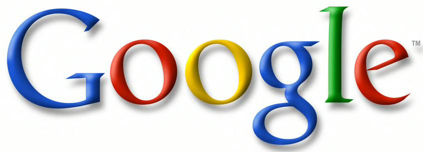

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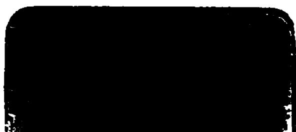

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Admiralty Law and Practice

IN CANADA

A Treatise on the Jurisdiction generally and in particular causes, and on the Practice of the Exchequer Court of Canada on its Admiralty Side, with the Statutes and Rules of Practice

— BY —

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To

THE HONOURABLE ARCHER MARTIN

JUDGE IN ADMIRALTY FOR THE PROVINCE OF BRITISH
COLUMBIA AND A JUSTICE OF APPEAL
FOR THAT PROVINCE

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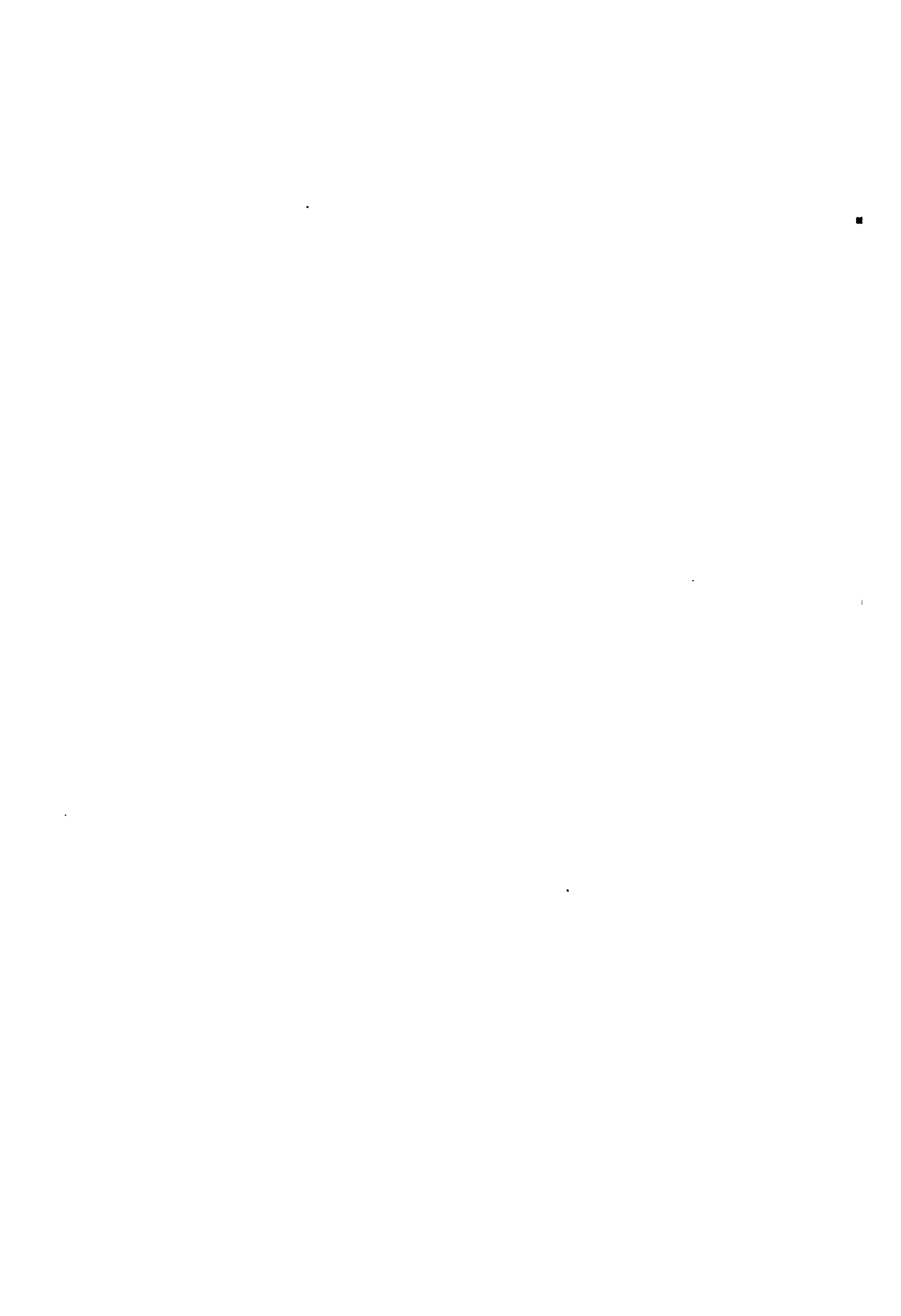

PREFACE.

The object of this treatise is to meet the need which seems to exist of a handbook of reference to the decisions of the Admiralty Court in Canada. It is now nearly twenty-five years since the Exchequer Court of Canada obtained a jurisdiction in Admiralty and there is as yet no work in which the decided cases, numerous as they are and scattered through the reports of the Exchequer Court, of the Supreme Court of Canada, and of the Courts of the Provinces, have been incorporated. It is mainly as a work of reference to those authorities that the present book is commended to the indulgence of the profession. At the same time it has been attempted to give a general and succinct account of Admiralty jurisdiction, with especial reference to its most characteristic feature, the maritime lien, and to note the most important conditions of the various Admiralty causes. The author, of course, owes much to such works of established reputation as those of Coote, Roscoe, and Williams and Bruce, as well as to the various invaluable digests of the reports of the old Vice-Admiralty Courts; but it has been attempted in every case of importance or difficulty to go back to the fountain head of authority, and to establish every important principle by the words of the judgments themselves. No one can be more sensible than the author of the shortcomings of a work, written as it has been in such short intervals as could be snatched from the practice of an exacting profession: but, *quasi cursor, qui scientiæ lampada tradit*, he hopes that it may at least prove an incitement to a more perfect and comprehensive work on what is one of the most interesting branches of the law, and which will undoubtedly become in Canada one of the most important; and that the future builder

of a more imposing structure than has been attempted here will at least find the foundations firmly laid. It is perhaps not unfitting that the first attempt to collate the decisions of the Exchequer Court on its Admiralty side should have been made in the Pacific Province, constituting as it does by far the most important of the Admiralty districts.

E. C. MAYERS.

VICTORIA, B.C.,
August 31, 1915.

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Admiralty Law and Practice in Canada

CHAPTER I.

ADMIRALTY JURISDICTION.

Courts having jurisdiction.

Admiralty law in Canada is administered in the Exchequer Court of Canada, which became invested with a jurisdiction in Admiralty by the conjoint operation of the Colonial Courts of Admiralty Act, 1890, passed by the Imperial Parliament (53 & 54 Vic. c. 27), and the Admiralty Act, 1891, enacted by the Parliament of Canada (54 & 55 Vic. c. 29): the latter Act with its amendments has been consolidated in the revision of 1906 and now appears as chapter 141 of the Revised Statutes of Canada.

Source of jurisdiction.

All jurisdiction in Admiralty is conferred by the Imperial Act, and its extent must therefore be sought within the four corners of that Act, which merely delegated to the colonial legislatures the powers to create a court or courts in which that jurisdiction might be exercised, and to limit its extent territorially or otherwise: this delegated power and its limitation is found in section 3 of the Colonial Courts of Admiralty Act, 1890:—

"The legislature of a British possession may, by any colonial law,—(a) declare any court of unlimited civil jurisdiction, whether original or appellate, in that possession to be a Colonial Court of Admiralty, and provide for the exercise by such court of its jurisdiction under this Act, and limit, territorially or otherwise, the extent of such jurisdiction; and—(b) confer upon any inferior or subordinate court in that possession such partial or limited admiralty jurisdiction, under such regulations and with such appeal (if any) as may seem fit:

Provided that any such colonial law shall not confer any jurisdiction which is not, by this Act, conferred upon a Colonial Court of Admiralty."

Section 4 of the same Act provided that every colonial law made in pursuance of that Act or which affected the jurisdiction of, or practice or procedure in any Colonial Court of Admiralty, or which should alter any such law, should be reserved for the assent of His Majesty.

By section 15 the expression "unlimited civil jurisdiction" was defined to mean "civil jurisdiction unlimited as to the value of the subject-matter at issue, or as to the amount that may be claimed or recovered;" and by the effect of section 16 the Act came into force in Canada on the first of July, 1891.

In pursuance of these powers the Parliament of Canada passed the Admiralty Act, 1891, which in accordance with section 4 of the Colonial Courts of Admiralty Act, 1890, was proclaimed and came into force on the second of October, 1891: (Canada Gazette, Oct. 10th, 1891; Stats. Can., 1892, lviii.)

By section 3 of this Act the Exchequer Court of Canada was constituted a Colonial Court of Admiralty with "all the jurisdiction, powers, and authority conferred by (The Colonial Courts of Admiralty Act, 1890), and by this Act": the last words would seem superfluous and nugatory in view of the proviso to section 3 of the Imperial Act. The jurisdiction so conferred was, by section 4, to be "exercisable and exercised . . . throughout Canada, and the waters thereof, whether tidal, or non-tidal, or naturally navigable or artificially made so." By section 6 provision was made for the appointment of local Judges in Admiralty of the Exchequer Court; and by section 9 every such local Judge was clothed, within his district, with all the jurisdiction in Admiralty of the Exchequer Court. There is, therefore, but one Court in Canada which is endowed with jurisdiction in Admiralty; the powers given by section 3, sub-section (b) not having been exercised.

The jurisdiction of the Exchequer Court is found in section 2, sub-section 2 of the Imperial Act:—

Extent of jurisdiction.

"The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations."

By sub-section 3, enactments relating to Vice-Admiralty Courts are to apply to a Colonial Court of Admiralty: and by the effect of the proviso to this sub-section, the word Canada is to be substituted for the words England and Wales in any Imperial Act referring to the Admiralty jurisdiction of the High Court in England: but the words 'United Kingdom' in a statute will not be construed as equivalent to or including the words 'England and Wales,' so as to fall within this sub-section (*The Sydney, &c., S. S. Co.* v. *Harbour Commissioners of Montreal,* 15 Ex. C. R. at p. 11: 49 S. C. R. 627).

The saving clause in this section relates to certain not important matters which will be dealt with later.

The Exchequer Court being thus invested with "the Admiralty jurisdiction of the High Court of England," it becomes necessary to ascertain what subject-matters that jurisdiction comprises, and what is the law applied in the exercise of that jurisdiction; but before proceeding to that inquiry, it may be well to take note of two questions which arise upon the language of the section, one of which has been definitely answered, the other of which seems still to be left doubtful.

No general jurisdiction.

The first question arose in this way: since the Judicature Acts of 1873 and 1875, there has been no separate High Court of Admiralty in England, but the Court in which maritime law is administered is merely a branch of the High Court of England: consequently a judge of the High Court of England administering maritime law can exercise every kind of jurisdiction, whether admiralty, common law, or equity, possessed by the High Court: has then the Exchequer Court the general jurisdiction of a judge of the High Court of England sitting in Admiralty? This question has been answered in the negative, for "the expression 'Admiralty jurisdiction of the High Court' does not include any jurisdiction which could not have been exercised by the Admiralty Court before its incorporation into the High Court, or may be conferred by statute giving new admiralty jurisdiction" (*The Camosun,* 1909, A. C. at p. 608). It had already been decided that no counterclaim could be set up in an action in the Exchequer Court, where the subject-matter of the counterclaim did not fall within the class of causes belonging to admiralty law (*The Camosun,* 12 B. C. R. 283, affirmed on appeal on the 13th of September, 1906, not reported but noted in 26 C. L. T. 779). The Judicial Committee decided that no matter could be put forward as a defence in an admiralty action in the Exchequer Court which could not be enter-

tained by that Court as a cross-action. This decision may have unforeseen but important consequences with regard to equitable defences which could be entertained by the Probate, Divorce, and Admiralty Division of the High Court of England, but which would seem not to be available in the Exchequer Court: it has been said by Lord Stowell that the High Court of Admiralty exercised an equitable jurisdiction, but the extent of this jurisdiction seems doubtful (*vide infra*). The decision in *The Cheapside* (1904, P. 339), is inapplicable owing to the peculiar constitution of the Exchequer Court: section 2, sub-section 1 of the Imperial Act (The Colonial Court of Admiralty Act, 1890), provided that the Court of Admiralty in a British possession might, for the purpose of its admiralty jurisdiction, "exercise all the powers which it possesses for the purpose of its other civil jurisdiction"; but the Exchequer Court of Canada has "no general common law jurisdiction" (1909, A. C. at p. 610), and is therefore limited as to the subject-matters it can entertain in any form of procedure by the "Admiralty jurisdiction of the High Court."

Jurisdiction conferred by subsequent statutes.

The second question which arises is as to whether the Exchequer Court can exercise powers conferred by statutes of a later date than the Admiralty Act. Mr. Justice Idington is reported to have said in "*The D. C. Whitney*" (38 S. C. R. at p. 320)—"whether the limits of that jurisdiction (of the Exchequer Court) be fixed as found by the law when the Dominion exercised the right thus conferred and established Courts within that right or are liable to their being shifted from time to time as the parent parliament may determine by later legislation regarding the Admiralty Division of the High Court of Justice, without express reference to the Colonial Courts, may become an interesting question." His Lordship did not find it necessary to decide the question: but the words of section 2, sub-section 2 of the Imperial Act (The Colonial Courts of Admiralty Act, 1890)—"the jurisdiction of a Colonial Court of Admiralty shall . . . be over the like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise . . . ." would seem to imply that the inquiry in each case should be as to the actually existing "admiralty jurisdiction of the High Court" at the time when the matter comes before the Exchequer Court for adjudication, subject, of course, to the general rules for the construction of statutes as to their retrospective effects, etc. This construc-

tion of the Colonial Courts of Admiralty Act, 1890, would seem to be supported by the words of the judgment of the Judicial Committee in *The Camosun* "or may be conferred by statute giving new admiralty jurisdiction," which appear to imply futurity: and receives a certain measure of confirmation from the fact that the Maritime Conventions Act, 1911 (1 & 2 Geo. V. cap. 57), by which the Admiralty Jurisdiction of the High Court is affected, is expressly stated not to extend to the Dominion of Canada (section 9). (Read literally the sentence in the judgment of the Judicial Committee would exclude all jurisdiction 'conferred by statute giving new admiralty jurisdiction'; but it is obvious that the expression of opinion was intended to include such new jurisdiction; the form of the sentence being due to the reporter's error.) In any case the *punctum temporis* at which "the Admiralty Jurisdiction of the High Court" is to be ascertained appears to have been wrongly fixed by Mr. Justice Idington: the learned Judge indicated that this point might have to be fixed at the date of the Colonial Act constituting a Colonial Court of Admiralty, but if it is to be assumed that the Imperial Act (The Colonial Courts of Admiralty Act, 1890), stereotyped the jurisdiction it conferred, then the date as of which that jurisdiction is to be sought must surely be the date of the passing of the Imperial Act: if on the contrary, as Mr. Justice Idington thought, the dates of the various Colonial Acts constituting Courts to exercise the jurisdiction given by the Imperial Act are respectively the points of time at which the extent of that jurisdiction is to be ascertained, then that jurisdiction is *ex hypothesi ambulatory*: and once it is admitted to be ambulatory, it would seem that the words of the Imperial Act (The Colonial Courts of Admiralty Act, 1890, sec. 2, sub-sec. 2) could bear no other interpretation than that the jurisdiction conferred is that actually existing at the time of the inquiry.

It remains then to ascertain what is the scope and content of the Admiralty jurisdiction of the High Court of England. Unfortunately, owing to historical accidents, no compendious definition of Admiralty jurisdiction can be given, and it is necessary to fall back on an enumeration of the causes which the High Court of Admiralty, before the Judicature Act, would have entertained, supplemented by a list of those over which jurisdiction has been conferred by subsequent statutes.

Original jurisdiction.

Originally it was acknowledged that "of contracts, pleas and quarrels made upon the sea or any part thereof which is not within any county (from whence no trial can be had by twelve men) the Admiral hath and ought to have jurisdiction" (4 Inst. 134): but that fair simplicity has been sadly mangled by the dominant tyranny of the Common Law. The extent of the ravages committed by the Common Law Courts may be seen by Lord Esher's statement of the law in *The Queen* v. *Judge of City of London Court* (1892, 1 Q. B., at p. 294): "I come then to enquire what the English law is. On what does the jurisdiction of the Admiralty Court depend? It does not depend merely on the fact that something has taken place on the high seas. That it happened there is, no doubt, irrespective of statute, a necessary condition for the jurisdiction of the Admiralty Court: but there is the further question, what is the subject matter of that which has happened on the high seas? It is not everything which takes place on the high seas which is within the jurisdiction of the Admiralty Court. A third consideration is, with regard to whom is the jurisdiction asserted? You have to consider three things—the locality, the subject matter of complaint, and the person with regard to whom the complaint is made."

Jurisdiction *in rem* and *in personam*.

Notwithstanding, however, that no comprehensive definition of Admiralty jurisdiction can be framed, it is possible to construct certain generalizations as to the conditions necessary for its existence. For this purpose it is necessary to observe the jurisdiction in motion, and it then appears that it has three forms of manifestation: it may give effect, by a proceeding *in rem,* to a maritime lien which has already vested in the claimant, or it may enforce, also by a proceeding *in rem,* certain rights of a lower nature than maritime liens, or it may take the form of a proceeding merely *in personam.*

Proceeding *in rem.*

The specific characteristic of Admiralty jurisdiction is the proceeding *in rem*: judgments affecting status may have effect as judgments *in rem* when pronounced by other Courts, but the proceeding *in rem,* the action ostensibly directed against a *res* is a peculiarity of Courts of Admiralty: in Canada the Exchequer Court is the only Court in which a proceeding *in rem* can be instituted (*R.* v. *The American Gasoline Fishing Boat,* 15 O. L. R. 314).

Maritime liens.

Just as, in the sphere of procedure, the Court of Admiralty has its peculiar action *in rem,* so, in the sphere of

substantive rights, the maritime lien is the distinctive feature of Admiralty jurisdiction. Modern statutes have enacted that maritime liens shall arise out of certain sets of circumstances, and have enabled actions *in rem* to be brought to enforce rights arising out of other sets of circummstances not giving rise to maritime liens, but it is in the inherent jurisdiction of Courts of Admiralty that the nature and extent of maritime liens must be sought.

The assertion has been strenuously made and even accepted by very high authority that, apart from statute, a Court of Admiralty "had no jurisdiction in any cases except such as conferred a maritime lien or involved a right in the ship itself." *The Heinrich Bjorn* (11 A. C. *arguendo* at p. 272). Lord Watson, in accepting this statement of the law, said at page 278 of the same report:—"it may be that at the time when the Act of 1840 was passed it was not the practice of the Admiralty Court to sustain an action *in rem*, except at the instance of a plaintiff who had either a real right in, or a proper lien over, the vessel against which it was directed. The authorities cited at the Bar appeared to me to bear out that proposition": but his lordship went on to point out that "the Court entertained actions *in personam* as well as *in rem*, and could, therefore, give an appropriate remedy in the case of a personal claim to which no maritime lien was attached."

Now if it were the case that the Admiralty Court had originally no jurisdiction except in matters giving rise to a maritime lien, this fact would throw much light on the modern controversy as to the nature of a maritime lien and the extent of the rights it conferred; for it would prove that Admiralty jurisdiction was in its essence a jurisdiction over a *res*, and did not extend to and had no concern with the liability of any individual.

The two reservations that are made from the proposition that Admiralty jurisdiction was founded on a maritime lien are that some proceedings *in rem* are independent of maritime lien, viz., "actions between co-owners, of possession and restraint" *The Henrich Bjorn* (11 A. C., at p. 275); and that Admiralty jurisdiction could be exercised *in personam*. But although it may be true that actions of possession and restraint were not founded on maritime lien, yet these actions "involved a right in the ship itself"; while the Admiralty jurisdiction *in personam* was, we think, originally

nothing but an exercise of the disciplinary authority of the Admiral. Both cases may therefore be nothing but an extension or perversion of the original jurisdiction over a *res*.

Origin of maritime liens. The nature and extent of a maritime lien can best be determined by a consideration of the source whence sprang the idea of such a right. Two theories of its origin are extant: one theory, of which Mr. Justice Holmes is the exponent, finds the source of the idea in the ascription of personality to the ship, on the analogy of the law of deodand.

Historical theory. On this theory it was the ship which was liable for the wrongs it committed, and the contracts it had undertaken. In the reign of Henry VI., if a man was killed or drowned at sea by the motion of the ship, the vessel was forfeited to the Admiral upon a proceeding in the Admiral's Court, and subject to release by favour of the Admiral or the King (1 Black Book of the Admiralty, 242). This proceeding found an echo in a case of *Greenway and Baker* (Godbolt, 260), tried in the reign of James I., where it was said:—"The libel ought to be only against the ship and goods, and not against the party."

Again in matters of contract, the remedy of the sailor for his wages was against the ship: "the ship is the debtor," as was said *arguendo* in *Clay* v. *Snelgrove* (1 Ld. Raym., at p. 577); and if the ship perished, the wages were lost: *ans perdront luos loers quant la nef est perdue* (2 Black Book of the Admiralty, 213). "By the maritime law every contract of the master implies an hypothecation" (*Justin* v. *Ballam,* 2 Ld. Raym. 805). Likewise in cases of quasi-contract, if salvage services were rendered to a ship, the Admiralty Court gave a remedy against the vessel, but no action could be brought against the owners (*Lipson* v. *Harrison,* 2 W. R. 10).

Consequences of the historical theory. If the ship is thus metamorphosed into a juridical entity, and a lien upon it given for obligations incurred or assumed, as it were, by the ship itself, three consequences would logically flow from this conception, viz.: (1) that the lien would attach to the ship quite irrespective of any personal obligation on the person who happened to be owner at the time when the event happened which gave rise to the lien; (2) that the limit of liability must be the value of the ship, and (3) that the lien would remain indelible notwithstanding any change of ownership.

Limit of liability.

Now it is the fact that by the maritime law of the Middle Ages the ship was not only the source, but the limit of liability (3 Kent's Commentaries 218; 3 Black Book of the Admiralty, 103, 243, 345). A striking instance of this limitation of liability to the value of the ship is found in the fact that in the case of a shipwreck, so long as any portion of the ship was saved, the lien of the mariners for their wages was saved, and attached on the salved portion, but *quoad ultra* was lost.

Personal liability.

With regard to the personal liability of the owner, Dr. Lushington in *The Ticonderoga* (Sw. 215) and Sir R. Phillimore in *The Lemington* (2 Asp. M. C. 475) decided that a maritime lien attached to a ship for damage done, notwithstanding that the ship was under the exclusive control of charterers under charterparties amounting to an actual demise of the ship. In the former case Dr. Lushington said:—"Supposing a vessel is chartered so that the owners have divested themselves . . . of all power, right and authority over the vessel for a given time, and have left to the charterers the appointment of the master and crew, and suppose in that case the vessel had done damage and was proceeded against in this Court—I will admit, for the purpose of argument, that the charterers, and not the owners, would be responsible elsewhere, although I give no opinion upon that point—but still, I should here say to the parties who had received the damage that they had, by the maritime law of nations, a remedy against the ship itself." In the second case Sir R. Phillimore said:—"Vessels suffering damage from a chartered vessel are entitled *prima facie* to a maritime lien upon that ship, and look to the *res* as security for restitution. I cannot see how the owners of the *res* can take away that security by having temporarily transferred the possession to third parties." The crucial test, however, would be the case of a vessel doing damage which, instead of being under lease, is in charge of a pilot whose employment is made compulsory by the laws of the country, into one of the ports of which the vessel is entering: this case has occurred in the United States of America, and by a decision of the Supreme Court the ship has been held liable in this instance also (*The China*, 7 Wallace 53). No doubt can arise as to the reason for this decision in reading the remarks of Chief Justice Marshall, quoted with approval by Story, J., in *The Malek Adhel*, 2 How., at pp. 210, 234:—"This is not a proceeding against the owner; it is a proceeding against the vessel for an offence committed

by the vessel; which is not the less an offence, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner." "The thing is here primarily considered as the offender, or rather the offence is primarily attached to the thing." Furthermore in *The Charkieh* (L. R. 4 A. & E. 59), there is a careful consideration in the judgment of the question whether the ship would have been liable to the jurisdiction of the Admiralty Court, in proceedings *in rem* in respect of a collision, if the owner had been a sovereign prince, and so ordinarily exempt from the jurisdiction of municipal courts: the learned Judge, after considering the law as to the privilege of foreign sovereigns, says:—"But it remains to be considered whether there may not be a proceeding *in rem* against property of the sovereign . . . which is free from the objection, fatal to the other modes of procedure": and he continues to say:—"That he would be prepared to hold that proceedings *in rem* in some cases may be instituted without any violation of international law, though the owner of the *res* be in the category of persons privileged from personal suit."

Thus in the case of obligations arising from contract or quasi-contract, from tort or quasi-tort, the whole manner of dealing with ships, according to Admiralty law in its purity, took the form of treating the ship as the delinquent or contracting party, without regard to any personal fault or privity of the owners, and with the consequent limitation of liability to the value of the ship. "The ship is instead of the owner, and thereof is answerable" (3 Keb. at pp. 112, 114).

Procedural theory. *The Dictator.*

On the other hand is what may be called the procedural theory, first advanced by Sir Francis Jeune in *The Dictator* (1892, P. 304); on the authority of Clerke's Praxis Curiæ Admiralitatis, the learned Judge came to the conclusion that the arrest of a ship was, like its possible alternatives, the arrest of the defendant or any other property of the defendant, merely a method of enforcing appearance, and providing a fund for securing compliance with the judgment; and consequently "that, under the earlier practice, the distinction between actions *in personam* and actions *in rem* depended on whether the person or the property of the defendant was arrested in the first instance, and, if the defendant appeared, the procedure and effect of the action *in rem* become those of an action *in personam*."

Limit of liability.

From these premises the learned Judge deduced the remarkable conclusion that in an action *in rem*, where the defendant has appeared, judgment can be recovered for the full amount of the claim, notwithstanding that that amount exceeds the value of the *res* proceeded against.

The Gemma.

The reasoning of this judgment was approved in *The Gemma* (1899, P. 285), and applied to an actual decision in *The Dupleix* (1912, P. 8.)

Now in the first place it is to be noticed that neither in *The Dictator* nor *The Gemma* was the doctrine thus for the first time distinctly formulated necessary to the actual decisions: in *The Dictator* the amount of the claim, though exceeding the amount for which bail had been given, was far less than the value of the *res;* the only question therefore for decision was whether judgment could be given for an amount in excess of the bail, which involved a point of practice, and not a question as to jurisdiction: in *The Gemma,* the only question was as to the enforcement of a judgment already obtained, and did not concern the propriety or incorrectness of the judgment itself. In *The Dupleix* the defendants had given bail to the full value of the ship and freight; judgment was given, condemning the defendants and their bail for the full amount of the claim, which very largely exceeded the value of the ship and freight: the President expressly based his decision on the reasoning of *The Dictator* approved in *The Gemma,* and so made apparent the remarkable effects of this remarkable reasoning, which entails the condemnation of the bail in an amount exceeding that for which they had given security.

The judgment of the President rested largely, apart from his references to Clerke's Praxis, on certain inferences which he drew from the language used by Lord Stowell in *The Dundee* (1 Hagg. 109), and by Dr. Lushington in *The Zephyr* (11 L. T. N. S. 351), and *The Aline* (1 Wm. Rob. 111). With regard to *The Dundee,* Lord Stowell was dealing wholly with a limitation of liability introduced by the then recent Act of 33 Geo. III. c. 159, and in his remarks the learned Judge was referring to the general law prior to the introduction by statute of the principle of the limitation of liability, and not to any principle of Admiralty jurisdiction. The remarks of Dr. Lushington in *The Zephyr* were addressed to a consideration of section 15 of The Admiralty

Court Act, 1861, which deals with the enforcement of decrees and orders of the High Court of Admiralty, and again throw no light on the principles of Admiralty jurisdiction. Again, in *The Aline* Dr. Lushington was dealing with the statutory limitation of liability, and this case was also disapproved by the Judicial Committee in the leading case on the subject of maritime liens, which also directly exploded the theory that the arrest of a *res* had an analogy to the procedure in foreign attachments, a theory enunciated by Dr. Lushingon in *The Volant* (1 Wm. Rob. 383), and *The Johann Friederich* (1 Wm. Rob. 35), and which appears to be one of the sources of the erroneous views as to the nature of maritime liens.

It is remarkable that what we submit is the correct principle was laid down by a Court of Common Law in *Brown* v. *Wilkinson* (15 M. & W. 391), where Baron Parke says, at p. 398: "From the practice of the Court of Admiralty no light could be derived on this question, for that Court proceeds *in rem, and can only obtain jurisdiction by seizure, and the value when seized, is the measure of liability.*"

Moreover this principle found expression in three actual decisions of Dr. Lushington, *The Volant* (1 Wm. Rob. 383), *The Hope* (1 Wm. Rob. 154), and *The Kalamazoo* (15 Jur. 885).

The Volant.

In *The Volant,* Dr. Lushington in giving his reasons, after remarking that where no appearance was given to the warrant the decree must necessarily be confined exclusively to the ship, went on to say:—"Where there is an appearance to the action and bail given, as to the bail, the decree cannot be extended beyond what they, who are strangers to the cause, have voluntarily made themselves responsible for; but in a case where the owner has appeared, *the question is to what extent he has appeared to the process against the ship.* It is material to see how that process is worded: it decrees 'the ship to be seized, and it cites all persons having or pretending to have any right, title, or interest therein, to appear in this Court, on certain days and hours, there to answer in a cause civil and maritime.' The owners are only called in respect to any right, title, and interest, in order that they may appear and *intervene for their interest in the vessel, and not further.* Now, if it were possible, on such warrant, to demand bail beyond the value of the ship, or if the process against the owners went to make them responsible beyond the value of the ship, there

could be no reason why bail should not be commensurate with the damage, where the amount is not restricted by statute; but if bail could not be demanded beyond the value of the ship, I do not see how the owners, in that proceeding, can be made further responsible; ***the warrant of arrest is confined to the ship, it goes no further.*** It appears to me, therefore, that there is no personal liability beyond the value of the ship, for this obvious reason, that the original process would not justify any such proceeding; the appearance given by the individual himself would not justify such proceeding, ***he has appeared only to protect his interest in the ship.***"

The Hope.

In *The Hope,* Dr. Lushington gave judgment as follows: "Looking to the general principles upon which the proceedings in this Court are conducted, it is, I apprehend, wholly incompetent to the Court to engraft a personal action against the Master as part owner of this vessel upon the proceedings which have already been taken in this cause" (*in rem*). "It may be true that the proceeds of *The Hope* will prove inadequate to answer the full amount of the damage which the owners of *The Nelson* have sustained. If so, it is undoubtedly a hardship upon these owners; but this circumstance will not entitle me to exercise a jurisdiction in their behalf, which, according to my own impression, I clearly do not possess. ***I am not aware of any case in which this Court, in a proceeding of this kind, has even engrafted upon it a further proceeding against the owners,*** upon the ground that the proceeds of the vessel proceeded against have been insufficient to answer the full amount of the damage pronounced for."

And in *The Kalamazoo* Dr. Lushington said: "I cannot think that I can engraft a personal action upon an action *in rem.*"

It is true that an owner by appearing renders himself liable to costs over and above the value of the *res;* but the cases which established this rule (*The John Dunn,* 1 Wm. Rob. 159; *The Volant,* 1 Wm. Rob. 383; *The Temiscouata,* 2 Spinks 208, and *The Freedom,* L. R. 3 A. & E. 495), apparently on the ground of preventing vexatious litigation, expressly and markedly draw a distinction between this personal liability for costs and any liability for damages in excess of the value of the *res.*

The learned Judge in *The Dictator* (1892, P. 304), also relied on a passage in the judgment of the Judicial Com-

mittee in *The Orient* (L. R. 3 P. C. at p. 702): "Where there is a remedy both *in personam* and *in rem*, a person who has resorted to one of the remedies may, if he does not get thereby fully satisfied, resort to the other." But this dictum, so far from supporting, would seem strongly opposed to the contention that "an action *in personam* can be engrafted upon an action *in rem*;" which was the proposition that the judgment in *The Dictator* purported to establish.

Personal liability.

Turning now to the question whether a maritime lien may arise independently of any personal liability on the part of the owner, we find an equal want of harmony in the English decisions.

Four cases are usually cited as sustaining the proposition that a maritime lien can only arise and be enforced against a vessel owned by persons who are personally liable to the party seeking to enforce the lien, these are: *The Parlement Belge* (5 P. D. 197); *The Castlegate* (1893, A. C. 38); *The Utopia* (1893, A. C. 492), and particularly *The Druid* (1 Wm. Rob. 391).

The Parlement Belge.

In *The Parlement Belge*, Lord Esher said, at p. 218: "In a claim made in respect of a collision the property is not treated as the delinquent *per se*. Though the ship has been in collision, and has caused injury by reason of the negligence or want of skill of those in charge of her, yet she cannot be made the means of compensation if those in charge of her were not the servants of her then owner, as if she was in charge of a compulsory pilot. This is conclusive to shew that the liability to compensate must be fixed not merely on the property, but also on the owner of the property." And like Sir Francis Jeune, Lord Esher deduced these conclusions from the course of Admiralty procedure.

The Castlegate.

In *The Castlegate*, Lord Watson said, at p. 52: "In the case of a lien for wages of master and crew the Legislature has recognized the rule that it attaches to ships independently of any personal obligation of the owner, the sole condition required being that such wages shall have been earned on board the ship. But that rule, which is founded upon obvious considerations of public policy, constitutes an exception from the general principle of the maritime law, which I understand to be that, inasmuch as every proceeding *in rem* is in substance a proceeding against the owner of the ship, a proper maritime lien must have its root in his personal liability."

In *The Utopia* this language was approved in the judgment of the Judicial Committee, in which the following words occur: "The foundation of the lien is the negligence of the owners or their servants at the time of the collision, and if that be not proved no lien comes into existence."

In *The Druid,* Dr. Lushington said: "The liability of the ship and the responsibility of the owners . . . are convertible terms; the ship is not liable if the owners are not responsible, and *vice versa,* no responsibility can attach upon the owners if the ship is exempt and not liable to be proceeded against."

These dicta at first sight seem to formidably militate against the idea of a maritime lien attaching to a ship as to a legal entity capable of contracting obligations; but a closer examination will shew that they were either not necessary to the actual decision, or were used in support of decisions irreconcilable with any theory of maritime liens at all.

In the *Parlement Belge* Lord Esher expressly states at p. 217, that any consideration of the nature of maritime liens was unnecessary in the determination of the question then before the Court: this question was as to whether the property of a foreign independent sovereign could be seized in any form of process, and the principle applicable was stated to be: "That as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its Courts, any of its territorial jurisdiction over the person of any Sovereign or Ambassador of any other State, or *over the public property of any State which is destined to its public use.* . . .

This principle might therefore be held to introduce an arbitrary exception to the general theory of maritime liens and their consequences, without having any bearing on their fundamental nature: although even this high and overbearing principle was, in the opinion of Sir Robert Phillimore in *The Charkieh* (L. R. 4 A. & E. 59), unable to affect the operation of a maritime lien.

Lord Watson in *The Castlegate,* sought support for his conclusions from the language of Lord Esher in *The Parliament Belge,* and of Dr. Lushington in *The Druid*: and moreover it is difficult to reconcile the language of Lord Watson

and the actual decision in *The Castlegate* with the express words of the statute which was being construed. Section 1 of chapter 46 of 52 & 53 Vict., which was the section in question, provides: "Every Master of a ship . . . shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of disbursements properly made on account of the ship, . . . as a Master of a ship now has for the recovery of his wages."

If then, as Lord Watson states in the case of a lien for wages of master and crew the Legislature has recognized the rule that it attaches to ships independently of any personal obligation of the owner . . . , it is difficult to see how the plain words of the Act can be cut down so as to make the master's claim for disbursements dependent on the owner's liability: how could it be said that thus rendering the master's claim for disbursements dependent on the owner's liability was giving the master "the same rights, liens and remedies for the recovery of disbursements . . . as (he) now has for the recovery of his wages."

In truth the whole error of Lord Watson's reasoning is to be found in the assumption that the rule as to wages "constitutes an exception from the general principles of maritime law," instead of seeing in the adoption by the legislature of that rule a recognition of the true theory of maritime liens.

The true ground on which the decision in *The Castlegate* and *The Turgot* (11 P. D. 21), may rest is to be found in the consideration of what is implied in the words used by the Act: "Properly made on account of the ship"; a matter which will have to be dealt with in its place.

The decision in *The Utopia* was concerned with the liability for damage by a wreck in Gibraltar Harbour, and it is not difficult to see that a principle of liability which finds its origin in the conception of a ship as a moving and animate *persona* can have no application to something which has ceased even to be a ship; moreover the language used was a mere reaffirmation of the opinions expressed by Lord Esher in *The Parliament Belge,* and Lord Watson in *The Castlegate.*

The case of *The Druid,* in which Dr. Lushington so explicitly affirmed the principle of the convertibility of the liability of owner and ship, and which was relied upon by Lord Watson in *The Castlegate,* is absolutely irreconcilable with Dr. Lushington's own decisions in *The Ticonderoga* (Sw.

215); *The Ruby Queen* (Lush, 266), and *The Edwin* (Br. & L. 281), with the decision of Sir Robert Phillimore in *The Lemington* (2 Asp. M. C. 475), and with that of Gorell Barnes, J., in *The Ripon City* (1897, P. 226); in none of which cases was there any personal liability of the owners, and in all of which a maritime lien was enforced against the offending or contracting ship. Moreover the principle of the necessity for liability on the part of the owner is in direct conflict with the fact that a maritime lien admittedly exists in the case of bottomry, and in that case is absolutely conditioned on *the absence of all personal liability on the part of the owner*.

Continuance of lien.

Again how is any such condition for the existence of a maritime lien consistent with that consequence of its attachment to the *res* which has never been controverted, viz.: "That a maritime lien travels with the thing into whosesoever possession it may come." And reverting to the rule laid down in *The Dictator* that an owner appearing may be made liable in excess of the value of the *res*, how is this rule to be consistently applied as against a mortgagee intervening in the action as he may undoubtedly do, or as against a subsequent purchaser or an owner of a demised vessel, when the master and crew in charge of the ship at the time of the inception of the obligation were the servants of the mortgagor, the former owner, or the charterers? In all these cases, notwithstanding the "personal liability of the owners," it is settled that a maritime lien does arise: are then the mortgagee, the subsequent purchasers, and the owner who has parted with possession to be liable to the full extent of the plaintiff's claim, though far in excess of the value of the *res*?

The Ripon City.

