer was to blame for this collision; that her defence that the sailing vessel carried no lights was an untrue defence, and that she had not a good look-out; and upon these two grounds the Langshaw was condemned. From this sentence there has been no appeal on the part of the steamer. The learned Judge proceeded to consider whether the sailing vessel was not also to blame, and after consultation with the nautical assessors upon the main point put forth on behalf of the Eliza Keith, he came to a conclusion that she also was to blame.

Now the Eliza Keith being a sailing vessel, it was her duty to keep her course, as it was the corresponding duty of the steamer to keep out of her way. The Eliza Keith admitted in her pleading and in her evidence that she had been compelled —as she said, by the necessities of the case—to port her helm, that is, that she had departed from the rule of navigation which ordered her to follow her course. She says that, admitting this to be so, she was justified in the circumstances, and the question before their Lordships has been, not whether the Langshaw was to blame, for the Langshaw has acquiesced in the decision of the Court below, but whether the Eliza Keith has made out her defence as to her admitted departure from the rule of navigation.

Their Lordships have to consider whether sufficient ground is shown for rescinding or varying in any respect the judgment of the Court below. It is a fact common to the case of both the vessels that when they first saw

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each other they were green light to green light. The Eliza Keith says that she expected that the Langshaw would pass her upon this tack, and without incurring any risk or danger; that after a certain time she saw the red light of the Langshaw; she then considered that she was about to cross her bows; that she saw the red light of the Langshaw upon her starboard bow. The learned Judge of the Court below put several questions of a very pertinent character to the nautical assessors by whom he was assisted, to which it is necessary to refer. They were of opinion that there was not a sufficient look-out on board the steamer, and that the Eliza Keith carried proper lights. The third question put to them was in these words: "Was "the porting of the helm of the Eliza Keith necessary to "avoid immediate danger, or would it have been prudent "for her to have kept her course?" The answer was: "She should have kept her course, and the immediate "danger did not require that she should port." They further stated that they thought the porting contributed to the collision.

It appears to their Lordships from listening to the argument, and the examination of the evidence, that there are two hypotheses, so to speak, upon which this defence of the Eliza Keith is to be considered. First, if she saw the red light a little on her port bow, as she says, at this time and in the circumstances mentioned, then she was not justified in porting her helm, because, upon that view of the case, both vessels would, in the opinion of the nautical assessors, if she had kept her course and obeyed the rule of navigation, have passed without any collision. Secondly, if she saw the green light of the steamer, and afterwards ported her helm, she was clearly wrong for porting into a green light, and the excuse that is offered that by so doing she might avoid or lessen the collision, is, in the opinion of the nautical assessors, by whom the Court is assisted, wholly insufficient. It appears to them, as it did to the learned Judge below, that the defence of the sailing vessel that she was driven to take this course by the uncertain conduct of

the steamer, was not supported by the evidence of the witnesses or by the facts in the case, and their Lordships have arrived at the same conclusion.

Upon the whole their Lordships are clearly of opinion that the obligation of the sailing vessel to excuse her admitted departure from the rule of navigation which required her to keep her course, has not been discharged; therefore, there being no appeal from that part of the judgment by which the steamer was condemned, their Lordships are of opinion that it will be their duty to advise Her Majesty to affirm the sentence of the Court below.

Their Lordships think it right to say that, in arriving at this conclusion, they have entirely rejected the evidence adduced on behalf of the steamer, as to whose misconduct throughout the whole of this transaction they entertain no doubt, and have relied altogether upon the evidence produced on the part of the barque.

Their Lordships will humbly advise Her Majesty to affirm the sentence of the Court below, and it must be with the usual costs of the appeal.

Their Lordships desire to observe that the learned Judge appears to have fallen into an error in his remarks upon the case of the Lake St. Clair. He seems to have imagined that their Lordships applied the Admiralty rule as to the division of damage, inconsistently with the provisions of the Canadian Statute, 31 Viet., c. 58, to that case. That was not so. The fault of the St. Clair upon which the judgment proceeded was an error in the management of the sails, and in the general navigation of the vessel; and not the breach of any of the sailing rules mentioned in the 298th section of the Merchant Shipping Act, 1854, or in the corresponding section of the Canadian Statute. (*a*)

Holt, Irvine and Pemberton, for the Langshaw and owners of cargo.

Alleyn and Chauveau, for the Eliza Keith.

(*a*) The members of the Board present were: Sir J. W. Colville, Sir Montague Smith, Sir R. J. Phillimore, Sir Robert P. Collier and Sir Barnes Peacock.

Friday, 12th October, 1877.

NORMANTON.—LEITCH.

The measure of damages for the detention of a vessel after a collision is the amount she can earn while unemployed by reason of it.

Where after a collision the vessel injured was docked for the winter and the resuming of her voyage could not take place until spring, by reason of the navigation of the St. Lawrence being closed until then, held, that her owners could not recover as part of their damages the seamen's wages while idle during the winter, and no more than would suffice to send them to the place where they were shipped, and to pay their wages until their arrival there.

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This was a contestation of a report of Registrar and Merchants, made under the order of reference in the cause. The nature of the objection is noticed in the judgment.

JUDGMENT.—*Hon. G. Okill Stuart.*

The owners of the steamship Normanton, by a decree of this Court, were, on the 28th of April of last year, condemned to indemnify the owners of the N. Churchill, a barque of 598 tons, for a collision off Little Metis, in the Lower St. Lawrence, on the 6th of November, 1875. By this decree a reference was made to the Registrar and Merchants to assess the damages of the barque. The claim put in amounts to $34,466.38, and the Registrar and Merchants by their report have reduced it to $20,168.98, to bear interest at 6 per cent. from date of decree on $2,033.60, of which $533.54 was for demurrage at 4d. sterling a ton, and the remaining $1,500 on what the barque might have earned during her detention. Interest on the remainder, viz.: $18,135.18, is allowed from the 3rd May, 1876, until paid. By this report the claim for the N. Churchill is reduced as much as $15,297.40, including a

large claim for demurrage. Upon this reduction the report has been contested by the owner of the N. Churchill. On the side of the Normanton the report has also been contested because, as alleged: 1st. The sums expended on the N. Churchill were equivalent to her value, and that she should have been treated as a total loss; and, 2nd. That the principle of demurrage adopted in the report was erroneous, instead of an adequate remuneration for the period she was thrown out of her usual employment. NORMANTON.

The N. Churchill was damaged by the collision and ran aground on the 6th November, a short time before the closing of navigation in the River St. Lawrence. She was towed from Little Metis to the Commissioners' wharf, at Quebec, where she arrived on the 9th of November. There three-fifths of her cargo, partly damaged, were taken out and stored. She was then towed to Montreal, where the remaining two-fifths of her cargo were discharged and stored, and then put into the dock of a shipbuilder of the name of Cantin, where she remained during the winter and where she was repaired. This course, her master has said was necessary by reason of the high price of labor at Quebec, because there was no dock vacant there, and because she could be repaired cheaper at Montreal, or as cheap as at Quebec. From comparative statements made by the Registrar and Merchants, who have taken much care, and have given the case their most attentive consideration, it appears that the N. Churchill could have been discharged, docked, repaired and wintered at Quebec on much more reasonable terms than the expenditure for these purposes at Montreal. It does not appear that any obstacle was offered to the discharging of the remaining two-fifths of her cargo at Quebec. The three-fifths were discharged into store during 28 hours of actual work between the 10th, and the afternoon of the 12th of November. Allowing three days of eight hours' work, ending on the 15th, the remaining two-fifths could have been discharged by the 16th, and in a shorter time by working night and day with fresh

NORMANTON. gangs of men to change. It does appear that a dock for wintering the vessel at Quebec on reasonable terms could be had, and that in fact one was offered to the master and declined. There was, therefore, no necessity for taking this vessel a distance of 180 miles further up the St. Lawrence, attended with the expense necessary for that purpose. The question is not for the purpose of this suit, whether the N. Churchill could be repaired at Montreal on as reasonable terms or at less expense than at Quebec, but it is one of fact. Was she repaired at Montreal at greater cost than she could have been at Quebec, and did the taking of her to the former place cause needless expenditure? The Registrar and Merchants, one of whom has been for many years a shipbuilder, and is intimately acquainted with the business of Quebec, show by their report that a very great excess in the cost of repairing this vessel, beyond what would have been required at Quebec has been incurred. It is consistent with prudence and a due regard to the interest of others in cases of collision, whether they be underwriters or the parties who have been so unfortunate as to become liable for a collision, that not only a survey of the vessel damaged should be made by competent persons, but, upon such survey, that an estimate or estimates of what it would cost to repair her, in the form of tenders or otherwise, should be obtained. Mr. Coker, Lloyd's surveyor at Quebec, and Mr. Simonds, surveyor for the Bureau Veritas, surveyed this vessel, and their survey directed what was to be done to her. Upon this survey no estimate was made, and no contract for the repairs entered into. Whether the excess of expenditure is owing to this cause or no, I do not express an opinion. It is sufficient as a general rule to say, that where a person is charged with the interest of others it is the safer course to have the work done by contract open to competition, than by leaving the price of material and labor within the discretion of the person interested in placing it at the highest figure. If the owner of the N. Churchill had acted upon a proper esti-

mate, it is quite possible that the difficulties and expense which have attended this case would have been avoided. An examination of the accounts, in the particulars of labor and materials referred to, does not, I think, justify me in interfering with the estimates formed by the Registrar and Merchants, and the objections to them on the part of the N. Churchill, upon matters peculiarly within their sphere of duty are over-ruled.

Now as respects the objection on the side of the Normanton that the extent of damage done to the N. Churchhill was equivalent to a total loss, and that the sums allowed by the report of the Registrar and Merchants were sufficient to make her a new ship; it is to be observed that if the sum total allowed were for repairs to the vessel, this objection would be well founded, but this is not so, as a very large portion of the expenditure was occasioned in preserving the cargo, worth, perhaps three times more than the vessel, which was essential and indispensable before she could be placed in dock and surveyed. If it were true that the amount allowed for repairs exceeded her value, immediately before the collision, and that this was or could have been ascertained after survey upon a proper estimate made of what was necessary, a duty would devolve upon this Court to award that value, less what the wreck might be worth, and in such case no demurrage whatever. The value of the N. Churchill at the time of collision has been settled by the evidence. Mr. James Ross and Mr. Fry, both well skilled in such matters, fix the value of a vessel of her description at Quebec as being $12,000, and Mr. Coker at $14,551. These are probably the extremes, and her value may be between the two estimates. Upon an examination of the report, I find the amount upon Cantin's charges for repairs, as allowed by it, is $8,296.90, which is several thousand dollars less than what the vessel was worth before the collision, so that the loss was partial and not total, and therefore the rule just stated does not apply. The objection taken on the side of the Normanton in this respect is therefore overruled.

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These objections being disposed of, I now take up a formidable portion of the claim of the N. Churchill, which is as follows:—

Demurrage 11 days with full crew 598 tons at 4d. sterling	$ 533.54
Demurrage 237 days part crew at 3d. sterling	8,658.05
	$9,191.59
The Registrar and Merchants have allowed on the first	$533.54
And have substituted for the second, as sufficient for the non-employment of the vessel during detention	1,500
	2,033.54
Thus rejecting upon this claim disallowed	$7,158.05

The owner of the N. Churchill contends for the principle involved in the first and second items, while the owners of the Normanton contest both, and advocate the principle involved in the allowance of the sum of $1,500. Before disposing of the first or smaller item, $533.54, I shall take up the second item, the $8,658.05, charged as demurrage, and the substitute for it of $1,500.

It is too well established to admit of any question that the true measure of demurrage caused by a collision is the length of time for which the vessel has been thrown out of her usual employment (*a*), and what, according to reasonable probability, all contingencies being taken into consideration, the vessel damaged would have earned (*b*). As to the proof of this it is not sufficient to establish the general rate of the ship's earnings, and that if she had not been detained in dock she *might* have earned freight. The opportunity of earning and the actual loss of that opportunity must be established (*c*), as where the claim of a

(*a*) The Black Prince, Lush. 588.
(*b*) The Hebe, 5 Notes of Cases 182, 2 W. Rob, 533.
(*c*) The Clarence, 3 W. Rob. 285, 14 "Jurist" 357, 7 Notes of Cases 579.

steam company for demurrage at the rate of £20 per day during the repairs, as being the amount at which the vessel might have been hired, was not allowed by a report of Registrar and Merchants in the High Court of Admiralty, on the ground that there was not sufficient proof of an actual loss having been sustained, and in this respect an objection to their report was overruled (*a*). And, again where the propriety of a charge for loss of employment of a vessel occasioned by her detention to undergo repairs consequent on a collision was in question, the Registrar and Merchants were considered more peculiarly competent to form a proper estimate of the propriety of such charge, and the High Court of Admiralty refused to alter their report in this respect (*b*). In allowing the earnings of the vessel "the lost voyage must have been contemplated as well as practicable, the chance of obtaining a cargo for whose profits or freight a compensation is claimed must have been certain or in the highest degree probable. If it can he shown that the vessel *would* have earned freight, or *would* have been employed for the profit of her owners if the collision had not occurred, the Admiralty will compensate the latter to the extent of the loss so far as it can be legally ascertained (*c*). In such a case a sum grounded on the probable amount of the earnings of the vessel during the period of her detention for repairs will be awarded (*d*), but so much must be deducted from the sum of the gross freight as would in all ordinary cases be disbursed on account of expenses incidental to the earning of it, (*e*) *i.e.*, seamen's wages, pilotage, towage, harbor dues and charges for light." (*f*) Although a claim for the loss of earnings specifically has not been preferred by the owner of the N. Churchill,

(*a*) Ib.

(*b*) The Alfred, 3 W. Rob, 243, 7 Notes of Cases 579.

(*c*) Clarence, 7 Notes of Cases 581 and 3.

(*d*) Hebe, 5 Notes of Cases 182.

(*e*) Gazelle 3 Notes of Cases 82, 83.

(*f*) Coote's Adm., Pr, 76.

NORMANTON. it has been evidently looked upon as coming before the Registrar and Merchants under the charge of demurrage, as above stated, viz., at 3d stg. a ton, $8,658.05, and allowed to the amonnt of $1,500. The proof of the earnings of the N. Churchill, as prescribed in the cases cited, is by no means positive. It is not shown that she *would* have earned or *would* have been employed, or that her chances of obtaining a cargo were certain, or in the highest degree probable. The only evidence I see in the record, on this head, is an imaginary estimate sent out by the owners of the N. Churchill of a voyage by her from the United Kingdom to Baltimore and back, say December 25th, 1875, to 5th April, 1876. And this purports to be certified by ship brokers in Liverpool as follows: "We certify that from our experience the above is as near as possible a correct estimate of such a voyage." In this statement the supposed balance of profit is stated to be £394 1s. 3d. stg. A similar imaginary estimate is given as of a voyage of the N. Churchill from the United Kingdom to Quebec and back, 5th April to 5th July, 1876, showing a balance of profit £344 12s. 10d. The master of the N. Churchill, a part-owner in her, examined as a witness, has considered these estimates fair, but neither he nor any one else, has said that these profits *would* have been earned, or that the vessel *would* have been employed on either of these voyages. Mr. Fry, a gentleman of well-known experience in all matters connected with shipping, has given an answer to a question submitted to him on the subject as follows:

"In your opinion, what would have been the profits of such a vessel as the N. Churchill after the landing of her cargo in London up to the 20th of May last year?"

Answer.—"It is exceedingly difficult to answer such a question, because it depends upon all the circumstances of the voyage, but looking to the size and value of the ship, and the general freight rates current during the winter of 1875 and 1876, I should consider fifteen hundred dollars a fair return for her winter voyage; that is net profit, although winter voyages are often made at a loss."

NORMANTON.

The Registrar and Merchants are to be considered, in the terms of an authority which I have just cited, more peculiarly competent to form a proper estimate of the matter, and I shall not disturb their allowance of fifteen hundred dollars, to which amount the sum of $8,658.05 stands reduced.

Proceeding now to the consideration of the allowance of demurrage, eleven days for full crew 598 tons at 4d. stg., $533.54. I do not see how the principle which it involves can be acquiesced in by this Court, however equitable in amount it may be. It is supposed to represent wages payable to persons on board the N. Churchill during the winter. For this I see an account in the record amounting to no less a sum than $3,367.33 for officers and men intended to be covered by the charge of $9,191.59. If there were allowed demurrage at the rate of 4d. per ton on this vessel of 598 tons for wages, the same rule applied to a vessel of from two to three thousand would be extremely large, and out of all reason. In the event of a vessel of these dimensions being constrained by the climate to remain in this port, the charge for the men, double in number of those on board of the N. Churchill, would amount to a very large sum for an idle winter. The expenditure of the N. Churchill on this head might have been and should have been avoided, except in so far as I am about to state. Her master knew to a certainty on the 10th of November that she had to go into dock and remain there for six months. The keeping of his men idle for this period, exposed to temptations incident to their class, he should have known was extremely injudicious, and the evidence taken in this case has already proved that it was. It was quite competent to him to discharge them by paying them their wages, their passage by rail to an open port, and thence to their port of departure. A period of ten days would have sufficed to land the men in Liverpool. Although by the general rule a master is not at liberty to discharge his crew in a foreign port without their own consent, circumstances

NORMANTON. may vest in him an authority to do so upon proper conditions. Where a vessel was wrecked on a voyage to St. Petersburg, near the Isle of Gothland, and compelled to remain at Ostergam whilst the season for navigating the Baltic was closed, it was held that the master was not bound to keep his crew in an unemployed state, living on shore and keeping holiday all winter at the expense of his owners, and to pay them *pro opere et labore* as the price of industry for unoccupied idleness—(*a*) upon being discharged the seamen would have had the right to claim their wages up to the time of the vessel's return to her original port with the expenses attending their reaching it. In this case under consideration there seems to have been no necessity for forced discharge, as the men were willing to take it, if paid their passage to their port of return. The master's refusal, according to his own statement, prevented their leaving. Had he complied with their request, he would have done that which the interest of those for whom he was acting required. The wages and the expenses of the seamen, as now stated, I think should be allowed instead of the $533.54, and the report will be returned to the Registrar and Merchants for amendment in this particular.

There are two items in the claim of the N. Churchill which have been disallowed; one of towage to Brandy Pots from Quebec, after being repaired and having taken in her cargo from store, amounting to $226, and another for a cable broken in getting the vessel off after being run on shore at the time of collision. There should be, I think, an indemnity in these particulars, and they are also referred back to the Registrar and Merchants for reconsideration.

A remaining question is as to the costs of the two contestations of the report. I cannot omit to remark upon the extraordinary claims which the owners of the N. Churchill have made. They have preferred a claim as earnings of their vessel for a few months in the form of demurrage

(*a*) The Elizabeth 2, Dodson's R. 403.

amounting to $9,191.59 (a sum approaching her value), and they have persisted in their efforts to prove it. The unnecessary costs incident to an exorbitant demand this Court will always have in view, and its rule in this particular, if applicable, will be enforced by the adjudication upon their final report. The disallowance of a sum of $15,297.40 upon a claim of $35,466.38, has been attended with a good deal of expense which might have been avoided. I have considered the matter, but will come to no determination until after a final report is sent in, when I shall be prepared to hear the parties; until then the question of costs is reserved.

I have only to add, that I have been thus particular in stating the principles of maritime law which govern this case, not only because similar cases must necessarily occur, but because I wish it to be understood that where property of individuals is by controlling circumstances administered without their supervision, a jealous regard will be had in this Court to its being properly cared for by those charged with it.

Tuesday, 11th December, 1877.

ELPHINSTONE.—BEAL.

An ocean steamship approaching a narrow channel in the St. Lawrence, bound upwards, having another steamship ahead entering the channel, held to blame under the sailing rules:—

1. For not stopping at the foot of the channel to let the descending vessel pass,

2. For not porting her helm in time when in the channel; and

3. For not slackening her speed or reversing in time.

A custom involving the stoppage of an ascending vessel, at certain difficult parts of the channel, noticed and approved.

JUDGMENT.—*Hon. George Okill Stuart.*

ELPHINSTONE.

The owners of a cargo of Indian corn, 164,000 bushels, shipped at Montreal, in the Redewater, an ocean steamship of 922 tons, have sued the owners of the Elphinstone, of 1,148 tons, also an ocean steamship, charging negligence which led to a collision and material damage to the cargo.

The collision in question occurred about half a mile below the *Pointe-aux-Trembles* Church, which is about ten miles below the city of Montreal, on the north side of the river St. Lawrence. There is a part of the channel there, in length about a mile and a half, somewhat in the form of an S without its termination, the current running eastward at the rate of three knots an hour. On the south side at the west end, it has a gentle curve outwards and a deeper one inwards, lower down, by pilots termed the *rond*. For ocean steamships it is from 250 to 300 feet in breadth and is marked out by four black buoys on the south and by two white buoys on the north side, one on the upper curve to the west, and the other about the

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centre of the lower curve. At the time of the collision there was a dredge belonging to the Montreal Harbor Commission anchored at the western end. At the lower or eastern extremity is Calf Island, *Isle aux Veaux*.

On the 4th of July last, about ten minutes past 11 o'clock in the morning, the weather clear and calm, the Redewater, whose length is 249 feet, and whose draught of water was then 18 feet 9 inch forward and 19 feet 9 inches by the stern, in charge of Joseph Chandonnet, a licensed pilot, left the harbor of Montreal, and a few minutes before noon was within a mile of the west end of the piece of channel already described. The Elphinstone, whose length is 280 feet, and whose draught of water was 19 feet 7 inches forward and 20 feet 2 inches aft, was at the same time about the same distance from and coming up the river to the east end, in charge of François Antoine Mayrand, also a licensed pilot. The Redewater was seen from the Elphinstone by her chief officer at a distance of five miles, and the latter vessel from the former at the like distance by her pilot, over the channel in question. The speed of the Redewater with the current was about nine knots, that of the Elphinstone about six. It is to be observed that the pilot of the Elphinstone, as he has acknowledged, while admitting that a vessel could be seen as far off as nine miles in front of him, did not see the Redewater until within two miles, he then taking her for a fore and aft Lake schooner at anchor at *Pointe-aux-Trembles*; and he did not notice that she was a steamship under steam until within a mile, when it was too late for him to stop near Calf Island, at the east end of the curved channel, where he has also stated the custom is for the up-going steamship to remain until the descending vessel has passed her—that is, where there is a chance of the two meeting. The reason for this necessary detention, at the outside not more than a few minutes, is explained by the fact that the vessel descending in this narrow strait being impelled by the current, would

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come across the channel if her headway were stopped, and expose herself to collision. Being in the channel, the pilot of the Elphinstone first observed the Redewater near the upper white buoy to the south of the dredge when approaching *end on*, each vessel being on the north side of the channel. Thinking that the Redewater would continue on the north side, he placed the Elphinstone in mid-channel. In this respect, by starboarding his helm, he disobeyed the rule of navigation prescribed by the law of the Dominion, which provides that "when two vessels 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."

The pilot of the Redewater had kept a better lookout, and saw the Elphinstone before she passed Calf Island, and had supposed she would remain there. When three-quarters of a mile above the dredge, he telegraphed to the engine room to *stand by*, on a nearer approach *to slow*, and while passing it, he gave a signal to the Elphinstone, one blow of the steam whistle, to port her helm. When about 150 feet to the south of the dredge, the two ships being nearly *end on*, he ordered the helm *hard a port* and the engine to be reversed full speed. In the meantime the Elphinstone having necessarily starboarded her helm to reach the mid-channel, continued steady, and placed her helm hard a port only after the Redewater had ported her's, and without even slackening her speed until, it may be said, the moment of collision. Her stem struck the port bow of the Redewater near the cat-head, and a fearful crash ensued. Her port bow was crushed in from the upper deck to within four feet of the keel, and both bows of the Elphinstone broken into the same depth. One vessel was beached and the other sank. It is needless to say that the cargo of the Redewater was saturated and most materially damaged. It is quite established in evidence that the collision took place on the south side of the channel

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within twenty feet of one of the black buoys, in fact upon its edge. The causes of this collision are apparent from the statement which I have made; they are to be found also in two observations, emphatically made by the master of the Elphinstone who had left the bridge but a few minutes before the collision for dinner below. Hearing the steam whistle, he had but time to be on deck and witness the collision. He then said to his pilot, "*Why did you not keep a proper look out,*"? and again "*Why the devil did you starboard.?*" It is true that the master denies the last expression, but three persons have sworn to it, one that he shook the pilot by the shoulders at the same time, and one of his own men at the helm, in his examination in chief, attributes to him the same language.

The only excuse offered by the pilot of the Elphinstone is, that the Redewater was on the north side of the channel, and that if she had either starboarded her helm, as he did, or kept his course, the vessels would have passed free. It is very likely they would, but the law prescribed the contrary, and the pilot of the Redewater was not to know that the pilot of the Elphinstone would not obey it in due time. The only excuse for not complying with the law would have been immediate danger. As this did not exist when the helm was starboarded, and when porting the helm of the Elphinstone was the proper step, the cause of collision rests with the Elphinstone.

At the argument it was said that the Redewater should have stopped above the channel. The evidence shows that she could not have done so with safety. It was further urged that there was no fixed regulation which required vessels to stop at the foot of the narrow channel, and a printed circular from the owners of the Allan line of ocean steamers has been produced to shew that there are some seventeen places or stations where stopping is recommended. In this respect the circular is worthy of commendation, but it is is by no means to be inferred that the maritime law is so defective, as not to provide for a case of

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this kind. By the 16th rule prescribed in the Dominion Act respecting the navigation of Canadian waters, it is directed that "every steamship when approaching another ship so as to involve risk of collision, shall slacken her speed or, if necessary, stop and reverse." The difficult portion of this narrow channel, Chandonnet, the pilot of the Redewater, has limited to a mile. The Elphinstone, laden deep in the water with railway iron and coal, was at the foot of this channel with so little water under her keel that she continued touching the ground until the moment of collision, whereby her steering was necessarily affected; the breadth of the channel was no greater than her length, and in its windings, with any other steamship coming down, she must have been continually "end on" or nearly "end on." This provision, particularly as the speed of the two vessels combined was a mile in four minutes, I hold strictly applicable in this case, and I shall decide accordingly. The pilot of the Elphinstone has said, with reference to the tortuous bends in the channel which have been referred to: "The custom is to stop everywhere if the channel is narrow and crooked: that is, only when one sees a ship will be met in the round (*rond*), we then stop below. This custom is not confined to this place. It is observed in all similar places. If there be no danger of meeting in the curve we go on, except in the *battures* of *Pointe-aux-Trembles;* we stop there below Calf Island (*L'Isle aux Veaux*) to allow the descending vessel to pass; these *battures* are a little lower down than where the collision happened." Not only the express letter of the law required that the Elphinstone should stop below the narrow strait, but the exercise of ordinary prudence required the same course. Not only steamships of about a thousand tons, such as those now mentioned, but steamships of three thousand five hundred tons pass through this *Pointe-aux-Trembles* channel, and I can come to no other conclusion than that steamships of these large dimensions must, under the rule of navigation referred to, stop at the foot of it

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whenever there is a probability of their meeting in it. Then with reference to the management of the Elphinstone when in the channel. It is true that she ported her helm, but too late, and reversed her engines, it may be said, at the moment of collision. Wherever a measure is right, if not taken in time, there is blame. (The Trident, *Spinks*, 222.) Had the Elphinstone kept her own side, or had she ported her helm sufficiently in time after starboarding, it is plain that there would have been no collision. The Redewater was quite within the sailing rule, and her being within twenty feet of the south side of the channel at the time of collision shows that by porting in time the Elphinstone would have passed free.

I think it proper on this occasion to advert to the recurrence of collisions on the Upper St. Lawrence, and their causes as established before this Court. I allude to ocean steamships only. It is not because the navigation of the river has been found impracticable at the points which have been referred to that they have come into collision. The channels are well buoyed and the river itself is a brilliant highway from its lights at night, and in fact there is no place in it that cannot be safely passed with ordinary care, if the ship is not too deep for the quantity of water. There has not yet come before this Court, so far as I am aware, any one case of collision with ocean steamships there wherein the negligence of the pilot has not been the only cause. In the case of the Hibernian, (*a*) decided by the late Judge of this Court, and the decision was afterwards affirmed in the Privy Council, two barges were sunk by her, and the master of one of them drowned. The fault then lay with the pilot exclusively, and, in passing, it may be said that it was at the same locality as the collision now under consideration. Then in the case of the Thames, a collision occurred off Varennes, about three miles further down, whereby one barge was sunk while another, together with a sailing ship, escaped as it were by a hair's breadth. There too, the Court found the cause to be negligence in the

(*a*) 2 L. C. A. C. 148.

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pilot, and now there is the present case which speaks for itself.

The cause of these disasters rests with the pilots or the pilot system. To what punishment the pilots in the two first cases were subjected, if any, does not appear. In the case of the Elphinstone, the Montreal Harbor Commissioners have suspended the pilot from the discharge of his duties until the 4th of July next, virtually for less than six months, when the winter months are deducted. This is but an easy retirement for that period, other avocations not being precluded. His return to duty, with others as negligent, on board ocean steamships navigating the difficult passes of the St. Lawrence will afford a very ineffectual guarantee against collisions, particularly between Montreal and Quebec,—collisions which may render the taking of marine risks an impossibility, and the navigation of the St. Lawrence there impracticable for the larger class of ocean steamships.

In this case, a decree is rendered declaring the Elphinstone solely to blame, for not stopping at the outlet of the *Pointe-aux-Trembles* channel, for not obeying the law which required the helm to be ported, and for not slackening her speed or reversing her engines in proper time, the whole owing to gross negligence in the pilot who had charge of her. The judgment is for the amount of loss sustained in the damage done to the cargo, to be ascertained on reference to the Registrar and Merchants, and costs.

W. Cook, for the Redewater.

Holt, Irvine and Pemberton, for the Elphinstone.

Friday, 15*th March*, 1878.

ENMORE.—HOLMAN.

BELLE HOOPER.—GILKEY.

1. Where an American sailing vessel was damaged by a collision with a British steamer in South American waters, and the latter released by a British gun-boat from the jurisdiction of a South American tribunal and followed into Canadian waters, a plea of a defective green light over-ruled, and suits of owners of sailing vessel and cargo maintained.

2. Where an affidavit was obtained before suit brought from a pilot derogatory to his conduct in the management of a vessel, and furnished to the adverse interest in a case of collision to serve as evidence, the same was struck from the record.

JUDGMENT.—*Hon. G. Okill Stuart.*

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Three suits involving a considerable amount have been submitted to this Court for decision: the first is that of the Enmore proceeded against by the owners of the Belle Hooper, a valuable American schooner; the second, of the owners of the cargo of the Belle Hooper against the Enmore; and the third, of the owners of the Enmore, a cross action against the Belle Hooper, all arising from one collision. This occurrence happened in South America, on the river La Plata, between Buenos Ayres, situated in the Argentine Republic, on the right, and Monte Video, in the Republic of Uruguay, on the left, descending the river, distant about 100 miles. Between these places, there is the Chico Banco, a shoal off which there is a light-ship. The estuary of the La Plata there is about thirty-six miles, and the channel above five miles wide. The first of these suits in order is that against the Enmore.

This vessel is an iron screw steamship of 1122 tons. At 5.15 P. M. on the 28th February, 1876, with a crew of

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33 hands, she left Buenos Ayres, with a general cargo, for Antwerp, to call at Monte Video, and at 9.15 P. M. she was near the Chico light-ship. The Belle Hooper, an American schooner of 398 tons, Gilkey master, with a crew of eight persons was, at the same time, making her way round the Chico light from the contrary direction. She had the wind from the S. S. E. on her port beam, and her rate of sailing was four knots an hour. About a mile from the Chico light these vessels came into contact. The starboard bow of the steamship struck the schooner a blow almost at right angles near the mizzen rigging on her starboard side, and cut her down to a depth of thirteen feet by six wide. She was prevented from sinking by a wood cargo. The family of the master of the schooner were, with her crew, taken off by a boat from the Enmore in charge of her chief officer. The vessels anchored for the night; at six o'clock in the morning the schooner was taken in tow by the steamer, and both arrived at Monte Video about 8 o'clock the same evening. Subsequently, a warrant was issued from the Tribunal of Commerce there, against the Enmore to answer for the collision; she was placed under arrest accordingly, but forcibly released from the officers in charge of a national transport who had her in custody. Her Majesty's gun-boat, the Beaver, cleared her decks for action alongside the transport and intimated an intention to release the Enmore by force. No resistance was offered; the Enmore slipped her chain cable and anchor and made off to sea. Appearing within this jurisdiction, she was arrested again on the 20th October following.

The cause of action assigned against the Enmore, is that on the 28th February, at 9 P. M., the Belle Hooper hauled up W. by N. round the Chico light-ship; that at 9.15 P. M. the Enmore's green light was reported by the schooner's "look-out," then her white light, which shewed her course to be about E. N. E., crossing the schooner's bows to starboard, the Chico light bearing southerly about a mile, and when about four points on the schooner's starboard bow

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she changed her course, heading for the schooner's lee beam; that she continued to come on with great speed and, when near, the people of the schooner hailed her, making all the noise in their power, without result; for without changing her course, or apparently diminishing her speed, she came on until she struck the schooner on the starboard side just forward of the mizzen rigging."

The plea of the Enmore is that she was steering E. by N. at half speed (5 knots) when the schooner was reported two points on her port bow, distant from two to three hundred yards; after which her green light, very dim, came into view, and that the collision was owing to the schooner having "a very dim green light on a very dark and rainy night."

The issue in the case of the owners of the cargo against the Enmore is the same; and in the suit against the Belle Hooper damages are claimed by the owner of the Enmore for injury sustained by her from the collision. The point at issue is the same in all the cases, and the evidence common.

Before deciding these issues, a motion reserved for the hearing of the case is to be disposed of. The promoters filed a declaration and protest made by them before the United States Consul at Monte Video, and along with it a statement on oath made by the pilot of the schooner, William F. Miller, as follows:

"I, the undersigned, William F. Miller, being a branch pilot of Monte Video, declare the following to be the solemn truth:

"I, William F. Miller, pilot of the Belle Hooper, of Boston, left Monte Video February the 26th, bound towards Rosario, a port in the Argentine Republic. Nothing occurred worth notice until the 28th February. At 8 A. M. I got under way, a strong flood tide making. At 6 P. M. made Chico light bearing W. N. W., distance 10 miles. At 7 P. M. a squall from the S. W.; stowed all the light sails and lowered down the fore-sail and spanker, and double-reefed the mainsail, the fore-staysail set at the

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same time. At 8 P. M. set the whole mainsail. At 9 P. M. the man on the "look-out" reported a green light on the port bow, the lugger heading W. by N. The light proved to be a steamer heading about E. N. E., which crossed our bow to starboard, and brought his green light four points on our starboard bow. The steamer shifting her course to S. E. by porting her helm ran us down on the starboard quarter, which sunk us immediately to the water line, being loaded with lumber. The wind S. S. E. light and clear; the collision occurring about 9. 30 P. M.; the lugger's lights, both port and starboard, in good condition, and not taken in from the rigging till after the separation of the two vessels, then, in the presence of the first officer of the steamer and boats' crew who came on board with an anchor light; and after coming on board, I made the remark that it was a blind look-out to run us down with lights as good as ours. The answer that I got from them was, that the man on the look-out had reported a green light twice, and no attention was paid towards it; therefore it was impossible to avoid a collision.

"Sworn and subcribed before me this 4th day of May, 1876.

"WILLIAM F. MILLER.

"C. S. CALDWELL, *Acting U. S. Consul.*"

Afterwards, on the issuing of a commission to examine the Respondent's witnesses at Monte Video, a copy of a document was produced, as signed by the same William F. Miller. It is as follows:—

Monte Video, March 1st, 1876.

"I, the undersigned, do hereby declare that on the night of the collision with the steamer Enmore, we were to blame for the damages sustained; our green light was half extinguished, and when I saw the steamer, I put the helm hard to starboard; my canvas set was the mainsail with the two topsails and foresail. S. W. ¼ S. was the course I was steering at the time of the collision.

"GUILLAUME F. MILLER."

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Miller was on the Respondent's list of witnesses; an interrogatory to prove his signature to the original of this paper was rejected, and the commission was sent off to Monte Video for execution. Witnesses were examined at that place, between the 17th and 27th September last. Miller was there, but he was not examined. After the return of the commission, there was filed by the Respondent at the Registry of this Court another affidavit of Miller, dated the 18th September, in which he has made oath "that being desirous, from conscientious motives and "reasons, and not influenced or induced thereto by corrupt "or illegal motives, he solemnly declared that his statement "of the 1st March, 1876, was strictly true." The motion is to reject this document from the record. It was filed with a notice that it was "*to serve as evidence in the cause.*" That this pilot swore to what was false, either on the 1st of March or the 4th of May is plain enough, and as each affidavit is in his own handwriting, he did so deliberately. As the Respondent desired his evidence, why did he not examine him at Monte Video as a witness, and not attempt to bring in an *exparte* statement by a side wind? An answer to this question at the argument was, "Why did not the other side do so?" It seems very unreasonable to suppose that the other side should do so, after the Respondent had shown that he, Miller, was not credible on oath, by producing a copy of his affidavit of the 1st of March, and had put him on his list of witnesses. The obtaining of an ordinary certificate or statement from a person on board a ship injured by collision by persons in the other ship, to serve as evidence against his own ship in prejudice of further investigation, has been marked in the High Court of Admiralty with strong animadversion and as a proceeding to be reprobated. *(a)* The binding of a man by an oath imputing to himself neglect of duty, injurious to his employer, is perhaps much worse, as a man is not likely to do

(*a*) The Great Eastern, Holt, Rule of the Road, 169.

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so without undue influence. The presumption is, as the Respondent desires Miller's exparte statement or evidence, that he fears an exposure of the way in which he obtained Miller's statement, or else that Miller himself is afraid to undergo a cross-examination. For this alone, apart from other reasons stated in the motion, the Monte Video affidavit of the 18th September, is rejected with costs.

Proceeding to the case of the Enmore, premising that the regulations for preventing collisions at sea are in force upon South American as well as upon North American waters, as well by convention with the Argentine and the Uruguay Republics, as with the United States, it stands thus:—1. Was the night of the 28th February, dark and rainy? 2. Was the green light of the schooner dim from defect in its make? 3. Was it properly trimmed? and 4. Did a defect in the green light cause or contribute to the collision, and if not, what was the cause of it?

Upon the first. There is no difference of opinion; the master of the Enmore has stated that at the time of collision ships' lights could be seen at the ordinary range, that the atmosphere was clear, and in this the witnesses of the promoters agree and say that it was a clear and starlight night.

As respects the second. The lights of the schooner, red and green, were brought into the Registry when the suit was entered. They were made in Boston; persons there have testified to their sufficiency. Vallerand, a dealer of lamps, has done so also, and two persons of Quebec, the Port Warden and a ship master of experience, after a trial made of them, have stated that their penetrating power extends, the one states to two, and the other to three miles. It is sufficient to say, without going into detail, that this evidence has not been impaired.

With reference to the third question. The evidence of the promoter shows that the lamps were hung up at sunset in the fore rigging; that they had been trimmed and cleaned on the morning before the collision, and that the green light

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was burning well before and after it. The man who cleaned and trimmed them, the steward, has sworn to the fact; the look-out, who placed the green light at sundown, and another seaman while cleaning the fore-castle lamp in the morning, saw the red and green lights then both cleaned. The second mate has said they must have been visible from two to three miles. The chief mate has spoken of them as being the regulation lanterns and as throwing the best lights of the kind he has seen; he saw them put up before the collision and they were burning well. In the language of the master of the Belle Hooper, "they are the usual regulation lights carried by vessels in the United States marine, and, as is usual in fore and aft vessels, we carried them about twenty feet above the water, and in the fore rigging. If carried elsewhere the sails hide them. On the night of the collision the Belle Hooper carried her side lights in such a way as to shew a uniform and unbroken light over an arc of the horizon of ten points of the compass, and were so fixed as to throw the light from right ahead to two points abaft the beam on either side."

For the respondent there is the evidence of the master and pilot of the Enmore; the former went upon deck as the vessels were coming into collision, and he, as well as the pilot, have expressed their opinion that the schooner's green light might have been seen about half a mile. The pilot has said that her red light was in good condition. The language of the chief mate who went on board the schooner, as already stated, is, "they were both very poor, not much to choose between them, one as bad as another. I say the lights were bad, you could not see them." Andrews, the Enmore's 'look-out,' was with the chief officer, and was one of those who went to the schooner after the collision with him; he has sworn that "the Belle Hooper then had no side light out," the man at the wheel thought "you could not see the green light more then 10 or 12 feet it was so bad." The engineer and the second mate say that after the colli-

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sion the green light was burning badly. The contradiction in this testimony cannot escape remark—the difference between half a mile and 10 or 12 feet, the statement of the look-out that the schooner had no side light out, which is contrary to the evidence of all the rest from the Enmore, and the statement of the pilot of the Enmore that the schooner's red light was good, while the chief mate has said that one was as bad as the other and both invisible, indicate a recklessness that very much discredits their testimony.

On the other hand there is an uniformity in the testimony of the promoters, and their statements in the above particulars show no contradiction.

Again, if the schooner's green light was bad and in bad trim, the respondent could have produced impartial testimony and better than he has done. These lamps were required the night after the collision on the schooner while being towed by the Enmore, under the 5th article of the sailing rules. As the oil and materials for supplying them were either submerged or inaccessible, they were relighted in the same state as they had been left in the night before. The master of the schooner has sworn that they then burned well, and no one has said that they did not. They were visible in rear of the steamer and could be seen by the thirty-three persons on board of her, none of whom have been examined as to their power at this time. On the first of March, and subsequently at Monte Video, the masters of these vessels conversed together respecting the collision. The master of the Enmore has said that he never complained of the lamps to the master of the schooner, but he does say that he assigned to him another cause for the collision, the starboarding of the schooner's helm. The lamps on the schooner's arrival at Monte Video could have been examined by disinterested persons, and no doubt they would have been, if a complaint has been made against them by the master of the steamer. A rule is that the best attainable evidence shall be adduced to prove every

disputed fact. The ground for the rule is a suspicion of fraud. If it appeared from the very nature of the transaction that other and better evidence of the fact is withheld, a presumption arises that the party has some secret and sinister motive for not producing the best and most satisfactory evidence, and is conscious that if the best were to be afforded his object would be frustrated (*a*)

Now as to the fourth enquiry—the cause of the collision. Vessels descending the Plata make the Chico light; they then diverge to a northerly point where they can see another, the Indio Point light, lower down the river; they then turn upon an easterly course towards it. At the argument, on the side of the schooner, it was attempted to shew that the Enmore had overshot her mark and gone beyond the point where it was necessary to turn her course upon the lower light, and that in coming round to take it, or after having attained her easterly course, she struck the schooner. On the other hand it was urged for the Enmore that she had been on an E. by N. course for some time and had not reached the place to assume her downward course. A perusal of this testimony has convinced me that it is in no way essential, as it matters not where these vessels had been, while we have the admitted fact that the collision took place about a mile from the Chico light, somewhere to the north or west of it, and in a channel five miles broad, on a starlight night. Then there is a document of a very suspicious character produced by the respondent to be considered. It is a declaration of facts signed by Gilkey, master of the schooner, as required in cases of collision by a Port regulation at Monte Video. Here again Miller, the pilot, appears. On the 1st of March he made his affidavit of that date imputing blame to the vessel under his control. On the same day he informed Captain Gilkey, that a declaration of the nature stated must be made by him. One was prepared in the Spanish language and translated by Miller to him, accurately as he supposed, but instead of

(*a*) Starkie Ev. 641, 642.

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the W. by N. course being stated in it, as in the log of the schooner, the course of S. W. ¼ S. was substituted, and this being either unexplained or the W. by N. course having been given as the true translation, Gilkey signed it. This change was evidently intended to bring the schooner across the bows of the Enmore and thus place her in fault, as attempted by Miller's affidavit of the 1st of March; but this attempt has defeated itself, for the reason that in this document the change of course is said to have been made at the distance of a mile and a half from the place of collision, the schooner sailing at the time with her proper lights. Miller signed the document as pilot. If she had her proper lights there was time at that distance for the Enmore to change her course and keep out of the way, and no harm would have been done. I look upon the document as an attempt by means of a false translation to back up Miller's affidavit of the 1st of March, and entitled to no consideration.

I have now reached that part of the evidence in which the true cause of the collision is to be found. The question is one of lights on the one side, and of caution and nautical skill on the other, as these vessels came up to the place of contact. According to the sailing rules if these vessels were proceeding in such directions as to involve risk of collision, no matter where or on what course, it was incumbent on the Enmore, if there were time and opportunity, to keep out of the way of the schooner; or else, when approaching her so as to involve risk of collision, to slacken her speed or, if necessary, stop and reverse. In the preliminary act of the respondent it is stated that the schooner was sighted from the Enmore at the distance of about half a mile. The master and pilot of the Enmore have both sworn, in their belief, that the green light of the schooner could have been seen before the collision at about that distance. It may therefore be safely assumed as true upon the evidence of the respondent that the people on board of the Enmore could, with a proper look-out, have

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seen the schooner's green light half a mile off. If they did not, there was an absence of due care and caution. Her master and chief-officer were both below. The Enmore was in charge of her pilot and second mate, having for her look-out Andrews, whose testimony has been already noticed. The pilot Forrest has said, "at half-past nine we saw the sails of the schooner, it was blowing strong from S. S. E., raining and lightning and hazy. The man on the look-out reported a sail on the port bow about two points; no lights to be seen. The second officer, that is myself, and the pilot thought it would be a small craft or cutter; then we observed a green light very dim; we immediately put helm "hard to starboard," stopped engine and went full speed astern. There was only one command, which was to put helm "hard to starboard, stop the engines, full speed astern and blow the whistle." Now let us see the account given by the second mate, who was acting with this pilot on the bridge; he has said "The look-out reported a light on the port bow, the look-out man reported the light and not the vessel. It is not true to say that it was after the vessel was reported that the green light was seen." He has also said. "The first I saw of the Belle Hooper was a faint green light on the port bow. It was reported at the same time. I saw it two points on the port bow. I consider the green light was about 300 yards off, I think. I looked at the light through the glasses. I then saw what appeared to be a small vessel approaching nearly 'end on' us to our port bow. When the green light was seen the pilot and I both gave orders, the orders were to starboard. *No further orders were given at that time.* A flash of lightning revealed the vessel close to us, and her masts were open at that time. Orders were thereupon given 'hard a starboard.'" He has also said when the order 'hard a starboard' was given the Belle Hooper was off 200 yards. The contradictions in this testimony are apparent, and throughout the depositions of these two persons the statements are confused. Still they come to this that either the sails of

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the vessel or her green light or both were seen at a distance of about 300 yards, and that no precautionary step in order to avoid collision was taken until after 100 yards of this space had been gone over. As there are 880 yards in half a mile the question naturally suggests itself what was done on board the Enmore to prevent a collision while the 580 yards was being gone over until she reached the schooner at the 300 yards. The answer is, simply nothing.—Then there is the evidence of Andrews, the look-out, whose testimony I have already had occasion to notice :—His power of sight was as defective before the collision as after it, when he could see no side lights on the schooner while every one also examined on the point did. In his evidence he has said that after a flash of lightning, to use his own words, "I saw the vessel that proved to be the Belle Hooper right ahead. I mean on the port bow. I turned towards the bridge and sang out vessel on port bow. I then turned back again and saw a dull green light on the port bow. I turned to the bridge and said green light on port bow. I then heard voices on the bridge 'hard a starboard.'"—One would infer from this statement that the schooner was reported twice, first without and then with her green light in immediate succession and the order 'hard a starboard' given almost simultaneously. The ideas of this witness as to time and space are quite as indistinct as his power of vision appears to have been imperfect. On his cross-examination he has said, "when I first saw the schooner she was not very far away, about a couple of ship's lengths. I mean about 300 feet when I say a ship's length. When I first saw the Belle Hooper she may have been a quarter of a mile, I can't say; she was very close when I saw the green light." This testimony, uncertain as it is, shews a very close proximity of these vessels before the schooner was seen from the Enmore. It certainly makes it doubtful whether she was seen at the 300 yards, and still more so when testimony on the side of the Belle Hooper is referred to. Her look-out has said

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"the Enmore was about 50 or 100 yards off when I sang out to starboard their helm; they ought to have heard me, for I heard a man on her forecastle singing out." According to this testimony a distance of less than 100 yards between these vessels must have been reached before anything was done on board the Enmore to prevent a collision. The speed of the Enmore has been given by her master as but one-half her power, five knots. If this were so there was the more time for the exercise of caution, but others say eight down to the moment of collision. Whichever it was there could have been no very great abatement in it, as we have the fact that the schooner was cut down thirteen feet to her floor timbers.

The assessors have given a very close attention to the evidence; they have favored me with their opinion on the nautical points submitted, and have no hesitation in saying that the schooner's lights were good, were properly placed, and at the time of collision showed a light at the distance prescribed by the sailing regulations. They are of opinion that if the proper precautions had been taken even at the 300 yards by reversing the engines of the Enmore the collision, which they attribute to a bad look on board the Enmore, might have been prevented, and for this collision they attribute the fault solely to the Enmore. This opinion I concur in and shall decree accordingly. A delay of two years has impeded the course of justice in these cases. The owners of the Belle Hooper have been hitherto deprived of their remedy but not because there has been any improper delay in this Court. They have had to follow the Enmore as a fugitive from justice over a large portion of the globe. Her flight from Monte Video has exposed them to delay in procuring of testimony in South America, the United States and in Canada, when all that was necessary was in Monte Video where the case could have been disposed of in a very short time. Maritime courts should be and are summary in their proceedings. The tribunal of commerce in the republic of Uruguay

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was legally seized of the claim of the owners of the Belle Hooper for damage sustained on South American waters. Before that tribunal the parties were entitled to trial under rules emanating from our own imperial legislation. The right of detention over the Enmore was vested in the owners of the Belle-Hooper, citizens of the United States. International law, the comity of nations and necessity recognizes in the courts of any country a jurisdiction over foreign ships in cases of collision upon its waters. Why one of Her Majesty's gun boats should have released the Enmore by a display of force ready for action, the record does not disclose and one is at a loss to conceive. That act has deprived a man of his legal right, a recourse for an injury sustained by property belonging to him, in a foreign country. The master of the Belle Hooper has said that his all was in his schooner; he and his family were shipwrecked by the gross negligence of the people of the Enmore, and their lives exposed to extreme danger, and for two years he has had to travel over a large portion of the world to seek for justice. The result of this case affords an example that the protecting power of Her Majesty's maritime courts, extending as it does over a large portion of the navigable waters of the globe, will afford redress as well to the foreigner, as to her own subjects however long an act of arbitrary power may have retarded it.

The decrees in the cases against the Enmore are for the damage to the Belle Hooper and to the cargo respectively—to be settled on reference to the Registrar and Merchants,—with costs. The action against the Belle Hooper is dismissed with costs.

William Cook, for the Belle Hooper and cargo.

Hon. George Irvine, Q. C. and E. H. Pemberton, for the Enmore.

Tuesday, 5th April, 1878.

EARL OF LONSDALE.—McKENNA.

Where a steamship, ascending the river, before entering a narrow and difficult channel, observed a tug approaching with a train of vessels behind her, and did not stop or slacken speed, and where she subsequently collided with the tug and her tow; held:

1. That the steamer was to blame for not stopping before entering the channel, in accordance with an alleged and estsblished custom to that effect;

2. That having taken upon herself the responsibility of disregarding this custom, she was liable for the consequences of a sheer, which threw her across the fairway, and into collision with the descending vessels.

3. That the burden of proof was upon her, to show that the collisions were not caused by her neglect; and, having failed to do so, her owners were liable.

And by the Judicial Committee of the Privy Council, on appeal:

1. That under the circumstances of the case, the fact of the tug not having ported until immediately before the collision, did not amount to contributory negligence on her part; and

2. That the decree of the Court below, should be affirmed, on all points.

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These were four suits, brought by the owners of the schooner Marie Olevina, the barge Canadien, and the barge Jessie, and by the owners of cargo laden on board the barges, against the screw steamship Earl of Lonsdale, for damages occasioned by collision, on the 7th of October, 1877. Mr. Andrews, Q. C., and Mr. Pemberton, for the the Promoters; Mr. Cook, for the Earl of Lonsdale. The facts of the case appear in the judgment of the Court this day rendered.

JUDGMENT.—*Hon. G. Okill Stuart.*

These cases were argued at the same time, and the evidence in one has been by consent made common to the

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rest. The collisions complained of were opposite the space on the south shore of the St. Lawrence, between the River Nicolet, which falls into it, and Port St. Francis, situated about two miles below. The course of the channel of the St. Lawrence is eastward, until it reaches a point above the River Nicolet, whence it runs south to another point opposite that river, where it enters the St. Lawrence, and a straight line of channel between these points, two miles and a half long, is known as the *Traverse* of Nicolet. At the lower point, opposite the Nicolet, the channel turns to its easterly course again, in a straight line, above two miles in length, until it reaches Port St. Francis, and its centre is indicated by two lights there, one in advance of the other. Its width along this length, until within nearly half a mile of Port St. Francis, where it expands, is from 300 to 350 feet, and its depth, in some places, not more than 20. Immediately upon turning the bend caused by the change of course at the point opposite the Nicolet on the north side, there is a shoal known as Iron Shoal, and about three quarters of a mile below it another shoal called Force Shoal. The channel is on the south of, and along these shoals; the current in it is strong and variable, the navigation difficult, and there the collisions now in question happened.

On the 7th October last, at about five o'clock in the afternoon, the weather was clear, and the St. Lawrence perfectly smooth, when a steam tug, after passing through the *Traverse* of Nicolet, had made the turn opposite the Nicolet, and was proceeding along Iron Shoal with four vessels in tow. This tug, the Rapid, is a vessel of 28 tons, and had in tow the Myrtle, a brigantine of about 130 tons, 90 feet long, laden with a full cargo of flour, and the Marie Olevina, a schooner of 114 tons, laden with a full cargo of flour, pork, and butter, the two held by a hawser from 220 to 240 feet long; they were nearly abreast, the Myrtle somewhat in advance, with about 15 feet between them. On another hawser from the tug, extending about

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60 feet behind the Myrtle and the Marie Olevina, she had in tow two barges, the Canadien and the Jessie, lashed together, the former on the starboard side of the latter, with her bow in advance about 6 feet of the Jessie. The Canadien was of the burthen of 100 tons; she had on board 7,600 bushels of Indian corn, and 500 barrels of flour. The Jessie was of 137 tons, her length 107 feet and her cargo 8,400 bushels of Indian corn.

The Earl of Lonsdale is a steamship of 1,543 tons, she is 250 feet long, and her draught was 18 feet 9 inches. On her way up the St. Lawrence she had passed the wharf at Port St. Francis, and had entered into the broad channel there, when her pilot and second mate saw the Rapid and her towage passing along Iron Shoal towards Port St. Francis. She did not stop in the broad channel above the wharf, nor at the foot of Force Shoal, but went on and continued to approach the tug and the train of vessels behind her, until they met in the narrow channel below the *Traverse* of Nicolet. The Earl of Lonsdale and the tug passed upon parallel courses from 60 to 100 feet apart, and then the relative positions of the Earl of Lonsdale to the vessels in tow became such, that the hawser by which the Myrtle and the Marie Olevina were towed, was cut in two by the stem of the Earl of Lonsdale. The Myrtle escaped, but the starboard bow of the Earl of Lonsdale and the port bow of the Marie Olevina came into contact which turned her head in the contrary direction; and after that the stem of the Earl of Lonsdale came into collision with the port bow of the Canadien outside, and her starboard bow with the bows of the Jessie inside of the Canadien.

The promoters have alleged that the Rapid and her tow were on the south side of the fairway, that the Earl of Lonsdale crossed over, and there broke the tow rope of the Marie Olevina, struck her, and then came into collision with the two barges. In two of the suits, the promoters say that there is a custom, where these collisions took place,

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for the ascending vessel to wait in the broad channel above the Wharf at Port St. Francis, or below Force Shoal, until vessels descending in the narrow channel have passed by her.

The case which has been set up for the defence is, that the Earl of Lonsdale was stationary at the time of the collision on the north side of the channel, and the vessels in tow crossed from the south side and struck her there. And, further, that there was a depth of water outside of the channel, which admitted of vessels of the draught of the tug and her tow going to the south, where they should have gone, so as to let the Earl of Lonsdale pass.

It is conceded that the Earl of Lonsdale did not stop below Force Shoal, and thus the following questions arise:—1. Should she have done so? 2. Did she cross to the south side of the channel and there occasion the damage, the matter of complaint? And 3. Could the Rapid, with her tow, have gone outside of the channel on the south, and thereby avoided collision?

The channel at and below the *Traverse* of Nicolet, and along Iron and Force Shoals, is one of seventeen places in the St. Lawrence, between the cities of Quebec and Montreal, so dangerous to navigate, that owners of the largest class of steamships and other vessels which pass through them, have by circular enjoined upon all persons in charge of them and of their craft of every description, to stop, or, if necessary to wait below, until the fairway of the channel has become clear. The wisdom of this circular was exemplified last year in the case of the Elphinstone, where two valuable iron steamships, quite of the dimensions of the Earl of Lonsdale, came into collision in one of these narrow channels, and with valuable cargoes sank, by reason of the ascending vessel not stopping below, for which she was adjudged by the Court to have been in fault and condemned in damages, a judgment from which there has been no appeal.

That the detention of the Earl of Lonsdale below Force

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Shoal, so as to allow the Rapid and her tows to pass her in safety, would have been from ten to twelve minutes has been proved.

As to the custom for an ascending vessel to stop below Force Shoal, a number of pilots agree in stating that when a steamship is descending the *Traverse* of Nicolet, and another ship is below ascending the river, it is customary for the latter to wait below Force Shoal until the former has gone by; but that in the case of a sailing vessel it is a matter of discretion.

That a steam tug, with four vessels in tow, would be more unmanageable in a case of difficulty in a narrow strait than any sailing vessel or any steamship, does not appear to admit of question, and ordinary care required that the Earl of Lonsdale, 250 feet in length, laden to within fifteen inches of the ground, should have waited until the Rapid and her tows, twice her length, had passed her below Force Shoal. This opinion is confirmed by a very experienced pilot engaged in navigating these waters, named Chandonnet, who has said, "The channel there is in some places narrow, in others crooked, and the current sets in badly, making it dangerous to meet; and prudence would require that a steamship, seeing from Port St. Francis a steam tug with four vessels in tow coming down, should wait either at Port St. Francis Wharf or at the foot of the Force Shoal." The language of Lord Cranbourne, in the Privy Council, having reference to a place of the kind on the Danube, will apply with some point on this occasion. In the case of the Symrna (*a*), his Lordship said, with reference to the ascending vessel stopping, "For this the reason is obvious: the descending vessel will, of course, be moving with great velocity, and must also, of necessity, be carried, more or less, into the concave bends of the stream, where the current is much stronger than on the opposite side. Prudence must therefore dictate that the ascending vessel ought to place herself out of the strength of the cur-

(*a*) 2. Moore, P.C.C., N. S. 449.

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rent, in order to allow full swing to the descending vessel, which must necessarily be hurried along by its course." And in the United States, it has been held that "a custom among navigators of steamboats on a river to observe particular situations in ascending and descending seems salutary and reasonable, analogous to the rule governing ships passing each other at sea, and such custom will bind such navigators to its observance, and in failure thereof will be at the peril of the owners." (*a*) Independent of any custom which might govern in this case, positive enactment requires every steamship when approaching another ship so as to involve risk of collision, to slacken her speed, or, if necessary, stop and reverse. (*b*) The Earl of Lonsdale was approaching the Rapid and her tows so fast that their usual speed combined would have caused them to meet within five minutes after the Earl of Lonsdale left Force Shoal, and this was such an approach on her part as involved risk of collision and required her to stop below Force Shoal.