Some of these difficulties confronted Mr. Justice Gorell Barnes in *The Ripon City* (1897, P. 226); at p. 244 he thus deals with "the personal liability of the owners":—"the principle upon which owners who have handed over the possession and control of a vessel to charterers, and upon which mortgagees and others interested in her who have allowed the owners to remain in possession are liable to have their property taken to satisfy claims in respect of matters which give rise to maritime liens may, in my opinion, be deduced from the general principles I have above stated and thus expressed. As maritime liens are recognized by law, persons who are

allowed by those interested in a vessel to have possession of her for the purpose of using or employing her in the ordinary manner, *must be deemed to have received authority from those interested in her* to subject the vessel to claims in respect of which maritime liens may attach to her arising out of matters occurring in the ordinary course of her use or employment. . . ."

This, it is submitted, is a strong assumption, and it is difficult to see on what principle of law it can rest. If the mortgagee of a motor car, or the owner of a horse and cart, allows the mortgagor or the hirer to use and drive the chattels, mortgaged or hired through the agency of a chauffeur or a coachman employed and paid by the mortgagor or the hirer, would the mortgagee or the owner be liable for accidents caused by improper driving? The well settled principle of the common law is that for the acts and defaults of the servants of an "independent contractor," the independent contractor is alone liable and no obligation attaches to him with whom he has contracted: "In ascertaining who is liable for the act of a wrongdoer, you must look to the wrongdoer himself or the first person in the ascending line who is the employer and has control of the work. You cannot go further back and make the employer of that person liable." (Willes, J., in *Murray* v. *Currie,* L. R. 6 C. P. at p. 27). The same principle is to be found in the civil law. From what source, then, came the principle that—"by the maritime law, charterers, in whom the control of the ship has been vested by the owners are deemed to have derived their authority from the owners . . ." (Lord Hannen in *The Tasmania,* 13 P. D., at p. 118)? Truly this is a novel doctrine of agency evolved by "the maritime law."

The procedural theory, and its offspring, the assumption that "a proper maritime lien must have its root in the personal liability (of the owner)" leads therefore to these very serious difficulties. It necessitates the sudden creation of a doctrine of agency entirely alien and directly opposed to the doctrine as known to the common and civil law: if carried to its logical conclusion it would enforce payment of the full amount of a claim, though far in excess of the value of the *res,* against a wholly innocent mortgagee or subsequent purchaser who intervened in the cause to protect his interest in the ship; and, most formidable of all, this lien, which finds

its root in the personal liability of the owner, may live and flourish after it has been entirely severed from that root, and may be enforced against a party who was not the owner at the time of the happening of the event which gave birth to it, and who cannot even on any principle of "the maritime law" as lately manufactured, be held liable for its occurrence: in addition to which in one class of cases, viz., bottomry, the maritime lien is dependent for its existence on the fact that the owner is not personally liable.

The Bold Buccleugh.

Little attention seems to have been paid to the course which the argument took in *The Bold Buccleugh* (7 Moo. P. C. C. 267), which would seem to throw a considerable light on the subject of maritime liens, while the decision itself and the reasoning by which that decision is supported would seem totally irreconcilable with recent theories on the subject.

In *The Bold Buccleugh* a suit had been instituted in Scotland in respect of damage caused by the ship; the vessel had been arrested, released on bail, and subsequently sold to a purchaser who had no notice of the unsatisfied claim against her; she came to London, and was arrested in a proceeding *in rem*. The new owner appeared under protest, pleading: (1) *lis alibi pendens;* (2) that he was a purchaser for value without notice. Surely an excellent opportunity of testing the question whether the arrest was merely an act of procedure "having primarily for its object the satisfaction of the creditor out of the property seized." (*The Dictator,* 1892, P., at p. 313), and whether "if the defendant appeared, the procedure and effect of the action *in rem* became those of an action *in personam*" (*ibid* at p. 312); inasmuch as, if this is the true view, then, the owner having appeared in England, the action there and the action in Scotland, were equally personal actions; and moreover, the arrest in Scotland would be of a precisely similar nature to the arrest in England. And also secondly, the determination of the question whether the plea of subsequent purchase for value without notice is any defence to an action against the ship, would seem to be likely to throw light on the question whether a maritime lien must have "its root in the personal liability of the owner."

Counsel for the owner contended that "the two suits are for the same cause of action, and the practice of the Admiralty Court is against the allowance of a second suit for the same subject"—"the arrest of the steamer is in the nature of a

foreign attachment"—"a *proceeding in rem is merely to compel appearance,*" (7 Moo. P. C. 274)—"no lien attaches upon a ship for damage, *The Volant, The Druid*"—"the only reason for the arrest of the ship is, to quote the language of Dr. Lushington in *The Volant* that such 'arrest offers the greatest security for obtaining substantial justice, in furnishing a security for prompt, and immediate payment" (*ibid.* 275)—"the arrest of the ship is only to compel the appearance of the owners; if they appear, the question is then to be decided according to the interests of the parties, without reference to the liability of the ship causing the collision" (*ibid.* 279)—"if (the owners) appear, then the proceeding is *in personam*" (*ibid.* 279).

Thus the argument of counsel in *The Bold Buccleugh* might well be taken as part of the judgment in *The Dictator*: it is instructive to see upon what grounds the Judicial Committee, with this argument fresh in their minds, rest their judgment. It must be remembered that by the law of Scotland there was, at that time, no lien and the action was throughout *in personam* (Ersk. iii. sec. 37).

The judgment of the committee which was composed of Sir Frederick Pollock, the Right Honourable T. Pemberton Leigh, the Right Honourable Sir Edward Ryan, and Sir John Jervis, was delivered by the last named, and in the course of it, it was said: "It is admitted that the Court of Admiralty has jurisdiction in a case of collision by a proceeding *in rem* against the ship itself; but it is said that the arrest of the vessel is only a means of compelling the appearance of the owners; that the damage confers no lien upon the ship, and that, the owners having appeared, the question is to be determined according to the interest of the party litigant, without reference to the original liability of the vessel causing the wrong . . . In *The Johann Friederich* Dr. Lushington is reported to have said that proceedings *in rem* in the Court of Admiralty were analogous to those by foreign attachment in the Courts of the City of London. For the purpose for which that allusion was made, viz., the liability of the property of foreigners to be arrested by process out of the Court of Admiralty, and the Courts of the City of London, the two proceedings may be analogous; but in other respects they are altogether different. The foreign attachment is founded upon a plaint against the principal debtor . . . the proceeding *in rem* . . . goes against the ship in the first instance. In the former case, the proceedings are *in personam,* in the latter, they are *in rem.* The

attachment . . . is merely for the purpose of compelling appearance . . . In all proceedings *in rem* . . . the proceedings are conducted in the same form, and there is no reason for saying that a different rule is to prevail, where the foundation of the jurisdiction is a collision from that which is admitted to be the practice, when the suit is instituted for . . the recovery of wages against the ship . . . A maritime lien is the foundation of a proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process. This claim or privilege travels with the thing, into whosoever possession it may come. . . . The pleadings show that the proceedings in Scotland were commenced by process against the persons of the defendants, *and that the seizure of the vessel was collateral to that proceeding, for the mere purpose of securing the debt.* We have already explained that, in our judgment, a proceeding *in rem differs from one in personam.*"

The Judicial Committee decided therefore that the suits in Scotland and in England, "being in their nature different, the pendency of the one cannot be pleaded in suspension of the other"; and also that the vessel was liable, notwithstanding that the owner was entirely free from all liability, and did not know and had no means of knowing, that there had been any personal fault on the part of the former owners or their servants.

The Bold Buccleugh, apart from the high authority it enjoys by reason of the eminence of the then members of the Judicial Committee, was unreservedly approved by the lords who decided the case of *Currie* v. *McKnight* (1897, A. C. 97); and the foundation of reasoning upon which that decision rests seems incompatible with the degradation of a maritime lien to a mere step in procedure.

Cause of the change in the character of maritime lien.

The explanation of the course which modern decisions have followed may be this. In its origin the law administered in the Court of the Admiral was derived from the various codes of the sea, in force from Barcelona round to the Hanseatic cities, chief of which were the Laws of Oleron, and the *consolato del mar;* these codes, with the vivid gift of personification common to early codes, identified the ship as the wrongdoer, who "moved to" the death or damage of another: the English common law

knew the deodand, and therefore an English Court would be receptive to the idea of the ship as an active wrongdoer. This would account for the practice of the Admiral's Court in subjecting offending vessels to forfeiture, against which numerous complaints are found on the Parliament Rolls down to the reign of Henry VIII. Like all early Courts it strove to expand its jurisdiction, and thereby awoke the jealousy and hostility of the Courts of Common Law, which rigorously confined the jurisdiction of the Admiralty to *dealings with the ship itself*. After the reign of Charles I., the Court fell into decay, and its practice became debased and obscured until the revival of the jurisdiction in the hands of Lord Stowell. During this long period of eclipse the foundation of Admiralty jurisdiction became obscured, consisting as they did of very archaic conceptions, and the very idea of a maritime lien in all its realistic intensity became strange to the revivors of the old jurisdiction, until the eminent Judges who decided *The Bold Buccleugh* reverted to the principle which underlies the conception and restored it in all its vigour to the law of the Admiralty.

In support of the explanation thus offered, it may be noted that the Court of Common Law, while always strenuously denying any jurisdiction to the Court of Admiralty over individuals personally, and diligently prohibiting any attempted exercise of such jurisdiction, have always conceded to the Court a jurisdiction by way of lien over a *res*: the decision of Lord Holt in *Johnson* v. *Shippen* (2 Ld. Raym. 982) was historically justified, where he said—"Since the proceedings in the Court of Admiralty are against the owners, as well as against the ship, let a prohibition go *quoad* the proceedings against the owners, and let them go on to condemn the ship." These words of Lord Holt are but an echo of the articles of the 18th of February, 1633, which provided—"that if suit shall be in the Court of Admiralty, for building, amending, serving, or necessary victualling the ship *against the ship, and not against any party by name*, but such as, for his interest, makes himself a party, no prohibition shall be granted, though this be done within the realm." Moreover the *Praxis Curiæ Admiralitatis* of Clerke on which the reasoning in *The Dictator* practically rests dates from the time when the jurisdiction of the Court of Admiralty had sunk to its nadir, and when the practice of the Court had fallen into extreme confusion, due to the desperate attempts made in the reign of Elizabeth to extend its jurisdiction over persons

and the resulting struggle with the common law Judges. It would appear to be clear that the Court of Admiralty never had and never exercised a jurisdiction *in personam*, but that subsequently to 1730 certain actions for salvage and damage were entertained against owners and masters, partly on the fiction of an action *in rem* having been brought, and partly by virtue of some disciplinary jurisdiction over masters which from ancient times was supposed to reside in the Admiral (*The Elton*, 1891, P. at 269; *Reg.* v. *Judge of City of London Court* 1892, 1 Q. B. at 307). This species of personal jurisdiction had again become obsolete in Dr. Lushington's time; the last precedent having apparently occurred in 1780 (*The Clara*, Sw. at p. 3): but this anomaly together with the neglect into which maritime law had fallen contributed to the confusion of the true principles on which Admiralty jurisdiction rested. That Dr. Lushington's mind fluctuated considerably on the subject is evident from a comparison of the cases of *The Ticonderoga* (Sw. 215), *The Ruby Queen* (Lush, 266) and *The Edwin* (Br. & L. 281), in which maritime liens were given their full expression, on the one hand, with the cases of *The Druid* (1 Wm. Rob. 391), and *The Volant* (1 Wm. Rob. 383), on the other: in the last case Dr. Lushington went so far as to say that " the damage confers no lien upon the ship." The extent to which the maritime law had to be recreated may be inferred from the fact that in 1862 Dr. Lushington could find no authority on the subject of whether maritime liens took precedence over ordinary possessory liens (*The Gustaf*, Lush. 506).

It was in this state of the law that *The Bold Buccleugh* was decided in the year 1852. That decision, it is submitted affirmed the principle of maritime liens in its fullest significance, and redrew the broad line of demarcation between actions *in rem* and actions *in personam;* it established as law the third consequence which we have stated as flowing logically from the conception of the ship as an animate wrongdoer, viz.: that the lien remains attached to the ship notwithstanding any change of ownership; it rejected the idea that the arrest of the ship was a mere step in procedure as was held to be the case in Scotland: and the whole scope of the reasoning on which it is founded would seem inconsistent with any idea of a maritime lien being dependent on personal liability.

The rule that the " claim or privilege travels with the thing into whosoever possession it may come " has never been questioned. The rule that the limit of liability in an action *in rem*

was the value of the *res* was never questioned till *The Dictator,* and this decision has, it is hoped, been shown to be founded on erroneous reasoning: it is somewhat curious that in the same year as the decision in *The Dictator* the correct rule was stated by Kay, L.J., in *Reg.* v. *Judge of City of London Court* (1892, 1 Q. B. at p. 310—"it seems to me that there is considerable authority for holding that the Court of Admiralty did exercise a jurisdiction *in personam* in certain cases. It did so whenever there was a remedy by proceeding *in rem,* (the learned Judge was here referring to the fiction of which we have spoken above); *but then it limited the damages recoverable to the value of the res.*" The rule that a maritime lien must have its root in the personal liability of the owner is a modern gloss, and may be traced back from *The Utopia* through *The Castlegate* to *The Parlement Belge,* and it is remarkable that in the last case Lord Esher cited no authority in support of his statement and could not reconcile the fact that the ship remained liable notwithstanding a change of ownership otherwise than by saying —"this is a severe law, probably arising from the difficulty of otherwise enforcing any remedy in favour of an injured suitor."

It may be that the Canadian Court of Admiralty may feel bound to follow the current which appears to prevail in the modern English decisions, but there would appear to be no insuperable obstacle to the Canadian Courts reverting to the true conception of maritime liens and by so doing enabling themselves to apply the law on the subject in a manner more harmonious and consistent with principle than is possible when the principle on which that law is founded is wrenched from its true foundation and twisted and distorted in the process.

The question of whether *The Dictator* and *The Gemma* were rightly decided has very recently been discussed in the case of *The A. L. Smith and The Chinook* (51 S. C. R. 39), and conflicting opinions were delivered, though no actual decision became necessary. Idington, J., stated that the views which found expression in *The Dictator* might have to be reconsidered (*ibid.* at p. 51): Duff, J., considered himself bound by the English decisions (*ibid.* at p. 56): while Anglin, J., while holding that the question did not arise, appeared to lean against the decision in *The Dictator.*

Since 1840 modern statutes, as has been noted above, have extended the original Admiralty jurisdiction, on the one hand, adding to the cases in which maritime liens arise, and on the

other enabling actions *in rem* to be brought to enforce claims not rising to the dignity of maritime liens.

Maritime liens. At the present time the maritime liens recognized by maritime law are those in respect of bottomry and *respondentia* bonds, seaman's wages, wages disbursements and liabilities of the master, damage, salvage, life salvage, fees and expenses of a receiver of wreck, and damage sustained by the owner or occupier of lands used to facilitate the rendering of assistance to a wreck.

Statutory liens. As distinguished from maritime liens there exist certain rights conferred by statutes, which are sometimes called by analogy statutory liens: this term is intended to express the effect of an arrest of the ship in a cause of towage, mortgage, ownership, possession, building, equipping, or repairing any ship, where the ship or proceeds are under arrest of the Court at the time the cause is instituted; of necessaries supplied to any foreign ship, or to any ship elsewhere than in the port to which she belongs, unless the owner is domiciled in Canada; and for damage to cargo imported into Canada, unless the owner is domiciled in Canada.

Effect of statutory right of arrest. The rights to which effect is thus given must of course exist before the ship is seized, "for the Court adjudicates upon the ship on the ground that it had jurisdiction to seize it and realize it for the plaintiff, on account of something which happened before the seizure" (Lord Esher in *The Cella,* 13 P. D. at p. 87): but these statutory liens differ from true maritime lieus by reason of the fact that until arrest the plaintiff acquires no security over the vessel, no "real right" or *jus in rem* in the ship itself, and therefore such statutory lien is of no avail against any valid charge on the ship subsisting at the time of arrest, nor against a purchaser for value in good faith whose title antedates the arrest; (*The Henrich Bjorn,* 11 A. C. 270, per Lord Watson, at p. 277; *The Piève Superiore,* L. R. 5 P. C. 482) nor does the fact of notice of the claim confer any greater right upon the plaintiff (*The Aneroid,* 2 P. D. 189).

Proceedings *in personam*. With regard to actions *in personam,* the Court of Admiralty, as has already been noticed, possessed no true inherent jurisdiction. Apart from cases of disciplinary jurisdiction, such as those noticed in *Reg* v. *Judge of City of London Court* (1892, 1 Q. B. 273), the Court exercised a jurisdiction *quasi in personam* in salvage action by means of a fiction which is explained in *The Elton* (1891, P. 265), and in *The Cargo ex Schiller* (2

P. D. 145): in *The Elton*, Jeune, J., said, at p. 269"—but although salvage suits, in the form of actions *in personam*, are comparatively rare, the Court of Admiralty always (*sic*) had jurisdiction, founded apparently on the fiction of an action *in rem* having been brought and the property salved having been allowed to be taken by the owners, to entertain such suits when at least there existed a *corpus* of property salved": and Brett, L.J., in *The Cargo ex Schiller* thus expressed himself at pp. 150, 151, in speaking of the nature of a salvage action—"the jurisdiction of the Admiralty is founded on the possibility of a proceeding *in rem* . . . the whole remedy (for salvage) is evidently founded on Admiralty remedy, which, although it does not shut out a remedy by suit *in personam* either in the Admiralty Court, or mayhap, in some other division of the High Court, yet shows that it is a remedy for a salvage claim, *which imports . . . the possibility of a suit in rem.*"

The proceedings, which were by monition, always commenced by the suing out of a warrant for the arrest of the ship, until this practice, which clearly shows the nature of the fiction, was abolished by the Admiralty Court Act, 1854, (17 & 18 Vict. cap. 78, sec. 13): and it was assumed that an action *in rem* was actually pending, so that all rights were tacitly reserved.

Since 1861, however, the Court of Admiralty has had a true jurisdiction *in personam* over all matters, as to which jurisdiction has been conferred on it by the Admiralty Court Act, 1861, (24 Vict. cap. 10), viz., claims for building, equipping, or repairing of ships where the ship or proceeds are under arrest of the Court at the time the cause is instituted; for necessaries supplied to any ship elsewhere than in the port to which she belongs, unless the owner is domiciled in Canada; for damage to cargo imported into Canada, unless the owner is domiciled in Canada; for damage done by any ship; for seamen's wages; for wages and disbursements of the master; or in respect of any duly registered mortgage; or in respect of the ownership, possession, employment, and earnings of any ship registered in Canada.

The various statutes which have conferred additional jurisdiction over the subjects mentioned above, together with other miscellaneous matters, upon the High Court of Admiralty, and the High Court in England and so, by virtue of sub-section 2 of section 2 of the Colonial Courts of Admiralty Act, 1890, upon the Exchequer Court of Canada, will be dealt with in connection with their appropriate subjects.

It remains to consider the territorial area within which the Exchequer Court of Canada may exercise its Admiralty jurisdiction: and it is very necessary to keep this question distinct from the entirely different question as to the jurisdiction of the Court over claims by and against foreigners and foreign ships in respect of matters which have arisen in foreign waters or on the high seas.

Territorial area of jurisdiction.

Section 4 of the Admiralty Act, 1891 (54 & 55 Vict., cap. 29, Can.) provides that—"such jurisdiction, powers, and authorities (of the Exchequer Court of Canada) shall be exercisable and exercised by the Exchequer Court throughout Canada and the waters thereof, whether tidal or non-tidal, or naturally navigable or artificially made so, and all persons shall, as well in such parts of Canada as have heretofore been beyond the reach of the process of any vice-Admiralty Court, or elsewhere therein, have all the rights and remedies in all matters (including cases of contract and tort and proceedings *in rem* and *in personam*), arising out of or connected with navigation, shipping, trade, or commerce, which may be had or enforced in any colonial Court of Admiralty, under the "Colonial Courts of Admiralty Act, 1890."

Admiralty Act 1891.

It will be observed that the first part of this section deals with the area *within which the jurisdiction is to be exercised*, and in no way concerns itself with the locus where the events have happened which give rise to the claim sought to be enforced nor with the nationality of the ships by or over which the jurisdiction is sought to be exercised. Nevertheless in *The D. C. Whitney* (38 S. C. R. 303), an attempt was made to found upon this section the proposition that the jurisdiction was "limited to cases of Canadian ships in Canadian waters." Mr. Justice Davies, who delivered the judgment, concurred in by the majority of the Court, declined to discuss this question, holding that it did not arise (*ibid* pp. 309, 310); but Mr. Justice Idington, in the course of his dissenting judgment, expressed himself very clearly on this point: he said at p. 319—"one or two observations may be made upon these sections (The Admiralty Act, 1891, sections 3 and 4) as it is urged that in some way or other the Exchequer Court of Canada, in the exercise of its powers, must be held to be upon a different footing from the High Court in England. I am unable to find any reasons for such a contention. The jurisdiction of the Court must be exercised within Canada. Again it must be exercised throughout Canada and the waters thereof. These terms designate the place within which the jurisdiction

The D.C. Whitney

is to be exercised; and the place within which the appellant came and was seized clearly and indisputably was within the area designated. *That by no means implies that the offences or the contract out of which the necessity for proceedings may arise, in rem, or in personam, must have taken place within Canada or upon the waters thereof."* The learned Judge then, after referring to the latter part of section 4 which gives jurisdiction in all matters "arising out or connected with navigation, shipping, trade, or commerce," the right and remedies for which "may be had or enforced in any Colonial Court of Admiralty under the 'Colonial Courts of Admiralty Act, 1890,'" proceeded—"it seems to me as if to all intents and purposes the result is just the same as if the Parliament and sovereign power that enacted the "Colonial Courts of Admiralty Act, 1890," had constituted the Canadian Court a branch of the High Court in England, for convenience sake, to exercise the powers which that Court might at the time of the passing of the Act have been endowed with."

It is clear that in an action *in rem,* jurisdiction attaches by the seizure of the *res* within the territorial sphere of action of the Court whose aid is invoked (*Castrique* v. *Imrie,* L. R. 4 E. & I., per Blackburn, J., at 429), quite irrespective of the locality of the wrong or obligation leading to the suit: it would seem then that the opening words of section 4 of The Admiralty Act, 1891, should be construed, in accordance with the opinion of Mr. Justice Idington, as intended merely to define the territorial ambit of the Court's action, rather than as intended to effect so radical a change in the principles of maritime law.

Jurisdiction over foreign ships.

While it is true that the seizure of the *res* within the Court's local sphere of action at the time of the institution of the suit is a necessary condition of the Court's exercise of jurisdiction, it is not invariably sufficient: American Courts appear to be readier to exercise jurisdiction over foreign ships in respect of matters arising in foreign waters than English Courts: in *The D. C. Whitney* (10 Ex. C. R. 1), the learned Judge in a very learned judgment gave numerous instances to show the large and generous manner in which American Courts had accepted and exercised such jurisdiction, but in Courts governed by the English Admiralty law, it is necessary to distinguish between the several classes of causes, and no general rule can be laid down as to the exercise of jurisdiction by an English Admiralty Court over foreign ships in regard to matters arising in foreign waters or even on the high seas.

Causes of collision and salvage.

It has long been held that all questions of collision and salvage are, as it is said, *communis juris*, "and are *prima facie* proper subjects of inquiry in any Court of Admiralty which first obtains jurisdiction (by seizure) of the rescued or offending ship, at the solicitation in justice of the meritorious or injured parties."

The earliest recorded case is that of *The Two Friends* (1 C. Rob. 271), before Lord Stowell, where a claim for salvage was made by British subjects in respect of an American ship alleged to have been rescued from the enemy on the high seas.

This case was expressly followed by Dr. Lushington in *The Johann Friederich* (1 W. Rob. 35), where a Danish ship was sunk on the high seas by a vessel belonging to the free city of Bremen; both ships being thus foreign bottoms.

In *The Diana* (Lush. 539), the collision occurred in foreign waters between British vessels, but in *The Courier* (Lush. 541), not only did the collision occur in foreign waters, but both vessels were also foreign, and nevertheless Dr. Lushington undertook to exercise jurisdiction.

In *The Hiawatha* (7 Ex. C. R. 446), a case of collision, both vessels were of American register and the place of collision was in American waters: in *The Calvin Austin* (9 Ex. C. R. 160), the collision occurred in American waters, and the wrongdoing ship was American, but the ship damaged was of British register.

In *The A. L. Smith and The Chinook* (51 S. C. R. 39) the collision occurred in American waters between American vessels: moreover shortly after the collision, the owner of the delinquent ship brought an action in the United States to limit the liability of the *A. L. Smith* and the extent of her liability was fixed at $1,500. Later the wrongdoing ships were seized in Canadian waters, and it was held that the proceedings in the United States court did not oust the Canadian court of jurisdiction.

Lis alibi pendens.

Moreover the actual pendency of a suit in a foreign Court does not necessarily prevent the institution of a suit *in rem* in the British Court. In *The Reinbeck* (6 Asp. M. C. 366), a German vessel had caused damage to a British ship in the Bosphorus, and the owners of the British ship sued the German vessel (*The Reinbeck*) in the German Consular Court at Constantinople: an order was there made for the arrest of *The Reinbeck* or

for bail, on the plaintiffs giving security: the plaintiffs never gave security and consequently *The Reinbeck* was never arrested, but the defendants voluntarily put in bail: subsequently *The Reinbeck* came to England where she was arrested in an action *in rem* for the same cause of action: the Court of Appeal, upholding the decision of Butt, J., refused to order the action to be stayed and *The Reinbeck* to be released: the judgments of the Court of Appeal lay stress on the fact that the bail was voluntarily given, but they all affirm the principle that there was jurisdiction in the Court to entertain the action and that the fact of bail having been given was merely a matter to be taken into consideration in exercising the discretion to stay the action. The case of *The Charlotte* (23 T. L. R. 750), went further in two directions: both ships were Norwegian vessels, the collision occurred on the high seas, and the offending ship had been actually arrested and released on bail in an action in the Norwegian Courts: Mr. Justice Bargrave Deane, nevertheless refused to stay an action brought in the English Admiralty Court. In *The Christiansborg* (10 P. D. 141), the majority of the Court of Appeal did indeed order the release of the vessel arrested in England after having given what the Court considered the equivalent of bail in the Admiralty Court in Holland, but no doubt was expressed as to the jurisdiction of the English Court to entertain the action, and the decision of the majority of the Court went on the ground that the institution of the second action was against good faith, and that the English Court having rightfully exercised its jurisdiction to entertain the action, would exercise another jurisdiction, viz., to stay the action as vexatious. A statutory power is also conferred by section 688 of the Merchant Shipping Act, 1894 (57 & 58 Vict. cap. 60), upon any Court of record in the United Kingdom to detain any foreign ship found in any port or river of the United Kingdom or within three miles of the coast thereof where such foreign ship has caused an injury to any property belonging to His Majesty or to any of His Majesty's subjects.

Causes of possession and co-ownership.

In actions of possession and co-ownership the Court will only exercise jurisdiction over foreign ships with the consent of the representative of the foreign state to which the ship belongs or on the invitation of a competent Court of such foreign state, (*The See Reuter,* 1 Dod. 23; *The Evangelistria,* 46 L. J. Ad. 1; *The Agincourt,* 2 P. D. 239); the theory apparently being that by such consent or invitation the jurisdiction of the foreign court is devolved on the English Court.

In regard to mortgages the Court has jurisdiction by virtue of section 3 of the Admiralty Court Act, 1840, (3 & 4 Vict. cap. 65) to determine suits concerning mortgages on foreign ships where the ship or the proceeds thereof are under arrest of the Court; and this jurisdiction was exercised in the case of *The Tagus* (1903, P. 44).

Causes of mortgage.

In causes of bottomry and *respondentia*, the Court has always exercised the widest jurisdiction where the bond is granted by the master of a foreign ship in this country or abroad, or by the master of a British ship abroad (*The Bonaparte*, 3 W. Rob. 298, 8 Moo. P. C. C. 459; *The Gaetana and Maria*, 7 P. D. 137; *The Constancia*, 10 Jur. 845). And just as the Court has jurisdiction over pledges granted by a master of a foreign ship, it has equally jurisdiction over cases of sale in similar circumstances (*The August*. 1891, P. 328).

Causes of bottomry.

Over claims for necessaries, the Court has jurisdiction by virtue of sec. 6 of the Admiralty Court Act, 1840 (3 & 4 Vict. cap. 65) and sec. 5 of the Admiralty Court Act, 1861 (24 Vict. cap. 10), and this jurisdiction extends over claims for necessaries supplied to any foreign ship at a time when such ship was in a British or Colonial port, or on the high seas, or in a foreign port on the high seas (*The Anna*, 1 P. D. 253; *The Wataga*, Sw. 165; *The India*, 32 L. J. Ad. 185; *The Ocean*, 2 W. Rob. 368; *The Mecca*, 1895, P. 95); and also over claims for necessaries supplied to any foreign ship elsewhere than in the port to which the ship belongs, unless at the time of the institution of the suit, any owner or part owner were domiciled in Canada (*The Mecca*, 1895, P. 95).

Causes of necessaries.

In claims for towage services rendered to foreign ships, the Court has exercised jurisdiction in the cases of *The Hjemmett* (5 P. D. 227) and *The St. Lawrence* (5 P. D. 250): in both these cases, the services were rendered in English waters, and in *The Constancia* (10 Jur. 845), it does not clearly appear where the towage services were rendered, though it seems probable that they were rendered in bringing the vessel back to the French port of Babia. It seems that the Court of Admiralty had an inherent jurisdiction in matters of towage (*The Henrich Bjorn*, 11 A. C. *per* Lord Bramwell, at p. 283), and if this be so, then the Court would, by analogy to its jurisdiction in other causes, have jurisdiction wherever the services were rendered, provided the ship were seized within the territorial jurisdiction. In cases coming under sec. 6 of the Admiralty Court Act, 1840 (3 & 4 Vict., cap. 65), there is jurisdiction over towage services rendered

Causes of towage.

to foreign ships at a time when such ship was in a British or Colonial port, or on the high seas, or in a foreign port on the high seas, but not in a foreign port, which is not part of the high seas (*The Mecca,* 1895, P. at p. 112).

Causes of wages and disbursements.

The Court has jurisdiction to entertain both actions for wages (*The Union,* Lush. 128) and actions for disbursements (*The Tagus,* 1903, P. 44) over foreign ships, nor is the nationality of the seamen or master material: in *The Golubchick* (1 W. Rob. 143), the suit was instituted by Spanish seamen for wages earned on board a Russian ship, sailing under Russian colours from Marseilles to Barcelona: in *The Herzogin Marie* (Lush. 292), the claim was against a vessel belonging to the port of Rostock in Mecklenburg Schwerin by the master, apparently a national of the Grand Duchy: in *The Union* (*ubi supra*), the claim was by French sailors against a French ship: in *The Tagus* (*ubi supra*), the claim was against an Argentine vessel by the master, a subject of the Argentine Republic, for wages and disbursements. Moreover, "it is clear that the Court, though there is express provision in the articles that seamen bind themselves to go before the tribunals of the country to which the ship belongs, is not ousted of its jurisdiction" (*The Leon XIII.,* 8 P. D. at 124). But although the consent of the representative of the foreign state is not essential to found the jurisdiction of the Court in such suits, yet it is necessary that notice of intended proceedings should be given in the first instance to the foreign minister or consul of the state to which the vessel proceeded against belongs (Admiralty Court Rules, R. 37 (a)); and if such foreign representative objects to the proceedings, the Court will exercise its discretion as to whether the suit should be entertained. "If all that the foreign consul does is to protest without giving reasons, then the Court of Admiralty will proceed with the action, but if he gives reasons, then the Court of Admiralty will inquire into them and allow his allegations to be contradicted. When it has entered into the facts, it will proceed to exercise its discretion" (*The Leon XIII.,* 8 P. D. at 124): and "if the matter in dispute (is) so connected with the municipal law of a foreign country, that (the) Court would be incompetent to render impartial justice, in such cases, undoubtedly, the Court (will) decline to adjudicate" (*The Golubchick,* 1 W. Rob. at 148). And this is equally the case, even when the plaintiff is a British subject (*The Nina,* L. R. 2 A. & E. 44; *The Leon XIII.,* 8 P. D. 121).

Causes of damage to cargo.

In certain cases of claims for damage to cargo, the Court has jurisdiction by virtue of sec. 6 of the Admiralty Court Act, 1861 (24 Vict. 10), and this jurisdiction extends over foreign ships (*The Ironsides,* Lush. 458; *The Bahia,* Br. & Lush. 61; *The Industrie,* 1894, P. 58); nor is it material that the cargo was not destined to be imported into Canada, but it is sufficient that it has been "carried into any port in Canada" on the way to its port of destination (*The Bahia,* Br. & Lush. 61; *The Patria,* L. R. 3 A. & E. 436).

Causes of limitation of liability.

Liability can only be limited under the Canada Shipping Act (R. S. C. 1906, c. 113, sections 920, et seq.) in cases where the collision occurred in Canadian waters, but the Merchant Shipping Act (57 & 58 Vict., c. 60, sec. 503) applies to foreign vessels when before British courts in respect of collisions which occur either in British territorial waters or on the high seas (per Anglin, J., in *The A. L. Smith,* 51 S. C. R. at p. 71): but there may be a doubt as to the proper court to exercise this jurisdiction. By sec. 504 of the Merchant Shipping Act, 1894 (57 & 58 Vict. cap. 60), jurisdiction is given to entertain suits for limitation of liability by the owner of any foreign ship who is alleged to be liable in respect of loss of life, personal injury, or loss of or damage to vessels or goods; by the words of the section, the jurisdiction is conferred on "any competent Court" in a British possession, and it may be that any Canadian Court is able to entertain such actions for matters not arising on the high seas, but with regard to all matters arising "outside the body of a county," it would seem that the Exchequer Court is the only "competent Court" by virtue of sec. 2, sub-sec. 4 of the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. cap. 27): "Where a Court in a British possession exercises in respect of matters arising outside the body of a county or other like part of a British possession, any jurisdiction exercisable under this Act, that jurisdiction shall be deemed to be exercised under this Act, and not otherwise." The effect of this obscure provision would appear to be to prohibit any Court other than the Exchequer Court from exercising Admiralty jurisdiction; inasmuch as the only "jurisdiction exercisable under this Act" is "the Admiralty jurisdiction of the High Court in England" (53 & 54 Vict. cap. 27, sec. 2, sub-sec. 2), and the only Court in Canada which can exercise the jurisdiction given by the Colonial Courts of Admiralty Act, 1890, is the Exchequer Court. Seeing, how-

ever, that the common law Courts have, of course, no Admiralty jurisdiction, this sub-section could only apply to some statute containing words such as those in this sec. 504 of the Merchant Shipping Act, 1894, which read in their widest sense and without the restraining effect of sub-sec. 4, might be construed as enabling any common law Court to entertain certain actions for matters even arising on the high seas. The special difficulties in ascertaining to what extent the Exchequer Court may exercise jurisdiction under the Merchant Shipping Act, 1894, will be dealt with later.

Territorial area of jurisdiction.

Having considered the jurisdiction of the Court in respect of foreign ships and matters arising in foreign waters, it remains to ascertain the local area within which that jurisdiction may be exercised; this local area is defined by sec. 4 of the Admiralty Act (R. S. C. 1906, cap. 141), as "Canada, and the waters thereof, whether tidal or non-tidal, or naturally navigable or artificially made so." Instead, however, of describing the boundaries of Canada as a whole, it will be more convenient to describe the boundaries of the maritime provinces, inasmuch as by sec. 18 of the Admiralty Act (R. S. C. cap. 141), provision is made as to the district registry in which a suit may be instituted, and by sec. 7 of the same Act, the existing districts are defined to consist of the provinces of Ontario, Quebec, Nova Scotia, New Brunswick, British Columbia, and Prince Edward Island.

Admiralty districts.

Boundaries: Nova Scotia, New Brunswick, Quebec, Ontario.

The southern boundary of Nova Scotia, New Brunswick, Quebec, and Ontario may be described continuously: it runs from Cape Breton to Cape Sable, including the island of that name and all other islands within forty leagues of the coast; thence westward on a line drawn from Cape Sable across the Bay of Fundy to the mouth of the River St. Croix (Commission to Governor Paterson, 1769) : this line passes southerly and westerly of the Grand Manan group of islands and of the majority of those in Passamoquoddy Bay (Article IV. of the Treaty of Ghent, 1814, and decision of the Commissioners under that article of the 24th of November, 1817) : the boundary then passes up the middle of the river St. Croix to its source (Article II. of the Treaty of Paris, 1783) : from the source of the St. Croix, the line is traced through various streams to the point where the 45th parallel strikes the south bank of the St. Lawrence (Article I. of the Ashburton Treaty, 1842) : from this point on the St. Lawrence, or as it is called in the Treaty of Paris, the Iroquois or Cataraquy, the boundary runs along the middle of the river

into Lake Ontario; passes through the middle of that lake, and of the Niagara River, Lake Erie, Detroit River, Lake St. Clair, River St. Clair, Lake Huron and the lower part of the St. Mary River to the foot of the Neebish Rapids (Article II. of the Treaty of Paris, 1783, Article VI. of the Treaty of Ghent, 1814, decision of the Commissioners under that article of the 18th of June, 1822): from this point in the Neebish Channel, near Muddy Lake, the line runs into and along the Ship Channel, between St. Joseph's and St. Tammany Islands, to the division of the channel at or near the head of St. Joseph's island; thence turning eastwardly and northwardly around the lower end of St. George's or Sugar Island, and following the middle of the channel which divides St. George's from St. Joseph's Island; thence up the east Neebish Channel nearest to St. George's Island through the middle of Lake George; thence west of Jona's Island into St. Mary's River, to a point in the middle of that river about one mile above St. George's or Sugar Island, so as to appropriate that island to the United States; thence through the River St. Mary and Lake Superior to a point north of Ile Royale, one hundred yards to the north and east of Ile Chapeau; thence south-westerly through the middle of the Sound between Ile Royale and the north-west mainland to the mouth of the Pigeon River, and up the said river to and through the north and south Fowl Lakes to the lakes of the height of land between Lake Superior and the Lake of the Woods, thence to the north-west angle of the Lake of the Woods (Article VI. of the Treaty of Ghent, 1814, Article II. of the Ashburton Treaty, 1842).

Ontario.

The westerly, northerly and easterly boundaries of the Province of Ontario were fixed by the Canada (Ontario Boundary) Act (52 & 53 Vict. c. 28): so far as is material, they are as follows:—Commencing at the north-west angle of the Lake of the Woods, the line passes through various lakes and rivers to the outlet of Lake St. Joseph; thence along the middle line of the river by which the waters of Lake St. Joseph discharge themselves to the shore of the part of Hudson's Bay, commonly known as James' Bay; thence south-easterly, following the said shore to a point where a line drawn due north from the head of Lake Temiscamingue would strike it; thence due south along the said line to the head of the said lake; thence through the middle channel of the said lake into the Ottawa River; thence along the middle of the Ottawa River past several seigneuries to a stone boundary on the north bank of the Lake St. Francis, at the

cove west of Point au Baudet, as shown on a plan approved by order of the Governor-General in Council, dated the 16th of March, 1861.