As bearing on the second question, there is evidence given by fourteen witnesses of the promoters, to the effect that the Rapid and the vessels she had in tow were on the south side of the line of lights, from their leaving the east point of the *Traverse* of Nicolet, until the collision; that the Earl of Lonsdale met and passed the Rapid, port side to port side, about 100 feet apart; that the courses of the two were parallel until the Earl of Lonsdale had gone by the Rapid from 100 to 200 feet, when her course was so altered that her bow was brought to bear upon the space between the Myrtle and the Marie Olevina, which caused the persons in charge of the vessels in tow to port their helms from a fear of collision; that the Earl of Lonsdale continued onwards, with a ripple at her cutwater, which indicated considerable headway, until she came across the hawser between the Myrtle and Marie Olevina, broke it,

(*a*) Jones *v.* Pitcher, Steele & Port, cited in Pritchard's Digest ing rules. (*b*) Art. 16 of steering and sailing 191; also Goslee *v.* Shules, N. 237.

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and then struck the port bow of the latter with her starboard bow, and, going on, struck the port bow of the Canadien, which was in advance of the bow of the Jessie, with her stem, and then the bow of the Jessie inside with her starboard bow; that the Canadien sank after floating a short distance so rapidly that the persons on her had but time to save their lives, and the Jessie was beached to save her from sinking. Three of the witnesses who were on the Rapid, say that they heard the pilot of the Earl of Lonsdale order her helm to starboard after she had passed the Rapid and before the collisions, and another person, the guardian of the lights, an indifferent spectator, has testified that about sunset he was lighting one of them which is placed on the shore about three or four arpents—an arpent being 180 feet— in a direct line in advance of the larger light fixed upon a pillar in the water, and that he saw the Earl of Lonsdale go into the channel above the wharf, as he thought, at "ease away," to give the tug and her tow, then on their downward course and lower down than the River Nicolet, a chance to clear her; but that the Earl of Lonsdale, when she was about fifteen arpents above the wharf, appeared to accelerate her speed, while in his opinion, the Rapid was more to the south of the channel than otherwise.

On the other side four persons who were on the Earl of Lonsdale, and in a position to see the course she took, have been examined. Her pilot has said that she had a look-out. If she had, he has not been examined. These witnesses, the pilot who was on the bridge, the second mate, and two men at the wheel, testify that when the Earl of Lonsdale was abreast of, and passing the Rapid, the latter was hailed from her to cut the hawsers by which the vessels in tow were held; that the Rapid and her tows were then about mid-channel; that the Earl of Lonsdale was and had been on a port helm; that her engines were reversed when opposite Force Shoal; and that before and at the collision her helm had been put and was hard a port. The place of collision,

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according to her pilot, was about 100 feet from the north brink of the channel. The same pilot has denied that he gave the order to starboard as attributed to him, but the persons who were with him have abstained from saying that he did not, unless by construction such denial is involved in the statements that the helm was placed to port and hard a port. The second mate of the Earl of Lonsdale, who was on the bridge with the pilot, has said, that when the tug and her tows were almost half a mile off from her an order to port her helm was given, which was followed by orders, when the tug and her tows were about 250 yards off, to stop the engines and to put her helm hard a port. These statements are scarcely reconcileable with the result, for if the Earl of Lonsdale had been so long on a port and on a hard a port helm she would most likely, in so narrow a channel, have gone aground, and her port side, not her starboard bow, had the tug and tows crossed as pretended, would have come into collision with the Marie Olevina and the barges.

After carefully comparing and considering the evidence, I have come to the conclusion that the Earl of Lonsdale did cross the channel to the south side, and did there come into collision with the schooner and the barges.

Then should the Rapid with her tow have gone out of her course and outside of the channel to the south?

It has been argued that these vessels are in law to be considered as one ship, and as one ship that she should have ported her helm, which would have sent her into shallow water on the south, and this would have enabled the Earl of Lonsdale to pass her. If this course had been feasible, and the persons in charge of the tug and tows neglected to adopt it, there would be mutual fault. In support of this view the case of the Cleadon (*a*) has been cited, but the law therein stated was afterwards explained by Lord Kingsdown in the Privy Council in the case of the Independence. (*b*) Delivering the opinion of their Lordships, he observed.

(*a*) 14 Moore, P.C.C. 92. (*b*) 14 Moore, P.C.C. 103.

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a steamer, unencumbered, 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 remove in one direction or the other with the utmost facility. 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 their Lordships observed in the case of the Cleadon she may be considered for many purposes 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 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. Had the tug adopted either of the courses thus stated the consequences would probably have been more serious than they were.

The following questions and answers indicate the opinions of the nautical assessors with which this Court has been favored:—

Question. Did the Earl of Lonsdale, by passing into the narrow channel at the foot of Force Shoal, while the Rapid and her towage were in it, approach them so as to involve risk of collision? and were the latter exposed to more than ordinary risk by the steamship not stopping there? *Answer.* She did, and the Rapid, with her towage, were thereby exposed to greater risk by the steamship not stopping.

Question. Did the Earl of Lonsdale cross the channel to the south side of it, and there occasion the several collisions complained of in the above-mentioned suits respectively? *Answer.* The Rapid and her tows were a little

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to the south of the leading mark of the channel, which was the two lights in one, and the steamship must have crossed the line of mid-channel when she collided with the schooner and the barges.

Question. According to the Admiralty Chart of record, showing the depth of water at and in the channel near the shoals, would it have been prudent for the tug and her towage to have kept further to the south? *Answer.* There would have been room, although the depth of water varies much, but there was not time when the steamship crossed. If she crossed, when the Rapid and her towage were higher up the channel they could have given more room by going southward. If the steamship had not crossed they would have gone clear.

Question. Do you think that the steamship was solely to blame for the several collisions that took place, as well with the schooner as the barges? *Answer.* We think she was alone to blame.

Despatch and impatience at delay seem to have led to these collisions, as appears from the evidence of the pilot of the Earl of Lonsdale. "If a steamship," he has said, "has to wait for smaller vessels, we would never get to Montreal, because there are always some in our way. We wait for vessels of deep draught; that is, for vessels which draw from sixteen to twenty feet of water," and this gives occasion to apply the law as stated in the High Court of Admiralty in the case of Rose (*a*). It may be a matter of convenience that steam vessels should proceed with great rapidity, but the law will not justify them in proceeding with such rapidity if the property and lives of other persons are thereby endangered.

The Earl of Lonsdale neglected an ordinary and proper measure of precaution. Her passing into the narrow channel below the *Traverse* of Nicolet, while the Rapid and her tow were in it, was fraught with risk and danger to them, and the law has, consequently, imposed on her the burden

(*a*) 2 W. Rob. 3.

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of showing that the collisions were not owing to her neglect (*a*). She has not done so. The contrary has been proved by the promoters, and her reckless course after entering the strait was such that by no act of the tug and tow, consistently with their own safety, could collision have been avoided.

Judgment in each case is in favor of the promoters, with costs, their damages to be ascertained upon the usual reference.

These cases were appealed to the Judicial Committee of the Privy Council, where the decrees of the Admiralty Court were affirmed. Their Lordships rendered the following judgment:

This is an Appeal from a decree of the Judge of the Vice-Admiralty Court of Quebec in four suits brought by the owners of a schooner called the Marie Olevina, the barge Canadien, the barge Jessie, and the cargoes of those barges, —each in a case of collision,—against a steamship called the Earl of Lonsdale. The Earl of Lonsdale was a screw steamer 250 feet in length and of 1,543 tons register, bound from Newport to Montreal with a cargo of coals, and was proceeding up the St. Lawrence. The Jessie and Canadien were coming down in tow of a steam-tug called the Rapid, which had two other vessels in tow, namely, a schooner called the Marie Olevina and a brig called the Myrtle. The Marie Olevina and Myrtle were next to the Rapid and were being towed abreast of one another, the Marie Olevina being on the port side; and the two barges were towing astern of the brig and schooner, and were lashed together. These vessels were all of small size, none drawing more than from 11 to 12 feet of water.

The Earl of Lonsdale was drawing between 18 and 19 feet of water. She was proceeding up the north side of the ship channel in the River St. Lawrence. There was water

(*a*) 6 Law, R. 111. Abbott on Shipping, 300, Note. Newberry's Reports, 494.

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for at least 200 yards. The breadth of the channel may be said to be about 200 to 300 yards. The Earl of Lonsdale was on her way up the St. Lawrence; she had passed the wharf at Port St. Francis, and had entered into the broad channel there, when her pilot and second mate saw the Rapid and her towage passing along Iron Shoal towards Port St. Francis. The Earl of Lonsdale did not stop in the broad channel above the wharf, nor at the foot of Force Shoal, but went on, seeing the tug approaching with a train of vessels behind her, namely, the two sailing vessels and two barges which have been mentioned. The Earl of Lonsdale and the tug passed upon parallel courses from 60 to 100 feet apart. The Judge says, "And then the relative positions of the Earl of Lonsdale to the vessels in tow became such that the hawser by which the Myrtle and the Marie Olevina were towed was cut in two by the stem of the Earl of Lonsdale. The Myrtle escaped, but the starboard bow of the Earl of Lonsdale and the port bow of the Marie Olevina came into contact, which turned her head in the contrary direction, and after that the stem of the Earl of Lonsdale came into collision with the port bow of the Canadien outside and her starboard bow with the bows of the Jessie inside of the Canadien."

The learned Judge of the Court below, after advising with his nautical assessors, and after a careful review of all the evidence, came to the conclusion that the Earl of Lonsdale was to blame for these collisions.

Now it appears to their Lordships that this conclusion was well-founded upon the evidence. After reviewing that evidence they think that if they had to come to a conclusion for the first time upon it,—if the case had been heard before them in the first instance,—they would have decided in the same manner as the learned Judge did; but they are of opinion that, unquestionably, there was ample evidence to found the conclusion at which he arrived.

It has already been said that the Earl of Lonsdale was 250 feet long. She had the tide, or at least the stream,

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against her, and it would have been very easy for her to have stopped before she went into the channel, and to have allowed this tug with all her train of vessels to have passed in safety, or if she did come into the channel it was her duty to have navigated with great discretion and caution, whereas the evidence shows that she neither stopped nor had any sternway upon her at all. She passed the Rapid, and her starboard bow ran into the port bow of the Marie Olevina, then her stem ran into the port bow of the Canadien and her starboard bow into the bows of the Jessie.

It appears to their Lordships, after communication with the sailing masters, that the tug with her tow would have gone quite clear if she had been allowed to keep her course and if the Earl of Lonsdale had not crossed to the southward. Their Lordships, therefore, think that the learned Judge was quite right in his finding that the collision was caused by that vessel crossing the channel to the south side, thereby coming into collision with the schooner and the barges.

There remains one question which their Lordships thought worthy of further consideration than it appears to have received in the Court below. Perhaps it was not raised there so fully as before their Lordships to-day, but their Lordships desired to have the question argued whether according to the evidence in this case the Rapid did not also contribute to the collision, and whether she was not therefore also to blame? That question is to be answered by various considerations, the first of which is, ought the Rapid to have ported more than she did? Because that she did port a little is clear from the evidence of the master of the Earl of Lonsdale, who says: "The tug, when passing us, though somewhat on a parallel course, was angling a little to the southward, with her helm a port I should think." It has been argued that the rule of navigation requires that at least she should port also, and that if the Rapid had done that the collision would have been avoided, even though the Earl of Lonsdale might have been to blame for coming across in the way in which she did. It appears, however, that the

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Rapid left more than half the river to the Earl of Lonsdale in which to pass, and their Lordships are not satisfied upon the evidence that she had not abundant space, without any danger of coming upon the shoals on the northern side of the channel, to pass in perfect safety while the Rapid pursued her course. It appears also to their Lordships that there was a proper look-out on board the Rapid, that her navigation was properly attended to, and that she had no reason to anticipate that the Earl of Lonsdale would cross or sheer to the southward. It was also argued that the Rapid ought to have eased or stopped her engines. But their Lordships, taking all the circumstances into consideration, are not of that opinion. In the first place they must bear in mind the long train of vessels behind her which she had to manage, and which rendered it extremely difficult for her to ease her engines without bringing them into a heap, as it were, one upon another. Their Lordships also remember that she had the current in her favor, which rendered the manœuvre suggested extremely difficult and perilous.

On the whole, therefore, their Lordships see no reason whatever for interfering with the judgment of the Court below, thinking that the learned Judge was perfectly well-founded upon the evidence in coming to the conclusion that the collision was caused by the Earl of Lonsdale crossing to the southern point, and thinking also that there is no evidence to support the proposition that the Rapid contributed to this collision by any want of proper skill or care on her part.

Their Lordships will therefore humbly recommend Her Majesty to affirm the decision of the Court below, and to dismiss this Appeal with costs (*a*).

(*a*). The members of the Board present were Sir James W. Colville, Sir Robert Phillimore, Sir Barnes Peacock and Sir Robert Porrett Collier.

Friday, 22nd November, 1878.

COMMODORE.—MILNE.

Where a tug was seen from a barque at anchor to cross her bow, and so suddenly to stop her speed as to allow her tow to drift upon and collide with the barque, an action by the barque against the tow, the cause of neglect in the tug not being proved, was dismissed.

JUDGMENT.—*Hon. George Okill Stuart.*

COMMODORE.

This suit comes before the Court at the instance of the owners of the Schelde, a Norwegian vessel. It appears that on the 25th of May last, in the afternoon, the Commodore, a bark of 562 tons, laden and ready for sea, was anchored off Indian Cove on the south side of the River St. Lawrence, about four miles below the city of Quebec. There lay at anchor at the same time and place other vessels, the nearest of them to the Commodore being the Dunrobin Castle, outside on the starboard bow, distant about a cable. At from four to five cables from the Commodore, more to the east and further to the north side of the river, there lay the Schelde almost astern of the Dunrobin Castle, but a little more to the south. She was steady to her anchor with her wheel a little a port which brought her bow slightly to starboard. While in these positions the Commodore had engaged the tug steamer William to tow her below the Traverse. The wind was strong from the east, the tide in the contrary direction half ebb. The tug accordingly was placed in front of the Commodore, and her steam-power was applied by means of the tow line between the two to assist in weighing the anchor of the Commodore.

The sole cause of action assigned by the Schelde, is that the Commodore after weighing anchor approached the Schelde in tow of the tug William, apparently to cross the

COMMODORE. river from the south, and that about three minutes after she was seen crossing the Schelde's bow, she came into collision and struck her jib-boom, while the bowsprit of the Schelde struck the Commodore on the starboard side, for which the Commodore was alone to blame.

The pleas are two :—1. That the collision was caused solely by the negligence of the tug which allowed the Commodore to drift on the Schelde; and, 2, by the omission of the Schelde to starboard her helm.

The hawser by which the Commodore was towed was from 40 to 50 fathoms long. After her anchor was tripped her pilot directed the tug to go ahead, intending to go directly ahead of the Dunrobin Castle, instead of which she towed under her stern at a distance of about a cable. The tug seems in this and some other particulars not to have complied with orders from the pilot of the Commodore; this pilot did not object to the course so taken by the tug, as he considered it perfectly safe, and so it may be considered, as no exception has been taken to it. After the tug had passed the stern of the Dunrobin Castle, all she had to do was to go ahead by applying the necessary steam-power, so as to take the Commodore clear of the Schelde, lying below. Instead of doing so she then relaxed her speed and the rope became slack. The Commodore canted to the tide and began to drift broadside towards the Schelde. When the tug had passed the Dunrobin Castle's stern, the chief officer of the Commodore has stated that she was about six cables above the Schelde, and before and after the Commodore had drifted about half that distance, he had called out to the tug to go ahead,—in his own language "stamping the deck with rage and bawling out to them to go ahead." He has also said that he hailed the Schelde to starboard her helm, which would have avoided the collision. Again blame is attributed to the William by the pilot of the Schelde.

No evidence has been offered to show why it was that the tug allowed the Commodore to drift upon the Schelde.

There is nothing to prove that it was an inevitable accident, and so far as the record shows to the contrary it may have either been from design or negligence. She did not act under the orders of the tow but contrary to them. There was no danger of collision until the tug relaxed her speed, and from that time there was no act done by the Commodore which contributed to the collision nor any omission on her part which led to or caused it. It by no means follows that because the Commodore was the proximate cause of damage she is to be made liable for it. Where the fault attaches to one exclusively, whether it be tug or tow, that one should be made liable, upon the principle that an innocent person should not suffer for the wrongful act of another, and where the fault attaches to both, they should be held jointly and severally liable. There exists a common obligation between them to make every reasonable effort to avoid danger and a common responsibility in case of neglect. (*a*) Were I convinced in this case that the Commodore in any degree contributed to the collision, she would have been held liable.

COMMODORE.

It is possible that she may have done so, but it is not in evidence that she did. The persons who were on board the tug have not been examined, and therefore we have no justification of their conduct. It seems to me that they should have been, and in the absence of their testimony the presumption is that the owners of the Schelde thought it would be of no use to adduce it.

On the second plea it is unnecessary that I should come to a decision, as the case is disposed of under the first. I may, however, remark that when the Commodore was driving on the Schelde it was supposed, until almost the moment of collision, that she might pass free, as thirty feet or thereabouts would have been sufficient for the purpose, and had the Schelde starboarded her helm it is not improbable that it would have been avoided, but the collision

(*a*) 14 Pickering, R. 1. Sprout vs. Hemmingway, 6 New York Legal Observer, 435 H. 369. The John Counter, I. Stuart R. 344.

COMMODORE. was so immediate after danger was apprehended that there was not time to do it, and if there was time it may have been an error but not a fault. (*a*) Nothing but gross negligence will render a vessel at anchor liable for a collision. (*b*)

Blanchet and Pentland, for the Schelde.

Ross, Stuart and Stuart, for the Commodore.

(*a*) The Propellor Genesee Chief vs. Fitzhugh. 12 How. Supreme Court, U. S.

(*b*) Pritchard's Digest Vo. Damage, 407.

Friday, 29th November, 1878.

WILLIAM.—SAMSON.

If a tug, for a stipulated price, promises to tow a vessel from one place to another, her engagement is that she will employ competent skill, with a crew and equipment reasonably adequate to the object, without a warranty of success under every difficulty.

Where a tug deviated from an order of her tow, and afterwards proved so deficient in skill as to allow the tug to collide with another vessel;—held, that the tug was liable for the consequences of the collision.

JUDGMENT.—*Hon. G. Okill Stuart.*

WILLIAM.

This suit was brought by the owners of the barque Commodore, against the tug steamer William, to be indemnified for damage said to have been caused by her negligence while towing the Commodore, on the afternoon of the 25th of May last, near Indian Cove, on the south shore of the St. Lawrence, about four miles below the city of Quebec. The owner of the William had, for a stipulated price, agreed with the master of the Commodore to tow her down the St. Lawrence from her anchorage opposite Indian Cove, and went alongside of her for that purpose. The William is a powerful tug of 85 tons and 75 horse-power. The Commodore is a barque of 562 tons, and was ready for sea. At the time the tug went alongside the Commodore, there were two vessels outside of her to the north; one was the Dunrobin Castle, on her starboard bow, and the other the Schelde, a Norwegian barque, on her starboard quarter, both at anchor. These three vessels being thus situated, the tug steamed ahead of the Commodore with a towing hawser attached, and by advancing or stopping relieved her men in weighing her anchor. After it was tripped off the ground, the pilot of the Commodore

WILLIAM. hailed the tug to go ahead; this was an order, and so understood by the master of the tug, to go straight ahead, which would have taken the Commodore to the south of the Dunrobin Castle, somewhat more than a cable's length from her, and thus she would have passed round the bow of that vessel and to the starboard of the Schelde lying nearly three cables' length below the Dunrobin Castle, and almost in a line with her. Instead of complying with this order, the master of the tug directed her helm to be ported, and that she should go ahead "full speed;" she accordingly did so, and the Commodore followed in tow also on her port helm, which brought the tug very speedily under the stern of the Dunrobin Castle. The tug continued on her port helm until beyond the Dunrobin Castle, where her tow rope became so slack that she but made progress and no more. The Commodore canted and drifted with the ebb broadside upon the Schelde, her main rigging came into contact with the jib-boom of the Schelde, and the damage was done, for which reparation is demanded.

The owner of the tug has pleaded that the pilot of the Commodore ordered her to go ahead to pass between the Dunrobin Castle and the Schelde, that with full power she proceeded to pass astern of the Dunrobin Castle, that she was impeded at first by the anchor of the Commodore not being fairly off the ground, and the ebb catching the Commodore, she was thereby driven towards the Schelde and came into collision, which might have been avoided had the Schelde starboarded her helm, which she was hailed from the tug to do, or had the Commodore cast off the hawser.

This defence, it may be observed at once, has failed on several and the most material points. It is established that the anchor of the Commodore was well up from the ground when the order for her to go ahead was given, that the pilot of the Commodore, who gave this order, intended that it was to go ahead south of the Dunrobin Castle, that it was so interpreted at the moment it was given by the

master of the tug and that with ordinary care the passage between the two vessels could have been safely accomplished.

The circumstances attending this collision were but partially disclosed in the case of the Schelde against the Commodore, in which that vessel was charged with fault, and as the cause of it. That case was dismissed because the tug William had allowed the Commodore to drift upon the Schelde, and because the latter was not to blame. In this case, however, the difficulty as to why the tug allowed the Commodore to drift upon the Schelde has been resolved, and the cause of it is to be found in testimony advanced for the tug. Three persons, who were on her deck, have been examined for the respondent, her master, secondly, a person acting under his orders who has been a pilot, but has lost his branch for misconduct, and the third, a seaman named Garneau, who were all in the round-house before the collision. The two first do not disclose the cause of the accident, but the third, perhaps unconsciously, does: He has said that he heard the master of the tug give the order, "*Full speed ahead,*" at the time she started with the Commodore in tow, and that she then went at that rate for about five minutes; that about three or four minutes after this order was given, he heard the master of the tug say to the person acting under him in the round-house, to put his wheel to go to the north, so as to pass the stern of the Dunrobin Castle, and that he would rather go astern of this ship than in front of her; he did not say why. Garneau has also said that about four minutes elapsed from the time that the tug passed the Dunrobin Castle until the collision. These computations of time seem to be accurate, and accord with other testimony:—And now I come to an important fact stated by this witness, which shows why it was that the speed of the tug became so very much reduced after she passed the Dunrobin Castle,—it was to change the tow line from the starboard to the port side of the tug. His testimony is in these terms, "nous avions passé de derriere du

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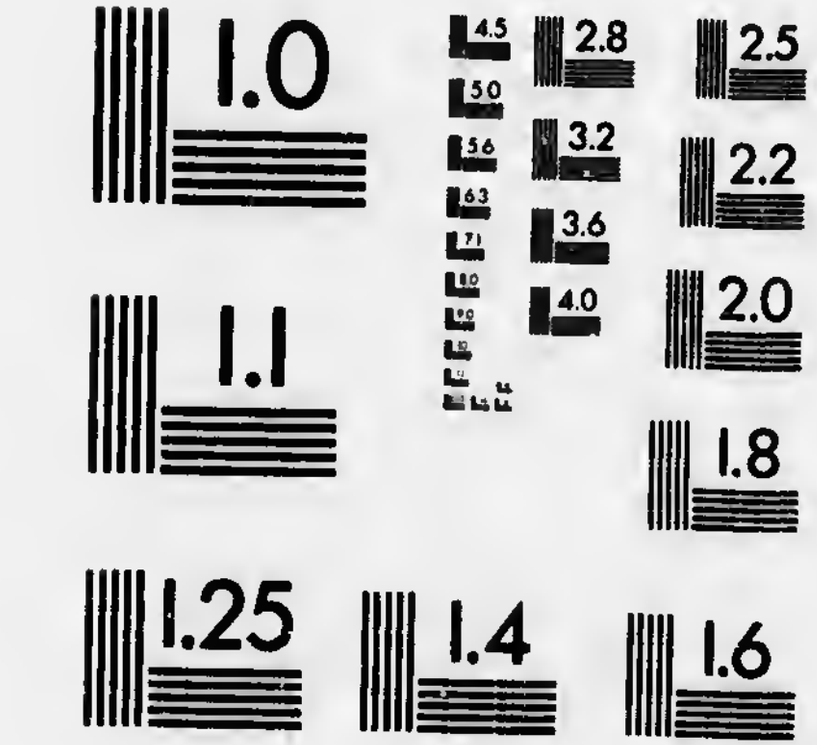

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WILLIAM. Dunrobin Castle un petit peu quand nous avons changé le grelin, c'est a dire nous l'avons accrochè au poteau a gauche, et cela pour donner une chance a notre steamboat de *virer en haut* et par la donner plus de chance au batement que nous remorquions de clairer le Schelde. Nous avons *slaché* notre vitesse une seconde pour faire cette accrochement de notre grelin." The tug, according to this witness, appears to have been repeatedly called to from the Commodore to keep her head up the river, which I take it is signified by the term *virer en haut*, in other words to starboard her helm. This was followed by forcible language from the mate of the Commodore to go ahead. Then there is this significant fact stated by the same witness. It was *at the very moment of collision the tug straightened up her course and went ahead.* The cause of the collision is thus explained. At the critical moment for a successful accomplishment of the manœuvre, which the evidence shows was quite feasible, it was discovered that the tow line had been thrown over the wrong post, and that while it was being shifted to the right one the Commodore was allowed to drift down upon the Schelde. No doubt, it may have taken but a second to remove the tow line from one post to the other, but before that there was to be removed the strain and pressure of a large ship bearing upon the tow post, and until then no number of men could change the tow line from one post to the other, which was ultimately effected by the speed of the steam tug being reduced to nearly "dead slow." The conclusion is that the tug was not in proper trim when she attempted to pass between the vessels.

The skillful aid which I have had from the nautical assessors will appear from the following answers to questions submitted by me to them.

Question. Was the anchor of the Commodore tripped, that is, clear of the ground, before the tug William commenced towing her?

Answer.—It was.

Question.—Did it continue so from that time until the moment of the collision?

Answer.—It did.

Question.—If the tug had gone ahead as directed by the pilot of the Commodore, would there have been any collision?

Answer.—There would not, as the tug and tow would have gone safely to the south of the Dunrobin Castle.

Question.—With the length of the anchor chain out when the William started, and was crossing and had crossed the stern of the Dunrobin Castle, could she have taken the Commodore in safety between the Dunrobin Castle and the Schelde, and in what way?

Answer.—She could, by the tug putting her helm a starboard the moment she was clear of the Dunrobin Castle.

Question.—It being in evidence that after the tug had passed under the stern of the Dunrobin Castle, the tow line from where it was attached to the tug was shifted, that is, from the starboard to the port post, would the doing of this have had the effect of retarding the progress of the tug with her tow after she had passed the stern of the Dunrobin Castle so as to allow her to drift upon the Schelde?

Answer.—When the tug had passed the Dunrobin Castle she continued with her helm aport instead of starboarding immediately. It appears that upon an order to starboard the helm of the tug being given, an attempt was made to shift the tow line from the starboard to the port post, which occasioned delay, and we can, in no other way, account for the tug not going ahead as directed from the Commodore, than by the delay occasioned in the shifting of the tow line, to do which it was necessary to slacken the tow rope. This delay occasioned the Commodore to drift on the Schelde.

Question.—Could any precaution have been taken on board of the tug before she began to tow the Commodore

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so as to prevent or avoid the delay referred to in the last question ?

Answer.—The tow line should have been shifted before the tug started to tow the Commodore, and this could have been foreseen as likely to be necessary. This was rendered necessary by the tug neglecting to keep her head up, by starboarding her helm so as to allow room for the Commodore to pass clear of the Schelde. If either of these precautions had been taken there would have been no accident. And we attribute the collision in question to these omissions alone.

E. D. ASHE, *Commander, R. N.*
F. GOURDEAU, *Harbor Master.*

It was argued for the defence that although the order for the tug to take the south side of the Dunrobin Castle was not obeyed, the pilot of the Commodore agreed to the change because he did not again give his order to go to the south, or a counter order. The master of the tug, without any notice to the Commodore, with a full pressure of steam on, had evidently determined not to obey it, and his precipitation in the carrying out of his determination may probably have led to the collision. The tug went across and under the stern of the Dunrobin Castle very rapidly, and a divided command then might have been attended with serious consequences. The master of the tug had previously disobeyed some orders of the pilot, and it seems to me certain that he had made up his mind to disobey this one, and what makes the matter worse, he has attempted to justify his conduct by stating in his evidence that there were vessels above so near as to prevent his going ahead of the Dunrobin Castle, which was not the case, as appears from the evidence.

But if the pilot did not approve of the change this does not mend the matter for the tug, because the passage between the two vessels, it is admitted, could have been accomplished with proper precaution. Again, it has been

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said that the Commodore might have cast off the tug; this is very questionable, and would have been a dangerous experiment, much more so than waiting for the tug to go sufficiently ahead to enable the Commodore to clear the Schelde. But a few moments more would have sufficed for this, and she would have done so were it not that the Schelde, according to the respondent's plea, neglected to starboard her helm. Another ground of defence is this neglect of the Schelde, but with it the promoter has nothing to do. If she were guilty of negligence in this particular, it would afford no justification for the conduct of the tug, nor would it relieve her from liability. The legal principle to be applied is this: "when a steamboat 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 under all circumstances and at all hazards, but she does engage that she will use her best endeavors for that purpose, and will bring to the task competent skill and such a crew, tackle and equipment, as are reasonably to be expected in a vessel of her class." (*a*) The William is a powerful tug. She had on a full head of steam and was quite equal to do the work which her owner undertook to do, but, unfortunately, competent skill for the task was wanting, and she must be made liable for the absence of it.

The judgment maintains the claim, to be settled upon the usual reference, with costs.

Ross, Stuart and Stuart, for Promoters.
William Cook, for Respondents.

(*a*) The Minnehaha, 15 Moore, P. C. C. p. 152.

Friday, 24th January, 1879.

CITY OF MANITOWOC.—HIGGIE.

Where an assignment was made by salvors of a sum due to them for salvage; held, that their lien on the ship was personal and inalienable, and that it did not vest in their assignees so as to enable the latter to proceed *in rem* against the ship. Also, that where an agent for a foreign vessel has made advances and disbursements for her use in account with her owner, and such vessel after sailing on her voyage is brought back to the port from which she sailed a wreck, the agent cannot treat his claim as one for "necessaries," under the Vice-Admiralty Courts Act, 1863.

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This case was submitted to the Court on behalf of the promoters, Denis and James Maguire, co-partners at Quebec, under the firm of D. & J. Maguire, after a second default, with affidavits in support of a motion for the *primum decretum* pronouncing for the amount demanded and costs. Doubts were then expressed by the Court as to its having jurisdiction in the matter, and judgment was suspended until the promoters were heard.

F. A. Andrews, Q. C., for promoters.

The present suit is *in rem* founded upon the maritime liens upon the vessel, for the debts which it is sought to recover by the action, viz.:

1. Salvage of the ship;
2. Necessaries supplied to the vessel in this Province, her owners being domiciled in the United States;
3. A claim for money paid for seamen's wages;
4. For money paid for pilotage, and,
5. For moneys disbursed for towages.

For all these matters, the Vice-Admiralty Court here has jurisdiction under the provisions of Act 26 Vic., ch. 24, sec. 10. *Maude & Pollock*, 487.—For such debts, those performing the services have, both by the common law of England

and by the Admiralty law, as also by the law of this Province, a *lien* upon the property in respect of which they are rendered.

But the maritime *lien* enforced by process in the Admiralty, and the lien given by the Common law, and that known to our own law, are not the same, this being a possessory *lien*. *Coote* Adm. Prac. page 16.—The maritime *lien* is the tacit hypothec of the Civil law, the *thing* being the defendant and not the owner of it. *Coote*, page 16.—In the case of a debt, its operation as a maritime *lien* depends upon the services of the creditor and not upon a contract.

By the common law of England, as well as by ours, the *lien* also arises from the nature of the services performed, but it continues only so long as the party executing them retains possession of the thing affected for the satisfaction of the debt, and in the ordinary courts, the action is against the owner, accompanied, it may be, by process of attachment of the thing to secure the creditor's rights or privileges over it.

Eng. L. & E. R., vol. 22, page 72.—In the Admiralty Court the suit is *in rem*, which is the legal means to perfect the right of which the maritime *lien* is the foundation.

Kay, vol. 2, page 1091.—"The maritime *lien* is not lost as the common law *lien* would be by a voluntary or extra judicial sale of the thing."

Williams & Bruce, page 149 —"Nor does it arise from the claimant's possession of the thing. The maritime *lien* exists independently of any possession."

The maritime *lien* then, in this case, for the debts claimed by the present action by the promoters no doubt existed at the time of the different services performed.

Two questions now present themselves :—

1. Has that maritime lien been lost?

2. Could it be assigned to the promoters?

As to the first question, has the maritime lien been lost? *Coote*, page 16.—The *lien* may be extinguished in various ways.

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By the payment of the debt *by* or *on behalf* of the owner of the *res*.

By bail being given in the Court of Admiralty to an action instituted to enforce it.

By the creditor electing to take, and taking, a security instead of payment in cash.

By the sale of the *thing* made under authority of a Court of Admiralty.

By the loss or destruction of the *thing*.

By want of reasonable diligence on the part of the creditor in enforcing the maritime *lien* while the *thing* was capable of satisfying it.

None of these causes of extinguishment of the *lien* can have any application to the present case.

The only one which might be considered as bearing upon it, is that with reference to the payment of the debt, *by* or *on behalf of the owner of the res*, but no such payment ever took place, but only an assignment of the debt of salvage by the salvors to the promoters on value being given by them.

And this gives rise to the second question as to whether the salvors could assign their debt and maritime *lien* for it to the promoters, so as to enable them to institute the present action in their own name?

Coote, page 19. — It is stated in the text, that a *lien is inalienable* except in the case of bottomry; he adds "it cannot be assigned or transferred to another person so as to give him a right of action *in rem* as assignee."

Now is this legal proposition well founded in law?

The cases quoted by the writer do not bear out the doctrine, and the principle enunciated, it is submitted, is not in conformity to reason, although admitted in the common law of England.

Daniel, on Neg. Instruments, page 1.—It is a rule of the common law of England, that a *chose in action*, by which is meant a claim which the holder would be driven to his action at law to receive, could not be assigned.

Parsons' Merc. Law, p. 407.—By the common law of England, if the contract be assigned, the action must be brought in the name of the assignor, and so in the State of New York, until the code, which provides that all actions are to be brought by the real parties in interest, which is the principle of our own law.

3 *Blk.* 50.—This principle of the common law, and the administration of a distinct system of jurisprudence by distinct tribunals of law and of equity, is peculiar to England and the colonies which derive their origin from England, and is not known to any other country.

There is no such principle in the civil law as that a *chose in action* or a *lien* is inalienable, and that it cannot be assigned or transferred to another person so as to give him a right of action *in rem* as assignee.

And if it can be assigned, then the action must be in the party to whom it is transferred.

Coote, p. 19.—"Not only is the *lien* extinguished by the payment of the debt by or on behalf of the owner of the *res*, but also when the payment is made by another person without the direction or privity of the owner, *e. g.*, where a mortgagee has paid seamen their wages in order to save the vessel upon which he has security from being wasted by their action, the *lien* is equally extinguished, and cannot be revived in the person of the payee, who, accordingly, has no right of action in the Court of Admiralty in respect of his advances."

The writer cites no decisions in support of this latter assertion. And we find that where a ship owner has paid a sum of money in order to release the ship and cargo from a claim for salvage, that he has a *lien* on the cargo for the proportion of those expenses payable to him by the owners of the goods. *Pritchard*, vol. 2, page 817, No. 791.

All Courts of Admiralty in Europe are governed by the civil law, and, therefore, the party in England may libel there for execution of a sentence in them. In the common law courts of England, though a bond, being a *chose in*

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action, cannot be assigned so as to enable the assignee to sue in his own name, yet in equity a bond is assignable for a valuable consideration paid; and the assignee alone becomes entitled to the money, and in the common law courts, several matters are now assignable by acts of Parliament, which were not so in their own nature, promissory notes, bills of exchange, bankrupt effects, &c.

Blatchford & Howland's Reports, 315, The Boston.—An American writer, Judge Betts, says: "A cardinal principle in which the practice of Admiralty Courts differ from that of Courts of common law, is that parties prosecute and defend in the civil law tribunals upon their rights as existing at the institution of the action, without regard to the state of parties when the right of action or defense accrued, rights of action as *choses in action* as they are termed at law, *vesting* in their assignee, *when properly transferred*, all the privileges and remedies possessed by their assignors, and, accordingly, the party in whom a debt is legally vested sues for it in his own name as if it were a chattel;" and in the case before him he adds (page 324): "The question now arises, whether Morrison has, as assignee, the privilege of a material man for that portion of the debt which arose from advances made for repairs and necessaries furnished to the vessel on her preceding voyage, so that he can enforce that privilege in the Admiralty Court? If the right of *lien* was a continuing one in his assignor, I perceive no objection to its continuance in the libellant who took the assignment of the debt for a full consideration at the express instance of the master, and would accordingly be entitled to the legal remedies for its recovery which were possessed by the original creditor."

The cases cited by Coote, as justifying the proposition that a *lien* is inalienable except in the case of bottomry, so as to give to another person a right of action *in rem* as assignees, are:—

The *New Eagle*, 4 Notes of Cases, p. 427.
The *Janet Wilson*, 1 Swabey, p. 262.
The *Louisa*, 6 Notes of Cases, p. 532.

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The Louisa, as reported in 3 *W. Rob.* 100, also 2 *Rob.* 22, and 3 *Rob.* 99, is, that when a person acting as the agent of the salvors has advanced money to them in anticipation of salvage, the court will not allow him to enforce his claim for reimbursement against the property in the hands of the court. The Judge said: "The claim is for the payment of a debt contracted solely upon the personal security of the salvors, and to allow this might be highly detrimental to the interests of the salvors themselves; it cannot be allowed to be converted into a *lien* upon the property in the hands of this court."

The Janet Wilson, 1 *Swabey*, 362:—This case was, where W., a ship owner, paid certain wages and other necessary disbursements after a bottomry bond had been given on the ship; the ship was sold at the suit of the bond holder, and W. applied to be reimbursed. The above payments to be made out of the proceeds in the registry, which, if W.'s application had been granted, would not have been sufficient to meet the bond. *Held*, that for such payment made without application to, and leave from the Court, W. was not entitled to be reimbursed. Dr. Lushington said: "I have great doubt whether, where wages have been earned prior to the giving of a bottomry bond, a mariner has a right to be paid before the bond holder; that depends on circumstances; it might destroy the very purpose for which bottomry bonds are granted, and would be exceedingly prejudicial to the maritime interests of the country."

13 Q. B., 167. Briggs *vs.* Merchant Traders, &c. The plaintiff had obtained possession of the ship and cargo on entering into recognizances as a security for the whole salvage. The vessel then sailed, and was totally lost with the cargo on board. Plaintiff was obliged to pay the amount of his recognizance. Held, in an action against the underwriters, that plaintiff had a *lien* on the cargo for that rateable portion.

13 Jur., 787. A ship owner who has paid the salvage to regain possession of the ship, has a *lien* upon the goods for the amount of the contribution.

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18 L. J. (Q. B.), 178.—It was argued that there might be a *lien* in *equity* in respect of the money paid by the plaintiff to the salvors, but that *at law* a right of *lien is personal. By the Court;*—The plaintiff, who paid the salvage, has a *lien.*

Rob. 288, The John.—In the Instance Court, warrants against the proceeds on the part of material men were sustained against the general creditors.

Williams and Bruce, Adm. Practice, 52.—At *law* a bottomry contract is regarded as a mere *chose in action,* and is not assignable. But the Admiralty recognizes, though it discourages, the transfer of bottomry bonds.

There is no doubt that by the Roman law, a subrogation of the creditor's privileges and hypothecs could be given to a party paying the debt.

Per curiam.—The City of Manitowoc is a foreign vessel. She is owned in the United States, and after leaving the port of Quebec on a voyage to Liverpool, was, in the month of August last, wrecked on the west end of the Island of Anticosti. While there, a written agreement was made at Quebec, between Messrs. D. & J. Maguire and three persons of the name of Angers, the former acting in the matter as agents of Homer Glass, her owner, whereby the Angers agreed to bring the City of Manitowoc to a wharf at Quebec, for the sum of $2,000, but contingent upon their successfully doing so, and for 50 per cent. on her materials saved. Success having attended the exertions of the salvors, she was brought to Quebec, and on the 8th of October last, a notarial deed of assignment was made, whereby the Angers, for an alleged sum of $2,000, assigned to D. & J. Maguire the $2,000 payable to them for salvage services, and thereby declared that they made over to them also their *lien* for this amount upon the vessel. D. & J. Maguire now claim this, and other sums paid by them for pilotage, ropes, provisions, seamen's wages, transport of materials, &c.

The motion for the decree was made by Mr. *F. A. Andrews, Q. C.*, and in support of it he argued that

the salvors could assign their claim for a valuable consideration, and that the assignment carried with it a *lien* upon the vessel, so as to give this Court jurisdiction *in rem*.

The novelty attending this demand for a judgment against the City of Manitowoc, has induced this Court to call the attention of the party interested, to the question of jurisdiction.

The commission of the Judge of this Court (*a*), empowers him to hear and determine causes according to the Civil and Maritime law of the High Court of Admiralty of England. In the administration of that law I am not aware that a third party has ever been allowed to recover against any vessel, or to rank upon the proceeds of a sale of any ship upon an assignment of a salvage claim, or of any other claims of the nature of those stated in the account of the promoters. No case has been cited to prove that the High Court of Admiralty has sanctioned a proceeding *in rem* at the instance of an assignee in these or similar cases. On the contrary, it holds that a *lien* may be extinguished in various ways, as by payment of the debt by or on behalf of the owners of the *res*, or by a payment made without the direction or privity of the owner (*b*). It was decided by that Court in the case of the Louisa, that a party advancing sums of money to salvors, has no claim in the Admiralty Court against the sum awarded to them in respect of such salvage (*c*). In the same case, upon a second application (*d*), Dr. Lushington said: "Upon a former occasion I decided that I had no authority to direct such advances to be deducted from the general fund in the hands of the Court, and I see no reason to depart from that opinion. The debt was contracted solely upon the personal security of the salvors. By allowing the conversion of that claim into a *lien* upon the property in the hands of the Court, I should, I conceive, not only be exceeding my proper jurisdiction, but, I should, in so doing, establish a precedent that might

(*a* 2 Stuart's V. A. R. 378.
(*b*) Coote's Ad. Pr. 19.
(*c*) 6 Notes of Cases, 531-2
(*d*) 3 W. Rob. 100-1.

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be productive of serious consequences hereafter, in encouraging advances of money that would be highly detrimental to the interests of salvors themselves."

The same doctrine has been applied in the United States, both in reference to salvage and seamen's wages (*a*). In the case of Patchin *v.* The Steamboat A. D. Patchin (*b*), decided in the District Court of the United States, for the northern district of New York, it was held that an assignment by a mariner of his wages confers upon his assignee no right to maintain a suit *in rem* against the vessel, for the recovery of the wages assigned; that "the right of the mariner to proceed against the ship *in specie* is conferred upon him for his own exclusive benefit. It arises by implication, and exists independently of possession. Its object is the more certainly to secure to him the hard-earned fruits of his perilous and useful services. When, therefore, his wages are paid, *no matter by whom*, the design of the privilege is answered; and, to say the least, it is very questionable whether he would be benefited by the capacity to transfer it to another, for, if this power would sometimes enable him to obtain immediate payment, it would also expose him to imposition through his credulity and proverbial improvidence;" and, again, "the petitioner cannot justly complain of being denied the privilege of maintaining a suit *in rem* in the Admiralty. The ordinary forms of remedy in favor of an assignee of a *chose in action* are open to him in common with all others."

The same reasons apply in the case of salvage, as may be seen in the case of the bark George Nicholson (*c*), decided in Admiralty in the eastern district of Louisiana, wherein it was held that an assignment of a claim for salvage divests the *lien* originally existing in favor of the salvors, and confers no right on the assignee to claim reimbursement in a Court of Admiralty, and, also, that a *lien* for towage was also divested by an assignment of the claim.

(*a*) 1 Parsons on Shipping and Adm., 186.
(*b*) 12 Law Rep. 21.
(*c*) Newberry's Rep. 449.

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I have, consequently, come to the conclusion that the *lien* of the salvors of the City of Manitowoc was personal and inalienable, and did not vest in the promoters by force of the assignment, and the same with respect to the other claims against her, paid by them. But it is said, that a portion of the claims (that is apart from the salvage) is for necessaries supplied to the vessel; and supplementary affidavits have been filed to show that they were so, and these I have carefully considered. To give these claims that character under the Vice-Admiralty Courts' Act, 1863, which gives this Court jurisdiction over claims for *necessaries* (*a*), it will be essential to consider how and when it was that D. & J. Maguire made the advances in money or otherwise to supply the wants of the City of Manitowoc. She made a voyage to and from Quebec in 1877, and, on that voyage, their advances amounted $1,145. Before she sailed from Quebec in 1878 they were reduced to $738, but the account was so far increased that at her departure it amounted to $1,372.55. This sum, including the old amount and a new one, was debited to the owner of the vessel in 1878, to secure which there was given a draft of the master on the receivers of her cargo at Liverpool, payable to the order of D. & J. Maguire for £280 sterling, about the equivalent of the debt. She left Quebec in August, 1878, and was brought back to Quebec a wreck, where she now is. Under these circumstances, can the money advanced on articles furnished, now assume the nature of *necessaries* so as to constitute a valid claim for them under the statute referred to?

The Admiralty Court Act, 1861, 24 Vic., ch. 10, which preceded the Vice-Admiralty Courts' Act, 1863, conferred jurisdiction on the High Court of Admiralty of England over claims for necessaries, and in giving an opinion as to whether the supplies furnished to the City of Manitowoc were such, I shall adopt the language of the High Court of Admiralty as to the sense of the term *necessaries*. In

(*a*) 2 Stuart's V. A. R. 255.

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the case of the Comtesse Fregeville (*a*), where the interpretation of the statute in this particular became necessary under the Admiralty Court Act, 1861, Dr. Lushington, in rendering judgment, said that the term *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 contra-distinguished from the necessaries of the ship. He also said that in that case there was, in fact, an account between the ship owner and agent; all the business was done by the plaintiffs' agents, the moneys were so advanced and so received, and the moneys received were sufficient to pay all necessary expenses; and, he added: "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 consider the statute."

In this case it appears that the City of Manitowoc was allowed to leave on two voyages without any claim for necessaries supplied by the Maguires; they were in the past and were not required for the future, when the wrecked vessel was brought back to this port. The debt was contracted upon the credit of the owner, and to him D. & J. Maguire must look for payment. In coming to this conclusion, I by no means say that a loan to pay for necessaries indispensable for a ship cannot be recovered in this Court by the lender. On the contrary, it has been held that where a shipwright repaired a vessel and refused to let her out of dock until the repairs were paid for, a person who paid his bill could recover in the Admiralty as for necessaries. (*b*).

(*a*) Lush. 333.
(*b*) L. R. Ad. & Ec. Vol. 3, p. 37. The Albert Crosby.

I do not regret that this Court is compelled to decline jurisdiction over the assignment of salvage, and the other matters for which this suit is brought, not only because its efficiency would be impaired if it had to determine the validity of assignments and disputed accounts, subjects for municipal law and regulation, and involving delay, but because, in the case of assignments of claims such as those in question, the assignors, the mariner and the salvor, may be subject to gross injustice where their wants compel them to accept a tythe of their due, for a claim admitting of no question. I express no opinion on the merits of this case. As it is not opposed, I take it for granted that the claims of the promoters are well founded, and if they are, they have their remedy before the ordinary tribunals of the country to which they can apply for relief.

The judgment is that the promoters take nothing by their motion.

Friday, 3rd October, 1879.

S. S. CYBELE.—McMILLAN.

Where a steamship overtook and sank a schooner Held:—
1. That the schooner was not to blame for not showing a stern light.
2. That the steamship was in fault for not keeping out of the way of the schooner. *Quære* as to the change of sailing regulations in the matter of a stern light.

This was a cause of damage promoted by Jean François Glasson, owner of the Alma Maria, a two-masted schooner of 27 tons, and in length forty feet, against the Cybele, a steamship of 1277 tons and 319 feet long.

JUDGMENT.—*Hon. G. O. Stuart.*

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The schooner Alma Maria was on a westerly course up the St. Lawrence, in about mid-stream, on the evening of the 29th September, 1878, and, at about 20 minutes past 7 o'clock, she was approaching the *Islets de Bellechasse*. Joseph and Charles Picard, two brothers, were navigating her; the former was master and at the helm, the latter forward on the look-out; their father was a passenger and there were no others on board. The evening was clear and starlight, the wind was light from the S.W. She had her four sails set and was making with wind and tide about three knots an hour. Joseph Picard then observed a white light astern; about ten minutes afterwards he saw a red light which convinced him that a steam vessel was overtaking the schooner, but on a course which would avoid her. Shortly after he saw her green light, and then that she was overtaking the schooner so rapidly that he immediately exclaimed: "*she will sink us!*" Having scarcely made this observation, the starboard bow of the Cybele struck the Alma Maria on her port quarter and cut

her into two pieces; the three persons on board were picked out of the water by a boat from the steamship which proceeded on her voyage with them to Quebec. The charge made against the Cybele is that she violated the 17th rule that "every vessel overtaking any other vessel shall keep out of the way of the said last mentioned vessel," and that her speed 10 to 11½ knots was too rapid; which charge is met by the defence that her speed was reasonable, nine knots or nine and a half, and that the Alma Maria carried no lights.

As respects the proper speed for the Cybele, this must altogether depend upon how near she was to the schooner before it could be abated, and in relation to the latter it is to be observed that she was all the while making over three knots, which would reduce any impetuosity in the steamship towards her by so much.

With reference to the schooner's lights, the look-out of the steamship, John Macdonald, has sworn that he was looking over her fore-castle until within a yard of the schooner, that he then saw her green and red lights on her cabin floor, that one of the three persons on board had a cup in one hand and in another a bottle. This evidence may be dispensed with at once as untrue, particularly as the side lights were in their places at the time he says he saw them on the cabin floor, and were there found upon the schooner's wreck. This, and some other attempts to fasten impropriety of conduct on the persons in the schooner, have been fruitless, and they were abandoned at the argument. But the not showing of a *white light* from the schooner's stern is admitted, and was relied upon by the respondent as a proof of negligence, such as should preclude a recovery for her loss. It is true there was no light shown from the stern of the schooner, and an attempt has been made by the respondent to prove that it was customary under such circumstances to show a white light, but the evidence as to any practice of the kind goes as much the one way as the other. Questions were put to one of the

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Picards to draw admissions from him, that had he shown a white light the collision would have been prevented, but anything he has said has been qualified by the statement that there was no time to show a white light after he saw the steamship's green light,—and it may be said also such a result would necessarily have depended upon a proper look-out and the vigilance of the officers or pilot in charge of the steamship. It was argued that the showing of a white light as stated was necessary under the 20th sailing rule, which provides that "nothing in the regulations to prevent collisions at sea will exonerate any ship from the consequences of any neglect to carry lights or signals, or the neglect of any precaution required by the ordinary practice of seamen or by the special circumstances of the case." But the answer to this is obvious. The regulations specify the lights to be used and make no mention of a white light for the stern of a vessel ahead of another. They do prescribe a white light for a vessel riding at anchor, and had the Alma Maria exhibited one, and a collision had occurred, she might have had no remedy. Her course was but slow and had she been taken for a vessel at anchor she might have been struck while moving to a point for collision.

The question is one of law upon which the Court has no discretion to exercise. The established regulations say what lights shall be used, and the Court cannot add to the number. It was so held in the case of the Earl Spencer (*a*), not long since determined in the High Court of Admiralty. There Sir Robert Phillimore, in rendering the judgment of that Court, said, with reference to a small schooner, the Merlin, which had been overtaken and run down by the Earl Spencer, a steamship, the former having shown no light from her stern: "I must consider this question with "reference to the particular case and the general law. First "as to the particular case. The Elder Brethren were careful "to draw my attention to the fact that the crew of the little "schooner were only four in number. That the master was

(*a*) 4 L. R., A. & E. 434.

"engaged in steering and the three others in making sail, "and, in their opinion, there was not time or opportunity to "have exhibited a light over the stern. In this opinion I "agree, but I am afraid I must also consider what the gen- "eral law is. That law is to be found now exclusively in "the regulations for preventing collisions at sea. The regu- "lations carefully prescribe the occasions upon which lights "are to be carried, and the character and positions of those "lights. It is not denied that no express provision is to be "found for the exhibition of a light to an overtaking vessel. "The second article of the regulation rules, that the lights "mentioned in certain following articles, and no others, shall "be carried in all weathers, from sunset to sunrise; and it is "clear that the case of an overtaking vessel was in the con- "templation of the framers of the regulations; for article 17 "says: 'every vessel overtaking any other vessel, shall keep "out of the way of said last mentioned vessel,' and if it be "ever the duty of the vessel overtaken to exhibit a stern "light, here is surely the place where it would have been "mentioned. It is no secret, that great nautical authorities "are divided in their opinion on the subject of the advantage "or disadvantage of exhibiting a stern light.—It may be "proper that a regulation to this effect should be made. I "do not offer an opinion on the point * * * I am of "opinion that the exhibition of a stern light is not obligatory "on the vessel ahead." The same opinion I now express in this case, and shall pass on to the other questions which arise, observing, in the meantime, that by a recent order of Her Majesty in Council, the sailing regulations adverted to by the Judge of the High Court of Admiralty, are to undergo changes, from and after the first day of September next, one of which will impose on the vessel ahead, when being overtaken by another, an obligation to show from her stern a white or flare up light, so that "the advantage or disadvantage of exhibiting a stern light" will now be tested in foreign and in Canadian waters, should in the latter case the new regulations be made to apply.

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Now, the main question is: Was it possible for the Cybele to keep out of the way of the Alma Maria while overtaking her? Her speed was quite ten knots an hour, but, as has been observed, the schooner's rate of sailing was three, which would leave but a difference of seven, by which the steamship gained upon her. The pilot in charge of the steamship, at the time, remarked the appearance of the night, and has said that a schooner could be seen at the distance of half a mile. Macdonald, the 'look-out' of the steamship, saw the schooner five or six minutes before the collision like a black spot "right a head," not larger than his head, the distance he cannot say; he sang out to the bridge "something right ahead," the response to which was "all right" or "aye, aye." Afterwards, he saw the sails, thought it was a *bateau* and sang out "*bateau* close ahead;" he then heard the telegraph bell to "stop her," and after that to reverse. The pilot could not have been the one who responded to the first hail of the 'look-out,' as he first heard a cry from the watch forward reporting a small vessel, and then he immediately ordered the helm 'hard a-port,' and before this was done a minute elapsed. A free passenger, a pilot on board, named Labrecque, then came from below upon the bridge, seized the telegraph and signaled to 'stop her,' and immediately after 'full speed astern;' the wheel was then scarcely *hard a-port* and the schooner was struck. The testimony amounts to this, that an object was descried from the Cybele *right ahead*, which was not looked after until it assumed the proportions of a schooner with all sails set, at a distance of about half a mile. At that moment, if not before, it became the duty of the steamship to slacken her speed, stop, or reverse full speed astern. Steamships are understood to possess the power of being brought to a standstill within the distance of their own length, and had this course been adopted at the proper time there would have been no collision.

No satisfactory explanation has been given why the steamship ported her helm. She certainly seems to have

done so more from impulse than reflection. Stress at the argument was laid upon the fact, that it is alleged in the libel that the people on the schooner hailed to the steamer to go to the north. Although they did so, it had no effect, as they were not heard. But it was quite natural for them to do so, because the steamship was following in the wake of the schooner, in the language of the witnesses *dans les mêmes eaux*. Before she shewed her green light, she was inclined to the north, and if she had kept so she would not have touched the schooner. In fact, had she either ported or starboarded her helm, the broad channel of the St. Lawrence admitted of her going to the north or south in perfect safety if done in proper time. If Macdonald's statement be true that six minutes before the collision the schooner was seen directly ahead, a very small object, porting or starboarding might have answered the purpose; afterwards, when that object was magnified into a schooner, which could have been seen half a mile off, then starboarding or porting might still have served as well. The safest course was that which has been stated; she should have slackened her speed until the schooner and her course were distinctly discerned. This, ordinary prudence required, and when done, keeping out of the way of the schooner would have been a very simple matter. The decree is for the damage sustained from the collision, and for costs.

Hon. A. R. Angers, Q. C., and D. Montambault, for the schooner.

William Cook, for the steamship.

Friday, 21st November, 1879.

ATTILA.—CLIFT.

The maritime law recognizes no fixed rate or speed for vessels sailing through fog.

Where a vessel is in a fog she should be under sufficient command to avoid all reasonable chance of collision.

Where a collision occurred in a fog between two sailing vessels, one lying to and the other running free, and the fog was so dense that their lights, respectively, could be seen but within from 15 to 20 seconds before collision; held, that the speed of the vessel running free was too great.

The Court will not receive as evidence depositions of persons professing to be skilled in nautical affairs as to their opinion upon any case.

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This was an action promoted by Sir Hugh Allan and others, owners of the iron sailing ship Pomona, to recover the damages sustained by their vessel, through a collision which occurred in the Gulf of St. Lawrence.

JUDGMENT.—*Hon. G. Okill Stuart.*

This is a suit brought by the owners of the Pomona, Isbister master, a sailing ship of 1,199 tons, against the Attila, likewise a sailing ship of 1,146 tons, and is attended with more than usual interest. It brings under notice a collision, and the speed with which sailing vessels may run through fog in the fair way from the Atlantic Ocean between Cape Ray and St. Paul's Island into the Gulf, and thence into the broad estuary of the River St. Lawrence. The question is one of vital importance, as it affects very materially the safety of life and property in the navigation of these waters.

Between the hours of one and two in the afternoon of the 24th May last, the Pomona was about 50 miles to the

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S. E. of St. Paul's, on a voyage from Dundee to Montreal. She was sailing before the wind, her course N. W. ½ N. until midnight, and in a fog approaching the entrance of the Gulf between St. Paul's and Cape Ray. The master, fearful of collision with other vessels, then had her brought to the wind on a course E. with the wind from the S. S. E. She thus continued headreaching, as it has been termed, and making from one and a half to two knots an hour until between two and three o'clock on the morning of the 25th, when there suddenly appeared to the persons in charge of her a red light bearing on her beam from a distance of fifty to one hundred yards. This was the red light of the Attila. The helm of the Pomona was immediately starboarded, but before it could act, and within twenty seconds from the moment the red light was seen from the Pomona, the stem of the Attila came into collision with the bow of the Pomona, and caused very considerable damage. On the other hand, the Attila, it appears, was from the 19th to the 25th of May in a fog; she was on a voyage from Savona in Italy to Quebec. She was running before the wind from S. S. E., when suddenly a green bright light, which was that of the Pomona, was seen at a distance of about ninety or a hundred feet. A collision appeared to the persons on board the Attila to be then certain, and that all to be done was to ease the impending blow by porting her helm. This was done, but within ten or twelve seconds from the seeing of the green light, the Pomona was struck by the Attila.

The plea to this suit avers that the lights of the Pomona were bad, that she did not sound her fog-horn and had no look-out; but these averments may be dismissed from consideration, as the contrary is proved, and they have not been insisted on. It also alleges, that upon the starboard tack the Pomona was so placed upon the track of vessels bound inwards, that she could neither stay or wear, and that the collision was caused by her being so.