Quebec.

The westerly boundary of the Province of Quebec is the easterly boundary of Ontario, the southerly boundary so far as it borders on the United States has already been traced, and so far as it borders on New Brunswick it runs, as to the material part, down the centre of the stream of the Restigouche to its mouth in the Bay of Chaleurs and thence through the middle of that bay to the Gulf of St. Lawrence (14 & 15 Vict. cap. 63): to the east it is bounded by the Gulf of St. Lawrence, including the Magdalene Islands, Anticosti and all other islands within six leagues of the coast of the Gulf of St. Lawrence (6 Geo. IV., cap. 59: Commission to Governor Paterson, 1769).

Nova Scotia.

The Province of Nova Scotia is bounded on the north by a line commencing at the mouth of the Missiquash River in Cumberland Bay, and thence following the several courses of the said river to a post near Black Island; thence north fifty-four degrees twenty-five minutes east, crossing the south end of Black Island, two hundred and eighty-eight chains, to the northerly angle of Trenholm Island; thence north 37 degrees east 85 chains and 82 links to a post; thence north 76 degrees east 46 chains and 20 links to the portage; thence south 65 degrees 45 minutes east 394 chains and 40 links to Sidnish Bay; thence following the several courses of Sidnish River along its northern upland bank to its mouth; thence following the north-westerly channel to the deep waters of the Bay Verte (C. S. 1903, cap. 189, sec. 9 D, Commission to Governor Carleton, 1784): on the east by the Gulf of St. Lawrence, "including all islands within six leagues of the coast" (Commission to Governor Paterson, 1769): and on the west by a line drawn from the centre of the line from Cape Sable to the River St. Croix, through the centre of the Bay of Fundy to the mouth of the Musquat or Missiquash River (Commission to Governor Carleton, 1784).

New Brunswick.

The boundaries of the Province of New Brunswick on the south, west, and north have already been given in describing the north boundary of Nova Scotia, the southern boundary of Canada, and the southern boundary of Quebec; in reference to this latter boundary it is to be noted that the islands in the Rivers Mistouche or Patapedia, and Restigouche to

the mouth of the later river at Dalhousie are given to New Brunswick (14 & 15 Vict., cap. 63, and 20 & 21 Vict., cap. 34): On the east the Province is bounded by the Gulf of St. Lawrence including all islands within six leagues of the coast. (Commission to Governor Paterson. 1769.)

Boundaries of British Columbia.

The boundaries of the province of British Columbia were fixed by the Imperial Statute of 26 & 27 Vict., cap. 83, but merely by reference to former treaties: so far as is material they are as follows—the southern boundary runs along the forty-ninth parallel of north latitude to the middle of the channel which separates the continent from Vancouver Island, thence southerly through the centre of that channel, of the Canal de Haro and of Fuca's Straits, to the Pacific Ocean (Article I. of the Treaty of Washington, 1846, Article I. of the Treaty of Washington 1871 and decision of the Arbitrator thereunder): the western boundary is the Pacific Ocean; and the northern boundary is a line commencing at Cape Muzon, running due west and then north through the Portland Channel to the northward of Pearse and Wales Island to the fifty-sixth degree of north latitude (Articles III. and IV. of the Treaty of St. Petersburgh. 1825. and award of the Alaska Boundary Tribunal, 1903).

Territorial waters.

It is also to be remembered that "the rightful jurisdiction of His Majesty . . . extends and has always extended over the open seas adjacent to the coasts . . . of all . . . parts of His Majesty's dominions to such a distance as is necessary for the defence and security of such dominions (41 & 42 Vict., cap. 73, preamble). These "territorial waters," i.e., "such part of the sea adjacent to the coast of some . . . part of His Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of His Majesty" (41 & 42 Vict., cap. 73, sec. 7), are variously defined as the waters within from thirty to three miles of low water mark, and the exact nature and extent of this "territorial sovereignty" are uncertain (*Reg.* v. *Keyn*, 2 Ex. Div. 63); but it is generally assumed that the territorial waters of a state include the sea to a distance of a marine league from low water mark. This is the limit within which an offence committed on the open sea is deemed to be "an offence within the jurisdiction of the Admiral" (41 & 42 Vict., cap. 73, sec. 2). But this statute, the Territorial Waters Jurisdiction Act, 1878, is directed purely to criminal jurisdiction; and the "inter-

Criminal jurisdiction.

national law" of which that statute makes mention is shown by the various judgments in *Reg.* v. *Keyn* (*ubi supra*) to be far from being settled and definite. With regard to criminal matters it may be doubtful whether the Exchequer Court does not possess some jurisdiction: the statutes of the 28th Henry VIII., cap. 15, and of the 4th and 5th Wm. IV., cap. 36, transferred the trial of indictable offences to the common law Courts, and the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict., cap. 27), provides by section 2, sub-section 3 (c) that "a Colonial Court of Admiralty shall not have jurisdiction under this Act to try and punish a person for an offence which according to the law of England is punishable on indictment." It is true that the same statute speaks of the Court which is to exercise the jurisdiction thereby conferred as a Court having "original unlimited *civil* jurisdiction," but in view of the restriction in sub-section 3 (c) of offences not to be tried to offences "punishable on indictment," it may be that the Exchequer Court would have jurisdiction over minor criminal or quasi-criminal offences.

Civil jurisdiction.

The Exchequer Court therefore has at any rate jurisdiction in civil matters over all ships and persons found within "Canada and the waters thereof" (The Admiralty Act, R. S. C., cap. 141, sec. 4), as defined above, including the territorial waters, in respect of matters which have arisen (1) on the high seas, or (2) within the body of a county. This jurisdiction as to matters arising on the high seas is inherent, and extends to all causes which are subjects of maritime jurisprudence: but with regard to matters arising within the body of a county this jurisdiction is wholly dependent on statute.

High seas.

The expression "high seas," when used with reference to the jurisdiction of the Court of Admiralty, includes all oceans, seas, bays, channels, rivers, creeks and waters below low-water mark, where great ships do generally go (Lindley, L.J., in *The Mecca,* 1895, P. at 107, Blackburn, J., in *Reg.* v. *Anderson,* L. R. 1 C. C. R. at 168); while the body of a county includes all land above low-water mark, and the space between the flux and reflux of the tide or the land up to the furthest point at which the tide recedes (Sir R. Phillimore in *Reg.* v. *Keyn,* 2 Ex. Div. at 71). A port may be on the high seas, as Simon's Bay (*The Wataga,* Sw. 165), Quebec (*The Anna,* 1 P. D. 253), or Alexandria and Algiers (*The Mecca,* 1895, P. 95).

Intra corpus comitatis.

The high seas, so defined, constitute the original area of jurisdiction of the Court of Admiralty, which possesses jurisdiction over matters arising within the body of a county only by virtue of some statute.

The great lakes.

The legal character of the great lakes bordering on the province of Ontario would seem to be doubtful: in *Reg.* v. *Sharp* (5 P. R. 135), it appears to have been held that Lake Erie was part of the high seas: it is difficult to disentangle what character the learned Chief Justice assigned to Lake Huron in *Rex* v. *Meikleham* (11 O. L. R. 366); he states that "it is not open to question that the province of Ontario extends to the line in Lake Huron which forms the western boundary of the British possessions . . .," but he goes on to notice the decision in *Reg.* v. *Sharp* without disapproval. The subject is dealt with in R. S. O. 1897, cap. 3, which provides by section 7 that: "the limits of all the townships lying on the River St. Lawrence, Lake Ontario, the River Niagara, Lake Erie, the River Detroit, Lake St. Clair, the River St. Clair, Lake Huron, the River St. Mary's, and Lake Superior, shall extend to the boundary of the province in such lake or river, in prolongation of the outlines of each township respectively; and unless herein otherwise provided, such townships shall also include all the islands, the whole or the greater part of which are comprised within the said outlines so prolonged." It would seem from this section that these waters are directly brought *intra corpus comitatum.*

The D.C. Whitney.

In connection with the question of the jurisdiction of the Court of Admiralty over foreign vessels, there remains to be noticed a case in the Supreme Court of Canada, remarkable not so much for the decision as for the reasons given for it: in *The D. C. Whitney* (38 S. C. R. 303), the ship arrested was an American vessel which had come into collision with another American vessel at Sandusky in the state of Ohio on the 28th of November, 1901: the action was commenced in the registry of the Toronto Admiralty District by the issue of a writ *in rem* on the 30th of October, 1902, affidavits were sworn and a warrant issued; and after these proceedings were had the offending vessel came into Canadian waters, and was boarded and arrested while in motion proceeding up the River Detroit.

Mr. Justice Davies, who delivered the judgment of the majority of the Court holding the arrest invalid, appears in the early part of his judgment to have based the decision upon

the right of free navigation given equally to American and British ships by Article VII. of the Ashburton Treaty of 1842. It is extremely difficult to see what bearing on the question of jurisdiction this particular article could have: as was said in *People* v. *Tyler* (3 Cooley 161, 233):—"This is no more than the innocent use of the water, without any surrender of jurisdiction, according to the principles of international law . . . certainly it cannot be claimed that the provision can detract from, in any respect, the entire and exclusive jurisdiction which each party had, in its own water, over persons there being or passing, any more than if this right of passage had been given to either over the lands of the other. . . . It is too clear to admit of any doubt that there is nothing in any of these Articles depriving the British Government of that complete and exclusive jurisdiction over that part of the lakes and rivers on her side of the boundary line, which any nation may exercise upon the land within her acknowledged territorial limits." The learned Judge in *The D. C. Whitney* went on to say:—"Jurisdiction only attaches over the *res* when it comes or is brought within the control or submits to the jurisdiction of the Court and not till then. Such jurisdiction does not exist against a ship passing along the coast in the exercise of innocent passage or through channels or arms of the sea which, by international law or special convention, are declared free and open to the ships of her nationality, unless expressly given by statute. I do not think it is possible successfully to argue that the right to initiate an action, make affidavits and issue a warrant, can exist before the foreign ship even comes within our territorial jurisdiction."

It is not obvious why so much stress should have been laid on the innocent character of the vessel's passage through Canadian waters; the Ashburton Treaty would seem to have been directed against a closing of the lakes to American ships, and the passage through these waters of an American vessel under that Treaty is no more innocent than the entry of a vessel into the port of a friendly power. As was pointed out by Idington, J., in his dissenting judgment, it is too late in these days to deny jurisdiction to a Court of Admiralty over collisions between foreign ships in foreign waters, and the only real question for decision in the action would seem to have been one of practice, viz., whether the writ can be issued and the warrant sued out before the offending vessel has come into Canadian waters.

In *The A. L. Smith* and *The Chinook* (51 S. C. R. 39) the facts were as follows: both the wrongdoing vessels, the tug and the tow, were American bottoms, as was also the injured barge at the time of the collision: the collision occurred in American territorial waters: the action was commenced in the Exchequer Court on the 14th April, 1913, and on the 12th May, 1913, the ships were arrested in Canadian waters: proceedings to limit the liability of the delinquent ships had been instituted in an United States Court on the 4th December, 1912, with what result did not appear. Nevertheless it was held that there was jurisdiction in the Canadian courts to entertain the action. In the Exchequer Court stress was laid on the fact that the owners of the delinquent ships had submitted to the jurisdiction by the express words of the bond given to secure the release of the ships, but no attention appears to have been paid to this fact in the Supreme Court of Canada by any member of the court except Anglin, J., who together with Davies, J., dissented, and in spite of the formal submission in the bond, considered that the action in the Canadian courts should be stayed pending completion of the proceedings in the courts of the United States. The reasons which moved the majority of the Court to overrule the plea to the jurisdiction appear to have been that the proceedings in the United States Court were directed only to limit the liability of the tug, while in the view of the majority of the Court, the tow was equally liable. In view of the express words of the bond and of the reasons given by the majority of the Court, the case is not a satisfactory authority on the jurisdiction over foreign ships; and unfortunately it is not stated whether the delinquent ships had entered Canadian waters before the writ was issued, so as to resolve the doubt expressed in *The D. C. Whitney,* although it may be inferred from the statement of facts given in the lower court (15 Ex. C. R. at p. 116) and on appeal (51 S. C. R. at p. 51) that the writ at least was issued before the ships came into Canadian waters.

Admiralty law, nature of.

Having dealt with the question of jurisdiction, there remains to be considered the character of the law applied in the Exchequer Court on its Admiralty side. By the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict., cap. 27), sec. 2, subsec. 2, the Exchequer Court may exercise its jurisdiction "in like manner . . . as the High Court in England"; and "the law which is administered in the Admiralty Court of

England is the English maritime law. It is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty either by Act of Parliament or by reiterated decisions and traditions and principles has adopted as the English maritime law" (Brett, L.J., in *The Gaetano and Maria,* 7 P. D. at p. 143). Much of this tradition and many of these principles may be traced back to the Digest and the various ordinances of the maritime states, such as the Consolato del Mar, and the laws of the Rhodians, of Oleron, of Wisbey, and the Hanse towns; but none of these codes are of themselves any part of the Admiralty law of England, unless they, or rather the principles they embody, have been incorporated into "the continuous practice and the judgments of the great Judges who have presided in the Admiralty Court, and the judgments of the Courts at Westminster." (Lord Esher in *The Gas Float Whitton, No. 2* (1896, P. at 47).)

Sources.

The various principles of admiralty law will be dealt with under their appropriate causes, but it is intended here to touch on some difficulties which arise by reason of a conflict of laws, and some special perplexities that beset the application in the Canadian Court of English statutes on maritime matters.

Conflict of laws.

A conflict of laws may occur in cases arising either (1) in respect of the construction of contracts of carriage by sea and the stipulations expressed or to be implied therein, or (2) in respect of the authority which the master possesses in certain cases to bind the cargo-owner, or (3) in respect of torts committed outside of English waters, or (4) in respect of questions as to wages and disbursements.

Contracts of carriage.

It is currently stated that where any question arises upon a contract of carriage by sea, or contract of affreightment, involving a conflict of laws, the law of the ship's flag, or the law of the country to which the ship belongs is to prevail: but this statement is much too wide. "It may be true in one sense to say that where the ship carries the flag of a particular country, *prima facie* the contract made by the captain of that ship is a contract made according to the law of the country whose flag the ship carries. But that is not conclusive. The question what the contract is, and by what rule it is to be construed, is a question of the intention of the parties, and one must look at all the circumstances and gather from them what was the intention of the parties" (Brett, L.J., in *Char-*

tered Mercantile Bank of India v. *Netherlands India Steam Navigation Co.,* 10 Q. B. D. at 529). All the surrounding circumstances have therefore to be considered in determining what is the true *lex contractus*; due weight being given to the fact that the ship belongs to a particular country.

Lloyd v. *Guibert.*

In *Lloyd* v. *Guibert* (L. R. 1 Q. B. 115). a British subject chartered a French ship, described in the charterparty as a French ship, belonging to French owners, at a Danish West India port, for a voyage from St. Marc, in Hayti, to Havre, London, or Liverpool; it was held that the contract of affreightment must be governed by French law in its construction. The form of the charterparty and the language in which it was couched are not given in the reports, though the charterparty is stated by Lindley, L.J., in a later case, to have been in the French language (10 Q. B. D. 540), and though the Court laid stress on the fact that the vessel was described as a French ship, the result seems to have been reached by a process of exclusion by considering the inapplicability of the various other laws suggested, rather than by a consideration of what must have been presumed to be the intention of the parties; and the general rule which the Court purported to lay down, viz.: "That where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern," is shown by subsequent cases to have been stated too widely.

In *The San Roman* (L. R. 5 P. C. 301) an intention to adopt English law was held to have been shown by the facts that the charterparty was in English and in the English form, although the ship was a German ship chartered in Germany.

In *The Wilhelm Schmidt* (25 L. T. 34) the master of a German ship lying at Constantinople, entered into a charterparty with German subjects, there resident, to carry a cargo to a port in the United Kingdom or on the continent, to be delivered to English consignees. The charter-party and the bill of lading given under it were in the English language and it was stipulated that the ship should call for orders at one of the ports of the United Kingdom: it was held that the law of England applied to the construction of the contract.

The same inference was drawn from the language and the form of the bill of lading in the cases of *Chartered Mercan-*

tile Bank of India v. *Netherlands India Steam Navigation Co.* (10 Q. B. D. 521), and *The Patria* (L. R. 3 A. & E. 436.)

The Industrie.

Finally in *The Industrie* (1894, P. 58), the facts and the law applicable thereto were stated by Lord Esher at p. 72 as follows: "It is a contract made for the carriage of goods on board a German ship. Is that conclusive to shew that it is to be construed according to German canons of construction. It seems to me that is not conclusive, and that you must look at a great many more circumstances to see what is the canon to be applied. The mere fact of its being written in English will not enable the Court to say that it is not a German contract. It might be made with the master abroad for the use of his ship from one foreign country to another foreign country, so as to have nothing to do with England at all. If it were so, and the only fact to rely on was that the contract was written in the English language, I should think it would be construed according to the canons of the law of the country of the ship. It would be made under the flag, just as if it were made in the country to which the ship belongs. But where you find a great many other matters come in you have to consider them. This is, no doubt, a contract in regard to carriage on board a German ship, but it is made between a German owner and the proposing English shipper, and it is made by means of a charterparty in writing, the instrument being headed with the English word "charterparty." It is made in London, the contract is negotiated between two English houses, the English brokers authorized by the German owner, and the defendants, the shippers who are English merchants. It is made on an ordinary English form of charterparty. . . . What is the true inference? . . . when you have two men of business dealing in that way, under such circumstances, with a contract made in London, between English brokers, and an English firm, who are not supposed to know German law, but who are supposed to know English mercantile law; with a contract made upon an English form, and on a printed form in common use; with a contract made with nothing but English phrases in it, and with a contract made with phrases peculiar to English contracts, what inference can be drawn but that these two people must have meant that this contract was to be construed according to English law?"

On the other hand the foreign law of the ship's flag was held to be applicable in the cases of *The Karnak* (L. R. 2 P. C. 505), and *The Express* (L. R. 3 A. & E. 597).

Incidents of the contract of carriage.

Again, notwithstanding that the general construction of the contract is to be governed by the law of a particular country, certain incidents of the contract may fall to be determined by a different law, as for instance by the *lex loci solutionis*: in *Robertson* v. *Jackson* (2 C. B. 412), the mode of delivery was held to be governed by the usages of the port of discharge: in *Hudson* v. *Clementson* (18 C. B. 213), and in *Gattorno* v. *Adams* (12 C. B. N. S. 560), the mode of taking the cargo on board was held to be governed by the usages of the port of loading.

Moreover, notwithstanding Lord Esher's insistence in *The Industrie* (*ubi supra*) on "phrases peculiar to English contracts," if it is determined that the construction of the contract is to be governed by a foreign law. then these phrases are to be construed *mutatis mutandis* so as to apply to the foreign country whose law is being applied. Thus in *Russell* v. *Niemann* (17 C. B. N. S. 163) the words "the King's enemies" included the enemies of the sovereign of the person who made the bill of lading, in that case, the Duke of Mecklenburgh.

Authority of master.

As distinguished from the contract of affreightment and its incidents express or to be implied is the authority of the master to sell or hypothecate cargo in circumstances of necessity: this authority or "power of the master does not arise out of the bill of lading nor out of the charterparty, because it may exist where there is neither bill of lading nor charterparty. It arises out of the contract of maritime carriage, by the shipment of goods on board a ship for the purpose of being carried from one country to another, and it exists the moment the goods are put on board for such a purpose." Unlike the contract of carriage which may or may not be governed by the law of the country to which the ship belongs, it seems that the nature and extent of this authority are invariably to be ascertained according to the law of the flag whether the exercise of that authority consists in an hypothecation (*The Gaetano and Maria*, 7 P. D. 137) or in a sale (*The August*, 1891, P. 328): in the former case Lord Esher stated the rule at p. 146 as follows:—"Upon principle it seems to me that he who ships goods on board a foreign ship, ships

them to be dealt with by the master of that ship according to the law of the country of that ship, unless there is a stipulation to the contrary." And this is so even though the contract of affreightment may be held to be governed by another law than the law of the flag (*ibid.* at p. 148).

Bottomry.

Questions of this class arise most frequently in connection with bottomry bonds, whose validity depends on the existence of certain conditions precedent to the lawful exercise of the master's authority: a learned author on Admiralty Practice has suggested that the existence of such prerequisites is a matter of evidence and procedure to be determined by the *lex fori*, and that a bottomry bond cannot be valid unless it be proved that the master's authority has been exercised in accordance with the principles of English maritime law; and has impugned the decision in *The Gaetano and Maria* (*ubi supra*) on this ground. But this contention is indeed to confuse the *facta probanda* with the *modus probandi*, and the objection was met and answered by both Brett, L.J., and Cotton, L.J., in the case attacked: the former said at p. 144:—"Now the manner of proving the facts is matter of evidence, and to my mind, is matter of procedure, but the facts to be proved are not matters of procedure; they are the matters with which the procedure has to deal. Here the facts, which are to be proved in order to give the captain the authority, are not the evidence of those facts. The thing to be proved cannot be evidence of the thing which is to be proved, and therefore it seems to me that this is not a matter of procedure to be governed by the law of the forum."

Wages and disbursements.

The position as regards wages and disbursements claimed by foreigners on board a foreign ship as against the ship and freight is a curious one.

The Milford.

In *The Milford* (Sw. 362) it was held, in a suit by a foreign master against the freight for his wages, that the question whether the freight was liable was a question of remedy and not of contract, and was therefore to be determined by the *lex fori*.

The Tagus.

In *The Tagus* (1903, P. 44) the action was *in rem* by the master for wages and disbursements, in priority to the claims of certain mortgagees intervening: the ship was an Argentine steamer, and the master appears to have been an Argentine subject: it was proved that by Argentine law the master could only claim his wages and disbursements for the last voyage

as a "privileged debt" in priority to the mortgagees: but it was held by Phillimore, J., that the question was one of remedy, and therefore the *lex fori* applied, under which the master could claim the whole of his wages and disbursements whilst master.

Now undoubtedly in proceedings under section 10 of The Admiralty Courts Act, 1861 (24 Vic., cap. 10), the question is one of remedy, but *The Milford* was decided in 1858, three years prior to the passing of the Act, and *The Tagus* professed to follow the decision in *The Milford* and no reference was made to The Admiralty Court Act, 1861: moreover section 10 of the Act confers no maritime lien, as was decided in *The Sara* (14 A. C. 209) and therefore a person arresting a ship under that Act is subject to all prior claims.

The Court of Admiralty had no inherent jurisdiction over claims by the master, but the various merchant shipping Acts have given the master the same rights and remedies for the recovery of his wages and disbursements as seamen have; so that the master now has a maritime lien for both.

Apart from the very serious difficulty in applying the appropriate sections of the Merchant Shipping Act to foreign masters, it would seem, even in the absence of authority, a strange assertion that the question of whether certain circumstances gave rise to a maritime lien is a question of remedy rather than of substantive right, inasmuch as, although the arrest of the ship to give effect to the lien is clearly a matter of procedure, yet the lien itself is equally clearly a *jus in rem.* Authority, however, is not wanting on the point: in *The Neptune* (3 Knapp P. C. C. 94) the question arose whether the furnishing of supplies gave rise to a maritime lien, and the Judicial Committee stated in their judgment at p. 118:—"It should, however, be remembered, that this is not a question of jurisdiction but of right; that the question is, whether material men have, by the law of this country, any lien or preferable claim . . ., not in what Court or by what means that claim is to be enforced."

In *The Tagus* (*ubi supra*) Phillimore, J., gives as his reason for applying the *lex fori*—"because we are construing an English statute with regard to property which is within the English jurisdiction" (at p. 51): but this reasoning would seem to be putting the conclusion in the place of the premises: if the *lex fori* applies, then the English statute may

be invoked, but before the *lex fori* can be applied, it must be determined that the question is one of remedy and not of right: but the learned Judge without deciding whether the matter was one of remedy or right, held the English statute applicable, and consequently that the matter was one of remedy.

Application of M. S. Act 1894, ss. 260, 261.

There are also great difficulties aliunde in the application of the statute in question, viz., the Merchant Shipping Act, 1894: this Act by section 167, which is a re-enactment of sections 191 of The Merchant Shipping Act, 1854 (17 & 18 Vict., cap. 104), and section 1 of The Merchant Shipping Act, 1889 (52 & 53 Vict., cap. 46) provides that the master of a ship shall have "the same rights, liens, and remedies" for the recovery of his wages and of disbursements or liabilities properly made or incurred by him as a seaman has for the recovery of his wages. So far the section is perfectly general, but by sections 260 and 261 of the Merchant Shipping Act, 1894, re-enacting section 109 of the Act of 1854. the application of the part of the Act containing these provisions is restricted to ships registered in the United Kingdom and British ships registered out of the United Kingdom. Dr. Lushington in *The Milford* (Sw. 362 at p. 367) avoided this difficulty by saying:—"The language there used is affirmative, stating the cases to which the third part of the Act shall extend; there are no negative words which tend to show that the Court should not apply section 191 to foreign masters and seamen." Phillimore, J., in *The Tagus* (*ubi supra* at p. 52) said that "if the matter were absolutely *res integra*, it might be difficult to arrive at the conclusion which was arrived at in *The Milford*": but the learned Judge proceeded to follow *The Milford*, relying on the fact that the Act of 1889 contained no restriction as to its application, and surmounting the difficulty created by the restrictions in the Act of 1894 by saying that the legislature had not thought fit to overrule *The Milford* in express terms. In reference to this truly startling line of reasoning, it seems sufficient to quote the words of Burbidge, J., in *The Aurora* (3 Ex. C. R. at p. 234): —"It is for the legislature to say in what cases (the master's lien) should exist, and I should have thought that it was consistent with justice for a Court enforcing such lien to hold its hand, when it had gone as far as the legislature had thought fit to go."

Even assuming, however, that the section is applicable, one is confronted by the difficulty that the master is to have the same "rights" as the seaman, and as this enquiry can certainly not be as to procedure, it would be necessary to ascertain what "rights" the seaman has by the only law which applies to rights, viz., the *lex loci contractus*: as was said by Dr. Lushington in *The Johann Friederick* (1 W. Rob. at p. 37):—"In cases of mariners' wages, whoever engages voluntarily to serve on board a foreign ship, necessarily undertakes to be bound by the law of the country to which such ship belongs, and the legality of his claim must be tried by such law."

Lastly, the decision in *The Tagus* (*ubi supra*) is quite incompatible with the decision in *Minna Craig Steamship Co.* v. *Chartered Mercantile Bank of India* (1897, 1 Q. B. 460): in the latter case it was held that where a maritime lien was created in German law by circumstances which would not give rise to a maritime lien according to English law, there the English Courts would recognize and give effect to a judgment pronounced by the German Court establishing such maritime lien. If therefore the English Courts recognize a maritime lien given by the particular foreign law in circumstances not sufficient to create it by the law of England, it follows *e converso* that the English Courts must refuse to enforce a maritime lien given by the law of England, but not given by the particular foreign law applicable.

Torts.

With regard to torts committed by foreign ships, some confusion has been caused by the misapplication of the principle that a merchant ship is part of the territory of the country whose flag she bears: in respect to acts committed on board a ship, this is true to a limited extent, but only in respect of certain matters (see per Lindley, J., in *Reg.* v. *Keyn*, 2 Ex. D. at pp. 94, 95): but the analogy is imperfect and is more often misleading than the reverse (see per Lindley, L.J., 10 Q. B. D. at p. 544): again where a tort is committed in a foreign country within the exclusive jurisdiction of that country, there an action of tort cannot be maintained in this country unless the cause of action would be a cause of action in that country, and also would be a cause of action in Canada (*The M. Moxham*, 1 P. D. 107). But where a tort is committed on the high seas by a foreign ship against a British or a foreign

ship, the offending ship can be proceeded against in Canadian Courts, if the tort is such as will constitute a cause of action according to the maritime law as administered in Canada, though it may not be a cause of action according to the law of the flag of the offending ship (*The Leon*, 6 P. D. 148; *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 10 Q. B. D. per Brett, L.J., at 537, per Lindley, L.J., at 545): "I am not aware of any decision in this country to the effect that where two ships come into collision on the high seas the rights and liabilities of their respective owners have been held to depend on the laws of the respective flags of the ships. The law applicable in this country to cases of collision on the high seas is the maritime law as administered in England and not the laws of the flags."

The rule laid down in this case was applied to cases of collision, but this is practically the only tort which can be committed by a ship on the high seas. Acts committed by the master and crew which might in one view be tortious would almost certainly fall to be determined according to the contract of carriage, or according to the authority of the master, such as damage to cargo by theft, breakage, or jettison or loss of cargo by sale or hypothecation: in these cases, of course, different considerations apply as has been seen above, the construction of the contract of carriage in many cases, and the nature and extent of the master's authority apparently invariably, being decided by the law of the flag.

Besides the inherent jurisdiction of the Court of Admiralty, modern statutes have conferred an additional jurisdiction, and others have affected the law administered in the Court; and it is now proposed to deal shortly with such statutes.

Statutory jurisdiction.

The most important acts are The Admiralty Court Act, 1840, and The Admiralty Court Act, 1861 (3 & 4 Vict., cap. 65, and 24 Vict,, cap. 10), extending the jurisdiction where it already existed and conferring jurisdiction in respect of new subject-matters. As to the subjects dealt with, although jurisdiction is conferred, no maritime lien is created either by the Act of 1840 (*The Henrich Bjorn,* 11 A. C. 270) or by the Act of 1861 (*The Sara,* 14 A. C. 209); at all events where jurisdiction is conferred over a new subject matter; but "where the subject matter, whether collision or seamen's

wages, had in its own nature a maritime lien, I can well understand that the extension of the jurisdiction to a case where the nature of the subject matter was the same, *e.g.*, collision within the body of a country, carried with it, as inherent in the nature of the thing itself, a maritime lien, and it may well be argued that the legislature did not intend to alter the incidents of the subject matter thus submitted to a new jurisdiction" (Lord Halsbury in *The Sara*, 14 A. C. at p. 216), and see also per Lord Bramwell in *The Henrich Bjorn*, 11 A. C. at p. 282). It is expressly provided by section 35 of the Act of 1861 that the jurisdiction conferred by the Act may be exercised *in rem*, while there is no corresponding provision in the Act of 1840, but nevertheless the ship may be arrested in a cause instituted under either Act, and the arrest of the ship creates a statutory lien which attaches upon the ship from the moment of the arrest. The difference between the position of a party who is entitled to a maritime lien and one who has merely a right to arrest the ship under the statutes is, however, important: "the position of a creditor who has a proper maritime lien differs from that of a creditor in an unsecured claim in this respect,—that the former, unless he has forfeited the right by his own laches, can proceed against the ship notwithstanding any change in her ownership, whereas the latter cannot have an action *in rem* unless at the time of its institution the *res* is the property of his debtor": (per Lord Watson in *The Heinrich Bjorn*, 11 A. C. at p. 277). A statutory lien therefore is of no avail against any subsisting charge on the ship, nor against a *bona fide* purchaser for value (*The Pieve Superiore*, L. R. 5 P. C. 482).

Right of arrest.

Jurisdiction has also been conferred over certain fisheries by The Seal Fisheries (North Pacific) Act, 1895 (58 & 59 Vict. cap. 21); The Behring Sea Award Act, 1894 (57 & 58 Vict., cap. 2); and The Customs and Fisheries Protection Act (R. S. C. 1906, cap. 47); which will be dealt with under their appropriate heading.

Fisheries.

The Bills of Lading Act (R. S. C. 1906, cap. 118), which is a replica of the Bills of Lading Act, 1855 (18 & 19 Vict., cap. 111)), and Part XVII. of the Canada Shipping Act (R. S. C. 1906, cap. 113), contain important provisions bearing on the rights and duties of shipowners under section 6 of The Admiralty Court Act, 1861 (24 Vict., cap. 10).

Bills of Lading Act.

Merchant Shipping Act.

Apart from statutes immediately conferring jurisdiction on Courts of Admiralty, the most important acts dealing with shipping and navigation are the Merchant Shipping Act, 1894 (57 & 58 Vict., cap. 60) and its successors, and the Canada Shipping Act (R. S. C. 1906, cap. 113).

By the English Rules of the Supreme Court (Merchant Shipping), 1894, "the jurisdiction of the High Court under the Merchant Shipping Act, 1894, with the exception of that under sections 28, 30, and 504 of the Act, shall be assigned to the Probate, Divorce and Admiralty Division"; but this would seem to be mere matter of procedure and not to constitute the jurisdiction under that Act part of "the Admiralty jurisdiction of the High Court in England" within the meaning of sec. 2, sub-sec. 2 of The Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict., cap. 27). Nevertheless the provisions of that Act are of so much importance in relation to shipping that, while referring the reader to the particular works on the statute for a detailed discussion of its provision, it may be advisable to notice the application of its various parts.

Application of M.S. Act.

Part I., which deals with the registration of ships, applies to the whole of His Majesty's dominions. Part II. deals with the rights and duties of masters and seamen, and regulations applicable to them and contains the important sec. 167 conferring a maritime lien on the master for his wages and disbursements; by secs. 260 and 261 this Part is made to apply to all sea-going ships registered in the United Kingdom and to all sea-going British ships registered out of the United Kingdom except where the ship is within the jurisdiction of the Government of the British possession in which the ship is registered; there is also the very important provision contained in sec. 265, which enacts that—"where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws, then, if there is in this part of the Act any provision on the subject which is hereby expressly made to extend to that ship, the case shall be governed by that provision, but if there is no such provision, the case shall be governed by the law of the port at which the ship is registered." Part III. concerning Emigrant ships applies to all voyages from the British Islands to any port out of Europe and not within the Mediterranean. Part IV., dealing with Fishing Boats, does not apply to Canada. The application of Part V., dealing with the safety of ships at sea, and

particularly in respect of collisions, will be dealt with under that heading. Part VI., dealing with inquiries into shipping casualties, is by virtue of sec. 478, replaced so far as regards Canada by the Canada Shipping Act (R. S. C. 1906, cap. 113), secs. 776 to 809 inclusive, as amended by the Act of the 7 & 8 Edw. VII., cap. 65. Part VII., dealing with the delivery of goods, applies only to the United Kingdom and is represented in Canada by the provisions of the Customs Act (R. S. C. 1906, cap. 48), particularly secs. 13 to 39 inclusive, and as to the province of Quebec by sec. 969 of the Canada Shipping Act (R. S. C. 1906, cap. 113).

Part VIII., which is concerned with the liability of shipowners extends to the whole of His Majesty's dominions, and is supplemented by secs. 921 to 923 inclusive of the Canada Shipping Act (R. S. C. 1906, cap. 113). Part IX., dealing with wreck and salvage, is confined as to many of its provisions to matters happening on the coasts of the United Kingdom and such provisions are replaced by Part X. of the Canada Shipping Act (R. S. C. 1906, cap. 113); while other provisions of this Part, notably those concerning salvage by His Majesty's ships, extend to all His Majesty's dominions. Part X., which regulates pilotage, is confined in its operation to the United Kingdom, and is replaced by Part VI. of the Canada Shipping Act (R. S. C. 1906, cap. 113). Part XI., concerning lighthouses, has no application to Canada and is replaced by Part XI. of the Canada Shipping Act (R. S. C. 1906), cap. 113). Part XII. is limited to the United Kingdom. Part XIII., which relates to legal proceedings, applies to the whole of His Majesty's dominions, and is mostly concerned with criminal offences, but it also contains the important section 685, which confers jurisdiction over ships lying off the coast on Courts of the district bordering on that coast; the power to arrest a ship which in any part of the world has caused injury to any property belonging to His Majesty or to any of His Majesty's subjects, given by sec. 688, is confined to ships found in any port or river of the United Kingdom or within three miles thereof, and is conferred only on courts of the United Kingdom: while it is provided by sec. 2, sub-sec. 3 (a) of the Colonial Courts of Admiralty Act, 1890. that "any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction of the High Court in England,

when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession, were therein substituted for England and Wales"; there is no corresponding provision with regard to the words "United Kingdom." By sec. 735 power is given to Colonial Legislatures to repeal any provisions of this Act, and this power has been exercised by sec. 951 of the Canada Shipping Act (R. S. C. 1906, cap. 113), so far as regards any provision inconsistent with Part XV. of the Canadian Act, which regulates deck and load lines. Section 736 of the Act also gives power to Colonial Legislatures to regulate the coasting trade; and Part XVI. of the Canadian Act deals with this subject.

Application to foreign ships.

The application of the Merchant Shipping Acts to ships of foreign countries is a matter of some difficulty, but it is possible to attempt a rough classification, subject to qualifications required by the particular case: and it may be said that the following provisions apply to foreign ships:—

(1) Provisions applying in terms to such ships.

(2) Provisions general in terms and such as it may be inferred the Legislature intended to apply to foreign ships: but there is an important distinction between the cases where the foreign vessel is situated or the event happens within the jurisdiction and when the situation of the ship or the occurrence of the event is without the jurisdiction: ordinarily, "the laws of Great Britain affect her own subjects everywhere—foreigners only when within her own jurisdiction" (Dr. Lushington, in *The Zollverein,* Sw. 96; and see also *General Iron Screw Colliery Co.* v. *Schurmann,* 1 J. & H. 180); but the language of the Act may show the intention of the Legislature to deal with foreigners, even out of the jurisdiction, as in the case of limitation of liability (*The Amalia,* 9 Jur N. S. 1111), and such application may also be required by public policy (*The Johanna Stoll,* Lush. 295): but the application will not be inferred where the subject-matter of the provisions is specifically left to be dealt with by international agreement (*Poll* v. *Dambe,* 1901, 2 K. B. 579).

(3) Provisions in fact applied to ships of a foreign country by agreement with the Government of that foreign country in virtue of sec. 734 of the Merchant Shipping Act, 1894.

A somewhat novel and startling rule has been laid down as to the application of Part II. of the Merchant Shipping Act, 1894, which deals with masters and seamen, to foreign ships: this part, as has been pointed out, contains sections, viz., secs. 260 and 261 specifically regulating the application of this part of the Act, as it would have seemed to "sea-going ships registered in the United Kingdom" (sec. 260), and "to all sea-going British ships registered out of the United Kingdom" (sec. 261): nevertheless it has been held in *Reg.* v. *Stewart* (1899, 1 Q. B. 964) following *Hart* v. *Alexander* (36 S. L. R. 64) that certain of the sections of this part apply also to foreign ships: the *ratio decidendi* is stated to be this: "The second part of the Act contains a variety of provisions: some of them are expressly applicable only to British ships, and some are made applicable also to foreign ships; but there is a third class of provisions which are quite irrespective of the nationality of the ship or seamen." The judgment of Channell, J., in the case of *Reg.* v. *Stewart* (*ubi supra*) shows that in order to arrive at this conclusion it is necessary to re-write secs. 260 to 266, which would seem to constitute a work of judicial legislation, but it is to be noted that the reasoning of Darling and Channell, JJ., in *Reg.* v. *Stewart* (*ubi supra*) was approved by the Court in *Poll* v. *Dambe* (1901, 2 K. B. 579, at p. 587): both these decisions, however, were of Divisional Courts, and the matter is open for review by a Court of Appeal. The corresponding part of the Canadian Act, being Part III. of the Canada Shipping Act (R. S. C. 1906, cap. 113), is expressly restricted as regards foreign ships by secs. 322 to 325 inclusive.