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It is quite true that there are a greater number of vessels bound inwards than outwards at the end of May, but it is also true that vessels from the lower ports, as well as vessels bound outwards at that season, sail there on the same track as the Pomona did, and it would certainly be very extraordinary if a sailing vessel, approaching the coast of St. Paul's, were to be held in the wrong for lying to in a fog to avoid collision or running ashore. In this respect it appears that a very salutary caution had been impressed on the master of the Pomona by her owners, and the Court is of opinion that in obeying his instructions he acted wisely.

Now, it was said in defence that should the Court be of opinion, as it now is, that the matter pleaded is not so proved as to fasten blame on the Pomona, the case is an inevitable accident, as the persons in charge of the Attila acted with ordinary care, caution and maritime skill. This ground would imply innocence of offence on each side, so that the loss sustained from this collision would fall on each one sustaining it. This, it seems to me, should have been specially pleaded, as it is rather inconsistent to charge a master of a ship with gross negligence, and, failing to prove it, then to turn round and say that he acted with care, caution and maritime skill, and that by him and the party complained against, a collision could not have been avoided. To support this defence it is said that the speed of the Attila was moderate, that it did not exceed six knots an hour, that this rate was customary during fogs at the entrance of the Gulf, and that there was no time to avoid the collision after the Pomona's light was seen. Had a special plea been filed with such averments and objected to, they would have been expunged by an order of this Court. As the matter stands, a small volume of nearly one hundred pages of illegal testimony has been adduced to establish this defence, to which, however, objections were taken by counsel and reserved. No less than nine persons, masters of vessels, have been examined to prove that six or

seven knots an hour for sailing before the wind, in the locality where the collision occurred, was right and proper in fog and was customary. These persons have no personal knowledge of the collision, and a hypothetical case is put to them so as to cover this. The objections to this evidence now come before me for the first time, and I cannot do better than apply to it the language used by the Judge of the High Court of Admiralty in a case wherein an attempt was made to introduce similar testimony. "The inevitable consequence would be, if received, that the Court would be inundated with the opinions of nautical men on the one side, and opposite opinions on the other, to the great expense of suitors, and a great delay in the hearing of the cause and with no benefit whatever. Therefore, I disclaim paying any attention whatever to the opinions which have been referred to and maintain the objections to them." (*a*)

The question then comes to be under the legitimate testimony—was the speed of the Attila consistent with the safety of other vessels? This is no doubt to be measured by the canvas which she carried. The sails which it is admitted she had were a reefed foresail, foretopsails, upper and lower, foretopmast staysail, main topsails, upper and lower, main topgallantsail, main royal and mizzen topsails, upper and lower, ten sails in all. The testimony for the Pomona fixes the speed of the Attila at from seven to ten knots an hour, and that for the Attila, at six or six and a half.

This Court is not competent to measure the speed of a vessel by the quantity of sail she may carry; nor will it say whether eight knots, the medium between the extremes stated, is a proper rate under any circumstances. Courts of Admiralty recognize no fixed rate; the question is one of law and fact, and they are governed by the circumstances of the particular case. In this instance there are

(*a*) The Gazelle 1. W. Rob. 474. Spinks E. and A. R. 184. 4 L. R. A. & E. 432.

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facts not disputed, and upon which the Court can judge whether the speed of the Attila was too great for the occasion or not. It is in evidence that the fog was so dense that an object could not be seen on board the Attila at a distance beyond one-half her length; her register shows her length to be 185 feet. Her people have said that she had a good look-out, and that the green bright light of the Pomona could be, and was only seen at a distance of from ninety to one hundred feet, and that this distance was traversed by her in ten seconds. On the other hand, the people of the Pomona, who also had a good look-out, have said that the red light of the Attila was seen, and could be seen but at a distance of from fifty to one hundred yards, and that she passed over this space within from fifteen to twenty seconds. On each side it is admitted that from the moment each vessel saw the other, collision was unavoidable. The testimony being coincident on these points, it must be conceded that twenty seconds is but a short allowance for any vessel to get out of the way of another running before the wind, and ten seconds equally short for the latter to avoid the former directly ahead of her. The concourse of vessels passing from the Atlantic Ocean into the Gulf, in the month of May, between Cape Ray and St. Paul's, is no doubt great. Within the Gulf it is still greater, and outside or inside or further west in the great estuary of the St. Lawrence, where gulf steamers and small craft are continually in motion on opposite courses, caution is a great necessity. The law imposes a heavier responsibility on a vessel running free than on one which is not. In fog or out of fog she must keep out of the way of other vessels, and must avoid a vessel close hauled. To relieve the Attila from liability for this collision, it is not enough that it should be shewn that there was no way of avoiding it at the moment it happened. For this purpose more is required; it must be satisfactorily proved that previous measures should not have been taken to have rendered it less probable. Instead of an object ahead, almost stationary as the Pomona was, there might have been a steamship

approaching the Attila at an equal rate of sailing, the combined speed of the two being, perhaps, sixteen knots an hour. Collision, in such a case, would have been simultaneous with the seeing of the vessels from one another, and the consequences may be imagined. Suppose we take another case,—the line of Allan vessels to which the Pomona belongs. The dimensions of the steamships are from 1000 to 4000 tons. At times, some of these have as many as five hundred souls on board; they daily meet their own or other steamships of equal dimensions. Should all run through fog, each at the speed of the Attila, the result might be the same as in the case of the Elphinstone, recently decided in this Court. She came into collision in the River St. Lawrence with the Redewater, and each instantly sank. They were both large iron steamers; they met with disaster from want of care when there was no fog; how much greater is the responsibility when there is.

No less but in fact a far heavier and more serious duty rests with this Court. Should the law be unduly relaxed, or the international sailing rules not strictly enforced, a bad precedent might be followed with very disastrous results. Should it establish a rate for sailing in a fog, without regard to the attendant facts, it would but afford a premium for recklessness and consequent disaster. This Court exercises a very extensive jurisdiction as well foreign as domestic. It is co-extensive with that of the High Court of Admiralty in cases of collision and mariners' contracts, no matter in what quarter of the world, whether on inland waters or on the ocean, the cause of action may arise. Whether it arises on the waters of Lakes Superior, Michigan, Erie, Huron or Ontario, the ship, when within the Province of Quebec, becomes amenable to this jurisdiction. With a sense of the responsibility imposed upon the Court, and I hope not otherwise than with a due regard to the safety of life and property upon the navigable waters of the Dominion, I do not hesitate in coming to the conclusion that the Attila should have either taken in sail before the Pomona's green light was seen from her, in which case

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the collision would have been less probable, or else she should have been brought to the wind as the Pomona was, and then there would not have been even the probability of a collision.

With this opinion I submit questions, as follows, to the assessors, Commander Ashe, of the Royal Navy, and Mr. Gourdeau, Harbor Master, acting as nautical assessors at Quebec:—

1. Was the Pomona, with a due and proper regard to her own safety, and that of other vessels, lying to on her starboard tack before and until the time of collision?

Answer.—We are of opinion that she was.

2. Was it in the power of the Pomona to avoid the collision after the Attila was first seen from her?

Answer.—No.

3. Was the speed of the Attila, while running free before the wind through fog, such that it was impossible for her to avoid collision with the Pomona, discovered at the distance at which alone she could be and was discovered?

Answer.—We are of opinion that it was.

4. Was the Attila, until the moment of collision, proceeding at such a rate in a fog on the morning of the 25th of May, that those on her deck had not sufficient command over her so as to avoid all reasonable chance of collision?

Answer.—We think that she was under too much canvas and going so fast that she was not under sufficient command so as to avoid all reasonable chance of collision.

Then you are of opinion that the Attila is solely to blame for the collision?

Answer.—Certainly.

The Court:—Entirely agreeing with these opinions, the Attila is declared to have been solely in fault, and she is condemned in the amount of damages sustained by the Pomona, to be determined in the usual course.

William Cook, for the Promoters.

F. A. Andrews, Q. C., for the Attila.

Friday, 27th February, 1880.

S.S. GOVINO.—SCARLETT.

Where, from a steamship ascending the *Traverse* below Quebec, a red and then a green light, indicating the approach of a sailing vessel, were seen and lost sight of, until too late to avoid a collision, Held:—

1. That the steamship was in fault for an insufficient look-out, and too much speed.

2. That the steamship was liable for the subsequent damage sustained by the injured vessel, unless upon the reference gross negligence or want of skill on her part was established; and

3. That the rule requiring the injuring vessel to stay by the injured vessel, will be rigidly applied, if the occasion should so require.

Collision, under the circumstances stated in the following judgment, pronounced this day: GOVINO.

JUDGMENT.—*Hon. G. Okill Stuart.*

The St. Lawrence, a small schooner of 63 tons, with a general cargo, left the port of Quebec for Gaspé on the 11th of November last, and while proceeding down the river St. Lawrence, the Govino, a steamship of 1,319 tons, bound for Quebec and Montreal, was ascending the river between the upper and lower lightships of the *Traverse*, and there a collision between these vessels occurred, for which the owners of the St. Lawrence now seek their remedy against the Govino. The night was fine and clear at about nine o'clock, when the vessels came into contact; the lights of each vessel were unexceptionable, the tide was in the last quarter ebb and there was but very little wind. The port bow of the Govino and the starboard bow of the schooner are the parts that came into collision, by which the bowsprit of the latter and her forerigging were carried away, accompanied by other damage.

The case shown by the evidence for the schooner is that she

GOVINO. had passed the Pillars while close hauled upon the starboard tack, the wind about E. S. E. slight and variable, scarcely enough for steerage way, and her course N. E. by E. That after having passed the upper lightship of the *Traverse*, the wind lulled and her course came to be about N. E. by N. She was under mainsail, foresail and two jibs, and making about four knots in all, about one with her steerage way and three with the tide and current. The white light of the Govino, distant between one and two miles, was observed bearing N. E. by E. about two points on the starboard bow, and afterwards her red and green lights were seen bearing upon the schooner until she was within hearing, and then she was hailed to starboard, so as to pass under the schooner's stern and thus avoid a collision. This she did not do and the collision took place. That the schooner had previously kept steadily on her course on the starboard tack drifting with the tide until the moment of collision, when she starboarded, without any effect from want of steerage way.

On the other hand, the case disclosed for the defence is, that the Govino was close to the lower lightship, when the schooner showed her red light about a quarter of a point on the port bow two miles off, and her helm was put to port until it was brought on her port bow two points, then steadied until after the schooner had shown her two lights, red and green, and until the schooner had shut out her red light and her green appeared at a distance of about 300 yards, by which change of course she was brought across the port bow of the Govino; that then the helm of the latter was placed hard a-port, and she reversed full speed astern, which did not prevent the schooner's bow striking the port anchor of the steamship.

From these statements respectively, it appears that each vessel was seen, the one from the other, about the same moment, the Govino after entering the *Traverse* at the lower lightship and the schooner after going into it at the upper one, the space between the two vessels being about two

miles. The master of the schooner had been for some time before she passed the upper lightship on the look-out in her bow, and a very experienced mariner was in charge of her helm until the collision, and their evidence, confirmed by the passengers and crew, is clear and positive that she kept her course upon a wind scarcely enough to keep her to it until the Govino struck her. At that moment the helm was starboarded to ease the blow, but without effect from the want of wind.

As respects the evidence on the part of the Govino, it is by no means so satisfactory and is quite conflicting on a very material point. She was in a place where the navigation requires great care and caution; the channel in the *Traverse* is stated to be about a quarter of a mile wide for large ships, and half a mile for smaller ones. The Govino was making six or seven knots over the ground, and the schooner by sail and drift was making about four, so that their approximation was at the rate of a mile in six or seven minutes. Supposing it to be true that the schooner was seen from the Govino as far off as two miles by her red light, as stated by the witnesses on her behalf, it is a matter of great uncertainty as to what time elapsed before she showed her green alone to the Govino, and the case depends in a great measure on this point. The mate of the Govino, who was on her bridge with the pilot in charge, has said from five to seven, and her look-out ten minutes had so elapsed, and according to the pilot, the green appeared immediately after the red was shut out at a distance of about three hundred yards. If the red and green lights did disappear at all, it was the duty of the Govino, as she knew that there was a sailing vessel meeting her on a piece of water dangerous for navigation, to have slackened her speed immediately, and not doing so subjects her to the imputation of negligence. The conclusion that I have come to is, that the look-out on board the Govino was bad, and that by reason of its being so she came down upon the schooner without seeing her until too late to avoid her.

GOVINO. That the look-out had been careless and did not see this schooner in the first instance as soon as he should have done, is evident from the statements of the pilot who had the Govino in charge. The look-out has sworn that he reported the red light of the schooner to the bridge, and the pilot has stated that he did not report the red light, but a light, and that he (the pilot) had seen the red light five minutes before the look-out reported a light. If this look-out was so inattentive as not to have seen the red light from the forecastle until five minutes after it was seen from the bridge, it is not at all unreasonable to suppose, that from like inattention he did not observe the green light of the schooner during the ten minutes, in which he did not see it. The statement of the pilot as to the schooner coming round and showing her green light in the short period within which he has said she did so, when it is admitted on both sides that there was little or no wind, is to me incredible.

Whether I take the evidence for the promoter or the respondent, I must come to the conclusion that the Govino was in fault. By the former, she should have seen the schooner's green light for more than a mile before the collision, and by the latter, after having seen the schooner's light, red or green, she should have slackened her speed so that, in either case on a nearer approach, she could have avoided her.

There is another question which was raised, as to the liability of the Govino for consequential damages. It appears that after the collision the schooner drifted below the lower lightship and there came to anchor. Finding that she was so disabled that she could not prosecute her voyage, her master determined to return to Quebec at the expiration of an hour or so. Upon her return a portion of the wreck under her keel and the loss of her forerigging so impeded her steerage power, that in thick weather she ran and remained aground for a short time, which occasioned further damage. It is said that this is not chargeable against the Govino. I do not agree. The rule adopted in all similar

cases is this: "All the subsequent damage arising from a collision must be borne by the vessel causing the damage, unless it can be shown by clear and positive evidence that any part of that subsequent damage arose from gross negligence or great want of skill, on the part of those on board the vessel damaged." (*a*)

This matter will be left in its entirety to the Registrar and Merchants, and should the respondent find reason to object to their report, the Court will decide upon his objections to it.

There was another point raised at the argument, which, although it may not call for adjudication in this instance, deserves notice. It was said that the Govino did not stay by the schooner until the master had ascertained that she had no need of further assistance. By our own Dominion Act respecting Canadian waters, failure in this respect, in the absence of proof to the contrary, will impute the collision to the wrongful act of the person in charge, should such collision occur in Canadian waters. But should a collision happen outside of Canadian waters the master or person in charge, under Imperial legislation, the Merchant Shipping Act, 1873, would be under like circumstances chargeable with a misdemeanor, and, if a certificated officer, his certificate might be cancelled or suspended. I am not called upon to say, as this case can be determined without my doing so, whether the evidence shows absolutely that the master of the Govino was guilty of neglect of duty in this particular. I may say, however, that he did not stop at the moment of collision but allowed the steamship to go on. It is true that he inquired if the schooner had a boat and was told she had, but at the same time he was requested to wait and he did not. I merely allude to this part of the case now, that persons in charge of vessels arriving at this port may feel that the provisions of law adverted to will, with a view to the protection of life, be in all cases

(*a*) The Pensher, Swabey 213.

GOVINO. occurring within or without Canadian waters, most rigidly enforced should the occasion require it.

The judgment is for the promoter with costs,—the damage to be settled as usual.

C. A. Pentland, for the schooner.
William Cook, for the steamer.

Friday, 6th February, 1880.

CANADIENNE.—BEAUDET.

SEAMAN'S WAGES.

Where a statute required the execution of a warrant or process under an order of two Justices of the Peace for seamen's wages to be authorized by the Judge of the Vice-Admiralty Court, Held, that the enactment imposed upon the Court a duty to supervise the proceedings of the magistrates.

It appearing that a warrant and process of two magistrates, issued for the sale of an undivided interest in a vessel, had not legally issued, a petition to authorize them was refused.

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Per curiam.—A petition has been presented to me on the part of one Ovide Beaudet, a seaman, setting forth that on the 5th day of December last, he obtained judgment in a suit brought by him against one François Thibaudeau, a trader, for wages as a sailor, amounting to $72.67, before two justices of the peace in the city of Three Rivers, by which judgment the sale of 32 shares of the schooner Canadienne, belonging to the defendant, was ordered; he has prayed that this Court will, in conformity with the 123rd section of the Dominion Act (37 Vic., ch. 129, respecting the shipping of seamen), authorize the execution of a warrant or process of the justices for the sale of the thirty-two shares of Thibaudeau.

This I believe to be the first application of the kind made to the Court, and as one materially affecting the shipping interest it has met with mature consideration.

The sections of the Statute which are to determine this matter are 52, 53, 54 and 55.

By the 52nd, two justices of the peace, acting in or near the place where service by a seaman has terminated, may, upon complaint on oath, summon a master or owner of a vessel to appear before them on a demand for wages under

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$200. By the 53rd, an order for payment by the justices is final. By the 54th, if the amount awarded is not paid within 24 hours, a warrant of distress may be issued against the goods and chattels of the defendant, and by the 55th section, if there be not sufficient levied under the warrant, the justices may then cause the amount of wages and costs to be levied on the ship, the tackle and apparel, and should the ship not be within the jurisdiction, the defendant may be imprisoned in the common gaol of the locality for not less than one, nor more than three, months.

With the petition there has been submitted a warrant under the hands and seals of the two justices, directed to the bailiffs and constables of the district of Three Rivers, for the sale of the 32 undivided parts or shares of Thibaudeau. In this document the proceedings before the justices are given in detail, but the complaint or summons has not been produced, neither has the order or judgment or the warrant of distress required as already stated by the 54th section. The returns of the seizing officers are also wanting. In the absence of these I am called upon to give effect to the 123rd section of the Act, which is as follows: "Nothing in this Act shall authorize or justify the execution of any warrant or process of any justice of the peace within the jurisdiction of any Court of Vice-Admiralty, unless such execution has been previously authorized by the judge."

Upon the production of a warrant only under the hands of two justices of the peace it seems to have been imagined that the judge of this Court is to be confined to the discharge of a mere ministerial act, the endorsement of the warrant. This is manifestly an error; the intention of the Legislature was that a power of supervision should be exercised by the Court, so as to restrain illegal acts of justices of the peace. The case of the Haidee (*a*), decided by this Court, has furnished an instance of irregularity committed by justices of the peace in the exercise of a like jurisdiction; and the 123rd section, I have no doubt, was passed to prevent a recur-

(*a*) 2 S. V. A. C. 25.

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rence of difficulties such as it presents. The 123rd section enacts that no warrant or process of the justices shall issue without being previously authorized by this Court. The case in its preliminary stages was not brought before me, yet process and warrants were issued. By the final warrant now submitted, which contains a narrative of the proceedings of the justices, it appears that a summons was issued by the plaintiff Ovide Beaudet for $50, against Thibaudeau as owner of 32 undivided parts or shares in the Canadienne. The claim was for two months and a half wages, and the only evidence in support of it was that of one Hamelin, the owner of the remaining 32 undivided shares in the schooner, who swore that he engaged Beaudet as a seaman for Thibaudeau, verbally, to navigate his 32 shares, an agreement of some novelty; that he served the two months and a half, and that the sum of $50 was due. The tonnage of this schooner does not appear, her register is not produced, and the absence of articles is not accounted for. Thibaudeau, the defendant, seems to have quietly acquiesced in all the proceedings. It does not appear by what process of reasoning Hamelin, in making verbal agreement to navigate the 32 shares for Thibaudeau, was not making an agreement for himself as well, unless indeed one half the ship could be navigated without the other. In short, the case has very much the appearance of collusion between the two owners of this schooner; Hamelin, the owner of one half, to fasten her liabilities on the owner of the other, Thibaudeau, an insolvent, if one may judge from the returns of *nulla bona* stated in the warrant. A conclusive ground which alone would compel this Court not to acquiesce in this application, is that it does not accord with the 54th section of the Statute. The remedy given by it is against the ship, the services in this case were in reality for the ship, and the law does not admit of its being divided into parts in the novel way which has been attempted in this instance. The application is consequently rejected.

Alfred Cloutier, for Petitioner.

Tuesday, 18th June, 1880.

EDWARD BARROW.—Rich.

By the Vice-Admiralty Courts Act, 1863, an Admiralty Court has jurisdiction over claims between owners, when the ship is registered within the possession for which the court is established, but the Dominion of Canada is not a possession within the meaning of the Act, so as to enable an Admiralty Court for one part of it, to entertain jurisdiction over a vessel registered in another part, for the enforcement of such claims.

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This was a cause of possession, civil and maritime, promoted by one of the owners of the ship Edward Barrow, to restrain her from proceeding to sea from the port of Quebec, until security was given to the extent of the promoter's interest in the vessel for her safe return to the port of Halifax, where she was registered. Upon several of the part owners appearing under protest, and pleading that the cause was not within the jurisdiction of the Vice-Admiralty Court at Quebec, the following judgment was rendered:

Per curiam.—This case presents a question of jurisdiction under the Vice-Admiralty Courts Act, 1863, which confers jurisdiction in the tenth section upon Vice-Admiralty Courts over "claims between the owners of any ship registered in the possession in which the court is established, touching the ownership, possession, employment, or earnings of such ship." The Edward Barrow is a vessel of 958 tons, and the promoter, Troop, is one of the owners to the extent of sixteen sixty-fourth parts or shares valued at $7,000 or thereabouts. Being dissatisfied with the management of this vessel by John Hay and others, the remaining owners, Troop has caused her to be arrested under process of this Court, for the purpose of restraining her from proceeding on a further voyage until bail shall be given for the safe return of her to the port of Halifax to

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which she belongs, to the amount of his shares $7,000. The register of the vessel shews that she was registered at Halifax, in Nova Scotia, one of the ports in the Dominion of Canada. The grounds upon which it is claimed that this Court has jurisdiction to restrain this vessel from proceeding further without security being given, are, that in law, the Dominion of Canada, comprising several ports, is now but one possession, and being such, this Court has a concurrent jurisdiction with the Vice-Admiralty Court at Halifax to grant the prayer of the promoter. But for several of the part owners an appearance under protest to the jurisdiction, followed by an act under protest, has been filed, to the effect that the Edward Barrow, not being registered in the Province of Quebec, but in Nova Scotia, the case is not cognizable by this Court, and this is the question now to be determined.

There is no doubt of the Dominion of Canada being for certain purposes a possession of the Crown, and that, although the several provinces of which it is composed have been in a measure, as it were, absorbed, still in many respects their individuality and autonomy remain intact. By the Imperial Act, 32 Viet., cap. 11, being an act for amending the law relating to the coasting trade and Merchant shipping in British possessions, known as the Merchant Shipping (Colonial) Act, 1869, it is enacted in the 7th section that "in the construction of the Merchant Shipping Act, 1854, and of the acts amending the same, Canada shall be deemed to be one British possession." This enactment is preceded by another in the same statute which declares that the term "British possession," means any territory or place situate within Her Majesty's Dominions and not forming part of the United Kingdom or of the Channel Islands or Isle of Man, and all territories and places under one legislature, as hereinafter defined, are deemed to be one British possession for the purposes of such act. It does not, from the provisions of this act, so far as the Court is able to judge, or of any other statute,

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appear that the provision of the Vice-Admiralty Courts Act, 1863, has been disturbed, or that an extension of the powers of Vice-Admiralty Courts has been effected so as to give them jurisdiction over claims between owners of any ship touching her ownership, possession, employment, or earnings, unless the ship is registered in the possession where the Vice-Admiralty Court is to exercise its jurisdiction. The Merchant Shipping (Colonial) Act, 1869, which has been referred to, has conferred upon the Dominion the character of a Brittish possession in the construction of the acts referred to, and no more, and I do not see how it can be applied to the Vice-Admiralty Courts Act, 1863.

In the course of the proceedings in this case, it has been said that some of the owners of the Edward Barrow exercise a control over her to the prejudice of the promoter, and abstain from entering a port in Nova Scotia, so as to avoid an investigation into their management of her. It would be, no doubt, most beneficial if a concurrent jurisdiction in the matter in question were given to all the Admiralty Courts established in the Dominion, that is, where the vessel is registered within it, but until Parliament so provides, the authority must be confined to the particular court having jurisdiction where the vessel is registered. The act on protest is therefore maintained.

Andrews, Caron, Andrews and Fitzpatrick, for Promoters.

Irvine and Pemberton, contra.

Friday, 23rd July, 1880.

ATALAYA.—EVE.

Upon the representations of the Consul-General of Spain for Canada an American vessel was detained and her cargo taken out and searched, by virtue of a warrant under the hand of the Governor-General of Canada, upon a charge of having on board arms and munitions of war, destined for the use of Cuban Insurgents, contrary to the provisions of the Foreign Enlistment Act, 1870. Held:

1. That the charges against the vessel were not supported by facts to justify her detention and search.
2. That hearsay evidence under the circumstances was inadmissible.
3. That the vessel should be released:—and
4. That an indemnity to the owner is payable by the Commissioners of the Imperial Treasury under the provisions of the Act.

Costs in such a case will be allowed against the Crown.

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This was an application by James H. Bogart, of New York, owner of the American brigantine Atalaya, under the twenty-third section of the Foreign Enlistment Act, 1870 (33 and 34 Vic. cap. 90), wherein he prayed for the release of his vessel, detained in the port of Quebec, on an alleged breach of the provisions of the Statute, and for a declaration by the court that there being no reasonable or probable cause for her detention, he was entitled to an indemnity in costs and damages. The circumstances of the case are fully noticed in the judgment this day rendered.

JUDGMENT.—*Hon. G. Okill Stuart.*

The Atalaya, a brigantine of 417 tons, Eve, master, was built in the State of Maine, and belongs to James H. Bogart, a citizen of the United States, residing in the city of New York, and he is the applicant in the case now under consideration.

The Atalaya was purchased by the applicant, a member of the firm of R. A. Tucker and Co., a continuation of Tucker

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and Lightbourne, merchants in New York, engaged in an extensive West India business, principally with Cuba, since the year 1854. The correspondents of this firm at Cienfuegos, in the Island of Cuba, are Thomas Terry and Co., a very wealthy firm, two of whose members are Spaniards, and whose loyalty to the Crown of Spain is admitted. From this firm, R. A. Tucker and Co., among others, received cargoes of sugar, and sent them in return lumber, cooperage and general merchandise. The extent of the business may be inferred from R. A. Tucker and Co. having received in one year from the Cuban house, sugar to the value of from six hundred to seven hundred thousand dollars.

The applicant became sole owner of the Atalaya by purchase on the 8th of July, 1878, date of the bill of sale. She was registered at New York on the 4th of September following. On the 2nd of April, 1880, Thomas Terry and Co. consigned 550 hogsheads of sugar, valued at about $40,000, to R. A. Tucker and Co., who consigned them to the firm of Gillespie, Moffatt and Co., at Montreal. The latter were at the same time requested to purchase a return cargo of lumber for the Atalaya. This was done. The purchase was from the Export Lumber Company, whose wharves are at Hochelaga, the eastern extremity of the city of Montreal. She arrived on the 17th of May, and landed her cargo at the Island wharf, in the western part of the city, when Eve, her master, was directed by Mr. Gillespie, one of the consignees, to drop down to the wharves of the Export Lumber Company, and there take in the return cargo of lumber destined for Cienfuegos. Mr. Gillespie, under the impression that the company's wharf was a private one, did not notify the harbor authorities of her removal as required by a harbor regulation, which subjected the master to a fine of £10, but which was remitted on Mr. Gillespie's error being submitted to the proper authority. A full cargo of lumber was then taken on board by a stevedore of the locality, from the wharves of the Export Lumber Company, the quantities delivered being checked by tally through an officer on

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board the vessel and a person employed by the company on the wharf. The rule with United States vessels is for the master to deposit his register with their consuls on arrival. This was done by the master of the Atalaya, and when about to leave it was returned to him by the Vice-Consul-General for the United States, at Montreal. In the meantime her manifest was signed by the master and presented to the Vice-Consul of Spain at Montreal, who signed and affixed to it the seal of his consulate. With her papers thus in order, she left Montreal in tow of the hired tug Hercules, to pass the city of Quebec on her voyage to Cienfuegos. She so left on the evening of the 2nd, and arrived at Quebec at about six o'clock on the evening of the 3rd of June. She was immediately boarded by a Custom House officer under the orders of Mr. Dunscomb, the Collector of the port, and she is still detained by him under a warrant of His Excellency the Governor-General. The validity of this detention is now the subject for consideration.

By the 8th section of the Foreign Enlistment Act of 1870, it is enacted that if any person "within Her Majesty's dominions, without the licence of Her Majesty, equip any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State" (by the interpretation clause meaning any foreign prince, colony, province, or part of any province or people, or any person or persons exercising or assuming to exercise the powers of Government in or over any foreign country, colony, province, or part of any province of people) "at war with any friendly State, the offender shall be punishable by fine and imprisonment, or either, at the discretion of the court, such imprisonment, if awarded, with or without hard labor, and the ship forfeited to Her Majesty."

By the same section the despatching, or causing, or allowing to be despatched, any ship under the like circumstances, is attended with the same penalties.

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By the 21st section, any officer of Customs in any British possession, as "a local authority," may seize or detain any ship liable to be seized and detained under the Act.

The 23rd section enacts that if the chief Executive authority, in any British possession the Governor, is satisfied that there is reasonable and probable cause for believing that a ship within Her Majesty's dominions has been, or is being built, commissioned or equipped contrary to this Act, and is about to be taken beyond the limits of such dominions, or that a ship is about to be despatched contrary to this Act, such chief Executive authority shall have power to issue a warrant stating that there is reasonable and probable cause for believing as aforesaid, and upon such warrant the 'local authority' shall have power to seize and search such ship and to detain the same until it has been either condemned or released by process of law or in the manner in the Act mentioned. The owner of the ship so detained, or his agent, may apply to the Court of Admiralty for its release, and the Court shall, as soon as possible, put the matter of seizure and detention in course of trial between the applicant and the Crown. And if the Court be of opinion that there was not reasonable and probable cause for the detention, and if no such cause appears in the course of the proceedings, the Court shall have power to declare that the owner is to be indemnified by the payment of costs and damages in respect of the detention, the amount thereof to be assessed by the Court, and any amount so assessed shall be payable by the Commissioners of the Treasury out of any moneys legally applicable for that purpose.

By the same section, where no proceedings are pending for its condemnation, the Secretary of State, or chief executive authority, may release the ship without security, if the Secretary of State, or chief executive authority, think fit so to release the same.

On the arrival of the Atalaya at Quebec, the Consul-General of Spain, El Conde de Premio Real, in company with Mr. Chauveau, Judge of Sessions and Police Magistrate,

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called on Mr. Dunscomb, Collector of the Customs there, and presented to him an affidavit of a person named Jean Baptiste Beaulieu. This affidavit, translated from the French language, is as follows:—

"Before me, the undersigned Judge of the Sessions of the Peace, in and for the city of Quebec, this third day of June, 1880, there appeared Jean Baptiste Beaulieu, of the city of Quebec, detective, who after being duly sworn, doth depose, declare and say as follows, to wit:—I am a detective in the police force of the city of Quebec. On Sunday, the thirtieth of May last, at the demand of the Consul-General of Spain, I accompanied from Quebec to the limits of the Province, and as far as the limits of the United States, a person named Dufaure, residing at Cuba, who said that he was engaged by a Cuban Insurrection Committee for the purchase of arms and munitions of war in Canada, which arms and munitions were to be despatched by ship to the insurgents in the Island of Cuba. In the execution of my duty of detective, and from the information which I have received, I am informed in a credible way and I really believe that arms and munitions have been purchased in the Province of Quebec, and in the Province of Ontario, by the agents of a Cuban Insurrection Committee established at New York. I have this information partly from the person named Dufaure, who confessed to me himself that he was a member and secret agent of this organization, and he communicated to me the object of his journey to Quebec.

"I swear, moreover, that I am informed in a credible way, and I have every reason to believe that the arms and munitions, so purchased with the object aforesaid, have been deposited on board of a sailer named the Atalaya, now on her way to Cuba, and which will pass the port of Quebec within the next twenty-four hours. These arms have been loaded in a clandestine way on board of the said vessel in the port of Montreal. I am also informed that this vessel is being towed to Quebec at the same time as another, the name of which I do not know.

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"I make this deposition at the express request of Count Premio Real, Consul-General of Spain, who has received the same information from different sources, and I have signed,

"J. BTE. BEAULIEU.

"Sworn before me at Quebec this 3rd day of June, 1880.

"ALEXANDRE CHAUVEAU, J.S.P."

On the day following an affidavit of the Spanish Consul-General was presented to the Collector which, translated from the French language, is as follows:

"Before me, the undersigned Judge of the General Sessions of the Peace in and for the city of Quebec, this fourth day of June, in the year 1880, appeared His Excellency Count Premio Real, who, after being duly sworn, doth depose and say as follows:—I am Consul-General of Spain in the British possessions of North America. My official residence is in the city of Quebec. According to information by me received from my agents and different sources, I have reason to believe, and in fact believe, that arms and munitions of war are hidden on board of a certain brigantine named the Atalaya, now detained in the port of Quebec by the Custom House authorities. According to my information these arms and munitions were purchased in the Province of Quebec and elsewhere, by persons acting as agents of Cuban insurrectionists with the object of being conveyed into the island of Cuba for the use of these insurgents, and the whole or a part of these arms and munitions have been hidden on board the brigantine Atalaya, contrary to the proclamation issued by the Government of the Dominion of Canada now in force, and to chapter 90 of the Imperial Act 33 and 34 Victoria, intituled: 'An act to regulate the conduct of Her Majesty's subjects during the existence of hostilities between Foreign States with which Her Majesty is at peace,' and I make this deposition

in virtue of the provisions of the said Act, and I have signed, ATALAYA.

"EL CONDE DE PREMIO REAL.

"Sworn before me at Quebec, this fourth day of June, 1880.

"ALEXANDRE CHAUVEAU, J.S.P."

At the urgent request of the Spanish Consul-General, the Atalaya was upon the first of these affidavits seized and detained by the Collector, on the third of June. He also urged the Collector to have her cargo discharged so that a thorough search for munitions of war might be made, but this was declined as the Collector's duty terminated with the seizure and detention of the vessel, and in reporting the fact to the Secretary of State at Ottawa.

On the fourth of June, the Consul-General made his affidavit, and the Collector by letter made his report to the Hon. J. C. Aikins, Secretary of State, accompanied by the affidavits of Beaulieu and of the Consul-General.

The next day, the fifth of June, the warrant of His Excellency the Marquis of Lorne, Governor-General of Canada, was issued as follows:—

"*To the Collector of Customs, Port of Quebec:*—

"Whereas, I am satisfied that there is reasonable and probable cause for believing that the ship Atalaya, now within the port of Quebec, has on board arms and munitions of war procured within Canada by certain agents of certain insurgents and insurrectionists in the Island of Cuba, now engaged in an insurrection and rebellion against the lawful authorities of Cuba, for the use and assistance of such insurgents and insurrectionists, and that such ship and munitions are about to be despatched to Cuba contrary to the provisions of the Foreign Enlistment Act of 1870, and of the law in that behalf.—Now, I do hereby, under the provisions of the said Act, and under the powers in me vested by any law or authority in that behalf, issue this warrant, and authorize

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you with such assistance as may be necessary to seize and search such ship, and to detain the same until it has been either condemned or released by process of law.

"Given under my hand this fifth day of June, A.D. eighteen hundred and eighty (1880.)

"LORNE,
"Governor-General of Canada."

Immediately after the receipt of this warrant, the Collector caused a search of the Atalaya to be made, and for the purpose her cargo was discharged. While this was in progress, the applicant, on the 11th of June, presented a petition to this Court, wherein he represents himself to be a citizen of the United States of America, that he has been owner of the Atalaya since the 4th September, 1878, and that while on a trading voyage to Cienfuegos with a cargo of wooden goods, 16,895 pieces of white pine goods, she had been seized under the warrant of His Excellency the Governor-General. The petition sets forth the bills of lading and other matters incident to the seizure, and concludes with the following allegation:—"The arrest and detention of the Atalaya and all the proceedings consequent thereon, were and are illegal and unjust, and wholly without reasonable or probable cause." The prayer of the petition is, that the Court will place the matter of the seizure and detention in course of trial between the applicant and the Crown, that it will order the release of the vessel and cargo, that it will declare that the applicant is to be fully indemnified by the payment of all costs and damages resulting from the seizure and detention,—to be duly assessed.

An order was made by the Court that the Crown should be notified of this petition, and subsequently an appearance was entered by the Hon. James Macdonald, Minister of Justice and Attorney-General for Canada *pro regina*, by A. R. Angers, duly authorized.

The search of the Atalaya for arms and munitions of war continued to go on, her cargo was taken out and a

thorough search made, which established that there were no arms or munitions of war on board.

The result has shown that there was no truth in the information which the Consul-General of Spain had derived from his agents and different sources which led him to believe, as stated in his affidavit, that arms and munitions of war were on board the Atalaya, and that the same was deceptive and untrue.

The unloading and reloading of the cargo, and the search under the direction of the Collector, lasted from the 8th to the 16th of June.

On the 23rd of June, the answer of the Crown to the applicant's petition was filed. After stating that there is an insurrection in Cuba, a possession of the Spanish Crown at peace with Her Majesty, and that the Foreign Enlistment Act, 1870, is in force in Canada by virtue of a proclamation issued pursuant to the Act, it proceeds to enumerate grounds, which it is said, afforded reasonable and probable cause for the detention and search of the Atalaya. These may be classed under two heads: the first are occurrences which took place before the Atalaya was seized and detained by the Collector, and the second, discoveries said to have been made during the search. Under the first head it is alleged:

1. That about the middle of May last, 1880, reliable information was received in Canada that a party of Spanish subjects engaged in aiding the insurrection in Cuba had arrived in Canada to purchase munitions of war and a fit and proper vessel, and equip her for the carrying of the same from Canada to Cuba, to be used by the insurgents there.

2. That in the present month of June, reliable information was received that the Atalaya, then in the port of Montreal, was being equipped and furnished with munitions of war and arms, contrary to the provisions of the Foreign Enlistment Act, 1870.

3. That during the few months previous, an unusual

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quantity of munitions of war, to wit, over a million cartridges with a considerable quantity of powder were imported into Montreal.

4. That about the 28th of May last, 1,192 packages of powder were, during the night time, unloaded from the ship Dunfillan, in the harbor of Montreal, and put on board a tug, about the time when the Atalaya left her berth there and took another berth at Hochelaga.

5. That the master of the Atalaya, at Montreal, gave instructions to the stevedore not to put a full cargo of timber on board, but to leave an empty space between decks next the master's cabin, the only way to communicate with which was by a concealed entrance from the cabin.

6. That on the 2nd of June, the Atalaya left Montreal in tow of a tug, and before her papers were signed by the proper authorities.

7. That the Atalaya delayed on her way to Quebec by night, a suspected agent of the insurgents and of the vessel having hurriedly left Quebec a few hours before her arrival.

8. That on the day of the arrival of the Atalaya at Quebec, a small vessel left Quebec with a quantity of arms, it being rumored that they were to be transhipped below Quebec.

Under the second head the charges are :—

1. After the search of the Atalaya, her statement as to cargo and stores were found incorrect, and that she was victualed in excess of her requirements.

2. That a secret entrance from the captain's cabin was casually discovered.

3. That another secret recess in the captain's cabin was also casually found.

4. That these two secret places would likely be used for the stowage and carriage of munitions of war and arms, and contraband goods.

5. Several flags, and a flag bearing the Spanish colors with the letters T. T. & C., were found on board, and also

a flag having the color and device of the Cuban insurrectionary party, as well as other flags susceptible of device in the Cuban insurrection to be used for the purpose of deceiving the loyal subjects of the King of Spain and of helping and fraternizing with the insurrectionists.

6. That the Atalaya had the appearance of a slave or Coolie trader.

7. That the Atalaya, when she left Montreal and when detained at Quebec, was sailing under a false register and false colors.

8. That she is a Spanish vessel owned by Spanish subjects residing at Cienfuegos, and commanded by a British subject.

9. That upon the arrest of the Atalaya becoming known, the remainder of the insurrectionary party left Canada, and some surrendered. These matters, it is alleged, furnished reasonable and probable cause for the detention and search of the Atalaya. The answer of the Crown denies all the statements of the applicant.

The question of law which now rests with this Court to determine is—*Was there, or not, reasonable and probable cause for the detention and search of the Atalaya?*

Upon an examination of the evidence, I find that the four last charges under the first head, which I have stated, may be discarded, as they are either unfounded in fact or have no bearing on the question. It is quite true that the master of the Atalaya did give instructions to the stevedore who stowed the vessel, to leave a space behind his cabin under the hatchway for the provisions of his ship, but there is no part of the testimony which leads to the inference or belief that it was intended for arms or munitions of war.

The Atalaya did leave Montreal in tow of a tug, but not before she was cleared or before her papers were properly signed. It is not true that the Atalaya delayed on her way to Quebec, except for two hours at Sorel, where the pilot of the tug thought it prudent to stop; and as to a small vessel having left Quebec with arms there is no legal evi-

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dence of such being a fact having any bearing on the Atalaya.

The charges against the Atalaya under the first head, which I have stated, are thus reduced to three.

1. Was there, on or before the detention of the Atalaya, a party of Cuban insurgents or their agents in this province, purchasing arms and munitions of war to ship for Cuba?

2. Was there introduced into the port of Montreal, arms and munitions of war in a manner to justify a reasonable belief that they were to be exported by the Atalaya for the use of the Cuban insurgents?

3. Was there legal evidence to justify a belief that the Atalaya was equipped with arms and munitions of war for the use of Cuban insurgents?

The evidence for the Crown, intended to establish these propositions, is to be found in the testimony of three persons, viz., Antoine De Laval, Count of Premio Real, whose rank, as given by himself, is that of Rear-Admiral in the Royal Navy of Spain, and Consul-General and Political Agent for the Province of Canada, the British and French possessions of North America, for British Guiana, &c., and that of two detectives employed by him, the one Jean Baptiste Beaulieu, whose affidavit has been given, and the other George Skeffington.

The evidence of the Consul-General is to the effect that before the first of June last, he received information from the Secret Service of his country that there were meetings of Cuban insurgents in the United States, at which they thought of transferring their operations to Canada, and of sending agents there to sound the country; that it was decided to send them, that a few arms and some powder were sent from the United States, and that they were to be shipped by the Atalaya. This witness makes mention of a man of the name of Dufresne *alias* Dufaure, who called upon him at Quebec on the 30th of May; this person seemed to him to be one of the Cuban agents. His

object was to obtain information from the witness about what was going on in Canada, which he did not accomplish. On the 30th of May the witness asked the Commissioner of Police at Quebec to furnish him with a detective, and Beaulieu was on that day sent to him from the Detectives' office. On Beaulieu's arrival, the Consul-General explained to him that he wanted him for the purpose of taking Dufresne *alias* Dufaure, out of the country. The detective said that he must first have permission. He went for Mr. Chauveau, Judge of the Sessions, charged with the duties of a Police Magistrate at Quebec, who came, and to whom the witness explained what he wanted. Mr. Chauveau spoke to the detective, who then said he was at the disposal of the witness. He then employed Beaulieu to take Dufresne *alias* Dufaure, to the United States boundary line and leave him there, which he did. The reason assigned by the witness for sending this man out of the country was "because he was certain he was an agent of the Cubans, and, therefore, not wishing to complicate Canada in this affair, he sent him away." At the close of his deposition the witness was asked: "At the time you sent him away had you any suspicions about the Atalaya?" His answer was "No, not on that day;" and again, "Not on the 30th May."

Jean Baptiste Beaulieu has testified that on the 31st of May he had arrived at Montreal with Dufresne *alias* Dufaure; he conducted him, while under the influence of liquor, to the boundary line at St. Albans, where he handed him to the railway conductor, who passed him over. The witness on the journey had a conversation with the man he was thus charged with. He said he was a stranger, and that he resided in Cuba, that he came to Canada to learn if there was a gang which had gone to Toronto to buy arms and munitions of war to be sent to Cuba; he said he was a Frenchman, that he had come to hire a *bateau* to send arms to Cuba, that he had an associate at Montreal from whom he had separated to go to Quebec. This person made no mention of the Atalaya. This witness when at Mont-

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real, fell in with George Skeffington, a detective. He received information about arms and munitions of war to be sent to Cuba before the 3rd of June. Skeffington was the first to give the witness the name of the Atalaya, and being asked if he did not give Skeffington information and receive information from Skeffington in return, he has answered, "on going up I gave him information, and when I returned "he gave it to me." The witness was the first to inform Skeffington.

George Skeffington, a witness for the Crown, has stated that he was charged with looking after a defaulter from Cuba, and that he saw a certain man in Montreal, to whom he spoke about him. At a subsequent meeting with this certain man on St. James street, Montreal, he said to witness "the man you were looking after from New York, has he anything to do with these Cuban filibusters?" The witness said "what Cuban filibusters?" he said, "why at present in the city of Montreal there are a lot of people with the purpose of going to Cuba." Witness said "I would like to know if there is anything in it, you may as well give me the information." He said "well, I would not like to get into trouble, if you promise not to make use of my name, I shall give you the information." He said, "there is a ship loading in this city which has arms and munitions of war on board." Witness said, "What is the name?" The "Atilda" was the name he gave witness. On a subsequent day, he continues, Detective Beaulieu came to Montreal to the witness' office and said he had received orders to see a man named Dufaure out of the city of Montreal, that he had orders from the Spanish Consul to see him out, and that he wanted assistance of the witness to see him out on the train, as he was a little the worse of liquor. Witness went to the Canada Hotel and saw Beaulieu leave on the train to put this man across the lines. Immediately after parting from Beaulieu witness telegraphed to the Spanish Consul the information he received; he had an answer saying there was a mistake in the name, it must have been the

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Atalaya. Witness then got a despatch from the Spanish Consul to go down to Quebec. Witness left on the night of the 1st of June, came down to Quebec, where he arrived on the morning of the 2nd. The first person he saw was the Spanish Consul, to whom he mentioned the information he received. At Quebec he communicated this information to Mr. Chauveau, with whom he talked the matter over. On his return to Montreal, on the 3rd of June, he went to the office of Messrs. Gillespie, Moffatt and Co., on other business, and among other things, mentioned that there were suspicions against the Atalaya for having cartridges on board; Mr. Gillespie smiled and said, "perhaps that is the reason she left and was away from the wharf. The Harbor Commissioners took objection to that, and were going to fine her, but we were interested and settled the matter." The witness has said that the Atalaya had left on that morning. Witness on that day, with Fahey, his partner, went round the town, as he knew "there was a good few Cubans in town." Some of them he followed into Charlie Crossen's, on St. James street. The same day the witness telegraphed to Quebec "that going along St. James street, Mr. Fahey and himself met a party in Montreal;" he came to us and said, 'Do you call yourselves detectives?" witness made the reply, "I do not know." He said, "You expected to find ammunition and arms on board that vessel, did you not?" Witness said "yes, certainly we did." Then he said, "you did not find them, they were transferred to another ship. If you give me three hundred dollars I will tell you the whole business." This the witness telegraphed to the Spanish Consul. On the day of his return to Montreal, the witness telegraphed Mr. Chauveau that his information about the ammunition being on board was correct. A man named Bowie told witness that he was outside of his tavern one night and heard a remark from some men who loaded the Atalaya, about tins going on board, and from this information he inferred that cartridges were packed in preserving tins. This witness has declined to give the names of any

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of his informants, and the Counsel for the Crown has claimed and obtained an exemption for him in this particular. The witness has received twenty-one dollars from the Spanish Consul to cover his expenses, boat hire to come to Quebec, and to give him the information he received; he has an account for his services, and this he intends sending in to Mr. Angers, Counsel for the Crown. The witness has stated that he had no personal knowledge of any of the facts stated in his evidence.

On the first question, as to there being Cuban insurgents or their agents in this province engaged in purchasing arms destined for Cuba, or as to there being any reasonable or probable cause for believing there were; it may be observed that the geographical position of Canada, particularly those parts known as the cities of Toronto and Montreal, and Cuba, are such as to preclude the supposition that arms and ammunition would be sent from the United States, say from New York northward, 400 or 500 miles, to Ontario or Montreal, thence eastward upon the River St. Lawrence, and afterwards southerly along the coasts of the Northern and Southern States, several thousand miles, to Cuba, when they could be shipped to some southern port of the United States, comparatively speaking, in the immediate vicinity of Cuba. The only evidence on this head is hearsay, and particularly the statement of Dufresne *alias* Dufaure. This man the Consul-General believes to have been, and he has said was, a Cuban agent. If he were so, he should not have been sent out of the country, but kept for the purpose of detecting the persons guilty of an infraction of the Foreign Enlistment Act; the best evidence to have been had was sent out of the way, and the Court is now required to determine without it, that there was reasonable and probable cause for supposing that arms were being purchased in Canada for Cuban insurgents. Then again, there was a supposed associate in Montreal, whose evidence could have been had on the subject, and he has not been produced. The sending of Dufresne *alias* Dufaure, out of the province

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is, to say the least of it, a very unusual occurrence. If the man was sent off against his will, which it is to be presumed he was from the employment of a detective, the act was an illegal one, and the conduct of Beaulieu and Skeffington, as agents of the Consul-General in carrying out his wishes, was equally unlawful. The step, instead of being one calculated to obtain information, was one quite the contrary, and the reason assigned by the Consul-General that it was "not to complicate Canada," is very weak and quite insufficient. There being no testimony on oath that persons in this province purchased arms destined for the Cuban insurgents, the Court cannot find upon the hearsay evidence adduced, that there was reasonable and probable cause for supposing that there were persons so engaged, or that any arms were purchased or destined for Cuba.

The second matter for enquiry is, whether there were introduced into the city of Montreal, arms and munitions of war in a manner to justify a reasonable belief that they were to be exported by the Atalaya for the use of Cuban insurgents. This question is not difficult of solution. Powder was imported into Montreal from the United States and from Great Britain. Munitions of war, it has been proved by the Deputy Collector from Montreal, cannot be imported from the United States without the permission of the Minister of Militia, who has delegated his authority to the Collector or his deputy. The Deputy Collector, a witness for the Crown, has accounted for all the powder imported from the United States for the eight months ending 31st of May, 1880, into Montreal. A list of all the persons who imported this powder, principally hardware merchants, has been produced; they are all well known respectable people who made the importations, principally as the Deputy Collector has said for sporting purposes. The powder by the Dunfillan was imported from London. It was landed under the authority of the Customs at Montreal, and the entire quantity, 1,122 packages, was sent to respectable persons in Toronto, all which has been proved by Mr. O'Hara, the

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Deputy Collector of Montreal. The mode of introducing this powder certainly did not justify a belief that it was to be exported by the Atalaya, and if the Consul-General of Spain had any doubts on the subject, a short enquiry at the Custom House in Montreal would have removed them.

There remains now the third and last subject for investigation. Is there legal evidence to justify a reasonable belief that the Atalaya was equipped with munitions of war for Cuban insurgents? In the prosecution of this enquiry it will be well to notice first, the period of time within which the Consul-General of Spain acquired the information which led to his causing the detention and search of the Atalaya. It was between the 30th of May and the 4th of June last. In his evidence, he is positive in stating that on the 30th of May he had no grounds for suspicion of the Atalaya; the detective, Beaulieu, certainly had none, as he was known to the Consul only on the day when he was engaged to take off Dufresne *alias* Dufaure, to the boundary line of the United States, so that the belief of the Consul-General, stated in his affidavit, that the Atalaya had arms and munitions of war on board, was based on the information acquired by him between the 30th of May and the 4th of June. Dufresne *alias* Dufaure, said nothing about the Atalaya. We may now commence with what has been stated by Beaulieu. He left Quebec for Montreal on the evening of the 30th with Dufresne *alias* Dufaure, in charge. How soon the intoxication of the latter commenced does not appear, nor has Beaulieu said whether the conversation, now to be noticed, which he had with him was while he was sober or when "under the influence of liquor." the state in which Skeffington, the detective, found him in Montreal. This man, belonging to a class who have acquired the name of Cuban Fillibusters, notoriously the scum of society and the embodiment of villany and vice, said to Beaulieu that he had come to Canada to buy arms and munitions of war, which he was to send in a *bateau*, to be hired by him for that purpose.

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This information Beaulieu imparted to Skeffington on his return to Montreal. In return he received from Skeffington the information that some unknown person on the street in Montreal, told him that there were Cubans in town, and that the Atalaya had arms and munitions of war on board. Skeffington communicated with the Consul-Gen-

who sent him a despatch to come to Quebec on the ..rd of June. He did so, and on his return to Montreal, on the 3rd of June, he telegraphed to the Consul-General of Spain that he was told by some one else that the arms and munitions of war had been transferred to another ship. Another statement of Skeffington was, that a tavern-keeper of the name of Bowie told him that he had heard laborers, who loaded the Atalaya, say outside of his tavern that preserving tins had gone on board. These tins Skeffington's imagination led him to believe were receptacles for cartridges. It is thus apparent that the entire information as to the Atalaya was from Skeffington; this was imparted to Beaulieu who knew nothing respecting her, and what the two together heard was imparted to the Consul-General of Spain, and served first for the affidavit of Beaulieu, and secondly for that of the Consul-General.

The evidence, as was admitted on the part of the Crown at the argument of the case, is entirely hearsay. A perusal of it shews that there is no one fact within the personal knowledge of any one witness that can implicate the Atalaya. Hearsay evidence is uniformly held incompetent to establish any *specific fact* which in its nature is susceptible of being proved by witnesses who can speak from their own knowledge. That this species of testimony supposes something better which might be adduced in the particular case, is not the ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind as to the existence of the fact, and the frauds which may be practised under its cover, combine to support the rule that hearsay evidence is totally inadmissible. (*a*)

(*a*) Greenleaf on Ev., § 99, p. 116.

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Reasonable and probable cause involves a consideration of what the facts of a case are, and what are the reasonable deductions from these facts. In the present case, where there is no intervention of a jury, as well the facts as the law are to be determined by this Court. Unfortunately for the case of the Crown, no facts have been adduced in evidence from which deductions suggestive of criminalty on the part of the Atalaya can be drawn. A learned judge has said as to probable cause, "There must be such "a state of facts as would lead a man of ordinary caution "and prudence to believe and entertain an honest and "strong suspicion that the person is guilty." (*a*).

In the course of the proceedings in this case it has been made to appear that there were no facts within the personal knowledge either of Beaulieu or the Consul-General of Spain, from which either could infer guilt in the Atalaya, and it is equally apparent that the hearsay evidence on which they acted, which I hold to be inadmissible in this case, has been a pure fabrication.

Such I believe to be the legal view of this case, and the judgment to be rendered will accord with it, but the pleading or answer of the Crown to the petition of the applicant enumerates the eight charges which I have stated. These are upon facts said to have been ascertained after the arrest of, and during the detention of the Atalaya. I am of opinion that this testimony would have been inadmissible because the test of probable cause is to be applied as at the time when the action complained of was taken; and if upon the facts then known the party had no probable cause for action, it would be no protection to him that facts came to his knowledge afterwards (*b*), but I do not feel at liberty to exclude it, as the applicant has joined issue upon them. In noticing this testimony it may be stated that on the evening of the 3rd of June, the Atalaya was boarded by Mr. Panet Larue, an assistant tide surveyor in the Customs

(*a*) Shaw, Ch. J., Bacon *vs.* Towne, 4 Cush. 217, 238.

(*b*) Cooley on Ev., 183.

at Quebec. He arrested her. The Consul-General of Spain went on board with him and interrogated the master, who until then appears to have had no idea of any charge against him. Upon the explanation of the Consul-General, he said to him that he was quite at liberty to search the vessel, and the Consul-General, finding that more trouble would attend the matter than he first expected, fixed with Mr. Panet Larue next morning for the search. On the ensuing day, 4th of June, the Consul-General made some calculations as to cost of taking out the cargo and search. Mr. Gillespie, of the firm of Gillespie, Moffatt and Co., one of the consignees, on the 4th of June, called upon the Consul-General and informed him that if he searched the vessel, something in the nature of a bond of indemnity should be given for the damages caused by detention, but the negotiation in this particular was broken off upon Mr. Gillespie's taking professional advice, and then upon the same day, in the afternoon, the Consul-General made his affidavit, and the warrant was issued on the next day, the 5th of June. The search commenced by the Collector taking out the cargo, and was continued with the most minute care. The Consul-General contributed a remarkable amount of vigilance in watching the vessel. He caused a copy of the proclamation bringing the Foreign Enlistment Act into force to be inserted at full length in a morning newspaper. At the foot of it, over his signature, he offered a reward of fifty dollars to any one who could procure a conviction of an offender against the provisions of the Act, to be paid upon sentence being pronounced against the "culprit." Several of these were distributed among the sailors of the Atalaya. At the same time, a young man was engaged by him to count the planks taken out of the vessel, and a lighter with men employed by him was in attendance watching for the discovery of arms and munitions of war, in case an attempt should be made to take any away.

In the progress of this severe and rigorous search, the

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vacant space for the pork barrels and other provisions of the ship, the vacancy into which it was supposed arms and munitions were to go, was visible enough, and was under a hatchway: a small recess in the side of the cabin, four inches deep 18½ inches wide, and two feet nine inches high, was discovered, but there were no arms or munitions of war in it. A statement made by the young man who counted the planks was put in, which shewed a greater number than shewn by the tallies of the person who checked the loading of the planks with the mate; and as respects the provisions being more than was required, the cook, on his cross-examination by the Crown, said that he fed his men well, that he had more provisions than sufficient to reach Cuba, except potatoes, and that he had tinned provisions taken on board at the Island wharf where the sugar was discharged. These tins are evidently the tins which engaged the attention of Skeffington. The attempt to give the Atalaya the appearance of a slave or Cooley trader has been anything but successful, and the statement that she was a Spanish vessel, owned by Spaniards trading under a false register and false colors, would have been found to be untrue had the United States Consul at Quebec been enquired of in the matter. There rests only the allegations respecting the Atalaya's flags to be noticed. The flags she had on board have been opened and displayed in Court: they were the United States ensign, the United States jack, the ship's Burgee, a flag with the letter T on it, and the house flag of Thos. Terry and Co., of Cienfuegos. There was a remnant of an old ensign which was useless and was used for a seat in the ship's boat. All the men on board the vessel have sworn that these are all the flags on board the vessel, and none others were found on board. The Consul-General interrogated as to a Cuban Insurgent's flag, has said that there is a sort of thing they use when they meet, which he saw with a procession of Cubans in Philadelphia; it is a triangle of blue with two corners white with a star called the Solitary Star, and he thinks there

was another added. Jean Baptiste Beaulieu has sworn that he saw another flag on board after the arrest of the vessel, and has attempted a description of it as pointed at the end with white points at the mast end, blue, with several stars. The questionable weight of this testimony may be inferred from the fact that all the officers and crew of the vessel ignore the existence of such a flag, and had there been one, the many hands and eyes on board of this vessel after her detention, would soon have secured it. Perhaps there is no enactment of the Imperial Parliament, which requires as much care and caution in its execution as the Foreign Enlistment Act, 1870. It must necessarily touch many and very important interests, it may interrupt our relations with friendly States, it may affect trade with them, it may occasion damage and loss in a pecuniary point of view, it may be injurious to the character and credit of the ship owner, the ship master and the owners and consignees of cargoes, it may affect the Imperial Treasury. The Act does not prescribe the mode of proceeding after the detention of a vessel by a "local authority." In this instance the Court is not called upon to express an opinion as to the way in which effect has been given to the Act, but merely to decide whether, carried into effect as it has been, there was reasonable and probable cause for the detention and search of the Atalaya. The polluted source from which the information through Beaulieu was obtained, and the gossip of Skeffington on the street and in the tavern, certainly have not furnished the reasonable and probable cause required. The danger of trusting to such information is great. Under it, a vessel and cargo have been improperly delayed, and the master, owners and consignees have been exposed to unjust and injurious suspicion upon charges recklessly made and not substantiated. The Atalaya is now under detention since the 3rd of June last, and must necessarily be held under some risk. The person in charge of her is Mr. Dunscomb, Collector of the Customs at this port,—a more efficient or a more judicious

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and discreet public officer by general acknowledgment is to be found nowhere,—still want of nautical experience might have prevented him from making the necessary arrangements for her safety. While in his charge there has been a possibility of other vessels colliding with her, and other accidents might have caused a total loss of the vessel and cargo, in which case the Imperial Treasury would have been called on to make good the loss.

As the search on board the Atalaya proved fruitless, no proceedings have been taken for a condemnation. The sole issue raised by the Crown, apart from a denegation of all the statements in the applicant's petition, has been that there was reasonable and probable cause for the detention, and in this view of the matter there was nothing to prevent the release of the Atalaya by the Crown at the termination of the search five weeks since.

It is but due to the owner, the consignees, master and crew of the Atalaya, to say that there rests not a shade of suspicion on any one of them. The witnesses have been examined apart *viva voce*. The testimony of the master and crew is concordant and void of contradictions. They all have the appearance of quite inoffensive persons. The master has been in the employ of the New York firms for the last fifteen years, he enjoys a good character, and his personal appearance certainly conveys no indication of free-booting or revolutionary tendencies. The sum and substance of their testimony, one and all, is that neither on the present or previous voyages made by them in the Atalaya to Cienfuegos had they any knowledge of arms or munitions of war being on board of her.

The decree of this Court is, that James H. Bogart, the applicant, having established that the brigantine Atalaya belongs to him, and that she has not been equipped with arms, munitions or stores, contrary to the provisions of the Foreign Enlistment Act, 1870, with which he has been charged, she be released and restored to him; and inasmuch as there was not reasonable and probable cause for her

detention, this Court doth further decree and declare that the said James H. Bogart, as owner of the said brigantine, be indemnified by the payment of costs and damages in respect of her detention, the amount thereof to be assessed by the Registrar and Merchants, and paid, as by the said Act is in such case provided, out of any moneys legally applicable for that purpose.

From this decree, an appeal was asserted and allowed to Her Majesty in Her Privy Council, which on instructions from the Earl of Derby, Secretary of State for the Colonies, was subsequently withdrawn.

William Cook, Q. C., for the Applicant.

Hon. A. R. Angers, Q. C., for the Attorney-General.

R. Alleyn, Q. C., for the Consul-General of Spain.

R. Bradley, for the Consul of the United States.

Friday, 5th November, 1880.

GENERAL BIRCH.—PEDERSEN.

PROGRESS.—CHABOT.

In the case of a steam vessel lying at anchor in fog upon an anchorage ground, while using her bell and shewing two white lights, one upon her foremast and the other at the gaff aft, each in an oblong lantern: Held:

1. That a sailing vessel, which, misled by the whistle of another steamer in motion, struck her, was in fault for going too fast; and

2. That the lights, though not in globular lanterns, as directed by the Act respecting the navigation of Canadian waters, being equal in power, were a substantial compliance with its provisions.

GENERAL BIRCH. PROGRESS.

Cross causes of collision between a steam tug and a barque, under the circumstances stated in the following judgment:

JUDGMENT.—*Hon. G. Okill Stuart.*

On the 25th of May last, between one and two o'clock in the morning, the steam tug Progress, of 267 tons, was lying at anchor off the River Ouelle point, in the Lower St. Lawrence, in a fog. She had her head to the N. E., and was held by her starboard anchor on thirty fathoms of chain. From the E. there was a moderate breeze, the tide was half flood, and the current about 3½ knots an hour; on her foremast, at about twenty feet above her hull, she had an anchor light in a lantern, oblong in form, with glass sides, and a similar one at the gaff aft.

At the same time, the General Birch, a Norwegian barque of 789 tons, carrying a foresail and a lower foretopsail, on a course S. W. by W., and making from six to seven knots over the ground, saw the tug's lights ahead and ported her helm. At the same time the tug reversed

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her engines, which sent her astern to the length of her chain cable. The port bow of the barque came into contact with the tug about seven feet from her stern, between it and the cat head, broke her chain cable, and other damage was the consequence. The barque suffered damage also, and each party now sues for indemnity, the one imputing negligence to the other.

The complaint against the barque is that she went too fast in the night time in a fog, over an anchorage ground in the channel, and that she had a bad look-out.

On the other hand, the steam tug is accused of having used her steam whistle, the signal of a vessel in motion, of not having rung a bell, the signal of a vessel at anchor in a fog, and, moreover, of not having shewn a proper anchor light.

If a vessel runs down another at anchor, *prima facie* she is to blame, but she may, by credible evidence, establish a defence to relieve her from all responsibility (421 *Pritchard's Digest*, p. 174). If, therefore, it has been established for the barque that the steam tug did use her steam whistle while at anchor, or that she did not ring a bell, or that she did not show a proper anchor light, and that either of such infringements of the sailing rules occasioned the collision, she was to blame; if it has not, the fault was with the barque.

The charge against the steam tug of having used her steam whistle while at anchor, may at once be dismissed from consideration, as there is proof positive that she did not, and none that she did. The controversy has thus become reduced. 1. To the ringing of a bell and its sufficiency in sound; and 2. To the not having shewn a proper anchor light.

That the steam tug had a proper bell has been proved, but it is said that its sound was impeded by two ventilators and otherwise, so as to render it inaudible. On this part of the case it may be observed that a practical experiment on an excursion round the harbor of Quebec has been tried

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to test its ringing power, which was very satisfactory to the persons who heard it and have testified to its merits; while on the other hand some speculative opinions upon intonation have been expressed in connection with the ventilators and other interfering obstacles calculated to detract from its sound. This Court is fortunately relieved from deciding upon the merits of the bell upon this evidence, because there is proof, irrespective of it, quite conclusive.

The steamship Buenos Ayrean, of the Allan line, was in advance of the General Birch. She was running at full speed when the fog closed in upon her. Her master, Neil Maclean, was in consequence called on deck at a quarter past midnight. By his orders her head was put to the north, her engines were slowed, at times stopped, and her lead, with a view to safe anchorage in the channel, was kept going. While under steerage way only, there was heard from E. S. E. by the people on board, distant about a mile and a quarter, a clear ringing bell, rang about every two minutes. Meanwhile the steamship kept her steam whistle going, to indicate she was in motion, until she came under the stern of a vessel at anchor, distant about 400 feet, which was the Progress, and whose bell it was that the people of the steamship had heard ringing for twenty minutes or half an hour before. These are facts sworn to by several persons on board the steamship, and not being contradicted, their truth cannot be questioned. It may be added that there is similar testimony from on board the Progress, and especially that of her pilot, who heard the steam whistle of the steamship as well as the fog horn of the General Birch, and who ordered the bell to be rung louder and faster as the latter approached.

It is perfectly true that every witness from on board the barque has sworn that he did not hear the bell before the accident, and some of them think that if it had been rung they would have heard it.

As to the anchor lights of the Progress:—The seventh

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article of the third section of the "Act respecting the Navigation of Canadian Waters," by which this case is governed, has enacted that "ships when at anchor in roadsteads or fairways shall exhibit where it can best be seen, but at a height not exceeding 20 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;" and in a subsequent article, that "if in a case of collision it appears to the court that the collision *was occasioned* by the non-observance of any of the rules prescribed by the Act, the vessel by which such rules have been infringed, shall be deemed to be in fault."

The white anchor lights of the Progress were not in globular but in oblong lanterns with glass sides. The question which this part of the case presents is: Does the Act require a literal compliance with the provision as to a globular lantern? In the case of the Telegraph, determined by the High Court of Admiralty, it was held, and the principle was subsequently sanctioned in the Privy Council, that a substantial compliance with a similar provision in an Act of the Imperial Parliament was sufficient. (*Spinks, A. and E. Rep.* 429.) There is quite a divergence of opinion as to the strength of the anchor lights of the tug before the collision, and as to the distance at which they could be seen in the fog. The master of the Buenos Ayrean has said at 400 feet, and when the fog lifted at intervals 600 feet, and the mate of the barque has said at one cable (720 feet), *not more*. The former has fixed the distance at which a good ship's light could then be seen, at 400 and 600 feet, and the latter has said that a good ship's light could have been seen in the fog at three cables. Whatever difference of opinion may have existed as to the power of the lights of the tug in a fog, it is established beyond dispute that they could be seen, when there was no fog, at the lowest computation from five to six, and at the highest from six to seven miles. The provision of the

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law which has been cited requires but one mile at least, and at that distance to show a clear, uniform and unbroken light round the horizon; these lights were good outside of a fog, there is no reason for saying that they were not as good within it, with a diminution of brightness in proportion to the density of the atmosphere.

Taking it for granted that the bell was rung at proper intervals, that the lights were good, and that the collision was not occasioned by remissness in the matter of either, it is by no means difficult to ascertain what the real cause of it was. The General Birch was going over the ground at seven knots. Her master has admitted that he was misled by the steam whistle of the Buenos Ayrean, which he erroneously supposed was that of the Progress, and that if he had heard the bell or seen the steam tug at two cables he could have avoided her. He kept his course and blew his fog horn, which would have been proper had he not made a mistake. He supposed that he was meeting a steam vessel under way when his delusion was suddenly dispelled by the appearance of the anchor lights of the tug, a vessel at anchor, at a moment too late for him to escape her. Then why was he too late? This question, too, admits of easy solution. Two men were on the forecastle on the look-out, one of whom has not been examined, a fact to be regretted, as he might have given some useful testimony. They did not see the light as soon as they could and should, or if they did, they failed to report it in proper time. This is evident from the testimony of the man at the helm of the General Birch. The length of a vessel of 789 tons necessarily would tell a good deal, where collision is impending, and had she that much more before her, and her master had that much to spare, he would have cleared the tug by the seven feet from the place where she struck the barque near the stern. That the look-out was deficient in duty, is to be learned from the evidence of the helmsman. "About three minutes before the "ships struck," he has said, "while at the wheel, I saw two

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" bright lights about two points on our port bow, about half " a cable's length off. I did not hear these lights reported " before that. The two lights shewed about twenty feet " apart. * * The pilot was standing about seven feet " from me when I saw these lights, and immediately after " I saw them he ordered me to put my helm *hard a-port.* " It had been midships just before that. * * *It* " *was I who told the pilot I saw the lights of the* " *Progress, when I did, the pilot had not spoken to* " *me about the lights before that.*" From this statement it is plain that the anchor lights of the Progress could have been seen by the look-out the length of the barque sooner than they were reported. If there was neglect to that extent there may have been more, and should the opinion of the mate of the barque be adopted, when he said that at the time of collision a good anchor light could be seen at three cables, there was ample time and opportunity to avoid the steam tug.

The Progress was in the great fairway of the spring fleet, bound up the St. Lawrence. She was at anchor in the night time, when darkness and fog made it dangerous for a vessel to proceed even at a very moderate rate; she rang her bell and showed a good anchor light. The General Birch did not hear her bell nor see her light, but proceeded at such a rate of sailing, that she did not hear the former nor see the latter, until too late for safety. Had she gone at one half the speed, she very probably would have heard the bell and seen the light in time to clear the steam tug. However this may have been, the prudent and proper course was for her to come to anchor as she was ultimately compelled to do, after the collision.

In the case of the Attila, not long since determined by this Court, it was held, that where a vessel is in a fog she must be under sufficient command to avoid all reasonable chance of collision. (*a*) The facts stated show that the General Birch was not. The collision is to be attri-

(*a*) *Infra*, p. 196.

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buted to too much haste through an anchorage ground in fog, and to a bad look-out. The Court being further of opinion that it was not caused as alleged, by an infringement of any one of the sailing rules in the matters of whistle, bell or light by the persons in charge of the steam tug, the General Birch is declared solely in fault. The decree is for the amount of damage sustained by the Progress, to be assessed in the usual course, and costs in the case against the barque. The suit of the latter is dismissed with costs.

F. A. Andrews, Q.C., for the Progress.

Charles A. Pentland, for the barque.

Friday, 19*th November*, 1880.

PRINCESS ROYAL.—WATTS.

RUBENS.—KRUDSEN.

When two vessels sailing, one on the starboard and the other on the port tack, came into collision, the latter held to be in fault for not keeping out of the way.

JUDGMENT.—*Hon. G. O. Stuart.*

PRINCESS ROYAL. RUBENS.

These suits, cross actions, originate from a collision in the Atlantic Ocean, on the morning of the 11th of May last. The Princess Royal, a barque of 1,200 tons, and the Rubens, a Norwegian barque of 375 tons, were then attempting an entrance through the ice into the Gulf of St. Lawrence with the spring fleet bound inwards, when they came into collision. At two o'clock in the morning the wind was a fresh breeze from the S. E. The Rubens was on the starboard, and the Princess Royal on the port tack. The head of the Rubens was N. E. by E., her mainsail was aback, slackening her speed through the ice, her lower foretopsail, forestaysail and mizzen staysail were set, and she was making about a knot an hour, or upwards, and was close-hauled. While in this position, her look-out on the forecastle with the second mate, who was the officer of the starboard watch, saw a green light, distant from two to three miles, which proved to be that of the Princess Royal, bearing about two points on her port bow. The helm of the Rubens was to port *and she was kept as close to the wind* as she could be. At about half-past two o'clock, the same light was seen about two points on her starboard bow. Shortly after, the the Princess Royal showed her red and green lights, and according to the statements of the persons on board the

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Rubens, she seemed to be bearing down upon her. The Rubens then attempted to fill her lower maintopsail, and while steady to the wind, as her people have said, the Princess Royal ran across her bows, so that the starboard bow, bowsprit and jib-boom of the Rubens struck the latter about midships on her port side.

Opposed to this view of the collision, the case stated for the Princess Royal is, that while on the port tack, steering S. W. by S., under two lower topsails and a foretopmast staysail, she saw the red and green lights of the Rubens a mile and a half or two miles off, and immediately the helm of the Princess Royal was put to port, and hard a-port, which kept her away, but the Rubens having apparently starboarded her helm and kept away, she ran into the Princess Royal.

By the twelfth article of the sailing rules, "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." It therefore became the duty of the Princess Royal to keep out of the way of the Rubens. The night was sufficiently clear to see a ship's light at almost full distance. That there was a good look-out from the Rubens does not admit of question; first the green light of the Princess Royal was seen to bear on the port bow, and again on the starboard bow; on the port, for about a quarter of an hour or more, and on the starboard, for about the same time; and then it was that the Princess Royal disclosed her two lights, and a collision was evident to the people of the Rubens. Neither in the pleadings nor at the argument, was it pretended that the Princess Royal saw either light of the Rubens before she saw her two lights. The Rubens' red light should have been seen from the Princess Royal as soon as the green light of the latter was seen from the

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former. If it had been, fifteen to thirty minutes would have served the Princess Royal to keep out of the way. Had the look-out of the Princess Royal been produced as a witness, it would have been for him to explain why he did not sooner report a light on the Rubens, but he was not. The master of the Princess Royal has in his evidence said that the man has deserted, but he has not caused a search warrant to issue for his apprehension, and being asked why not, his answer was, "I went to the police and gave them an order, and gave them his eyes and his description, that is all I suppose," and from which it may be inferred that there was no particular anxiety for his appearance. That there was a bad look-out on the Princess Royal is sufficiently borne out in evidence. But it is said, on the other side, that before the collision the Rubens filled her lower maintopsail and starboarded her helm. She did so, and if these orders had effect, she contributed to the collision; the fault was mutual, and the owners of these vessels should share the damages equally. The evidence in these particulars has been maturely considered. The persons on board the Princess Royal examined as witnesses, attribute the collision to these orders, and some masters of vessels have been examined as to the effect of filling the lower maintopsail.

On the other hand, the second mate of the Rubens has candidly admitted that he gave an order to brace the lower maintopsail yard, and to fill that sail and to starboard her helm. But with others on board the Rubens he has positively sworn that the sail had no time to fill, that the order to starboard was instantly and so soon as given, countermanded by an order to port, that the former had no effect, and the red light of the Princess Royal showed itself immediately before the vessels struck.

In weighing this testimony, it is to be observed that the persons who were on the Princess Royal could not see what was done on board of the Rubens, and can have given but their opinions. While on the other hand, the persons who were on the Rubens could see what was done and the effect, if any, produced.

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Here I may refer with advantage to the case of the ship Liberty (*a*), which was decided by this Court. She was on the port, and the barque Anne on the starboard tack, off Pointe des Monts, in the River St. Lawrence. It was contended for the ship that she had ported her helm and went four or five points off the wind, but that the Anne, instead of keeping her course, starboarded her helm, which caused a collision. The language of Mr. Black, as Judge of this Court in that case, may be appropriately used in this: "The positive testimony of the master, mate, seamen and hands of the Anne as to what passed under their own eyes, and was done by them, cannot be overset by the impressions or belief in what form soever stated,—formed in a moment of excitement—by persons who were in another vessel, and could have no positive knowledge of what passed on board the Anne, and whose opinions would naturally be in favor of their own ship. While, then, I give credence to their statements as to matters within their knowledge, I cannot allow their opinions to over ride the positive facts on the other side." The case of the Liberty is singularly similar to the present, in this, that the lights of the vessel on the opposite tack were not seen as soon as they should have been.

The nautical assessors have given their answers to the several questions as follows:—

1. Were the Princess Royal and the Rubens crossing while the first was on the port and the latter on the starboard tack?

Answer.—The Princess Royal was crossing the bows of the Rubens before the collision, while the former was on the port tack.

2. Did the Princess Royal place her helm hard a-port in sufficient time after the light or lights of the Rubens could have been seen from her?

Answer.—We think she did not.

(*a*) S. L. C., A. C., p. 105.

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3. Do you think the Princess Royal was to blame for the collision?

Answer.—We do, from not having taken proper precautions in due time.

4. Did the Rubens keep her course close hauled until the moment of collision?

Answer.—In our appreciation of the evidence she did.

5. Did the starboarding of the helm of the Rubens immediately before the collision, notwithstanding the immediate counter, order given, contribute to the collision?

Answer.—We think not, as the order to starboard and the counter order were given, as it were, in the same breath.

E. D. ASHE, *Commander R. N.*
F. GOURDEAU, *Harbor Master.*

Per Curiam.—I agree with the opinion of the assessors, and accordingly maintain the action of the Rubens and dismiss that of the Princess Royal with costs. Damages to be ascertained as usual.

Charles A. Pentland, for the Rubens.
William Cook, Q.C., and Archibald Hay Cook, contra.

Friday, 19th November, 1880.

BRIDGEWATER.—DOWELL.

Assault and battery and oppressive treatment by the master and owner of a ship upon a seaman. Defence—mutiny—sustained.

JUDGMENT.—*Hon. G. Okill Stuart.*

BRIDGE-WATER.

This is a suit to recover damages to the amount of $500 for alleged assault and illtreatment, brought by Benjamin Roberts, a sailor, against John Henry Allen, owner, and John Dowell, master of the Bridgewater, an American vessel of 1600 tons, with a crew of about twenty men. The promoter signed articles on the 5th September last in London and, in the prosecution of a voyage to the port of Quebec, he has complained that the master attempted to put him in irons but failed, owing to passive resistance; that thereupon the owner said, "I'll help the master to put you in irons," and having disappeared, he reappeared with a sword-bayonet in his hands and struck promoter several blows on the head with it to stun him, the more easily to put him in irons. That one flesh wound was inflicted, and then the master struck the promoter.

The defence is that the promoter engaged as an able seaman, he being but an ordinary seaman, and that the attempt to put him in irons, was for refusal of duty; that he resisted and was mutinously supported by others of the crew; that the master was violently assaulted and knocked down by the promoter, and that the master acted in self-defence; that the crew were in open mutiny and armed with knives and other weapons with which the master was threatened, and that in consequence the defendants armed themselves for the protection of themselves and the wife and children of the owner, who were on board; further, that the language and behavior of the promoter during

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the voyage were mutinous, subversive of good order and discipline, and, as a ringleader, others of the seamen were by him incited to refusal of duty.

The crew of the Bridgewater, it appears, was composed of negroes and mulattoes, and there were two Norwegian carpenters and two young men passengers on board. The promoter's statement on oath is, that he had obeyed several orders of the master, and was about to perform the last, when he used strong language, upbraiding him for being slow while he was putting on his oil-skin trowsers; that the master then told him he was going to put him in irons; that on his refusal to submit, the master sent for the carpenters to help him, and they as well as others of the crew refused. The master then alone attempted to put the irons on the promoter, and while the latter was resisting him, the owner, John Henry Allen, came out of the cabin with a cutlass in his hand and struck him over the head with it, and wounded him in the side. The entire crew, excepting those who have deserted the ship, give the same account of the matter with much exaggeration. The cutlass has been produced, and for cutting or thrusting is a very effective instrument. Roberts, the promoter, has not sworn to any wound in the head, nor is any charged in the libel. He has sworn to a wound in the side, but the clothes he had on were not cut, and the wound must have been, if made by the sharp point of the cutlass, a puncture through the skin. The two carpenters and the young men, the passengers, have sworn, although on the spot, that they did not see the promoter struck.

With reference to the defence, it is to be observed that after the ship had been for some time on the voyage, she had to encounter a very violent gale of wind, and the ballast shifted. This necessarily endangered the safety of the ship. The crew, including the promoter, refused to do their duty, because they said it was extra to the ordinary work, and it was only after a great deal of trouble and delay that they would do it. This act of insubordination the crew have admitted, under the supposition that they

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had a right to refuse this duty. There was no mate on board the ship. The second mate, Ward, refused to obey the master's orders, according to the log on the 13th September; on the 23rd, when in charge of the decks, he was found by the master lying over the poop rail, apparently asleep, and upon being asked by the master why he did not strike the bells as usual, with an angry growl answered, "How can I run bells and ships too?" and used abusive and threatening language. This man, according to entries in the log, threatened the master and owner, saying that he had fire arms and would use them, and with such language in presence of a number of the crew, he must have disturbed the discipline of the ship. During the voyage, until the occurrence which has led to this suit, there does not appear to have been any act of harshness or severity either by the master or owner towards any one of the crew; on the contrary, the owner gave to the promoter some articles of clothing as he was not sufficiently clad.

While in the act of trimming the yards on the 18th of October, the men were so careless and slow that they did not appear to the master to pull at all; he had to jump among them and get hold of the forebrace and put it in their hands, and, as he has said, put them to the point, if they meant to work the ship or not. Benjamin Roberts, the promoter, replied: "Captain, you will get yourself in trouble if you commence that with us." The rest of the watch all stood in angry silence; all stopped hauling and seemed in readiness for a row. The master then went aft, and fearing for the ship, she being then off the S. W. point of Anticosti, that at a critical moment she would be on a lee-shore or caught in a squall, and the men refuse duty, he sent a message for Roberts, who appeared to him the ringleader, and told him that he would put him in irons. The master sent for the carpenters to assist him; from fear or sympathy with the crew they refused, others of the crew did so also, and the master then attempted to do it alone. He had previously informed the owner, who with his wife and children were in the cabin, that he intended to put

Roberts in irons, and that he feared some trouble. Hearing the disturbance, the owner rushed on deck, where he found the master lying on his back with Roberts upon him on the deck, the crew ranged on the outside in a violent and fierce state of excitement, the boatswain in advance of the rest with his knife unsheathed, and another with a billet of wood. He immediately struck Roberts over the head with the flat of the cutlass once, perhaps twice or more; the owner admits that he did so, but is quite unaware of having wounded him with the point of the weapon. The effect was to release the master. Guns and a revolver were sent for—the wife of the master brought them from the cabin. Two guns were fired off, one on one side of the vessel and one on the other side, with no other purpose than to intimidate the crew, notwithstanding which, the promoter endeavored to incite the men not to return to their duty but to return to the master; one of the crew, however, interfered and prevented further disturbance. The master has said that the crew shipped as able seamen, and that not more than four of them were such. He found them laggards in the discharge of duty, and intentionally such; that his patience was continually put to the test, and for the safety of his vessel, he deemed it his duty to put a stop to the irritating conduct of the crew by making an example of one of the worst of them.

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The maritime law in a case of this description is well settled: "It is hardly to be disputed," said Lord Stowell, in the case of the Agincourt, "that in a case of gross misbehavior, the master of a merchant ship has a right to inflict corporal punishment upon the delinquent mariner. The Agincourt, 1 *Hagg.* 271. Lowther Castle, Ib. The mode of correction may be, not only by personal chastisement, but by confinement or imprisonment on board the ship. The extent of the punishment must depend upon circumstances. In general, deadly weapons cannot be employed. But cases of necessity may justify the use of them." And in the case of mutiny, any force and any weapon may be used, which the urgency requires to repress it;

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but still with all the caution which the law requires in all other cases of self-defence, and in vindication of rightful authority. (*Abbott on Sh., Notes by Story and Perkins, p.* 236.) In the case against the Lowther Castle, brought by a seaman, the act of disobedience was slowness of work, which he said he would take easy, and a disrespectful reply to his officers. For this he received thirty-six lashes on his bare back and an imprisonment of four or five days in irons. In rendering judgment dismissing his suit, Lord Stowell was "inclined to admit that the punishment inflicted rather exceeded the offence," but the retrospective offences of the man, "gross idleness, skulking from the most important duties and the sheltering himself from immediate punishment by a dilatory performance of what was assigned to him, yet always performing it in a grumbling and growling manner and with a most disgusting show of dissatisfaction, and not without the use of contumelious expressions, which even the vessel itself could not escape" were held to be a sufficient justification. In this case, not only to the promoter, but it may be said to every seaman on the ship, this language will apply. The forbearance of the master was remarkable, he showed no vindictiveness and was actuated by a desire to preserve discipline on board the ship, and no more. The owner of the vessel, with a defiant and mutinous crew before him, and the authority of the master subverted, acted with energy and decision. Had he not done so, passive resistance to the authority of the master would have assumed an active form, and possibly have caused loss of life.

The Court is of opinion that the mariner, Benjamin Roberts, is not entitled to the compensation claimed, and discharges Captain Dowell and John Henry Allen from any further attendance in this Court, and the suit of the promoter is dismissed with costs.

O'Farrell and Pentland, for Promoter.
R. J. Bradley, for J. H. Allen.

26th November, 1880.

THE BRIDGEWATER.—DOWELL.

FOREIGN VESSEL—SUIT FOR WAGES—PROTEST BY CONSUL.

In a suit by American seamen for wages, the consul of the United States, upon receiving notice of suit, made a representation in writing, accompanied by accounts showing promoters to be in debt to the ship, and requested that the case should not be entertained. Held, that the exercise of jurisdiction by the court over causes of wages of foreign seamen being discretionary, the court would, under the circumstances, decline to proceed with the present suit.

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The promoters with thirteen others, shipped on board of the American ship Bridgewater, 1600 tons, at London, for a voyage "from London to a port in the United States of "America, or to Cape Breton, and from thence on a gen- "eral freighting voyage between the Columbia River, "North, and Melbourne, South." On arrival at the port of Quebec, they brought suit for wages alleged to be due, and prayed to be discharged from the ship, on the grounds of deviation, uncertainty in the description of the voyage, and insufficiency and unfitness of food.

The Honorable John Nelson Wasson, Consul of the United States of America, at Quebec, having received notice of suit, laid the following representation in writing before the court:

"United States Consulate,
"Quebec, Canada, Nov. 19, 1880.

"To the Honorable
"G. Okill Stuart,
"Judge of the Vice-Admiralty Court,

"SIR,

"I have the honor to represent that notice has been "served upon me that an action has been commenced in

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"your Court on the part of Benjamin Roberts and other "seamen of the American ship Bridgewater against said "vessel, to recover wages alleged to be due the promoters. "The ship's papers, including the shipping articles, were "duly deposited with me, as required by law, and are, as I "believe, substantially correct in form. Without question- "ing in any way the jurisdiction of the Vice-Admiralty "Court of the Province of Quebec, in the premises, I have "been led to believe, by reference to judicial decisions, that, "not as a matter of right, but of international courtesy, and "to promote justice, British Courts do not take jurisdiction "in the class of cases above mentioned, except to remedy "great wrongs. I herewith submit the accounts of wages "of the said seamen as made out by the master, and which "I accept as *prima facie* correct, showing that they are "indebted to the ship. Considering the character of the "crew, of which your Honour has had an opportunnity of "judging in a recent action, the hardship of a possible "detention of the vessel here during the winter, and the "firm belief that no substantial injury will result to the "seamen therefrom, I feel it my duty to respectfully ask "that your Honour will not take jurisdiction in their case.

"I am, Sir,

"Your obedient servant,

"JNO. N. WASSON,

"*U. S. Consul.*"

O'Farrel, for promoters, moved that the proceedings be continued notwithstanding the said representation, inasmuch as the same assigned no valid reason why the court should decline to assume jurisdiction over the subject mattter of the suit.

Bradley, for respondent, moved for the dismissal of the suit. He referred to The Herzogin Marie, 1 *Lush.*, 202, The Octavie, 1 L. T. N. S., The Nina, 2 L. R. C. P., 38.

Per Curiam.—I am decidedly of opinion that the circumstances of the present suit entirely justify the applica-

tion of the United States Consul. I therefore decline to exercise further jurisdiction, and the action will be dismissed. I make no order as to costs. BRIDGEWATER.

J. O'Farrel and C. A. Pentland, for Promoters.

R. J. Bradley, for the Bridgewater.

Friday, 28th January, 1881.

ATALAYA.—EVE.

FOREIGN ENLISTMENT ACT, 1870.—REPORT OF REGISTRAR AND MERCHANTS.—DAMAGES.

Damages in respect of detention restricted to the natural and proximate consequences of it, and damages remote and consequential not allowed.

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This was an appeal from an award of the Registrar and Merchants, to whom, by interlocutory decree, the court had referred the assessment of damages in this matter. On the 7th instant, Mr. Cook, Q.C., for the applicant, moved that the report be reformed and amended, by substituting for the sum of £105 allowed in the first article thereof, "Such other and further sum, as would reasonably and sufficiently compensate and indemnify the applicant for the injury occasioned to himself and the firm in which he is a partner, by the unfounded prosecution of his vessel for an alleged breach of the Foreign Enlistment Act, 1870, and by the criminal and injurious charges preferred against himself throughout the proceedings,"—all which, it was averred, had seriously affected his pecuniary interests, and the profitable business relations which he had hitherto maintained with the Spanish West Indies.

JUDGMENT.—*Hon. G. Okill Stuart.*

A decree of this Court has awarded to James H. Bogart, a citizen of the United States, an applicant under the Foreign Enlistment Act, 1870, an indemnity for the seizure and detention of his brigantine the Atalaya, and the Registrar and Merchants (*a*) have by their report settled the amount

(*a*) Mr. Dunbar, Q.C., Registrar, and Mr. J. G. Ross and Mr. Thomas Beckett, Merchants.

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at £1,034 7s. 10d. sterling, composed of £626 14s. 3d. for actual detention during sixty-one days; £119 11s. 2d. depreciation of a wood cargo from unloading and reloading, and the remainder for loss of time, etc.

In the claim of the applicant the first article is for £8,000 sterling, damages for seizure and detention, and also for criminal conduct laid to his charge by the prosecution, which have affected him very injuriously, as also the profitable business of a New York firm, in which he is a partner, and its commercial relations with Cuba and the Spanish West India Islands. This article has not been allowed in the report, except a small portion amounting to £105, and an objection has been made to it by the applicant on the ground that, according to law, and the proceedings and evidence of record at the trial, and upon the reference, costs and damages greatly exceeding the sum of £105 should be paid to him under it. By motion, also, he has applied for a final decree in accordance with the report, except as respects a rejection of the first article, by which the report will be reformed, and the sum of £8,000 allowed to him. This motion is supported by the evidence taken at the trial, and by depositions since obtained from New York. In these, it is stated that the seizure and detention of the Atalaya and her cargo were telegraphed immediately to New York, and, along with the intelligence, the criminal charges against the vessel were published in Canada, the United States and in Cienfuegos, Cibarien, Havana and other ports in Cuba, where the correspondents of the applicant's firm resided, which led to a diminution of the usual quantity of sugars consigned to it, compared with a corresponding period, by $523,081, the commissions on which would have been $26,154, and the applicant has sworn to a loss of $40,000.

The cause shown against the motion is to be found partly in depositions of persons taken, also in New York, before Mr. Archibald, late Her Majesty's Consul there, and partly in depositions taken before Mr. Chauveau, the Judge of the Sessions at Quebec.

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The depositions so taken in New York represent the applicant's firm to be in reputation, wealth and credit above reproach, and that it was not affected by the criminal charges against the Atalaya, or by her detention.

Those taken before the Judge of Sessions are a renewed attempt to incriminate the Atalaya since the decree of this Court was pronounced, and to produce an impression, that had a box and some loose cartridges found at the bottom of the St. Lawrence been discovered before the trial, it would have affected the judgment. As this has been stated by the press, and appears to have been brought under the notice of His Excellency the Governor General, it will be well to rectify the matter in the progress of observations now to be made.

The applicant relies on the terms of the Act that "if the court be of opinion that there was not reasonable and probable cause for the detention, and if no such cause appear in the course of the proceedings, the court shall have power to declare that the owner is to be indemnified by the payment of costs and damages in respect of the detention." These, it has been argued, *import a complete remedy for all damages arising, as well from the slander of his ship as from the loss of business occasioned by, and consequent upon, detention.*

It has been further contended on behalf of the applicant, that the type of a coolie or slave trader, assigned to his vessel in the pleadings of the Attorney-General and Minister of Justice, the accusations of sailing with a false register, a false manifest and under false colors, including the Cuban rebel flag, and the having on board arms and munitions of war, coupled with the seizure and detention, have operated such an injury, and occasioned such a pecuniary loss as to entitle him to redress in the form of an indemnity as allowed by the Act. To strengthen this argument, it has been further said that if a relief is not thus afforded, he will not have any remedy at all, as from the Chief Executive authority downwards, immunity is granted to all who have partici-

pated in the wrongs of which he has complained, as appears from the 28th section, which declares "that no damages shall be payable, and no officer or local authority shall be responsible, either civilly or criminally, in respect of the seizure or detention of any ship in pursuance of this Act,"

It may be as well first to notice the additional evidence offered by the Crown to meet the objection of the applicant, before allusion is made to the argument of the counsel of the applicant. Depositions of several persons residing in New York have been, as I have observed, taken before Mr. Archibald, late Her Majesty's Consul there, who have stated that the character of the applicant and of his firm are irreproachable, their wealth great and their credit to correspond. They go further, and say, that consequently they have suffered no damage as they have complained. Should this be considered as a plea of justification, and I can regard it in no other light, it is quite possible that before a civil court and jury it might be considered an aggravation, and lead to exemplary damages.

In the matter of the cartridges, a man of the name of Louis Pelletier, a diver, found near the Point à Carey wharf at Quebec a box full; this he carried to a man of the name of Joseph Nadeau, from him it went before the Judge of Sessions, who took their depositions; the Judge affixed his seal to the box and made a deposit of it in the Registry. Mr. Verret, Secretary of the Harbor Commission, in whose employ Pelletier and Nadeau were, caused the former to dive again, and the result was some loose cartridges found at the same place. The two men have been at the pains to state that the box had the appearance of being in the water two or three months, which would correspond with the period elapsed since the Atalaya sailed, and that the place where they were found was passed over by the boat of the Atalaya when under seizure and detention. Had there been less zeal and more caution shown in relation to this box, there would have been seen stamped upon it the broad arrow and other marks, indicating it to be the property of the Crown,

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as coming from the Queen's stores, and therefore that it could not have come from Cuban insurgents. How it found its way under the track of the Atalaya's boat does not appear, nor is it necessary to enquire. It is sufficient to say that at the argument, the Counsel for the Crown abandoned the matter, and that there is an end of this episode in the case of the Atalaya.

The depositions last noticed have no bearing upon the present application which is to be dealt with on its own merits.

Jurisdiction upon this court is conferred in this matter by the nineteenth section of the Act. After excluding that of other courts, it has enacted "that the Court of Admiralty shall, in addition to any power given to the court by this Act, have, in respect of any ship or other matter brought before it in pursuance of this Act, all powers which it has in the case of a ship or matter brought before it in the exercise of its ordinary jurisdiction." By the 23rd section it is further enacted that "if the court be of opinion that there was not reasonable and probable cause for the detention, and if no such cause appear in the course of the proceedings, the court shall have power to declare that the owner is to be indemnified by the payment of costs and damages in respect of the detention, the amount thereof to be assessed by the court, and any amount so assessed shall be payable by the Commissioners of the Treasury." This case has therefore to be regarded as one of detention, having its cause in a marine tort, and is to be dealt with as such. Possibly the applicant has suffered from the opprobrious terms by which his brigantine has been characterized. Coupled with the detention they may have deprived the applicant of many valuable customers. Probably the law maxim *ubi jus ibi remedium* may be at fault. Unfortunately there are exceptions to this just principle, and there are many cases where parties have suffered injuries from the acts and doings of others of which the law takes no cognizance. If it were intended by the Imperial Legislature that the Treasury

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should make amends for the loss occasioned by its officers when it relieved them, it would have so enacted. In the absence of such a provision the *argumentum ab inconvenienti* cannot prevail. In nautical cases where the detention of a vessel is the consequence of an unlawful act, a general rule, and one most prominent is, that the natural and proximate consequences of the act causing damage are to be considered; (*a*) and both English and American Courts have generally concurred in denying profits as any part of the damages to be compensated whether upon contract or in tort. (*b*) The actual damage sustained at the time and place of the injury, and not the profits which might probably have been realized if the act complained of had not occurred, constitutes the just measure of damages to be awarded to the injured party. (*c*)

Before pronouncing a final judgment consonant with these principles, I feel it to be the duty of this Court to bring under notice the practical working, of which this case furnishes a striking illustration, of the 23rd Section of the Foreign Enlistment Act, 1870, which confers upon the executive authority a power to seize and detain a ship and cargo, and upon a Court of Admiralty a power to release them and award compensation in costs and damages in respect of their detention. When the Executive and Judicial powers are blended and are made to co-operate injustice is frequently the consequence, and this may be such a case. In the civil courts of this Province, upon evidence similar to that laid before the Chief Executive authority on the occasion of issuing the warrant in this case, the person may be arrested and property to any amount attached before trial and judgment as in the case of an absconding debtor, or a fraudulent secreting of property with intent to defraud, and this through the act of a ministerial officer, but in a case of injustice the judge is at once ready to accord immediate relief.

(*a*) Sedgwick Meas. of Dam., 112.
(*b*) Ib. 69.
(*c*) For cases see Prit. Dig. Vo. Registrar and Merchants, 143 et seq.

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That a Foreign Enlistment Act is an indispensable necessity, is recognized by civilized nations. Great Britain has hers, and the United States of America have theirs, but they differ in material respects as in the case of a citizen of a Foreign State transiently within the United States. (*a*)

The mode prescribed for giving effect to each respectively also varies. The Imperial Statute is attended with difficulty and may be productive of serious results. Without particular reference to the cases of the Alabama and others, it may be observed that the term *equipping* in relation to a ship, which includes the furnishing of arms and munitions, has occasioned much legal difficulty. In this case it seems to have been quite misunderstood. The prosecution of the Atalaya has been based upon the supposed simple fact that there were arms and munitions of war on board for the use of Cuban insurgents. At no stage of the proceedings has any person been charged with a violation of the Act. This Statute, with its predecessor, 59 Geo. III, c. 69, repealed by it, constitutes no offence unless there be an intention in some one to violate it. The intent is the essential ingredient to effect a condemnation or forfeiture, or to constitute the misdemeanor which it creates. At and after the issuing of the warrant for the detention and search, had she been found laden with rifles, pistols and gunpowder to her upper decks, she would have been guilty of no offence, unless it was made to appear that her owner had the intent to use them in aid of the insurrection; whether on board of a ship or in a hardware shop they are but merchandize. She might have sailed with them to Cuba or any where else with perfect impunity, without contravening the Act. A distinguished writer in an essay upon the Act has said, "It prohibits "warlike enterprises, but it does not interfere with commer- "cial adventure. A subject of the Crown may sell a ship of "war, as he may sell a musket, to either belligerent with im- "punity; nay, he may even despatch it to the belligerent "port. But he may not take part in the overt act of making

(*a*) Revised Stat. U. S., 5,912.

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"war upon a people with whom his Sovereign is at peace. "The purview of the Foreign Enlistment Act is to prohibit a "breach of allegiance on the part of the subject against his "own Sovereign, not to prevent transactions in contraband "with the belligerent." (*a*) The same doctrine is to be found in the commentaries of Kent as to the intent of the owner, where it is also said of Foreign Enlistment Acts, "that by making municipal regulations of this kind a nation changes its whole mode of proceeding, points out a specific and technical method of punishing its citizens for this class of breaches of neutrality, and is bound by all the niceties and difficulties of such a technical remedy." (*b*) Unfortunately, in this case a foreigner is the suffering party. Neither at the time of the seizure and detention, nor since, has there been any accusation against him personally or against anyone else. Until there was some evidence to compromise him, neither the vessel or cargo should have been touched. The question then naturally presents itself, how has it happened that a considerable sum of money is to be drawn from the Imperial Treasury to remedy a wrong and an injustice done to the applicant? The answer may fairly be said to be the absence of an effectual check against the undue procuring of a warrant of search and detention from the Chief Executive authority under the twenty-third section. It provides only that if he is *satisfied* as to there being reasonable and probable cause to believe in an *equipping* he may issue his warrant. A perusal of the depositions of Count Premio Real, the Spanish Consul-General, and his detective, will satisfy any reasonable person that there was such cause to be found in them for believing that the Atalaya was laden with arms and munitions, *equipped* in the sense of the Act; and at the same time it is to be observed that the vessel had commenced her voyage, and had she escaped with them, and the slaughter of Spanish loyal subjects the consequence, there would have been a reclamation from Spain for an indemnity,

(*a*) Historicus, 168. Sir Wm. V. Harcourt.

(*b*) International Law, Ed. Abdy.

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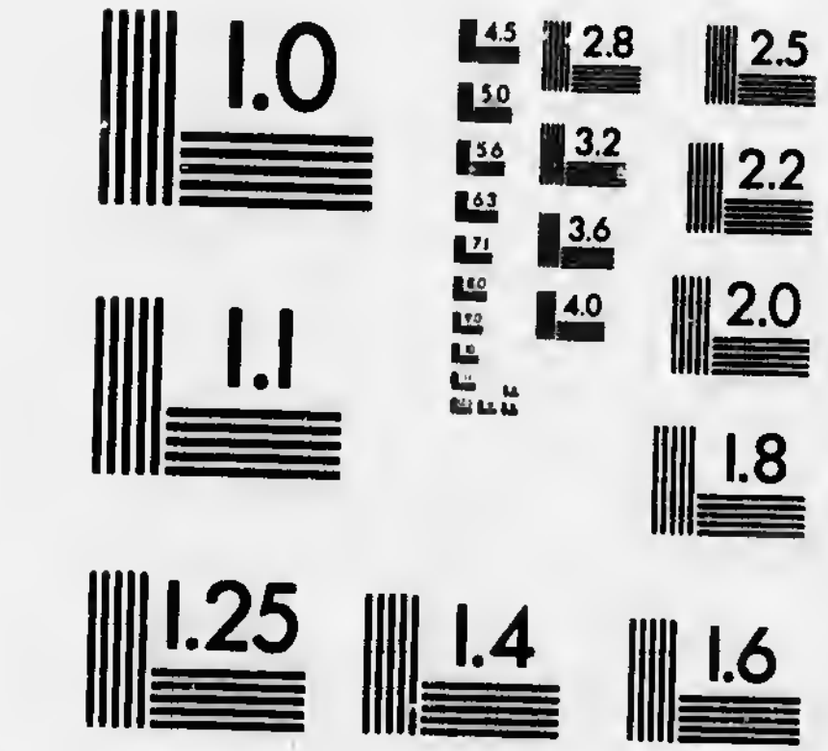

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the responsibility for which would have rested with the Chief Executive authority. His Excellency the Governor-General, therefore could not possibly do otherwise than issue his warrant. But if the evidence to satisfy the Chief Executive authority was sufficient, which it undoubtedly was, then it is quite certain that the information upon which the Consul-General of Spain acted was most defective, and that his relying upon the erroneous representations of another has resulted in the detention of the Atalaya without reasonable or probable cause. If it can be left to a detective in the working up of what he may call the case, so to influence the political or commercial agent of a foreign country, as to set in motion against a subject of a friendly nation, so dangerous an engine of power as the Foreign Enlistment Act, 1870, there must be some deficiency in the enactment. The official correspondence published in the case of the Alabama between Earl Russell, Secretary of State, and Mr. Adams, Ambassador of the United States, shows the danger of tardy action where a vessel escaped, and this case shows the danger of haste, where one was detained. The difficulty thus presented is one of the most serious nature, even where neighboring countries are at peace, but in times of internal commotion such as have existed in this country and the United States, or when they are at war, the danger becomes indefinitely magnified. The coasts of the Dominion on the Atlantic extend from Maine to Cape Breton, their line runs along the Gulf and the great estuary of the St. Lawrence, and the border line passes through the St. Lawrence and the great Lakes across the continent to the Pacific Ocean, and if from any point communication by the electric wire can procure the seizure and detention of a ship and cargo owned by a subject or a foreigner, there is no amount of loss to which the Imperial Treasury may not be exposed..

Having conceived it to be the duty of this Court, the only jurisdiction to which the subject belongs, to bring under notice the practical effect of the twenty-third section of the Act, I now proceed to pronounce a final decree. The

Registrar and Merchants have stated their opinion that the proof does not substantiate the entire claim for £8,000 sterling. I pronounce no opinion on this point, because I do not think the Act requires it. The Court for a similar reason takes no cognizance of the offensive charges made against the vessel of the applicant, because any damages resulting from them in the loss of business and profits are remote, and not the natural and proximate consequences of detention. The objection of the applicant therefore cannot be maintained. The decree is limited to the sum of £1,034 7s. 10d. sterling. As respects the costs of reference, it is to be observed, that the evidence for the Crown taken in New York has been useless and inoperative. There should have been a motion made to exclude the subject matter of the applicant's article No. 1, so as to prevent its going before the Registrar and Merchants, and thus the legal question which it involves would have been decided without evidence. Each party will therefore pay their own costs upon the reference.

Cook, Q.C., for the Applicant.

Alleyn, Q.C., and Larue, for the Crown.

Friday, 3rd June, 1881.

MARGARET M.—PAQUET.

Where two steam tugs were from a distance approaching each other nearly end on, one light and the other with a train of booms in tow, and the former inclined from her course upon her starboard helm, and afterwards crossed upon a hard-a-port helm and struck the tug having the tow; held, that she was in fault, and that the tug with the tow was not to blame for starboarding at the moment of collision, and for not reversing.

JUDGMENT.—*Hon. G. Okill Stuart.*

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The collision, complained of by the St. Lawrence Steam Navigation Company, whose name has by Act of Parliament, been substituted for St. Lawrence Tow-Boat Company, and owners of the Albion, a wheel steam tug of 107 tons, as against the Margaret M., a screw tug of 44 tons, took place opposite the lighthouse, half a mile above Point St. Antoine, on the south shore of the St. Lawrence, 24 miles above the city of Quebec. The course of a steamer on the way up the St. Lawrence in this locality is about W. by N., until reaching Point St. Antoine; she then turns upon a course about W. by S., and passes to the south of the St. Croix light, a few miles fu[illegible] up the river. The channel is about 600 yards in breadth and runs along the *Pointe-aux-Trembles* and the Ecureuils shoals on the north side, and the *batture* of St. Antoine on the south. At about 10 o'clock in the morning of the 15th of July last, the Albion had made the round of the point with a tow of 44 booms, chained two and two astern, the whole with the tow line, being about 400 feet. The tug Margaret M. had been seen from her for some time before rounding the point; and afterwards they appeared to be approaching from almost opposite courses. The Albion was seen from the Margaret

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M. at about the same time. The Margaret M. was light and had no tow; her speed was from nine to ten knots, while that of the Albion, with that of the flood tide, which was running about three and a-half, amounted to about six, the conjoined speed of the vessels exceeding fifteen knots an hour. So soon as the pilot of the Margaret M. saw the side lights of the Albion and her two mast head lights, he became aware that she had a tow of booms, as there was no raft light behind her. The speed of the two vessels continued unabated until opposite the St. Antoine light, when the stem of the Margaret M. came into collision with the starboard side of the Albion, about 30 feet from her stem. At the moment of collision the Margaret M. was on a hard-a-port helm, and the Albion starboarded hers, but without effect.

On the one hand, the Albion has attributed fault to the Margaret M. for that while she was on the proper course, slightly on the south side of the channel, bearing somewhat to the south of the St. Croix light, the Margaret M. descending on a parallel course about 360 feet to the north, suddenly changed it towards the south, and thereby came into collision; while on the other hand, for the Margaret M., it has been contended that she was not on the north side of the channel, but on the south, that she saw the side lights and mast head lights of the Albion two miles off, that her green light first disappeared, then her red and mast head lights were visible from the port bow of the Margaret M., that she changed her course, showing her green light, and hove across the bow of the Margaret M.

Not only is the evidence on one side in conflict with that of the other upon these statements, but the evidence on each side is, to a certain extent, in conflict with itself, which has been a source of some embarrassment to me. The difficulty is as to whether the Margaret M. was on the north side of the channel. The idea of the people of the Albion appears to have been that the Margaret M., a screw steamer drawing much more water than the Albion, was afraid of

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running upon the shoals upon the north side of the channel, and attempted to cross over to the south, a supposition somewhat fortified by the opinion of some of the witnesses for the Margaret M., who say that she should have stopped her speed. The court is much relieved from difficulty on this score by the impartial testimony of Captain Humphrey, of the tug Rival, which had been in advance of the Albion from the time she left Quebec. He had two sea-going schooners in tow, and passed the Margaret M. when about a mile or a mile and a-half ahead of the Albion. The Margaret M. passed the Rival, starboard to starboard, about 72 feet apart. Captain Humphrey seems to have kept his eye upon the course of the Margaret M. for a quarter or half a mile after she passed, and remarked to his pilot that if she continued so much to the north she would run upon the *Pointe-aux-Trembles* shoals. These two vessels were meeting at first end or nearly end on, and, it is said, were "dead ahead." It is also said that the Albion was in the wake of the Rival. If this be so, the Margaret M. must have starboarded her helm and gone over to the north before she came into contact with the Albion. This being so, it was for her to explain how, after passing the Rival and meeting the Albion at their conjoined speed of a mile in four minutes, she reached the south side of the centre of the channel, where the collision occurred. The mode of explanation attempted has been the placing of the Margaret M. on the south side of the centre of the channel, and a pretension that the green light of the Albion was seen, that she closed it and showed her red and afterwards her green, when the helm of the Margaret M. was put hard-a-port. But this by no means accords with the evidence of the master of the Margaret M. He has said that, not once but twice, he had recommended his pilot to go further to the south, which he declined doing, and it was only on his doing so a third time, and stating that the Albion had a tow, and that it was their business to clear her, that he did so. It was then that her helm was put hard-a-port, after which by sound-

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ing, her master found that she was on the north side of the channel. This leads me to the conclusion that the Margaret M., after she passed the Rival on the north, led the pilot of the Albion to believe that she would pass her in the same way; instead of which he, possibly from fear of the shoals, crossed a moment too late, when a miscalculation of the speed of the vessel led to the collision. Had she slackened her speed in due time, or stopped and reversed, there would have been no collision. The Albion, even if time were given her for the purpose, could not adopt this course, because the force of the tide would have thrown the booms on her paddles and made her ungovernable. The starboarding her helm at the last moment does not appear to have contributed to the collision.

The view I have taken of the case agrees with that of the assessors, as is to be seen from the following questions and their answers :—

1. After the Albion with her tow had passed the turn at Point St. Antoine had she assumed her proper course?

Answer.—She had, and for about half a mile.

2. Were the two vessels then approaching "end on" or "nearly end on?"

Answer.—We are of opinion that, at a long distance off, they were nearly "end on," but as they approached to within about three quarters of a mile, the green light of the Albion was seen on the starboard bow of the Margaret M., and remained so until the Margaret M. ported her helm, which was the cause of the collision.

3. Considering the conjoined speed of the two vessels, should either, and which of them, have slackened her speed or reversed?

Answer.—The Margaret M. should have slackened her speed to ascertain the position of the Albion with her tow before she altered her course, and we think the Albion was not called upon with her tow to slacken her speed.

4. At the time of the porting of the helm of the Margaret

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M. was there time for the Albion to get out of her way, or could she by any course have avoided the collision?

Answer.—We think not, as they were too near each other.

5. Do you think the Margaret M. solely to blame for the collision?

Answer.—We do.

E. D. ASHE, *Commander, R. N.*
F. GOURDEAU, *Harbor Master.*

The Court:—Judgment for promoters with costs,—damages to be assessed.

F. A. Andrews, Q.C., for the Promoters.

Charles A. Pentland, contra.

Saturday, 30th June, 1881.

IDA.—ROULSTON.

A plea of irresistible accident overruled, on the ground that the vessel proceeded against had attempted to bring up in bad weather, in an improper position, and unprovided in the equipment necessary to enable her to do so in safety.

IDA.

The litigation in this case arose from a collision on the upper ballast ground at Quebec. The weather was clear, the tide was on the flood, and the wind strong from the east. The British Lion, a barque of 1098 tons, was lying at anchor with other ships, when the Ida, a barque of 571 tons, hove round in front of her, and let go her anchors, which not holding, she drifted upon the British Lion. The latter sustained damage for which this suit was brought. The plea was inevitable accident occasioned by the irresistible force of the wind and tide, a *vis major*, and by the fault of the British Lion not starboarding her helm.

Per Curiam.—To support a plea of inevitable accident, it must be shown that the collision could not possibly have been prevented by the exercise of ordinary care, caution and maritime skill. It appears that at about three o'clock in the afternoon of the 9th of May last, the British Lion was, and during two hours previous to the collision had been, riding safely to her starboard anchor, in nineteen fathoms of water, upon about eighty fathoms of chain. She was on the upper ballast ground, and the farthest westward of any of the ships there, save one on her port quarter. The wind was a strong easterly breeze, which, with the flood tide running about three knots an hour, might drive a vessel through the water at the rate of five or six knots. The Ida, then from sea, had lowered all sail except her upper top sails, and these were taken in when about opposite the Citadel. Arriving

IDA. at the ballast ground under bare poles, she made an attempt to anchor at the distance of about half a mile ahead of the British Lion, while coming round and up to the wind and tide. Her failure in doing so was caused by circumstances detailed in the evidence of the Ida's chief officer, second mate and pilot. The first has said, "before we dropped our anchor, our helm was put to starboard by the pilot's orders, we were then running before the wind, and we came round from four to six points before we dropped our starboard anchor; afterwards we dropped our port anchor, our port chain parted at about sixty fathoms, and both chain and anchor; were lost. We continued to pay out chain on the starboard anchor, and were still paying out on that anchor when the vessels fouled. Our anchors did not fetch us up to the moment of collision, we were driving with wind and tide all the time." The second mate of the Ida has said, "the chain on the starboard anchor did not pay out very easily, but that was not the reason why we let go our port anchor; we dropped it when we found that the starboard anchor would not hold. The port chain ran out by itself, but the starboard chain did not run out so freely because the normans were gone on the windlass; it did not jam, however, it was the chain flying over the windlass that made the normans give way." Then the pilot of the Ida, Treffle Simard, has said that her port anchor chain was an old one, and, although still good enough to hold her in moderate weather, it was not sufficient with the wind as it was on that day; and that if it had been as good as the starboard chain and held, it would have brought her up. It is also in evidence that when the vessels fouled, the Ida's starboard chain cable was almost perpendicular to the hawse pipe, and that after the vessels separated, she was brought up about a mile further up the river by her starboard anchor without its stock and with one of its flukes broken. It being further proved that the Ida might have been safely brought up at the place where she attempted to anchor, several of her witnesses stating that they would have anchored her

there at the time, no other conclusion can be come to than that the cause of the collision was the Ida's starboard anchor chain not running out freely, either from the defective windlass or some other cause, not explained; also to a defective port chain cable, and very possibly to her being brought round with too much headway, a view of the case strongly supported by the fact that, after the collision, the broken starboard anchor held her. Good seamanship seems to require that a vessel should not anchor directly ahead or directly astern of another vessel in the direction of the tides or prevailing winds, unless at such or so great a distance as would allow time for either vessel to take measures to avoid collision in the event of either driving from their anchors,(*a*) and in the case of the Lotus, (*b*) in this Court, it was held that when a vessel is lying at anchor and another vessel is placed voluntarily by those in charge in such a position that danger will happen if some event arises, which is not improbable, those in charge of the second vessel must be answerable. If it were true, as many of the witnesses of the Ida say, that it was blowing a gale and the Ida was driving before it, with an increased rate from the tide, it was certainly the height of indiscretion to round as she did upon faith in an impaired windlass and an insufficient chain cable, instead of bringing to astern of the British Lion, where she could have done no injury to her or any other vessel. The plea of inevitable accident must therefore be overruled, as well for mismanagement on board the Ida, as for her not being furnished with apparel adequate to the safety of herself and others.

There remains to mention the fault imputed to the British Lion for not starboarding her helm. If it were true that the collision could have been avoided by this being done, and she neglected to do it, the fault would be mutual and each vessel would bear its own loss. The Ida's pilot says that he hailed the British Lion, at the distance of half a

(*a*) The Cumberland, 1 L. C., Adm. R. 75.

(*b*) Ib. vol. 2, p. 58.

IDA. cable's length to starboard her helm, and he and others, state their belief that she did not do so. But this testimony is sufficiently contradicted. The chief mate of the British Lion had been watching the approach of the Ida broadside on, and until he heard the call to starboard, he was in doubt as to her passing to port or starboard, and then he instantly ordered the helm hard a-starboard. His evidence in this respect is confirmed by several on board of the British Lion, who say that his order was instantly carried into effect. The suit must therefore be maintained against the Ida, the damage of the British Lion to be ascertained in the usual way.

Cook, for the Promoter.

Alleyn, Q.C., for the Ida.

Friday, 11th November, 1881.

THE EUCLID.—ANDERSON.

Where an agreement was made on the Lower St. Lawrence with a tug to tow a ship to Quebec, Montreal and back to Quebec, held:—

1. That the tug having towed the ship to Quebec and Montreal her owner could not transfer the contract to another to complete it, and

2. That he could not substitute an inferior tug with additional tow for the purpose.

Quære, as to the jurisdiction of the court.

EUCLID.

This suit against the barque Euclid, of about 470 tons, was brought by the owners of the Margaret M., Conqueror No. 2, and Dauntless, tugs employed by them in towing vessels in the gulf and river. The case, as stated in the libel, was that the promoters agreed to tow the Euclid from Bersemis to Quebec, thence to Montreal at tariff rates; that the Margaret M. towed her to Quebec, that the Dauntless moved her from the anchorage to a wharf for a sum of $10. That the barque was towed to Montreal by the Conqueror No. 2, that the towage from Bersemis to Montreal is $390, which with another sum for services at Montreal forms a sum of $400. That on the 16th of June, the master of the Euclid telegraphed the promoters that he wanted a steamer for the next day, Thursday, that on the 16th of June, the promoters offered to tow the vessel to Quebec in accordance with said agreement next day, but in violation of the said agreement the master refused to permit the promoters to tow the vessel, and employed another tug at a cheaper rate, which occasioned a loss of profits to the promoters of $313.82, which with the sum of $400 already stated forms $713.82.