The distinctive characteristics of a maritime lien have already been noticed incidentally in the course of the foregoing discussion, but it may be as well to advert to them once again.

Maritime liens, incidents of.

A maritime lien is a claim or privilege upon a maritime *res* (*The Gas Float Whitton No. 2,* 1897, A. C. 337), in respect of service done to or injury caused by it (*The Veritas,* 1901, P. 304, *The Ripon City,* 1897, P. 226).

Such lien does not include or require possession, for it is inchoate from the moment of the happening of the event which gives rise to it: it is a claim or privilege which travels with the *res* into whosoever possession it may come, and when

carried into effect by the legal process of a proceeding *in rem*, it relates back to the time when it first attached (*The Bold Buccleugh*, 7 Moo. P. C. C. 267).

It is not necessary that the circumstances should be such as would give rise to a maritime lien by the law of England, if they are such as do give rise to it by the particular foreign law applicable (*Minna Craig Steamship Company* v. *Chartered Mercantile Bank of India*, 1897, 1 Q. B. 460).

The question as to whether a maritime lien can arise, where there is no personal liability of the owner of the *res*, has been discussed above, but where a maritime lien does exist, it is quite unaffected as to its enforcement by the existence of valid charges on the *res* created prior to the attachment of the lien, or by the sale of the *res* to a *bona fide* purchaser for value subsequently to the attachment of the lien (*The Ripon City*, 1897, P. 226; *The Bold Buccleugh*, 7 Moo. P. C. C. 267).

It remains only to consider the questions of the assignment of maritime liens, and their priorities, both as regards each other, and as regards possessory and statutory liens.

Assignment.

As a general rule maritime liens other than the lien for bottomry and *respondentia* cannot be assigned (*The Eliza Fisher*, 4 Ex. C. R. 461, followed in *The J. L. Card*, 6 Ex. C. R. 274). Persons who advance money to salvors have no lien on the award (*The Louisa*, 3 W. Rob. 99). Wages and salvage due to seamen cannot be assigned before the accruing thereof (Merchant Shipping Act, 1894, secs. 156 and 163, and the Canada Shipping Act, secs. 236 and 237): it is to be noticed that the Canadian Act, unlike the Imperial Act, does not make an exception in cases of ships employed in salvage service: but it has been held that an equitable arrangement for the apportionment of salvage, though the case does not fall within the exception, is not contrary to law, provided that it is equitable in the opinion of the Court, and *semble* that these provisions against assignment do not apply to masters (*The Wilhelm Tell*, 1892, P. 337).

Notwithstanding the non-assignability of maritime liens, the Admiralty Court has allowed persons who have, with the sanction of the Court, paid off claims against a ship to have the same priorities as the person whose claim they have satisfied (*The Kammerhevie Rosenkrants*, 1 Hagg. 62, *The Fair Haven*, L. R. 1 A. & E. 67, and *The Bridgwater*, 3 Asp. M. C. 506); and has even conferred the like priority where the

claims have been paid without the sanction of the Court first obtained (*The William F. Safford,* Lush, 69; *The Cornelia Henrietta,* L. R. 1 A. & E. 51; and *The St. Lawrence,* 5 P. D. 250); but in *The Cornelia Henrietta* (*ubi supra*) a note of warning was struck, and Dr. Lushington stated that in future such a practice would not be sanctioned unless the leave of the Court for the payment were first obtained, and accordingly in *The Lyons* (6 Asp. M. C. 199) priority as of a maritime lien was refused to parties who had paid wages without the leave of the Court. In *The Tagus* (1903 P. 44) it was held that a master was entitled to a maritime lien for disbursements made by him when acting as supercargo by way of advances to the crew on account of their wages.

Priority.

With regard to the ranking of the different classes of liens, their priorities depend on the order in time when they attach; possessory liens dating from the time when the claimant obtained possession and control of the *res,* statutory liens from the institution of the suit to realize the claim, and maritime liens from the happening of the event which gives birth to them.

Possessory liens.

The ordinary common law lien, arising from the possession by a person of a *res* on which that person has bestowed labour or skill in its amelioration, affords a mere right of retainer and confers no power of sale (*Thames Iron Works Co.* v. *Patent Derrick Co.,* 1 J. & H. 93; *Somes* v. *British Empire Shipping Co.,* 8 H. L. C. 338). It does not therefore prevent the *res* being arrested and sold in an Admiralty action, but the interests of the claimant of the possessory lien will be regarded by the Court; and priority will be given to such possessory liens over all claims arising after the ship is taken into possession, while the possessory lien will be postponed to all liens which have attached before possession has been taken. Thus all maritime liens arising from events which have occurred prior to the *res* being taken into possession by the claimant of the common law lien will have priority over the common law lien, at least to the extent of the value of the *res* at the time of the delivery to the shipwright (*The Gleniffer,* 3 Ex. C. R. 57); while matters giving rise only to statutory liens will be postponed to the common law lien, unless the suit to realize them was instituted before the possession of the claimant of the common law lien commenced (*The Gustaf,* Lush. 506; *The Immacolata Concezione,* 9 P. D. 37;

The Tergeste, 1903, P. 26). The common law lien has priority over the claims of a mortgagee and is not determined by the arrest of the ship in an action for necessaries instituted by the claimant of the lien (*The Acacia,* 4 Asp. M. C. 254).

Statutory liens. The priority of statutory liens depends on the time of the institution of the suit which gives rise to them (*The Cella,* 13 P. D. 82). The arrest of the ship in an action to realize a statutory lien does not avail against any valid charges on the ship, nor against a *bona fide* purchaser (*The Pieve Superiore,* L. R. 5 P. C. at p. 491, *The Henrich Bjorn,* 11 A. C. at p. 277), nor does it displace any prior lien which has once attached (*The Heinrich,* L. R. 3 A. & E. 505). This lien is therefore postponed to all maritime liens created by events prior in date to the institution of the suit and to all common law liens where possession has been taken of the *res* before its arrest.

Maritime liens. Accordingly maritime liens have precedence over all common law liens and statutory liens, where in the one case possession, and in the other case the arrest, is subsequent in point of time to the happening of the event which gives rise to the maritime lien.

In respect to the priorities of maritime liens *inter se,* it is to be observed in the first place that they are susceptible of a division into two classes—liens arising *ex delicto,* and liens arising *ex contractu* or *quasi ex contractu.* In general liens *ex delicto,* such as damage take precedence over prior liens arising *ex contractu* or *quasi ex contractu;* while the latter class, such as claims of wages, bottomry, and salvage in general rank against the fund in the inverse order of their attachment on the *res* (*The Veritas,* 1901, P. at p. 312). There seems to be no authority on the question of the priority of liens *ex delicto inter se,* but on principle it would seem that they would rank in the direct order of their attachment.

The general rule is, however, subject to variation and other principles than that merely regulating priority come into play. Thus in the case of a foreign ship, the lien for damage prevails over the lien for wages whether earned before or after the collision, except possibly where the owner of the delinquent ship is bankrupt (*The Linda Flor,* Sw. 309; *The Elin,* 8 P. D. 39, 129): whereas the lien for damage, though accorded priority over a bottomry bond previously

given, is postponed to a bond given subsequently to a stranger who has advanced money for repairs, at all events to the extent of the increased value of the ship (*The Aline*, 1 W. Rob. 111); and similarly the lien for damage, while having priority over a prior lien for salvage, is postponed, it would seem, to a lien for subsequent salvage: the point, it is true, has never been actually decided, but the conclusion would seem to follow from the reasoning in *The Sea Spray* (10 Asp. M. C. 462) and *A. G.* v. *Norstedt* (3 Price, 97). And it was held in Canada that a master's lien for wages and disbursements which arises after the collision is to be preferred to a lien for damage in the case of a British ship, where the owner is bankrupt (*The City of Windsor*, 5 Ex. C. R. 223).

The rule that liens arising *ex contractu* or *quasi ex contractu* have priority in the inverse order of their attachment on the *res* is also subject to a few exceptions. Thus life salvage when payable by the owners of the ship has priority over all other claims for salvage (R. S. C. cap. 113, sec. 757; M. S. Act, 1894, sec. 544). Again the lien for seamen's wages, subsistence money, and viaticum has priority over a bottomry bond though given subsequently (*The Union*, Lush, 128; *The Madonna D'Idra*, 1 Dods 37); and also over the master's lien, irrespective of the dates when the several services were rendered, because the seamen have a right of action against the master (*The Salacia*, Lush, 545).

The master's lien may be postponed to a bottomry bond given before the wages were earned, when the master is personally liable on the bond (*The Jonathan Goodhue*, Sw. 524, *The William*, Sw. 346, *The Daring*, L. R. 2 A. & E. at p. 262). But the master's lien is not affected by the fact that he is also part owner of the vessel (*The Feronia*, L. R. 2 A. & E. 65; *The Daring*, L. R. 2 A. & E. 260; *The Arctic and Dominion*, 5 Ex. C. R. 190. Moreover the master's lien may be postponed to the claims of a material man (*The Jenny Lind*, L. R. 3 A. & E. 529), or a solicitor's lien for costs (*The Heinrich*, L. R. 3 A. & E. 505), when the master is part owner and ordered the repairs or gave the instructions, although in the ordinary cases such claims could not compete with a maritime lien.

The Cargo ex Galam (Br. and Lush, 167) is a curious case, where the common law lien on the cargo for freight and general average was given precedence over a *respondentia* bond.

The question of the precedence of liens is to be determined by the *lex fori* (*The Union*, Lush, 128).

Equity.

It is a question of some difficulty how far equitable principles, *sensu stricto*, are admissible in the application of Admiralty jurisdiction. Sir William Scott and Dr. Lushington in his earlier judgments were inclined to the view that the Court of Admiralty exercised a wide equitable jurisdiction (*The Jacob*, 4 C. Rob. at p. 250; *The Minerva*, 1 Hagg, at p. 357; *The Harriett*, 1 W. Rob. at p. 192; and *The Alexander Larsen*, 1 W. Rob. at p. 297); but in *The Saracen* (6 Moo. P. C. C. 56), it was held by the Judicial Committee that, although in the decision of cases properly within the jurisdiction of the Court of Admiralty, equitable considerations ought to have weight, yet that the Court is not armed with the powers nor vested with the jurisdiction of Courts of Equity; and in *The Victoria* (Sw. 408) decided in 1859, Dr. Lushington doubted whether he had power to "enforce rights of technical equity, such as trusts"; and in the latter case the learned Judge drew a distinction "between enforcing an equitable right at the instance of the party claiming such right, and refusing to enforce a claim of a legal owner to the disregard of an equitable right."

The lack of a technical equitable jurisdiction is unimportant in England, as the Probate, Divorce and Admiralty Division, which exercises the jurisdiction of the former High Court of Admiralty, has all the common law and equitable jurisdiction of the High Court of England, but it is otherwise in Canada (*The Camosun*, 1909, A. C. 597) and difficulties may arise in the case of equitable mortgages of ships which are recognized by modern English law (M. S. Act, 1894, sec. 57), inasmuch as by the Admiralty Court Acts, 1840 and 1861 (3 & 4 Vict., cap. 65 and 24 & 25 Vict., cap. 10), a certain jurisdiction over the enforcement of mortgages is conferred upon the Court of Admiralty.

Companies winding-up.

Where the owner of the ship upon which a lien has attached is a limited company, and a winding-up supervenes before the realization of the lien by action, the proper course for the claimant of the lien appears to be to apply in the winding-up for leave to proceed in Admiralty, at all events where there are mortgages of the ship.

In *In re Australian Direct Steam Navigation Company* (L. R. 20 Eq. 325) Sir George Jessel held that the arrest of

a ship is a sequestration within the meaning of the Companies Act, and is therefore void if effected after a winding-up order is made (R. S. C. 1906, cap. 144, sec. 23), and that the proper course was for the claimant to apply in the winding up for the realization of his lien; and the learned Judge stayed all proceedings in the Admiralty Court.

In *In re Rio Grande do Sul Steamship Company* (5 C. D. 282), Sir George Jessel's decision was approved by the Court of Appeal, but the claimant of the lien was permitted to proceed in Admiralty. inasmuch as there were mortgagees of the ship proceeded against and their claims could not be dealt with by the Court administering the winding-up.

However in *The Richelieu & Ontario Navigation Co.* v. *The Steamship Imperial* (12 Ex. C. R. 243), Cassels, J., refused to follow Sir George Jessel's decision, and held that the proper course was for the claimant of a maritime lien to obtain leave from the Court administering the winding-up to proceed in Admiralty.

In *The Canada* (13 Ex. C. R. 469) the company owning a ship which had been arrested in Admiralty at the suit of a mortgagee went into liquidation and the liquidator applied in the Admiralty Court for leave to take an inventory of the ship, to collect moneys due to her, and that the proceeds of her sale should be paid to the credit of the winding-up action in the Supreme Court of Quebec. Routhier, J., held that he had no concern with the winding-up, that he could not stay the proceedings in the Court of Admiralty and remit the matter to the Supreme Court, and that it was his duty to pronounce on the validity of the mortgage and to order a sale of the ship, any surplus of the proceeds over the amount of the sum secured to be handed over to the liquidator.

Finally in the matter of the *B. C. Tie & Timber Co.* (14 B. C. R. 204), it was held that where a company is being wound up pursuant to the Dominion Winding-up Act, proceedings in the Admiralty Court on a claim for seamen's wages, taken without leave of the Court having control over the winding-up, are not void, but only irregular; and that as no tribunal is so well fitted to entertain and adjudicate upon claims for seamen's wages and maritime liens as the Admiralty Court, therefore leave should be given, by an order to take effect *nunc pro tunc*, to commence and continue proceedings in Admiralty.

In *In re Fort George Lumber Company, Ltd.* (18 B. C. R. 473), a ship owned by a company had been sold by the liquidator under the sanction of the Court: the proceeds were claimed by the mortgagee of the ship and by certain seamen who had a lien upon the ship for their wages: the ship had been destroyed after the sale. The majority of the Court held that the seamen were entitled to be paid in priority to the mortgagee. The case is so scantily reported that it is difficult to understand, as some of the most material facts are not stated, particularly those relating to the proceedings taken by the mortgagee and the seamen in the winding up and whether they consented to the sale by the liquidator; nor is it altogether easy to find the principle on which the judgment of the majority proceeded. The sale did not, of course, affect the maritime lien, and *prima facie* the destruction of the ship destroyed the lien; as has been pointed out above, there can be no lien when there is no *res* to which it can attach. If, as does not appear by the report, the seamen had applied in the winding up for the realization of their lien, as they might have done according to *In re Australian Direct Steam Navigation Company* (L. R. 20 Eq. 325), then undoubtedly they would have been entitled to be paid out of the proceeds in priority to all other claimants not entitled to a superior maritime lien. But it seems that if they had made no claim till after the sale of the ship, their rights could only be determined, as Irving, J., points out, in accordance with sec. 70 of the Winding-up Act (R. S. C. 1906, cap. 144), which accords a preferential claim to clerks and servants of the company; saving, of course, their remedy aganist the ship into whosesoever possession she might have come. Section 80 of the Winding-up Act had no bearing on the case, as it only applies to cases where the ship has been assigned to the secured creditor, who is thereupon bound to satisfy all "mortgages, judgments, executions, hypothecs and liens thereon, holding rank and priority before his claim." In the absence of any claim by the seamen in the liquidation for leave to realize their lien, the case would seem to have fallen under sec. 77 of the Winding-up Act, providing for assignment of the security to the liquidator and payment by him of the value placed upon the security to the creditor out of the estate as soon as he has realized the security.

This case has since been carried on appeal to the Supreme Court of Canada, where the facts were ascertained to be as

follows: the mortgagee had consented to the sale of the ship by the liquidator free from incumbrances at the same time when he sold the other assets of the company by direction of the court: after the loss of the ship, maritime liens were advanced for wages and the seamen claimed to be entitled to a preference on the proceeds of the sale of the ship; while the mortgagee made claim to the whole of the fund. It was held that by its consent to the sale of the ship under the direction of the court, free from incumbrances, the mortgagee had assented to the conversion thereof released from its mortgage and that the proceeds of the sale should be apportioned amongst the creditors in the order and according to the priorities provided by law: consequently that the mortgagee was not entitled to any special charge on the fund realized by the sale: and it was further held that the rights of the seamen entitled to maritime liens were not affected by the loss of the ship after it had been sold by the liquidator under the order of the court and that they were entitled to realize their claims out of the fund produced by the sale of the ship in priority to the mortgagee (48 S. C. R. 593). Duff, J., with whom the Chief Justice and Davies, J., agreed, said, at p. 604:—"The sale must be taken to have been authorized with a view to attain the object for which the winding-up proceedings were initiated, namely, to convert the assets of the company and to apply the proceeds in payment of the creditors according to the order and priority ordained by law . . . in consenting to the sale, the (mortgagee) must be taken to have assented to the fund being dealt with on this principle, and on this principle, the superiority of the (seamen's) claim is indisputable. It is true that the (seamen) did not, as the mortgagee did, consent to the sale before it took place. It may be assumed that, in the absence of circumstances giving rise to an estoppel, the sale would not . . . pass to the purchaser a title to the ship free from their liens. On the other hand, if immediately after the sale they had attempted to enforce their rights by proceeding against the ship *in rem*, the court would, unquestionably, on the application of the purchaser, have directed the liquidator to apply the proceeds of the sale in his hands in satisfaction of the liens; and these proceeds being sufficient for the purpose would have restrained the proceedings of the lien-holders. The lien-holders, moreover, might have elected . . . to affirm the sale as passing to the purchaser a title free from incumbrances

of the claim at the time of, or before, the date of the purchase. In *The Gordon Gauthier* (4 Ex. C. R. 354), the defence of the statute was again raised, and again no notice appears to have been taken of the difficulty created by the wording of the Act, but the local Judge held that a mortgagee, claiming under a mortgage granted prior to the accruing of the claim sought to be enforced against the ship, but who goes into possession under his mortgage subsequently to such accrual, does not thereby become a "subsequent *bona fide* purchaser" as against the claimant of the lien.

It has recently been held that the period of prescription introduced by the Public Authorities Protection Act, 1893 (56 & 57 Vict. U. K. c. 61) has no application to proceedings on the Admiralty side of the Exchequer Court of Canada (*The Sydney, &c., S. S. Co.* v. *Harbour Commissioners of Montreal,* 15 Ex. C. R. 1: affirmed on appeal to the Supreme Court of Canada, 49 S. C. R. 627.)

Proceedings *in rem*, jurisdiction in.

It has been decided in Ontario that a proceeding *in rem* is unknown to the Superior Courts of Common Law of that province (*Rex* v. *The American Gasoline Fishing Boat,* 15 O. L. R. 314); but it seems that a proceeding *in rem* should be possible in any Court which has the same jurisdiction as the old Court of Exchequer in England.

CHAPTER II.

ADMIRALTY CAUSES.

Section 1.—Possession and Ownership.

Possession.

The High Court of Admiralty has always had power to deal with the possession of ships: thus it could restore to the true owner a vessel of which possession had been wrongfully taken (In the matter of *Blanshard,* 2 B. & C. 244): and it could give possession of a vessel to a majority of the co-owners wishing to send the vessel to sea (*The New Draper,* 4 C. Rob. 287; *The Kent,* Lush. 495); on the other hand the Court would never interfere to change possession at the instance of a minority in interest (*The Valiant,* 1 W. Rob. 64; *The Egyptienne,* 1 Hagg. 346*n*), and would decree possession to the majority notwithstanding that the minority had possession and offered full security in order to be allowed to retain it (*The Kent,* Lush. 495): the Court could also dispossess masters whose misconduct necessitated their removal, or whom the majority of the part-owners wished to have removed (*The New Draper,* 4 C. Rob. 290; *The See Reuter,* 1 Dods. 23).

Ownership.

Where however any claim to ownership was set up as a defence, the jurisdiction of the Court was formerly ousted: by the Admiralty Court Act, 1840 (3 & 4 Vict. cap. 65), sec. 4; however, it was enacted that the Court should have jurisdiction "to decide all questions as to title to or ownership of any ship or vessel, or the proceeds thereof remaining in the registry, arising in any cause of possession, salvage, damage, wages or bottomry . . ." The Court can now, therefore, inquire into the validity of an alleged sale or into any other set of circumstances affecting the right of property in a ship (*The Victor,* 13 L. T. 21; *The Empress,* Sw. 160; *The Margaret Mitchell,* Sw. 382). Where by mistake a mortgage has been wrongly entered on the register to the prejudice of a plaintiff entitled to a decree of possession, the Court will order the rectification of the register (*The Rose,* L. R. 4 A. & E. 6; *Brond* v. *Broomhall,* 1906, 1 K. B. 571); but the rights of a *bona fide* purchaser for value whose name has been entered on the register will not be interfered with, although his predecessor on the register has been guilty of fraud (*The Horlock,* 2 P. D. 243).

The provisions of the Merchant Shipping Act do not prevent the property in a ship from passing to the assignee under an Insolvency Act (*Jones* v. *Kinney*, 11 S. C. R. 708).

Removal of master.

The Court has power to remove the master of any ship within the jurisdiction of the Court upon being satisfied of the necessity of his removal, and to appoint a new master in his stead. (M. S. Act, 1894, sec. 472).

Registration.

Part I. of the Canada Shipping Act (R. S. C. 1906, cap. 113), and Part I. of the Merchant Shipping Act, 1894 (57 and 58 Vict. cap. 60) provide for the registration of ships, and mortgages thereon.

Section 2.—Co-ownership and Restraint.

Statutory jurisdiction.

The Court has jurisdiction by statute "to decide all questions arising between the co-owners or any of them touching the ownership, possession, employment, and earnings of any ship registered at any port in Canada, or any share thereof, and may settle all accounts outstanding and unsettled between the parties in relation thereon, and may direct the said ship or any share thereof to be sold . . ." (Admiralty Court Act, 1861. 24 Vict. cap. 10, sec. 8).

Accounts.

This jurisdiction may be exercised *in personam* or *in rem*, and consequently the ship may be arrested in such a suit (*The Raven*, 9 Ex. C. R. 404: 11 B. C. R. 486). The Court will order accounts to be taken either as a step in the cause or in a suit having the taking of accounts for its sole object (*The Seaward*, 3 Ex. C. R. 268); and in an action for an account between co-owners where one of the parties had before action parted with all his interest in the ship, the Court held that it had jurisdiction, and ordered him to give security to the amount of the shares he formerly possessed in the ship (*The Lady of the Lake*, L. R. 3 A. & E. 29). A receiver will also be appointed in cases where it appears just and convenient that he should be appointed (*The Ampthill*, 5 P. D. 224).

Restraint.

We have seen that the Court will not deprive the majority of the co-owners of the possession of the ship, but the minority are not without remedy. If it is proposed by the majority to send the ship upon a voyage against the will of the minority, the minority may institute an action of restraint, arrest the ship, and have it detained until the majority give bail in the amount of the value of the shares of the plaintiffs for the safe return of

the ship to a specified port (*The Talca,* 5 P. D. 169. *The Keroula,* 11 P. D. 92, *The Robert Dickenson,* 10 P. D. 15); when bail has been given, the dissentient minority are not compelled to bear any portion of the expenses of the voyage, and are not entitled to any share of the profits of the adventure (*The Apollo,* 1 Hagg. 312; *The Robert Dickenson, ubi supra,* Abbott, Law of Merchant Ships and Seamen, 14th ed., Part 1, Chap. III.) The bond given in this action is a security given to the Court which can enforce it by reason of the jurisdiction conferred upon it by the institution of the action, but where the majority of the part owners, without any application to the Court, execute a bond to the minority of the part owners, conditioned for the safe return of the ship to a port mentioned, such a bond is not one which can be enforced in a Court of Admiralty, inasmuch as it is a mere contract between the parties, not falling within the scope of admiralty jurisdiction (*The Abeona,* 13 Ex. C. R. 417).

Sale.

Furthermore, the Court can, in its discretion, order the sale of a ship or shares in a ship registered in Canada at the instance of a minority of part owners against the will of the majority, but a strong case must be made out by the minority to induce the Court to exercise this discretion (*The Hereward,* 1895, P. 284; *The Marion,* 10 P. D. 4).

Injunction against mortgage.

In *The Horlock* (2 P. D. at p. 250), an order was made *ex parte,* restraining the defendant in an action of co-ownership "from further mortgaging or creating any charge in or otherwise dealing with any share or shares in" the ship, the subject-matter of the action: but it appears from the case of *Nicholas* v. *Dracachis* (1 P. D. 72), that this power is derived from the jurisdiction of the High Court of Chancery, and it may be that under the peculiar constitution of the Court of Admiralty in Canada (*The Camosun,* 1909, A. C. 597), that no such power could be exercised by it. By the Merchant Shipping Act, 1894 (57 & 58 Vict. cap. 60, secs. 30 and 28), any dealing with a ship or any share therein may be prohibited for a time, and where any property in a registered ship or share therein is transmitted on marriage, death, bankruptcy or otherwise to an unqualified person, a sale of such property may be ordered: but by these sections, the powers are given to "the Court having the principal civil jurisdiction in" the British possession in which the ship is registered; and this would apparently mean the ordinary common law Courts: so far as regards the sale of a registered ship which has passed by marriage, death, bankruptcy or otherwise to a person not qualified to own a British ship, there

Sale on transmission.

Sale on transmission to unqualified person.

can be no doubt, however, of the jurisdiction of the Admiralty, although that jurisdiction is derived in a curious manner: the power of sale of such a ship was originally conferred, in England, on the Court of Chancery by section 62 of the Merchant Shipping Act, 1854 (17 & 18 Vict. cap. 104), and by section 12 of The Admiralty Court Act, 1861 (24 Vict. cap. 10) the same power was expressly conferred on the Court of Admiralty and therefore passed to the Exchequer Court by virtue of section 2, sub-section 2 of The Colonial Court of Admiralty Act, 1890 (53 & 54 Vict. cap. 27), and the subsequent repeal of the Merchant Shipping, 1854, by the Act of 1894 would not seem to operate to divest the Exchequer Court of the jurisdiction once acquired.

Section 3.—Mortgage.

Mortgages.

The Court of Admiralty has no inherent jurisdiction in respect of mortgages of ships: no suit could be instituted by a mortgagee and it was doubtful whether even a mortgagee could intervene to protect his interest in a suit already instituted by parties competent to do so (*The Percy,* 3 Hagg. 402; *The Dowthorpe,* 2 Wm. Rob. 82). By The Admiralty Courts Act, 1840, (3 & 4 Vict. cap. 65), it was enacted in section 3: "Whenever any ship or vessel shall be under arrest by process issuing from the said High Court of Admiralty, or the proceeds of any ship or vessel having been so arrested shall have been brought into and be in the registry of the said Court, in either such case the said Court shall have full jurisdiction to take cognizance of all claims and causes of action of any person in respect of any mortgage of such ship or vessel, and to decide any suit instituted by any such person in respect of any such claims or cause of action respectively."

Admiralty Courts Act, 1840.

Unregistered and equitable mortgages.

The jurisdiction conferred by this section, though limited to cases where the mortgaged ship is already arrested, or the proceeds are in Court, extends to unregistered and equitable mortgages as well as to registered mortgages (*The Atalanta,* 5 Ex. C. R. at p. 62), and it must be remembered that while the Merchant Shipping Act, 1894 (57 & 58 Vict. cap. 60), by sections 31 to 38 provides for the registration of mortgages of ships, and for their priority *inter se* according to the date of registration, yet by section 57 it preserves the rights of unregistered mortgages, so far as they do not conflict with those of mortgagees who have registered.

Notwithstanding the wide language of the section of The Admiralty Court Act, 1840, the Court, while it would determine the right of the mortgagee to freight, when, in consequence of the intervention of the mortgagee as a defendant, the question arose in the course of a suit instituted against the ship and freight (*The Dowthorpe*, 2 W. Rob. 81), yet would not interfere where the suit was against freight alone (*The Fortitude*, 2 W. Rob. 217, 223; *The Atalanta*, 5 Ex. C. R. 57).

Admiralty Courts Act, 1861.

Accordingly the jurisdiction was extended by The Admiralty Courts Act, 1861 (24 Vict. cap. 10), which by section 11 provides: "The High Court of Admiralty shall have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of The Merchant Shipping Act . . . whether the ship or the proceeds thereof be under arrest of the said Court or not."

This section, it will be observed, only relates to duly registered mortgages.

An unregistered mortgage is good as against execution creditors of the mortgagor (*Imperial Timber & Trading Co.* v. *Henderson*, 10 W. L. R. 595).

Priorities.

The claim of a mortgagee whether registered or unregistered, and whether in possession or not, ranks below the claims of persons having maritime liens on the mortgaged ship (*The Gordon Gauthier*, 4 Ex. C. R. 354; *The City of Windsor*, 4 Ex. C. R. 400; *The Dominion*, 5 Ex. C. R. 190; *The Nymph*, Sw. 86; *The Royal Arch*. Sw. 269; *The Mary Ann*, L. R. 1 A. & E. 8; *The Feronia*, L. R. 2 A. & E. 65; *The Ripon City*, 1897, P., at p. 243); and is also subject to any possessory lien which exists for work done to the ship by orders of the mortgagor in possession (*The Sherbro*, 5 Asp. M. C. 88; *The Susannah Thrift*, 4 Asp. M. C. 254 *n* (*a*): but the rights of the mortgagee prevail where the ship is not in the actual possession of the materialman (*The Scio*, L. R. 1 A. & E. 353). and they are also entitled to precedence over claims for necessaries, equipment, or damage to cargo, where a statutory right of arrest, but no maritime lien, is given, in cases where the registration of the mortgage is prior in date to the institution of the suits in which the claims are made (*The Pacific*, Br. & L. 243; *The Troubadour*, L. R. 1 A. & E. 302; *The Two Ellens*, L. R. 4 P. C. 161; *The Pieve Superiore*, L. R. 5 P. C. 482).

Sections 39 to 54 inclusive of The Canada Shipping Act (R. S. C. 1906, cap. 113) make provision for securing advances on ships in course of construction.

Section 4.—Bottomry and Respondentia.

Bottomry. Bottomry is the name given to the contract whereby the owner or master of a ship hypothecates the vessel or her freight or cargo in order to enable her to make or complete her voyage: *respondentia* is the term applied when the cargo alone is hypothecated.

Respondentia.

The Court of Admiralty has inherent jurisdiction to entertain actions to enforce bottomry or *respondentia* bonds, and indeed is the only Court in which such bonds are recognized: owing to the greatly increased means of communication by telegraphy, wireless or otherwise, such actions have become rare in modern times.

Nature of. Inasmuch as the contract of bottomry implies a pledge without a change of possession, it is unknown to the common law, and has been adopted from the civil law, in which such an hypothecation was a recognized 'act in the law': by the contract the keel or bottom of the ship is pledged in consideration of money advanced for the necessities of the voyage, such as the repair of the vessel or for the payment for such repairs: if the ship is lost in the course of the voyage by any of the perils enumerated in the contract, the lender loses his money; but if the ship arrives safely, the lender recovers his loan with maritime interest, as it is called, and which may be proportionate to the risks of the voyage. While not only the ship, but also the freight and cargo, may be the joint or several subjects of hypothecation, yet the master will only be justified in giving a *respondentia* bond, when the interests of the cargo owners demand such action.

Conditions of validity. There are certain conditions precedent to the validity of a bottomry bond, and the Court will not entertain a suit on such bond unless it is proved to its satisfaction that all the circumstances which are essential to its validity did in fact exist (*The India,* 32 L. J. Ad. 186).

Thus "the hypothecation of a ship is only justified when it is done to secure amounts due for necessary repairs to enable the ship to proceed with her voyage or for necessaries or provisions required for the same purpose, and which must be furnished on the express condition that the amount is to be secured by the bond. There must be also a total absence of personal credit on the part of the owner and master, and before

binding the ship in this way the master is bound, where it is at all possible to do so, to communicate with the owner" (*The St. Joseph,* 3 Ex. C. R., at p. 349).

Personal credit.

With regard to the element of personal credit, it seems that, though the master cannot render the owner personally liable on the bond, yet the owner, if he himself hypothecate the ship, may bind himself personally (*Willis* v. *Palmer,* 7 C. B. N. S. 361).

Moreover not only cannot the master render his owners liable on the bond, but also the Court will not pronounce for the validity of the bond unless it is shewn to its satisfaction that the master was unable to obtain the advances on his own personal credit (*The Prince of Saxe Coburg,* 3 Moo. P. C. C., at p. 9). A bond may, however, be good in part and bad in part, and may therefore be enforced so far as it represents loans made on the credit of the hypothecation of the ship though void as to any money lent on the personal security of the master (*Cargo ex Sultan,* Sw. 504; *The Augusta,* 1 Dods. 283).

Safe arrival.

It is further essential that the repayment of the loan should be made contingent on the safe arrival of the ship (*The Indomitable,* Sw. 446); but it is not necessary that the exaction of maritime interest should be stipulated for (*The Cecilie,* 4 P. D. 210).

Necessity.

With regard to the element of necessity for the loan the rule is that "if the foreign merchant, after due inquiry, shall have reasonable ground for concluding that the repairs are necessary, and that the money cannot be raised on personal credit, then his security on the ship and cargo shall not be impeached or invalidated, because it might happen, that notwithstanding his reasonable and *bona fide* inquiries, the repairs were not necessary or the money might have been had on personal credit (*The Prince of Saxe Coburg,* 3 Moo. P. C. C., at p. 9).

Communication.

The condition which is most strictly insisted on is that the master should have communicated with his owners, informing them expressly that hypothecation is contemplated (*The Olivier,* Lush. 488; *The Oriental,* 7 Moo. P. C. C. 398; *The Bonaparte,* 8 Moo. P. C. C. 459; *The Karnak,* L. R. 2 P. C. 505); unless the circumstances render such communication practically impossible (*The Olivier, ubi supra*). And when the cargo is hypothecated the rule is even more stringently applied: the owners of the cargo must be apprised of the contemplated pledge and of the necessity for it (*The Karnak ubi supra*). This rule has, however, as we have seen, no application in the case of a

bond granted by the master of a ship belonging to a foreign country by the law of which communication is not required (*The Gaetano & Maria*, 7 P. D. 137).

The contract must be in writing (*Ex parte Halkett*, 19 Ves. 473) : but the exact form is of little moment (*The Alexander*, 1 Dods. 278).

Section 5.—Necessaries.

Necessaries. The position of importance which the subject of bottomry used to occupy in maritime law has been usurped by the subject of necessaries.

No maritime lien. Persons who build, repair, or equip ships have a choice of several remedies for the recovery of monies due to them for the services rendered or the goods supplied; but by Admiralty law as administered in Canada they have no maritime lien.

Materialmen. By the civil law materialmen, as those are commonly called who supply necessaries to a ship or who repair or equip her, have a maritime lien upon the ship, independently of any express contract of hypothecation; but in England the Court of Admiralty had no jurisdiction to entertain suits for necessaries (*The Neptune*, 3 Knapp, 94). Modern statutes have remedied this result of the ancient conflict between the Courts of Common Law and the Court of Admiralty, and have conferred a remedy in Courts of Admiralty upon the materialman, but these statutes have stopped short of creating a maritime lien for necessaries.

Remedies. In the present state of the law the materialman may have his choice between four possible remedies:

(1) He may avail himself of his possessory lien.

(2) He may sue the owner, charterer or master at common law.

(3) He may proceed *in rem* against the ship.

(4) He may in certain circumstances circuitously enforce a maritime lien against the ship by forcing the master to avail himself of the maritime lien which statutes have given to the master in respect of the master's disbursements.

Cause of action. Although rights resting in contract and enforceable at common law are not within the strict purview of this treatise, yet here it is necessary to take note of the conditions necessary to

maintain an action for necessaries against the owner of a ship, as the remedy *in rem* against the ship is conditional on the existence of a good cause of action at common law against the master.

Necessaries, meaning of.

And first as to the meaning of the term necessaries: "there is no distinction as to necessaries between the cases in which by the common law a master has been holden to bind his owner and suits for necessaries instituted in (the) Court (of Admiralty)" and there is no "solid distinction between necessaries for the ship and necessaries for the voyage" (*The Riga,* L. R. 3 A. & E., per Phillimore, J., at p. 522, differing from Dr. Lushington in *The Comtesse de Fregeville,* Lush., at p. 332). "What ever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel, as a prudent man, would have ordered if present at the time, comes within the meaning of the term 'necessaries' as applied to those repairs done or things provided for the ship by order of the master, for which the owners are liable" (*Webster* v. *Seekamp,* 4 B. & Ald., per Abbott, C.J., at p. 354, cited in *The Riga,* L. R. 3 A. & E., at p. 552; approved in *Foong Tai & Co.* v. *Buchheister & Co.,* 1908, A. C., at p. 466).

Thus the term includes anchors, chains, cables, rigging and all other such articles (*The Alexander,* 1 W. Rob. 346; *The Sophie,* 1 W. Rob. 368; *The Comtesse de Fregeville,* Lush., at p. 332); coals (*The West Friesland,* Sw. 454; *The Comtesse de Fregeville, ubi supra,* 329); provisions (*The Comtesse de Fregeville, ubi supra,* at p. 332; *The N. R. Gosfabrick,* Sw. 344); clothing for the master and crew (*The William F. Safford,* Lush. 69); copper sheathing (*The Perla,* Sw. 353; *The Turliani,* 2 Asp. M. C. 603; screw propeller and whatever else is requisite to put the machinery of a ship in the best working order (*The Flecha,* 1 Spks. 438, 441); towage and dock dues (*The St. Lawrence,* 5 P. D. 250); insurance on freight (*The Riga,* L. R. 3 A. & E. 516); alterations in the structure and equipment of fishing vessels for the purpose of making them fit to engage in fishing with dories, instead of as a trawler (*The Canada & The Triumph,* 18 B. C. R. 515, 15 Ex. C. R. 142); fishing stores or fishing tackle, such as hooks, gaffs, nippers and knives (*The Alliance No. 2,* 20 B. C. R. 560); on the other hand the travelling expenses of an agent to attend a trial in a case of collision are not necessaries (*The Bonne Amelie,* L. R. 1 A. & E., 19); nor are monies advanced to a master to pay averages due from the vessel in respect of a

collision (*The Aaltje Willemina*, L. R. 1 A. & E. 107). Moreover "the person who pays for necessaries supplied to a ship has, as against that ship and her owner, as good a claim as the person who actually supplied them, and further, he who advances money to the person who thus pays, for the purpose of enabling him to pay, stands in the same position as the person to whom the money is advanced" (*Foong Tai & Co.* v. *Buchheister & Co.*, 1908, A. C., at p. 466).