The respondent admitted the liability for the $400, and tendered and paid it; but by his plea asserted that the agreement included towage not only from Bersemis to

EUCLID. Montreal but from Montreal to Quebec with the Margaret M., instead of which the promoters offered the Resolute, not their property nor in their possession, to tow the Euclid along with two other vessels to Quebec, for which the Resolute was unfit; and her master declined to be answerable for the safety of the Euclid.

Per Curiam.—The promoters have stated in their libel an agreement to tow from Bersemis to Quebec, and from Quebec to Montreal only, and claim damages under the same agreement for not being allowed to tow to Quebec, by no means a legal inference.

I do not see that this Court can award damages for a breach of contract as stated in the libel. But as each party has submitted the case upon the supposition that the contract involved a re-towing to Quebec, I shall, upon this view, express my opinion. When the Euclid was ready to leave Montreal, the promoters had not one of their own steam tugs there. They, when asked to tow her, referred her master to Mr. John Wilson, owner of the steam tug Resolute, and made an agreement with him to perform the towage to Quebec for seventy-five dollars. It seems that the Resolute was to tow two other vessels, a brig and brigantine, and that the Euclid was to be added to them. The Resolute was of 140 tons and 75 horse-power. The Margaret M. was twice her strength, and the Conqueror No. 2 still more powerful. Mr. Wilson was of opinion that he could tow the three vessels safely by the Resolute, but persons of nautical skill, and whose business it was to know, were of a different opinion. The pilot of the Euclid declined to go in tow with the other two vessels, and the pilot of one of them told the pilot of the Euclid, that if the Euclid went, he would not go. One of these pilots had before been towed by the Resolute when he was in charge of other vessels, and has expressed his opinion that the Resolute was not equal to towing the three vessels. Upon these opinions the master of the Euclid acted, and he did rightly. Had he done otherwise, and an accident had happened

from defective power in the tug, at one of the many and dangerous twists in the channel between Montreal and Quebec, he would have incurred a serious responsibility. He was obliged to engage another tug to tow the Euclid to Quebec for $160, and seems to have been willing to pay the promoters the towage less that sum, an offer rather injudiciously declined. The suit cannot be maintained for two reasons; the first is that the agreement to tow was with the owners as owners of three powerful tugs, in whose place the promoters had no right to substitute the owner of an inferior tug, and the second is that had they the right to substitute another tug, it should have been one of greater power, or else the Resolute minus one of the other vessels. The contract which has been proved has not been performed by the promoters. If they have not received profits upon a towage to Quebec, it is not the fault of the respondent but their own. The respondent has in no wise been guilty of a breach of the contract, and the Court cannot award damages against him. The decree I make is that declaring the tender of $400 to have been sufficient, the demand of $313.82 for damages over and above such tender, is dismissed with costs.

Pentland, for the Promoters.

William and Archibald Hay Cook, contra.

Friday, 11*th November*, 1881.

THE FAREWELL.—COTÉ.

The Dominion Parliament may confer on the Vice-Admiralty Courts jurisdiction in any matter of shipping and navigation, within the territorial limits of the Dominion.

When an Act of the Dominion Parliament is in part repugnant to an Imperial Statute, effect will be given to its enactments in so far as they agree with those of the Imperial Statute.

FAREWELL.

This was an action for indemnity in the nature of pilotage, based upon the Pilotage Act, 1873 (36 Vic., chap. 54), under the circumstances noticed in the following judgment:

Per Curiam.—The promoter, a pilot, was engaged by the respondent, owner of the Farewell, to pilot her from Quebec to Bic, the limit of the pilotage district in the Lower St. Lawrence. At Bic he was, without his consent, taken to sea on the 21st of November. On the 14th of December, at sea, he was transferred to the Bolgaya, of Dundee, taken to St. Thomas, thence to Havana, by a steam vessel to New York, and by rail arrived at Quebec on the 22nd of January last. By the fortieth section of the Dominion Pilotage Act, 1873, it is enacted "that no pilot shall, without his consent, be taken to sea, and every pilot so taken shall be entitled to cabin passage, and over and above the pilotage dues, to the sum of two dollars a day from the day on which the ship passes the limits up to which he was to pilot her." In the terms of this provision the promoter has claimed a sum of $280.45. For pilotage dues, there is no claim. By act on protest, the respondent declines this jurisdiction, on the ground that the Dominion Parliament has no legislative authority to enlarge or restrict the powers of this Court as one of Imperial creation. If this be true, the Court cannot enforce the fortieth section of the Dominion Pilotage Act, 1873, which awards the indemnity demanded, and no remedy, either *in rem* or *in personam*, can be afforded in this suit under that Act.

FAREWELL.

By the British North America Act, 1867, the exclusive legislative authority in the Parliament of Canada extends to the regulation of navigation and shipping. As an incident to this power, the courts of Vice-Admiralty necessarily come under its control, as may be seen on reference to the case of the Hibernian, (*a*) determined by this Court, and its decision affirmed by the Privy Council. The case of the Eliza Keith may be referred to on the same point, (*b*) and as conclusive, the cases of the Samuel Gilbert and Franklin B. Schenck, wherein, upon the information of Sir John A. Macdonald, the Attorney-General, two American vessels were declared forfeited by the judgment of the Court, for an infraction of the Dominion Act "respecting fishing by foreign vessels," 31 Vict. cap. 61. In all these cases, however, it is to be observed that the jurisdiction was exercised in matters within the territorial limits of the Dominion, which "do not extend beyond three marine miles (or a marine league) from the coasts, such being the distances to which, according to the modern interpretation and usage of nations, a cannon shot is supposed to reach." (*c*)

Another section of the Pilotage Act, 1873, the forty-second, declares that so soon as the vessel passes out of the pilotage district, the service is performed, which disconnects the pilotage dues from the subsequent indemnity for being taken to sea. The consequence of this is, that the Dominion Parliament Pilotage Act, 1873, awards an indemnity either for an injury sustained upon the high seas, or for an obligation there incurred. This is the exercise of a power beyond the territorial limits of the Dominion, and is so far void unless relieved by Imperial Legislation.

By the Merchant Shipping Act, 1854, s. 357, it is enacted that no pilot, except *under circumstances of unavoidable necessity* shall, without his consent, be taken to sea or beyond the limits for which he is licensed, *in any ship whatever*, and every pilot so taken, *under circumstances of unavoidable necessity*, or without his consent, shall be

(*a*) 2 Stuart's V. A. R. 156; 4 P. C. App. 511.

(*b*) 3 Quebec L. R., p. 143.

(*c*) Forsyth's Con. Law, 25.

FAREWELL.

entitled, *over and above his pilotage*, to the sum of 10s. 6d. a day to be computed from and inclusive of the day, on which such ship passes the limit up to which he was engaged to pilot her, and inclusive of the day of his being returned in the said ship to the place where he was taken on board, or up to and inclusive of such day as will allow him, if discharged from the ship, sufficient time to return thereto, and in such last mentioned case he shall be entitled to his reasonable travelling expenses." From this enactment, the clause of the Dominion Pilotage Act, 1873, varies in this, that it allows an indemnity to the pilot when taken to sea without restriction, while the Imperial Act provides the indemnity only under circumstances of unavoidable necessity. Then the *per diem* allowance of the one act is two dollars, and that of the other is ten shillings and six pence sterling. As respects the specific allowances of the Dominion Act, they may be brought under the head of travelling expenses allowed in the other. It may be further noticed that the disconnecting of the pilot service from the indemnity, does not appear in the Imperial Statute.

By the Vice-Admiralty Courts Act, 1863, the Imperial Parliament conferred on this Court jurisdiction over claims in respect of pilotage, and the Merchant Shipping Act allows the indemnity over and above his pilotage in the same connection, and thus makes the pilot's indemnity incident to his having piloted the vessel. It was held by this Court in the case of the Haidee that where it has original jurisdiction of the principal matter it has also cognizance of the incidents thereto; (*a*) and again, by Chancellor Kent, it was said that where the Court of Admiralty has original cognizance of the principal matter it has also of the incident, though that incident would not of itself, and if it stood for a principal thing, be within the Admiralty jurisdiction. (*b*) Even if there were no such enactments as those in the Vice-Admiralty Courts Act, 1863, and the Merchant Shipping Act, it by no means follows that a person taken to sea without his con-

(*a*) Stuart's V. A. R., vol. 2, p. 25. (*b*) 1 Com. § 379.

sent, and detained on board of a vessel, would be without his remedy in this Court either upon an implied obligation, or for injury done upon the high seas. (*a*) If it were not so there would substantially be no remedy ; the service rendered by a pilot at the close of navigation in the St. Lawrence, when ice obstructs and snow storms prevail, is one attended with unusual danger, and the interests of the shipowner require that there should be no stint in providing a remuneration for taking him to sea, in the interest of the ship. If it were otherwise, pilot service at that season might not be easily had.

I proceed now to state the grounds of my decision on the act on petition. By the Imperial Act 28 and 29 Vict. cap. 63, intituled "An act to remove doubts as to the validity of colonial laws," it is enacted that "any colonial law repugnant to the provisions of any act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under the authority of such act of Parliament, or having in the colony the force and effect of such act, shall be read subject to such act, order or regulation, and shall, to the extent of such repugnancy, be void." Upon this authority I shall give effect to the Dominion Act so far only as it is not in conflict with the clause of the Merchant Shipping Act, which in this case amounts to no more than the difference between the *per diem* allowance of two dollars, and ten shillings and six pence sterling, which it is quite competent to the promoter to abandon, as he has done by his preference for the Dominion Act upon which he has proceeded. I therefore overrule the act on protest with costs.

Blanchet, Pentland and Pelletier, for the Promoter.

Andrews, Caron, Andrews and Fitzpatrick, for the Respondent.

(*a*) The Friends, 1 S. V. A. R., 118. The Toronto, Ib. 170. The Ruckers, 4 C. Rob. 76.

Friday, 11*th November*, 1881.

S.S. EUROPEAN.—Simpson.

Where a steam vessel overtook and collided with a barque, in a very dense fog. Held:—

1. That her speed, between seven and eight knots, was, under the circumstances, excessive, and that she was therefore to blame; and

2. That the steamer, not having become visible from the barque, until within a distance of one hundred and twenty feet, or thereabouts, although her whistle had been heard for some time, the barque's people were not in fault in failing to show a stern light, as prescribed in the sailing regulations.

The rule, as to when a stern light is to be exhibited, explained.

Judgment.—*Hon. G. O. Stuart.*

European.

This is a suit for damages consequent upon a collision,—the defence, a breach of the sailing regulations.

The Norwegian barque Gefion, of 440 tons, left the port of Arendel, in Norway, on the 19th of April last, on a voyage to St. Thomas, in the River St. Lawrence, and on the 14th of June, when about 40 miles to the south of Burgeo, Newfoundland, at about two o'clock in the morning, she was on the port tack in a dense fog, steering by the wind, a light breeze from W. S. W., heading about N. W. half N., and going through the water at between 3 and 4 knots. Her starboard watch was on deck, she had a look-out on the top gallant forecastle, and her fog horn was sounded at regular intervals. At the same time the European, a steamship of 1774 tons, from Liverpool, bound for Quebec, was upon a similar course. She sounded her fog whistle every two minutes; a sound from right ahead was heard, her engines were stopped, the sails of the Gefion were seen from her under her bow, and the engines were reversed full speed astern, the two vessels being then too near to avoid a collision. The stem of the European struck the

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stern of the Gefion a little to port of her midship line and carried away the round house, part of the roof of the cabin house and steering gear. Her stern was cut down to within three feet of the water's edge, where the stem of the European had penetrated about 10 feet, and the foremast and bowsprit were sprung. The master of the European has stated her speed to have been between 7 and 8 knots, and that it had not abated at the moment of the collision. The fog was so dense that a vessel could not be seen further than at about 120 feet, and the engineer of the European has stated that, previous to getting the order to stop, the engines were going at full speed ahead. The look-out of the European, in his experience of thirty years, had not seen a thicker fog. There is no discrepancy in the matter of speed and the density of the fog. The sight of the Gefion from the European and the collision were very nearly simultaneous. The speed of the European was too great for the fog, and consequently she was in fault.

It has been pleaded that the Gefion was to blame for not blowing a fog horn and for not showing a stern light. Were she in default in either of these respects, censure would attach to her also, and the damages be divided. As respects blasts from the fog horn there is testimony, including that of the man on board the Gefion who made them, that there were two in succession, as required from a vessel on the port tack, immediately before the collision, in the terms of one of the recent regulations; and in reference to a white or flare-up light being shown, by a ship overtaken by another from her stern, required by another of the same regulations,—its plain interpretation requires that the vessel astern, should be or could be seen from the vessel ahead of her before the rule can apply, otherwise every vessel at night would have to carry a light permanently showing over her stern, which is by no means the purport of the rule. That the European was not and could not be seen from the Gefion, in time to exhibit a white or flare-up light, admits of no question. That these lights were in the

EUROPEAN. stern part of the vessel ready for instant use is in evidence. They seem to have been in an appropriate and proper place, but one which could not be approached without danger to life, so immediate and instantaneous was the approach of the European. The defence on these points having failed, I pronounce in favor of the Gefion with costs, and the decree of the court is, that the amount of her damages be ascertained in the usual course.

Blanchet, Pentland and Pelletier, for the Promoter.

W. and A. H. Cook, contra.

Friday, 13th January, 1882.

S.S. LOMBARD.—STEVENSON.

FAREWELL.—COTÉ.

Where a steamship, in a narrow channel in Lake St. Peter, was in the act of overtaking a steam tug and tow so carelessly navigated as to create risk of collision, and one of the vessels in tow collided with her; Held:—

1. That the steamship was in fault for not keeping out of the way, and the tow to have been to blame for not keeping her course; and
2. That the damages should be equally divided, without costs to either party.

JUDGMENT.—*Hon. G. Okill Stuart.*

LOMBARD.
FAREWELL.

The cases of the Lombard and the Farewell are two claims for damages. The first is that of Messrs. Maguire, of Quebec, owners of the barkentine Farewell of 317 tons, against the Lombard, a steamship of 1132 tons registered tonnage; and the second is a counter claim by J. H. Davidson, of Newcastle, the owner of the Lombard, against the Farewell. They originate from a collision between these vessels in that part of the channel in Lake St. Peter which is about opposite River du Loup, below Sorel. There the channel of the St. Lawrence, according to a notice by the Montreal Harbour Commissioners, has but 280 feet in breadth, but is spoken of as 300 feet. The Farewell is of a length of 136 feet and she drew 9 feet 9 inches of water. Another vessel, the Louis A. Martinez, is a bark considerably longer, of between five and six hundred tons, drawing 17 feet 6 inches. On the morning of the 17th November, 1880, these two vessels left Sorel, below Montreal, from whence they had reached Sorel the previous evening destined for sea, passing by the Port of Quebec. They were in tow of the tug

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Challenger, a steam vessel of about 75 tons, of medium strength, but her horse-power does not appear. These vessels were fastened by separate tow ropes to the same post about midships of the tug. The Farewell was towed ahead of the Louis A. Martinez by her tow rope, in length somewhat over thirty fathoms, and the Louis A. Martinez by her's about 20 or 25 feet longer, astern of the Farewell, all three, tug and tow, in a line. The wind was fair and strong from the S.W., and said to be half a gale. The sails carried by the Farewell were her lower and upper topsails, and the Louis A. Martinez was under her upper and lower foretopsails and foretopgallant sail. The tow lines were loose and occasionally in the water. The Lombard had left Sorel some time after these vessels, and had been gradually overtaking them. After passing a curve in the channel, and when within a quarter of a mile of them, she intimated her intention to pass by blowing her whistle for them to keep to the north side of it, and they did so. The speed of the tug and tow was about six knots and that of the Lombard a mile or so faster. When the Lombard had come nearly abreast of the Farewell, and when they were about 150 feet apart, the Louis A. Martinez drove upon the Farewell, struck the port side of her taffrail and sent her over upon the Lombard. The latter, to escape collision, ordered her engines full speed ahead, but too late. The anchor of the Farewell came into contact with the Lombard at about 25 feet from her taffrail, which prevented her steering upon her port helm, and caused her to run aground upon the nort hbank of the channel, about 400 feet below the place of collision.

The sailing rules by which these cases are to be governed are the twentieth and the twenty-second. The twentieth is, that, "notwithstanding anything contained in any preceding article, every ship, whether a sailing ship or a steamship, overtaking any other, shall keep out of the way of the overtaken ship;" and the twenty-second is, that "where, by the above rules, one of two ships is to keep out of the way, the

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other shall keep her course." The case of the Lombard is to be tested by the the twentieth, and that against the Farewell by the twenty-second rule.

It appears that about ten minutes would have brought these vessels, at the rate the tug and tow were moving, to a greater breadth of channel, where they could have been passed with safety, and it rested with the pilot of the Lombard to try the experiment to pass or wait. The tug and tow in length were more that the breadth of the channel, and the derangement of their line in any particular would obviously endanger the Lombard, or the Lombard them, in passing. The Farewell was steering badly, and the pilot of the Louis A. Martinez was heard from the Lombard several times reproaching the pilot of the Farewell for not minding his helm, and prudence should perhaps then have dictated a retrograde movement to the Lombard. The Louis A. Martinez was but twenty-five feet astern of the Farewell, the latter steering under her bows. The tow-ropes were slack and the vessels in tow were subjected to the counter influences of the tow-ropes and their sails. All this was visible from the Lombard. Still she went on and assumed the risk of passing. She failed by the length of about twenty-five feet, and the consequences of her imprudence must be felt by her under the twentieth rule. On a former occasion I acted upon the principle, "If it be practicable to pursue a course which is safe, and you follow so closely upon the track of another vessel that mischief may ensue, you are bound to adopt the safe course." This is the principle which is always acted on in cases of injury done at sea, (*a*) and in the case of the Betavier, Dr. Lushington said: "A steamer going at a slow rate, even at one knot "and a half an hour, if she sees anything in her way which "if she prosecutes her voyage without stopping she will be "likely to destroy or put life in danger, is bound not merely "to diminish her rate but to stop altogether." (*b*)

(*a*) Quebec, L.R., vol. 2, p. 1. (*b*) Spink's A. and E.R., 382. Infra. p. 87.

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Now, with reference to the counter claim of the Lombard against the Farewell. It was equally imperative upon her under the twenty-second rule to keep her course as it was upon the Lombard to keep out of her way. This rule was especially made for the purpose of preventing the vessel charged with the duty of avoiding the other, in this instance the Lombard, from being embarrassed by a change of course on the part of the other, in the present cases of the tug and tow, in the eye of the law, but one ship (*a*). The Farewell, comparatively a very light vessel, was injudiciously placed in the line of tow in front of a heavy one, a faster sailer under the pressure of a high wind. Moreover, she could not use her starboard helm, which was necessary to keep her on her course and from running across the channel. The reason why, is repeatedly stated by the pilot of the Louis A. Martinez, that by starboarding she would have ran into his vessel, which accounts for his so often calling upon the pilot of the Farewell to mind his helm, and that was for his own safety. With his helm half-paralyzed it is plain that an accident might from one moment to another occur. The propelling force of the wind upon the sails sent the tow over their tow-ropes and so weakened the tractive power of the tug as to deprive it of all control. Considering the proximity of the Louis A. Martinez to the Farewell, a collision between them was by no means improbable, under their pressure of sail. That the blow of the former upon the port end of the taffrail of the latter was one of considerable violence admits of no doubt. It rendered the helm useless, and the man in charge was compelled to leave it. Either at the moment of this collision, or shortly before, the Farewell was on her port helm and the blow of the Louis A. Martinez upon the port quarter of the Farewell under sail caused a very rapid transit across the channel, so much so that there was not time to foresee the impending collision, as the pilot of the Farewell and the master of the Lombard were exchanging salutations almost at the moment it took place. As well

(*a*) Marsden Coll. at sea, p. 202.

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the master as the chief officer have each given their opinion as to the cause of collision. That of the master is, that it was owing to the Farewell sheering underneath the bows of the Louis A. Martinez, to her having her topsail set, to the Louis A. Martinez being the fastest sailer and overruning her hawser, and also to the pilot of the Farewell not minding his helm. The opinion of the chief officer does not materially differ. He has attributed it to the tug being too light for keeping her tow under command, to the sheering of the Farewell under the bows of the vessel astern, and to her being upon a port helm and its desertion by the man in charge of it.

On the other hand, the Farewell has met these charges by a statement that the speed of the Lombard was too great, and that her wave or swell drove the Louis A. Martinez upon her, and that she was thereby rendered unmanageable. I cannot see how this could be, as the speed of the Lombard was reduced about one-half before she attempted to pass, and her progress was but about a mile or so faster than that of the tug and tow, nor does it appear to me that the wave or suction, as it has been also termed, could have had any influence on the Louis A. Martinez, upon a parallel course 150 feet distant. In truth it would have been better for the Farewell had the Lombard's rate been faster, as but a very little more would have carried her clear of the collision. As it was, the Lombard was in a dilemma, (in what is familiarly termed a tight place,) she could not recede or advance without danger at the moment the Farewell took the sheer. I will only add that a strict observance of the sailing rules, alone will prevent accidents to life and property upon the many narrow passes in the channels of the upper St. Lawrence. On this occasion the collision originated from the Farewell placing herself in a false and dangerous position, only twenty-five feet in front of a faster sailer than herself. It cannot be permitted that a light tug should dangle at the end of two ropes, with vessels at their other ends, sailing at cross pur-

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poses upon a breadth of channel much less than their length.

The view I have taken of these cases quite accords with that of the nautical assessors, whose opinions are to be found in the following questions and answers:

Question.—Was there risk of collision when the Lombard in overtaking the tug Challenger and her tow attempted to pass them, considering the breadth of the channel and their position at the time?

Answer.—There was.

Question.—Could the Lombard, after the Farewell was struck by the Louis A. Martinez, have kept out of the way of the Farewell?

Answer.—The time was too short.

Question.—Was the Lombard to blame for the collision?

Answer.—The Lombard should have seen that the small tug had not sufficient control over the tow to prevent their sheering about, and in this particular the Lombard was to blame.

Question.—Did the Farewell by any act of her officers and crew contribute to the collision, or are they in any way to blame for it?

Answer.—She was to blame in deviating from her course.

E. D. ASHE, *Commander R. N.*
F. GOURDEAU, *Harbor Master.*

Per Curiam:—There having been mutual fault, the decree is, that the damages be equally divided under the old rule recently revived by an Act of the Dominion Parliament, and that the parties respectively pay their own costs. Reference as usual. (*a*)

Andrews, Q.C., for the steamer.

Jules Larue, for the barque.

(*a*) The sixth section of the Dominion Statute, 31 Vict. cap. 58, provided that in cases of collision arising from non-observance of the rules of navigation prescribed by the Statute, the owner

of the vessel or vessels by which such rules were infringed *should not be entitled to receive any compensation whatever*, thus virtually, if not expressly, putting an end in a large number of cases, to the Admiralty principle of the equal division of the damages, in the event of common fault. The Dominion Act, 43 Vict. cap. 29 restores the former law.

When the Judicature Act for England was introduced, in 1873, it was proposed by the Lord Chancellor (Lord Selbourne), that the rule of common law, where it was shown that the plaintiff had contributed to the injury, should in all cases prevail, and the proposed alteration was adopted in the House of Lords. In the Commons' Committee, however, the Admiralty rule was restored, with the concurrence of the Attorney-General, and of all the legal members of the House, and it thus, after a somewhat narrow escape remains a principle of the existing Maritime Law. (*Hansard Parl. Deb. 3rd Series, Vol.* 216, *pp.* 1800, 1801.) This result was in no small measure due to the exertions of Mr. H. C. Rothery, then Registrar of the High Court of Admiralty, who in an admirable letter to the Chancellor, stated and defended the antiquity and equity of the ancient maritime rule. (*Longmans & Co.* 1873.)

It has been suggested that the Mosaic law lays down, in one case at least, that, namely, of collision, between beasts, not ships, very similar principles.

"And if one man's ox hurts "another's that he die; then "shall they sell the live ox, *and* "*divide the money of it; and the* "*dead ox also shall they divide.*

"Or if it be known that the ox "hath used to push in time past, "[illegible] hath not kept "him in; he shall surely pay ox "for ox, and the dead shall be his "own."

(*Exodus, Ch.* XXI. *V.* 35-36.)

Without claiming for the rule such a remote descent, there can be no doubt of its great antiquity, and of the fact that it has been adopted by almost all the civilized nations of the world.

"To find the origin of the rule," says Mr. Rothery, in the letter referred to, "we must go to the collections of Maritime Laws, which date from the revival of civilization and commerce in Europe in the 12th, 13th and 14th centuries. I refer to the Consolato del Mare, the Laws of Oleron, the Ordonnances of Wisbuy, the Siete Partidas, the Black Book of the Admiralty, the Jugemens de Damme, and others of the same period. From these, it is that the General Maritime Law of Europe was framed, and it is here that we shall find the principle of the equal division of damages in certain cases of collision, for the first time laid down."

Friday, 28*th April*, 1882.

BOTHAL.—BROTHERTON.

NELSON.—GLAISTER.

Where a sailing vessel and a steamship were meeting nearly "end on," and the former ported, while the latter starboarded. Held that the former was in fault for not keeping her course, and the latter, for not stopping, or slackening her speed.

JUDGMENT.—*Hon. G. O. Stuart.*

BOTHAL. NELSON.

Proceedings in cross-actions bring under notice a collision of the Nelson, a barque of 288 tons, with the Bothal, a steamship of 1228 tons, at 12.30 a.m. of the 18th September last, with the wind N.E. The Nelson on a course S.W. by W. was sailing up the river St. Lawrence, under all plain sail, the Crane Island Light, about two miles distant, bearing W. by S. In her log it is stated, that the white light of the Bothal, on her course down the river, was seen about three miles off, bearing about a point and a half on her port bow, then her red light; and when she had approached to within a mile and a half, the pilot of the Nelson ordered her helm to port. The speed of the Bothal was about ten, and that of the Nelson about five knots; and, according to the pilot of the Nelson, she continued her course until she was within a quarter of a mile of the Bothal, when the latter starboarded her helm which brought her across the bows of the Nelson and into contact with the end of the jibboom, which struck the Bothal aft the bridge. It further appears from this pilot that the Bothal had been coming "head-on," showing her three lights before the Nelson ported. The collision was in the centre of the channel, about a mile in breadth. The account given by the second mate of the Bothal, who was

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with the pilot in charge, is, that the lights of the Nelson, when first seen, were about a point and a half on her starboard bow, and when within about two miles from her, the pilot of the Bothal ordered her helm to starboard, and while answering it she lost the green light of the Nelson and saw her red, when the helm was ordered hard-a-starboard, and then came the collision.

No satisfactory reason has been given for the Nelson's porting her helm. This change of helm brought her from whatever distance she was at the time from the south side of the channel to the centre of it, where the collision occurred. To excuse this act, the Bothal has been blamed for not keeping to the starboard side of the fairway or mid-channel under the 31st rule, which so directs when in a narrow channel. But this was not a narrow channel, and if it were, it would be no excuse for the Nelson's porting contrary to the 22nd rule, which directs that she should have kept her course. In point of fact, the Nelson ported for no other reason than to allow the Bothal to pass port to port. It appears that a conversation took place between Mr. Carbray, the agent of the Bothal, and the master of the Nelson at Quebec, when the former said to the latter, "What business had you porting your helm"? to which, according to Mr. Carbray, the answer was, "I ported my helm to get out of your road, when I saw your vessel coming down upon us." It is true that the master has denied this statement. If he did speak as stated, he must have had it from hearsay, as he was not on deck before the collision. But the evidence of the second mate of the Nelson leaves no doubt upon the point; he has stated that her helm was ported when the red light of the Bothal was seen, and then she inclined slightly to the right in order to show her red light perfectly to the Bothal, so that she could pass on the Nelson's port side. The Nelson is therefore in fault, for not complying with the 22nd rule.

It by no means follows that the Bothal was not to blame also. By the 18th article of the regulations, every

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steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed or stop, and reverse if necessary. The weather was clear, the wind moderate, and the tide flood. While the Bothal was steaming at the rate of ten knots and saw the green light of the Nelson shut out, her red being visible, it was plain that one vessel was crossing the course of the other, and that the two were approaching so as to involve risk of collision.

Instead of starboarding or hard-a-starboarding, had the Bothal slackened speed or reversed, or even ported, as anticipated by the Nelson, there would have been no collision. Both these vessels being in fault, the decree is that the damages be divided, and that each party defray their own costs. With ordinary prudence and care the Bothal could have kept out of the way of the Nelson, and for not doing so she is to blame.

From this judgment, the owners of the Nelson asserted on the 5th of May, an appeal to Her Majesty in Her Privy Council.

William Cook, Q.C., and Archibald Hay Cook, for the barque.

Jules Larue and C. A. Pentland, contra.

Friday, 19*th May*, 1882.

BARCELONA.—ANDERSON.

Upon the liquidation of on account by the Registrar and Merchants in a case of collision for damages done by a ship to a wharf:

Held: 1. That a claim for consequential damages, not asked for in the libel nor awarded by the decree, cannot be considered by the Registrar and Merchants; and

2. That if it could, such damages should not be allowed, either under article 1660 of the Civil Code, or by the Maritime law.

Quære, as to jurisdiction.

BARCELONA.

Appeal from an award by the Registrar and Merchants, to whom under interlocutory decree, the assessment of damages had been referred in this matter.

Per Curiam.—This is a suit for damages arising from the ship Barcelona, striking and breaking into the wharf of Mr. Alford, the owner, and is brought under the Imperial Act of 1861, which confers jurisdiction on the court in respect of claims for damage *done by any ship*. The charge in the libel is "that the collision and the damages and losses consequent thereon are attributable to the negligence of those on board the Barcelona." The decree of the court of the 16th December last, is for the damages demanded, with the usual reference for their liquidation. On the 24th January last, Mr. Alford submitted his claim to the Registrar and Merchants; it amounts to $4857.81, composed of three items, viz.: 1st. For labor and materials, $3793.81; 2nd. For stages used in the work and for care of them, $64; and 3rd. $1000 for damages said to have been sustained by the St. Lawrence Steam Navigation Company, lessees of Mr. Alford, consequent upon their being deprived of the use of the wharf. The report of the Registrar and Merchants has reduced the demand for labor and materials by $761.67, viz.: to $3026.20. They have rejected the item of $64 and

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By an act on petition the accuracy of the report is questioned, and the court has been called on to rectify it by allowing the parts of the claim which have been rejected.

The damage done to the wharf was on the 11th October last. Mr. Archer, a builder and contractor, had been applied to by the agent of Mr. Alford to furnish an estimate of the cost to repair the damage, and on the 13th of October he furnished one; it amounted to $2,300. Mr. Simon Peters, a builder and contractor, was applied to by the agent of the ship, also, for an estimate, and on the 14th of October he furnished another amounting to $2,400. These estimates appear to have been based upon exhaustive calculations of the materials and labor required, for which, as respects Mr. Peters, a fee of $20 was charged. No application was made to Mr. Archer to perform the work, but after delay to the 31st of October, it was given to Mr. Peters by Mr. Bossé, the agent of Mr. Alford, and the two estimates ignored. The account of Mr. Peters is that now under consideration; it is $1,393.81 above his estimate, and $1,493.81 above that of Archer. Mr. Peters has given as reasons for the excess of his charges over his estimate, that the work to be done was not all visible, and that the cost was more than he anticipated; but the evidence of Mr. Simons, surveyor of the Bureau Veritas, and of Mr. Dick, the port warden, is that it was quite possible to see as much as was necessary to make an estimate; and so says Mr. Archer, who was checked in his calculations by Mr. Simons, and the former has sworn that he would have done the entire work for $2,300. The objections to the account are the charges for iron bolts and the value of the timber. On the new bolts the reduction is one-half, from 10 to 5 cents, and on the old, welded and renewed, from 5 to 2½. The reduction on the timber, white pine, is from 40 to 20 cents per foot, and for joisting to 30

cents, from 40. These reduce the account by the $767.61. Mr. Simons has fixed the outside value of the timber at 23 cents. Mr. Amos Bowen has said that timber at 15 cents, would have answered, and Mr. Archer was offered timber at 15 cents when he examined the wharf, and his estimate was based on 20 cents; the iron he was to use was from 4 to 5 cents a pound, and he included the plant. Mr. Tweeddle has sworn that the price charged for the bolts is exorbitant, and their value in his opinion was 4 cents. As respects the stages, they are plant, they are incident to the work and are not allowed. Altogether the reductions amount to $831.61. Mr. Peters is still allowed $462.20 above his own estimate. Mr. Alford in assuming to do this work as if he were the *negotiorum gestor* of the owners of the Barcelona, was bound to do what a reasonable man would have done for himself under the circumstances. It was his duty, while acting for another, either to take Mr. Archer's estimate, which was in reality a tender, as he has sworn that he would have done the entire work for $2,300, or else to have applied for tenders if not satisfied with Mr. Archer's. I have gone over the evidence with care, and find the deductions of the Registrar and Merchants quite in accordance with it. There would have been a difficulty with me if the report had been contested, instead of being acquiesced in by the respondents. If it had been contested I certainly would have hesitated in allowing more than the estimate of Mr. Archer. It might have been, that Mr. Archer would have lost money by the contract, but that was his own lookout, and the respondents would have had the benefit.

As respects the additional claim for $100 being for damages sustained by the St. Lawrence Steam Navigation Company, lessees of the wharf, it is pretended that Mr. Alford is liable to them for such damages, and that, therefore, he can recover them from the owners of the Barcelona. This claim is for consequential damage, that is, *for damages sustained by the lessees for loss of use of wharf;* these damages appear to have depended upon the contingency of

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the price of coal to be used by the company, and the difference between fall and spring prices in the article, in other words, upon the state of the market in the spring following the collision. In support of the claim, Article 1660 of the Quebec Code has been referred to, by which, for a partial destruction of property, the tenant is allowed a proportionate reduction of the rent; no doubt it is so, but the same Article expressly provides, that the lessee shall have no claim for damages against the lessor. The St. Lawrence Steam Navigation Company have claimed damages for having been depri ed of the use of the wharf, which can arise from no other cause than being hindered in the receiving and disposing of goods and merchandize from off it. There has been no claim for reduction of rent by the lessees,—a very different claim from consequential damages. Such damages are explicitly disallowed by the code upon which the language of the com.. .ntators is very plain. The law as administered in France before the code existed, is thus stated by Pouthier, *Louage*, 81: "Il y a différentes "espèces de troubles qui peuvent être apportés de la part "des tiers à la jouissance du conducteur. Il y en a qui ne "consiste que dans des voies de faits sans que ceux qui "ont apporté le trouble prétendent avoir aucun droit dans "l'heritage, ou par rapport a l'heritage. Le locateur n'est "pas garant de cette espèce de trouble, le fermier n'a d'action "que contre ceux qui l'ont causé, *actionem injuriarum*." The Louisiana Code (*a*), as well as ours, is based on the 1722nd Article of the *Code Napoleon*, the commentators on which state the law under it as given by Pothier. The maritime law is quite in accord with the provisions of our Code, in the matter of consequential damages. In the case of *Minon* v. *the Steamer Picayune* (*b*), it was held that in cases of collision between ships, in estimating damages, the remote and consequential damages growing out of the supposed loss of profits, is not to be considered. (*c*) These

(*a*) See Article 2673.

(*b*) Louisiana Am. R., vol. 13, p. 564.

(*c*) The Atalaya, Q. L. R., vol. 7, p. 5. Infra. p. 260.

damages, therefore, not being chargeable against Mr. Alford, he cannot recover them from the Barcelona.

I have treated this latter claim as if it were before the court, because it was argued at some length and with confidence, and because it is desirable the parties should know that, if properly before the court, it would not have been allowed. Neither the libel nor the decree of the court makes mention of this claim for consequential damages. It has, therefore, not been adjudicated upon, and of course there could have been no reference for its liquidation. The registrar was quite right in not submitting it to the referees for their opinion.

I must add that the first duty of the court is to be assured of its jurisdiction. If the libel had contained an article asserting this claim, I should have called the attention of counsel to the question, as to whether the court can accord damages under the Imperial Statute for breach of a contract, made and to be executed, on land, according to the municipal law of the country.

The report is confirmed, and as the claim stands diminished by more than a third, the costs of reference necessarily fall upon the promoter. Judgment will therefore be entered for $3026.20.

Bossé and Languedoc, for the Promoter.

Irvine and Pemberton, contra.

Friday, 16*th June*, 1882.

RED JACKET.—Atkin.

Where seamen were shipped for a voyage from London to Quebec, and back to the port of London; held, that the nature of the voyage thus stated, was a sufficient intimation to the mariner of its duration.

Red Jacket.

This was a cause of subtraction of wages, civil and maritime, and came before the court upon a reference made under the authority of the Merchant Shipping Act, by the Judge of the Sessions of the Peace, at Quebec, before whom the original suit for wages was brought.

Judgment.—*Hon. G. Okill Stuart.*

This suit is one of several others; it is brought by William Kearney, seaman of the Red Jacket, a ship of 2,006 tons, to test the validity of articles signed by him for "*a voyage from London to Quebec and back to the port of London*," the duration of the voyage not being stated. It was commenced before the Judge of Sessions at Quebec, and has been by him, under the 19th section of the Merchant Shipping Act, 1854, referred to this court for decision. The suit treats the articles as null, and simply claims a balance of wages as on a voyage from London to Quebec, where the ship now is. The articles have been pleaded as an existing agreement, by an act on protest; and if this be true the promoter cannot recover but must fulfil his engagement. It is contended that as well under the 149th section of the Merchant Shipping Act, 1854, as under that of 1873, the duration of the voyage must be stated on pain of nullity. By the first of these enactments the nature and, as far as practicable, the duration of the intended voyage or engagement are to be indicated; and, by the second, as a substitute, the *maximum* period of the voyage and an indication of the

places or parts of the world, if any, to which the voyage is not to extend, is sufficient.

The 149th section enacts, that every such agreement shall be in a form sanctioned by the Board of Trade, and shall contain the nature, and, as far as practicable, the duration of the intended voyage or engagement. The articles of the Red Jacket in point of form are sanctioned by the Board of Trade. This form appears to have been adopted by it in 1869, and purports to be such as the 149th section already referred to requires.

Before stating the voyage of the Red Jacket to be from London to Quebec and back to the port of London, there is to be found a printed reference at the foot of the articles in the following terms: "Here the voyage is to be described and the places named at which the ship is to touch, or, if that cannot be done, the general nature and probable length of the voyage is to be stated." The articles as they stand, have thus the sanction of the Board of Trade; the voyage is given, and as there were no intermediate places to touch at, none could be stated, and this would seem to preclude any reference to the alternative, a statement of the probable length of the voyage from London to Quebec and back.

Two cases decided by this Court have been referred to by the promoters' counsel in support of this suit,—one the Varuna, decided by Mr. Black (*a*), and the other the Latona (*b*) decided by me. The first did not come under the 149th section because it was not in force, and the question detemined was one of departure from the voyage stated in the articles; so it was in the case of the Latona a departure also, and although the articles in these cases were declared void it was not, in either, upon the question of duration. The intention of the Imperial Legislature in declaring that the nature, and, as far as practicable, the duration of the voyage should be contained in the articles, is plain enough; it was no more than to give the mariner a fair intimation of the

(*a*) S. V. A. R., Vol. 1, p. 357.
(*b*) Ibid, Vol. 2, p. 203.
(*c*) The Westmoreland, 1 W. Rob. 221.

RED JACKET.

value of the service and of its length, and the question simply is, was the statement of a voyage from London to Quebec, and back again to the port of London, a fair intimation to the mariners of the Red Jacket of its nature and duration? Before the enactment of the 149th section, seamen were induced to sign articles to take them to any part of the world, for an indefinite period, and of such a nature as to keep them in ignorance as to when or whether they would ever return, to their native country. Courts of Justice have to discover the true intention of the law, and whenever that intention can be indubitably ascertained, they are bound to give it effect, and the real intention too, when collected with certainty, will always in statutes prevail over the literal use of the terms. For "every statute ought to be expounded not according to the letter, but according to the meaning, *qui haeret in litera haeret in cortice.*" (*a*) In specifying a voyage as from one place to another, touching at fixed, intermediate ports, the Board of Trade has given effect to the 149th section, and, after an experience of thirteen years, an Admiralty Court will not lightly disturb it by setting at liberty the many ships' crews now held under it. The statement of a voyage from London to Quebec and back to the port of London, conveys along with it a knowledge of its duration, viz.: just so long as it will take to go and return with an interchange of cargo. The seamen would not be a whit the wiser if the length of the voyage were said not to exceed six weeks or six years, as the nature of the voyage in such a case would control the term so stated. In the case of the American Union, which was determined upon the 149th section, it was said "that the Merchant Shipping Act, 1854, requires that the ship's articles should set forth the nature, and, as far as practicable, the duration of the intended voyage or engagement; and, therefore, the time specified in articles is only to be viewed as a particular of the intended voyage, and the substance of the articles being the performance of the voyage therein described, whe-

(*a*) 2 Dwarris on Stat. 690.

ther or no the assigned period fall short or exceed, the actual time named, the voyage, if at all undertaken by the seamen must be carefully carried out and completed by them." (*a*) These observations are particularly applicable in a case where the voyage is clearly defined, as in the present case, although, in other cases, such as that of the Latona, where the voyage was so ambiguously stated that the seaman might have been carried to any part of the known world, they would not apply. Whenever the intention which the makers of a statute entertained can be discovered, it ought to be followed in its construction in a course consonant to reason and discretion. (*b*) The intention of the Legislature was to enable the mariner to know the nature of the voyage, and, as far as practicable, its duration; and it does appear to me that it would be inconsistent with reason and common sense, in this case, to say, that the description of the voyage as stated did not convey to him, as far as practicable, its nature, and a knowledge of its probable duration. The act on protest is maintained, and the suit is dismissed.

M. A. Hearn, Q.C., and C. A. Pentland, for the seaman.

E. R. Alleyn and A. H. Cook, for the ship.

(*a*) 5 (Irish) Jurist N. S. 380. (*b*) 2 Dw. on Stat. 690.

Friday, 15th September, 1882.

PROGRESS.—BERNIER.

A steam vessel, while on fire in the Lower St. Lawrence, derelict, was partially saved by a steam tug, which towed her to the shore, where she was beached, and afterwards sold by decree. Held, that the salvors were entitled to one-third of the proceeds of sale and their costs, and the award distributed among them.

PROGRESS.

Salvage services, under the circumstances stated in the following judgment.

Per Curiam :—Three suits for salvage have been brought against the steam vessel Progress, which belongs to the St. Lawrence Steam Navigation Company, by whom, as stated by the promoters, she had been abandoned while on fire. The first suit is by John Wilson, owner of the tug Resolute, of 139 tons; the second, by James Keiley, her master, and the third by Honoré Dussault, her pilot, to which last are parties the second pilot, two engineers and seven others, who worked on board of her. The owners of the Progress have denied that salvage services were performed; they have averred that there was no abandonment, that her crew had left her but temporarily, that the Resolute had refused help in proper time, and that the promoters had incurred no danger or risk. The evidence establishes that on the evening of the 17th of May last, at about nine o'clock, there was seen from the Resolute, then alongside another vessel between the Brandy Pots and White Island, a vessel on fire, which was supposed to be the Progress, about nine miles distant. The Resolute soon after went to and reached her near the west end of Green Island and passed at some distance from her stern. The master then perceived that the burning vessel was the Progress, and that there was no one on

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board of her. After sounding the whistle of the Resolute there were seen two boats, which, it was ascertained, contained the master and crew of the Progress, then about a third of a mile from the shore of Green Island. They were taken on board, and the master of the Progress, requested the master of the Resolute to beach the former on Green Island; but after consultation with the pilot of the Resolute the request was declined from the fear of fire and the dangerous nature of the place. The Resolute then returned to River du Loup, the neighborhood of which she had left, and landed the master and crew of the Progress there. They did not return to their vessel, nor do they appear to have intimated any intention of doing so, but afterwards took their departure for Quebec.

Towards the following morning the master of the Resolute from River du Loup observed that the flames from the Progress were diminishing, and about daybreak he returned to her. She had floated about a mile higher up the river than where she was when he left her. The fire was now confined to her hold. The Resolute took her in tow and arrived at River du Loup at about 8.30 the same morning. She was there allowed to settle upon the ground with a receding tide upon the east, but at high tide she was removed, to the west side of the wharf, and there she sank. The time occupied in the salvage services does not appear to have exceeded seven hours. The wind and weather was propitious, and as the fire was confined to the hold of the burning vessel there does not appear to have been danger from it. Still, had it not been for the Resolute, the Progress would have been a total loss. The parties interested in these suits unfortunately have not agreed upon the value of the vessel as she now lies. A decree of appraisement was consequently issued from the court, and competent appraisers have valued her at $6,000, with a recommendation that she should be brought to Quebec where she would bring a better price. This again was not agreed to, and she was sold as she lay sunk at the much smaller

PROGRESS.

figure of $3,000. Upon the best consideration I can give to the case, I am of opinion that one-third of this sum, $1,000, is a fitting reward for the salvage services. Three-fifths of this, $600, will go to Mr. Wilson, the owner of the Resolute; $120 will be the portion of her master, who acted with judgment and discretion; the pilot will receive $50, the second pilot $30, each engineer, there being two, will receive $30, and the balance will be divided among the remaining promoters, with costs in each case.

W. and A. H. Cook, for John Wilson.

Hearn, for the other Promoters.

Andrews, Caron, Andrews and Pentland, for the Company.

Friday, 13th October, 1882.

BARCELONA.—ANDERSON.

VICE-ADMIRALTY COURT ACT, 1863.—JURISDICTION.—LESSEE.

Where damage was done by a ship to a wharf; held, that the Vice-Admiralty Court Act, 1863, conferring jurisdiction on Vice-Admiralty Courts, where damage was done by any ship, does not extend to awarding consequential damages occasioned to the traffic of a lessee.

BARCELONA.

Per Curiam.—This is a second suit against the ship Barcelona, arising out of a collision with a wharf, at the City of Quebec. In the first suit, Mr. Alford, the proprietor, has recovered in this court a sum of $3,026.20 for damages done to his property, and now, his lessees, the St. Lawrence Steam Navigation Company, holding the wharf under a pending lease for five years, at a rental of $2,400, claim damages consequent upon the collision for not having had the use of the wharf in part, during the repairs, and the winter ending at open navigation of the present year.

A plea has been filed, in which it is alleged that the subject matter of this suit was determined in that of Alford v. the Barcelona. This was specially objected to by the promoters, and on the preliminary hearing judgment was reserved, and the case has proceeded to, and been heard on, the merits. But an objection to the jurisdiction of the court suggests itself, although there is no exception by which it has been pleaded.

The Vice-Admiralty Courts Act, 1863, in its tenth section, confers upon courts of Vice-Admiralty jurisdiction *in respect of damage done by any ship.* The court has already had occasion to decide cases under this provision, as in the matter of this same vessel at the suit of Mr. Alford,

BARCELONA. already referred to, and also in the case of the Czar. (*a*) In these cases damages were awarded to the parties interested, the owners of the property damaged, but they were the direct and immediate consequence of the collision. The claim in this suit is not for damage done by the ship to property, and it is not for any damage occasioned at the time of the collision, but for remote and consequential damages arising from disturbance in the enjoyment of a five years' lease. If damage could be allowed for loss of business during the period now demanded, from the 11th of October to the ensuing month of July, when the Barcelona was arrested the second time, a period of eight months, she might be kept under a *lien* for damages during the five years' lease. In cases of ordinary collisions and detention the maritime law does not recognize damages of this nature. It confines the claim to actual damage sustained at the time and place of injury, and does not allow profits which might probably have been realized, if the act complained of had not occurred. The term "damage" in the singular, used by the Imperial Statute, would seem to be in accordance with the law as it now stands, with reference to collision of ships, and restrictive of the injury to time and place. An addition to the jurisdiction of Vice-Admiralty courts is made by the act, and a statute creating a new jurisdiction ought to be construed strictly, and the jurisdiction of the superior courts not ousted, but by express words or necessary implication. (*b*) By article 1660 of our Code, the St. Lawrence Steam Navigation Company, the promoters, would seem to have their remedy against Mr. Alford, their lessor, for a reduction of rent proportionate to their own enjoyment, and with the jurisdiction of the superior courts in this particular, I cannot interfere.

The defendants have not taken exception to the jurisdic-

(*a*) The Barcelona, 8. Q. L. R., p. 193. The Czar, L. C. J., vol. 19, p. 197 *Ante*, p. 9.

(*b*) Dwarris on Statutes, vol. 2, p. 751. 10 Rep. 75. St. 558. The Atalaya, 712. *Infra*, p. 260.

tion, and, as a necessary consequence, they cannot recover costs, without which this suit is dismissed. BARCELONA.

Andrews, Caron, Andrews and Pentland, for Promoters.

Irvine and Pemberton, for Defendants.

Saturday, 9th December, 1882.

SS. MONICA.—THACKER.

Where a sailing vessel deviated from her course contrary to the sailing rules, and came into collision with a steamer which might have otherwise avoided her, each held to be in fault and the damages divided.

Where a steamer is charged with having omitted to do something which ought to have been done, proof of three things is required :—first, that it was clearly in the power of the steamer to have done, the thing charged to have been omitted ; secondly, that if done it would in all probability have prevented the collision ; and, thirdly, that it was such an act as would have occurred to any officer of competent skill and experience in command of the steamer.

JUDGMENT.—*Hon. G. O. Stuart.*

MONICA.

Five suits have been brought against the steamship Monica, 1,312 tons, for damages caused by a collision with the schooner Marie Marthe, of 62 tons, when the former, bound from Pictou with a cargo of coal for Montreal, collided with the latter, bound for St. Pierre de Miquelon with a cargo of flour and other provisions. It occurred off Basque Island at about eleven on the night of the 9th of June last, when the weather was clear and where the channel is eight miles broad. The result was the sinking of the schooner, which was so much injured as not to be worth repairs, and damage to her cargo. The first suit is that of the owners of the schooner, and the others are those of Messrs. Hossack, Woods and Co., Lemesurier and Sons, Renaud and Co., and Joseph Whitehead and another, owners of part of her cargo.

The complaint of the promoters in these suits is, that while the Marie Marthe was on a course N.E. the steamship did not keep out of her way, which is met by the defence that the schooner did not keep her course but changed it on a starboard helm and thereby caused the collision. The way

in which the collision occurred was, by the round of the port bow of the steamship, colliding with the round of the starboard bow of the schooner. A large hole was made in the bow of the latter. She became water-logged and in that state was towed by the Monica a distance of twenty-five miles and sank near a wharf at River du Loup.

The crew of the schooner were in number five, Thomas Tremblay and Clovis Tremblay, the owners, the first named being master, Xavier Bouchard, mate, a seaman and a cook. The only persons on her deck up to the moment of the collision were Clovis Tremblay at the wheel and Xavier Bouchard, who acted as a look-out, and upon their testimony the cases of the promoters principally rest. According to them, the schooner was on her course N.E., her speed between five and six knots, when a white light, supposed by them to be the light of a pilot schooner, but which was afterwards ascertained to be that of the Monica, at a distance of about six miles, appeared about two points on their port bow. That it approached the schooner rapidly, and, when within a mile or two, it passed from north to south and crossed her. About fifteen minutes after, all at once, the steamer's red lights appeared at about a distance of 150 feet, when Clovis Tremblay cried out "My God, it is a steamer, she will cut us in two." Bouchard then called out to him "luff," which was attempted without effect as the steamer was then, as they say, about fifteen feet distant. These witnesses are persistent in their statement that the schooner never deviated from her N.E. course until then, and they positively state that the look-out from the schooner was continuous, and that they did not, at any time, see the steamship's lights, red or green, before the red light appeared 150 feet distant.

To meet this testimony there is that of the master, chief officer, pilot and engineer of the Monica, all of whom, except the engineer, were on the bridge of the steamship, and that of the look-out, who was on the forecastle. From this it would appear that the speed of the steamship was about eight knots

MONICA. and a half. That while on a course S.W. by W. the schooner's red light was seen about a point on her port bow, about four miles off, that the steamer's helm was then ported, and afterwards the schooner's two lights were seen; and it was ported a second time. The steamer was then put ahead at full speed, and so continued until the red light of the schooner was shut out and her green appeared; then the engines were reversed full speed astern, which reduced her headway to about three knots, when the vessels came into collision in the way which has been stated. This testimony is positive that the schooner must have starboarded her helm, first, when she showed her two lights; and, secondly, when she shut out her red and showed her green light. The pilot of the steamship has sworn as follows:—"We stopped and reversed when the schooner shut her red light and showed only her green;" and being asked "If the Monica had stopped and her engines reversed full speed astern when the two lights of the schooner were first seen what would have been the result?" he answered that he did not know; and being interrogated; "Assuming you saw the green light of a sailing vessel about a point and a-half or two points off your port bow, how would you steer your steamer to avoid a collision?" he has answered "I would order the steamer's helm to be starboarded."

From these statements the two questions at issue arise:—1. Did the schooner deviate from her course by starboarding her helm? and, 2. Was it in the power of the steamship to avoid her?

That the Marie Marthe did deviate from her N.E. course by starboarding her helm is clear from the statements of the persons on board the steamship. It is quite true that Clovis Bouchard and Tremblay deny that she did so. But their account is quite unreliable, because their statement as to the course of the steamship could not have produced the collision in the way they admit, that is her port bow coming into contact with that of the schooner at the fore-rigging. They have evidently not kept a proper look-out, for if they had,

they would not have told so improbable a story, and if in one particular their statement is at variance with the truth, it is not unfair to presume that it is so in another, as in the matter of starboarding, of which there is such positive testimony against them. I have, therefore, no hesitation in coming to the conclusion that the Marie Marthe did starboard her helm, and that her doing so led to the collision.

It remains to be considered whether the steamship is to blame for not having kept out of the way of the schooner. It was said by the Privy Council in a modern case (*a*) "It "is undoubtedly true, in cases of collision between a sailing "ship and a steamer, that, although the sailing ship may be "found to have been guilty of misconduct, or not to have "observed the sailing regulations, yet the steamer will be held "culpable if it appears that it was in her power to have "avoided the collision. It cannot be too much insisted on that "it is the duty of a steamer when there is risk of collision, "whatsoever may be the conduct of the sailing vessel, to do "everything in her power that can be done consistently with "her own safety in order to avoid a collision." The Monica and the Marie Marthe were approaching nearly end on, when the latter was seen from the former to be starboarding her helm. For this there is the testimony of the master of the steamship, that when the schooner shewed her two lights she was heading about N.E. by E., while the steamship was heading S.W. by W. half W. Was it in the power of the steamship to have kept out of her way at this moment? Three courses were open to her, 1. To continue on her port helm; 2. to starboard, or, 3., abate her speed by reversing the engines full speed astern. Uncertainty attended either of the two first courses: the first because the schooner was starboarding, and how far she would go upon that helm was by no means certain, and as respects the second, there was no certainty that she would go back to the course she was leaving. The third course would seem to have been unexceptionable, because there appears to have been time to

(*a*) The City of Antwerp, L. R. 2, P.C. 25.

MONICA.

adopt it successfully. The master of the Monica has said that sternway could be put on the steamship from full speed ahead within barely half a mile, which was about the distance the vessels were apart when the schooner shewed her two lights. Had this course been followed it is for the nautical assessors to say what, in their opinion, would have been the result. Then there is an ulterior question to be answered. Was it proper after the schooner's red light was shut out and the green light of the schooner appeared, for the steamship to go off upon a hard-a-port helm while the schooner was fast coming round upon a starboard helm? I shall put this case in the way that the case before the Privy Council on an appeal already referred was considered. "The material inquiry arises whether anything was done "by the steamer that ought not to have been done, or "whether anything was omitted to be done that ought to "have been done, and which if omitted or done would have "prevented the collision." The nautical assessors, with whose assistance I am favored, have maturely considered the several bearings of the case submitted to them by me, as will be seen from the following questions and answers :—

1. Had the Monica and the Marie Marthe, when first seen from each other, kept their respective courses, would there have been a collision?

Answer.—We think that the vessels would have passed clear of each other.

2. When did the risk of collision commence?

Answer.—When the steamship saw both lights of the schooner.

3. Would the porting, steadying, and hard-a-porting of the Monica, as stated by the pilot, have caused her red light to be visible from the Marie Marthe to a proper look-out until the moment of collision, or for how long before it?

Answer.—The look-out on board of the schooner should have seen the red light, and afterwards the green, if the steamship had crossed the schooner as stated by the man at the wheel of the schooner. These should have been visible if the look-out were good.

MONICA.

4. If the Monica, at the distance of a mile or more from the Marie Marthe, had changed her course from north to south, would not her green light have been visible to a proper look-out from the Marie Marthe, if on a north-east course?

Answer.—No doubt it would.

5. If the Marie Marthe had continued on a north-east course from the time of first seeing the white light of the Monica, could the latter, proceeding on a course from north to south, have struck the Marie Marthe, on the bow, *stem on*, or port bow against port bow?

Answer.—She could not.

6. When the red light of the Marie Marthe opened on the Monica, then her green and red, and afterwards her green, was the course of porting and hard-a-porting of the Monica such a course as should have been adopted by her to prevent a collision?

Answer.—No. So soon as the lights, red and green, of the schooner were seen from the Monica, the latter should have slowed immediately and stopped and reversed full speed astern, and so soon as the green light of the schooner was seen the steamship should have starboarded her helm. In not adopting this course, we think she was in fault.

7. At what distance was the schooner from the steamship, when her two lights, red and green, were seen from the steamship?

Answer.—According to the evidence, half a mile.

8. At that time, so to show her red and green lights to the steamship, must not the schooner have starboarded her helm and gone off?

Answer.—Yes, and from three to four points. She had the wind on her port quarter.

9. If the schooner had held her course instead of starboarding, as stated in the last question, would the two vessels have passed clear of each other?

Answer.—They would—green light to green light.

E. D. ASHE, *Commander R. N.*
F. GOURDEAU, *Harbor Master.*

MONICA.

For the condemnation of a steamer in a case of this description three requisites have been held requiring clear proof. 1. That the thing omitted to be done was clearly within the power of the steamer to do. 2. That if done it would in all probability have prevented collision, and 3. That it was an act which would have occurred to any officer of competent skill and experience in command of the steamer. (*a*)

The omissions by the persons in charge of the steamship, clearly stated by the assessors, shew that they were not equal to the emergency, and that ordinary skill would have sufficed to enable her to pass the schooner in safety.

The decree of the court is, that each party being to blame the losses be divided, and according to the Admiralty rule in similar cases, I make no order as to costs. Reference as usual.

Andrews, Caron, Andrews and Pentland, for Promoters.

W. and A. H. Cook, for the Monica.

(*a*) Maud and Pollock, Shipping, p. 602.

Friday, 2nd March, 1883.

THE GUELPH.—MAY.

Where negligence was charged against a tug for running her tow aground in an intricate channel in the St. Lawrence: Held:—

1. That the accident was owing to the increased danger of the navigation at the beginning of winter.
2. That the immediate cause was the shutting out of lights and from the fact of the buoys in the channel being invisible; and
3. That the tow was to blame for navigating without a pilot.

GUELPH.

Per Curiam.—A claim for towage by Vital Paradis, owner of the tug Calumet, of 22 tons and 45 horse-power, has been preferred before this Court for $150, for towage of the Guelph, a top sail schooner of 239 tons, from Montreal to Quebec at the close of the season of 1881.