Possessory lien.

Turning now to the remedies of the materialman, the least important is his possessory lien, which arises out of and is dependent upon his possession of the ship. This lien does not attach unless the ship is in the possession of the materialman, and ceases to exist as soon as the ship passes out of his possession: he cannot enforce it by sale, but can only continue to hold the ship until his claims are paid (*Raitt* v. *Mitchell*, 4 Camp. 146; *Spartali* v. *Benecke*, 10 C. B. 223); a sale by a party entitled to a lien is tortious and amounts to a conversion, even though the retention of the property on which the lien is claimed is attended with expense (*Mulliner* v. *Florence*, 3 Q. B. D. 484); and the materialman cannot add to the amount for which the lien exists, a charge for keeping the ship till the debt is paid (*Somes* v. *British Empire Shipping Co.*, 8 H. L. C. 338). This possessory lien does not entitle the materialman to detain the ship against the authority of the Court of Admiralty, but the Court will protect his rights in the course of any suit instituted against the ship (*The Harmonie*, 1 W. Rob. 178); and it is subject to maritime liens which have already attached upon the *res* (*The Gustaf*, Lush. 506); while on the other hand it is entitled to priority over maritime liens attaching subsequently and to claims *in rem* not perfected by seizure when the possession commenced (*The Gustaf*, *ubi supra; The Nordstjernen*, Sw. 260).

Agency of master.

The requisite foundation for a claim for necessaries is the liability of the owner. In contracting for the supply of necessaries the master acts as an agent and may impose liability both on himself and his principal or on his principal alone, or on himself alone. The master is himself personally bound by any contract for necessaries made by him unless by express terms or necessary implication, credit is given to the owner alone (*Garnam* v. *Bennett*, 2 Stra. 816; *Rich* v. *Coe*, 2 Cowp. 636; *The Elmville*, 1904, P. 319); but contracts made by the owner himself, or in circumstances which show that credit was given to him alone, impose no liability on the master (*Farmer* v. *Davies*, 1 Term. Rep. 108; *Hutcheson* v. *Eaton*, 13 Q. B. D., at

p. 865). And when necessaries are supplied to a ship in a home port, and the facts show that they were supplied on the credit of the ship, the liability therefor is that of the owners and not that of the master who has ordered the goods at the request of the owners (*The John Irwin,* 13 Ex. C. R. 502).

Liability of owner.

Questions as to the parties liable on a contract for necessaries arise most frequently as between the owner and charterer, when the charter party amounts to a demise of the ship. In the first place, the owner of the ship is bound by every contract made by the master for necessaries, if either it is within his actual authority or the owner has held him out as having authority to make such contract, unless indeed the owner's liability is expressly excluded; and the owner continues so bound even after he has sold the ship, until the master is apprised of the sale; but the mere fact of ownership is in itself no evidence that the master had authority to pledge the credit of the owner, for questions of this kind depend on the existence of the relationship of principal and agent, and not on the ownership of the vessel (*Mitcheson* v. *Oliver*, 5 E. & B. 419; *Frazer* v. *Marsh,* 13 East. 239; *Mackenzie* v. *Pooley,* 11 Exch. 638; *Trewhella* v. *Rowe,* 11 East. 435); although the fact of the defendant being the registered owner is an element to be taken into consideration in determining the question as to whom credit was given (*Frost* v. *Oliver,* 2 E. & B. 301).

Ship under charter.

When, therefore, by a charterparty, the owner transfers the possession and control of the ship to a charterer, and the latter appoints the master and crew and pays their wages and other expenses the master in incurring a debt for necessaries is the agent of the charterer and not the agent of the owner (*The David Wallace,* 8 Ex. C. R. 205); nor, in such a case, does the fact of being registered as owner constitute any holding out of the master as the agent of such registered owner (*The Baumwoll Manufactur von Carl Scheibler* v. *Furness,* 1893, A. C. 8); even though the materialman may have had no knowledge of the existence of a charterparty (*The David Wallace, ubi supra*). The latter case is a particularly strong one, inasmuch as it was found as a fact that the necessaries were supplied on the order of the master and the credit of the registered owners. And it would seem to follow from these cases that even where the charterparty does not amount to a demise, yet the owner cannot be made liable on a contract for the supply of articles for which the master had no authority to pledge his owner's credit; the liability to supply those articles having been imposed upon

the charterers: for in such a case the master would have no actual authority, and the mere fact of the owner being the registered owner of the ship and allowing the master to continue in control does not constitute a holding out of the master as having authority to pledge the owner's credit.

It is true, however, that the Judge of The Exchequer Court in *The David Wallace* (*ubi supra,* at p. 241), considered that in such a case the owner's liability would depend on the question of whether the materialman had notice of the master's want of authority or not.

Master's authority.

Moreover even in cases where the master is actually the agent of the owner, there being no charterparty in existence, yet even so the master has no authority to bind his owner in any part of the world if the owner or his properly authorised agent can personally do what is required; it is only when the ship is at a foreign port where the owner has no agent, or at a home port at a distance from the owner's residence, and necessaries are required to be promptly provided that the master may pledge his owner's credit (*Arthur* v. *Barton,* 6 M. & W. 138; *Gunn* v. *Roberts,* L. R. 9 C. P. 331; *Edwards* v. *Havill,* 14 C. B. 107; *Stonehouse* v. *Gent,* 2 Q. B. 431*n*; *Johns* v. *Simons,* 2 Q. B. 425).

Necessity.

In the absence of express authority to contract for the particular matters in question, the materialman must prove that the things ordered were necessary, and that it was reasonably necessary that the master should obtain them by pledging his owner's credit (*Rocher* v. *Busher,* 1 Starkie 27; *Gunn* v. *Roberts, ubi supra*): "The creditor is required to prove the actual existence of the necessity of those things which give rise to his demand: the authority of the master is to provide necessaries; if therefore a person trusts him for things not necessaries, he trusts him for that which it is not within the scope of his authority to provide, and consequently has no right to call upon his principal for payment" (*The Alexander,* 1 W. Rob., at p. 363).

And it is most important to be observed that although the articles supplied or the repairs done may fall within the legal definition of the word "necessaries," yet the materialman must prove that they were not only "necessaries" but also necessary for the ship at the time, and if it is shown that there were other things of the same description on board, the materialman must prove that they were not sufficient: "It is not sufficient to say that they are necessaries, but they must be necessary at the time and under existing circumstances" (*The Alexander,*

ubi supra, at p. 361): "The creditor (is required) to use proper diligence in ascertaining that the articles supplied were necessary and such as the owner himself, if present, would have ordered (*The Alexander, ubi supra,* at p. 366).

Admiralty jurisdiction.

Such being the materialman's position at common law, it remains to ascertain what is his *locus standi* in Courts of Admiralty.

"It is clear that previous to the passing of the 3 & 4 Vict. cap. 65, the Court of Admiralty had no jurisdiction in the case of necessaries supplied to a ship, and that the supply of such necessaries did not give any maritime lien upon the ship. It is perfectly true that for many years prior to the time of Charles II. the Court of Admiralty had claimed, and to a considerable extent exercised, such a jurisdiction; but the Courts of Common Law, in the time of Charles II., and subsequently, had prohibited them from exercising that jurisdiction on the ground that they never possessed it. Subsequently in the case of *The Neptune* (3 Knapp. 94), it was decided by this tribunal that there was no such jurisdiction. Therefore notwithstanding this jurisdiction was practically exercised for years, it must be taken now to be conclusively the law that the Court of Admiralty, by the law of England, never had jurisdiction in a suit for necessaries supplied to a ship, and that necessaries so supplied did not give a maritime lien on a ship" (*The Two Ellens,* (1872), L. R. 4 P. C. 161, at p. 166).

The Two Ellens.

In this state of the law, the two Admiralty Court Acts were passed.

Admiralty Court Act, 1840.

The first (3 & 4 Vict. cap. 65), provides by section 6 that "the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever . . . for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the . . . necessaries (were) furnished, in respect of which such claim is made."

Admiralty Court Act, 1861.

The second (24 Vict. cap. 10), provides by section 5 that "the High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales: Provided always, that if in any such cause, the plaintiff do not recover twenty pounds, he shall not be entitled

to any costs, charges or expenses incurred by him therein, unless the Judge shall certify that the cause was a fit one to be tried in the said Court."

By The Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. cap. 27, section 2, sub-section 3 (*a*)), the word Canada is to be substituted for the words England and Wales.

Effect of arrest.

The first "question that arose on these statutes was whether they gave the materialman a maritime lien on the ship, or only enabled him to enforce his claim in the Admiralty Court, and as one means to that end gave him a right to arrest the ship, but no right against the ship until the action was instituted. The construction put upon the sixth section of the Act of 1840, and in general acquiesced in for a number of years, was that it gave such a lien to a person who supplied necessaries to a foreign ship in an English port; while an opposite view was taken as to the effect of the fifth section of the Act of 1861. In 1884 in the case of *The Rio Tinto* (9 A. C. 356), it was held by the Judicial Committee of the Privy Council that section 10, sub-section 10, of The Vice-Admiralty Courts Act, 1863, (since repealed) by which jurisdiction was given to Vice-Admiralty Courts in respect of claims for necessaries supplied in the possession in which the Court was established to any ship of which no owner or part owner was domiciled within the possession at the time of the necessaries being supplied, did not create a maritime lien with respect to such necessaries. Then in 1886 in the case of *The Henrich Bjorn* (11 A. C. 270), the question as to whether the sixth section of the Act of 1840 gave a maritime lien in respect of necessaries supplied to a foreign ship in an English port came again under discussion, and it was held by the Court of Appeal and by the House of Lords that it did not" (*The David Wallace,* 8 Ex. C. R. at p. 225).

No maritime lien.

The case which finally decided that section 5 of the Admiralty Court Act, 1861, conferred no maritime lien was *The Two Ellens* (L. R. 4 P. C. 161).

The supply of necessaries, therefore, "does not give any maritime lien . . . nor any right against the ship till action brought (*Foong Tai & Co.* v. *Buchheister & Co.,* 1908, A. C. at p. 466): and, therefore, the materialman "cannot have an action *in rem* unless at the time of its institution the vessel is the property of the debtor," differing in this from one entitled to a true maritime lien who "can proceed against the ship, notwithstanding any change in her ownership" (*The Heinrich Bjorn,* 11 A. C. at p. 277).

Yet, in spite of this overwhelming body of authority, we find that as late as 1906 a local Judge of the Court of Admiralty apparently considered that the supply of necessaries might create a maritime lien (*The Brian Boru,* 10 Ex. C. R. 176).

Conditions of arrest.

The first condition of the right to proceed under these statutes is the existence of a good cause of action at common law: the master or other person at whose orders the necessaries were supplied must have had authority to bind the owner of the ship: the articles supplied must have been "necessaries:" and the obtaining of them must have been "necessary" in the sense already described.

"I will state in one sentence what I apprehend to be the condition necessarily imposed upon the Court. It is this: that the Court must not make the owners of a foreign ship liable for the supply of any article for which, under similar circumstances, if resident here, they would not be responsible in a Court of common law" (*The Alexander,* 1 W. Rob. at p. 360). "I wish it to be distinctly understood that in all these cases, I never can make a ship responsible for advances and supplies for which the owner himself, if he were in this country, would not be responsible" (*The Sophia,* 1 W. Rob. at p. 369). "In cases where there is no (maritime) lien, the ship is not liable, unless the owner is liable" (*The David Wallace,* 8 Ex. C. R. at p. 241).

Thus where the ship is under a charter which amounts to a demise to the charterer, a materialman who supplies necessaries upon the order of the master, or who, whether the charter does or does not amount to a demise, supplies necessaries on the order of the charterer, can have no right to proceed against the ship *in rem* (*The Garden City,* 7 Ex. C. R. 34; *The David Wallace,* 8 Ex. C. R. 205; *The Brian Boru,* 11 Ex. C. R. 109). "In the present case, there being no maritime lien, no act of the master in purchasing supplies for the ship, with a full knowledge of the terms of the charterparty, could bind either the vessel, or the owners, or any person, except the charterers or himself personally" (*The Garden City, ubi supra,* at p. 45).

Foong Tai v. Buchheister.

But "it by no means follows that (the material man) cannot sue *in rem* . . . unless . . . (he is) at the same time in a position to sue at law *in personam* . . . every person having a proprietary interest in equity in the ship." It is sufficient that the person contracting for necessaries was in a position to render liable the owner of the ship. Where, therefore, the registered owner A was a trustee for two parties, B

and C, who had the beneficial interest as co-owners in the ship, and the plaintiffs advanced monies for necessaries on the order of B, so as to have a right to sue B *in personam* on his contracts for the sums they expended, they were held entitled to proceed *in rem* against the ship (*Foong Tai & Co.* v. *Buchheister & Co.*, 1908, A. C. 458).

Admiralty Court Act, 1840.

Foreign ships.

If the requisite conditions of liability are satisfied, there is a very wide right of proceeding *in rem* given by the two statutes. They differ, however, in respect of the nationality of the ship, the locality of the supplies, and the restriction of the remedy. The Act of 1840 applies only to foreign ships, and only to foreign ships to which supplies have been furnished "within the body of a country or upon the high seas:" but the cause may be instituted irrespective of whether any owner or part-owner is or is not domiciled in Canada. The expression "within the body of a county" applies to the territorial divisions of the United Kingdom or of any British possession where a similar division prevails: the expression "high seas" includes all salt water below low-water mark, where great ships could go, with the exception only of such parts as are "*intra fauces terræ;*" and "a foreign or colonial port, if it was part of the high seas in the above sense, would be as much within the jurisdiction of the Admiralty as any other part of the high seas" (*The Mecca,* 1895, P. at p. 107).

Admiralty Court Act, 1861.

The jurisdiction of the Court of Admiralty was enlarged by the Act of 1861, both as to nationality and locality: a cause of necessaries may be instituted against any ship, English, foreign or colonial, for necessaries supplied anywhere (*The Mecca, ubi supra,* at p. 108); provided only that the place of supply was not the port to which the ship belongs. It was only, however, in 1895 that the broad construction of the Act was adopted, for, in *The India* (32 L. J. Ad. 185), Dr. Lushington had decided that the section did not apply to foreign ships: this decision was overruled in *The Mecca* (1895, P. 95), followed in Canada by *The George L. Colwell* (6 Ex. C. R. 196); and there is now, no doubt of the right of the materialman to proceed *in rem.* for necessaries supplied anywhere on the high seas, or in port, elsewhere than in the home port of the ship, and whether the ship be English, foreign or colonial. The exception of the home port of the vessel applies as well to claims for money advanced to procure necessaries, as to claims for the supply of necessaries (*The Flora,* 6 Ex. C. R. 137).

Owner domiciled in Canada.

Moreover, jurisdiction under section 5 of the Act of 1861 may be ousted if "it is shewn to the satisfaction of the Court that at the time of the institution of the cause, any owner or part-owner of the ship is domiciled in Canada:" the word "owner," as here used, means the registered owner, or the person entitled to be registered as owner, and not a charterer or other owner *pro tempore* (*The Garden City,* 7 Ex. C. R. 34, affirmed, at p. 94); and the word "domicil" is to be understood in its ordinary legal sense (*ibidem*): and, therefore, if the owner be only temporarily absent from Canada *animo revertendi,* no action by the materialman will lie against the ship (*The Pacific,* Br. & L. at p. 245).

It was held, however, in *The Ella A. Clark* (Br. & L. 32), that where necessaries have been supplied to a foreign ship, she can be proceeded against *in rem.* under the 6th section of the Act of 1840, notwithstanding a subsequent and *bona fide* transfer to a British owner; and that in such a case, the 5th section of the Act of 1861 does not apply, although at the time of the institution of the suit, the British owner is domiciled in England. In this case of *The Ella A. Clark,* Dr. Lushington went on to express an opinion that these sections conferred a maritime lien, and that the 5th section of the Act of 1861 does not apply to foreign ships: both these dicta and Dr. Lushington's own subsequent decisions founded thereon have been overruled by *The Henrich Bjorn* (*ubi supra*) and *The Mecca* (*ubi supra*), but the actual decision in *The Ella A. Clark* has been untouched.

Apart, however, from this particular instance, it is the domicil of the party who is owner at the time of the institution of the suit which must be looked to, and if such party is then domiciled in Canada, no suit can be brought against the ship, notwithstanding that that party may not have been domiciled in Canada when the necessaries were supplied (*The Garden City,* 7 Ex. C. R. 34, at p. 45).

A company whose head office is in England, but which is licensed or registered to carry on business in one of the provinces of Canada is not domiciled in Canada, so as to oust the jurisdiction of the Court of Admiralty (*The Canada and The Triumph,* 18 B. C. R. 511, 15 Ex. C. R. 136). Where repairs have been made on a foreign ship in a foreign port and by foreign contractors, the law of the foreign state as to the existence of a lien has been held to govern the question (*The John B. Ketcham,* 13 Ex. C. R. 413).

Taking of securities.

If negotiable instruments have been taken for the amount of the claim, and have been subsequently dishonoured before suit, it appears that the ship may then be sued for the original debt (*The N. R. Gosfabrick,* Sw. 344; *The Canada and The Triumph,* 18 B. C. R. 511, 15 Ex. C. R. 136; *The Cella,* 13 P. D. 82).

Building, equipping and repairing.

In addition to the remedies under these two sections, the fourth section of the Act of 1861 provides that "the High Court of Admiralty shall have jurisdiction over any claim for the building, equipping, or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the Court."

This section came under discussion in *The Skipwith* (10 L. T. 43), and in that case, Dr. Lushington said: "I am of opinion that, however the claim originally arose, whether it arose from giving credit to the master of the vessel, or not—provided that the claim was not satisfied at the time, and that the work for building, equipping or repairing had been done and provided also that the ship and the proceeds were under the arrest of the Court—it was and is competent to the party to proceed here." The defendant in the cause was the mortgagee of the ship, who was not in possession, and who had not ordered the repairs for which the suit was brought, not having in fact acquired his interest until after the repairs were done: it is not stated when the ship was arrested, but Dr. Lushington states roundly:—"He (the mortgagee) stands in the position of the original owner of the property, and takes his mortgage *cum onere,* and is, therefore, liable for all the repairs and all the debts legally attaching to the ship."

Mortgagee.

These observations, if correct, would very strongly differentiate the effect of section 4 of the Act of 1861 from that of section 5 of the same Act or of section 6 of the Act of 1840; but in *The Pacific* (Br. & L. 243), which was a suit brought under section 5, Dr. Lushington retracted his statements in *The Skipwith,* and in *The Lyons* (6 Asp. M. C. 199), Butt, J., held that the mortgagee had priority even under section 4. The section was also discussed in *The Two Ellens* (L. R. 4 P. C. 161), where in the judgment of the Judicial Committee, it is stated:—"Their Lordships think it is quite clear that the 4th section does not give any maritime lien, because it only gives jurisdiction in respect of "any claim for building, equipping, or

repairing of any ship, if at the time of the institution of the cause the ship is under arrest of the Court, or the proceeds thereof." Now, it certainly would be absurd to say that the question whether the mortgagee is or is not to take precedence over a person who had either built or repaired or equipped a ship, should depend upon the accidental circumstance, whether some third person had happened to commence a suit in the Court of Admiralty and arrest the ship. That would certainly be a most irrational construction, and therefore, it seems clear that that section at any rate does not give any maritime lien, but merely entitles the person who has done the repairs or built the ship to be paid out of the proceeds, in preference at any rate to the owner, to whom the proceeds would otherwise be given up."

Personal liability of owner.

Therefore as regards the nature of the remedy conferred, there seems no difference between the effect of sections 4 and 5; but it nowhere clearly appears whether, in order to found a valid claim under section 4, the materialman must establish personal liability against the owner, as he must do when proceeding under section 5, or whether the mere fact of building, equipping, or repairing is sufficient to entitle the materialman to arrest the ship. The words of the section itself appear to be colourless, but Dr. Lushington in *The Skipwith* (*ubi supra*) expressed himself clearly as of the opinion that "however the claim originally arose," the materialman was entitled to proceed to the arrest of the ship; and it is difficult to see just how far his subsequent recantation in *The Pacific* (*ubi supra*) went: the learned Judge in the latter case may have merely meant to retract so much of his expressed opinion in the former case as concerned the quality of the remedy conferred by the section and the priority gained by proceeding thereunder, without intending to qualify his statement as to the incidents necessary to found a claim under the section. The Canadian cases on the section are very few, and none of them deal with the point: it is true that in *The Flora* (6 Ex. C. R. 135) the learned Judge refused to entertain a claim under section 4, because there was no contract, express or implied, on the part of the plaintiffs to build, equip or repair, yet this leaves untouched the question whether such a contract is itself sufficient irrespectively of the party with whom it is made; whether, that is to say, such a contract is sufficient even though made with the charterer, or in some other way, so as not to bind the owner personally.

Balance of account.

There is a further restriction when the plaintiff is himself the agent of the shipowner, for the Court will not exercise the powers conferred by the sections 6 and 5 of the Acts of 1840 and 1861, in order to enforce the payment of the balance due on an ordinary mercantile account between shipowner and agent: "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." (*The Countesse de Fregeville*, Lush, 329, at p. 333).

Agents.

But there is nothing in the Act to exclude agents from suing—nothing in the relation itself; and even though the agent be also a part owner, he may nevertheless recover against the ship: part owners are not necessarily partners, but even if they are so in the particular case, this is not necessarily a bar to the suit, for "at Common law partner cannot sue partner, but that is a rule that does not obtain in (the) Court (of Admiralty); (for there) the property is sued and not the co-partner" (*The West Friesland*, Sw. 454). The decision in this case was reversed on appeal (Sw. 456 and *sub nomine The Twentje*, 13 Moo. P. C. C. 185), but not on any ground which affected the above exposition of the law: the principle applied in the Privy Council was that a creditor is not able to subsequently alter an appropriation once made of payments to specific items of debit, and accordingly in the case under appeal the plaintiff had prevented himself from having any claim against the ship by the state of his own accounts: "When a ship is arrested on a specific demand, before a reference of the accounts can be directed, it ought at least to be shown to the Court that at all events something is due, although the actual amount may properly be the subject of inquiry. It is not like a bill in equity on an unsettled account, where the Court directs the account, leaving it to be shown by the result on which side the balance lies" (13 Moo. P. C. at p. 194).

The true principle is "that, as necessaries supplied to a ship are *prima facie* presumed to have been supplied on the credit of the ship, and not solely on the personal credit of her owners, the form in which accounts are rendered by an agent, who has supplied or paid for necessaries, to his principal is evidence to rebut that *prima facie* presumption and shew that the agent looked for payment to the principal alone. There is nothing in the Act of 1861 to prevent an agent from

suing for necessaries under section 5, nor is there any rule or principle of law that an agent loses his right so to sue if in the account he furnishes to his principal for those necessaries he gives credit for sums received" (*Foong Tai & Co.* v. *Buchheister & Co.*, 1908, A. C. at p. 469).

Priorities.

In regard to priority, as no maritime lien is conferred by these sections, the date at which the rights of the materialman are ascertained with regard to competing claims is the date of the institution of the suit: all liens therefore, whether maritime or possessory which have attached prior to that date and are still in force, are entitled to preference over the claim of the materialman; and not only liens, but all other valid charges on the ship existing at that date: therefore a registered mortgagee takes precedence of claims for necessaries or equipment made under these sections, in cases where the registration of the mortgage is prior to the institution of the suit in which the claim is made, although, it may be, subsequent to the supplying of the necessaries (*The Pacific*, Br. & L., 243; *The Tronbadour*, L. R. 1 A. & E. 302; *The Two Ellens*, L. R. 4 P. C. 161; *The Henrich Bjorn*, 11 A. C. 270; *The Rio Tinto*, 9 A. C. 362). But the fact that there may be such preferential charges on the ship does not interfere with the right of the materialman to institute the suit and arrest the ship, for "the fact that it may turn out that such (statutory) lien may be postponed, to a prior charge or charges, by way of lien or mortgage, or to the claim of a *bona fide* purchaser of the ship for value, does not prevent its enforcement so far as may be lawful upon the facts to be thereafter established either upon the trial or upon a subsequent motion" (*The Canada and The Triumph*, 18 B. C. R. at p. 514, 15 Ex. C. R. 136).

On the other hand, the statutory lien takes effect from the moment of the arrest of the ship, and therefore no change in the title to the ship supervening after the arrest can effect the right of the materialman (*The Cella*, 13 P. D. 82). Moreover, it would appear from *The Wasp* (L. R. 1 A. & E. 367) that a materialman might, even before 1875, assign not only the personal claim, but also the remedy *in rem;* and that nothing done or suffered by the assignor after the assignment would affect the rights of the assignee.

Several claimants.

Notwithstanding, however, that the materialman has "a security arising at the commencement of the action *in rem*,"

yet it does not by any means follow that such a security takes priority over securities of the same kind, arising subsequently in a similar manner. Therefore, when several suits are instituted by different persons for necessaries, and the proceeds are insufficient to satisfy all the claimants, the Court will not give preference to the claimants in the order in which the suits have been instituted, but will now direct the proceeds to be divided *pro rata*. Formerly it appears that a materialman might obtain priority by an unconditional decree, as for instance in *The Saracen* (6 Moo. P. C. C. 56), where a materialman who had obtained a final decree was allowed to hold its fruits against another claimant of the same class who commenced his action subsequently to such decree: but it is to be observed that the priority was given by the decree and not by the institution of the suit. And "at the present time the decree in this Court in an action for necessaries is either conditional in any case, or certainly, if there is any reason to suppose there may be other claims of equal rank; and even if the decree were in any instance made in unconditional terms, I am inclined to think that so long as the funds remained in the hands of the Court it could and should be modified so as to let in other persons, who, without laches, put forward claims of a like character" (per Sir Francis Jeune in *The Africano*, 1894, P. at p. 150).

The Saracen.

The Africano.

Bottomry bonds.

The claim upon a bottomry bond approaches most nearly in the circumstances of its origin to the claim of the materialman, but in the former case there is, and in the latter case there is not, the creation of a maritime lien; consequently the claim on a valid bottomry bond always takes precedence of the claim of the materialman. And further where there is a bottomry bond on ship, freight, and cargo, and the proceeds of ship and freight will be exhausted to satisfy the claim on the bottomry bond, the Court will not marshall the assets in favour of a claim for necessaries against ship and freight; for, to do so, would be to prejudice the rights of the cargo owners by throwing the burden of the bottomry bond upon the cargo so to let in against the proceeds of the ship and freight the claim of the materialman with whom the cargo owners have no concern (*The Chioggia*, 1898, P. 1).

Marshalling.

Master, part owner.

There is, however, one instance in which the materialman may prevail against a maritime lien, viz., where the master who has ordered the necessaries is also himself part owner of the ship: in such a case the materialman is entitled to be

paid for the necessaries out of the proceeds of the ship and freight in priority to a claim of the master for wages and disbursements: for "the master who has given the order to the materialmen is personally liable on his own contract, and has also rendered his owner liable, for whom, as agent, he made the contract; and in both capacities, as master and owner, he is liable in this case to the creditor; as part owner, his ship has had all the advantage from the supply of necessaries, and it would be a great injustice if he could cause that ship, so advantaged, to pay his wages, while, by so doing, he left unpaid his share of the debt for the necessaries which he had ordered" (*The Jenny Lind,* L. R. 3 A. & E. 529). Nor is it material that he is not solely liable for the debt, for he can recover his proper contribution from the other part owners (*ibid.* at p. 533).

It is most important to observe that under section 4 of the Act of 1861, when a creditor finds a ship or the proceeds thereof under arrest of the Court, he may at once institute his suit, and the Court at once acquires jurisdiction over the claim for building, equipping, or repairing the ship. "The burden is not cast upon the litigant to shew to the Court that the original action under which the ship was arrested must eventually succeed . . . it is the present fact of the arrest, and not the future result of the suit, that determines the question of jurisdiction" (*The Aurora, No. 3,* 18 B. C. R. 353, 15 Ex. C. R. 27).

Civil Code of Quebec: *le dernier voyage.*

In the Civil Code of Quebec is contained a provision (art. 2383) purporting to confer a privilege upon vessels for the payment of certain debts: this article came up for consideration by the Supreme Court of Canada in the case of *The Inverness Railway & Coal Co.* v. *Elder Dempster & Co.* (40 S. C. R. 45); but unfortunately the question whether the legislature which enacted the Code had any power to legislate on such matters was not raised in the lower Courts, and as the majority of the members of the Supreme Court held that the plaintiffs case was not within the provisions of the article, it became unnecessary to consider the question of jurisdiction. Mr. Justice Girouard, however, after tracing the history of maritime jurisdiction in the province of Quebec, in the course of a most fascinating judgment, inclined to the opinion, though without deciding the point (*ibid.* at p. 57), that there was a concurrent jurisdiction over matters maritime residing in the Courts of the province of Quebec.

Any inquiry into the power of the legislature which enacted the Civil Code belongs to the domain of Constitutional Law, and is far beyond the scope of this treatise: it would involve a minute consideration not only of the British North America Act, but also of The Colonial Laws Validity Act; and of the corresponding questions as to the exclusive powers of Courts of Admiralty which have arisen in the United States of America: much too might turn on the true construction of the enigmatical section 2, sub-section 4 of the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict., cap. 27).

The matters dealt with in article 2383, and the true meaning of the words "*les reparations faites et les provisions fournies pour le dernier voyage,*" and of "*le dernier equipeur,*" are subjects rather of mercantile than of maritime law, and in addition they were so exhaustively dealt with in *The Inverness Railway and Coal Co.* v. *Elder Dempster & Co.* (*ubi supra*) as to leave little occasion for further discussion.

Section 6.—Towage.

Towage. The line of demarcation between towage services and salvage is a narrow one. "A towage service may be described as the employment of one vessel to expedite the voyage of another, where nothing more is rquired than the accelerating her progress" (Dr. Lushington in *The Princess Alice,* 3 W. Rob. at p. 140, approved in *The Strathnaver,* 1 A. C. at p. 63). The essential element to convert a towage service into a case of salvage is the existence of danger to the vessel rendering the services: it is not necessary that the danger should be present and imminent, "*mais it faut tout de même qu'il y ait un danger serieux bien constaté*" (Routhier, L.J., in *The Thomas J. Scully,* 6 Ex. C. R. at p. 325): where therefore the towage was performed "under the easiest circumstances, without danger, without increased trouble, without delay" (*The Thomas J. Scully, ubi supra,* at p. 326), there could be no salvage claim.

Salvage.

Maritime lien. The Court of Admiralty appears to have exercised an inherent jurisdiction in matters of towage, on the high seas, and if therefore the argument developed in the last chapter is well-grounded, the performance of towage services must have conferred a maritime lien: in four cases it has been so

treated, *The Isabella* (3 Hagg. 427), *The Constancia* (4 N. of C. 512, 10 Jur. 845), *The Princess Alice* (3 W. Rob. 138), *The St. Lawrence* (5 P. D. 250); although as has been pointed out, "there was no distinct argument or distinct decision that towage . . . was the subject of a maritime lien (43 C. D. at p. 246).

On the other hand it was stated in both Courts in the case of *The Henrich Bjorn* that towage gave no maritime lien (10 P. D. 53, 11 A. C. 283): in the House of Lords, Lord Bramwell said: "Jurisdiction is by the section (3 & 4 Vict., cap. 65, sec. 6) given in cases of 'towage,' and it cannot be pretended that there was any maritime lien as to that when it occurred on the high seas . . . jurisdiction as to towage was not created by the statute: it existed before with no maritime lien" (11 A. C. at p. 283). The learned Lord goes on to remark: "I cannot help thinking that the confusion which exists . . . is attributable to a notion that Admiralty jurisdiction only existed where there was a maritime lien . . . that the law was so, was stoutly contended before us; but ultimately, and most properly, that was given up, on the strength of authorities shewing beyond doubt that Admiralty jurisdiction exists and always existed where there was no such lien. Proceedings might be *in personam* without the *res* being affected." This, however, is to misstate the question to be decided: the contention is not that the Court of Admiralty had only jurisdiction *in rem*: it certainly had some jurisdiction *in personam*: but it is maintained from a consideration of the origin and history of Admiralty jurisdiction that the jurisdiction *in rem* only existed in cases where there was a maritime lien.

High seas.

Whatever might have been the nature of the inherent Admiralty jurisdiction in matters of towage, however, it only existed when the services were rendered on the high seas: "All demands for towage services, when the transaction took place within the body of a country, were cognizable in the Courts of common law alone" (Dr. Lushington in *The Ocean*, 2 W. Rob. at p. 370).

This limitation was remedied by The Admiralty Court Act, 1840 (3 & 4 Vict., cap. 65), which provided by section 6—"the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever . . . in the nature of towage . . . whether (such) ship or vessel may

have been within the body of a country or upon the high seas, at the time when the services were rendered . . ."

The words of the section would not suffice to confer a maritime lien (*The Henrich Bjorn,* 11 A. C. 270); but it might well be that the section, while conferring a mere statutory lien in respect of services rendered within the body of a county, left untouched the nature of the claim acquired in respect of services rendered on the high seas. It is true that in *Westrup* v. *Great Yarmouth Steam Carrying Co.* (43 C. D. 241), Kay, J., purported to decide broadly that there is no maritime lien for ordinary towage services; but his decision rested entirely on the dicta in *The Henrich Bjorn,* which proceeded on the assumption that there was no maritime lien previously to the Act. Lord Bramwell in the latter case appears to have conceded (11 A. C. at p. 282) that where there was, prior to the Act, a maritime lien for matters dealt with by the Act, when transacted on the high seas, there might well be, since the Act, a maritime lien for those matters, when transacted within the body of a county. It therefore still seems open to question whether towage does not confer a maritime lien, wherever the services were performed.

Foreign ships.

In the case of *The Henrich Bjorn,* when under consideration in the Court of Appeal, it was stated that the section of the Act conferred jurisdiction in respect of claims for "towage services rendered to any foreign ship" (10 P. D. at p. 52): but when the section is examined, it is apparent that the words "foreign ship" are used only in connection with claims for necessaries; and in *The Ocean* (2 W. Rob. 368, 370), Dr. Lushington expressed himself clearly of opinion that the part of the section dealing with towage was intended to refer generally to all ships or sea-going vessels; and in *The Christina* (6 Moo. P. C. C. 371) decided in 1848, the Court of Admiralty entertained a claim against a vessel, "homeward bound to London," for towage services rendered in Limehouse Reach.

The Court of Admiralty will only entertain a claim for towage when the tug has performed its contract (*The Edward Hawkins,* Lush, 515, at p. 517); the contract is indivisible, and there can therefore be no claim on a *quantum meruit* (*The Madras,* 1898, P. 90).

Duties of the tug.

When the contract of towage is made, there is "an engagement that each party to the contract will perform his duty

in completing it; that proper skill and diligence will be used on board both the vessel and tug; and that neither party, by negect or mismanagement, will create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken. If in the course of the performance of the contract, any inevitable accident happens to the one, without any default on the part of the other, no cause of action could arise. Such an accident will be one of the necessary risks of the engagement to which each party was subject, and could create no liability on the part of the other. If, on the other hand, the wrongful act of either occasion any damage to the other, such wrongful act will create a responsibility on the party committing it, if the sufferer had not, by any misconduct or unskillfulness, on her part, contributed to the accident" (*The Julia,* 14 Moo. P. C. C. 210, at 230; *The Lillie,* 11 Ex. C. R. 274). The mutual obligations of the parties may of course be varied by the express terms of the contract (*The United Service,* 8 P. D. 56, 9 P. D. 3).

Control by tow.

In an ordinary contract of towage the vessel in tow has control over the tug, and if therefore the pilot of the tow negligently allows the tug to steer a dangerous course whereby the tow is injured the tug is not responsible in damages therefor; therefore where a sailing vessel in tow of a steam tug was passing up the St. Lawrence River, and the pilot of the tow and the pilot of the tug were both at fault in not having the course changed after passing a certain point in the river, although the pilot of the tow discovered the mistake, and gave notice to the tug, by executing the proper manoeuvre, but not until it was too late to avoid an accident which befell the tow, it was held that the owners of the tow could not recover from the owners of the tug (*The Niobe,* 13 P. D. 55; *The Florence,* 5 Ex. C. R. 151, 218): although when a very great part of the blame is to be attributed to the tug, the costs of the latter in defending the action may not be allowed (*The Florence.* 5 Ex. C. R. 151). Moreover, as the vessel in tow has control over the tug, it may be liable for the wrongful acts of the latter, unless they are done so suddenly as to prevent the vessel in tow from controlling them (*The Niobe,* 13 P. D. 55; *The Isca,* 12 P. D. 34; *The Lord Bangor,* 1896, P. 28; *The Morgengry and Blackcock,* 1900, P. 1). But the rule is not invariable, and where the control is with the tug, the tow is not liable for a collision caused by the negligence of the tug

(*The Quickstep,* 15 P. D. 196). In *The Wandrian* (38 S. C. R. at p. 446) the rule was stated to be "that under an ordinary contract of towage, the tow has control over the tug and the latter is bound to accept the directions and orders of the former. There are exceptions to this rule, notably in the cases of dumb barges, and canal boats having little or no control over their movements and where by custom, contract or necessity the control of the tow is in the tug." It is the duty of the tug under ordinary circumstances to obey the directions of the pilot of the tow (*The Energy,* L. R. 3 A. & E. 48); but this duty is not to be construed too strictly (*The Christina,* 3 W. Rob. 29; *The Sinquasi,* 5 P. D. 244; *The Altair,* 1897, P. 105, at p. 115).

In cases of collision the question of the identity of a tow with its tug is a question of fact, and where a collision occurs through the faulty navigation of the tug, and the tow is, as regards navigation, completely under the control of the tug and does not stand to the latter in the relation of master and servant, the tow is to be regarded as an innocent ship in no sense identified with the delinquent tug (*The Devonshire,* 1912, A. C. 634).

In *The American* and *The Syria* (L. R. 6 P. C. 127) *The American* found at a foreign port *The Syria* totally disabled: both vessels belonged to the same owner: the captain of *The American,* to protect his employer's interest and earn salvage from the owners of the cargo of *The Syria,* took *The Syria* in tow and towed her into the English Channel, and whilst so doing came into collision with a sailing ship. It was held that, the governing as well as the motive power being wholly with *The American, The Syria* was not liable to be condemned in damages, as *The Syria* could not be deemed, in intendment of law, to be one vessel with *The American,* or liable for her negligence.

All that was decided in the last case, however, was that the fact of mere physical connection or of joint ownership does not create or affect liability (*The A. L. Smith,* 51 S. C. R., per the Chief Justice, at p. 44); and where two vessels are necessarily connected for the purpose of the particular business in which both are engaged for the benefit of their common owner and are both in the possession and under the control of the same crew for all the purposes of their navigation, then, if as a result of the way in which that navigation is

carried on, a collision occurs to which both vessels contribute, both vessels are equally liable to the injured ship (*The A. L. Smith* and *The Chinook*, 51 S. C. R. 39).

This question is further considered under the heading of Damage (*infra*, p. 150).