The responsive plea of the owners is that the Guelph left Toronto laden with lumber for Porto Rico on the 10th of November, and arrived at Montreal on the 20th. That the agreement was for $150, but with the condition that if the transit to Quebec exceeded 25 hours it should be reduced to $80. That against their consent two barges were taken in tow of the schooner. That in Lake St. Peter, while the weather was fine, owing to the negligence of the tug, the schooner was run aground, when one of the barges struck her stern and did damage, which occasioned delay. That she was also delayed at Three Rivers for fuel, and was afterwards cast adrift at the Richelieu, a dangerous place, where she had to come to anchor, and broke her anchor stock, the damage exceeding in amount the value of the towage.

So much of this plea as relates to a reduction of the amount of $150 to $80, may be disposed of at once, as there has been no evidence to prove it. So may the matter of the barges. The bargain for $150 appears to have been

GUELPH. first made with Mr. Benjamin Tripp by the promoter, in the presence of the owner of the barges, and subsequently repeated between the master of the Guelph and Dallaire, who took it for granted that the price had been previously settled. The promoter and the owner of the barges both testify that Tripp consented to the barges being towed also. It is true that Tripp has denied that he did. But, besides the evidence of the owners, there is that of Dallaire that he agreed with the master that the barges should go also, and they were lashed to the schooner accordingly. It may be here observed that the master upon enquiring of Dallaire how long it would take to reach Quebec, was told twenty-four hours in fine weather.

The defence is then restricted to: 1st. delay and damage where the schooner ran aground; 2nd. delay at Three Rivers; and 3rd. the anchoring at the Richelieu, where the schooner's anchor stock was broken and delay caused.

The tug and her tow left Montreal on the 23rd November; in the afternoon she had passed Sorel with the weather fine until they reached Lake St. Peter, and when in the Lake opposite River du Loup, where the channel is but 300 feet wide and very intricate, they passed the two light ships, their lights being visible, but the next light, about sixteen miles ahead, was invisible. The buoys had been either taken up on the approach of winter, or from darkness were not to be seen. A fall of rain and snow had commenced, and the Guelph grounded on the north side of the channel. No damage was done to the schooner, as she touched upon the flats in a muddy bottom, further than injury to a plank in her stern which her master has said not to have been of much moment. It was considered dangerous by the persons in charge of these vessels to proceed, and the tug went alongside the schooner and remained there with steam up until seven in the morning, a period of nine hours. The tug then towed the schooner off with ease and proceeded. The person who acted as a pilot on the schooner, Louis Cyrille Fortier, but who was not qualified as such, has said that the

GUELPH.

night was fine, that there was no snow, and that the lights, without specifying which, were visible; and that he called out to the tug that she was too far to the north, but he thought he might not have been heard. Other witnesses say that there was no snow, to their recollection, but most of the promoter's witnesses testify as to both rain and snow.

If the weather was fine and the lights visible on that night, as Fortier has said, as have also the defendants in their protest, why did he not go on, as the schooner could then have been as easily towed off the flats as she was the next morning. The responsibility for not requiring this to be done rests with the tow, and the law on this point was accurately stated for the respondents at the argument: "that the tug is the moving power, but it is under the control of the master or pilot on board the ship in tow." The inference from this is plain that the stopping for the night was either a necessary precaution owing to the thick weather, or if it were not, that the delay was assented to by the defendants. The opinion I have formed after careful consideration of the testimony is that the tug was proceeding with due caution, but that the buoys on the sides of the channel were invisible (a witness has stated that they had been removed,) and the lights ahead were suddenly obscured by misty weather. It has been held that a tug using ordinary care is not liable for damage caused by an unexplained sheering of the tow to the right or left, and that, where the accident to a tow was occasioned by a sudden gust of wind, the tug is not liable. (*a*) I do not think that negligence on the part of the tug has been shown or that she can be made responsible for the schooner's taking the ground.

With reference to the delay at Three Rivers, it is to be observed that the Calumet left Montreal with a sufficient quantity of coal, in fact as much as she could carry, about 13 tons, which would have sufficed to reach Quebec; but her passage down, and keeping up her steam alongside her tow all the night of the 23rd, with the assent of the tow,

(*a*) Desty's Shipping and Admiralty, § 339.

GUELPH.

reduced the quantity by one half, and she had to stop at Three Rivers to take in 3½ cords of fire wood, a necessary precaution as it was consumed, and but one chaldron of coal remained, when the tug and her tow arrived at Quebec.

Now with respect to the third complaint, that the tow was cast off at the Richelieu. It seems that after leaving Three Rivers in the afternoon, owing to gusts of snow and occasionally bad weather, as stated by the promoter's witnesses, there was a delay at Batiscan, which was not objected to by the people of the tow, and Grondines, at the head of the Richelieu, was reached about midnight. Of a sudden, the lights at Deschambault and the Platon, which indicate a most dangerous piece of navigation, the Richelieu, were obscured by snow with a strong north-west wind, when the schooner was cast off and came to anchor. The cold was so severe that ice was forming fast and the tow line was kept under water to prevent its freezing. Under these circumstances Fortier has said that the vessel should not have been cast off to anchor, because the snow drift lasted but a very short time, and that the tug could have gone on safely after it. He has however failed to state by what process of divination the duration of the gust of wind and snow could be known before hand. If the vessels had not come to anchor it is quite possible that they would have gone upon the rocks in the Richelieu, and have been cut into by the ice, as happened on the ensuing day to the Guelph after she arrived at Quebec, in which event it is as likely as not that the promoter would have been liable for the consequences.

When the anchor was raised next morning on the Guelph, its stock was broken, not from the mismanagement of the tug, but owing to the rocky bottom of the river, as admitted by her master. The damage is said by her master to have been about $10.

That the attempt of the schooner to run down the St. Lawrence and go to sea at so late a period of the navigation when, it may be said, the winter was actually setting in,

was a hazardous experiment, does not admit of question. She left Montreal on the 23rd, and the buoys on the channel in the lower St. Lawrence were taken up on the 24th. She left Montreal, it may be said, without a pilot, as Fortier, it is proved, was not a licensed pilot, nor even a *cotier* between Montreal and Quebec. It is not improbable that if there had been a competent pilot on board, the accident would not have occurred, and for not having one, I think the schooner was to blame. Pilots of small tugs are generally not licensed pilots, and the pilot of the tug was not, thus rendering stronger the reason for a qualified one on the sea going vessel. The pilot of the tug has said that if Fortier had been a pilot, he would have ordered him to stop at Sorel, that is before entering the Lake, until daylight as is the custom.

The delays at River-du-Loup, Three Rivers and the Richelieu, amount together to but one day. They originated in the grounding of the Guelph at River-du-Loup. This accident was owing to bad weather, incident to the coming on of winter, and was, I think, inevitable. I award the sum demanded with costs, no very adequate remuneration to the promoter, who has stated that he loses by his bargain $200, owing to its having taken eight days for his tug to work through ice to reach Montreal.

Langelier and Langelier, for Promoters.

Andrews, Caron, Andrews and Pentland, contra.

Tuesday, 6th April, 1883.

ROYAL.—BURNS.

In a suit by the master of a steam tug against the owner for wages and disbursements; held,

1. That a Vice-Admiralty Court cannot, under "the Vice-Admiralty Courts Act, 1863," exercise its jurisdiction so as to give effect to an agreement between the owner and master of a vessel, where the duties to be performed are miscellaneous and not incident to the situation of a master.

2. That by the Dominion Statute, "the Seamen's Act, 1873," the jurisdiction of this Court, as respects vessels registered in the Provinces of Quebec, Nova Scotia, New Brunswick and British Columbia, being restricted to claims for master's and seamen's wages over $200, the 189th and 191st sections of the Imperial Merchant Shipping Act, 1854, are so far repealed as to reduce £50 stg. to $200.

3. That "the Vice-Admiralty Courts Act, 1863," has not in any other way effected or repealed the 189th and 191st sections of "the Merchant Shipping Act, 1854."

4. That in a suit for ship's disbursements brought by the master, who became liable upon condition that the owner did not pay them, there must be a demand on the owner before suit

5. Where a master sues for ship's disbursements without first presenting his accounts, he cannot recover costs.

ROYAL. The Court this day delivered its opinion in the above cause, to the following effect:—

JUDGMENT.—*Hon. G. O. Stuart.*

This is a suit by Pierre Raphael Baron, who was master of the steam tug Royal, a vessel registered in this Province, and owned by Helena Maria Kelly, wife of John Griffin Burns, against that vessel for wages as master, for work, and by reason of liability for necessaries, on the following statement:

For the season of navigation in 1880 (1st May to 22nd November), less one month, wages at $45 a month, $258; less $151 paid on account..... $107.00

ROYAL.

For the season of 1881 at $45, $307.50; less $283.50 on account	24.00
For part of the season 1882 (1st May to 15th July)	111.50
1882, July—18 cords of firewood purchased at Batiscan	40.50
8 tons of coal purchased at Sorel	50.00
Duchesneau, blacksmith	13.62
Roy, "	7.00
	$353.62

The libel states the services of the promoter as master, for the seasons of 1880-81 and part of 1882, and goes on to allege that he acted as pilot, agent, and carpenter and performed numerous other duties.

There is a plea to the jurisdiction, to which the respondent excepts upon the ground that the promoter was not engaged as master, but as an agent for the tug Royal and the tug Challenger, to secure employment for these vessels, at $45 a month. That he discharged this duty for the Royal until the 16th of August, 1880, and for the rest of that season was employed for the Challenger, for which it is admitted that there is a balance of $68 due to him. For the season of 1881, it is alleged that the Royal was chartered by the Quebec and Levis Tow Boat Company, and that by them the promoter was paid in full $40 a month; and as respects the season of 1882, that the promoter acted as master at $40 a month, on account of which he has received $46, leaving due to him $24.60.

The jurisdiction is not excepted to as respects the liability for what were really disbursements and not necessaries, as stated in the libel. If they were the latter, the Court could not award them owing to the residence of the parties in the same locality. The respondent denies her liability for the disbursements, and has pleaded that the promoter has not paid them.

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There can be no doubt that the agreement was for the promoter to act as sub-agent for the tugs, and as master or pilot when and if required. Indeed, it so appears, from the evidence of the promoter. In the season of 1880, until the 14th of August from the 9th of May, he discharged his duty under the agreement for the Royal. He then became master of the Challenger, for a month or more. One Joseph Flamand has been master of the Royal until the 24th September. He then left her, the promoter took his place as master for about two weeks, when her pilot, Dubuc, was appointed, and so continued through the rest of the season. The exclusive duty as master, for the period he so served, would entitle the promoter to $22.50 as master's wages.

For the season of 1881, the agreement was continued, but the Royal being under charter to a company, they would not give the promoter more than $40 a month, which he took under protest. The additional $5 a month, he would be entitled to under the renewal or continuation of the agreement of the previous year, making $24, but not as master; for during this season, it appears that he acted as a carpenter, as painter, painting the tug himself, and as watchman. Having been paid for the entire season by the company, except as to the $24, it is impossible to say that this was master's wages. It would thus necessarily be classed with the $68, making $92 for miscellaneous work. The agreement does not appear to have been continued for the season of 1882, but the promoter acted as master until the 15th of July, when he was discharged by Burns, at which period there appears to be a balance of wages amounting to $24.60. This with the sum due for wages alone in 1880, viz.: $22.50, would make a sum of $47.10. The question now is, can this Court assume jurisdiction: 1st, to enforce the contract, and 2nd, to allow the wages earned as master.

The only authority under which it can be pretended that the court has jurisdiction, with reference to the agreement, is the Imperial Statute, "the Vice-Admiralty Courts Act, 1863," 26 Vic., c. 24, s. 10, sub. s. 2, by which it is enacted

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that the matters among others, in respect of which Vice-Admiralty Courts shall have jurisdiction, are as follows: *Claims for master's wages, and for his disbursements on account of the ship.* By the same statute, the jurisdiction is made to extend to *claims in respect of towage.* In a case which came before this Court in 1865 (the British Lion, 2, S.V. A. R., p. 114), it was said by Mr. Black that he had great doubt as to the power of the Court to enforce an agreement to employ a particular tug, either for a definite or indefinite quantity of work. No doubt the court can under the statute, 26 Vic., c. 24 (the Vice-Admiralty Courts Act, 1863), enforce the payment of reasonable towage, but it does not seem that it has power to enforce an agreement to employ a particular tug either for a definite or an indefinite quantity of work; and Dr. Lushington in the case of the Martha (*Vernon Lush.* R. 314) held the same opinion under the 3rd and 4th Vic., c. 65, s. 6, an act giving similar jurisdiction to the High Court of Admiralty. (*a*) The same reasoning applies, and perhaps with additional force, to the agreement now under consideration, upon which remuneration is asked for a sub-agency not incident to the duties of a master of a vessel, but one comprising duties analogous to those of a *commissaire;* most assuredly, the terms of the Statute "claims for master's wages" cannot cover claims of a runner for a tug-boat or for the miscellaneous offices which the promoter promised to perform. I therefore can exercise no jurisdiction to award the $92 evidently due to the promoter.

The second question, as to the allowance of the $47.10 due the promoter for wages that have been earned by him as master, is to be determined by the enactments of two Statutes, the Merchant Shipping Act, 1854, ss. 189, 191, and that of the Dominion, known as the Seamen's Act, 1873 (36 Vic., c. 129, ss. 56, 59). By the former no suit for the recovery of master's wages under the sum of £50 sterling can be instituted by or on behalf of a master or seaman in any Court of Vice-Admiralty. By the latter the

(a) *Vide* City of Petersburg, 2 S. V. A. R. 333.

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sum of £50 is reduced to $200, as respects vessels registered in the Provinces of Quebec, Nova Scotia, New Brunswick and British Columbia. The Parliament of the Dominion is vested with exclusive legislative powers in all matters classed under "navigation and shipping," under the British North America Act, 1867. The Seamen's Act, 1873, was passed by it, and after reservation for the Royal Assent it came into force on the 27th of March, 1874. By it, the 189th and 191st sections of the Merchant Shipping Act, 1854, are so far repealed as to reduce £50 sterling to $200, as I have said, with reference to vessels registered in the four Provinces I have named. The 189th and the 191st sections remain in full force as respects all other vessels which had been made subject to them, and have been invariably carried into effect as respects them. These enactments have had a most salutary effect and have remedied grievances of which the shipping interest had great reason to complain, particularly at this port, where suits without foundation for seamen's wages, levying black mail, and in aid of the crimping business, were continually resorted to. Effect was given to these sections in the case of the Margaretha Stevenson, (2 S.V. A. R., 192) determined by this Court in 1873. I observe that this latter decision has been questioned by a court, although one of limited jurisdiction; still as an opinion expressed by it, if correct, would unsettle the law in a most important particular, I shall advert to it. (The tug Robb. Mar. Court Ontario--C. A. J., 1881, p. 67). It is stated that the two sections of the Merchant Shipping Act, 1854 (189th, 191st) are not to be read in connection with the Vice-Admiralty Courts Act, 1863, thus leaving it to be inferred that the latter repealed the former act. If such be the case, an efficient safeguard to British shipping, frequenting not only this port, but all the ports of Her Majesty's Dominions, would be removed. The Merchant Shipping Act, 1854, by two sections limits, except in certain cases, Vice-Admiralty jurisdiction over masters and seamen's wages to cases above £50 sterling; and because

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it is said in the Vice-Admiralty Courts Act, 1863, while enumerating the cases of jurisdiction, that the Vice-Admiralty Courts shall have jurisdiction in respect of claims for their wages, it is contended, that it repeals by inference or implication the 189th and 191st sections. As no mention of the first statute is made in the second, the latter would rather be confirmatory of it, affirming that which existed before. The former statute is not even referred to in the latter. A later act of Parliament has never been construed to repeal a prior act, unless there be contrariety or repugnancy in them, or, at least, some notice taken of the former act, so as to indicate an intention in the law to repeal it; the law does not favor a repeal by implication unless the repugnance be quite plain, and a subsequent Act which can be reconciled with a former Act shall not be a repeal of it. (*Dw. on Stat.*, and cases cited, p. 674.) Of this supposed implied or inferential repeal, a recent writer has taken notice. (*Maclachlan* on Shipping, p. 253.) Adverting to the Admiralty Court Act, 1861, (2 S. V. A. R., App. 248.—*Boyd* Merchant Shipping Laws, pp. 161, 456,) in which a like jurisdiction is conferred on the High Court of Admiralty over any claim for masters' wages, and providing that if in any such case the plaintiff do not recover £50 he shall not be entitled to costs, he has observed: "It has been said that this section is repealed by the provision of the Admiralty Court Act, 1861, because the language of it is '*any claim*;' but whereas the one statute affirmatively gives jurisdiction, and the other negatively, within certain limits, debars the suitor from the court, there seems to be no contradiction between them, such as would otherwise imply the repeal of the earlier statute." Additional jurisdiction in other matters was to be given by the new act, and in a list of the whole, claims for masters' wages, were necessarily repeated, leaving them standing as before. Then there is the Imperial Statute, the Merchant Shipping Act, 1873, the second section of which enacts,—that it is to be construed as one with the Merchant Shipping Act, 1854, and the Acts amending the same, and

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I have, therefore, not the slightest hesitation in deciding that the two sections of the Merchant Shipping Act, 1854, have not been repealed by implication or inference, and that I must give effect to them, except in so far as they have been modified by the Dominion Statute, the Seamen's Act, 1873, with respect to vessels registered in the Provinces referred to. Now as the sums earned by the promoter as masters' wages do not amount to $200, I cannot assume jurisdiction so as to award them to him.

There remains to be disposed of the claim for disbursements. The amounts have been already stated. The last, for $7, may be discarded, as the promoter does not appear at the time (March, 1872) to have been then employed as master; in fact, the navigation could not have then been open. As respects the remaining three accounts: the first is for firewood sold by one Edouard Alain, on the 29th June, at Batiscan, when the Royal was towing a raft and required fuel. The promoter then gave an order on Burns for the price, $40.50, payable to Alain, and the promoter endorsed it. Alain has testified "that in taking the signature of the promoter on the order he intended to hold him responsible for the price, *if he was not paid by Burns.*" The suit was brought on the 19th of July, 1882, and the draft was paid by Burns on the 22nd of the same month. The second account is for coal sold at Sorel, by one Ernest Rondeau, the day before the purchase of the firewood; the account was made out against the steamer Royal for $50; at the foot the promoter wrote *correct*, and signed his name to it. Rondeau at the same time asked the name of the owner; the promoter said Burns; the reply was: "I don't

know him, I will give the coal to you, but you must be responsible; and then the promoter said: "*It is all right, if he does not pay you I will.*" Rondeau being in Quebec on the 15th of September last, 1882, Burns paid him the amount. The third account is for work and materials furnished by one Deeheneau at Quebec, to whom the promoter said: "*If Burns does not pay you I will.*" The account was made out on the 22nd July, 1882, and at the expiration of a fortnight Burns paid it.

The respondent has contended that these amounts cannot be recovered because the promoter did not pay them. It was so held by Dr. Lushington (the Chieftain, *Browning & Lush* 104, the Edwin, 281) but the rule was relaxed by Sir Robert Phillimore in the case of the Feronia (2 A. and E. R., p. 65), in which he said: "I cannot but think that in this and other cases," referring to Dr. Lushington's decisions, "an attempt has been made to strain those judgments beyond what the learned Judge has intended. My reasons for that opinion were fully stated by me in a recent case, that of the Red Rose. I shall allow the items, but I shall accompany them with a recommendation that no order for the payment thereof be made, until the master has deposited in the Registry vouchers for the payment, or given satisfactory evidence that the accounts have been paid." I would readily so decree in this case, if it were not for several obstacles. The evidence establishes that the promoter did not assume a direct liability to pay the accounts but one purely conditional upon the agent of the tug not paying them; and until such time as the respondent, or her agent, was placed *in morâ* upon the presentment of the draft and the accounts, and a refusal or neglect to pay established, liability by the promoter could not attach to him. These precautions were not taken, as I think they should have been. But there is another impediment in the way of a judgment in favor of the promoter. In the case of the Fleur de Lis it was held, that a master suing for wages and disbursements, is bound to furnish accounts before

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beginning his suit; if he do not, he will not be entitled to his costs; the language of Dr. Lushington in the case is "The master was bound by practice and justice to furnish accounts before bringing his suit; he might have had the amount claimed without suit, he is therefore not entitled to his costs." (*a*). If the account sued upon with the proper vouchers, that is, the accounts which have been referred to, had been presented to the respondent or her agent, Burns, before this suit was brought, and a default to pay the three accounts established, I should have rendered judgment in favor of the promoter for the amount, if not paid, and if paid after action was brought, for the costs. The promoter quarrelled with Burns when discharged. He seems to have acted without due premeditation in bringing this suit, a step like others taken in haste most unfortunately to be repented of at leisure, as I find myself compelled to dismiss his suit. He must also pay the costs.

Pentland, for Promoter.

Hearn, *Q.C.*, contra.

(*a*) 1. A. & E 49.

Friday, 8th June, 1883.

VICTORY.—NATVIG.

SALVAGE SUPERVENING ON A TOWAGE CONTRACT.

A steam tug engaged to tow a ship can claim for services to such ship, if she incurs a risk or performs a duty, outside the scope of her original engagement, and when she has been freed from the obligations under which she is placed by her original contract, as by a *vis major*, or by accidents not contemplated when the contract was entered into.

The tug cannot claim if the ship has been brought into a dangerous position by the fault of the tug, on the principle that a vessel (so to speak) cannot profit by her own wrong.

This was a suit for salvage, promoted by Mr. J. H. Powell, for services rendered under the circumstances fully stated in the following opinion of the court. VICTORY.

JUDGMENT.—*Hon. G. Okill Stuart.*

The promoter, John H. Powell, owner of the steam tugs Rhoda of 182 tons, with a crew of ten, and of the Flora of 49 tons, with a crew of eight persons, has brought this suit against the Victory, of 1,500 tons, valued at $5,000, and her cargo at $18,000, for salvage services. It appears that on the morning of the 12th of November last she was laden with timber and deals, and ready for sea, lying at Hall's booms, on the north shore of the St. Lawrence. Under an agreement that the Rhoda should tow her as far as the *Traverse*, she was at an early hour towed out of these booms, and inside of the Fly Bank, a shoal running along the north shore, where there was a channel for vessels of the draught of the Victory, about 150 feet broad. This vessel was from 200 to 300 feet long, and it appears that after proceeding about half a mile, and when near the end

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of the bank, she took a sheer and there ran aground. Ineffectual attempts were made by the Rhoda and by the Flora to tow her off with a receding tide. They were directed to return at the flood-tide in the afternoon. They did so, and under the direction of the pilot of the Victory, the tugs were kept at work, but were unsuccessful in getting her off, until, as the promoter, the owner of the tugs, who had been specially requested by the master of the Victory to accompany his tugs, has said, he suggested taking out two hawsers from the stern of the ship and fastening them to the booms known as Blais, on the north shore, opposite to which the ship was aground. This being done the Victory was held from drifting up with wind and tide over a bottom of small boulders. The pilot claims the merit of suggesting and adopting this course, of which I entertain doubts, as he had been at work for three hours and upwards, and it was only about 8 p.m. that the Flora took out the hawsers and fastened them to the booms, when the Victory swung round, and, with the aid of the Flora, floated off. The wind was strong and blowing a gale, the night was dark with rain and hail, the boats ran some risk, and, although well handled, the Rhoda suffered some damage, and the ship was in great peril of receiving much more injury than she actually sustained. Had she gone further on the bank in the late season of November, she might have been permanently injured; as it was, according to the master's statement, the damage was great. He has said that " by going and lying aground the damage sustained was the straining of the hull and the breaking of a number of her bottom planks, also the breaking of about 200 feet of her false keel. She had about nine feet of water in her when she was got off the bank. The estimate of damage to the hull is $7,000. The cost of discharging the cargo, including *bateau* hire and other expenses, amounted to something like $1,500." The plea to this suit, while admitting salvage services, is that they were of small value and that $250 is a sufficient remuneration, which with costs has been paid into the

Registry; and that if there was injury to the tugs it was because they were badly managed.

The evidence on each side is composed of quite a number of depositions, portions of which are inadmissible testimony not objected to, namely, the opinions of persons upon a hypothetical case, or some case where salvage has been paid to their knowledge. As to this particular salvage, witnesses for the promoter say it was worth $2,000. On the other hand, most of those for the ship say that in reality there was no salvage at all, because she would have floated with the return tide, and that $10 an hour, tariff rate for towage, would have been sufficient remuneration. Among others the master of the Victory has said, that it would have been better if the tugs had not turned up at all, as all he had to do was to take out the hawsers himself from the stern, attach them, and then float her off. This witness seems to have forgotten that he pressed the promoter personally to accompany his tugs to ensure a better command of them; and not only this, but while he or his pilot were using the tugs he attempted to force upon the promoter the hiring of another tug, which he declined; and, what is more, while the ship was lying broadside on the shoal, he or his pilot were tugging at her about three hours to force her against wind and tide, and the idea of the hawsers during that time never occurred to either. Even when the idea was adopted it was almost too late, and but for the Flora's activity in taking the hawsers to the booms in boisterous and tempestuous weather and fastening them, attended with some danger, the Victory would not have been then got off, as there was not time for the ship's boats to do it, and it is in evidence that the men refused to go in them. The *quantum* for these services is the only question in the case, as no negligence or carelessness in the tugs has been pleaded or proved; on the contrary, the master of the Victory has admitted that they were well handled. The Rhoda has suffered damage, and it is in evidence that she must be docked to ascertain its nature, at a cost of $60.

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As to the mode and manner and amount of remunerating the proprietors of tugs for their services there is no fixed rule. The Court has to rely on its own judgment. If it had to rely on the opinions of the witnesses, all very respectable persons, who have been examined, it would necessarily feel very much afloat; as between $2,000 sworn to on one side, and $250, or nothing, on the other, there is a most material difference. The witness who has spoken most intelligently in the matter is Julien Chabot, who, in answer to a question stating the nature of the service which was rendered and the danger of the tugs, has said that everything depends on the position of the vessel and where the steamers are placed to do the service; there is always more risk in working at night, more particularly in the fall of the year, than at any other time. A good deal would depend also upon the skill in handling the boats and upon the danger of coming into collision with other vessels at anchor in the vicinity; there is always danger of striking the booms if there is no vessel alongside. In a current there is the also danger of coming into contact with the ship herself. All these circumstances are dangers of navigation. He rates the Rhoda and Flora as second and third class boats respectively on account of their power. The Flora is considered in every respect a good harbor tug, and powerful for her size, and the Rhoda is considered a first class boat for her power, and a good sea boat. This witness, of much experience, has been produced by the respondents. He has been the manager of the St. Lawrence Steam Navigation Company for about nineteen years, and has further said: "I know the usual charges for the services of tug steamers, and I know the tug steamers Rhoda and Flora," and upon being asked, upon a statement of the work done by these vessels, for the Victory what his charge would be, he has answered, "If we had made no engagement our charge would be dependent upon difficulty of the service and the value of the property saved. Under these circumstances we would not be limited to the tariff rates. We have sometimes charged more than forty

dollars an hour for a boat when she was required for special service to assist a vessel in danger, we have charged as much as a hundred dollars for an hour's work, but it was under special arrangement with the captain. Without any agreement at all, we have charged from forty to fifty dollars an hour in the harbor of Quebec."

As stated in instructions of the Board of Trade respecting salvage, the main ingredients of a salvage service are: 1. The degree of danger from which the property is rescued. 2. The value of the property saved. 3. The risk incurred by the salvors. 4. The value, if any, of the property by the use of which the services are rendered, and the danger to which it was exposed. 5. The skill in rendering the services. 6. The time and labor occupied.

That the Victory was rescued from a place where if there had been further delay she might have been a wreck is not to be doubted. The value of the ship and cargo has been stated. The Rhoda is worth $15,000 and the Flora $10,000.—The night was dark; the velocity of the wind appears from the evidence of Mr. William Ashe, in charge of the Quebec observatory, to have been by 11.30 p. m. at least 41 miles an hour. It was accompanied by sleet and rain, the waves dashed over the booms, and the wharves were overflowed by the force of the tide, and there was but a confined space between the shoal and booms to work. That some risk attended the boats is apparent from the fact that the Rhoda was injured and must be docked. That the Flora rendered essential service—whether at the instance of the promoter or the Victory's pilot is a matter of indifference—admits of no question. The time occupied in the salvage service was quite five hours, and I think the case is within the fifty dollar category stated by Mr. Chabot. Then there is the matter of towage in the morning of the 12th November.

I cannot but believe that the Victory was run aground by negligence in steering, and without any fault in the tugs.

The Rhoda was in attendance and towed out the Victory and the two were at work for an hour and a half; for this I

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allow as towage work $50. I am disposed to allow the further sum of $60, which it will cost to dock the Rhoda, the whole making a sum of $610 and costs. In coming to this conclusion I have adhered to the rule applicable in similar cases. "The amount, according to the maritime law of England and the United States, rests in the sound discretion of the Court, upon a full consideration of all the facts of the case. It generally far exceeds a mere remuneration *pro opere et labore*, the excess being intended, upon principles of sound public policy, not only as a reward to the particular salvor, but also as an inducement to others to render like services." (*a*)

W. and A. H. Cook, for the salvors.

Andrews, Caron, Andrews and Pentland, for Respondents.

(*a*) Marvin, Wreck and Salvage, s. 96.

Friday, 20th July, 1883.

MONARK.—HALVORSEN.

In a suit for seamen's wages, the protest of a Foreign Consul to the jurisdiction over-ruled.

MONARK.

This was a suit for seamen's wages, and came before the court upon the intervention of the Consul for Sweden and Norway, in the form of a protest to the jurisdiction, the Monark being a foreign vessel, and the case being one which it was represented the Court in its discretion ought not to determine.

JUDGMENT.—*Hon. G. Okill Stuart.*

A motion has been made in this suit for wages, to dismiss it upon the ground that the Monark is a foreign Norwegian vessel, and that notice of the suit before it was instituted was not given to the Consul for Sweden and Norway, and that no copy of such a notice was attached to the affidavit to lead the warrant for arrest of the ship; and in support of it, a protest from Mr. Schwartz, the Consul for Sweden and Norway, has been addressed to me. It is to the following effect, and bears date the 16th instant: "In connection with the present case, I would respectfully draw your Honour's attention to the following facts: The vessel seized by the promoter arrived in this port on the twenty-seventh day of June last; from that day to this I never saw the promoter. No complaint or demand of any kind has been made by him to me, and I never received any intimation from the promoter declaring his intention of making a claim against the Monark, except the letter hereunto annexed, and signed, I believe, by M. A. Hearn, Esquire, advocate, of this city. This note I received at about 10.30 o'clock on the morning

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of the 12th instant. The vessel being at New Liverpool, I did not succeed to see the master before about four o'clock in the afternoon, when I immediately informed him of the contents of Mr. Hearn's letter. No formal notice of any kind from the promoter was ever served upon me. I herewith submit the account of wages of the said seaman as made out by the master, and which I accept as *prima facie* correct. The balance, as shewn by this account, the master assures me he has always been willing to pay if he had been requested by the promoter to do so. This balance is now deposited in the Consulate for payment upon proving his identity. I beg, therefore, to submit that no wrong has ever been done or intended to be done by the master, who has always been ready to pay the promoter his due, but who has not even had an opportunity to become aware of his desires before the action was commenced, and that there is not, nor ever has been, any need or necessity whatever of the intervention of the Vice-Admiralty Court in the matter. Under these circumstances I consider it my duty to protest against the promoter's suit, and to respectfully ask that your Honour will not take jurisdiction in this cause."

The letter from Mr. Hearn referred to by the Consul, addressed to him, bears date the 12th July, and is as follows :—

"SIR,—Frank Berry has instructed me to proceed against the Norwegian vessel called the Monark, her master and owners, in the Vice-Admiralty Court, for wages due him on a voyage from Antwerp to Quebec. It appears that my client was carried to sea without signing the ship's articles or being engaged before the Consul. I have already written to the master of the vessel, but he has not thought proper to even acknowledge the receipt of my letter. As the amount due my client is small and the costs incident upon its collection must necessarily be high, perhaps an amicable settlement might be had. A reply before noon to day is requested, as my instructions are of a peremptory nature."

At about three o'clock in the afternoon of the same day, 12th July, the Consul answered this letter personally by calling on Mr. Hearn and stating to him that he had not seen the captain, that he knew nothing of the matter and could not do anything. Upon his being asked by Mr. Hearn what he was to do as he did not wish to trouble the Court with so small a case, the Consul replied: "It is not for me to tell you what you should do, but you can do as you wish." On the same afternoon the warrant was issued, but the Monark was not arrested until the next day.

Two days before the notice to the Consul, on the 10th July, Mr. Hearn wrote to the master demanding payment.

The statement of the promoter, on oath, is, that he was told by the master at Antwerp, that the Monark was to sail for New York, that he was not asked to sign, and did not sign ship's articles, that on the voyage he ascertained she was bound to Quebec; that on arrival at Quebec he asked for his discharge from the master, stating that he had friends and relatives in New York whom he wished to join, to which he received for answer: "We are in Quebec now and you must return in the ship." Upon this he asked to be paid off, but received $2 on account. He has added that on two occasions he demanded his wages and discharge from the master, before applying to a lawyer to sue him.

So much of the foregoing statement is denied by the master as respects the demand of payment, and at the same time, while stating that he did not receive notice of the suit, he admits his willingness to pay the wages.

The notice to the Consul would have been considered by me as too short were it not that he acted upon it by declining to interfere. Moreover, the Consul has signed a bond for the release of the ship, in which it is stated: "William Anthony Schwartz, of the city of Quebec, gentleman, who, submitting to the jurisdiction of Her Majesty's Vice-Admiralty Court of Quebec, binds himself in £30 to answer this action." This bond bears date the 14th July

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and carries with it an assent to the jurisdiction of this Court. The master of the ship and the Consul admit the amount claimed, but refuse to pay the promoter's costs. The case originates in an irregularity of the master, in taking the promoter to sea without signing articles. This, he was aware of some time before the suit was brought, and his duty then was to discharge him and pay him his wages if he refused to sign articles, which he did refuse to do at Quebec. After the arrest of the ship, the wages appear to have been tendered without costs and refused, which so come to be the sole difficulty in the matter. The protest does not contain sufficient grounds to induce the Court in the exercise of its discretion to stay its hand by declining jurisdiction, for the reasons stated in the respondent's motion. The not annexing the notice to the affidavit seems to have been an accidental omission, but this will not annul the proceedings.

The respondent's motion is dismissed with costs.

Hearn, Q.C., for the Promoter.

Pentland, for the Monark.

Friday, 27th July, 1883.

MONARK.—HOLVORSEN.

JURISDICTION—WAGES.

The 189th section of the Merchant Shipping Act 1854, applies to foreign as well as British vessels, and a Vice-Admiralty Court cannot entertain a suit for seamen's wages, the demand being below £50 stg., unless upon a reference as prescribed by that Act.

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A seaman of the Monark, a Norwegian ship, was engaged at Antwerp, where he was informed that her destination was New York. He did not sign articles. After sailing he learned that she was on a voyage to the port of Quebec, and after her arrival there he demanded his discharge and wages. Subsequently he brought this suit, which was tried summarily, and at the argument exception to the jurisdiction was taken, on the ground that the amount in controversy was less than £50 sterling, and that the Court must *ex-officio* decline exercising it.

JUDGMENT.—*Hon. G. Okill Stuart.*

In this case, which is a suit for wages for $54.40, the demand is admitted to the extent of $16.13, but at a summary trial, without any plea to the jurisdiction, it was argued for the respondent that this Court had no jurisdiction as the amount in controversy was less than £50 sterling, and that thus it was taken away by the 189th section of the Merchant Shipping Act, 1854. The case of the Margaretha Stevenson (*a*) was referred to in support of this position, wherein it was decided that a less sum than £50 sterling being due to the master of the ship as wages, the master, by the Act being upon the same footing as a seaman, the Court could not take cognizance in the matter.

(*a*) 2 S. V. A. R., p. 192.

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The 189th section enacts that "*no suit or proceeding for the recovery of wages under the sum of £50 sterling shall be instituted by any seaman in any Court of Admiralty or Vice-Admiralty* (with the exceptions therein stated, of which this case is not one,) *unless any Justices acting under the authority of this act refer the case to be adjudged by such Court.*" By the same Act, section 188, *a seaman can sue for wages in a summary manner before two justices or a stipendiary magistrate where the amount does not exceed £50*. As respects British vessels and seamen, the section of the statute limiting the jurisdiction to £50 has been continually acted on by this Court since the decision in the case above referred to, but the present suit, it is now said, is against a foreign ship, and the section of the statute must be limited to British vessels, and the jurisdiction of this Court exercised as it stood previous to the act of 1854. Upon a careful examination of cases decided under this section I find none in which the question was fully raised or examined. The only one in which it is alluded to, is that of Burns *vs.* Chapman (*a*), in which a case of Cope *vs.* Doherty (*b*) was referred to, and in which it was held that, excepting where foreign ships are expressly mentioned, the Merchant Shipping Act of 1854 applies only to British ships, but that, it is be observed, applies to matters affecting the substance of the remedy, and not the form. In the former case there was a claim for wages against the master, also a part owner of an American ship, and upon an incidental question to set aside a capias there was a *quære* whether the 189th section applies to a claim for wages earned on board an American ship. On the other hand, there is the case of the Milford, which would seem to cover the point now in controversy. (*c*) It was there held in a suit for wages by a master, who is placed on the same footing by the Act as a seaman in respect of the recovery of his wages, that the 191st section does so

(*a*) 5 C. B. N. S. 481.
(*b*) 27 L. J. 500
(*c*) Swabey p. 362.

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extend to the masters of foreign ships, and gives them a remedy under it for their wages. Master and seamen having thus the same remedy for their wages, the observations of the court in that case are applicable in this. The language of Dr. Lushington in it was. "But what is there to prevent the application of the Merchant Shipping Act, 1854, the 191st section of which gives the master the same rights and remedies for the recovery of his wages as seamen have? The construction put upon the 296th section of the Act in cases of collision, where foreign vessels on the high seas are concerned, cannot bind it in the present case. In cases of collision the court has held that a British statute could not regulate the conduct of foreigners on the high seas. 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." According to this authority, the promoter in this suit would have his remedy under the 189th section, only under the restrictions therein stated. The object of the legislature in passing the 189th section was to remedy a serious evil, to which the shipping in British ports was exposed, to prevent frivolous and unfounded suits in the higher courts, including the Vice-Admiralty Courts, by seamen who were in the habit, particularly at this port, upon a claim of wages, of instituting suits for trivial amounts and detaining vessels at an expense of hundreds of dollars, when perhaps not ten dollars were due. On the other hand, cases of oppression by masters of vessels on their men and improper retention of their wages occurred. To meet these evils the 189th section was passed, which precludes the institution of a seaman's suit for less than £50 sterling, in this Court. So much for the protection of the ship-owner. As respects the seaman the previous section, the 188th, affords him a remedy in a summary manner before a Stipendiary Magistrate or any two Justices of the Peace acting in or near to the place at which

MONARK. the service has terminated upon a claim not exceeding £50, so that for anything above £50 the seaman has this court as his tribunal, and for anything below that sum he has the Justices,. with this further relief, however, that his case may come before this court should the Justices see fit to refer it. These provisions have operated well as respects British ships, by affording an effective and cheap remedy to the ship-owner and the seaman. But it is said that the 189th section does not comprise foreign ships. The language is most comprehensive where it enacts that *no suit* or proceeding for the recovery of wages under the sum of £50 shall be instituted by or on behalf of *any* seaman or apprentice in any Court of Admiralty or Vice-Admiralty. Why should not foreigners profit by this most beneficial piece of legislation? It is to be observed that it is discretionary with the Court to adjudicate upon suits of foreigners for wages, and in the exercise of that discretion I cannot distinguish, where the law does not, as between British subjects and foreigners. Seamen, without distinction, are brought under the enactment, and it is a principle of law not to be questioned, that the law of the place of the contract, *lex loci contractus*, is to be observed in deciding on the nature, validity and construction of a contract; but the form of the action and the course of judicial proceedings and remedy must be directed by the laws of the state in which the action is brought. This is law in the United States (*a*), and there suits *in rem* are local, and the court, within whose jurisdiction the thing is situated is the proper *forum*, although all the parties in interest are foreigners. (*b*) In the language of Judge Story: "All that any nation can therefore be justly required to do is to open its own tribunals to foreigners in the same manner and to the same extent as they are open to its own subjects; and to give them the same redress as to rights and wrongs which it deems fit to acknowledge in its own municipal code for natives and residents;" (*c*) and in England Lord Brougham's

(*a*) Pritchard's Dig. Jurisdiction 225 (*b*) Ib.

(*c*) Story's Conflict of Laws ch. 14, § 557.

judgment in the case of Donn *vs.* Lippman (*a*) contains some striking remarks on the same subject:—"The law on this point," he said, "is well settled in this country, where this distinction is properly taken, that whatever relates to the remedy to be enforced must be determined by the *lex fori*, the law of the country to the tribunals of which the appeal is made." (*b*) The tribunal before which the promoter should have brought his claim for $54.40 is obviously that of the justices to which I have referred. By the limitation of £50, this court is debarred from acting in the matter, and I must therefore decline jurisdiction. The suit is dismissed, but without costs.

Hearn, Q.C., for Promoter.

Andrews, Caron, Andrews and Pentland, contra.

(*a*) 5 Clark and Finnely, R. 1, 13, 14, and Story 1 c. in note. (*b*) The Vernon, 1 W. Rob. 319.

Friday, 28th September, 1883.

THE CARMONA.—HALCROW.

Where a vessel with a valuable cargo was stranded on a dangerous place near Cape Rosier salvage services were rendered by a passing steamer. Held,

1. That as there was no danger to life or property incurred by the salving steamer in aiding to get her off, the sum of $1,000 was an adequate remuneration ; but

2. That a tender of the above amount, after suit brought, without costs was insufficient.

CARMONA.

Salvage.—This was a suit promoted by the Quebec Steamship Company, under circumstances fully noticed in the following judgment:

JUDGMENT.—*Hon. G. Okill Stuart.*

The present claim for salvage services has been made by the owners of the Miramichi against the steamship Carmona. They appear to have been performed on the 27th June last, while the Carmona of the burden of 2,247 tons, with a valuable cargo, was ashore about seven miles N.N.W. from Cape Rosier, where she had run aground in foggy weather, at about one o'clock in the afternoon. She was laden with iron rails, coals and other goods. She made no water and received no damage. The master and crew immediately set to work and threw a part of the cargo overboard, so as to lighten her and float her off with the aid of her engines at the rise of the tide. They so continued until about seven o'clock in the evening, when the Miramichi, a steam vessel of 727 tons, hove in sight on her way from Gaspé to Montreal. The Miramichi is a passenger steamer, and was by signals hailed to come to the assistance of the Carmona. She did so, and came to anchor on her starboard side. She subsequently weighed anchor, and by means of hawsers

from the Carmona fastened to the Miramichi, an attempt was made to pull her off with the aid of the engines of the Carmona. After the hawsers became taut, the Carmona's engines were reversed, and while the Miramichi was attempting to draw her off, aided by the engines of the Carmona, she floated. The time expended by the Miramichi during which she was engaged in the floating off the Carmona, was about two hours and a half, and her deviation from her course, as one of the respondent's witnesses has said, was nothing to speak of. The defence against this claim is that the Carmona was relieved from her perilous position by the rising of the tide and the power of her own engines, before the Miramichi rendered any assistance. This pretension is not substantiated by the evidence, although the master of the Carmona has testified in support of it. The master of the Miramichi finds it hard to say that there was not a possibility of her coming off as pretended, but in his opinion, she would not have done so that night. The master of the Carmona has stated that if she had not come off his intention was to take half an hour for supper, then turn to all hands and throw over cargo all night. The coast is an extremely dangerous one, and had the wind come on to blow in the night the probability was that she would have been a wreck by the ensuing morning. The rise and fall of the tide in the locality is from four to six feet, and it is, I think, extremely doubtful whether the Carmona would have even got off without the aid of the Miramichi, until the ensuing day, at the cost of much more of her cargo. At any rate, she aided in getting the Carmona out of extreme danger while stranded in a very dangerous place, and her owners are entitled to salvage. Although it has been held that when salvors, in good weather, simply towed a vessel disabled to a safe anchorage, incurring no risk of life or property, as in this case, and there was no deviation from their ordinary pursuits, a low rate of salvage should be allowed, (*a*) still Admiralty Courts have to look not

(*a*) D'Esty's Shipping and Adm. §320.

CARMONA. merely to the exact *quantum* of service performed in the case itself, but to the general interests of the navigation and commerce of the country, which are greatly protected by exertions of this nature. The day before the hearing of this suit the defendant offered a sum of one thousand dollars to the promoters, in full of all demands, for the salvage services now sued for. It was made by a notary at the office of the promoters. It is limited to the salvage services and makes no tender of costs then fully incurred, and is therefore insufficient. The next day, when the case came on for hearing on the merits, the defendants without notice prayed for *acte* that they admit the promoters' claim to the amount of one thousand dollars, and have moved that such sum, including costs, which they state had been tendered the day previous by the tender referred to, be deposited in Court. This motion cannot be allowed for two reasons: the first is want of notice; and the second, that the tender without costs is insufficient both in the notarial tender and in that by motion. I am of opinion that one thousand dollars is an adequate remuneration for the salvage services rendered and I pronounce judgment for that amount with costs.

Andrews, Caron, Andrews and Pentland, for Promoter.

Irvine and Pemberton, contra

Friday, 28th September, 1883.

ARRAN.—MacMicken.

Where two ships in the harbor of Quebec, from the violence of the wind and force of the tide, were accidentally brought into such proximity that each had a foul berth, both held to be in fault for not adopting the proper course to relieve themselves from their perilous positions, and thereby avoid a collision.

JUDGMENT.—*Hon. G. Okill Stuart.*

ARRAN.

This suit against the Arran, a British barque of 1,063 tons, has been brought by the owners of the Moen, a Danish barque of 1,002 tons, for damages arising from a collision on the 23rd of May last, on the upper ballast ground, in the harbor of Quebec, about ten o'clock at night, as caused by the negligence of the former. The Arran was laden and had been there from the day previous, held by her starboard anchor until between two and three o'clock in the afternoon of the 23rd. On the north, the Quebec side of the river, there lay next to her the Albertine and further in shore the Gatineau. The wind was from the east, a gale with a heavy swell; the tide had but turned to ebb when the Moen in ballast sailed up the river, carrying her upper topsails, passed the Arran between the Albertine and the Gatineau, and dropped her starboard anchor, which broke off with 45 fathoms of chain. Her [illegible] anchor was then cast and after drifting she came to. At six o'clock in the evening, the ebb tide, the Arran and the Moen were in such dangerous proximity that when swung to the ebb a collision appeared to be inevitable, an anticipation afterwards realised.

The promoters have represented that about four o'clock in the afternoon, when the tide had turned to flood and the Moen had swung to her anchor, the Arran, then four and a

ARRAN. half cables length lower down the river, began to drag her anchor and approached the Moen until within fifteen fathoms on her port side, and so gave the latter a foul berth; and, further, that about ten o'clock p. m., when the vessels began to swing with the ebb, the Arran collided with the Moen, her jibboom becoming foul of the port main rigging of the Moen and the starboard bow of the Arran coming into contact with the Moen's port side, between her main and mizzen rigging.

The counter allegation of the respondents is, that when the Moen came to anchor she attempted, but unsuccessfully, to do so to the north-west of the Arran, but failed, and was so close that she gave her a foul berth. That the Arran did not drift, but as a matter of precaution, at six o'clock in the afternoon, the tide being flood, she dropped her port anchor with forty-five fathoms of chain. There is no cross action, and no protest was made by the respondents, as no damage appears to have been sustained by the Arran.

Upon these issues the evidence has established that the Arran had been at anchor from the day previous and was held upon her starboard anchor, when in the afternoon the Moen was driven from the place where it was intended that she should anchor by the breaking of her chain, to a place more to the south of the Arran and higher up the river.

There is no doubt that the two vessels, after the tide had turned to flood, had each of them a foul berth, so much so that at the ebb when the vessels would have to swing with the tide, a collision was inevitable, if they, respectively, held each its position. Upon the questions—1. Whether the Moen on anchoring gave a foul berth to the Arran; or, 2. Whether the Arran afterwards dragged her anchor and drifted up the river with the flood too close to the Moen and so gave her a foul berth, the testimony is unusually conflicting, the discrepancy varying from four and a half cables length, as stated by the witnesses of the promoter, to about a ship's length, as stated by those of the respondent, as the distance at which the Moen anchored higher up the river than the Arran. After a very careful con-

ARRAN.

sideration of the matter, it appears to me that although the Moen missed the place of her selection for coming to anchor, she did not come up so close as to give a foul berth as charged against her. As respects the Arran, I think that she did drag her anchor but not under such circumstances as to justify the charge of negligence, the gist of this action. It is evident that the place first selected by the Moen for anchoring was a safer one for each vessel, and that, had she not broken her chain and drifted, there would have been no collision. As it was, she lay almost astern of the Arran at the flood. The latter was a laden vessel, and therefore more apt to drag her anchor than one in ballast. The wind was a gale, the ballast ground was crowded with vessels. When the Albertine came to anchor before the Moen broke her chain, she had come into collision not only with the Arran but also with the Gatineau, and the master of the Albertine has testified that there were but few of the vessels which arrived at the ballast ground at the time, that got off without the loss of an anchor or coming foul of another ship; and the pilot of the Moen has attributed the loss of her anchor to the violence of the gale. I am therefore disposed to attribute the proximity of these vessels at six o'clock on the evening of the 23rd of May to the difficulties into which they had been forced by wind and tide, rather than to negligence in either; and had the matter rested here, the judgment would have been in accordance with such an opinion. But at that time the case had assumed a very different aspect. At six o'clock, and during four hours afterwards, it is certain that these vessels occupied such relative positions until the turn of tide to ebb at ten o'clock, as to render a collision certain. The master of the Moen has testified that when the Arran brought up east of him, she was so close that when the vessels swung there would be a collision, and that without the assistance of a tug it would have been dangerous for either to drop down the river, owing to the great number of vessels in the vicinity. He has said also: "We did not think of moving,

ARRAN. because our pilot said we were not to blame, and I was aware that if one of the vessels was not moved a collision was inevitable." The chief mate of the Arran was in charge of her during the afternoon until half-past nine o'clock, half an hour before the collision, when her master, who had been absent on business connected with his vessel, on coming on board called out "How the deuce has that ship got so close to us," and he has said, "that he could have chucked a biscuit on board of her." It is proved that at any time during the four hours that I have mentioned, these vessels could have been relieved from impending danger by the use of a tug. It is plain that one would not give way to the other by employing one, but preferred to stand the consequences of a collision. Now it has been determined that in coming into harbor, it is the duty of mariners to provide for their own safety and that of others, and not to wait till the moment of danger. (*a*) Also, that it is the duty of every vessel seeing another at anchor, whether in a proper or improper place, and whether properly or improperly anchored, to avoid, if practicable and consistent with her own safety, a collision. (*b*) Again, it is necessary that the measures taken to avoid a collision should not only be right, but that they should be taken in time. (*c*) If circumstances evidently and clearly require prudential measures, and those measures are not taken, and the natural result of such omission is accident, the court would be inclined to hold the party liable, even if such result was only possible. (*d*) In a cause of damage, both ships were equally blamable for not taking the necessary precaution to prevent accidents, and the court awarded one-half the value of the plaintiff's loss against the defendant (*e*), and by the modern

(*a*) Prit. Dig p. 172. No. 407.

(*b*) The Batavier, 4 Notes of cases 356 2 W. R. p. 407, 10 Jar. 19.

(*c*) The Trent, Spinks, 222.

(*d*) 2 V. R. 240, 8 Jar. 131, 3 Notes of cases 5.

(*e*) The Favorite, 5 (Irish Jur 118.)

practice of the Court of Admiralty, the defendant is condemned in a moiety of the damages of the plaintiff's vessel. (*a*)

It was in the power of each of these vessels to avoid a collision by a precautionary measure—the employment of a tug; in fact there was one near them. That each should quietly wait for a collision is almost inconceivable, a result that might have been attended with loss of life and property.

They have thus courted disaster, and must mutually abide the consequences. The judgment of the court is, considering that there is no cross-action, and that the Arran has not suffered damage nor made a protest, but that the injury done by the collision is confined to the Moen, that the amount of the damage be paid by the owners of these vessels respectively, each a moiety, without costs to either.

Charles A. Pentland, for the Moen.

Archibald Hay Cook, for the Arran.

(*a*) See Pritchard's Dig. p. 136. No. 31.

Friday, 2nd November, 1883.

SS. PALMERIN.—ANDERSON.

The Palmerin, a screw steamship of 1725 tons registor, valued at £19,500 sterling, when on a voyage from Montreal to Cape Breton, broke her shaft off the Bird Rocks.

The SS. Nestorian, valued, with her cargo and freight, at £57,000 sterling, bound from Montreal to Glasgow, took the Palmerin in tow, and towed her safely to Sydney; in doing so the Nestorian deviated from her voyage, but incurred no special risk. The towage lasted twenty hours. £1150 sterling allowed as salvage remuneration.

PALMERIN.

This was a cause of salvage, promoted by Andrew Allan, William Rae and others, in which they claimed compensation for salvage services, rendered by their steamship the Nestorian in the Gulf of St. Lawrence, to the Palmerin, an iron screw steamship in distress. The facts of the case sufficiently appear from the following opinion of the learned judge :

THE COURT.—*Hon. G. O. Stuart.*

This suit has been instituted by the owners of the iron screw steamship Nestorian, one of the Allan line, for salvage services to the Palmerin, also an iron screw steamship, while the former was on a voyage from Montreal to Glasgow. The Palmerin is of 1725 tons register, valued at £19,500 stg. She was, on the morning of the second of June last, at the hour of 2.40, in the prosecution of a voyage from Montreal to Little Glace Bay, Cape Breton, in ballast, when her shaft broke, as also her stern tube, and as respects machinery she became quite powerless. It was, when in this state, that the services for which this suit was brought were rendered. The defence to the claim is that these services were not salvage but towage services, and that the Palmerin could have

accomplished her voyage by means of her sailing capacity. No tender or offer has been made.

At the time of the accident the Palmerin was in the Gulf of St. Lawrence not far from the Bird Rocks. Her sails were then set and her course shaped for Sydney, Cape Breton, distant about 140 miles. The same morning she spoke the steamship Winnipeg, whose offer to tow her she declined, because her master would not agree for a fixed sum. She continued under canvas until 11 o'clock on the morning of the 4th of June, about fifty-six hours, when she was about 85 miles from Sydney, and when the Nestorian was seen to be crossing her stern, the weather being at the time a dead calm: she hoisted signals which were three balls at the fore-mast head and flags flying at half-mast, to intimate to the Nestorian that her machinery was disabled and that she required assistance. The Nestorian came near and the master of the Palmerin endeavored to obtain her services to tow to Sydney for a specified sum, as in the case of the Lake Winnipeg, an offer which was declined: but finally it was agreed that the amount should be left for the owners of the vessels to settle, and the Palmerin was towed safely into Sydney without accident, except the breaking of a tow line. When taken in tow she was ten miles off Cape Ray, Newfoundland, and in 47.35 N. L. by 59.38 W. L.

The Nestorian is 2,465 tons register; she had on board 332 head of cattle; her cargo was worth about £20,000 sterling, which, with her own value and freight, have been estimated at £57,000 sterling. Her course when she sighted the Palmerin was about S.E. ½ S., steering towards Cape Race outside Miquelon. Her course to Sydney with the Palmerin was S.W. The master of the Nestorian has stated the most dangerous part of the navigation between Montreal and Glasgow to be between Capes Ray and Race, where fogs are frequently encountered; that the Palmerin when taken in tow had two square sails set, which, from the want of wind, were useless, and that the current outside Cape Ray and St. Paul's Island being very strong

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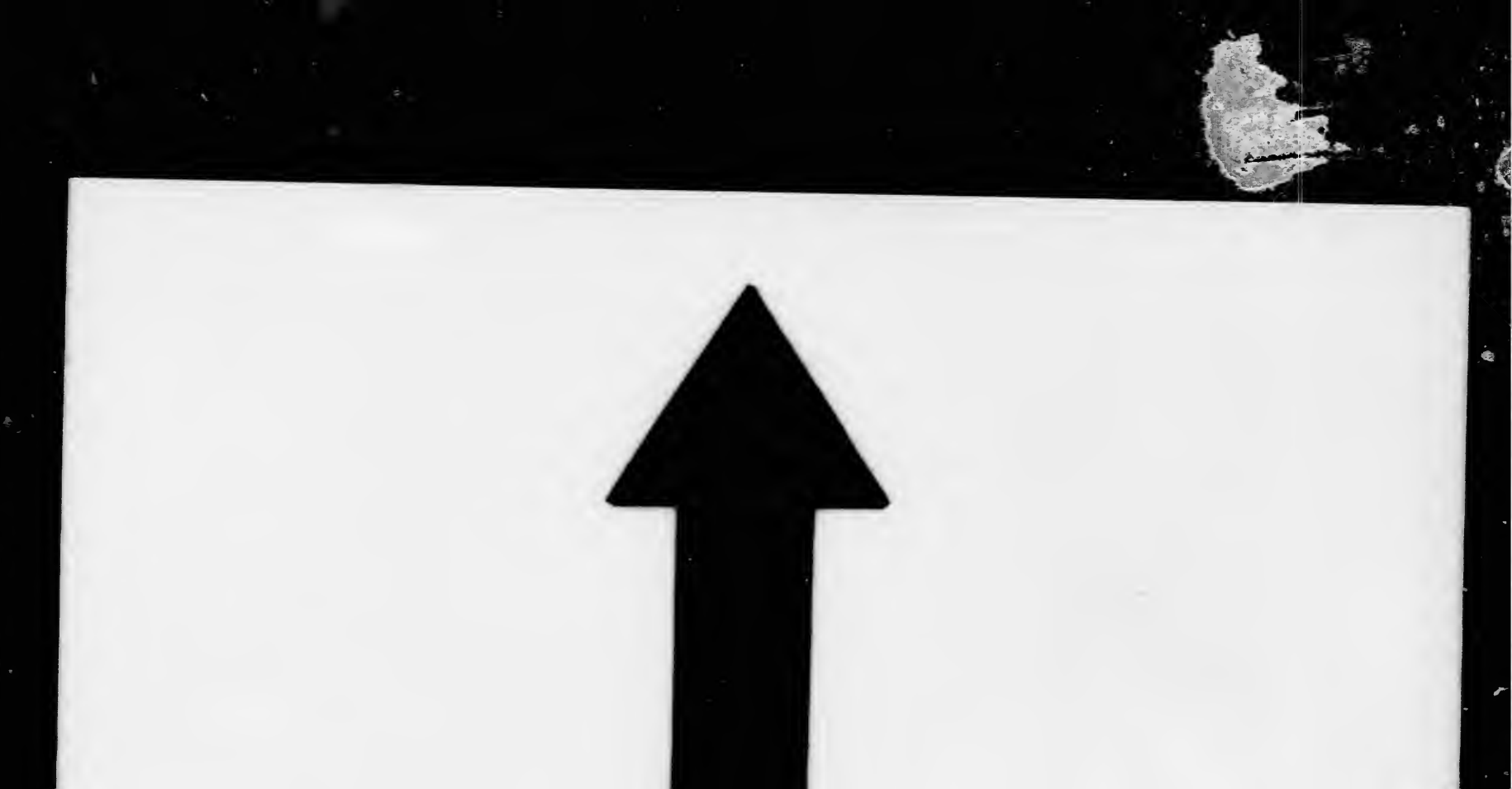
might possibly have put the ship on shore. He considered the Palmerin to be in a dangerous position, especially had a dense fog set in or a gale from southward and eastward, which generally accompanies the fog, and has expressed his opinion that the Palmerin, had he left her without assistance, would sooner or later have gone on shore, and life and property been sacrificed, because she could not have been kept off the land with her sails or guided to a harbor. His experience has further enabled him to say that with the propeller outside, as the Palmerin had, it is impossible to keep a ship under command and to steer her in any given direction. He has added that he ran great risk in taking the Palmerin into Sydney, as his upper deck was encumbered with cattle, and had it come on to blow, or if dense fog had set in, it would have been a very serious thing for him. The time occupied in towing the Palmerin into Sydney, including what elapsed afterwards, to place the Nestorian on her course again, was about twenty hours, and in the afternoon of her departure a fog came on which compelled her to slow her engines and lose time.