The Buckeye State.

In *The Buckeye State* (12 Ex. C. R. 419), it was laid down that "the relation between tug and tow, where a damage occurs by a collision by which the tow is damaged by the unskillful navigation of the tug, is not so much that which arises directly from the contract of towage, but rather that which imposes a duty on the part of the tug towards the barge, to observe such ordinary care and skill in the towage as will avoid any possible damage or injury." This dictum derived from American cases which apparently differ widely in their principles from those acted on in English Courts, does not seem acceptable, if it is intended to mean that the law imposes some duty on the tug ab extra and independently of the contract of towage. It seems reasonably clear from the cases of *The Julia* (14 Moo. P. C. C. 210), *Spaight* v. *Tedcastle* (6 A. C. 217) and *Sewell* v. *British Columbia Towage and Transportation Company* (9 S. C. R. 527), that the relation between the tug and tow is governed entirely by the contract with its incidents expressed and implied by law as explained in *The Julia* (*ubi supra*).

In the *Lloyd S. Porter* (15 Ex. C. R. 126) the tug was held to be liable to a maritime lien for damage sustained by the cargo of the tow, which went ashore by reason of negligent navigation on the part of the tug, though there was no actual impact between the tug and the tow.

Towage award.

One great difference between claims for towage and for salvage respectively is that in the case of towage, the officers and crew of the tug are not entitled to participate in the amount awarded for the towage which goes entirely to the owner of the tug (*The Thomas J. Scully*, 6 Ex. C. R. 318).

The discussion of the relative rights and duties of tug and tow has been entered on here, as it properly falls within the subject of towage, although such rights and duties come into question usually in causes of damage, and not in causes of towage: it is indeed a question of much doubt whether, in cases where the tug has actually performed its contract, it is open to the defendant to set up misconduct on the part of the tug in answer to a claim for towage. The question was

discussed, but not decided in *The Christina* (3 W. Rob 29, 6 Moo. P. C. C. 372).

Reference. In a suit for towage, where it appears that no specified reward has been fixed by the parties, the Court, if the claim is well founded, will pronounce for it, and direct a reference on the question of amount to the registrar and merchants for inquiry and report (*The Alfred,* 5 Asp. M. C. 214).

Section 7.—Seamen's Wages: Master's Wages and Disbursements.

Seamen's wages. Seamen's wages have always been one of the subjects of the inherent jurisdiction of the Court of Admiralty, although it was only after a severe struggle that the Court managed to maintain its jurisdiction during the attacks to which it was subject in the sixteenth century: and the lien for such wages is of all the classes of maritime liens that which has survived in the purest form; "it attaches to ships independently of any personal obligation of the owner, the sole condition required being that such wages shall have been earned on board the ship" (1893, A. C. 52).

Maritime lien.

Master's wages. The jurisdiction did not extend to claims for master's wages, and was restricted to claims for seamen's wages under the ordinary mariner's contract: the Court was regularly prohibited where the wages were claimed under a contract under seal, or under a contract whose terms were special or unusual.

Contract under seal.

Little importance, however, now attaches to the inherent jurisdiction of the Court, as the whole subject of seamen's wages and master's wages and disbursements has been the subject of statutory regulation: and, in order to fully understand the existing state of the law, it is necessary to trace the course of legislation on this subject.

Freight the mother of wages. The Merchants' Shipping Act, 1854 (17 & 18 Vict. cap. 104, sec. 183), abrogated the old rule that "freight was the mother of wages" by providing that "no right to wages shall be dependent on the earning of freight," while at the same time allowing the right to wages to be barred by proof that the seaman had not exerted himself to the utmost, in cases of wreck or loss of the ship, to save the ship.

Maritime lien for master's wages. In respect to masters, the Merchants Shipping Act, 1844 (7 & 8 Vict. cap. 112, sec. 16), gave to masters, in case of the bankruptcy or insolvency of the owners of the ship, the same

rights and remedies for the recovery of their wages as seamen had: the master thus became entitled to a maritime lien for his wages.

Disbursements. The last Act was repealed by the Merchants Shipping Act, 1854 (17 & 18 Vict. cap. 104), but the master's rights and remedies were preserved and extended by section 191, which not only confirmed the master's lien for his wages, but also gave the Court a limited jurisdiction over the master's disbursements (*The Caledonia*, Sw. 17, 19).

Admiralty Court Act, 1861. The limitation was removed and the whole subject of mariners' wages and master's wages and disbursements dealt with by the Admiralty Court Act, 1861 (24 Vict. cap. 10, sec. 10), which provided that "the High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship and for disbursements made by him on account of the ship, provided always that if in any such cause the plaintiff do not recover fifty pounds, he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the Judge shall certify that the cause was a fit one to be tried in the said Court."

This section does away, therefore, with the old rule which prevented the Court of Admiralty from entertaining claims on a special contract or one under seal; the only condition now being that the wages should have been earned on board the ship.

Disbursements, maritime lien for. Mariners had now in all cases a maritime lien for their wages, and the master had likewise a maritime lien for his wages. For many years it was supposed that the master had equally a maritime lien for his disbursements, given either by the Merchant Shipping Act, 1854, or the Admiralty Court Act, 1861, or by the conjoint effect of the two (*The Glentanner*, Sw. 415; *The Mary Ann*, L. R. 1 A. & E. 8; *The Edward Oliver*, L. R. 1 A. & E. 379; *The Feronia*, L. R. 2 A. & E. 65; *The Marco Polo*, 1 Asp. M. C. 54; *The Limerick*, 1 P. D. 411; *The Fairport*, 8 P. D. 48; *The Ringdove*, 11 P. D. 120); but all this chain of authority was overruled in *The Sara* (14 A. C. 209), which decided that the master had in the then existing state of the law, no maritime lien for his disbursements.

In the year following the decision in *The Sara,* the Merchant Shipping Act, 1889, was passed (52 & 53 Vict. cap. 46), giving the master the same rights and remedies for the recovery of disbursements as for the recovery of his wages.

The whole of the series of Merchant Shipping Acts have been repealed and re-enacted with additions and modifications in the Merchant Shipping Act, 1894 (57 & 58 Vict. cap. 60), which in Part II, by sections 155 to 167 inclusive, regulates the rights to and the modes of recovering wages and disbursements of mariners and masters: the application of the provision of this part of the Act is provided for in sections 260 to 266 inclusive, and gives rise to serious difficulties of construction which have been noticed above.

The subject of wages and disbursements has also been the matter of legislation in Canada, where provision has been made for sea-going ships and ships navigating the inland waters of Canada respectively.

Canada Shipping Act.

Part III. of the Canada Shipping Act (R. S. C. 1906, cap. 113) deals with "seamen:" its application is limited by section 127 to the Provinces of Quebec, Nova Scotia, New Brunswick, Prince Edward Island, and British Columbia: sections 179 to 195 inclusive regulate the rights to and the modes of recovering wages and disbursements, and are a literal transcript of the provisions of the Imperial Act.

The sections which are of importance in connection with Admiralty jurisdiction are the following:—

Earning of freight.

Section 181: "No right to wages of any seaman or apprentice on board of any ship registered in any of the provinces shall be dependent on the earning of freight.

2. "Every such seaman or apprentice who would be entitled to demand and recover any wages, if the ship in which he has served had earned freight, shall, subject to all other rules of law and conditions applicable to the case, be entitled to claim and recover the same, notwithstanding that freight has not been earned: Provided that, in all cases of wreck or loss of the ship, proof that he has not exerted himself to the utmost to save the ship, cargo and stores, shall bar his claim."

Institution of cause in the Admiralty Court.

Section 191: "No suit or proceeding for the recovery of wages under the sum of two hundred dollars shall be instituted by or on behalf of any seaman or apprentice belonging to any ship registered in any of the provinces in the Exchequer Court on its Admiralty side, or in any Superior Court in any of the provinces, unless

(a) the owner of the ship is insolvent within the meaning of any Act respecting insolvency, for the time being in force in Canada; or,

(b) the ship is under arrest or is sold by the authority of the Exchequer Court on its Admiralty side, or any Superior Court; or,

(c) any Judge, magistrate or justice, acting under the authority of this Part, refer the case to be adjudged by such Court; or,

(d) neither the owner nor the master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore.

Section 192: "If any suit for the recovery of a seaman's wages is instituted against any such ship or the master or owner thereof in the Exchequer Court on its Admiralty side, or in any Superior Court in any of the provinces, and it appears to the Court in the course of such suit, that the plaintiff might have had as effectual remedy for the recovery of his wages by complaint to a Judge, magistrate or two justices of the peace under this Part, the Judge shall certify to that effect, and thereupon no costs shall be awarded to the plaintiff."

Master's wages and disbursements.

Section 194: "Every master of a ship registered in any of the provinces shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages, and for the recovery of disbursements properly made by him on account of the ship and for liabilities properly incurred by him on account of the ship, which, by this Part or by any law or custom, any seaman, not being a master, has for the recovery of his wages."

Set-off and counter-claim.

Section 195: "If, in any proceeding in any Court possessing Admiralty jurisdiction in any of the provinces touching the claim of a master to wages or such disbursements and liabilities as aforesaid, any right of set-off or counterclaim is set up, such Court may enter into and adjudicate upon all questions and settle all accounts then arising or outstanding and unsettled between the parties to the proceedings, and may direct payment of any balance which is found to be due."

Inland waters.

It will have been observed that the provisions of Part III. do not apply to the Province of Ontario, and its "inland waters:" the wages and disbursements of masters and mariners on ships navigating the "inland waters of Canada" are regulated by Part IV. of the Canada Shipping Act (R. S. C. 1906, cap. 113).

By section 326 (c), the inland waters of Canada are defined as including "all the rivers, lakes and other navigable waters within Canada, except salt water bays, arms of the sea and gulfs on the sea coast, (including) the River St. Lawrence as far seaward as a line drawn from Cape Chatte on the south shore to Point de Monts on the north shore."

In this Part, the provisions of Part III., already set out, are repeated, with the exception of section 181.

Section 191 is repeated in section 348: section 192 in section 349: section 194 in section 350: section 195 is slightly varied in section 351, which gives power to the Court of Admiralty to entertain a set-off or counterclaim only when the proceeding is "touching the claim of a master to wages."

These provisions of Part IV. are re-enactments of the provisions of the old "Inland Waters Seamen's Acts (36 Vict. cap. 129, 45 Vict. cap. 34, 56 Vict. cap 24).

The distinction, therefore, between the provisions governing suits for wages and disbursements on sea-going ships and ships navigating the inland waters of Canada is that in the former class, wages are made independent of the earning of freight, while in the latter class, no such provision is made by statute, and also a set-off or counterclaim may be set up in suits for wages or disbursements in the case of sea-going ships, while the jurisdiction is confined to suits for wages in the case of ships on the inland waters.

Conflict of laws.

The provisions of section 10 of the Admiralty Court Act, 1861 (24 Vict. cap. 10), and of sections 191 and 348 of the Canada Shipping Act (R. S. C. 1906, cap. 113) give rise to a conflict of laws: by the former section, the Court of Admiralty was given jurisdiction over a claim for wages, whatever might be its amount, although the suitor for a less amount than £50 might be deprived of his costs: in the latter sections is contained a prohibition from suing in the Court of Admiralty for wages under the sum of $200 sought to be recovered by a seaman or apprentice.

The W.J. Aikens.

This antinomy has given rise to conflicting judicial decisions. In *The W. J. Aikens* (4 Ex. C. R. 7), the local Judge of the Toronto Admiralty District held that section 34 of the Inland Waters Seamen's Act (R. S. C. 1886, cap. 75), now re-enacted as section 348 of the Canada Shipping Act (R. S. C. 1906, cap. 113) had been impliedly repealed by the Admiralty Act, 1891 (54 & 55 Vict. cap. 29), which brought into force in Canada,

through the medium of the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. cap. 27), the provisions of section 10 of the Admiralty Court Act, 1861 (24 Vict. cap. 10), and that, therefore, the Court of Admiralty had jurisdiction over claims for wages, irrespective of the amounts. On the other hand, in *The Savoy and The Polino* (9 Ex. C. R. 238), the local Judge of the Quebec Admiralty district decided that the provisions of section 56 of the Seamen's Act (R. S. C. 1886, cap. 74), now re-enacted as section 191 of the Canada Shipping Act (R. S. C. 1906, cap. 113) effectually prevented a suit for wages under the sum of $200 being instituted in the Court of Admiralty, and refused to follow the decision in *The W. J. Aikens*. These decisions were noticed in *The Christine* (11 Ex. C. R. 167), but no opinion was expressed on the merits of the controversy. The sections relating to ships registered in the Maritime Provinces and those navigating the inland waters of Canada are expressed in identical terms, and are both a reproduction of section 165 of the Merchant Shipping Act, 1894 (57 & 58 Vict. cap. 60), which is itself a re-enactment of section 189 of the Merchant Shipping Act, 1854 (17 & 18 Vict. cap. 104).

The Savoy and The Polino.

In *The W. J. Aikens* (*ubi supra*), the learned Judge appears to have rested his decision on an inference which he drew from the case of *The Empress* (L. R. 3 A. & E. 502), where it was held that the effect of the County Courts Admiralty Jurisdiction Act, 1868, was to restore to the Court of Admiralty its inherent jurisdiction over the actions mentioned in section 9 of that Act, which included causes of wages, whenever such jurisdiction had been taken away by previous legislation. Starting from this premise, the learned Judge, in *The W. J. Aikens,* reached the conclusion that the effect of legislation in Canada on Admiralty matters, being later in date than the Inland Waters Seamen's Act, had impliedly abrogated the restrictive provisions of the earlier Act. On the other hand, in *The Savoy and The Polino,* Routhier, L.J., considered that the restrictive provisions of the Seamen's Act constituted a special law on the subject, while the Admiralty legislation, on which the learned Judge, in *The W. J. Aikens,* relied, was in the nature of general law, and could not, therefore, repeal earlier special legislation.

The difficulty would seem to be that both the provisions of section 10 of the Admiralty Court Act, 1861 (24 Vict. cap. 10), and of sections 34 and 56 of the Inland Waters Seamen's Act and the Seamen's Act (R. S. C. 1886, cap. 75 and 74) are really special law: but as against this must be set the fact that

the latter sections have been re-enacted by the Canada Shipping Act (R. S. C. 1906, cap. 113), which is later in date than the Admiralty legislation of Canada; and also that the Merchant Shipping Act, 1894, is later in date than the Admiralty Court Act, 1861, and the County Court Admiralty Jurisdiction Act, 1868: although these considerations are somewhat weakened by the fact that both the Canada Shipping Act and the Merchant Shipping Act, 1894, are only consolidating Acts (*Mitchell* v. *Simpson,* 25 Q. B. D. 183).

However, it would seem on the whole that the decision in *The Savoy and The Polino* (*ubi supra*) is the more acceptable one: in *The Ferret* (8 A. C. 329), decided in 1883, it was expressly argued that section 10 of the Admiralty Court Act, 1861, had repealed section 189 of the Merchant Shipping Act, 1854, but the Judicial Committee, on somewhat similar legislation in the Colony of Victoria, appears to have considered the restriction operative; and in *The Socotra* (13 B. C. R. 309), Martin, L.J., clearly considered that, in order to escape from the operation of section 165 of the Merchant Shipping Act, 1894, it was necessary to bring the case within one of the exceptions to the section.

Since the foregoing was written, the whole subject has been examined by the learned judge of the British Columbia Admiralty District: in *The St. Alice,* after an exhaustive examination of all the authorities on the subject, it was held that under section 191 of the Canada Shipping Act (R. S. C. 1906, c. 113) the plaintiff must recover at least the minimum amount specified in the section or the action will be dismissed as the Court has no jurisdiction to entertain an action for less than such prescribed amount (*The St. Alice.* Brit. Col. Ad. Dis., 17th July, 1915). And in *The Kobe,* the same principle was applied in the case of a claim by a master (*The Kobe,* Brit. Col. Ad. Dis., 17th Sept., 1915).

Where, however, a number of seamen combine, as they may do, in bringing a suit for wages, it is sufficient if the total amount claimed exceeds the statutory limitation, although each of the individual sums claimed may be below that amount (*The Ferret,* 8 A. C. 329; *The Christine,* 11 Ex. C. R. 167; *The Vipond,* 14 Ex. C. R. 326).

All British ships would seem to be governed by the restrictive provisions: if the vessel is registered in Canada, either Part III. or Part IV. of the Canada Shipping Act (R. S. C. 1906, cap. 113) would apply, and if she were registered in British

dominions, outside Canada, Part II. of the Merchant Shipping Act, 1894, would, by section 261, appear to govern the case. But a foreign seaman would appear not to be affected (*Burns* v. *Chapman*, 5 C. B. N. S. 481).

Insolvency of owner. The owner, whose insolvency removes the prohibition against suing in the Court of Admiralty, must be the registered owner (*The Jessie Stewart*, 3 Ex. C. R. 132).

"Seamen." The persons whose claims are comprehended within section 10 of the Admiralty Court Act, 1861 (24 Vict. cap. 10), are masters and seamen: the word "seaman" is defined by the Merchant Shipping Act, 1894 (57 & 58 Vict. cap. 60, sec. 742), and the Canada Shipping Act (R. S. C. 1906, cap. 113, sec. 126 (d)) in the same terms, viz.: as including every person employed or engaged in any capacity on board any ship, except masters, pilots, and apprentices duly indentured and registered: the purpose of the Admiralty Court Act, 1861, was, however, to extend and not to curtail the jurisdiction of the Court of Admiralty (*The Diana*, Lush. *per* Dr. Lushington, at p. 540), and by the ancient practice of the Court every person other than the master employed on board a ship was entitled to sue in Admiralty to enforce a maritime lien for his wages; so that it would appear that the class of persons entitled to proceed *in rem* for their wages is not confined within the limits of the definitions in the Merchant Shipping Acts. Thus, both a pilot (*The Adah*, 2 Hagg. 326; *The Servia and Carinthia*, 1898, P. 36), and an apprentice (*The Albert Crosby*, Lush. 44) have been permitted to sue in Admiralty: this privilege has also been extended to the mate (*Bayly* v. *Grant*, 1 Ld. Raym. 632; *Hook* v. *Moreton*, 1 Ld. Raym. 397), to the purser (*The Prince George*, 3 Hagg. 376), to the surgeon (*The Lord Hobart*, 2 Dods. 105; *The Wharton*, 3 Hagg. 148, n. (a)), to the stewardess (*The Jane and Matilda*. 1 Hagg. 187), to the carpenter (*Wheeler* v. *Thompson*, 2 Str. 707; *The Lord Hobart*, 2 Dods. 104), to the boatswain (*Alleson* v. *Marsh*, 2 Vent. 181; *Ragg* v. *King*, 2 Str. 858), to seamen and officers employed on board a ship after the discharge of the rest of the crew (*R.* v. *Judge of the City of London Court*, 25 Q. B. D. 339), and to a female in charge of a confectionery stand on board a ship (*The Flora*, 6 Ex. C. R. 131): while, on the other hand, it has been denied to a musician who was on board under an arrangement with the master that he should have meals and accommodation on the ship and the right to collect gratuities from the passengers (*The Flora*, 6 Ex. C. R. 129), and to the watchman who was in charge

of the ship while she was lying dismantled in dock (*The Flora,* 6 Ex. C. R. 133).

Earned on board.

The remedy given by section 10 of the Admiralty Court Act, 1861 (24 Vict. cap. 10), is for wages earned on board any ship: it was held in *The Chieftain* (Br. & Lush. 104) that wages were earned by the master on board his ship, although during his service he did not sleep on board the ship and many of his duties were performed on shore; and in *R.* v. *The Judge of the City of London Court* (25 Q. B. D.), it was said, at p. 342, "the right to proceed *in rem* for services rendered on board a ship apparently extends to every class of person who is connected with the ship as a ship, as a sea-going instrument of navigation or of transport of cargo from one place to another, and to services rendered by such persons in harbours just as much as to services rendered by them at sea."

Share of catch.

In *The Thomas F. Bayard* (16 W. L. R. 527), an attempt was made by a seaman to recover his share in the proceeds of certain sea-otter skins obtained during the voyage: it was held that he had not succeeded in proving the alleged agreement on which he sued, but a doubt was expressed whether he could in any case have recovered on such an agreement in view of section 152 of the Canada Shipping Act (R. S. C. 1906, cap. 113).

Claims in the nature of damages for wrongful dismissal would seem not to fall within the meaning of wages earned on board a ship.

Wrongful dismissal, damages for.

In the case of a seaman, the Canada Shipping Act (R. S. C. 1906, cap. 113), by sections 162 and 336, which are reproduced from section 162 of the Merchant Shipping Act, 1894 (57 & 58 Vict. cap. 60), provides that "any seaman who has signed an agreement under (Part IV.) and is afterwards discharged before the commencement of the voyage, or before one month's wages are earned, without fault on his part justifying such discharge and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he has earned, due compensation for the damage thereby caused to him, not exceeding one month's wages, and may, on adducing such evidence as the Court hearing the case deems satisfactory of his having been so improperly discharged, recover such compensation as if it were wages duly earned."

Apart, however, from this section, it has been held that seamen are entitled to sue for compensation for wrongful dismissal (*The Great Eastern,* L. R. 1 A. & E. 384; *The*

Ferret, 8 A. C. 329) : and a similar decision has been reached in the case of a master (*The Blessing,* 3 P. D. 35; *The Lady Eileen,* 11 Ex. C. R. 87; *The Tartar,* 11 Ex. C. R. 308). In the last case, a custom was attempted to be set up that masters of tug-boats and small coasting vessels might be discharged without notice, and leave their service in the same manner, in either case receiving their wages up to the date of the cessation of their services; the learned Judge found the custom not proved, and went on to state that in any event he would have held that such a custom was not reasonable.

Custom.

The Canada Shipping Act (R. S. C. 1906, cap. 113) renders various sums of money recoverable as wages, and the Admiralty Court has the same jurisdiction in such cases as over claims for wages. Thus, by section 165, moneys paid in advance in contravention of the section may be sued for and recovered by the seaman: by section 199, all money, wages, and effects of any seaman or apprentice belonging to or sent home in any Canadian foreign sea-going ship employed on a voyage which is to terminate in any of the provinces and dying during such voyage, shall be recoverable as wages: by section 205, the expenses of seamen and apprentices discharged abroad are recoverable as wages: by section 213, the statutory allowance for shortage in or bad quality of, provisions is recoverable as wages.

Sums recoverable as wages.

A sailor who engages on a whaling voyage and is to receive a certain sum per month 'and lay' (the term 'lay' being set out in the ship's articles as an apportionment to the officers and crew of various amounts for various kinds of whales that are taken by the ship) may include the sum due to him under the 'lay' in an action for wages against the ship: the sum so due is not subject to forfeiture under a clause in the articles providing for the forfeiture of a 'bonus' in case the seaman leaves his employment before the final termination of the whaling season (*The White,* Brit. Col. Ad. Dis., 29th Oct., 1914).

"Lay."

Special provisions are made by section 166 (1) of the Merchant Shipping Act, 1894 (57 & 58 Vict. cap. 60) and sections 37 and 38 of the Merchant Shipping Act, 1906 (6 Edw. VII. cap. 48), for the discharge of seamen out of the United Kingdom (*The Socotra,* 11 Ex. C. R. 301).

Discharge.

In a wages suit, the Court of Admiralty has jurisdiction to determine all questions of forfeiture by reason of desertion, misconduct, incompetency, embezzlement and the like (Canada

Forfeiture, deductions,

cessation of wages, etc.

Shipping Act, R. S. C. 1906, cap. 113, secs. 297 and 367). The right to wages is terminated by the wreck or loss of the ship (secs. 183 and 337), or by the seaman being left on shore under a certificate of his unfitness or inability to proceed on the voyage (see secs. 183 and 337), or by the seaman unlawfully refusing or neglecting to work (secs. 184 and 338), or by the seaman being incapacitated by illness caused by his own wilful act or default from performing his duty (secs. 185 and 339).

Fair deductions for money received, subject to the provisions of the Act as to advances, or for clothes or other articles furnished on the voyage are allowed (*The Repulse,* 4 Notes of Cases 169).

Neglect or misconduct.

The master and seamen are also liable to a deduction from their wages of the amount of any loss occasioned by their gross neglect or misconduct (*The New Phoenix,* 2 Hagg. 420; *The Camilla,* Sw. 312; *The Atlantic,* Lush. 566; *The Sir Charles Napier,* 5 P. D. 73; *The Alliance No. 2,* 19 B. C. R. 529).

Limitation of actions.

By the statute, 4 Anne, cap. 16, or as it is printed in the Statutes Revised, 4 & 5 Anne, cap. 3, sec. 17, suits for wages must be brought within six years.

Joinder of plaintiffs.

Seamen are accorded an exceptional privilege "by which any number of them forming the crew of a ship may unite as plaintiffs in one action in the Court of Admiralty for variable amounts due to them individually as wages" (*The Christine,* 11 Ex. C. R. 167; *The Vipond,* 14 Ex. C. R. 326); and in an action *in rem.* for wages wherein no appearance has been entered, and the ship is in the marshall's hands for sale in another cause, all preliminary proceedings may be waived and judgment entered forthwith (*The Aurora,* 18 B. C. R. 449, 15 Ex. C. R. 31).

Disbursements.

Turning to disbursements, it has been seen that the master has by statute had conferred on him a maritime lien for disbursements properly made and liabilities properly incurred by him on account of the ship, (R. S. C. 1906, cap. 113, secs. 194, 350): the Imperial Act extends the remedy to "every person lawfully acting as master of a ship, by reason of the decease or incapacity from illness of the master of the ship" (57 & 58 Vict. cap. 60, sec. 167 (2)), but the Canadian statute is confined to masters.

Conditions of validity of lien.

The master's lien for disbursements is subject to the same conditions as those which must be satisfied in a cause of necessaries; that is to say, the master must have been the agent of the ship-owner for the purpose of ordering the goods and

repairs in respect of which the lien is claimed; there must have been present the element of necessity, and the master must have been without adequate means of communication with his owners.

Master's authority.

With regard to the first requisite, that of the master's authority to bind the ship-owners, it has been established by the House of Lords in *The Castlegate* (1893, A. C. 38) that the statutory provisions do not give the master of a ship a maritime lien on the ship for disbursements for which the master has no authority to pledge the shipowner's credit, and that where there is no maritime lien on the ship, there can be no lien on freight in respect of the same debt: where, therefore, under a charter-party, which did not amount to a demise and which for many purposes left the master the agent of the owners, the charterers were to provide and pay for coal, it was held that the master had no maritime lien on the ship for disbursements made for coal which it was necessary to procure to enable the ship to prosecute her voyage and earn freight; nor upon freight, though the freight was taken by the charterers, and the disbursements made in their interests and with their authority; the lien on freight being absolutely dependent upon the liability of the ship to attachment for the same debt.

Lien on freight.

Necessity.

Communication.

As to the second and third conditions, even when the owner has given the master power to pledge his credit, no lien is created in his favour, unless it was both (a) necessary that the necessaries should be supplied, and (b) he could not communicate with his owner before ordering them (*The Orienta,* 1895, P. 49).

Priority.

Where however these conditions are fulfilled, the lien is good as against mortgagees (*The Queen of the Isles,* 3 Ex. C. R. 258), or persons in the position of mortgagees (*The Ripon City,* 1897, P. 226), though the disbursements have been made or the liabilities incurred without their knowledge or consent (*The Queen of the Isles* (*ubi supra*)), for if the owner is allowed to remain in possession the master "is not bound to consider the mortgagee at all, so long as he acts in good faith."

The inability of the master to communicate with his owners need not be absolute: it is sufficient that the power of communication by the master with the owners is not correspondent with the existing necessity, whether the disbursement be made or the liability incurred in a foreign (*The Queen of the Isles,* 3 Ex. C. R. 258), or a home port (*The City of Windsor,* 4 Ex. C. R. 362, 400), the latter case is notable for a very learned judgment of the local Judge, who examines the whole

subject of the master's lien both for disbursements made and liabilities incurred but not paid (4 Ex. C. R. 362).

The limit of liability to the lien is the whole value of the ship and freight (*The Queen of the Isles,* 3 Ex. C. R. 258).

Materialmen.

It has been noticed in the last section that a materialman has no maritime lien: but by means of the master's lien for disbursements and liabilities the materialman may succeed in making the ship available for the satisfaction of his debt, for he may proceed against the master upon his personal liability for the necessaries ordered, and so force him to exercise the maritime lien which the statute confers upon him.

Master's lien as against mortgagees and purchasers.

The master's lien, being a maritime lien, is not affected by the hypothecation or mortgage of the ship, or by her sale to a *bona fide* purchaser without notice (*The Ripon City,* 1897, P. 226, at p. 243; *The Nymph,* Sw. 86; *The Fairport,* 8 P. D. 55; *The Queen of the Isles,* 3 Ex. C. R. 258; *The City of Windsor,* 4 Ex. C. R. 362, 400; *The Dominion,* 5 Ex. C. R. 190); subject as regards the Province of Ontario to the limitation imposed by sec. 22 of the Admiralty Act (R. S. C. 1906, cap. 141); but the mortgagee of a ship who takes possession under his mortgage before the institution of a cause for wages does not become a "subsequent purchaser" though the lien may have arisen since the date of the mortgage (*The Gordon Gauthier,* 4 Ex. C. R. 354).

Priority.

According to the rules already noticed (*supra* 57) as to the ranking of liens, the master's lien is postponed to the lien for damage by collision (*The Linda Flor,* Sw. 309; *The Elin,* 8 P. D. 39, 129), and to the lien for salvage services rendered subsequently to the time when the wages were earned or the disbursements made or the liability incurred (*The Gustaf,* Lush, 506, 508), and to the lien for seamen's wages (*The Salacia,* Lush, 545; *The Daring,* L. P. 2 A. & E. 260).

The lien for wages of course takes precedence over all statutory liens, such as those for building, equipping or repairing, or for necessaries supplied (*The Aurora,* 20 B. C. R. 92).

Claimants of equal degree.

The questions which arise when several suits are instituted on different dates by different claimants of equal degree have been considered in connection with claims for necessaries (*supra* 88). The same question in regard to wages fell to be considered in *The Comrade* (7 Ex. C. R. 330): there the plaintiffs, two seamen, had obtained judgment for the amount

of their wages, and a decree for sale under which the ship was sold: subsequently to the institution of the cause by the plaintiffs, but prior to the date of the plaintiffs' judgment, four other seamen had instituted causes against the same ship, and obtained judgments later however in date than that of the plaintiffs' judgment; the local Judge held that the fund realized by the sale of the ship must be distributed in payment of:

(a) the plaintiffs' costs;

(b) the plaintiffs' claims;

(c) the claims of the subsequent suitors rateably.

This decision was avowedly based on a literal interpretation of *The Saracen* (6 Moo. P. C. C. 56), and the case of *The Africano* (1894, P. 141) was not cited, and the decision itself appears to be disapproved in *The Aurora* (20 B. C. R. at p. 93).

Viaticum.

Mariners are entitled to subsistence money from the time they leave the ship to the time they return home; and this, with the expenses of the journey home, and the costs of the action to recover the same, rank with their prior wages (*The Immacolata Concezione,* 9 P. D. 37). Viaticum, an allowance of money made to the crew of a vessel in consideration of their finding their own provisions, is part of their wages and they have a maritime lien in respect of it (*The Tergeste,* 9 Asp. M. C. 356).

Section 8—Damage.

Torts, jurisdiction in respect of.

The Court of Admiralty originally had jurisdiction over all torts committed on the high seas; and although during the struggle with the Common Law Courts in the sixteenth and seventeenth century, some losses were sustained by the Court, it continued to exercise jurisdiction over wrongs to person and property on board ship, and many instances of the exercise of such jurisdiction are to be found in the books during the latter half of the eighteenth and the nineteenth century (*The Zeta,* 1893, A. C. per Lord Herschell at p. 481 *et seq.; The Hercules,* 2 Dodson per Lord Stowell at p. 371; *The Ruckers,* 4 Ch. Rob. 73).

Collision.

The most important instance of the modern exercise of this jurisdiction is found in the case of damage done to or by a

ship, and the chief value of the early cases consists in the light they shed on the meaning of the word damage as used in modern statutes.

Damage to a ship.

Of these statutes the Admiralty Court Act, 1840 (3 & 4 Vict., cap. 65), by section 6, gave to the Court "jurisdiction to decide all claims and demands whatsoever in the nature of damage received by any ship or sea-going vessel . . . and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas, at the time when the . . . damage (was) received."

Damage by a ship.

The Admiralty Court Act, 1861 (24 Vict., cap. 10), by section 7 gave jurisdiction "over any claim for damage done by any ship."

Damage to persons and things other than a ship.

The meaning of the word "damage" as used in these enactments, and the relation of the jurisdiction conferred to the original jurisdiction of the Court was for some time not clear. It had been well established by many authorities that the Act of 1861 applied to damage done by a ship to persons and things other than ships: thus the seventh section was held to apply where the damage was done by a steam vessel to a barge within the body of a county (*The Malvina*, Lush, 493); and Dr. Lushington stated that the section gave the utmost jurisdiction to the Court in cases of collision, a remark which was repeated with approval in the judgment of the Judicial Committee in the same case on appeal (*The Malvina*, Br. & L. 57): again damage done by a ship to a pier or a breakwater, or a mooring dolphin, or an oyster-bed has been equally held to fall within the seventh section (*The Excelsior*, L. R. 2 A. & E. 268; *The Uhla*, L. R. 2 A. & E. 29; *The Albert Edward*, 44 L. J. Adm. 49; *The Swift*, 1901, P. 168); and in *The Maagen* it was held that a ship may be sued for damage to a bridge over a tidal and navigable river by colliding with it through careless navigation amounting to negligence (*The Maagen*, Brit. Col. Ad. Dis., 5th March, 1915). On the other hand, in *The Robert Pow* (Br. & L., 99), Dr. Lushington confined the word "damage" in the Admiralty Court Act, 1840, according to what he stated to be the well understood meaning of the phrase in the Admiralty Court, to damage caused by a collision between two ships: this interpretation was, however, decisively rejected in *The Zeta* (1893, A. C. 468), where it was held that damage received by a ship by collision with a pier head within the body of a county, founded a claim under the sixth section of the Admiralty Court Act, 1840.

Damage to a ship from collision by something not a ship.

It seems, therefore, now clear from the language used in the Court of Appeal and the House of Lords in *The Zeta* (1892, P. 285, 1893, A. C. 468), that the intention of the legislation of 1840 and 1861 was "to give reciprocal rights in cases of damage done by a ship and to a ship"; and that the effect of that legislation is to extend the jurisdiction formerly existing in cases of damage occurring on the high seas to cases of damage done to or by a ship within the body of a county, whether the subject causing or the object suffering the harm be a ship, a person, or a thing other than a ship.

Contact.

It is not even necessary in order to found a claim under the statutes that there should be actual contact causing damage by the offending object: where, for instance, the complaining ship took the ground owing to an effort to escape the effects of the wrongful navigation of the offending vessel, it was held that there was a good cause of action (*The Industrie,* L. R. 3 A. & E. 303; *The Batavier,* 9 Moo. P. C. C. 286; *The Wheatsheaf,* 2 Asp. O. S. 292; *The Sisters,* 1 P. D. 117) But in order that a suit may be brought in the Court of Admiralty the plaintiff or the defendant, as the case may be, must be a ship or sea-going vessel, and therefore there is no jurisdiction to entertain a cause of damage by collision between two barges propelled by oars only (*Everard* v. *Kendall,* L. R. 5 C. P. 428).

Ship or seagoing vessel.

Notwithstanding, however, all that was said in *The Zeta* (*ubi supra*), the same considerations do not always or exactly apply in the case of damage done by a ship and to a ship, nor do the same results follow in both cases. Thus, while, as has been seen, a cause may be instituted for damage done to a ship, though there may have been no actual impact by the offending object, yet on the other hand, no cause can be entertained for damage done by a ship unless the damage has been done by the ship to something with which it has come in contact (*The Vctoria,* 12 P. D. 105). So, too, while in order to assert a maritime lien for damage done to a ship, the offender must, *ex necessitate rei,* be inanimate and also, most probably, a ship; on the other hand a maritime lien may be claimed for damage done by a ship, though the sufferer be a thing other than a ship, or even a person.

The consideration of personal injuries inflicted by a ship, however, gives rise to difficult questions.

Personal injury.

It is possible that originally the infliction of such injuries would have conferred a maritime lien upon the offending vessel, on the principle that the Court of Admiralty had originally jurisdiction in respect of all torts committed on the high seas, as was stated by Dr. Lushington in *The Sarah* (Lush, 550); but the same Judge in *The Robert Pow* (B. & L., at p. 101) limited the word "damage" to damage by collision, according to what he affirmed to be the well-understood meaning of the word in the Admiralty Court. The proposition that the Court of Admiralty had jurisdiction over all torts committed on the high seas was questioned by Kay, L.J., in *Reg.* v. *Judge of City of London Court* (1892, 1 Q. B. at 310), and there is no instanee of an action being brought against the ship in respect of personal injuries sustained before the Admiralty Court Act, 1861 (24 Vict., cap. 10). The cases of *The Ruckers* (4 Ch. Rob. 73), *The Agincourt, The Lowther Castle,* and *The Enchantress* (1 Hagg. 271, 384, 395), were all personal suits brought against the master for assault committed on a passenger or a member of the crew; but it is noteworthy that in *The Ruckers,* Lord Stowell speaks of the case as a cause of damage, which would seem to contradict Dr. Lushington's statement as to the meaning of damage in *The Robert Pow* (Br. & Lush, at 101), which was also adversely criticized by Lord Herschell in *The Zeta* (1893, A. C. at 481). It is true that Lord Selborne, in considering whether an action could be brought in respect of the death of a mariner occasioned by a collision with the vessel on which he was serving, is reported as saying: "Now the question whether such an action lies or not depends altogether upon the construction and effect of the 7th and 35th sections of the Admiralty Court Act, 1861" (10 A. C. 64); but his Lordship's attention seems to have been directed to a consideration only of that statute, and not to the question of the general jurisdiction of the Court of Admiralty. It seems impossible therefore to affirm that in no case was a maritime lien conferred before the Acts of 1840 and 1861 by the infliction of personal injury.

Inherent jurisdiction.

Admiralty Court Act, 1861.

Passing from the inherent jurisdiction of the Court of Admiralty to the jurisdiction conferred by statute, it is necessary to consider the meaning and extent of section 7 of the Admiralty Court Act, 1861 (24 Vict., cap. 10), by which it is enacted that: "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship":

by section 35 this jurisdicion may be exercised by proceedings *in rem* or *in personam*. The words of section 7 have given rise to the questions (1) whether damage includes personal injuries at all; (2) whether if it does so include personal injuries, they must be caused by the ship as a whole moving to the harm of the complainant, or whether personal injuries sustained on the ship by reason of some defect in the equipment of the ship or otherwise can be proceeded for by action *in rem;* and (3) whether personal injuries resulting in death may found a claim against the ship.

With regard to the question whether damage includes personal injury, there has been much conflict in the English Courts.