Considerable evidence has been adduced by the respondents, to establish that the Palmerin by means of her canvas alone could have reached her destination. To accomplish this it appears that the wind must have been constantly fair. She seems, according to the respondent's evidence, to have been distant from Sydney when she broke her shaft about 140 miles, and with favorable winds to have made 200 miles before she fell in with the Nestorian, but fifty of which were available on her course. The best evidence of her sailing power and headway, however, would have been found in her log, which has been withheld. It has been attempted to prove also that the Palmerin, with the wind upon a lee shore, could keep from it by taking a course north or south, evidence which I do not find convincing.

A careful consideration of the testimony has led me to the conclusion that there was but a bare possibility of the

Palmerin's reaching her port of destination by her as alone without shipwreck. The master seems to ha come to the same conclusion, otherwise he would not have pplied to the Nestorian for aid, after having declined it from the Lake Winnipeg two days before. Had his sailing efforts not have proved fruitless he would most probably have persisted in them. With a head wind and her screw in a dead lock she would have been at the mercy of the winds, waves and currents, and in the exercise of a sound discretion he availed himself of the aid of the Nestorian. His vessel was in a dead calm when taken in tow, and what might have subsequently happened is matter of conject

The respondents have made no offer or as remuneration for the services rendered by the N orian. They have said that there was no salvage service but a towage only, and for this even they have made no offer. That the services in question were salvage services admits of no question. The language of Dr. Lushington in the case of the Undaunted is in point: "There is a broad difference 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 labor unsuccessfully they are entitled 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 labor 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 take her in tow, if required: The steamer does so, the ship rides out the gale safely without the assistance of the steamer. I should undoubtedly hold in such a case that the steamer was entitled 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



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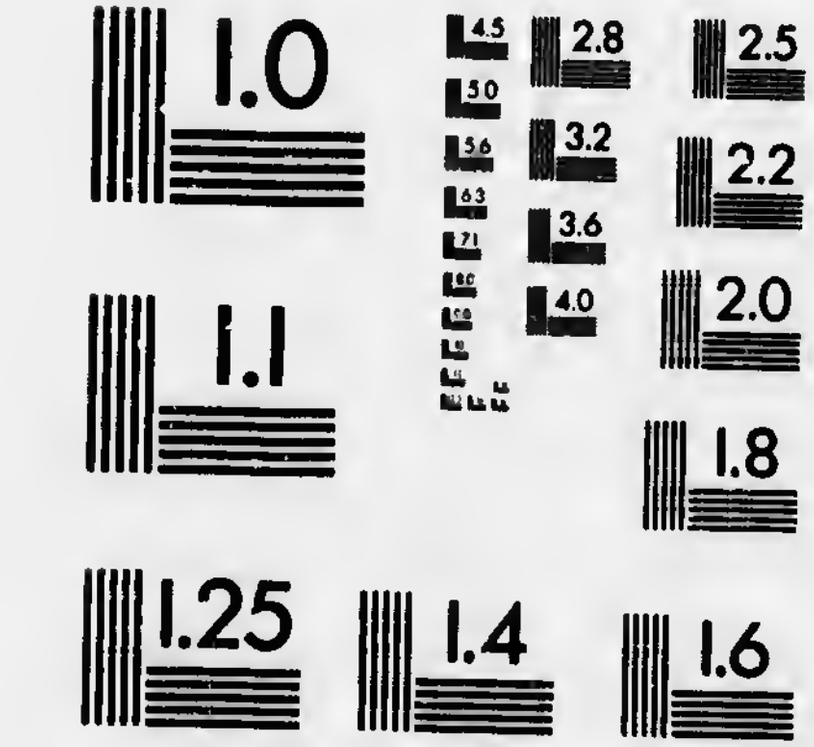

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PALMERIN.

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." (*a*)

The how much—the *quantum*—to be awarded in this suit is now the question. The safety of the Palmerin no doubt required the services of the Nestorian. Property to the amount of £19,500 sterling, her value, was at stake. The Nestorian, her freight and cargo, valued at £57,000 sterling, were more or less jeopardized, not only by deviating from her course but by towing, an occupation for which she was not constructed, and one which necessarily enhanced the ordinary risk of navigation. In settling the value of salvage services, the Court has regard to the interest of trade and navigation, and the vast amount of property engaged in it. The necessity of an ample remuneration for salvage services on the inhospitable coast of Newfoundland is too apparent to require comment. The interest, as well of the underwriter as of the shipowner, demands it, and the Court must necessarily award it. Should it not do so, and with liberality, owners of steamships would restrict their salvage service to life, and allow vessels to go to wreck and destruction.

In coming to a decision, I have maturely weighed the scale of remuneration adopted in the Admiralty Division of the High Court, as accurately as I can. The amount at first claimed by the promoters was £2,000 sterling—afterwards reduced to £1,250 sterling. The promoters have consented to bail in the amount of £1,150 sterling which, by the judgment of the Court, I now award them, with costs.

William Cook, Q.C., for the salvors.

C. A. Pentland, for the Palmerin.

(*a*) Lush. p. 92.

Friday, 14*th December*, 1883.

SS. NETTLESWORTH.—Tom.

Where a vessel under charter was injured by collision caused by another vessel, the charter-party providing that in case of damage the hiring should cease until she could be repaired: Held, that an action by the charterers against the offending ship for the detention would lie.

JUDGMENT.—*Hon. G. Okill Stuart.*

NETTLES-WORTH.

The Fiado, a steamship of 985 tons, gross register, while lying at the Island wharf, at Montreal, was injured by the Nettlesworth, of 1,150 tons, also a steamship, by striking her on the port side; her bulwark was broken as also several of her iron plates. She was consequently detained in Montreal for a day. Her destination was Pictou, and in the prosecution of her voyage she was detained eight days at Quebec, for survey and for repairs.

This suit has been brought by the charterers of the Fiado, who represent that she had been hired to them for freight for six calendar months with the master and crew, that she was under their exclusive control, and that they were entitled to $2,000 in damages, the result of her detention during nine days. The respondents in the first instance objected to the jurisdiction of the Court, and by their act on protest have said that the damages were consequential, the result of a *vis major* or inevitable accident. As such a statement, if true, can by no means preclude the Court from adjudicating in the matter, the act on protest is overruled. The contents of the act on protest were then pleaded. That the Nettlesworth was to blame for the collision does not admit of question. Indeed, it is admitted that she was, and it is in evidence that there was a detention of the Fiado

NETTLESWORTH.

for survey and repairs during nine days. The question now is, can the charterers of the Fiado recover upon the loss sustained by this detention? By the first condition of the charter party it is stipulated "that the owners shall provide and pay for all provisions and wages of the captain, officers, engineers, firemen and crew; shall pay for the insurance of the vessel, also for all engine-room stores, and maintain her in a thorough efficient state in hull and machinery for the service." By the second, the charterers were to pay for the use of the vessel at the rate of thirteen shillings and three-pence per gross register ton per calendar month. By the eighth, if the charterers had reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners should, on receiving particulars of the complaint, investigate the same, and if necessary make a change in the appointments; and by the eleventh condition it was stipulated, that, in the event of loss of time from deficiency of men or stores, break down of machinery or damage, preventing the working of the vessel for more than forty-eight hours, the payment of hire should cease until she should be again in an efficient state to resume her service.

It is quite true that the loss of the owners from the suspension of the charter-party would be recoverable with other damage against the Nettlesworth. "Where, in consequence of a collision a vessel loses the benefit of a charter-party damages are allowed for the loss of the charter-party in addition to demurrage." (*a*) So that an indemnity may be recovered by the owners of the Fiado against the Nettlesworth for the loss of the hire of the Fiado for nine days. An actual loss from detention was sustained by the promoters, the charterers. It has been caused by the wrongful act of the persons in charge of the Nettlesworth, their carelessness and negligence in the management of their vessel—and for this they must have their remedy.

By the terms of the eleventh condition, they are pre-

(*a*) The "Star of India," 1 P. D. 466, Marsden's Collisions at Sea, p. 62.

precluded from redress against the owners of the Fiado, and necessarily they must fall back upon the Nettlesworth. NETTLESWORTH.

The judgment overrules the act on protest, and maintains the suit for detention during nine days, with costs. Reference to the registrar to settle the loss.

Fitzpatrick, for Promoters.

Laruc, Q. C., contra.

Friday, 18*th January*, 1884.

SIGNE.—BIERMAN.

ROSE C.—GARDANNES.

Two vessels crossing, one on the starboard and the other on the port tack—Held: That the latter did not keep a proper look out and that the former did not keep her course, but ported her helm too late to avoid a collision, and that there was mutual fault.

SIGNE. ROSE C.

These were causes promoted by the owners of the Rose C. against the barque Signe, and by the owners of the Signe against the Rose C., each vessel proceeding against the other, for considerable damage by a collision which took place on the 14th September last, while both vessels were in the Gulf of St. Lawrence, the jib-boom of the Signe striking the mizzen-mast of the Rose C., and her stem coming in on the French barque's starboard quarter.

The facts of this case are sufficiently noticed in the following opinion of the learned judge:

JUDGMENT.—*Hon. G. O. Stuart.*

Cross-actions of damages have been brought by the owner of the Rose C., a French barque of 419 tons, and the owners of the Signe, a Norwegian barque of 994 tons, for a collision. On the morning of the 14th of September last, these vessels were in the Gulf of St. Lawrence, between Newfoundland and Anticosti, and at about 3.30 were approaching each other. The night was dark, but so clear that a ship's light could be seen three miles off, and the wind north-westerly, a moderate breeze. The Rose C. was on the port tack, her course N.N.E. ½ E., her yards braced sharp to the wind, her speed about three knots, and her lights bright. The Signe was on the starboard tack under all sails, except the flying jib, royals and topgallant staysail, close hauled, on a course W. by S., with a speed

SIGNE.
ROSE C.

of about five knots. It was the duty of these vessels respectively, while crossing, to follow the rule of navigation, which directs that the vessel—in this case the Rose C.—on the port tack must keep out of the way, while the other, the Signe, on the starboard tack, had to keep her course. The Rose C. did not keep out of the way, nor did the Signe keep her course until the moment of collision. The jib-boom of the Signe came into contact with the mizzen-mast of the Rose C. at about thirty feet from her stern, and the damages resulting to the parties have been estimated at from four to six thousand dollars to the Rose C. and two thousand two hundred dollars to the Signe. The case as represented for the Rose C. is, that the Signe showed no lights, that those she had were improperly placed, that she did not keep her course, and, finally, that she did not render assistance after the collision. On the other side it has been contended, that the lookout on board the Rose C. was bad, and that she did not keep out of the way.

The facts attending the collision, as represented for the Rose C., are to be found principally in the evidence of her lookout, Vincenco Perricollo, a young man, an Italian, nineteen years of age, and of her master. The persons on deck were the master, Perricollo, and three others composing the captain's watch. Perricollo was on the lookout on the forecastle, and has said that at the distance of a quarter of mile he saw something dark, a black mass, without knowing what it was, or on what side it was approaching, and it showed no lights. He left the forecastle instantly and went astern to notify the master, who was on the poop. The master ordered the helm to port, and seeing that the Rose C. would not come round, further ordered her sails aft to be hauled down, but she would not pay off in time, as the dark object which proved to be the Signe struck her with her jibboom. The forepart of her mainmast was carried away ; the stem of the Signe also struck her railing on the starboard side, thirty feet from the stern, her mizzen-mast was broken into three pieces, and the whole came down with a crash, splitting the rudder from top to bottom.

SIGNE. ROSE C.

In these particulars the testimony of the master and the others on the watch of the Rose C. corresponds, and is to the effect also that they saw no lights upon the Signe, and that if there were they would have seen them. After carefully weighing this evidence by itself, it has seemed to me that the lookout Perricollo was tardy in seeing the Signe. Although the distance at which he saw her, is said to be a quarter of a mile, or two cables, I think she must have been much closer, and possibly he may have deemed it more prudent to leave his post to find the master instead of hailing the watch, as usual with seamen on the lookout. This supposition is confirmed by the testimony of the master of the Rose C. He seems not to have had time for reflection, or proper action, before the crash came; and, what is more, he has stated that after the Signe came into collision she passed by, and that he kept her in view on the starboard tack without seeing her lights until daylight, when she was about three miles off. If so, the weather being the same, Perricollo should have seen her at more than a quarter of a mile off. But, were there any doubt in the matter, it is removed by testimony, positive and to the point, from persons on board the Signe, who have testified that her lights were bright and burning long before, at the time of, and after the collision. Had the Signe been perceived in proper time the Rose C. could have have kept away on a port helm and have passed clear.

Referring now to the course taken by the Signe, her case may be determined, I think, by the evidence of the chief mate, who was in charge with his watch. Her lookout reported to him the green light of the Rose C. about a mile and a half off, about two points on the port bow. For the period of about ten minutes he kept this light in view, expecting that she would wear and show her red light, the Signe all the time being kept close to the wind; but the Rose C., instead of doing so, kept her course on the port tack until her hull was close under the bow of the Signe. When the helm of the Signe was put down, she answered it and luffed, but her sails had not come aback, her topgallant sail

only beginning to shiver when the vessels came into contact. The chief mate has said that he adopted this course to ease the blow, but it was one, as it appears to me, which had a contrary effect, and had he kept his course it is quite possible, as the witnesses from on board the Rose C. have stated, that the Signe would have passed clear and without collision. In construing the rules of navigation, due regard must be had to its dangers and to any special circumstances rendering a departure necessary, in order to avoid immediate danger. (*a*)

Before the opinion of the nautical assessor, by whose advice I am favoured, is given, I may state with reference to the two other points raised on the part of the Rose C., that they are without foundation. It has been contended that the lights of the Signe were improperly placed. Very weak testimony on this head has been given, and it is met by overwhelming testimony to the contrary. Again, it has been urged that the Signe after the collision did not stop to render assistance to the Rose C. These vessels were very much disabled, and continued to be so for about three hours before they could put matters sufficiently to rights to proceed on their respective courses, and I see no reason to impute blame to the Signe in this particular.

The opinion of the nautical assessor is as follows :—

Question.—When the Rose C. on her port tack, close hauled, was approaching the Signe on her starboard tack, also close hauled, supposing the night to have been sufficiently clear to see the lights of the Signe at one or two miles off, could she have kept out of her way by porting her helm in proper time, or by any other course ?

Answer.—She could by porting her helm. Even if the master of the Rose C. did not see the lights of the Signe as he has stated, but saw her hull, he might have put his vessel on the other tack and thus have avoided the collision.

Question.—After the Signe saw the green light of the

(*a*) The Khedive, L. R. 5, App. Cases 876. The Buckhurst, L. R. 6, P. D. 152.

SIGNE. ROSE C.

Rose C. for a mile or more, had she kept her course close to the wind instead of porting her helm before the collision, would she have passed clear of the Rose C. without accident, or could she have adopted any other course to avoid it?

Answer.—I am not sure, but I think it likely she would have passed clear; but her proper course was to heave everything aback instead of luffing up, and by doing so she would have avoided the collision; for this there was ample time, as the green light of the Rose C. was seen from the Signe at a distance of a mile and a half before the collision.

Question.—Did the Signe by porting her helm, or otherwise, contribute to the collision?

Answer.—She did,—by porting her helm.

Question.—Are one or both of these vessels to blame?

Answer.—I am of opinion that each was in fault.

F. GOURDEAU, *Harbor Master.*

THE COURT.—The opinion of Captain Gourdeau being that both vessels are to blame, in which view of the matter I fully concur, I pronounce accordingly, and decree that the damages be apportioned equally between the parties, according to the Maritime law,—the amount to be established upon the usual reference. Each party must pay his own costs. (*a*)

From this judgment the owners of the Signe asserted, on the 25th instant, an appeal to Her Majesty in Her Privy Council, and gave the usual bail.

Larue, Q.C., and Panet Angers, for the Rose C.

C. A. Pentland, for the Signe.

(*a*) In the cases of the Khedive and Voowaarts, referred to in the note on the preceding page, the House of Lords recently decided that an unnecessary departure from the regulations, even in the agony of the collision, and though it only possibly contributed to the collision, did not absolve the ship from blame for such departure. The same decision tends to make it somewhat doubtful, though the departure could not possibly have contributed to the disaster, yet if it was unnecessary, whether the ship so departing would not be to blame. As, however, this exact point did not arise in the case, this judgment is no direct authority on the question. See *Roscoe's* Admiralty Law and Practice, Ed. of 1882, p. 45.

COURT.

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APPENDIX.

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A.—The Queen's Order in Council, of the 23rd day of August, 1883, establishing rules for the Vice-Admiralty Courts in Her Majesty's possessions abroad.

B.—The Vice-Admiralty Courts Act, 1863.

C.—An Act to extend and amend the Vice-Admiralty Courts Act, 1863.

D.—Rules for the Vice-Admiralty Courts, in Her Majesty's possessions abroad.

E.—The Vice-Admirals of Canada, during the period of these reports

F.—The Judges of the Vice-Admiralty Court, during the same period.

APPENDIX.

A.

AT THE COURT AT OSBORNE HOUSE, ISLE OF WIGHT,

The 23rd day of August, 1883.

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS there was this day read at the Board a Memorial from the Right Honourable the Lords Commissioners of the Admiralty, dated the 22nd day of August, 1883, in the words following, viz.:

"WHEREAS by an Act passed in the twenty-second year of Your Majesty's Reign, entitled 'Vice-Admiralty Courts Act, 1863,' it was amongst other things provided that 'Her Majesty 'may, by Order in Council, from time to time establish Rules 'touching the practice to be observed in the Vice-Admiralty 'Courts, as also Tables of Fees to be taken by the Officers and 'Practitioners thereof for all acts to be done therein, and may 'repeal and alter all existing and all future Rules and Tables 'of Fees, and establish new Rules and Tables of Fees in addition 'thereto or in lieu thereof.'

"And whereas it appears to us to be expedient that in lieu of the Rules and Tables of Fees now existing in the Vice-Admiralty Courts, the Rules and Tables of Fees annexed hereto should on and from the first day of January, 1884, be established and be in force in all the Vice-Admiralty Courts.

"Now therefore it is most humbly submitted that Your Majesty will be graciously pleased by Your Order in Council to direct that all the existing Rules and Tables of Fees in the Vice-Admiralty Courts be repealed, and that, in lieu thereof, the Rules and Tables of Fees, annexed hereto, shall from the

first day of January, 1884, be the Rules and Tables of Fees for all the Vice-Admiralty Courts."

Her Majesty having taken the said Memorial into consideration, was pleased, by and with the advice of Her Privy Council, to approve of what is therein proposed. And the Right Honourable the Lords Commissioners of the Admiralty are to give the necessary directions herein accordingly.

C. L. PEEL.

COPY OF THE ADMIRALTY BOARD MINUTE.

The necessary steps are to be taken for carrying into effect the provisions of Her Majesty's foregoing Order in Council.

A. C. KEY.
T. BRANDRETH.

By Command of their Lordships,
G. TRYON,
Admiralty, 24th September, 1883.

B.

26 VICT., CAP. 24.

An Act to facilitate the Appointment of Vice-Admirals and of Officers in Vice-Admiralty Courts in Her Majesty's Possessions abroad, and to confirm the past Proceedings, to extend the Jurisdiction, and to amend the Practice of those Courts. [8th June, 1863.]

WHEREAS it is expedient to facilitate the appointment of Vice-Admirals and of Officers in Vice-Admiralty Courts in Her Majesty's possessions abroad, and to confirm the past proceedings, to extend the jurisdiction, and to amend the practice of those Courts: 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 "Vice-Admiralty Courts Act, 1863."

Interpretation of terms.

2. In the interpretation and for the purposes of this Act (if not inconsistent with the context or subject matter) the following terms shall have the respective meanings hereinafter assigned to them: that is to say,

"Her Majesty" shall mean Her Majesty, her heirs and successors:

The "Admiralty" shall mean the Lord High Admiral or the commissioners for executing his office:

"British possession" shall mean any colony, plantation, settlement, island, or territory, being a part of Her Majesty's dominions, but not being within the limits of the United Kingdom of Great Britain and Ireland, or of Her Majesty's possessions in India:

"Governor" shall mean the officer for the time being lawfully administering the government of any British possession:

"Vice-Admiralty Court" shall mean any of the existing Vice-Admiralty Courts enumerated in the schedule marked A. hereto annexed, or any Vice-Admiralty Court which shall hereafter be established in any British possession:

"Ship" shall include every description of vessel used in navigation not propelled by oars only, whether British or foreign:

"Cause" shall include any cause, suit, action, or other proceeding instituted in any Vice-Admiralty Court.

Appointment of Vice-Admiral.

3. In any British possession, where the office of Vice-Admiral is now or shall at any time hereafter become vacant, the governor of such possession shall be ex officio Vice-Admiral thereof, until a notification is received in the possession that a formal appointment to that office has been made by the Admiralty in the manner hereinafter mentioned.

Appointment of judge.

4. In any British possession, where the office of judge of a Vice-Admiralty Court is now or shall at any time hereafter become vacant, the chief justice, or the principal judicial officer of such possession, or the person for the time being lawfully authorized to act as such, shall be ex officio judge of the Vice-Admiralty Court, until a notification is received in the possession that a formal appointment to that office has been made by the Admiralty in the manner hereinafter mentioned.

Appointment of registrar and marshal.

5. In any British possession, where the office of registrar or marshal of any Vice-Admiralty Court is now or shall at any time hereafter become vacant, the judge of the Court may, with the approval of the governor, appoint some person to the vacant office until a notification is received in the possession that a formal appointment thereto has been made by the Admiralty in the manner hereinafter mentioned, and may, for good and reasonable cause, to be approved by the governor, remove the person so appointed.

The judge may also appoint some person to act as registrar or marshal during the temporary absence of either of those officers.

Names of appointees, &c. to be notified to the home government.

6. On any vacancy in the office of judge, registrar, or marshal of any Vice-Admiralty Court, the governor of the British possession in which the Court is established shall, as soon as is practicable, communicate to one of Her Majesty's principal Secretaries of State the fact of the vacancy, and the name of the person succeeding or appointed to the vacant office.

Saving the powers of the Admiralty.

7. Nothing in this Act contained shall be taken to affect the power of the Admiralty to appoint any Vice-Admiral, or any judge, registrar, marshal, or other officer of any Vice-Admiralty Court, as heretofore, by warrant from the Admiralty, and by letters patent issued under seal of the High Court of Admiralty of England.

Past proceedings confirmed.

8. No act done by any person in the capacity of judge, registrar, or marshal of any Vice-Admiralty Court, which shall not have been set aside by any competent authority before the pass-

ing of this Act, shall be held invalid by reason that such person had not been duly appointed, but all such Acts shall be as valid and effectual as if done by a person duly appointed.

Protection of officers.

9. No action, prosecution, or other proceeding shall be brought against any such person by reason of the illegality or informality of any Act hereby declared to be valid and effectual.

Jurisdiction of Vice-Admiralty Courts.

10. The matters in respect of which the Vice-Admiralty Courts shall have jurisdiction are as follow :

(1.) Claims for seamen's wages :

(2.) Claims for master's wages, and for his disbursements on account of the ship :

(3.) Claims in respect of pilotage :

(4.) Claims in respect of salvage of any ship, or of life or goods therefrom :

(5.) Claims in respect of towage :

(6.) Claims for damage done by any ship :

(7.) Claims in respect of bottomry or respondentia bonds :

(8.) Claims in respect of any mortgage where the ship has been sold by a decree of the Vice-Admiralty Court, and the proceeds are under its control :

(9.) Claims between the owners of any ship registered in the possession, in which the Court is established, touching the ownership, possession, employment, or earnings of such ship :

(10.) Claims for necessaries supplied, in the possession in which the Court is established, to any ship of which no owner or part owner is domiciled within the possession at the time of the necessaries being supplied :

(11.) Claims in respect of the building, equipping, or repairing within any British possession of any ship of which no owner or part owner is domiciled within the possession at the time of the work being done.

Jurisdiction of Vice-Admiralty Courts.

11. The Vice-Admiralty Courts shall also have jurisdiction—

(1.) In all cases of breach of the regulations and instructions relating to Her Majesty's navy at sea :

(2.) In all matters arising out of droits of Admiralty.

Nothing to restrict existing jurisdictions.

12. Nothing contained in this Act shall be construed to take away or restrict the jurisdiction conferred upon any Vice-Admiralty Court by any Act of Parliament in respect of seizures for breach of the revenue, customs, trade, or navigation laws, or of the laws relating to the abolition of the slave trade, or to the cap-

ture and destruction of pirates and piratical vessels, or any other jurisdiction now lawfully exercised by any such Court; or any jurisdiction now lawfully exercised by any other Court within Her Majesty's dominions.

As to matters arising beyond limits of colony.

13. The jurisdiction of the Vice-Admiralty Courts, except where it is expressly confined by this Act to matters arising within the possession in which the Court is established, may be exercised, whether the cause or right of action has arisen within or beyond the limits of such possession.

Her Majesty empowered to establish and alter rules and tables of fees.

14. Her Majesty may, by Order in Council, from time to time, establish rules touching the practice to be observed in the Vice-Admiralty Courts, as also tables of the fees to be taken by the officers and practitioners thereof for all acts to be done therein, and may repeal and alter the existing and all future rules and tables of fees, and establish new rules and tables of fees in addition thereto, or in lieu thereof.

Rules and tables of fees to be laid before the House of Commons.

15. A copy of any rules or tables of fees which may at any time be established shall be laid before the House of Commons within three months from the establishing thereof, or if Parliament shall not be then sitting, or if the session shall terminate within one month from that date, then within one month after the commencement of the next session.

To be entered in the records of the Courts.

16. The rules and tables of fees in force in any Vice-Admiralty Court shall, as soon as possible after they have been received in the British possession in which the Court is established, be entered by the registrar in the public books or records of the Court, and the books or records in which they are so entered shall at all reasonable time be open to the inspection of the practitioners and suitors in the Court.

To be hung up in Court, &c.

17. A copy of the rules and tables of fees in any Vice-Admiralty Court shall be kept constantly hung up in some conspicuous place as well in the Court as in the office of the registrar.

Established fees to be the only fees taken.

18. The fees established for any Vice-Admiralty Court shall, after the date fixed for them to come into operation, be the only fees which shall be taken by the officers and practitioners of the Court.

Taxation may be revised by the High Court of Admiralty.

19. Any person who shall feel himself aggrieved by the charges of any of the practitioners in any Vice-Admiralty Court, or by the taxation thereof by the officers of the Court, may apply to the High Court of Admiralty of England to have the charges taxed, or the taxation thereof revised.

Registrar may administer oaths.

20. The registrar of any Vice-Admiralty Court shall have power to administer oaths in relation to any matter depending in the Court; and any person who shall wilfully swear falsely in any proceeding before the registrar, or before any other person authorised to administer oaths in the Court, shall be deemed guilty of perjury, and shall be liable to all the penalties attaching to wilful and corrupt perjury.

As to the hearing of cross causes.

21. If a cause of damage by collision be instituted in any Vice-Admiralty Court, and the defendant institute a cross cause in respect of the same collision, the judge may, on application of either party, direct both causes to be heard at the same time and on the same evidence; and if the ship of the defendant in one of the causes has been arrested, or security given by him to answer judgment, but the ship of the defendant in the other cause 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 former cause until security has been given to answer judgment in the latter cause.

No appeal save from final sentence or order.

22. The appeal from a decree or order of a Vice-Admiralty Court lies to Her Majesty in Council; but no appeal shall be allowed, save by permission of the judge, from any decree or order not having the force or effect of a definitive sentence or final order.

Appeal to be made within six months.

23. The time for appealing from any decree or order of a Vice-Admiralty Court shall, notwithstanding any existing enactment to the contrary, be limited to six months from the date of the decree or order appealed from; and no appeal shall be allowed where the petition of appeal to Her Majesty shall not have been lodged in the registry of the High Court of Admiralty and of appeals within that time, unless Her Majesty in Council shall, on the report and recommendation of the judicial committee of the privy council, be pleased to allow the appeal to be prosecuted, notwithstanding that the petition of appeal has not been lodged within the time prescribed.

Acts repealed. Saving rules established under 2 & 3 W. 4, c. 51.

24. The Acts enumerated in the schedule hereto annexed marked B. are hereby repealed, to the extent therein mentioned, but the repeal thereof shall not affect the validity of any rules, orders, regulations, or tables of fees heretofore established and now in force, in pursuance of the Act of the second and third William the Fourth, chapter fifty-one; but such rules, orders, regulations, and tables of fees shall continue in force until repealed or altered under the provisions of this Act.

SCHEDULE A.

List of the existing Vice-Admiralty Courts to which this Act applies.

Antigua.
Bahamas.
Barbadoes.
Bermuda.
British Columbia.
British Guiana.
British Honduras.
Cape of Good Hope.
Ceylon.
Dominica.
Falkland Islands.
Gambia River.
Gibraltar.
Gold Coast.
Grenada.
Hong Kong.
Jamaica.
Labuan.
Lagos.
Lower Canada, otherwise Quebec.
Malta.
Mauritius.
Montserrat.
Natal.
Nevis.
New Brunswick.
Newfoundland.
New South Wales.
New Zealand.
Nova Scotia, otherwise Halifax.
Prince Edward Island.
Queensland.
Saint Christopher.
Saint Helena.
Saint Lucia.
Saint Vincent.
Sierra Leone.
South Australia.
Tasmania, formerly called Van Diemen's Land.
Tobago.
Trinidad.
Vancouver's Island.
Victoria.
Virgin Islands, otherwise Tortola.
Western Australia.

SCHEDULE B.

ACTS AND PARTS OF ACTS REPEALED.

Reference to Act.	Title of Act.	Extent of Repeal.
56 Geo. III. c. 82.	An Act to render valid the Judicial Acts of Surrogates of Vice-Admiralty Courts abroad, during Vacancies in Office of Judges of such Courts.	The whole Act, save as regards Her Majesty's Possessions in India.
5 Geo. IV. c. 113.	An Act to amend and consolidate the Laws relating to the Abolition of the Slave Trade.	Section 29, save as above.
2 & 3 Will. IV. c. 51.	An Act to regulate the Practise and the Fees in the Vice-Admiralty Courts abroad, and to obviate doubts as to their Jurisdiction.	The whole Act, save as above.
6 & 7 Vict. c. 38.	An Act to make further Regulations for facilitating the hearing Appeals and other Matters by the Judicial Committee of the Privy Council.	Section 11, so far as it relates to Appeals from Vice-Admiralty Courts, save as above.
17 & 18 Vict. c. 57.	An Act for establishing the Validity of certain Proceedings in Her Majesty's Court of Vice Admiralty in Mauritius.	The whole Act.

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Extent of Repeal.
The whole Act, save as regards Her Majesty's Possessions in India.
Section 29, save as above.
The whole Act, save as above.
Section 11, so far as it relates to Appeals from Vice-Admiralty Courts, save as above.
The whole Act.

C.

30 & 31 Vict., Cap. 45.

An Act to extend and amend the Vice-Admiralty Courts Act, 1863.

[15th July, 1867.]

Be it 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 Vice-Admiralty Courts Act Amendment Act, 1867."

26 & 27 Vict. c. 24, applied.

2. This Act shall be read as one Act with the Vice-Admiralty Courts Act, 1863.

Interpretation of terms.

3. In the interpretation and for the purposes of this Act (if not inconsistent with the context or subject matter) the following terms shall have the respective meanings hereinafter assigned to them; that is to say:

"Judge" shall mean the person lawfully appointed by the Admiralty to be judge of any Vice-Admiralty Court, or, in default of such appointment, the chief justice or principal judicial officer, or the person for the time being lawfully authorized to act as the chief justice or principal judicial officer in the British possession in which such Court is established:

"Judicial Powers" shall mean all powers and authorities which may be lawfully exercised by, and all duties by law imposed upon, any such judge in the trial, hearing, or progress of any cause:

"Ministerial Powers" shall mean all powers and authorities which may be lawfully exercised by, and all duties by law imposed upon, any such judge, not included under the term "Judicial Powers:"

"Sit" or "Sitting" shall mean sit or sitting for the exercise of judicial powers, whether in Court or in Chambers.

Tenure of office of vice-admiral.

4. On the governor of any British possession, who is also vice-admiral thereof, vacating the office of governor of such possession, the office of vice-admiral of the same possession shall thereupon be deemed to be also vacant within the meaning of the third section of the Vice-Admiralty Courts Act, 1863.

Judge may appoint deputy judges.

5. The judge of any Vice-Admiralty Court may from time to time, with the approval in writing of the governor of the British possession in which the Court is established, appoint one or more deputy judge or judges to assist or represent him in the execution of his judicial powers.

Judicial powers of deputy judges.

6. It shall be lawful for any such deputy judge to exercise all the judicial powers of the judge; and all acts done by such deputy judge shall be as valid and effectual, to all intents and purposes, as if they had been done by the judge; and all orders or decrees made by such deputy judge shall be subject to the same right of appeal in all respects as if they had been made by the judge.

Deputy judges may sit separately.

7. Any deputy judge may sit at the principal seat of government or elsewhere in the possession at the same time that the judge or any other deputy judge is sitting, and either at the same or at any other place in such possession, and whether the judge is or is not at that time within the possession.

Judge may sit with deputy judges.

8. The judge may, if he thinks fit, require any such deputy judge or judges to sit with him in the same Court, and in such case the decision of the majority, or, if they are equally divided in opinion, the decision of the judge, shall be the decision of the Court; and such decision shall be subject to the same right of appeal in all respects as if it had been made by the judge alone.

Judge to regulate the proceedings.

9. The judge may direct at what place and time any such deputy judge shall sit, and what causes shall be heard before him, and generally make such arrangements as to him shall seem proper as to the division and despatch of the business of the Court.

Tenure of office of deputy judges.

10. The judge may, if he thinks fit, with the approval in writing of the governor, at any time revoke the appointment of any such deputy judge or judges, but the appointment shall not be determined by the occurrence of a vacancy in the office of the judge.

Judge may delegate ministerial powers.

11. The judge may, if he thinks fit, from time to time, delegate all or any of his ministerial powers to any such deputy judge or judges.

Judge may appoint deputy registrars and marshals.

12. The judge may, from time to time, if he thinks fit, appoint any competent persons to act respectively as deputy registrars and deputy marshals of the Court, and may, if he thinks fit, at any time revoke any such appointment, but the appointment shall not be determined by the occurrence of a vacancy in the office of the judge.

Admiralty may revoke appointments.

13. Notwithstanding anything contained in this Act, it shall be lawful for the Admiralty, if they think fit, at any time to

revoke the appointment of any deputy judge, deputy registrar, or deputy marshal appointed under this Act.

Deputies to receive fees.

14. Any deputy judge, deputy registrar, or deputy marshal, appointed under this Act, shall be entitled to the same fees in respect of any duty performed by him as would be lawfully payable to the judge, registrar, or marshal respectively for the performance of the same duty.

Barristers and solicitors entitled to practise in Vice-Admiralty Courts.

15. All persons entitled to practice as advocates, barristers-at-law, proctors, attorneys-at-law, or solicitors in the superior Courts of a British possession, shall be entitled to practice in the same respective capacities in the Vice-Admiralty Court or Courts of such possession, and shall have therein all the rights and privileges respectively belonging to advocates, barristers-at-law, proctors, attorneys-at-law, and solicitors, and shall in like manner be subject to the authority of the person for the time being lawfully exercising the office of judge of such Court.

Her Majesty may establish a Vice-Admiralty Court in a possession having legislative powers.

16. It shall be lawful for Her Majesty to empower the Admiralty, by commission under the Great Seal, to establish one or more Vice-Admiralty Courts in any British possession, notwithstanding that such possession may have previously acquired independent legislative powers; and the jurisdiction and authority of all the existing Vice-Admiralty Courts are hereby declared to be confirmed, to all intents and purposes, notwithstanding that the possession in which any such Court has been established may at the time of its establishment have been in possession of legislative powers.

Extended to the Straits Settlements.

17. The Vice-Admiralty Courts Act, 1863, shall, together with this Act, apply to any Vice-Admiralty Court now established or hereafter to be established in the Straits Settlements.

26 & 27 Vict. c. 24, s. 23. extended to appeals from Vice-Admiralty Courts in Indian possessions.

18. The limitation of the time allowed for appeals contained in the twenty-third section of the Vice-Admiralty Courts Act, 1863, shall be held to apply to all decrees or orders pronounced in any Vice-Admiralty Court now established or hereafter to be established in any of Her Majesty's possessions in India.

D.

RULES FOR THE VICE-ADMIRALTY COURTS IN HER MAJESTY'S POSSESSIONS ABROAD.

1. In the construction of these rules, and of the forms and tables of fees annexed thereto, 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:—

"Possession" shall mean any colony, plantation, settlement, island, or territory, being a part of Her Majesty's dominions, but not being within the limits of the United Kingdom of Great Britain and Ireland;

"Court" shall mean any Vice-Admiralty Court now existing or which shall hereafter be established in any possession;

"Registry" shall mean the registry of the court, or any district registry thereof;

"Judge" shall mean the judge of the court, or any person lawfully authorised to act as judge thereof;

"Registrar" shall mean the registrar of the court, or any deputy or assistant registrar thereof;

"Marshal" shall mean the marshal of the court, or any deputy or assistant marshal thereof;

"Action" shall mean any action, cause, suit, or other proceeding instituted in the court;

"Counsel" shall mean any advocate, barrister-at-law, or other person entitled to practise in the court;

"Solicitor" shall mean any proctor, solicitor, or attorney entitled to practise in the court;

"Plaintiff" shall include the plaintiff's solicitor, if he sues by a solicitor;

"Defendant" shall include the defendant's solicitor, if he appears by a solicitor;

"Party" shall include the party's solicitor, if he sues or appears by a solicitor;

"Ship" shall include every description of vessel used in navigation not propelled by oars only;

"Month" shall mean calendar month.

ACTIONS.

2. Actions shall be of two kinds, actions *in rem* and actions *in personam*.

3. Actions for condemnation of any ship, boat, cargo, proceeds, slaves, or effects, or for recovery of any pecuniary forfeiture or penalty, shall be instituted in the name of the Crown.

4. All actions shall be numbered in the order in which they are instituted, and the number given to any action shall be the distinguishing number of the action, and shall be written or printed on all documents in the action as part of the title thereof. Forms of the title of an action will be found in the Appendix hereto, Nos. 1, 2, and 3.

WRIT OF SUMMONS.

5. Every action shall be commenced by a writ of summons, which, before being issued, shall be indorsed with a statement of the nature of the claim, and of the relief or remedy required, and of the amount claimed, if any. Forms of writ of summons and of the indorsements thereon will be found in the Appendix hereto, Nos. 4, 5, 6, and 7.

6. In an action for seaman's or master's wages, or for master's wages and disbursements, or for necessaries, or for bottomry, or in any action in which the plaintiff desires an account, the indorsement on the writ of summons may include a claim to have an account taken.

7. The writ of summons shall be indorsed with the name and address of the plaintiff, and with an address, to be called an address for service, not more than three miles from the registry, at which it shall be sufficient to leave all documents required to be served upon him.

8. The writ of summons shall be prepared and indorsed by the plaintiff, and shall be issued under the seal of the court, and a copy of the writ and of all the indorsements thereon, signed by the plaintiff, shall be left in the registry at the time of sealing the writ.

9. The judge may allow the plaintiff to amend the writ of summons and the indorsements thereon in such manner and on such terms as to the judge shall seem fit.

SERVICE OF WRIT OF SUMMONS.

10. In an action *in rem*, the writ of summons shall be served—

(*a*) upon ship, or upon cargo, freight, or other property, if the cargo or other property is on board a ship, by attaching the writ for a short time to the mainmast or the single mast, or to some other conspicuous part of the ship, and by leaving a copy of the writ attached thereto.

(*b*) upon cargo, freight, or other property, if the cargo or other property is not on board a ship, by attaching the writ for a short time to such cargo or property, and by leaving a copy of the writ attached thereto.

(*c*) upon freight in the hands of any person, by showing the writ to him and by leaving with him a copy thereof.

(*d*) upon proceeds in court, by showing the writ to the registrar and by leaving with him a copy thereof.

11. If access cannot be obtained to the property on which it is to be served, the writ may be served by showing it to any person appearing to be in charge of such property, and by leaving with him a copy of the writ.

12. In an action *in personam*, the writ of summons shall be served by showing it to the defendant, and by leaving with him a copy of the writ.

13. A writ of summons against a firm may be served upon any member of the firm, or upon any person appearing at the time of service to have the management of the business of the firm.

14. A writ of summons against a corporation or a public company may be served in the mode, if any, provided by law for service of any other writ or legal process upon such corporation or company.

15. Where no such provision exists, a writ of summons against a corporation may be served upon the mayor or other head officer, or upon the town clerk, clerk, treasurer, or secretary of the corporation, and a writ of summons against a public company may be served upon the secretary of the company, or may be left at the office of the company.

16. If the person to be served is under disability, or if for any cause personal service cannot, or cannot promptly, be effected, or if in any action, whether *in rem* or *in personam*, there is any doubt or difficulty as to the person to be served, or as to the mode

of service, the judge may order upon whom, or in what manner service is to be made, or may order notice to be given in lieu of service.

17. The writ of summons, whether *in rem* or *in personam*, may be served by the plaintiff or his agent within *six months* from the date thereof, and shall, after service, be filed with a certificate of service indorsed thereon.

18. The certificate shall state the date and mode of service, and shall be signed by the person who served the writ. A form of certificate of service will be found in the Appendix hereto, No. 8.

APPEARANCE.

19. A party appearing to a writ of summons shall file an appearance at the place directed in the writ.

20. A party not appearing within the time limited by the writ may, by consent of the other parties or by permission of the judge, appear at any time on such terms as the judge shall order.

21. If the party appearing has a set-off or counterclaim against the plaintiff, he may indorse on his appearance a statement of the nature thereof, and of the relief or remedy required, and of the amount, if any, of the set-off or counterclaim. But if, in the opinion of the judge, such set-off or counterclaim cannot be conveniently disposed of in the action, the judge may order it to be struck out.

22. The appearance shall be signed by the party appearing, and shall state his name and address, and an address, to be called an address for service, not more than three miles from the registry, at which it shall be sufficient to leave all documents required to be served upon him. Forms of Appearance and of Indorsement of set-off or counterclaim will be found in the Appendix hereto, Nos. 9 and 10.

PARTIES.

23. Any number of persons having interests of the same nature arising out of the same matter may be joined in the same action whether as plaintiffs or as defendants.

24. The judge may order any person who is interested in the action, though not named in the writ of summons, to come in either as plaintiff or as defendant.

25. For the purposes of the last preceding rule an underwriter or insurer shall be deemed to be a person interested in the action.

26. The judge may order upon what terms any person shall come in, and what notices and documents, if any, shall be given to and served upon him, and may give such further directions in the matter as to him shall seem fit.

CONSOLIDATION OF ACTIONS.

27. Two or more actions in which the questions at issue are substantially the same, or for matters which might properly be combined in one action, may be consolidated by order of the judge upon such terms as to him shall seem fit.

28. The judge, if he thinks fit, may order several actions to be tried at the same time, and on the same evidence, or the evidence in one action to be used as evidence in another, or may order one of several actions to be tried as a test action, and the other actions to be stayed to abide the result.

WARRANTS.

29. In an action *in rem*, a warrant for the arrest of property may be issued by the registrar at the time of, or at any time after the issue of the writ of summons, on an affidavit being filed, as prescribed by the following rules. A form of affidavit to lead warrant will be found in the Appendix hereto, No. 11.

30. The affidavit shall state the nature of the claim, and that the aid of the court is required.

31. The affidavit shall also state—

(*a*) In an action for wages, the national character of the ship, and if the ship is foreign, that notice of the action has been served upon a consular officer of the State to which the ship belongs, if there is one resident in the Possession:

(*b*) In an action for necessaries, or for building, equipping, or repairing any ship, the national character of the ship, and that, to the best of the deponent's belief, no owner or part owner of the ship was domiciled in the Possession at the time when the necessaries were supplied or the work was done:

(*c*) In an action between co-owners relating to the ownership, possession, employment, or earnings of any ship registered in the Possession, the port at which the ship is registered and the number of shares in the ship owned by the party proceeding.

32. In an action for bottomry, the bottomry bond in original, and, if it is in a foreign language, a 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.

33. The registrar, if he thinks fit, may issue a warrant, although the affidavit does not contain all the prescribed particulars, and, in an action for bottomry, although the bond has not been produced; or he may refuse to issue a warrant without the order of the judge.

34. The warrant shall be prepared in the registry, and shall be signed by the registrar, and issued under the seal of the court. A form of warrant will be found in the Appendix hereto, No. 12.

35. The warrant shall be served by the Marshal, or his officer, in the manner prescribed by these rules for the service of a writ of summons in an action *in rem*, and thereupon the property shall be deemed to be arrested.

36. The warrant may be served on Sunday, Good Friday, or Christmas Day, as well as on any other day.

37. The warrant shall be filed by the Marshal within *one week* after service thereof has been completed, with a certificate of service indorsed thereon.

38. The certificate shall state by whom the warrant has been served, and the date and mode of service, and shall be signed by the Marshal. A form of certificate of service will be found in the Appendix hereto, No. 13.

BAIL.

39. Whenever bail is required by these rules, it shall be given by filing one or more bail-bonds, each of which shall be signed by two sureties, unless the judge shall, on special cause shown, order that one surety shall suffice.

40. Every bail-bond shall be prepared in the registry and shall be signed before the registrar, or by his direction before a clerk in the registry, or before a commissioner appointed by the court, to take bail. Forms of bail-bond and commission to take bail will be found in the Appendix hereto, Nos. 14 and 15.

41. Sureties may attend to sign a bond either separately or together.

42. If bail is taken before a commissioner, the sureties shall justify by affidavit.

43. The commission to take bail and the affidavits of justification shall be prepared in the registry, and issued with the bail-bond, and shall with the bail-bond, when executed, be returned to the registry by the commissioner.

44. No commissioner shall be entitled to take bail in any action in which he, or any person in partnership with him, is acting as solicitor or agent.

45. Before filing a bail-bond, notice of bail shall be served upon the adverse party, and a certificate of such service shall be indorsed on the bond by the party filing it. A form of Notice of Bail will be found in the Appendix hereto, No. 16.

46. If the adverse party is not satisfied with the sufficiency of any surety, he may file a notice objecting to such surety, or requiring him to justify, if he has not already done so. Forms of Notice to Justify, of Affidavit of Justification, and of Notice of Objection to Bail will be found in the Appendix hereto, Nos. 17, 18 and 19.

RELEASES.

47. A release for property arrested by warrant may be issued by order of the judge.

48. A release may also be issued by the registrar, unless there is a caveat outstanding against the release of the property—

(*a*) On payment into court of the amount claimed, or of the appraised value of the property arrested, or, where cargo is arrested for freight only, of the amount of the freight verified by affidavit:

(*b*) On one or more bail-bonds being filed for the amount claimed, or for the appraised value of the property arrested; and on proof that *twenty-four hours'* notice of the names and addresses of the sureties has been previously served on the party at whose instance the property has been arrested:

(*c*) On the application of the party at whose instance the property has been arrested:

(*d*) On a consent in writing being filed signed by the party at whose instance the property has been arrested:

(*e*) On discontinuance or dismissal of the action in which the property has been arrested.

49. Where property has been arrested for salvage, the release shall not be issued under the foregoing rule, except on discontinuance or dismissal of the action, until the value of the property arrested has been agreed upon between the parties or determined by the judge.

50. The registrar may refuse to issue a release without the order of the judge.

51. The release shall be prepared in the registry, and shall be signed by the registrar, and issued under the seal of the court. A form of release will be found in the Appendix hereto, No. 20.

52. The release shall be served on the Marshal, either personally, or by leaving it at his office, by the party by whom it is taken out.

53. On service of the release and on payment to the Marshal of all fees due to and charges incurred by him in respect of the arrest and custody of the property, the property shall be at once released from arrest.

PRELIMINARY ACTS.

54. In an action for damage by collision, each party shall, within *one week* from an appearance being entered, file a Preliminary Act, sealed up, signed by the party, and containing a statement of the following particulars:—

(1) The names of the ships 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 and force of the wind;
(5) The state of the weather;
(6) The state and force of the tide;
(7) The course and speed of the ship when the other was first seen;
(8) The lights, if any, carried by her;
(9) The distance and bearing of the other ship when first seen;
(10) The lights, if any, of the other ship which were first seen;
(11) The lights, if any, of the other ship, other than those first seen, which came into view before the collision;
(12) The measures which were taken, and when, to avoid the collision;
(13) The parts of each ship which first came into collision;
(14) What fault or default, if any, is attributed to the other ship.

PLEADINGS.

55. Every action shall be heard without pleadings, unless the judge shall otherwise order.

56. If an order is made for pleadings the plaintiff shall, within *one week* from the date of the order, file his petition, and, within *one week* from the filing of the petition, the defendant shall file his answer, and within *one week* from the filing of the answer the plaintiff shall file his reply, if any; and there shall be no pleading beyond the reply, except by permission of the judge.

57. The defendant may, in his answer, plead any set-off or counterclaim. But if, in the opinion of the judge, such set-off or counterclaim cannot be conveniently disposed of in the action, the judge may order it to be struck out.

58. Every pleading shall be divided into short paragraphs, numbered consecutively, which shall state concisely the facts on which the party relies; and shall be signed by the party filing it. Forms of pleadings will be found in the Appendix hereto, No. 21.

59. It shall not be necessary to set out in any pleading the words of any document referred to therein, except so far as the precise words of the document are material.

60. Either party may apply to the judge to decide forthwith any question of fact or of law raised by any pleading, and the judge shall thereupon make such order as to him shall seem fit.

61. Any pleading may at any time be amended, either by consent of the parties, or by order of the judge.

INTERROGATORIES.

62. At any time before the action is set down for hearing any party desirous of obtaining the answers of the adverse party on any matters material to the issue, may apply to the judge for leave to administer interrogatories to the adverse party to be answered on oath, and the judge may direct within what time and in what way they shall be answered, whether by affidavit or by oral examination.

63. The judge may order any interrogatory that he considers objectionable to be amended or struck out; and if the party interrogated omits to answer or answers insufficiently, the judge may order him to answer, or to answer further, and either by affidavit or by oral examination. Forms of interrogatories and of answers will be found in the Appendix hereto, Nos. 22 and 23.

DISCOVERY AND INSPECTION.

64. The judge may order any party to an action to make discovery, on oath, of all documents which are in his possession or power relating to any matter in question therein.

65. The affidavit of discovery shall specify which, if any, of the documents therein mentioned the party objects to produce. A form of affidavit of discovery will be found in the Appendix hereto, No. 24.

66. Any party to an action may file a notice to any other party to produce, for inspection or transcription, any document in his possession or power relating to any matter in question in the action. A form of notice to produce will be found in the Appendix hereto, No. 25.

67. If the party served with notice to produce omits or refuses to do so within the time specified in the notice, the adverse party may apply to the judge for an order to produce.

ADMISSION OF DOCUMENTS AND FACTS.

68. Any party may file a notice to any other party to admit any document or fact (saving all just exceptions), and a party not admitting it after such notice shall be liable for the costs of proving the document or fact, whatever the result of the action may be, unless the taxing officer is of opinion that there was sufficient reason for not admitting it. Forms of notice to admit will be found in the Appendix hereto, Nos. 26 and 27.

69. No costs of proving any document shall be allowed, unless notice to admit shall have been previously given, or the taxing officer shall be of opinion that the omission to give such notice was reasonable and proper.

SPECIAL CASE.

70. Parties may agree to state the questions at issue for the opinion of the judge in the form of a special case.

71. If it appears to the judge that there is in any action a question of law which it would be convenient to have decided in the first instance, he may direct that it shall be raised in a special case or in such other manner as he may deem expedient.

72. Every special case shall be divided into paragraphs, numbered consecutively, and shall state concisely such facts and documents as may be necessary to enable the judge to decide the question at issue.

73. Every special case shall be signed by the parties, and may be filed by any party.

MOTIONS.

74. A party desiring to obtain an order from the judge shall file a notice of motion with the affidavits, if any, on which he intends to rely.

75. The notice of motion shall state the nature of the order desired, the day on which the motion is to be made, and whether in court or in chambers. A form of notice of motion will be found in the Appendix hereto, No. 28.

76. Except by consent of the adverse party, or by order of the judge, the notice of motion shall be filed *twenty-four hours* at least before the time at which the motion is made.

77. When the motion comes on for hearing, the judge, after hearing the parties, or, in the absence of any of them, on proof that the notice of motion has been duly served, may make such order as to him shall seem fit.

78. The judge may, on due cause shown, vary or rescind any order previously made.

TENDERS.

79. A party desiring to make a tender in satisfaction of the whole or any part of the adverse party's claim shall pay into court the amount tendered by him, and shall file a notice of the terms on which the tender is made.

80. Within *a week* from the filing of the notice the adverse party shall file a notice, stating whether he accepts or rejects the tender, and if he shall not do so, he shall be held to have rejected it. Forms of notice of tender and of notice accepting or rejecting it will be found in the Appendix hereto, Nos. 29 and 30.

81. Pending the acceptance or rejection of a tender, the proceedings shall be suspended.

EVIDENCE.

82. Evidence shall be given either by affidavit or by oral examination, or partly in one mode, partly in another.

83. Evidence on a motion shall in general be given by affidavit, and at the hearing by the oral examination of witnesses; but the mode or modes in which evidence shall be given, either on any motion or at the hearing, may be determined either by consent of the parties, or by order of the judge.

34. The judge may order any person who has made an affidavit in an action to attend for cross-examination thereon before the judge, or the registrar, or a commissioner specially appointed.

85. Witnesses examined orally before the judge, the registrar, or a commissioner, shall be examined, cross-examined, and re-examined in such order as the judge, registrar, or commissioner may direct; and questions may be put to any witness by the judge, registrar, or commissioner, as the case may be.

86. If any witness is examined by interpretation, such interpretation shall be made by a sworn interpreter of the court, or by a person previously sworn according to the form in the Appendix hereto, No. 31.

OATHS.

87. The Judge may appoint any person to administer oaths in Vice-Admiralty proceedings generally, or in any particular proceedings. Forms of Appointments to administer oaths will be found in the Appendix hereto, No. 32.

88. If any person tendered for the purpose of giving evidence objects to take an oath, or is objected to as incompetent to take an oath, or is by reason of any defect of religious knowledge or belief incapable of comprehending the nature of an oath, the judge or person authorised to administer the oath shall, if satisfied that the taking of an oath would have no binding effect on his conscience, permit him, in lieu of an oath, to make a declaration. Forms of oath, and of declaration in lieu of oath, will be found in the Appendix hereto, Nos. 33 and 34.

AFFIDAVITS.

89. Every affidavit shall be divided into short paragraphs numbered consecutively, and shall be in the first person.

90. The name, address, and description of every person making an affidavit shall be inserted therein.

91. The names of all the persons making an affidavit, and the dates when, and the places where it is sworn, shall be inserted in the jurat.

92. When an affidavit is made by any person who is blind, or who from his signature or otherwise appears to be illiterate, the person before whom the affidavit is sworn shall certify that the affidavit was read over to the deponent, and that the deponent appeared to understand the same, and made his mark or wrote

his signature thereto in the presence of the person before whom the affidavit was sworn.

93. When an affidavit is made by a person who does not speak the English language, the affidavit shall be taken down and read over to the deponent by interpretation either of a sworn interpreter of the court, or of a person previously sworn faithfully to interpret the affidavit. A form of jurat will be found in the Appendix hereto, No. 35.

94. Affidavits may, by permission of the judge, be used as evidence in an action, saving all just exceptions.

(1.) If sworn to, in the United Kingdom of Great Britain and Ireland, or in any Possession, before any person authorised to administer oaths in the said United Kingdom or in such Possession respectively;

(2.) If sworn to, in any place not being a part of Her Majesty's dominions, before a British minister, consul, vice-consul, or notary public, or before a judge or magistrate, the signature of such judge or magistrate being authenticated by the official seal of the court to which he is attached.

95. The reception of any affidavit as evidence may be objected to, if the affidavit has been sworn before the solicitor for the party on whose behalf it is offered, or before a partner or clerk of such solicitor.

EXAMINATION OF WITNESSES BEFORE TRIAL.

96. The judge may order that any witness, who cannot conveniently attend at the trial of the action, shall be examined previously thereto, before either the judge, or the registrar, who shall have power to adjourn the examination from time to time, and from place to place, if he shall think necessary. A form of order for examination of witnesses will be found in the Appendix hereto, No. 36.

97. If the witness cannot be conveniently examined before the judge or the registrar, or is beyond the limits of the Possession, the judge may order that he shall be examined before a commissioner specially appointed for the purpose.

98. The commissioner shall have power to swear any witnesses produced before him for examination, and to adjourn, if necessary, the examination from time to time, and from place to place. A form of commission to examine witnesses will be found in the Appendix hereto, No. 37.

99. The parties, their counsel and solicitors, may attend the examination, but, if counsel attend, the fees of only one counsel on each side shall be allowed on taxation, except by order of the judge.

100. The evidence of every witness shall be taken down in writing, and shall be certified as correct by the judge, or registrar, or by the commissioner, as the case may be.

101. The certified evidence shall be lodged in the registry, or, if taken by commission, shall forthwith be transmitted by the commissioner to the registry, together with his commission. A form of return to commission to examine witnesses will be found in the Appendix hereto, No. 38.

102. As soon as the certified evidence has been received in the registry, it may be taken up and filed by either party, and may be used as evidence in the action, saving all just exceptions.

SHORTHAND WRITER.

103. The judge may order the evidence of the witnesses, whether examined before the judge or the registrar, or a commissioner, to be taken down by a shorthand writer, who shall have been previously sworn faithfully to report the evidence, and a transcript of the shorthand writer's notes, certified by him to be correct and approved by the judge, registrar, or commissioner, as the case may be, shall be lodged in or transmitted to the registry as the certified evidence of such witnesses. A form of oath to be administered to the shorthand writer will be found in the Appendix hereto, No. 39.

PRINTING.

104. The judge may order that the whole of the pleadings and written proofs, or any part thereof, shall be printed before the trial; and the printing shall be in such manner and form as the judge shall order.

105. Preliminary Acts, if printed, shall be printed in parallel columns.

ASSESSORS.

106. The judge, on the application of any party, or without any such application if he considers that the nature of the case requires it, may appoint one or more assessors to advise the Court upon any matters requiring nautical or other professional knowledge.

107. The fees of the assessors shall be paid in the first instance by the plaintiff, unless the judge shall otherwise order.

SETTING DOWN FOR TRIAL.

108. An action shall be set down for trial by filing a notice of trial. A form of notice of trial will be found in the Appendix hereto, No. 40.

109. If there has not been any appearance, the plaintiff may set down the action for trial, on obtaining from the judge leave to proceed *ex parte*—

(*a.*) In an action *in personam*, or an action against proceeds in court, after the expiration of *two weeks* from the service of the writ of summons;

(*b.*) In an action *in rem* (not being an action against proceeds in court), after the expiration of *two weeks* from the filing of the warrant.

110. If there has been an appearance, either party may set down the action for trial—

(*a.*) After the expiration of *one week* from the entry of the appearance, unless an order has been made for pleadings, or an application for such an order is pending;

(*b.*) If pleadings have been ordered, when the last pleading has been filed, or when the time allowed to the adverse party for filing any pleading has expired without such pleading having been filed.

In collision cases the Preliminary Acts may be opened as soon as the action has been set down for trial.

111. Where the writ of summons has been indorsed with a claim to have an account taken, or the liability has been admitted or determined, and the question is simply as to the amount due, the judge may, on the application of either party, fix a time within which the accounts and vouchers, and the proofs in support thereof, shall be filed, and at the expiration of that time either party may have the matter set down for trial.

TRIAL.

112. After the action has been set down for trial, the registrar shall send notice to the parties of the day on which it will be tried.

113. At the trial of a contested action the Plaintiff shall in general begin. But if the burden of proof lies on the Defendant, the judge may direct the Defendant to begin.

114. If there are several Plaintiffs or several Defendants, the judge may direct which Plaintiff or which Defendant shall begin.

115. The party beginning shall first address the court, and then produce his witnesses, if any. The other party or parties shall then address the court, and produce their witnesses, if any, in such order as the judge may direct, and shall have a right to sum up their evidence. In all cases the party beginning shall have the right to reply, but shall not produce further evidence, except by permission of the judge.

116. Only one counsel shall in general be heard on each side; but the judge, if he considers that the nature of the case requires it, may allow two counsel to be heard on each side.

117. If the action is uncontested, the judge may, if he thinks fit, give judgment on the evidence adduced by the Plaintiff.

REFERENCES.

118. The judge may, if he thinks fit, refer the assessment of damages and the taking of any account to the registrar either alone, or assisted by one or more merchants as assessors.

119. The rules as to the evidence, and as to the trial, shall apply *mutatis mutandis* to a reference to the registrar, and the registrar may adjourn the proceedings from time to time, and from place to place, if he shall think necessary.

120. Counsel may attend the hearing of any reference, but the costs so incurred shall not be allowed on taxation unless the registrar shall certify that the attendance of counsel was necessary.

121. When a reference has been heard, the registrar shall draw up a report in writing of the result, showing the amount, if any, found due, and to whom, together with any further particulars that may be necessary. A form of the Report will be found in the Appendix hereto, No. 41.

122. When the report is ready, notice shall be sent to the parties, and either party may thereupon take up and file the report.

123. Within *two weeks* from the filing of the Registrar's report, either party may file a notice of motion to vary the report, specifying the items objected to.

124. At the hearing of the motion the judge may make such order thereon as to him shall seem fit, or may remit the matter to the registrar for further inquiry or report.

125. If no notice of motion, to vary the report is filed within *two weeks* from filing the registrar's report, the report shall stand confirmed.

COSTS.

126. In general costs shall follow the result; but the judge may in any case make such order as to the costs as to him shall seem fit.

127. The judge may direct payment of a lump sum in lieu of taxed costs.

128. If any Plaintiff (other than a seaman suing for his wages or for the loss of his clothes and effects in a collision), or any Defendant making a counterclaim is not resident in the Possession, the judge may, on the application of the adverse party, order him to give bail for costs.

129. A party claiming an excessive amount, either by way of claim, or of set-off or counter-claim, may be condemned in all costs and damages thereby occasioned.

130. If a tender is rejected, but is afterwards accepted, or is held by the judge to be sufficient, the party rejecting the tender shall, unless the judge shall otherwise order, be condemned in the costs incurred after tender made.

131. A party, who has not admitted any fact which in the opinion of the judge he ought to have admitted, may be condemned in all costs occasioned by the non-admission.

132. Any party pleading at unnecessary length or taking any unnecessary proceeding in an action may be condemned in all costs thereby occasioned.

TAXATION OF COSTS.

133. A party desiring to have a bill of costs taxed, shall file the bill, and, as soon as conveniently may be, the registrar shall send to the parties notice of the time at which the taxation will take place.

134. At the time appointed, if either party is present, the taxation shall be proceeded with.

135. Within *one week* from the completion of the taxation application may be made to the judge to review the taxation.

136. Costs may be taxed either by the judge or by the registrar, and as well between solicitor and client, as between party and party.

137. If in a taxation between solicitor and client more than *one-sixth* of the bill is struck off, the solicitor shall pay all the costs attending the taxation.

APPRAISEMENT AND SALE, &c.

138. The judge may, either before or after final judgment order any property under the arrest of the court to be appraised, or to be sold with or without appraisement, and either by public auction or by private contract.

139. If the property is deteriorating in value, the judge may order it to be sold forthwith.

140. If the property to be sold is of small value, the judge may, if he thinks fit, order it to be sold without a commission of sale being issued.

141. The judge may, either before or after final judgment, order any property under arrest of the court to be removed, or any cargo under arrest on board ship to be discharged.

142. The appraisement, sale, and removal of property, the discharge of cargo, and the demolition and sale of a vessel condemned under any Slave Trade Act, shall be effected under the authority of a commission addressed to the marshal. Forms of commissions of appraisement, sale, appraisement and sale, removal, discharge of cargo, and demolition and sale, will be found in the Appendix hereto, Nos. 42 to 47.

143. The commission shall, as soon as possible after its execution, be filed by the marshal, with a return setting forth the manner in which it has been executed.

144. As soon as possible after the execution of a commission of sale, the marshal shall pay into court the gross proceeds of the sale, and shall with the commission file his accounts and vouchers in support thereof.

145. The registrar shall tax the marshal's account, and shall report the amount at which he considers it should be allowed; and any party who is interested in the proceeds may be heard before the registrar on the taxation.

146. Application may be made to the judge on motion to review the registrar's taxation.

147. The judge may, if he thinks fit, order any property under the arrest of the court to be inspected. A form of order for inspection will be found in the Appendix hereto, No. 48.

DISCONTINUANCE.

148. The Plaintiff may, at any time, discontinue his action by filing a notice to that effect, and the Defendant shall thereupon be

entitled to have judgment entered for his costs of action on filing a notice to enter the same. The discontinuance of an action by the Plaintiff shall not prejudice any action consolidated therewith or any counterclaim previously set up by the Defendant. Forms of notice of discontinuance and of notice to enter judgment for costs will be found in the Appendix hereto, Nos. 49 and 50.

CONSENTS.

149. Any consent in writing signed by the parties may, by permission of the registrar, be filed, and shall thereupon become an order of court.

APPEALS.*

150. A party desiring to appeal shall, within *one month* from the date of the decree or order appealed from, file a notice of appeal, and give bail in such sum, not exceeding £300, as the judge may order, to answer the costs of the appeal. A form of notice of appeal will be found in the Appendix hereto, No. 51.

151. Notwithstanding the filing of the notice of appeal, the judge may, at any time before service of the inhibition, proceed to carry the decree or order appealed from into effect, provided that the party in whose favor it has been made gives bail to abide the event of the appeal, and to answer the costs thereof, in such sum as the judge may order.

* Under the Act 26 & 27 Vict. c. 24. by s. 22. "The appeal from a decree or order of a Vice-Admiralty Court lies to Her Majesty in Council; but no appeal shall be allowed, save by permission of the judge, from any decree or order not having the force or effect of a definitive sentence or final order."

By s. 23. "The time for appealing from any decree or order of a Vice-Admiralty Court shall, notwithstanding any existing enactment to the contrary, be limited to six months from the date of the decree or order appealed from; and no appeal shall be allowed where the petition of appeal to Her Majesty shall not have been lodged in the registry of the High Court of Admiralty and of Appeals within that time, unless Her Majesty in Council shall, on the report and recommendation of the Judicial Committee of the Privy Council, be pleased to allow the appeal to be prosecuted, notwithstanding that the petition of appeal has not been lodged within the time prescribed.

Rules (Nos. 148-53) relate only to the proceedings to be taken in the Vice-Admiralty Courts. The Procedure in the Appellate Court is regulated by the Rules for appeals in ecclesiastical and maritime causes established by Order in Council of the 11th December, 1865.

152. An Appellant desiring to prosecute his appeal is to cause the registrar to be served with an inhibition and citation, and a monition for process, or is to take such other steps as may be required by the practice of the Appellate Court.

153. On service of the inhibition and citation all proceedings in the action will be stayed.

154. On service of the monition for process, the registrar shall forthwith prepare the process at the expense of the party ordering the same.

155. The process, which shall consist of a copy of all the proceedings in the action, shall be signed by the registrar and sealed with the seal of the court, and shall be transmitted by the registrar to the registrar of the Appellate Court.

PAYMENTS INTO COURT.

156. All moneys to be paid into court shall be paid, upon receivable orders to be obtained in the registry, to the account of the registrar at some bank in the Possession to be approved by the judge, or, with the sanction of the local government, into the Treasury of the Possession. A form of receivable order will be found in the Appendix hereto, No. 52.

157. A bank receipt for the amount shall be filed, and thereupon the payment into court shall be deemed to be complete.

PAYMENTS OUT OF COURT.

158. No money shall be paid out of court except upon an order signed by the judge. On signing a receipt to be prepared in the registry, the party to whom the money is payable under the order will receive a cheque for the amount, signed by the registrar, upon the bank in which the money has been lodged, or an order upon the Treasury in such form as the local government shall direct. A form of order for payment out of court will be found in the Appendix hereto, No. 53.

CAVEATS.

159. Any person desiring to prevent the arrest of any property may file a notice undertaking, within *three days* after being required to do so, to give bail to any action or counterclaim that may have been, or may be, bought against the property, and thereupon the registrar shall enter a caveat in the caveat warrant book hereinafter mentioned. Forms of notice and of caveat warrant will be found in the Appendix hereto, Nos. 54 and 55.

160. Any person desiring to prevent the release of any property under arrest shall file a notice, and thereupon the registrar shall enter a caveat in the caveat release book hereinafter mentioned. Forms of notice and of caveat release will be found in the Appendix hereto, Nos. 56 and 57.

161. Any person desiring to prevent the payment of money out of court shall file a notice, and thereupon the registrar shall enter a caveat in the caveat payment book hereinafter mentioned. Forms of notice and of caveat payment will be found in the Appendix hereto, Nos. 58 and 59.

162. If a person entering a caveat is not a party to the action, the notice shall state his name and address, and an address within three miles of the registry at which it shall be sufficient to leave all documents required to be served upon him.

163. The entry of a caveat warrant shall not prevent the issue of a warrant, but a party at whose instance a warrant shall be issued for the arrest of any property in respect of which there is a caveat warrant outstanding, shall be condemned in all costs and damages occasioned thereby, unless he shall show to the satisfaction of the judge good and sufficient reason to the contrary.

164. The party at whose instance a caveat release or caveat payment is entered, shall be condemned in all costs and damages occasioned thereby, unless he shall show to the satisfaction of the judge good and sufficient reason to the contrary.

165. A caveat shall not remain in force for more than *six months* from the date of entering the same.

166. A caveat may at any time be withdrawn by the person at whose instance it has been entered, on his filing a notice withdrawing it. A form of notice of withdrawal will be found in the Appendix hereto, No. 60.

167. The judge may overrule any caveat.

SUBPŒNAS.

168. Any party desiring to compel the attendance of a witness shall serve him with a subpœna, which shall be prepared by the party and issued under the seal of the court. Forms of subpœnas will be found in the Appendix hereto, Nos. 61 and 62.

169. A subpœna may contain the names of any number of witnesses, or may be issued with the names of the witnesses in blank.

170. Service of the subpœna must be personal, and may be made by the party or his agent, and shall be proved by affidavit.

ORDERS FOR PAYMENT.

171. On application by a party to whom any sum has been found due, the judge may order payment to be made out of any money in court applicable for the purpose.

If there is no such money in court, or if it is insufficient, the judge may order that the party liable shall pay the sum found due, or the balance thereof, as the case may be, within such time as to the judge shall seem fit. The party to whom the sum is due may then obtain from the registry, and serve upon the party liable, an order for payment under seal of the court. A form of order for payment will be found in the Appendix hereto, No. 63.

ATTACHMENTS.

172. If any person disobeys an order of the court, or commits a contempt of court, the judge may order him to be attached. A form of attachment will be found in the Appendix hereto, No. 64.

173. The person attached shall without delay be brought before the judge, and if he persists in his disobedience or contempt, the judge may order him to be committed. Forms of order for committal and of committal will be found in the Appendix hereto, Nos. 65 and 66.

The order for committal shall be executed by the marshal.

EXECUTION.

174. Any decree or order of the Court may be enforced in the same manner as a decree or order of the Supreme Court of the Possession may be enforced.

INSTRUMENTS, &c.

175. Every warrant, release, commission, attachment, and other instrument to be executed by any officer of, or commissioner acting under the authority of the court, shall be prepared in the registry, and signed by the registrar, and shall be issued under the seal of the court.

176. Every document issued under the seal of the court shall bear date on the day of sealing, and shall be deemed to be issued at the time of the sealing thereof.

177. Every document requiring to be served shall be served within *six months* from the date thereof, otherwise the service shall not be valid.

178. Every instrument to be executed by the marshal shall be left with the marshal by the party at whose instance it is issued, with written instructions for the execution thereof.

NOTICES FROM THE REGISTRY.

179. Any notice from the registry may be either left at, or sent by post to, the address for service of the party to whom notice is to be given.

FILING.

180. Documents shall be filed by leaving the same in the registry ,with a minute stating the nature of the document, and the date of filing it. A form of minute on filing any document will be found in the Appendix hereto, No. 67.

181. Any number of documents in the same action may be filed with one and the same minute.

182. No document, except preliminary acts, bail-bonds, documents issued from the registry, and minutes, shall be filed without a certificate indorsed thereon, signed by the party filing the same, that a copy thereof has been served upon the adverse party, if any.

TIME.

183. If the time for doing any act or taking any proceeding in an action expires on a Sunday, or on any other day on which the registry is closed, and by reason thereof such act or proceeding cannot be done or taken on that day, it may be done or taken on the next day on which the registry is open.

184. Where, by these rules or by any order made under them, any act or proceeding is ordered or allowed to be done within or after the expiration of a time limited from or after any date or event, such time, if not limited by hours, shall not include the day of such date or of the happening of such event, but shall commence on the next following day.

185. The judge may, on the application of either party, enlarge or abridge the time prescribed by these rules or forms or by any order made under them for doing any act or taking any proceeding, upon such terms as to him shall seem fit, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time prescribed.

SITTINGS OF THE COURT.

186. The judge shall appoint proper and convenient times for sittings in court and and in chambers, and may adjourn the proceedings from time to time and from place to place as to him shall seem fit.

REGISTRY.

187. The registry shall be open to suitors during fixed hours to be appointed by the judge.

188. The registrar shall obey all the lawful directions of the judge. He shall attend all sittings whether in court or in chambers, and shall take minutes of all the proceedings He shall have the custody of all records of the court. He shall collect for the judge's use the fees payable to him. He shall not act as counsel or solicitor in the court.

MARSHAL.

189. The marshall shall execute by himself or his officer all instruments issued from the court which are addressed to him, and shall make returns thereof.

190. Whenever, by reason of distance or other sufficient cause, the marshal cannot conveniently execute any instrument in person he shall employ some competent person as his officer to execute the same.

HOLIDAYS.

191. The registry and the marshal's office shall be be closed on Sundays, Good Friday, Easter Monday, Easter Tuesday, and Christmas Day, and on such days as are appointed by law or by the Governor of the Possession to be kept as holidays or fast days.

RECORDS OF THE COURT.

192. There shall be kept in the registry a book, to be called the minute book, in which the registrar shall enter in order of date, under the head of each action, and on a page numbered with the number of the action, a record of the commencement of the action, of all appearances entered, all documents issued or filed, all acts done, and all orders and decrees of the court, whether made by the judge, or by the registrar, or by consent of the parties in the action. Forms of minute, of order of court, of minute on examination of witnesses, of minute of decree, and of minutes in an action for damage by collision, will be found in the Appendix hereto, Nos. 68 to 71.

193. There shall be kept in the registry a caveat warrant book a caveat release book, and a caveat payment book, in which all such caveats respectively and the withdrawal thereof shall be entered by the registrar.

194. Any solicitor may, free of charge, inspect the minute and caveat books.

195. The parties to an action may, while the action is pending and for *one year* after its termination, inspect, free of charge, all the records in the action.

196. Except as provided by the two last preceding rules, no person shall be entitled to inspect the records in a pending action without the permission of the registrar.

197. In an action which is terminated, any person may, on payment of a search fee, inspect the records in the action.

COPIES.

198. Any person entitled to inspect any document in an action shall, on payment of the proper charges for the same, be entitled to an office copy thereof under seal of the court.

FORMS.

199. The forms in the Appendix to these rules shall be followed with such variations as the circumstances may require, and any party using any other forms shall be liable for any costs occasioned thereby.

FEES.

200. Subject to the following rules, the fees set forth in the tables of fees in the Appendix hereto shall be allowed on taxation.

201. Where the fee is per folio, the folio shall be counted at the rate of 72 words, and every numeral, whether contained in columns or otherwise written, shall be counted and charged for as a word.

202. Where the sum in dispute does not exceed £50, or the value of the *res* does not exceed £100, one half only of the fees set forth in the table hereto annexed shall be charged and allowed.

203. Where costs are awarded to a Plaintiff, the expression "sum in dispute" shall mean the sum recovered by him in addition to the sum, if any, counter-claimed from him by the Defendant; and where costs are awarded to a Defendant, it shall mean the sum claimed from him in addition to the sum, if any, recovered by him.

204. The judge may in any action order that half fees only shall be allowed.

205. If the same practitioner acts as both counsel and solicitor in an action, he shall not for any proceeding be allowed to receive fees in both capacities, nor to receive a fee as counsel where the act of a solicitor only is necessary.

REPEALING CLAUSE.

206. From and after the 1st day of January, 1884, except in regard to actions commenced before that day, the under-mentioned rules and regulations, together with all forms thereto annexed, and all tables of fees now in force in any court shall be repealed; viz.:

(*a.*) The rules and regulations touching the practice to be observed in suits and proceedings in the several Courts of Vice-Admiralty abroad, established by an Order in Council of the 27th June, 1832.

(*b.*) The twenty-fifth section of rules and regulations touching the practice to be observed in suits and proceedings in the several Courts of Vice-Admiralty abroad, substituted in lieu of section 25 in the former rules and regulations, and established by an Order in Council of the 25th June, 1851.

(*c.*) The additional rules and regulations for the several Courts of Vice-Admiralty abroad, established by an Order in Council of the 6th July, 1859.

(*d.*) Any of the above-mentioned rules and regulations, as extended by subsequent Orders in Council to other Vice-Admiralty Courts.

CASES NOT PROVIDED FOR.

207. In all cases not provided for by these rules the practice of the Admiralty Division of the High Court of Justice of England shall be followed.

COMMENCEMENT OF RULES.

208. These rules shall come into operation on the 1st day of January, 1884, and shall apply to all actions commenced on or after that day. Actions commenced before that day may, by consent of parties, and with permission of the judge, be continued under these rules on such terms as to the judge shall seem fit.

E.

VICE-ADMIRALS OF CANADA

During the period of these Reports, with the dates of their Commissions.

EARL OF DUFFERIN.....22nd May, 1872
MARQUIS OF LORNE.....7th October, 1878
MARQUIS OF LANSDOWNE.....18th August, 1883

F.

JUDGES

During the same period.

HENRY BLACK, C.B.....21st September, 1836
GEORGE OKILL STUART.....23rd October, 1873

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ACTS OF PARLIAMENT.

UNITED KINGDOM.

1. An Act to facilitate the appointment of Vice-Admirals and of Officers in Vice-Admiralty Courts in Her Majesty's possessions abroad, and to confirm the past proceedings, to extend the jurisdiction, and to amend the practice of those Courts. "The Vice-Admiralty Courts' Act, 1863," 374.

2. An Act to extend and amend the Vice-Admiralty Courts' Act, 1863 (15th July, 1867), 381.

ADMIRALTY JURISDICTION.

VICE-ADMIRALTY COURTS.

1. Her Majesty, by Commission under the Great Seal, may empower the Admiralty to establish one or more Vice-Admiralty Courts in any British possession, notwithstanding that such possession may have previously acquired independent legislative powers (30 & 31 Vict. c. 45, s. 16), p. 383.

2. The jurisdiction and authority of all the existing Vice-Admiralty Courts are declared to be confirmed to all intents and purposes, notwithstanding that the possession in which any such Court has been established may, at the time of it establishment, have been in possession of legislative power, *ib.*

3. Vice-Admiralty Courts have jurisdiction in all cases of breach of regulations and instructions relating to Her Majesty's navy at sea, and in all matters arising out of droits of Admiralty (26 Vict. c. 24, s. 10), p. 376.

4. The jurisdiction in respect of seizures for breach of the revenue, customs, trade, or navigation laws, or of the laws relating to the abolition of the slave trade, or to the capture and destruction of pirates and piratical vessels, is not taken away or restricted by "The Vice-Admiralty Act, 1863" (26 Vict. c. 24, s. 12), pp. 376, 7.

5. Nor, any other jurisdiction, at the time of the passing of that Act, lawfully exercised by any such Court, *ib.*

6. The jurisdiction of the Vice-Admiralty Courts, except where it is expressly confined by that Act to the matters arising within the possession in which the Court is established, may be exercised, whether the cause or right of action has arisen within or beyond the limits of such possession, *ib.* 376.

7. Vice-Admiralty Courts have jurisdiction in respect of seizures of ships and vessels, fitted out or equipped in Her Majesty's Dominions, for warlike purposes, without Her Majesty's license, in contravention of the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90).

8. The Court has jurisdiction to entertain a suit promoted by the owners of a towed vessel against the tug for damages sustained by the tow, through the negligent navigation of the tug, having been brought into collision with another vessel. *The William—Samson*, 171.

9. While the Court can enforce the payment of reasonable towage, it cannot award damages for breach of an alleged towage contract, *e.g.*, the refusal of a vessel to carry out an agreement to employ a particular tug. *The Euclid—Anderson*, 280.

10. The Dominion Parliament may confer on the Vice-Admiralty Courts jurisdiction in any matter of shipping and navigation, within the territorial limits of the Dominion. *The Farewell—Côté*, 282.

11. Where an Act of the Dominion Parliament is in part repugnant to an Imperial Statute, effect will be given to its enactments in so far only as they agree with those of the Imperial Statute, *ib.*

12. The Court will be guided by circumstances, in exercising or declining to exercise jurisdiction, in the matter of suits for wages by foreign seamen, when the consul of the country to which the vessel proceeded against belongs protests against the further prosecution of the suit. *The Bridgewater—Dowell*, 257; *The Monark—Halvorsen*, 341.

13. Where a vessel under charter was injured by collision caused by another vessel, the charter party providing that in case of damage the hiring should cease until she could be repaired: *Held*, that an action by the charterers against the offending ship for the detention would lie. *The Nettlesworth—Tom*, 363.

14. The Vice-Admiralty Court, at Quebec, has no jurisdiction over claims between owners, when the ship in relation to which such claims are asserted, is registered in another Province, as in the Province of Nova Scotia. *The Edward Barrow—Rich*, 212.

15. The jurisdiction conferred by the Vice-Admiralty Courts' Act, 1863, does not, in the case of damage by a ship to a wharf, extend so far as to enable the Court to award consequential damages occasioned to the traffic of a lessee. *The Barcelona—Anderson*, 311.

16. The Court cannot exercise jurisdiction so as to give effect to an agreement between the owner and master of a vessel, where the duties to be performed by the latter are miscellaneous and not exclusively those of a master. *The Royal—Burns*, 326.

17. In so far as regards Canadian registered vessels, the Court can entertain claims for master's and seamen's wages, if the amount due is or exceeds

two hundred dollars, and this under the Dominion Statute, the Seamen's Act, 1873, *ib.*

18. The Vice-Admiralty Courts' Act, 1863, has not affected or repealed the 189th and 191st sections of the Merchant Shipping Acts, 1854, *ib.*

19. The 189th section of the latter Act applies to foreigners as well as to British vessels, *ib.*

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ASSESSORS.

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1. As to the authority of the master of a merchantman to put a seaman in irons for disobedience, neglect of duty and conduct tending to induce a mutiny. *The Bridgewater—Dowell*, 254.

2. He may correct not only by personal chastisement but by confinement or imprisonment on board the ship, *ib.*

3. To accomplish his purpose, deadly weapons, in general, cannot be employed, but cases of necessity may justify their use, and, in the event of mutiny, any force and any weapon may be used which the urgency requires to repress it.

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CANADA (DOMINION OF).

The Dominion of Canada is not a possession within the meaning of the Vice-Admiralty Courts' Act, 1863, so as to enable a Vice-Admiralty Court established in one Province of it to entertain jurisdiction over a vessel registered in another Province, for the enforcement of claims between owners. *The Edward Barrow—Rich*, 212.

CARGO, OWNERS OF.

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COLLISION.

1. In order to support an action for damages in cases of collision, it is necessary distinctly to prove that the collision arose from the fault of the persons on board the vessel charged as the wrong-doer; or from the fault of the persons on board of that vessel and of those on board of the injured vessel. *The Agda—The Clydesdale*, 1.

2. Where the evidence on both sides is conflicting, and there is reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen, *ib.*

3. Where a part of the line of an electro-magnetic telegraph passed under the river St. Lawrence, being laid in such a manner, on the bed, as not injuriously to interrupt the navigation:—*Held*, in a case of gross negligence on the part of a sailing ship, causing the wire cable to be broken, that her owners were liable for the damage;—and as under existing statutory law, the Admiralty has jurisdiction, in case of damage done by any ship, that consequently proceedings *in rem* against the offending vessel were rightly taken. *The Czar—Scolfield*, 9.

4. Where a steamship did not keep out of the way of a sailing ship, there being risk of a collision, and the sailing ship, by porting her helm, instead of keeping her course, contributed to the collision, both held to be in fault, and neither entitled to recover. *The Quebec—The Charles Chaloner*, 17.

5. The law imposing compulsory pilotage having been repealed, the liability of shipowners for acts of pilots in charge of their vessels revived, *ib.*

6. A steamer having a clear course altered it to go to the south and pass between two other vessels, and in attempting to do so collided with both. The fact of one of such vessels having very improperly altered her helm, and contributed materially to the collisions does not relieve the steamer from the liability to make good the injuries sustained by the vessel, which did not contribute to the accident. *The Quebec—Bennett*, p. 32.

7. Where one steamship overtook another in a shallow channel, in the river St. Lawrence, and a collision ensued, the overtaking vessel declared to be in fault. *The Quebec—Thearle*, p. 37.

8. Collision by two vessels while sailing close to the wind, on opposite tacks By the rule of the road the ship on the starboard tack was entitled to keep

her luff:—*Held*, in the Vice-Admiralty Court, that she was, notwithstanding in a case of imminent danger, and on being apprised that the port-tacked vessel was not under command, bound to give way, and for not doing so condemned in damages and costs. *The Underwriter—The Lake St. Clair*, 43.

9. Held, on appeal by the Judicial Committee of the Privy Council, that when a port-tacked vessel has thrown herself into stays and becomes helpless, she ought, nevertheless, to execute any practical manœuvre, in order to get out of the way of the starboard-tacked vessel, *ib.*

10. A starboard-tacked vessel when apprised of the helpless condition of a vessel, which by the ordinary rule of navigation, ought to get out of her way, is bound to execute any practical manœuvre which would tend to avoid the collision, *ib.*

11. Both vessels held to blame for the collision, and the damages ordered to be assessed according to the Admiralty rule, *ib.*

12. In such a case each party must bear their own costs, both in the Court below and in appeal, *ib.*

13. To support a plea of inevitable accident the burden of proof rests upon the party pleading it, and he must show before he can derive any benefit from it, that the damage was caused immediately by the irresistible force of the winds and waves; that it was not preceded by any fault, act or omission on his part, as the principal or indirect cause: and that no effort to counteract the influence of the force was wanting. *The Agamemnon—Martin*, 60.

14. Where a barque and a steamer were proceeding in opposite directions, and the latter, when between a quarter and half a mile of the former, which was then keeping her course, ported her helm without slackening her speed, which brought her across the course of the barque, the helm of which was shortly afterwards starboarded, and a collision occurred:—*Held*, that the action of the steamer in porting her helm, having brought the barque (which otherwise should have kept her course) into instant and most imminent danger, she was justified in starboarding; and the steamer whose duty, when proceeding in a direction involving risk of collision—was to keep out of the way, and, moreover, to stop and reverse when danger was imminent, was responsible for the collision. *The N. Churchill—The Normanton*, 65.

15. The payment of sums of money to witnesses, considerably larger than those legally allowable to them, even when shown to have been made with no wrong intent, but from an unfounded apprehension that they would leave the country before testifying, will bring such discredit on their testimony as seriously to affect its credibility, *ib.*

16. A ship sailing seven knots an hour in a fog over fishing-ground on the banks of Newfoundland, without adequate means on deck to prevent accident:—*Held*, to have been in fault, and

a plea of inevitable accident overruled. *The Frank—Petersen*, 81.

17. Where the blasts of a fog-horn on an American schooner were substituted for the ringing a bell, as required by the sailing regulations, a plea, that it was done in accordance with a circular from the Secretary of the Treasury of the United States, overruled. But the breach of the regulation not having contributed to the accident the schooner was relieved from liability, *ib.*

18. An omission to ring a bell in a fog covered, where an anchor light was seen in time to avoid a collision, *ib.*

19. Where two ships were each to blame for a collision in Canadian waters, an Act of the Parliament of Canada, which precludes either from recovering its damage:—*Held*, to be operative, although the Admiralty rule which divides the loss prevails in England. *The Eliza Keith—The Langshaw*, 107.

20. In a case of collision, the fault being mutual, the Admiralty rule will apply, as between the owners of cargo and the delinquent ships, dividing the loss, each ship being answerable for a moiety, *ib.*

21. An ocean steamship approaching a narrow channel in the St. Lawrence, bound upwards, having another steamship ahead entering the channel:—*Held*, to blame under the sailing rules, for not stopping at the foot of the channel to let the descending vessel pass; for not porting her helm in time when in the channel; and for not slackening her speed and reversing in time. *The Elphinstone—Beol*, 132.

22. A custom involving the stoppage of an ascending vessel at certain difficult parts of the channel, noticed and approved, *ib.*

23. Where an American sailing vessel was damaged by a collision with a British steamer in South American waters, and the latter released by a British gun-boat from the jurisdiction of a South American tribunal and followed into Canadian waters, a plea of a defective green light overruled, and suits of owners of sailing vessel and cargo maintained. *The Enmore—Belle Hooper*, 139.

24. Where an affidavit was obtained before suit brought from a pilot derogatory to his conduct in the management of a vessel, and furnished to the adverse interest in a case of collision to serve as evidence, the same was struck from the record, *ib.*

25. A steamship, ascending the river, before entering a narrow and difficult channel, observed a tug approaching with a train of vessels behind her, did not stop or slacken speed, and subsequently collided with the tug and her tow:—*Held*, that the steamer was to blame for not stopping before entering the channel, in accordance with an alleged and established custom to that effect; and that having taken upon herself the responsibility of disregarding this custom, she was liable for the consequences of a sheer, which threw her across the fairway, and into col-

lision with the descending vessels. *The Earl of Lonsdale—McKenna*, 153.

26. The burden of proof was upon her to show that the collisions were not caused by her neglect; and, she having failed to do so, her owners were liable, *ib.*

27. *Held*, in the same case, by the Judicial Committee of the Privy Council, on appeal, that, under the circumstances, the fact of the tug not having ported until immediately before the collision, did not amount to contributory negligence on her part, and that the decree of the Vice-Admiralty Court should be affirmed on all points, *ib.*

28. A tug was seen from a barque at anchor to cross her bow, and so suddenly to stop her speed as to allow her tow to drift upon and collide with the barque; an action by the barque against the tow, the cause of neglect in the tug not being proved, was dismissed, *The Commodore—Martin*, 167.

29. If a tug, for a stipulated price, promises to tow a vessel from one place to another, her engagement is that she will employ competent skill, with a crew and equipment reasonably adequate to the object, without a warranty of success under every difficulty. *The William—Samson*, 171.

30. Where a tug deviated from an order of her tow, and afterwards proved so deficient in skill as to allow the tug to collide with another vessel:—*Held*, that the tug was liable for the consequences of the collision, *ib.*

31. A steamship, on a very dark night, overtook and sank a schooner:—*Held*, that the schooner was not to blame for not showing a stern light, and that the steamship was in fault for not keeping out of the way. *The Cybele—McMillan*, 190.

32. *Quære* as to change of sailing regulations in the matter of a stern light, *ib.*

33. The maritime law recognizes no fixed rate of speed for vessels sailing through fog. *The Attila—Clift*, 196.

34. Where a vessel is in a fog she should be under sufficient command to avoid all reasonable chance of collision, *ib.*

35. Where a collision occurred in a fog between two sailing vessels, one lying to and the other running free, and the fog was so dense that their lights, respectively, could be seen but within from fifteen to twenty seconds before collision:—*Held*, that the speed of the vessel running free was too great, *ib.*

36. The Court will not receive as evidence depositions of persons professing to be skilled in nautical affairs as to their opinion upon any case, *ib.*

37. Where, from a steamship ascending the *Traverse* below Quebec, a red and then a green light, indicating the approach of a sailing vessel, were seen and lost sight of, until too late to avoid a collision:—*Held*, that the steamship was in fault for an insufficient look-out, and too much speed, and that she was liable for the subsequent damage sustained by the injured vessel, unless

upon the reference gross negligence or want of skill on her part was established. *The Govino—Scarlett*, 203.

38. The Court will rigidly apply the rule requiring the injuring vessel to stay by and assist the injured vessel, if the occasion should so require, *ib.*

39. In the case of a steam vessel lying at anchor in fog upon an anchorage ground, while using her bell and showing two white lights, one upon her foremast and the other at the gaff aft, each in an oblong lantern:—*Held*, that a sailing vessel, which, misled by the whistle of another steamer in motion, struck her, was in fault for going too fast; and that the lights of the steam-vessel, though not in globular lanterns, as directed by the Act respecting the navigation of Canadian waters, being equal in power, were a substantial compliance with its provisions. *The General Birch—The Progress*, 240.

40. When two vessels sailing, one on the starboard and the other on the port tack, came into collision, the latter held to be in fault for not keeping out of the way. *The Princess Royal—The Rubens*, 247.

41. Where two steam tugs were from a distance approaching each other nearly end on, one light and the other with a train of booms in tow, and the former inclined from her course upon her starboard helm, and afterwards crossed upon a hard-a-port helm and struck the tug having the tow:—*Held*, that she was in fault, and that the tug with the tow was not to blame for starboarding at the moment of collision and for not reversing. *The Margaret M.—Paquet*, 270.

42. A plea of irresistible accident overruled, on the ground that the vessel proceeded against had attempted to bring up in bad weather, in an improper position, and unprovided with the equipment necessary to enable her to do so in safety. *The Ida—Roulston*, 275.

43. Where a steam vessel overtook and collided with a barque, in a very dense fog:—*Held*, that her speed, between seven and eight knots, was, under the circumstances, excessive, and that she was therefore to blame; and that the steamer not having become visible from the barque until within a distance of one hundred and twenty feet, or thereabouts, although her whistle had been heard for some time, the barque's people were not in fault in failing to show a stern light, as prescribed in the sailing regulations. *The European—Simpson*, 286.

44. The rule as to when a stern light is to be exhibited explained, *ib.*

45. Where a steamship in a narrow channel in Lake St. Peter was in the act of overtaking a steam-tug and tow so carelessly navigated as to create risk of collision, and one of the vessels in tow collided with her:—*Held*, that the steamship was in fault for not keeping out of the way, and the tow for not keeping her course. *The Lombard—The Farewell*, 289.

46. In cases of mutual fault, the ancient Admiralty rule, as to the division of the damages between the

offenders now prevails in Canadian waters, since the passing of the Act 43 Vic. cap. 29, which restores the old law, *ib.*

47. And in such cases each party must pay his own costs, *ib.*

48. Where a sailing vessel and a steamship were meeting nearly *end on*, and the former ported, while the latter starboarded:—*Held*, that the former was in fault for not keeping her course, and the latter for not stopping, or slackening her speed. *The Bothal—The Nelson*, 296.

49. A sailing vessel deviated from her course contrary to the sailing rules, and came into collision with a steamer which might have otherwise avoided her. Each held to be in fault and the damages divided. *The Monica—Thacker*, 314

50. When a steamer is charged with having omitted to do something which ought to have been done, proof of three things is required:— first, that it was clearly in the power of the steamer to have done the thing charged to have been omitted; secondly, that, if done, it would in all probability have prevented the collision; and, thirdly, that it was such an act as would have occurred to any officer of competent skill and experience in command of the steamer, *ib.*

51. Where two ships in the harbor of Quebec, from the violence of the wind and force of the tide, were accidentally brought into such proximity that each had a foul berth, both held to be in fault for not adopting the proper course to relieve themselves from their perilous positions, and thereby avoid a collision. *The Arran—MacMicken*, 353.

52. A vessel under charter was injured by a collision, caused by another vessel, the charter-party providing that, in case of damage, the hiring should cease until she could be repaired:—*Held*, that an action by the charterers against the offending ship for the detention would lie. *The Nettlesworth—Tom*, 363.

53. Two vessels crossing, one on the starboard and the other on the port tack:—*Held*, that the latter did not keep a proper look out and that the former did not keep her course, but ported her helm too late to avoid a collision, and that there was mutual fault. *The Signe—The Rose C.*, 366.

COMPULSORY PILOTAGE.

1. Circumstances under which owners, who have taken a pilot on board under compulsion of law, are not allowed to throw the responsibility of an accident upon him. *The Agda—Clydesdale*, 7.

2. Compulsory pilotage done away with in Canadian waters, by the Act of Canada, "The Pilotage Act, 1873." *The Quebec—The Charles Chaloner*, 31.

CONSULS.

Foreign Vessels—Suit for Wages—Protest by Consul.

1. In a suit by American seamen for wages, the Consul of the United

States, upon receiving notice of suit, made a representation in writing, accompanied by accounts showing the promoters to be in debt to the ship, and requested that the case should not be entertained:—*Held*, that the jurisdiction of the Admiralty over causes of wages of foreign seamen being discretionary, the Court would, under the circumstances, decline to proceed with the action. *The Bridgewater—Dowell*, 257.

2. In a suit for seamen's wages the protest of a foreign Consul to the jurisdiction over-ruled. *The Monark—Halvorsen*, 341.

COSTS.

1. In collision suits, either where there are cross-cases, or where one suit alone is brought, by the practice of the Admiralty, when mutual fault is established and the damages are divided, each party must bear his own costs. *The Lombard—The Farewell*, 289.

2. This rule is also enforced by the Judicial Committee of the Privy Council, even where a party, condemned as being wholly in fault in the Court below, succeeds so far in Appeal as to have the fault declared mutual and the damage divided. *The Underwriter—The Lake St. Clair—Coffee*, 43.

3. When on a reference, the promoter's claim is reduced by one-third or more, by the practice of the Court, he must pay all costs of the reference. *The Barcelona—Anderson*, 299.

CUSTOM.

1. A custom involving the stoppage of an ascending vessel at certain difficult parts of the channel noticed and approved. *The Elphinstone—Beal*, 132.

2. A steamer held to blame for not stopping before entering an intricate channel, to allow a descending vessel to pass, in accordance with an alleged and established custom to that effect. *The Earl of Lonsdale—McKenna*, 153.

DAMAGES, DIVISION OF.

1. Where, in cases of collision, both parties are mutually blameable, Courts of Admiralty, adhering to the ancient maritime law, would have apportioned the damages equally between the respective owners of the vessels; but, by the Act of Canada, 31 Vic. c. 58, owners of vessels contravening the rules prescribed in such Statute are precluded from recovering any portion of their damage. *The Rosa—The Ranger*, 104. *The Eliza Keith—The Langshaw*, 113.

2. The foregoing rule does not apply to owners of cargo laden on board one of the delinquent vessels; but in the case of negligence on the part of both ships one moiety only of the damage can be recovered from the ship which collided with that in which the cargo was laden, *ib.*, 116.

3. By the Canadian Statute 43 Vic. cap. 29, the Admiralty principle of the equal division of damages, in the event of common fault, is reverted to. *The*

Lombard—The Farewell, 289. *The Nelson—The Bothal*, 296. *The Monica—Thacker*, 314. See also Note on page 294.

4. By the modern practice of the Admiralty, where, in the case of collision, both ships are to blame, but no cross-action is brought, the defendant is condemned in a moiety of the plaintiff's damages. *The Arran—McMicken*, 356.

DAMAGES, MEASURE OF.

1. A vessel collided with two lighters endeavoring to raise a sunken steamtug, broke the chains which connected them with the wreck, sent them both adrift, and was condemned in the damages resulting from such collision. On the reference, the Registrar and Merchants allowed the promoters all expenses incurred in endeavoring to raise the sunken tug, for the four weeks preceding the accident, on proof only that the money had been duly expended. *The Celeste—Wright*, 76.

2. Upon objection the report was overruled, and it was held that it was necessary for the promoters to go further, and to establish not only the actual expenditure, but that such expenditure was adapted to the purpose for which it was made, and had enured so much to the benefit of the promoters, *ib.*

3. When items in a claim are disputed the principles of evidence applicable in ordinary suits come into play, *ib.*

4. The measure of damages, for the detention of a vessel after a collision is the amount she can earn while unemployed by reason of it. *The Normanton—Leitch*, 122.

Where, after a collision, the vessel injured was docked for the winter and the resuming of her voyage could not take place until spring, by reason of the navigation of the St. Lawrence being closed until then:—*Held*, that her owners could not recover as part of their damages the seamen's wages while idle during the winter, and no more than would suffice to send them to the place where they were shipped, and to pay their wages until their arrival there, *ib.*

5. The promoters having stated and proved their loss in the United States currency the Registrar and Merchants reported an equivalent amount in gold, not at the current rate of exchange, but at the rate as on the day of the collision. The Court, upon contestation, maintained the report. *The Frank—Petersen*, 105.

6. Upon objection to a report of the Registrar and Merchants, to whom had been referred the assessment of the damages sustained by a foreign shipowner, through the arrest, detention and search of his vessel, without reasonable cause, under the Foreign Enlistment Act, 1870; the report was confirmed, and held correct, in restricting the damages so occasioned to their natural and proximate consequences, and in disallowing remote and consequential loss. *The Atalaya—Eve*, 260.

7. Upon the liquidation of an ac-

count by the Registrar and Merchants in a case of collision, for damages done by a ship to a wharf:—*Held*, that a claim for consequential damages not asked for in the libel nor awarded by the decree cannot be considered by the Registrar and Merchants; and that, if it could, such damage should not be allowed either under article 1660 of the Civil Code or by the Maritime Law. *The Barcelona—Anderson*, 299.

8. Report confirmed, *ib.*

9. Where damage was done by a ship to a wharf:—*Held*, that the Vice-Admiralty Courts' Act, 1863, conferring jurisdiction on Vice-Admiralty Courts, where damage was done by any ship, does not extend to consequential damages occasioned to the traffic of a lessee. *The Barcelona—Anderson*, 311.

DAMAGES, PERSONAL.

Assault and battery and oppressive treatment by the master and owner of a ship upon a seaman. Defence—mutiny—sustained. *The Bridgewater—Dowell*, 252.

DETENTION.

See MEASURE OF DAMAGES, 4, 6.

EVIDENCE.

1. Where an affidavit was obtained before suit brought from a pilot, imputing fault to himself in the management of a vessel under his control as such, and furnished by him to the adverse interest in a case of collision to serve as evidence,—the same struck from the record. *The Enmore—The Belle Hooper*, 139.

2. Obtaining certificates, statements, and especially affidavits, from persons on board an injured vessel to avail as evidence against their own vessel in prejudice of further investigation, is viewed by the Court with strong disapprobation and as a proceeding to be reprobated, *ib.* 143.

3. In causes of collision, the Court will *not* receive as evidence the depositions of persons professing to be skilled in nautical affairs, as to their opinion upon any stated case. *The Atilla—Clift*, 199.

4. Nor in salvage will the Court be guided by the opinions of *soi-disant* skilled persons, pronouncing upon the value of services, on a hypothetical case, but will exercise its own judgment on a review of all the circumstances. *The Victory—Natvig*, 337.

5. When items in a claim referred to the Registrar are disputed, the principles of evidence applicable in ordinary suits come into play. *The Celeste—Wright*, 77.

6. Reasonable and probable cause involves the consideration of what the facts of a case are, and what are reasonable deductions from those facts. *The Atalaya—Eve*, 234.

7. And these facts must be legally established—hearsay evidence is insufficient, *ib.*

FEES.

A table of fees to be taken in Vice-Admiralty Courts, by the officers and practitioners, established by Order in

Council, of the 23rd August, 1883, under the authority of the Act 26 Vict. c. 24, s. 14, 372.

FOG.

1. An omission to ring a bell in a fog covered, where an anchor light was seen in time to avoid a collision. *The Frank—Petersen*, 81.

2. The maritime law recognizes no fixed rate or speed for vessels sailing through fog. *The Atilla—Clift*, 196.

3. Vessels should, however, be under sufficient command to avoid all reasonable chance of disaster, *ib.*

See also the case of THE GENERAL BIRCH.

FOG-HORN.

A Norwegian barque collided in fog with an American schooner at anchor, on the banks of Newfoundland. A plea that the substitution of the blasts of a fog-horn for the ringing of a bell, as provided in the International Sailing Regulations, was done in accordance with instructions contained in a circular from the Secretary of the Treasury of the United States,—overruled. *The Frank—Petersen*, 81.

FOREIGN ENLISTMENT ACT.

1. Upon the representations of the Consul-General of Spain for Canada, an American vessel was detained and her cargo taken out and searched, by virtue of a warrant under the hand of the Governor-General of Canada, upon a charge of having on board arms and munitions of war, destined for the use of Cuban insurgents, contrary to the provisions of the Foreign Enlistment Act, 1870:—*Held*, that the charges against the vessel were not supported by facts sufficient to justify her arrest, detention and search, and her release ordered. *The Atalaya—Eve*, 215.

2. Hearsay evidence under the circumstances inadmissible, *ib.*

3. The owner declared entitled to an indemnity by the Commissioners of the Imperial Treasury, under the provisions of the Statute, *ib.*

4. Costs allowed against the Crown, *ib.*

5. Damages in respect of search and detention under the Act restricted to the natural and proximate consequences, and damages remote and consequential not allowed. *The Atalaya—Eve*, 260.

FOREIGN SEAMEN.

The 189th section of the Merchant Shipping Act, 1854, applies to causes brought by foreign as well as by British seamen. *The Monark—Halvorsen*, 345.

GOURDEAU.

Captain Francois Gourdeau, Harbour Master of Quebec. See ASSESSORS.

INEVITABLE ACCIDENT.

See COLLISION, 13, 16, 33, 42.

INSCRUTABLE ACCIDENT.

See COLLISION, 1, 2.

JUDGES.

Judges of the Vice-Admiralty Court at Quebec during the period of these reports, 410.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Opinions of the Lords of the Judicial Committee affirming the judgments of the Vice-Admiralty Court of Lower Canada, in the cases of *The Quebec*, 34; *The Eliza Keith* and *Langshaw*, 117; *The Earl of Lonsdale*, 163.

Opinion of the Lords of the Judicial Committee altering the judgments of the Vice-Admiralty Court of Quebec, in the cases of *The Underwriter* and *Lake St. Clair*, 55.

JURISDICTION.

See ADMIRALTY JURISDICTION.

JUSTICES OF THE PEACE.

1. Where a Statute required the execution of a warrant or process under an order of two Justices of the Peace, to levy seamen's wages to be authorised by the Judge of the Vice-Admiralty Court:—*Held*, that the enactment imposed upon the Court a duty to supervise the proceedings of the magistrates, and it appearing that the process had issued for the sale of an undivided interest in a vessel, and not legally, a petition to authorise them, refused. *The Canadienne—Beaudet*, 209.

JUSTIFICATION.

In an action by a seaman against the master and owner, a justification on the ground of mutinous, disobedient and disorderly conduct sustained. *The Bridgewater—Dowell*, 252.

LIEN.

Except in the case of bottomry, a maritime *lien* is inalienable and cannot be assigned or transferred to another person, so as to give him a right of action *in rem* as assignee. *The City of Manitowoc—Higgie*, 185.

LIGHTS.

1. Anchor lights, in oblong and not in globular lanterns, as directed by the Act respecting the navigation of Canadian waters, being equal in power:—*Held*, to be a substantial compliance with the provisions of the Act. *The General Birch—The Progress*, 240.

2. Previous to the regulations of 1880, an overtaken vessel held not bound to show a stern light. *The Cybele—McMillan*, 190.

3. The rule as to when a stern light is to be exhibited, explained. *The European—Simpson*, 286.

See also cases of THE ENMORE; THE ATTILA; THE SIGNE, and THE ROSE C.

MARINER'S CONTRACT.

Where seamen were shipped for a voyage from London to Quebec, and back to the port of London:—*Held*, that the nature of the voyage thus stated was a sufficient intimation to the mariner of its duration, and a substantial compliance with the provisions of the Merchant Shipping Acts, 1854 and 1873. *The Red Jacket—Atkin*, 304.

MARITIME LIEN.

See LIEN.

MASTER.

See ASSAULT; WAGES 3, 4, 5, 6 and 7.

MATERIAL MEN.

See NECESSARIES.

MERCHANT SHIPPING ACT, 1854.

1. The 189th section of this Act applies to foreign as well as to British vessels, and a Vice-Admiralty Court cannot entertain a suit for seamen's wages, the demand being below £50 sterling, unless upon a reference as prescribed by that Act. *The Monark—Halvorsen*, 345.

2. Nor is this limitation of its jurisdiction affected by the general language of the Vice-Admiralty Courts' Act, 1863, which confer upon it jurisdiction as to "claims for seamen's wages," and as to "claims for master's wages and disbursements;" but the two Statutes being to some extent, *in pari materiâ*, must be construed together, *ib.*

MUTUAL FAULT.

See DIVISION OF DAMAGES.

NAVIGATION.

See COLLISION, *passim.*

NECESSARIES.

An agent for a foreign vessel made advances and disbursements for her use, in account with her owner. The vessel afterwards sailed on her voyage, but was brought back in a wrecked state to the port of departure:—*Held*, that the agent could then not treat his claim as one for *necessaries*, under the Vice-Admiralty Courts' Act, 1863. *The City of Manitowoc—Higgie*, 178.

ORDER IN COUNCIL.

At the Court at Osborne House, Isle of Wight, the 23rd August, 1883, 372.

See FEES; RULES AND REGULATIONS; TABLES OF FEES.

PILOTAGE.

1. An indemnity in the nature of pilotage, based upon the Pilotage Act, 1873, (36 Vict. cap. 54), awarded to a pilot taken to sea, without his consent. *The Farewell—Côté*, 282.

2. The Dominion Parliament may confer on the Vice-Admiralty Courts jurisdiction in any matter of shipping and navigation within the territorial limits of the Dominion, *ib.*

3. When an Act of the Dominion Parliament is in part repugnant to an Imperial Statute, effect will be given to its enactments in so far as they agree with those of the Imperial Statute, *ib.*

See COMPULSORY PILOTAGE.

POSSESSION.

1. By the Vice-Admiralty Courts' Act, 1863, an Admiralty Court has jurisdiction over claims between owners, when the ship is registered within the possession for which the Court is established. *The Edward Barrow—Rich*, 212.

2. The Dominion of Canada is not a possession within the meaning of the Act so as to enable an Admiralty Court for one part of it to entertain jurisdiction over a vessel registered in another part, for the enforcement of such claims, *ib.*

PRIVY COUNCIL.

See JUDICIAL COMMITTEE OF PRIVY COUNCIL.

REASONABLE AND PROBABLE CAUSE.

Defined as "such a state of facts as would lead a man of ordinary caution and prudence to believe and entertain an honest and strong suspicion that the person is guilty." *The Atalaya—Eve*, 234.

REFERENCE.

See REGISTRAR AND MERCHANTS.

REGISTRAR AND MERCHANTS.

Reports of, objected to and sustained in the cases of THE FRANK, THE ATALAYA, and THE BARCELONA; overruled in the cases of THE CELESTE and THE NORMANTON.

See DAMAGES, MEASURE OF.

ROTHERY, H. C.

Registrar of the High Court of Admiralty: his letter to Lord Selborne. See NOTE 294.

RULES AND REGULATIONS.

Made in pursuance of the Imperial Statute, 26 Vict., c. 24, touching the practice to be observed in the several Courts of Vice-Admiralty in Her Majesty's possessions abroad, and established by Her Majesty's Order-in-Council, at the Court at Osborne House, Isle of Wight, the 23rd of August, 1883, 384.

SALVAGE.

1. The *lien* of salvors upon property saved by their exertions is personal and inalienable. *The City of Manitowoc—Higgie*, 178.

2. An assignment by salvors, for a valid consideration, of a sum due them for salvage, does not so vest in their assignees as to enable the latter to proceed *in rem* in their own names, *ib.*

3. A steam vessel, while on fire in the lower St. Lawrence, derelict, was partially saved by a steam tug, which towed her to the shore, where she was beached, and afterwards sold by decree. The salvors declared entitled to one-third of the proceeds of sale and their costs, and the award distributed among them. *The Progress—Bernier*, 308.

4. A steam-tug engaged to tow a ship can claim for services to such ship, if she incurs a risk or performs a duty outside the scope of her original engagement, and when she has been freed from the obligations under which she is placed by her original contract, as by a *vis major*, or by accidents not contemplated when the contract was entered into. *The Victory—Natvig*, 335.

5. The tug cannot claim if the ship has been brought into a dangerous position by the fault of the tug, on the principle that a vessel (so to speak) cannot profit by her own wrong, *ib.*

6. Where a vessel with a valuable cargo was stranded on a dangerous place near Cape Rosier, salvage services were rendered by a passing steamer:—*Held*, that as there was no danger to

life or property incurred by the salving steamer in aiding to get her off, the sum of $1,000 was an adequate remuneration. *The Carmona — Halcrow*, 350.

7. A tender of the above amount after suit brought without costs declared insufficient, *ib.*

8. The Palmerin, a screw steamship of 1725 tons register, valued at £19,500 sterling, when on a voyage from Montreal to Cape Breton, broke her shaft off the Bird Rocks. The SS. Nestorian, valued, with her cargo and freight, at £57,000 sterling, bound from Montreal to Glasgow, took the Palmerin in tow, and towed her safely to Sydney,—in doing so the Nestorian deviated from her voyage, but incurred no special risk. The towage lasted twenty hours. £1,150 sterling allowed as salvage remuneration. *The Palmerin—Anderson*, 358.

SEAMEN.

See ASSAULT; PERSONAL DAMAGE; MARINERS' CONTRACT; WAGES.

STATUTES (IMPERIAL).

59 Geo. III, c. 69.
3 & 4 Vict. c. 65.
17 & 18 Vict. c. 104.
24 Vict. c. 10.
25 & 26 Vict. c. 63.
26 Vict. c. 24.
28 & 29 Vict. c. 63.
30 & 31 Vict. c. 45.
32 Vict. c. 11.
33 & 34 Vict. c. 90.
36 & 37 Vict. c. 85.

STATUTES (CANADIAN).

10 & 11 Vict. c. 83.
12 Vict. c. 114.
31 Vict. c. 58.
31 Vict. c. 61.
36 Vict. c. 54.
37 Vict. c. 129.
43 Vict. c. 29.

STATUTES (CONGRESS).

Revised Statutes 4404, 4405 and 5912.

STUART, The Hon. GEORGE OKILL.

Judge of the Court from 1873 to 1884.

See PREFACE to this Volume.

TABLES OF FEES.

See FEES.

TELEGRAPH CABLE.

See COLLISION, 3.

TOWAGE.

1. Where an agreement was made in the Lower St. Lawrence with a tug to tow a ship to Quebec, Montreal and back to Quebec:—*Held*, that the tug having towed the ship to Quebec and Montreal her owner could not transfer the contract to another to complete it, and that he could not substitute an inferior tug with additional tow for the purpose. *The Euclid—Anderson*, 279.

2. *Quære*, as to the jurisdiction of the court, *ib.*

3. Where negligence was charged against a tug for running her tow aground in an intricate channel in the

St. Lawrence :—*Held*, that the accident was owing to the increased danger of the navigation at the beginning of winter, and that the immediate cause was the shutting out of lights and the fact of the buoys in the channel being invisible. *The Guelph—May*, 321.

4. In the opinion of the Court, the tow was to blame, for navigating at a dangerous and inclement season, without a qualified licensed pilot, *ib.*

TUG AND TOW.

See COLLISION, 25, 26, 28, 29, 41, 45. SALVAGE, 3, 4. TOWAGE.

VICE-ADMIRAL.

Vice-Admirals of Canada during the period of these reports, with the dates of their commissions, 410.

VICE-ADMIRALTY COURTS.

See ADMIRALTY JURISDICTION.

VIS MAJOR.

See INEVITABLE ACCIDENT.

VOYAGE.

See MARINER'S CONTRACT.

WAGES.

1. Where a Statute required the execution of a warrant or process under an order of two Justices of the Peace for seamen's wages to be authorized by the Judge of the Vice-Admiralty Court :—*Held*, that the enactment imposed upon the Court a duty to supervise the proceedings of the magistrates. *The Canadienne—Baudet*, 209.

2. It appearing that a warrant and process of two magistrates, issued for the sale of an undivided interest in a vessel, had not legally issued, a petition to authorize them was refused, *ib.*

3. In a suit by the master of a steamtug against the owner for wages and disbursements :—*Held*, that a Vice-Admiralty Court cannot, under the Vice-Admiralty Courts Act, 1863, exercise its jurisdiction so as to give effect to an agreement between the owner and master of a vessel, where the duties to be performed are miscellaneous and not incident to the situation of a master. *The Royal—Burns*, 326.

4. By the Dominion Statute, the Seamen's Act, 1873, the jurisdiction of the Court, as respects vessels registered in the Provinces of Quebec, Nova Scotia, New Brunswick and British Columbia, being restricted to claims for master's and seamen's wages above $200, the 189th and 191st sections of the Imperial Merchant Shipping Act, 1854, are in relation to such vessels, so far repealed as to reduce £50 sterling to $200, *ib.*

5. The Vice-Admiralty Courts' Act, 1863, has not in any other way effected or repealed the 189th and 191st sections of the Merchant Shipping Act, 1854, *ib.*

6. In a suit for ship's disbursements brought by the master, who became liable for their payment upon condition that the owner did not pay them, there must be a demand on the owner

by the creditors or by the master, before the master can validly bring his suit, *ib.*

7. Where a master sues for ship's disbursements without first presenting his accounts, he cannot recover costs, *ib.*

8. The 189th section of the Merchant Shipping Act, 1854, applies to foreign as well as to British vessels, and a Vice-Admiralty Court cannot entertain a suit for seamen's wages, the demand being below £50 sterling, except upon a reference as prescribed by that Act. *The Monark — Halvorsen*, 345.

See cases of THE BRIDGEWATER; THE RED JACKET, and THE MONARK.

WITNESS.

Money payments to witnesses larger than those legally due them, even when shown to have been made with no wrong intent, but from an unfounded apprehension that they would leave the country before testifying, will so discredit their testimony as seriously to affect its credibility. *The N. Churchill—The Normanton*, 65.

WRECK.

In the case of a wrecked and derelict steam-tug one-third of the gross proceeds arising from its sale, allowed over and above costs, to salvors for meritorious services. *The Progress—Bernier*, 308.