The Sylph.

In *The Sylph* (1867, L. R. 2 A. & E. 24) a diver was caught by the paddle wheel of a steamer and suffered considerable injury; it was held that he was entitled to proceed *in rem,* Sir R. Phillimore founding himself not only on the section of the Act, but also on "the jurisdiction . . . over torts committed on the high seas."

The Beta.

In *The Beta* (1869, L. R. 2 P. C. 447), the claim was by a mate of the ship injured by collision with the offending vessel, and it was held by the Judicial Committee that he was entitled to maintain his suit. Lord Romilly, in delivering the judgment, said that the words of the 7th section included "every possible kind of damage," and that "personal injuries are undoubtedly within the words 'damage done by any ship.'"

Smith v. Brown.

In *Smith* v. *Brown* (1871, L. R. 6 Q. B. 729) *The Sylph* and *The Beta* were expressly dissented from by the majority of the Court, consisting of Cockburn, C.J., and Hannen, J., who limited the meaning of the word damage to injuries to property and inanimate things: Blackburn, J., doubted as to this interpretation of the Act which was not necessary to the actual decision of the Court, and repeated his doubt in *The Vera Cruz* (10 A. C. at 72).

The Vera Cruz.

Monaghan & Horn.

The question appears to be settled in Canada by the decision of the Judicial Committee in *The Beta* (*ubi supra*) and by the acceptance of that decision in *Monaghan & Horn* (7 S. C. R. 409): in the latter case Fournier, J., after considering the conflict of English decisions says at p. 428: "Since

there is a conflict of opinion in the highest Courts in England on this question, the judgment of the honourable Privy Council, which is the Court of last resort for our country, must in this case lay down the law for us"; Henry, J., considered the Court had jurisdiction over the subject matter, *i.e.* a claim for personal injury (p. 433): Taschereau, J., held himself bound by the decision in *The Beta* (*ubi supra*). It may therefore be asserted with confidence that as regards Canadian Courts, the 7th section covers claims for personal injuries not resulting in death.

By the ship or on the ship.

With respect to the question whether the injury must be caused by the ship as a whole, or whether injury suffered on the ship as distinct from injury caused by the ship, may give a remedy *in rem,* authority is very scanty.

The Theta.

In *The Theta* (1894, P. 280) the claim was in respect of injuries sustained through falling down the hold of a vessel, owing to the hatchway being only covered with a tarpaulin: Bruce, J., following the dicta of the Master of the Rolls in *The Vera Cruz* (9 P. D. at p. 99), and of Lord Herschell in *The Zeta* (1893, A. C. 478), held that the words "damage done by any ship" included damage to persons, but that the damage in the case before him was done, not "by the ship," but on the ship by those in charge of the ship, and that to bring a case within the section, the ship itself must be the "active cause," or "noxious instrument," as expressed by the Master of the Rolls and Bowen, L.J., in *The Vera Cruz* (9 P. D. 99, 101).

The Duart Castle.

In *The Duart Castle* (6 Ex. C. R. 387), an engineer, who was injured by the breaking of a stop valve on board a ship, was allowed to maintain a suit *in rem,* not without consideration of the previous authorities; but in *The Nederland* (12 Ex. C. R. 252), a stevedore who was injured while working on a foreign ship by reason of the faulty construction of the hatch coverings, was refused a remedy.

The Nederland.

The Rigel.

In *The Rigel* (1912, P. 99), the plaintiffs brought an action *in rem* for damages by collision against the defendants, and claimed indemnity in respect of a sum for which the plaintiffs had been held liable by reason of an award, under the Workmen's Compensation Act, 1906, making a weekly allowance, during incapacity, in favour of a seaman on board the injured ship at the time of collision, and who, it was alleged, was suffering from shock due to fright caused by seeing the defendant's

vessel looming out of the fog and bearing down upon the injured vessel: Bargrave Deane, J., held that this was not "damage done by any ship" within sec. 7.

The result of the cases appears to be that by virtue of secs. 7 and 35 of the Admiralty Court Act, 1861 (24 & 25 Vict. cap. 10), a person who suffers personal injuries by a collision of the vessel on which he was with another vessel, where the latter vessel was in fault and was the noxious instrument of the injury, is entitled to proceed against the offending ship by an action *in rem,* and that the same remedy is available to a person who has suffered damage, though not while on another ship, by contact with the offending vessel, which had "moved to" his injury: but that damage done not by the ship as a moving whole, but by some part of the equipment of the ship, in other words, not "by" the ship, but "on" the ship, is not such damage as gives a remedy *in rem,* though it might well give a remedy *in personam* against the owners of the ship. This interpretation of sec. 7 of the Admiralty Court Act, 1861 (24 Vict. cap. 10), would seem to have received legislative approval in The Maritime Conventions Act, 1911 (1 & 2 Geo. V. cap. 57) which by sec. 5 provides: "Any enactment which confers on any Court of Admiralty jurisdiction in respect of damage, shall have effect as though references to such damages included references to damages for loss of life or personal injury and accordingly proceedings in respect of such damages may be brought *in rem* or *in personam.*" Had the original enactment included damage by personal injury such a provision would have been otiose. The Maritime Conventions Act, 1911 (1 & 2 Geo. V. cap. 57), does not apply to Canada (sec. 9).

Maritime Conventions Act, 1911.

Where, however, the injuries result in death, the Court of Admiralty has no jurisdiction either under the Fatal Accidents Act (9 & 10 Vict. cap. 93), or analogous legislation: *The Vera Cruz* (10 A. C. 59), or apart from such legislation: *Monaghan* v. *Horn* (7 S. C. R. 409): in the latter case the Supreme Court of Canada introduced into Canada and acted on the common law rule, first authoritatively laid down in *Osborn* v. *Gillett* (L. R. 8 Ex. 88), that the death of a human being cannot afford a cause of action.

Death.

Although causes of damage are instituted in respect of wrongful acts, and are not a means of remedying breaches of contract, yet the Court will not decline to entertain such causes on the ground that the wrong complained of also constituted a

breach of contract, if it was at the same time actionable independently of contract (*The Julia,* Lush., 224; *The Nightwatch,* Lush. 542; *Spaight* v. *Tedcastle,* 6 A. C. 217): in these and similar cases the wrong complained of was also a breach of the contract of towage.

Having considered in what cases a cause of damage will be entertained by the Court of Admiralty, it remains to determine the nature of the remedy which the Court applies in the different circumstances.

Maritime lien for damage.

It is clear that damage by collision between two ships on the high seas has always created a maritime lien upon the offending vessel. "*The Bold Buccleugh* (7 Moo. P. C. C. 267) . . . is the earliest English authority which distinctly establishes the doctrine that in a case of actual collision between two ships, if one of them only is to blame, she must bear a maritime lien for the amount of the damage sustained by the other, which has priority, not only to the interest of her owner, but of her mortgagees" (*per* Lord Watson in *Currie* v. *McKnight,* 1897, A. C. at p. 105, where *The Bold Buccleugh* was approved and stated to contain the English law on the subject).

It seems equally clear that since the enactment of the Admiralty Court Act, damage by collision between two ships within the body of a county creates a maritime lien on the offending vessel. It has been seen in the case of necessaries, towage, and the master's disbursements that the mere giving of jurisdiction to be exercised by a proceeding *in rem* does not by itself create a maritime lien; but it appears that where by the inherent jurisdiction of the Court a maritime lien was created by certain circumstances, the extension by legislation of the Court's jurisdiction in other similar circumstances may have the effect of creating a maritime lien. Thus in *The Two Ellens* (L. R. 4 P. C. 161), Mellish, L.J., in delivering the judgment of the Judicial Committee, said, at p. 167: "Though it is perfectly true that the only words in the section (3 & 4 Vict., cap. 65, sec. 6), are 'that the High Court of Admiralty shall have jurisdiction,' which words seem hardly sufficient in themselves to create a maritime lien, yet, looking at the subject-matter to which that section relates, it appears designed to enlarge the jurisdiction which the Court of Admiralty already had in matters forming the subject of a maritime lien. These are strong grounds for holding that, as respects salvage and as respects collision, which already gave a maritime lien

when they occurred on the high seas, it was intended that they should also, when they occurred in the body of a county, equally give a maritime lien." In *The Henrich Bjorn* (11 A. C. 270), Lord Bramwell said, at p. 282: "But then it has been said that jurisdiction is given in cases of salvage and collision, and that as to them a maritime lien existed when the salvage or collsion arose on the high seas, and that it could not be intended that there should not be a similar law if they arose within the body of a county, that, therefore, the words of the statute by implication give such lien in those cases, and are therefore sufficient to give it in the case of necessaries. Now it may be admitted that it would be strange that if a collision occurred just below the Nore, there should be a maritime lien, while if it was just above there should not be. However that may be I do not say, but assuming there would be a maritime lien in case of a collision within a county, and that it might be in a sense said to be given by the statute, it by no means follows that one is given in the case of towage or necessaries. It may well be that salvage and collision within counties are put in the same plight and condition as on the high seas . . ." In *The Sara* (14 A. C. 209), Lord Halsbury said, at p. 216: "Where the subject matter, whether collision or seamen's wages, had in its own nature a maritime lien, I can well understand that the extension of the jurisdiction to a case where the nature of the subject matter was the same, *e.g.*, collisions within the body of the county, carried with it, as inherent in the nature of the thing itself, a maritime lien, and it may well be argued that the legislature did not intend to alter the incidents of the subject matter thus submitted to a new jurisdiction." Finally and most important of all, *The Bold Buccleugh* (7 Moo. P. C. C. 267) was a case of a collision occurring in the River Humber, within the body of a county.

Going a step further, it appears that, in order to create a lien upon the offending ship, it is not necessary that the damage should be done to another ship. In *The Veritas* (1901, P. 304), it was held that a maritime lien might arise out of damage done by a ship to a landing stage, and Gorell Barnes, J., expressed the opinion (at p. 311) that "there is a maritime lien for this kind of damage if it had occurred on the high seas, and it seems to follow that it was intended the law should be the same as to damage done by a ship elsewhere."

In cases where harm has been caused without actual contact, there appears to be no direct decision that the damage

creates a maritime lien, but in *The Industrie* (L. R. 3 A. & E. 303), Sir Robert Phillimore, in commenting on sec. 7 of the Admiralty Court Act, 1861 (24 Vict., cap. 10), said: "It is undisputed that if the *Blue Bell* had come into actual collision with *The Industrie,* the Court would have had jurisdiction to entertain any claim for damage caused by the collision; and I am unable to see why there should be any difference in the rights of the parties, simply because *The Blue Bell,* in order to prevent a collision with *The Industrie,* was compelled to go out of the fareway, and in consequence received damage." If therefore the rights of the parties are not affected by the mere fact that no actual impact ensued, it follows that a maritime lien attaches to the wrongdoing vessel.

The case which has gone furthest in this direction is *The Lloyd S. Porter* (15 Ex. C. R. 126): the action was brought by the owners of cargo on board the barge *Marengo,* which was in tow of *The Lloyd S. Porter*: by reason of the negligent navigation of *The Lloyd S. Porter,* she grounded, and the tow, *The Marengo,* went ashore on a rocky shoal. There appears to have been no impact between the two ships. Nevertheless the learned judge held that *The Lloyd S. Porter* was subject to a maritime lien in favour of the owners of the cargo on *The Marengo.* It may be observed that all the cases relied on in the judgment were cases of actual collision.

The case of personal injury is one of some difficulty: it is true that causes for personal injury have always been entertained by the Court, but these causes, of which the more important are *The Agincourt* (1 Hagg. 271); *The Lowther Castle* (1 Hagg. 384), and *The Ruckers* (4 Ch. Rob. 73), were apparently always *in personam*: if, therefore, the effect of the Admiralty Court Acts is to create a maritime lien in circumstances happening within the body of a county, which circumstances, if occurring on the high seas, would have given rise to a maritime lien according to the ordinary law of the Admiralty, it may be that, as there is no instance of personal injury having been held to create a maritime lien before the Admiralty legislation, so the effect of that legislation in such cases is merely to give the right of proceeding *in rem.*

Damage done by a ship.

The result of this inquiry into the consequences of damage "done by a ship" may, therefore, be summed up by saying that an offending vessel becomes subject to a maritime lien for damage done by it to a ship or a thing other than a ship upon the high seas or within the body of a county, and whether there be

actual contact or not, but that damage done by a ship to a person gives rise only to a statutory right *in rem*.

Damage done to a ship.

Turning now to the converse case of damage received by a ship, it is obvious from the very nature and origin of maritime liens that such a lien can only exist in respect of a ship. It is true that in Clerke's Praxis it is stated that the ordinary method of proceeding in the Admiralty Court was by arrest of the person of the defendant, and failing that by arrest of any of his goods within the jurisdiction of the Court: but this was a mere method of compelling appearance, in the nature of *mesne* process, and totally distinct from the arrest of a ship to which a maritime lien had attached, a right which sprang from the conception of the ship as the guilty person: no doubt this attribution of wrongdoing to things inanimate was not confined in very early English law to ships alone, but the idea of the deodand survived only in connection with ships. It may be true, too, as stated by Lord Herschell, in *The Zeta* (1893, A. C., at p. 485), that the jurisdiction of the Court of Admiralty in cases of damage received by a ship was not limited to damage received by collision with another vessel, but the Court exercised jurisdiction *in personam* as well as *in rem,* and it appears safe to say that there is no instance in all the books of a maritime lien having been held to attach to anything other than a ship. *The Zeta* (*ubi supra*), was a proceeding *in personam,* and it is difficult to see how there could be even a statutory lien under the Acts upon something such as a pier or an oyster-bed which is attached to the soil, and it would of course be impossible to affix a lien of any sort upon a human being: as to the latter no case has occurred where even an action *in personam* has been attempted against a human agent for damage received by a ship through his acts, though in principle there seems no reason why such an action should not lie under the Admiralty Court Act, 1840 (3 & 4 Vict., cap. 65, sec. 6). In connection with the question whether a thing other than a ship can become subject to a maritime lien for damage received by a ship, the language of Lord Watson and Lord Halsbury in *Currie* v. *McKnight* is not without significance. In *Currie* v. *McKnight* (1897, A. C. 97), Lord Watson stated, at p. 106: "I think it is of the essence of the rule that the damage in respect of which a maritime lien is admitted must be either the direct result or the natural consequence of a wrongful act or manœuvre of the ship to which it attaches. Such an act or manœuvre is necessarily due to the want of skill or negligence

of the persons by whom the vessel is navigated, but it is, in the language of maritime law, attributed to the ship, because the ship in their negligent or unskilful hands is the instrument which causes the damage." Therefore where the crew of *The Dunlossit,* which was in serious peril of damage from contact with the vessels between which she lay, cut the mooring ropes of *The Easdale,* whereby *The Easdale* was driven ashore and damaged, it was held that this was not such an act as gave rise to a maritime lien for damage sustained by *The Easdale,* inasmuch as it was not *The Dunlossit* which was the instrument of mischief, and "in order to establish the liability of the ship itself to the maritime lien claimed some act of navigation of the ship itself should either mediately or immediately be the cause of the damage" (*per* Lord Halsbury, 1897, A. C., at p. 101). It is true that in this case the House of Lords had not to consider the effect of the Admiralty Court Acts, but the decision and the language used to support that decision is none the less of great importance in considering when and to what a maritime lien may attach.

The result seems therefore to be that in the case of damage received by a ship, a maritime lien can arise only when that which causes the harm is a ship, and when the damage flows from some act of navigation of the ship, but that the Court will entertain a cause *in personam* for damage caused by a thing other than a ship, and possibly also when caused by a person, and that there may be some rare instances when a cause *in rem* will lie against a thing other than a ship.

The circumstances under which a maritime lien attaches have already been discussed at length in the preceding chapter, where it was noticed that a maritime lien for damage was not dependent upon the personal liability of the owners of the ship, but that a ship may be proceeded against for damage caused by the negligence of persons not the servants of the owners, to whom or whose principals the owners have entrusted the entire control of the ship; and in the same connection the special difficulties were pointed out which arise from the partial abandonment of the principles which rest on the conception of the ship as the independent noxious instrument of harm, and the deflection of that theory of liability by considerations drawn from the region of process, or in other words by the degradation of the pure theory of maritime liens by reducing such liens from substantive rights to mere steps in procedure, thereby exalting the fact of arrest of a ship above

the principles and ideas which originally gave ground for the arrest.

It only remains to notice that the lien attaches to the ship and all its appurtenances (*The Alexander,* 1 Dods. 282), and extends to subsequent accretions in the value of the ship arising from repairs effected before the arrest at the expense of the owner (*The Aline,* 1 Wm. Rob. 111): the lien also attaches to freight which was in the course of being earned at the time of the collision, and which has actually accrued due (*The Orpheus,* L. R. 3 A. & E. 308); but there can be no lien on freight where there is no lien on ship (*The Castlegate,* 1893, A. C. 38).

Appurtenances.

Freight.

By far the most important instance of damage is damage caused by collision, and special rules and regulations have been framed by legislatures for the purpose of preventing collisions at sea. In Canada there are nominally three sets of these rules and regulations to be considered; there are the Imperial Regulations for preventing collisions at sea; there are the Canadian Regulations for preventing collisions at sea; and there are the Canadian Rules for navigating the Great Lakes: in point of fact, however, the Canadian Regulations are with unimportant exceptions exact replicas of the Imperial Regulations.

Collision.

Regulations.

The Imperial Regulations grew out of the various rules of the road established by the practice of seamen which formed part of the general maritime law administered in the High Court of Admiralty. The subject was in the nineteenth century dealt with by legislation, and four different sets of rules have been issued under legislative sanction: the first complete set is contained in Table C of the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63); following but expanding the rules contained in the Merchant Shipping Act, 1854 (17 & 18 Vict., cap. 104); the next two sets were promulgated by orders in council under the authority of section 25 of the Merchant Shipping Act Amendment Act, 1862: the orders in council bringing them into force were of the dates of the 14th of August, 1879, and the 11th of August, 1884, respectively, and the rules are known as the Regulations of 1880 and the Regulations of 1884: they are to be found set out in the reports at 4 P. D. 241, and 9 P. D. 247.

Imperial Regulations.

By the Merchant Shipping Act, 1894 (57 & 58 Vict. cap. 60, sec. 418), power is given to His Majesty upon the joint recommendation of the Admiralty and the Board of Trade,

Regulations of 1897.

by order in council, to make regulations for preventing collisions at sea. Such regulations are to apply to British ships everywhere, and to foreign ships when within British jurisdiction. By order in council of the 27th of November, 1896, the Regulations of 1884, except article 10, were annulled as to British ships, as from the 1st of July, 1897, and the Regulations of 1897 were substituted for them.

By order in council of the 4th of April, 1906, article 10 of the Regulations of 1884 and the provisions of the various orders in council affecting that article, were repealed, and a new article to be numbered 9 in the Regulations of 1897 was substituted.

Foreign ships.

By 57 & 58 Vict. cap. 60, sec. 424, His Majesty is empowered, with the consent of the foreign governments, to direct that the regulations shall apply to the ships of foreign countries, whether within British jurisdiction or not, and that such ships shall, for the purpose of the regulations, be treated as if they were British ships. By orders in council of the 18th of May and the 7th of July, 1897, they have been applied to ships of various nations, while ships of certain other nations are subject to the Regulations of 1880 and 1884 (Marsden's Collisions at Sea, 6th ed., 315, 316).

The Imperial Regulations of 1897 are set out in Marsden's Collisions at Sea (6th ed., at p. 507) and the whole subject of damage by collision is exhaustively discussed in that work, so that it is only necessary here to treat of the subject so far as it has been dealt with by Canadian legislation and the principles of the law illustrated by cases decided in the Canadian Courts.

Canadian Regulations.

The subject of regulations for preventing collisions at sea was first comprehensively dealt with in Canada by the Parliament of the late Province of Canada in an Act of the 27 & 28 Vict., being chapter 13, which embodied Table C of the Merchants Shipping Act Amendment Act, 1862; this Act was repealed by the Parliament of Canada by the Act of the 31 Vict., being chapter 58, which, however, incorporated the same set of regulations.

When Table C of the Merchant Shipping Act Amendment Act, 1862, was annulled in 1879, by the Imperial Order in Council of the 14th of August, 1879, which brought into force the Imperial Regulations of 1880, the Parliament of Canada enacted the 'Act to make better provision respecting the navigation of Canadian Waters' (43 Vict. cap. 29), and embodied

the Imperial Regulations of 1880 in sec. 2 of the Act: this section containing the regulations was subjected to slight amendments by 44 Vict. cap. 21, sec. 2, and 49 Vict. cap. 4, sec. 2.

In 1886 occurred the revision of the Canadian Statutes and the 'Act respecting the navigation of Canadian Waters' appears as cap. 79 of the Revised Statutes, 1886: the regulations, which are made part of sec. 2 of this Act, are an exact replica of the Imperial Regulations of 1880.

The Imperial Regulations of 1884 do not appear to have found their counterpart in Canadian legislation; but when the Imperial Regulations of 1880 and 1884 were in their turn superseded by the Regulations of 1897, the Governor in Council, acting under the powers contained in sec. 14 of cap. 79, made corresponding changes in the regulations in force in Canada.

By Order in Council dated the 9th of February, 1897, the new regulations were brought into force as from the 1st of July, 1897, and published in the *Canada Gazette,* Vol. XXX., p. 1735. The Canadian Regulations are an exact copy of the Imperial Regulations of 1897, except as regards the latter part of article 8 in the Imperial Regulations, which deals only with pilot vessels employed for the service of pilots licensed by the committee of any pilotage district in the United Kingdom.

When the Imperial Regulations were amended in 1906, as regards article 9, the Canadian Regulations were amended in conformity therewith by Order in Council dated the 28th of June, 1909, published in the *Canada Gazette,* Vol. XLIII,, p. 76.

Inland waters.

The Canadian Regulations of 1880, 1886, and 1897, applied to all the rivers, lakes and other navigable waters within the Dominion of Canada, or within the jurisdiction of the Parliament thereof: but in 1904, an Act (4 Edw. VII., cap. 26) was passed enabling the Governor in Council to repeal the regulations so far as they applied to the inland waters of Canada and to make new regulations to be in force in such inland waters.

Accordingly, by Order in Council of the 20th of April, 1905, the existing regulations were cancelled so far as the waters of Lakes Superior, Huron (including Georgian Bay), Erie and Ontario, their connecting and tributary waters, and the St. Lawrence River as far east as the lower exit of the Lachine Canal and the Victoria Bridge at Montreal were concerned,

and fresh regulations were made for these waters to come into force on the 1st of April, 1905.

These new regulations are printed in the *Canada Gazette*, Vol. XXXVIII., p. 2477, and differ from the old regulations in regard to articles 3 (*b*), 11 (*d*), 15, 25 (*b*), and 28.

By Order in Council of the 18th of May, 1906, the regulations in force on the inland waters were amended as respects article 2 (*e*), and article 15 (2): the amendments are printed in the *Canada Gazette*, Vol. XXXIX., p. 2666.

In the revision of 1906, the existing regulations are preserved by sec. 913 of the Canada Shipping Act (R. S. C. 1906, cap. 113), which also gives power to the Governor in Council to make changes in the regulations so as to ensure their conformity to the Imperial Regulations for the time being in force.

The Canadian Regulations of 1897, 1905, and 1906, are to be found in the Appendix.

Effect of infringement.

But although the text of the regulations is thus so similar in England and Canada, the operation of an infraction of the regulations upon the liabilities of the offending vessel is widely different in English and Canadian jurisprudence.

The effect of a disregard of the regulations is first defined in the Act of the Province of Canada (27 & 28 Vict., cap. 13), in these words: "If, in any case of collision, it appears to the Court before which the case is tried, that such collision was occasioned by the non-observance of any of the rules prescribed by this Act, the vessel or raft by which such rules have been violated shall be deemed to be in fault; unless it can be shewn to the satisfaction of the Court that the circumstances of the case rendered a departure from the said rules necessary."

The same words reappear as sec. 6 of the Act of the 31 Vict., cap. 29; sec. 5 of cap. 79 of the Revised Statutes, 1886: and with the substitution of "regulations" for "rules" are found again in sec. 916 of the Canada Shipping Act (R. S. C. 1906, cap. 113), which is the statute now in force.

This section is a copy with unimportant verbal changes, of sec. 29 of the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict., cap. 63): and so therefore the effect of infringing the regulations was originally the same in England and Canada. But in 1873 a decisive change was made: by sec. 17 of the Merchant Shipping Act, 1873 (36 & 37 Vict., cap.

85), it was provided that "if in any case of collision it is proved to the Court before which the case is tried that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts, 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary." These words have been repeated in sec. 419, sub-sec. 4 of the Merchants Shipping Act, 1894 (57 & 58 Vict., cap. 60), which is the enactment now in force on the subject.

On the high seas.

The effect of the Imperial legislation now in force is to impose on a vessel which has infringed a regulation that is *prima facie* applicable to the case, the burden of shewing affirmatively that such infringement could not, by possibility, have contributed to the collision; and to render inadmissible evidence to shew that the breach of the regulations did not affect the collision, unless such evidence is sufficient to establish that such breach could not by any possibility have affected the collision (*The Khedive,* 5 A. C. 876; *The Lapwing,* 7 A. C. 512; *The Arklow,* 9 A. C. 137; *The Arratoon Apcar,* 15 A. C. 37; *The Duke of Buccleuch,* 1891, A. C. 310; *The Corinthian,* 1909, P. 260). And therefore such is the effect to be attributed in Canadian Courts to a breach of the regulations in cases of collision occurring on the high seas (*The Reliance,* 31 S. C. R. 653; *The Birgitte,* 9 Ex. C. R. 339).

In Canadian waters.

Where, however, the case falls to be decided under the provisions of Canadian legislation, the question to be considered, as under the earlier English Act, is whether or not the non-observance of the rule occasioned or contributed to the collision. The difference between the effect of the English and Canadian legislation was first judicially ascertained in 1896 in the case of *The Cuba* (26 S. C. R. 651), which has since been followed in *The Porter* (6 Ex. C. R. 208); *The Westphalia* (8 Ex. C. R. 263); *The Tecumseh* (10 Ex. C. R. 149); *The Norwalk* (12 Ex. C. R. 434, 451), and *The Rosalind* (41 S. C. R. 54: Can. Rep., 1909, A. C. 441).

Therefore a breach of the regulations committed on the high seas creates a presumption that an ensuing collision was due to that breach, a presumption only rebuttable by proof that the breach could not by possibility have caused the collision; whilst in the case of a collision occurring in Canadian waters a breach of the regulations creates no presumption, so that the ordinary

rules as to negligence apply, and the complaining vessel must prove the cause of the collision (*The Albert M. Marshall,* 12 Ex. C. R. 178, at p. 183): "Apart from statutory definitions of blame or negligence there seems no difference between the rules of law and of Admiralty as to what amounts to negligence causing collision" (*The Cuba,* 26 S. C. R. 651, at p. 661). And where a ship could with ordinary care, doing the thing that under any circumstances she was bound to do, have avoided the collision, she ought to be held alone to blame for it, although the other ship may have been guilty of some breach of the regulations, but which did not contribute to the collision (*The Porter,* 6 Ex. C. R. 208): so, therefore, when the master of a ship, in danger of collision with another ship, instead of porting his helm puts it to starboard and so makes the collision inevitable, the absence of a signal required by a local regulation to be given by the other ship in such circumstances, does not relieve the ship primarily responsible for the collision from full liability if the omission to give such signal did not contribute in any way to the accident (*The Tecumseh,* 10 Ex. C. R. 149). And the burden of proving that a breach of the regulations admitted or proved did at least in part contribute to the collision appears to be upon the complaining vessel (*The Rosalind,* 41 S. C. R. 54, 60: Can. Rep., 1909, A. C. 441).

Contributory negligence.

It follows, therefore, that in the case of collision in Canadian waters, the defence of contributory negligence is open to the defendant ship, though in fact she may have been guilty of a breach of the regulations, for it is not sufficient that there should have been a breach of the regulations unless it appears to the Court that such breach was the proximate cause of the collision (*The Rosalind,* 41 S. C. R. 54); and on the other hand it also follows that such a defence of contributory negligence will not be established by proving merely that the plaintiff ship committed an infraction of the regulations, for if the consequences of the plaintiff's breach could have been avoided by ordinary care and prudence on the part of the defendant, the plaintiff's breach of the regulations would be no answer to the action (*The Norwalk,* 12 Ex. C. R. 434, 449); therefore, where a steamer collided with a dredger at anchor, it was held to be no defence that the dredger was lying in an improper place and did not exhibit proper lights, if it be shewn that the collision could have been avoided by the exercise of reasonable skill and care on the part of the moving vessel (*The Albert M. Marshall,* 12 Ex. C. R. 178).

But again where fault on the part of one vessel is established by uncontradicted testimony and such fault is of itself sufficient to account for the collision, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel: for where the defendant vessel is "a deliberate transgressor of the law" and such transgression was sufficient to have caused the collision (*The Diana,* 11 Ex. C. R. at p. 65) "the burden of proving clearly that the plaintiff ship might, by ordinary skill and prudence, have avoided the collision" lies on the offending vessel (*The Cape Breton,* 36 S. C. R. 564). It is submitted that the language of the Chief Justice in the last case at pp. 576, 577, must be qualified in the manner indicated by inserting the condition that the breach of the regulations should be proved to have been sufficient to have caused the collision, otherwise the language used would be in conflict with the unbroken line of decisions which affirm the principle that mere infringement of the regulations does not of itself raise a presumption against the offending vessel, a line of decisions stretching from *The Cuba* (*ubi supra*), to *The Rosalind* (*ubi supra*). It is to be observed that in *The Cape Breton* (*ubi supra*), Nesbitt, J., with whom Idington, J., agreed, differed from the Chief Justice and preferred to rest his decision on the ground that any fault imputable to the complaining vessel was committed in the agony of collision (36 S. C. R. 575, 591, 592).

Of course in a case of collision, one vessel cannot justify a departure from the rules of navigation by the fact that the other vessel was also disregarding the rules: on the contrary a primary disregard of the rules by one vessel imposes on the other vessel the duty of special care, prompt action, and maritime skill, as well as the duty of acting in strict conformity to the rules applicable to the latter in the circumstances (*The Dorothy,* 10 Ex. C. R. 163): so much of the *ratio decidendi* in this case is indeed unimpeachable, but the learned Judge seems to have been wrong in applying the English rule in the circumstances of a collision which occurred in the Soulanges Canal; if as would seem to be the case, the collision occurred in navigable waters within the Dominion of Canada, the case of *The Arratoon Apcar* (15 A. C. 37), relied on by the learned Judge, was inapplicable, inasmuch as the latter case enforced the strict rule made applicable by the Merchant Shipping Acts of the Imperial Parliament since 1873, which, as has been seen, has not been adopted by the Canadian Legislature.

Construction of regulations.

With regard to the application and construction of the regulations, the following rules have been laid down by authority. Inasmuch as the object of the regulations is to avoid risk of collision, they are all applicable at a time when the risk of a collision can be avoided, not when the risk of collision is already fixed and determined; and the right moment of time to be considered is that which exists at the moment before the risk of collision is constituted: moreover the regulations can only apply to circumstances which must or ought to be known to the parties at the time, and therefore the consideration must always be not whether the regulation was in fact applicable, but were the circumstances such that it ought to have been present to the mind of the person in charge that it was applicable. In interpreting the regulations, they are to be construed as they would probably be understood by the class of men, masters of vessels, for whose guidance they are prepared (*per* Davies, J., in *The Parisian,* 37 S. C. R. at p. 295; citing *The Dunelm,* 9 P. D. at p. 171; *The Beryl,* 9 P. D. at p. 140; *The Theodore H. Rand,* 12 A. C., at p. 250).

In conformity with the rule as to the point of time to be regarded in considering the applicability of a regulation, it is no defence to prove that at the moment of collision it was too late to adopt a precaution which ought to have been taken earlier (*The Tecumseh,* 10 Ex. C. R., at p. 65).

Agony of collision.

On the other hand the effect of neglect of any regulation is always subject to the principle that "where one ship puts another in extreme danger, where that vessel is in what may be called the agony of a collision, then if such vessel does fail to do what is best and makes a movement which may be wrong she cannot be held responsible (*The Wandrian,* 11 Ex. C. R., at p. 17; *The Cape Breton,* 36 S. C. R., at p. 591; *The Cuba,* 26 S. C. R., at p. 662; *The Arranmore,* 11 Ex. C. R. 21; 38 S. C. R. at p. 185).

And it is of course the paramount duty of a ship to avoid a collision, and therefore when a collision is inevitable, the vessel not in fault is justified in changing her proper course with the object of avoiding or lessening the effect of the collision (*The Arranmore,* 11 Ex. C. R. 21; 38 S. C. R. 176, at p. 185).

But every vessel is justified up to the last moment in relying upon every other vessel obeying the ordinary rules, and every vessel has a right to proceed upon the belief that every other vessel will perform the proper manoeuvres for the pur-

pose of avoiding any difficulty or danger (*The Turret Age* P. C. 36, S. C. R. 566).

Stages of collision.

In considering the relative rights and duties of the ships involved in a collision, it is necessary to distinguish between the respective stages of a collision. It has been said that there are three stages in a collision: "1st. When it appears possible, there being merely a chance of a collision occurring; 2nd. When a collision is imminent; 3rd. When it is inevitable. In the last two stages, certainly in the last stage, skilful and careful navigation requires, at least permits, each commander to look after the safety of his own vessel exclusively. In the first stage, skilful and careful navigation requires each commander to take such steps as are requisite for the safety and convenience of both vessels. Neither vessel has a right . . . to necessitate the other to have recourse to difficult or embarrassing manœuvres in order to avoid a catastrophe" (*The City of Puebla,* 3 Ex. C. R., at p. 28).

Finally, a rigid adherence to the regulations irrespective of consequences is expressly prohibited by the regulations themselves. Article 27 of 1897 (article 23 of 1886) provides that: "In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger." (*The City of Puebla,* 3 Ex. C. R. 26). "A vessel may be placed in a situation where to follow the letter of the law would invite rather than prevent collision; and in such a case persistently to conform to certain of the regulations without taking into account the situation of other vessels and their course, at the risk of producing a collision, is blameable." (*The Cape Breton,* 9 Ex. C. R., at p. 121; 36 S. C. R. 564). "The duty is to avoid collision by observing the rules, primarily; by departing from them, if necessary to avoid danger" (*The Cape Breton,* 9 Ex. C. R., at p. 126). "Not only is it the right of ships to disregard the rules in certain cases to avoid a collision, but it is their duty to do so, and if they fail in this duty, they will be held responsible for the result" (*The Crown of Aragon,* 13 Ex. C. R. at p. 407).

Those of the regulations which have received judicial consideration in Canada are the following:

Hove to

In *The Birgitte* (9 Ex. C. R. 339) it was held that a vessel 'hove to' with her helm lashed was not 'a vessel which from

any accident is not under command' within article 4, but is a vessel under way and must carry the lights mentioned in articles 5 and 2.

Lights.

Article 3 prescribes the lights to be carried by a steam vessel when towing another vessel, but there is no rule which provides for the lights to be carried when a steam vessel has in tow a boom of logs (*The British Columbia,* 18 B. C. R. 87): where, however, a steam vessel with such a tow, measuring 1,740 feet in length from the stern of the tug to the stern end of the tow, was carrying two bright white lights in a vertical line ostensibly under article 3, she was held to be shewing misleading lights (*The British Columbia,* 18 B. C. R. 86); inasmuch as the rule provides for the carrying of an additional light when the length of the tow exceeds 600 feet.

Article 11 corresponds to article 8 of the Regulations of 1886 (R. S. C. cap. 79, sec. 2), but there has been a change in the rule which indicates that some importance is to be attached to the position in which the light to be carried by a vessel at anchor should be placed: article 8 provided for such a vessel carrying a bright white light, where it could best be seen, but at a height not exceeding 20 feet above the hull: article 11 adds a provision for ships under 150 feet in length, which are to carry the light not as in the earlier article "where it can best be seen," but "forward where it can best be seen." "It is obvious that a case might arise in which the position in which the light was carried might be very material," and "the person who contravenes the rule takes the risk of it being found material" (*The Porter,* 6 Ex. C. R., at p. 211). When a vessel at anchor is exhibiting proper lights and is injured by collision with a moving vessel, the onus is on the latter vessel to justify her conduct; but the vessel at anchor is also bound to keep a competent person on watch, whose duty it is to see that the anchor light or lights are properly exhibited and to do anything in his power to avert or minimize a collision (*The Lake Ontario,* 7 Ex. C. R., at p. 406). A vessel "fast to the shore" is not a ship "at anchor" or "under way" within the proper meaning of those terms as understood by seafaring men (*The City of Seattle,* 9 Ex. C. R., at p. 150).

Anchor watch.

Fast to the shore.

Fog signals.

Article 15 corresponds with article 12 of the Regulations of 1886 (R. S. C., cap. 79, sec. 2) with some verbal differences and the addition of a number of new points: this article deals with sound signals in fog, mist, falling snow, or heavy rain storms; and its provisions must not be confused with those of

article 28 which relate to the signals to be given when vessels are in sight of one another; in giving unauthorized signals under article 28, there is a danger of confusing them with those that are authorized under article 15 (*The Tartar,* 7 W. L. R. at p. 421). And so when two vessels, *The Heather Belle* and *The Fastnet,* were not in sight of one another, and there was a dispute as to the duration of the blasts blown by *The Heather Belle,* the captain of that ship maintaining that they were short blasts indicating a course to starboard, and the captain of *The Fastnet* maintaining that the blasts were all long ones, it was held that *The Fastnet* was not entitled to consider the blasts as indicative of direction at all, inasmuch as the vessels were not in sight of one another, but that *The Fastnet* was bound whether the blasts were long or short to treat the sound signal as indicating what the fog signals intend, viz., that another ship was in the vicinity (*The Heather Belle,* 3 Ex. C. R. at p. 48). In cases of collision in Canadian waters, disregard of this statutory rule as to fog-horns will not entail liability if the immediate cause of the harm was a fault, *e.g.,* excessive speed, on the part of the other vessel (*The Zambesi,* 3 Ex. C. R. 67): and even in the case of a collision on the high seas, liability may be escaped by showing that the lack of the fog horn not only did not, but could not by any possibility have contributed to the collision (*The Birgitte,* 9 Ex. C. R. at p. 346).

Speed.

Article 16 corresponds, in a very expanded form, to article 13 of the Regulations of 1886 (R. S. C. cap. 79, sec. 2): article 13 provided:

"Every ship, whether a sailing ship or steamship, shall, in a fog, mist, or falling snow, go at a moderate speed." Article 16 now provides:

"Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

"This is a most important article, and one which ought to be more carefully adhered to in order to avert the danger of collision in thick weather: it is notorious that it is a matter of the very greatest difficulty to make out the direction and distance of a whistle heard in a fog, and that it is almost impos-

sible to rely with certainty on being able to determine the precise bearing and distance of a fog signal when it is heard" (*The Iroquois,* 18 B. C. R. at p. 79). "The word 'moderate' is regarded in this connection as a relative term, and, in law what it should be in each case depends on the circumstances of the particular case. A general principle is, that speed such that another vessel cannot be seen in time to avoid her is unlawful: speed which is justifiable in an unfrequented part of the ocean is unlawful in a crowded roadstead, or in a highway: besides, speed which was moderate when no vessel was known to be near may be illegal after the whistle or horn of another is heard to be approaching. "The object of article (16) is not merely that vessels should go at a speed which will lessen the violence of a collision, but also that they should go at a speed which will give as much time as possible for avoiding a collision when another vessel suddenly comes into view at a short distance . . . in a fog so dense that it is not possible for a ship to see another in time to avoid it, she is not justified in being under way at all, except from necessity" (*The Heather Belle,* 3 Ex. C. R. at p. 49). "To escape liability, it must be shown that the movement was not more than was necessary" (*The Iroquois,* 18 B. C. R. at p. 78): and while it may be that a ship runs more regularly at a certain speed, that fact does not justify her in maintaining that speed, and thereby making herself more dangerous to other vessels (*The Iroquois,* 18 B. C. R. at p. 79). "It is impossible to say what the speed ought to be in figures in every case, but it is obvious, if a vessel is proceeding at a speed which would not allow her to pull up in something like her own length (at a time when vessels could only see each other at a distance of 100 feet), and if a vessel could proceed and have steerage way at a smaller speed than she was going, she ought to have gone at that speed, and in so far as that speed was exceeded, it was excessive" (*The Sargasso,* 1912, P. at p. 199, cited in *The Iroquois,* 18 B. C. R. at p. 79).

Where there was a dense fog, and the horn of a schooner was heard on board a steamer, it was held that the captain of the steamer should, at once, have taken precautions to prevent a collision by stopping his way until he had ascertained the position of the schooner (*The Pawnee,* 7 Ex. C. R. 390): "it may be laid down as a general rule of conduct that it is necessary to stop and reverse, not indeed every time that a steamer hears a whistle or foghorn in a dense fog, but when in such a fog it is heard on either bow and approaching, and

is in the vicinity, because there must then be a risk of collision" (*The John McIntyre,* 9 P. D. at p. 136, cited in *The Pawnee,* 7 Ex. C. R. at p. 399). Nor is the rule confined to cases of vessels approaching each other, but it applies not only when vessels are sailing towards each other, but when vessels are sailing in such a direction as to be liable to come together and there is danger of a collision (*The Pawnee,* 7 Ex. C. R. at p. 398).

Stop and reverse.

Where a ship is navigating in a fog, a failure in the attending to the possibility of fog signals may very well amount to a neglect of the direction to act with "careful regard to existing circumstances and conditions" (*The Rosalind,* 41 S. C. R. at p. 67) : but where *The Rosalind* had improperly failed to hear the fog signals of *The Senlac,* and had even been navigating at an excessive rate of speed, she was exonerated from blame for the ensuing collision, because at the crucial moment she had stopped and reversed, while *The Senlac* failed to take this most necessary course, and although she had time by reversing her engines at any rate to lessen the force of the impact if not to avert the collision, nevertheless attempted to cross the bows of *The Rosalind* (*The Rosalind,* 41 S. C. R. 54: Can. Rep., 1909, A. C. 441).

Article 19 corresponds with article 16 of the Regulations of 1886 (R. S. C. cap. 79, sec. 2), and provides as follows:

Crossing ships.

"When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other."

This rule was considered in *The Heather Belle* (3 Ex. C. R. at p. 53), and *The Cutch* (3 Ex. C. R. at p. 368) : in *The Astrid* (6 Ex. C. R. 178) the distinction between a "crossing" ship and an "overtaking" ship was laid down following *The Franconia* (2 P. D. 8), to the effect that "where two ships are in such a position, and on such courses, and are at such distances, that, if it were night, the hinder ship could not see any part of the sidelights of the forward ship, and the hinder ship is going faster than the other, the former is to be considered as an "overtaking" ship, and no subsequent alteration of the bearing between the two vessels can make the "overtaking" vessel a "crossing" vessel.

The Parisian.

In *The Parisian* (37 S. C. R. 284) the facts were as follows: *The Parisian* making for Halifax Harbour, came along the western shore, sailing almost due north to a pilot station,

on reaching which she slowed down, finally stopping her engines. *The Albano,* making for the same port, approached some miles to the eastward, sailing first, by error, to the north-east, and then changing her course to the south-west, apparently making for the eastern passage to the harbour. She again altered her course, however, and came almost due west towards the pilot station. When about a quarter of a mile from *The Parisian* she slowed down, and on coming within eight or nine ship's length gave three blasts of her whistle. *The Parisian,* then, seeing that a collision was inevitable, went full speed ahead for about 200 feet when she was struck on the starboard quarter and had to make for the dock to avoid sinking outside. *The Parisian's* engines were stopped about six minutes before the collision, and a boat from the pilot cutter was rowing up to her when she was struck. In the Supreme Court of Canada it was held, affirming the judgment of the local Judge that *The Albano* had no right to regard *The Parisian* as a crossing ship, but this decision was reversed by the Judicial Committee: their Lordships pointed out (1907, A. C. at p. 205) that it was not possible to regard the situation from the point of view contended for by *The Parisian,* viz., that being on the spot first and with little motion left, she was entitled to be treated as a vessel to which the rules did not apply and that therefore *The Albano* should have given way to her: their Lordships proceeded to lay down the principle that the situation must be considered as at the time when the vessels were approaching towards the spot where the collision took place, and would if they continued doing what each of them was respectively doing, arrive at that spot so as to involve risk of collision. The two vessels were in fact converging on a spot on courses and at speeds which would probably bring them to that spot so as to present a danger of collision when they reached it, which each of them would do in the course of her navigation and in these circumstances, they were crossing vessels.

Article 20 corresponds with article 17 of the Regulations of 1886 (R. S. C. cap. 79, sec. 2), differing from it only verbally:

Steamer to keep out of the way of sailing vessel.

"When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel."

"When a steamer and a sailing vessel are in danger of collision the statute throws on the steamer alone the duty of getting out of the way. If she does not do so, *prima facie* she is a wrongdoer and has neglected her duty. If it be said on her behalf that she could not stop in time, that only states in other words that she was going too fast to permit her to perform this duty" (*The Zambesi,* 3 Ex. C. R. at p. 69; *The Westphalia,* 8 Ex. C. R. at pp. 268, 296; *The Diana,* 11 Ex. C. R. at p. 64; *The Tiber,* 6 Ex. C. R. 402). But, notwithstanding the favoured position of the sailing vessel, she is under the necessity of complying with the provisions of the following rule.

Article 21 corresponds with article 22 of the Regulations of 1886 (R. S. C. cap. 79, sec. 2):

Keeping course and speed.

"Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed.

NOTE.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving way vessel alone, she also shall take such action as will best aid to avert collision (see articles 27 and 29)."

The note is newly added, and there is an important addition in the words "and speed."

In *The John Irwin* (12 Ex. C. R. 374), it was held that under this rule a sailing vessel, when she is compelled to go about, cannot do so close ahead of a steamer, so as to embarrass the latter and make it difficult for her to keep out of the way and where a sailing vessel and a steamer were so close together as to involve risk of collision and the sailing ship undertook to go about without being compelled to do so and without any good reason to justify the manœuvre, and by so doing embarrassed the steamer and rendered her unable to avoid a collision, it was held in this case that the sailing vessel had violated this rule and was responsible for the collision. "A steamer, it is true, must keep out of the way of a sailing vessel when such vessels are proceeding in such directions as to involve risk of collision. But it is also true that where by the rules, one of two vessels is to keep out of the way of the other, the other shall keep her course and speed, and under this rule, I take it to be settled that a sailing ship must not, when she is compelled to, (sic) go about close ahead of a steamer, so as to embarrass the steamer and make it difficult for her to keep out of the way;

and that where risk of collision exists, a sailing ship is not entitled to go about until compelled to" (*The John Irwin*, 12 Ex. C. R. at p. 376). And "where a ship required by the regulations to keep out of the way is unable to do so, it is the duty of the other not to keep her course, but herself to keep out of the way" (*The Cape Breton*, 9 Ex. C. R. at p. 122). "All the articles . . . must be read together as one Code, and if article 21 requires a ship to keep her course, other articles prescribe that she shall take such action as will best aid to avert a collision, and that due regard must be had to any special circumstances which may render a departure from the rules necessary to avoid immediate danger" (*The Arranmore*, 38 S. C. R. at p. 185). So if a vessel properly keeps her course until she is in the very agony of collision and then undertakes a manœuvre to escape the inevitable consequences of persisting in her course, she will not be held to blame (*The Heather Belle*, 3 Ex. C. R. at p. 53; *The Westphalia*, 3 Ex. C. R. at p. 274). In *The Diana*, (11 Ex. C. R. at p. 52), it was sought to contend that that vessel should have done something to avert the collision in obedience to the note to this rule, but it was held that there were no causes which should indicate to *The Diana* that the collision could not be avoided.

Article 22 is first found in the Regulations of 1896:

Crossing ahead.

"Every vessel which is directed by these rules, to keep out of the way of another vessel, shall, if the circumstances of the case admit, avoid crossing ahead of the other."

This rule enforces an obvious duty of good seamanship, and is like the preceding and following rules, a consequence of the duties imposed by rules 19 and 20, in conjunction with which it is usually considered (*The Tiber*, 6 Ex. C. R. 402; *The Westphalia*, 8 Ex. C. R. 263, at p. 297; *The Cape Breton*, 9 Ex. C. R. 67, at p. 122; *The Parisian*, 1907, A. C. 193).

Article 23 corresponds with article 18 of the Regulations of 1886 (R. S. C. cap. 79, sec. 2), but differs from it, not only verbally, but in effect:

Slacken speed or stop or reverse.

"Every steam vessel which is directed by these rules to keep out of the way of another vessel, shall, on approaching her, if necessary, slacken her speed or stop or reverse."

It thus applies only to one of the approaching vessels, viz., the ship whose duty it is to keep out of the way; while article 18 applied to both ships. Thus, in *The City of Puebla* (3 Ex. C. R.

26), it was held that where two steamers, the one entering, the other leaving the port of Nanaimo, signalled to each other that they both proposed to take the same channel, the one steamer being fully committed to the channel, it was the duty of the other steamer, under article 18, to remain completely outside until the first had passed completely through.

The words in the rule, "if necessary," do not mean that the situation is such that, without stopping and reversing, a collision would take place, but they are equivalent to "prudent and expedient" (*The Heather Belle*, 3 Ex. C. R. at p. 50).

The Santanderino.

In *The Santanderino* (3 Ex. C. R. 378), *The Santanderino* was proceeding up the harbour of Sydney, N.S., at the rate of eight or nine miles an hour; *The Juno* was anchored near the middle of the channel and when *The Santanderino* was on the port side of *The Juno*, distant about 200 yards, she suddenly turned and struck *The Juno* on her port side; it was proved that the reason for this manœuvre of *The Santanderino* was the breaking of the stearing gear, which was assumed to be an inevitable accident, but it was held, notwithstanding, that the master of *The Santanderino* was in fault, under article 18, in not stopping and reversing at once when he became aware of the accident to his steering gear (affirmed, with some doubt, 23 S. C. R. 145).

The object of the rule is to obviate, as well as to minimize the result of a collision, and the burden of showing why she did not comply with the rule is thrown upon the steamship which was, by the rules, bound to keep out of the way of the other (*The Shenandoah*, 8 Ex. C. R. at p. 42). But the nonobservance of the rule, in the case of collisions in Canadian waters, is not to be considered as a fact contributing to a collision, provided that the collision could have been avoided by the impinging vessel by reasonable care exerted up to the time of the accident (*The Cuba*, 26 S. C. R. 651).

A breach of this rule may be proved under a general allegation in the preliminary act that the offending vessel did not keep out of the way, inasmuch as the rule itself is only a declaration of the law that it is negligence in a steamship to fail to slacken her speed, or stop or reverse, if such manœuvre be necessary or prudent to avoid collision (*The Diana*, 11 Ex. C. R. at p. 64).

The dependency of this rule on articles 19 and 20 is illustrated in *The Tiber* (6 Ex. C. R. 402), *The Westphalia* (8 Ex.

C. R. at p. 297), *The C. F. Bielman* (10 Ex. C. R. 155), a case of collision in the inland waters; and *The Parisian* (1907, A. C. 193).

Article 24 corresponds with article 20 of the Regulations of 1886 (R. S. C. cap. 79, sec. 2).

Overtaking vessel.

"Notwithstanding anything contained in these rules, every vessel, overtaking any other, shall keep out of the way of the overtaken vessel."

The new article adds a definition of an overtaking vessel, which, though not before stated in the regulations, merely formulates the dicta of the Judges and decisions of the Courts (Marsden's Collisions at Sea, 6th ed. 435; *The Cutch,* 3 Ex. C. R. at p. 367; *The Astrid,* 6 Ex. C. R. 178; *The Empress of Japan,* 7 Ex. C. R. 143).

The obligation to keep out of the way of the overtaken vessel is not fulfilled by mere avoidance of physical impact, but it is the duty of the overtaking vessel to pass at such a distance that no harm will result to the other from the suction produced by her passage through the water or from her displacement wave, and she is bound to know the effect of her swell, and to pass at a distance sufficient to avoid danger therefrom or to reduce her speed to such a degree that a displacement wave will be avoided (*The C. F. Bielman,* 10 Ex. C. R. at p. 156).

Where the defendant's preliminary act alleged that at a certain point the bearing of the ship at fault was "a little abaft the starboard beam" of the injured ship, evidence was admitted to show that the line of approach was not more than two points abaft, or was forward of the beam of the injured vessel (*The Diana,* 11 Ex. C. R. 40).

Article 25 corresponds with article 21 of the Regulations of 1886 (R. S. C. cap. 79, sec. 2):

Narrow channels.

"In narrow channels, every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

For the period between the years 1862 and 1880 this rule did not exist in the English Regulations and hence there are English cases upon the question of the practice or course of conduct to be observed by vessels traversing rivers in the absence of a statutory regulation on the subject (*The Velocity,* L. R. 3 P. C. 44; *The Niord,* L. R. 3 P. C. 436; *The Cologne,* L. R. 4 P. C. 519; cited in *The Shenandoah,* 8 Ex. C. R. at p. 46).

In the case of the inland waters of Canada, the regulation is split into two sub-sections, the first of which reproduces *verbatim* rule 25, and the second of which adds:

Inland waters.

"In all narrow channels where there is a current, and in the rivers St. Mary, St. Clair, Detroit, Niagara, and St. Lawrence, when two steamers are meeting, the descending steamer shall have the right of way, and shall, before the vessels have arrived within the distance of half a mile of each other, give the signal necessary to indicate which side she intends to take."

The latter provision is identical in effect with rule 24 of the American regulations, which was considered at length in *The Shenandoah* (8 Ex. C. R. 1, at p. 38).

No definition of a "narrow" channel has ever been attempted: but it appears that, though the word channel implies length as well as breadth, no particular length is necessary to constitute an opening a "narrow channel," so that the "neck" formed by the two extremities of a breakwater at the entrance of a harbour may be a "channel" (*The Kaiser Wilhelm der Grosse,* 1907, P. 259, 263, 264).

Examples of narrow channels.

In Canada, the rule has been applied to the First Narrows at the entrance to Vancouver Harbour (*Bryce* v. *Canadian Pacific Railway Co.,* 13 B. C. R. 96, affirmed on appeal to the Judicial Committee, 13 Ex. C. R. 394; *The Bermuda,* 15 B. C. R. 506; the Parrsborough River at Newville Wharf (*The Wandrian,* 11 Ex. C. R. 1, 12; 38 S. C. R. 431); the St. Lawrence River between St. Antoine and St. Croix (*The Euphemia,* 11 Ex. C. R. 234): the Detroit River at Bar Pointe (*The Tecumseh,* 10 Ex. C. R. 44, 61); the Soulanges Canal at Coteau (*The Dorothy,* 10 Ex. C. R. 163); the Harbour of Charlottetown, P.E.I., near Alchorn Point (*The Tiber,* 6 Ex. C. R. 402, 407); the mouth of Charlottetown Harbour, outside the Block House (*The Heather Belle,* 3 Ex. C. R. 40, 46); the south channel in Nanaimo Harbour (*The Cutch,* 3 Ex. C. R. 362); the navigable channel in the harbour of Sydney, N.S. (*The Santanderino,* 3 Ex. C. R. 378); the entrance to Halifax Harbour, N.S. (*The Parisian,* 1907, A. C. 193).

The Calvin Austin.

But a harbour containing wharves and anchorage for ships on either side and where ships and tugs are continually plying back and forth, is not a "narrow channel" (*The Calvin Austin,* 9 Ex. C. R. 160; 35 S. C. R. 616); no definition was given in the latter case, but Davies, J., in delivering the judgment of the Supreme Court of Canada, remarked, at p. 623: "The object

of the rule is to prevent collisions by keeping steamers on the proper side of narrow channels, through which they steam. It is a reasonable and necessary rule for such waters, but we cannot see reason or object in its application to such a place as this inner harbour (Boston Inner Harbour). Surrounded, except at its entrance from the sea, by docks and wharves, having practically a uniform depth of water, and not having either a natural fair-way or mid-channel or an artificially buoyed one to indicate to vessels the side of the fairway which would lie on their starboard side, we cannot see how article 25 could reasonably be applicable to it."

The words "when it is safe and practicable" imply that the vessel is only obliged to keep to starboard when she can do so without danger of collision (*The Calvin Austin,* 9 Ex. C. R. 160, 184). "Where there is no local impediment of any kind, no difficulty arising from the peculiar formation of the channel itself, no storm, no wind, or anything of that kind occurring, then the obligation continues to keep to the starboard side, and no consideration of convenience, nor opportunity of accelerating the speed, none whatever, can justify a disobedience of (the rule)" (*The Dorothy,* 10 Ex. C. R. 163, at p. 172, citing *The Unity,* Sw. 101).

The respective rights and duties of vessels in a narrow channel were exhaustively discussed and established in the important case of *Bryce* v. *Canadian Pacific Railway Co.* (13 B. C. R. 96) by the learned judge in Admiralty for British Columbia: the judgment contains a wealth of illustration and authority and it was emphatically approved and affirmed by the Judicial Committee of the Privy Council, where the judgment was delivered by Lord Gorell (13 Ex. C. R. 394: 15 B. C. R. 510).

Article 27 corresponds with article 23 of the Regulations of 1886 (R. S. C. cap. 79, sec. 2), with the addition of the words "and collision:"

Special circumstances.

"In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the rules necessary in order to avoid immediate danger."

The application of this rule gives rise to considerable difficulties. On the one hand, a vessel will certainly not be excused when she has deliberately caused a collision by a strict and literal application of the regulations: "Not only is it the right

of ships to disregard the rules in certain cases, in order to avoid a collision, but it is their bounden duty to do so, and if they fail in this duty, they will be held answerable for the consequences: for instance, where two ships are meeting, visible to each other from a distance, they both ought to know what they have to do: one observes the appropriate rule, the other fails to do so by infringing the rule; the latter is proceeding to cause a collision for which she will be responsible, but if the former, who is observing the rule, sees clearly that by departing from it, the collision will be avoided, she is bound to disregard the rule" (*The Crown of Aragon,* 13 Ex. C. R. at p. 408). *The Crown of Aragon* had collided with and damaged the plaintiff's cable by casting her anchor in breach of a local regulation of the harbour of Quebec; but the manœuvre was undertaken in order to avoid an imminent collision with other vessels moored at the quay, and she was absolved from blame (*The Crown of Aragon,* 13 Ex. C. R. 399). So, where *The Caspian,* in backing out of Kingston harbour, blew two whistles, but nevertheless ported her helm, and *The Magedoma* persisted in her orthodox manœuvre and refused to give way, the latter ship was held to blame under the special circumstances of the case (*The Magedoma,* 12 Ex. C. R. 483).

But the principle embodied in this rule, though a sound one, is one which should be applied very cautiously, and only where the circumstances are clearly exceptional (*The Tiber,* 6 Ex. C. R. 402, at p. 411, citing *The Byfoged Christensen,* 4 A. C. 669). And this caution was further emphasized by the Supreme Court of Canada in *The Cape Breton* (36 S. C. R. 564); and the principle re-affirmed that a vessel which is required by the regulations to pursue a certain course has a right to presume up to the last moment that the other vessel will do her duty and also observe the regulations (*ibid.,* at p. 574). An attempt was made, but unsuccessfully, to invoke this rule in *The Parisian* (1907, A. C. 193).

Instances of what have been held special circumstances may be found in *The Tweedsdale* (14 P. D. 164), *The Prince Leopold de Belgique* (1909 P. 103), *The Ann Caroline* (2 Wall. 538), *The Commodore Jones* (25 Fed. Rep. 506), *The Winnie* (64 Fed. Rep. 893).

Sound signals.

Article 28 corresponds with article 19 of the Regulations of 1886 (R. S. C. cap. 79, sec. 2) with the difference that the prescribed methods of signalling have been made imperative, instead of optional (*The Arranmore,* 11 Ex. C. R. 23).

"If a steamer is following a course which may possibly appear unusual to other steamers, although she is justified by special reasons, she does so at her own risk, and ought to signal her intentions, for the others have the right to assume that she will conform her course to the ordinary rules" (*The Cape Breton*, 9 Ex. C. R. at p. 116; 36 S. C. R. at p. 579).

And "the duty of a steamer to answer a signal given by an approaching vessel is as imperative as the duty to give one" (*The C. F. Bielman*, 10 Ex. C. R. at p. 161; *The Dorothy*, 10 Ex. C. R. at p. 173).

The rule only applies and the signals only authorized "when vessels are in sight of one another:" and in giving unauthorized signals under this rule, there is a danger of confusing them with those that are elsewhere authorized, *e.g.*, under article 15 (*The Charmer*, 7 W. L. R. at p. 421).

"In a dispute between vessels as to what signals have been given by either vessel, the evidence of witnesses upon the vessel giving the signal, if no circumstances are shown which would go to impeach their credit or truthfulness, is to be preferred to the evidence of witnesses equally credible upon the other vessel, who also testified that the alleged signal was not given by the first vessel" . . . and the vessel which gives the signal cannot be held responsible because those on the approaching vessel did not hear it" (*The Shenandoah*, 8 Ex. C. R. at p. 39; *The Bermuda*, 13 Ex. C. R. 389, at p. 390).

Article 29 corresponds with article 24 of the Regulations of 1886 (R. S. C. cap. 79, sec. 2):

Practice of seamen and special circumstances.

"Nothing in these rules shall exonerate any vessel, or the owner or master, or crew thereof from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

Look-out.

"It seems difficult to attribute to this article any legal effect" (Marsden's Collisions at Sea, 6th. ed. 471). It is most usually invoked in cases of defective look-out: in *The Cape Breton* (9 Ex. C. R. 67), the local Judge held that a pilot in charge of a ship, or the man at the wheel, is not a proper look-out, and that the look-out should have nothing else to do than to scan the horizon (*ibid.* at pp. 101, 102, affirmed, 36 S. C. R. 564). In *The Porter* (6 Ex. C. R. 154, at p. 166) and *The Dorothy* (10 Ex. C. R. 163, at p. 174), it was held that the

absence of a look-out was immaterial, as that circumstance had not contributed to the collision.

The jurisdiction of Canadian Courts over foreign vessels in foreign waters and on the high seas has been dealt with in the last chapter; and it has been pointed out above that the Canadian Court of Admiralty may be called on to administer three nominally different sets of regulations according as the collision occurred on the high seas, within Canadian waters, or on the inland waters of Canada.

Foreign ships. It remains to notice that by section 919 of the Canada Shipping Act (R. S. C. 1906, cap. 113) foreign ships within Canadian waters are subject to the regulations in force for the time being under that Act, and are to be treated as if they were British or Canadian ships.

Foreign regulations. In cases of collision happening in foreign waters, the Court will receive evidence of the foreign regulations in force in those waters: "It is true that in many cases the Courts of England inquire and act upon the law of foreign countries . . . as in the case of a collision on an ordinary road in a foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed" (*The Halley,* L. R. 2 P. C. at p. 203, cited in *The Shenandoah,* 9 Ex. C. R. at p. 167). But the admission of such evidence is subject to the application of the principle that "an English Court of Justice will (not) enforce a foreign municipal law, and will (not) give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed" (*The Halley, ubi supra,* at p. 204). In the latter case, it was accordingly held that the owners of an English ship were not liable for a collision in Belgian waters occasioned by the fault of the compulsory pilot in charge, though, according to Belgian law, the plea of compulsory pilotage was not a defence. On the other hand, "an act done in a foreign country is not actionable as a tort in the Canadian courts unless it is a wrong by the law of the country where it occurred . . . where the collision occurs in the domestic waters of the foreign ship held to be at fault, the *lex loci commissi delicti* determines the extent of her liability . . . in dealing with either the ship or her owners, when subject to their jurisdiction, the courts of this country, while they will not condemn for a cause not actionable here, will not, on the other hand,

subject her or them to a greater liability than is imposed by the law of the ship's own flag as proved" (per Anglin, J., in *The A. L. Smith* and *The Chinook*, 51 S. C. R. at p. 72). But these rules have of course no application where the collision occurs on the high seas (*ibid*).

American rules. The only cases which have come before the Canadian Court of Admiralty involving questions of foreign regulations have been cases of collisions in American waters, where the regulations applicable have been similar to and often identical with the Imperial and Canadian Regulations. In *The Hiawatha* (7 Ex. C. R. 446), the rules whose application was in question were the American rules 19 and 20, corresponding to articles 20 and 21 of 1897; in *The Shenandoah* (8 Ex. C. R. 1; 33 S. C. R. 1), the American rule 24 was in question corresponding to article 25 (b) of the Regulations for the inland waters; in *The Calvin Austin* (9 Ex. C. R. 160; 35 S. C. R. 616), it was article 25 of the American rules corresponding to article 25 of the Regulations of 1897 which was considered.

Article 30 of the Regulations of 1897 contains a saving for "any special rules, duly made by local authority, relative to the navigation of any harbour, river, or inland waters."

Local rules. This article, which is identical with article 25 of 1886 (R. S. C. cap. 79, sec. 2), is taken, as indeed are the other articles, from the Imperial Regulations, and it appears that in the waters in which local rules are in force, they must be obeyed without regard to the Imperial Regulations, if the latter conflict with them. But it is otherwise in Canada: section 914 of the Canada Shipping Act (R. S. C. 1906, cap. 113) provides:

"No rule or by-law of the Harbour Commissioners of Montreal, or the Trinity House of Quebec, or the Quebec Harbour Commissioners, or other local rule or by-law, inconsistent with this Part, or the regulations from time to time in force thereunder . . . shall be of any force or effect; but, so far as it is not inconsistent therewith, any such rule or by-law . . . shall be of full force within the locality to which it applies.

In *The Cape Breton* (9 Ex. C. R. 67), it was sought to contend that the duties of the colliding vessels were fixed by rule 33 of the Montreal Harbour Commissioners' Regulations; this contention was rejected by the local Judge on the ground that the officers of *The Cape Breton* could not be bound to know of a local practice (*ibid.* at p. 115); in the Supreme Court of Canada, it was held that the rule had no application, as *The Cape Breton*

was not going to the harbour to which rule 33 applied (36 S. C. R. at pp. 578, 589).

Other local rules which have come before the Admiralty Court are rule 81 of the by-laws of the Harbour Commissioners of Montreal (*The Universe,* 10 Ex. C. R. 352, at p. 374); rule 50 of the Dominion Canals Regulations (*The Nicaragua,* 11 Ex. C. R. 67), where it was held that a mastei who had relied on a bridge being open from seeing the green light thereon, was entitled to so rely and was not negligent for having failed to take further means of ascertaining that the bridge was in fact open: sub-section (d) of section 19 of the Dominion Canal Regulations (*The Havana,* 1910, A. C. 170).

Custom. In addition to local rules established by some competent authority, there may be a custom sanctioned by long usage and well-recognized practice which, in the absence of any statutory regulation, it is negligent to infringe (*The Smyrna,* 2 Moo. P. C. N. S. 435). A custom for vessels coming up the St. Clair Rapids to keep close to the American bank was set up in *The Shenandoah* (8 Ex. C. R. 1; 33 S. C. R. 1); the local Judge considered that the alleged custom conflicted with rule 24 of the "White Law" (the Act of Congress entitled "An Act to regulate navigation on the Great Lakes and their connecting and tributary waters," Statutes at Large, vol. 28, cap. 64): as this was an Act of the United States, the provisions of section 3 of chapter 79 of the Revised Statutes of 1886, corresponding to section 914 of the Canada Shipping Act (R. S. C. 1906, cap. 113) did not apply, but the local Judge remarked (*ibid.* at p. 51): "The St. Clair River is an international highway and, therefore, a custom which varies or conflicts with the regular rules of navigation should be strictly proved by the party setting it up. The custom should be so universally known that any departure from it would be considered as unusual and extraordinary . . . more witnesses affirm the custom than negative it; but is the evidence so overwhelming as to justify the Court in holding that it supersedes statutory rule 24? . . . I think that upon a river like the St. Clair, traversed as it is annually by thousands of vessels, and used by two nations, a custom which in effect superseded a statutory rule, ought to require the most conclusive and cogent proof; and, as it is sought to make it binding upon foreign, as well as domestic vessels, the proof should include some convincing evidence that a knowledge of the alleged custom existed among mariners generally and extended

The Shenandoah.

to mariners sailing on vessels carrying the foreign flag and habitually traversing this busy river." In the Supreme Court of Canada (*ubi supra,* at p. 5), it was held that the custom and the rule were not at variance, but Davies, J., in delivering a judgment in which Taschereau, Sedgewick, and Girouard, JJ., concurred, remarked: "Now, if the statutory rule gave (one vessel) the right to the side of the channel lying next the United States, it is perfectly clear that no evidence of custom as to a contrary practice could operate to repeal the statutory rule.

The American rule 24 considered, in *The Shenandoah,* is identical with rule 25 (b) of the Regulations for preventing collisions on the inland waters of Canada, which was considered in *The Norwalk* (12 Ex. C. R. 434).

Negligence.

The foundation of a cause of damage by collision is the negligence of the defendant vessel, and under the Canada Shipping Act, there is no difference between the rules of law and of admiralty as to what amounts to negligence causing collision (*The Cuba,* 26 S. C. R. at p. 661); the general conditions of a cause of action for negligence are, therefore, to be properly sought in the common law authorities on the subject. One principle, however, limiting liability for the result of action causing harm has received considerable attention in Courts of Admiralty; the defence of inevitable accident is frequently set up and has received consideration in several important cases in Canada, where the conditions necessary to a successful defence on this plea have been established; the leading English case is *The Merchant Prince* (1892, P., at p. 189), where Fry, L.J., stated the principles applicable to this defence as follows:—

Inevitable accident.

"The burden rests on the defendant to show inevitable accident. To sustain that, the defendants must do one or other of two things. They must either show what was the cause of the accident and show that the result of that cause was inevitable, or they must show all the possible causes, one or other of which produced the effect, and must further show, with regard to every one of these possible causes, that the result could not have been avoided" (cited in *The Santanderino,* 3 Ex. C. R. at p. 380). "To constitute inevitable accident, it is necessary that the occurrence should have taken place in such a manner as not to have been capable of being prevented by ordinary skill and ordinary prudence. We are not to expect extraordinary skill or extraordinary diligence, but that degree of skill and of diligence which

is generally to be found in persons who discharge their duty . . . inevitable accident is that which a party charged with an offence could not possibly prevent by the exercise of ordinary care, caution and maritime skill . . . it would be going too far to hold his owners responsible, because (the master) may have omitted some possible precaution which the event suggests he might have resorted to; the rule is that he must take all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger in the circumstances in which he may happen to be placed" (*The Baden*, 8 Ex. C. R. at p. 347). "It is not enough to show that the damage could not be prevented by the offending party at the moment of collision; for one of the crucial questions is: Could previous measures have been adopted which would have prevented it or rendered the risk of it less probable" (*The D. C. Whitney*, 10 Ex. C. R. at p. 13; *The Prescott*, 13 Ex. C. R. at p. 427). "If a ship is negligently allowed to be at sea in a defective or inefficient state as regards her hull or equipment, and a collision occurs which probably would not have occurred but for the defective condition, the collision will be held to have been caused by the negligence of her owners" (*The Prescott*, *ubi supra*, at p. 427). "If at a critical moment in the agony of a collision or immediately before it takes place, a vital or material part of the machinery or of the steering gear or equipment of a vessel fails or breaks and cannot possibly be remedied, and the command of the movements of the vessel by those in charge of her is lost and cannot possibly be regained, and a collision then occurs without any antecedent negligence on the part of the disabled ship, and is unavoidable as far as she is concerned, the accident is inevitable. But if . . . a bell spring breaks, a mere accessory of the equipment of the vessel, and the command of the vessel is not thereby necessarily lost by those in charge of her, and antecedent fault on her part is proved, this cannot be deemed to be an inevitable accident" (*The Prescott*, *ubi supra*, at p. 449). "A vessel going at too great a rate of speed on a dark night or in foggy weather cannot be heard to say that a collision was the result of inevitable accident" (*The Hiawatha*, 7 Ex. C. R. at p. 467).

Unseaworthiness.

Breakdown of machinery.

Excessive speed.

In addition to the ordinary principles of the law of negligence, and the rules embodied in the Regulations for preventing collisions, there are a number of ancillary rules laid down by the cases for the governance of ships at sea.

Moving and stationary vessels.

One most important rule relates to the duties of moving and stationary vessels respectively. When a ship is tied up at her lawful wharf, she is "at home" and entitled to assume she is in a place of safety (*The City of Seattle,* 9 Ex. C. R. at p. 149); and where a collision occurs between a moving vessel and one lying at anchor, the burden of proof is upon the moving vessel to show that such collision was not attributable to her negligence (*The Yosemite,* 4 Ex. C. R. 241). In such a case, the defendants must begin on the question of liability for the accident with the right to reply on the question of damage, if it becomes necessary to go into that question (*The Colorado,* 3 Ex. C. R. 263). "The general rule of law is that a vessel under way is bound to keep clear of another at anchor. It applies, though the ship at anchor is brought in the fairway or elsewhere in an improper berth" (*The Porter,* 6 Ex. C. R. at p. 165). "The rule is well known that a ship under way running into a vessel at anchor, whether anchored in a proper or improper place, is to blame and can only relieve herself by saying that the accident was practically inevitable" (*The Wandrian,* 11 Ex. C. R. at p. 11; 38 S. C. R. at p. 439). But, on the other hand, "the vessel at anchor is also bound to keep a competent person on watch, whose duty it is to see that the anchor light or lights are properly exhibited and to do anything in his power to avert or minimize a collision" (*The Lake Ontario,* 7 Ex. C. R. at p. 406).

Passing ships.

If two vessels are approaching each other in the position of "passing ships," where, unless the course of one or both is changed, they will go clear of each other, no statutory rule is imposed, but they are governed by the rules of good seamanship (*The Cuba,* 26 S. C. R. 651). The four possible positions for ships approaching one another appear to be "crossing," "meeting," "overtaking," or "passing;" although this arrangement involves a cross classification, since a "crossing" ship, while it can never be a "meeting" ship, may be an "overtaking" ship. A "crossing" ship is one the line of whose course, if prolonged, would intersect the line of the course of the other ship (*The Oceanic,* 61 Fed. Rep. 338); a "meeting" ship is one which, by day, sees the masts of the other vessel in a line, or nearly in a line, with her own, or by night, sees both the side lights of the other vessel (article 18); an "overtaking" vessel is one which by night would be unable to see either of the overtaken vessel's side lights, *i.e.,* one which is more than two points abaft the beam of the overtaken vessel (article 24); a "passing"

Possible positions. Crossing. Meeting. Overtaking. Passing.

ship is one proceeding on a parallel or nearly parallel course with the other, so that her red light or green light is immediately behind the red light or green light of the other, if she is coming up behind the other, or which, at night, sees the red light without the green light, or the green light without the red light of the other.

Where one vessel is admitted to be in no way to blame for the collision, the burden of proof of relieving herself from responsibility is, of course, thrown upon the other ship (*The Santanderino,* 3 Ex. C. R. 379).

Conflict of evidence.

Where there is a conflict of evidence in Admiralty cases, the Court must be governed chiefly by certain undeniable and leading facts, and this applies especially to estimates of distances between vessels; under the most favourable circumstances, it is impossible to measure distances on the water with accuracy, but in times of excitement, there is very little reliance to be placed on the opinion of any one on this subject (*The C. F. Bielman,* 10 Ex. C. R. at p. 159).

"In a dispute between vessels as to what signals have been given by either vessel, the evidence of witnesses upon the vessel giving the signal, if no circumstances are shown which would go to impeach their credit or truthfulness, is to be preferred to the evidence of witnesses equally credible upon the other vessel, who also testified that the alleged signal was not given by the first vessel" (*The Shenandoah,* 8 Ex. C. R. at p. 39). "Eminent and experienced Judges have frequently, on the advice of experienced assessors . . . refused to accept credible testimony that a signal was not heard as sufficient evidence to show that it was not given in the face of positive evidence that it was given, and it may be accepted that the vagaries and uncertainties of sounds in certain atmospheric conditions make it, as a rule, unsafe to infer that a signal was not given on one ship at sea because it was not heard upon another. On the other hand, it is, I think, impossible to lay down as a rule that in no circumstances would the fact that a signal proved to have given on one ship was not heard by another be evidence of culpable inattention on the latter" (*The Rosalind,* 41 S. C. R. at p. 67).

Look-out.

The sufficiency of the look-out is always a matter of importance. "Steamers are required to have constant and proper look-outs stationed in proper places on the vessel and charged with the duty for which look-outs are required. They must be actually employed in the performance of the duty to which they are assigned. They must be persons of suitable experience,

properly stationed on the vessel, and actually and vigilantly employed in the performance of that duty. Proper look-outs are competent persons, other than the master or helmsman, properly stationed for that purpose on the forward part of the vessel" (*The Ottawa,* 3 Wall. 268, cited in *The Diana,* 11 Ex. C. R. at p. 57). A pilot in charge of a ship, or a man at the wheel, is not a sufficient look-out (*The Cape Breton,* 36 S. C. R. 564). Where the mate and the look-out man were dividing their attention between the look-out and preparing the ropes for mooring the ship, it was held that there was no efficient look-out (*The D. C. Whitney,* 10 Ex. C. R. at p. 15). Failure to see the lights of an approaching ship may raise a presumption that there was no proper look-out (*The Cape Breton, ubi supra,* at p. 576); and non-hearing of the blast and danger signals of the approaching vessel may be held to be conclusive evidence of a defective look-out (*The C. F. Bielman,* 10 Ex. C. R. at p. 161). If, however, the absence of the look-out clearly had nothing to do with the collision, it will not be deemed to be a fault contributing to the collision (*The Arranmore,* 38 S. C. R. 176). When a vessel is at anchor, it is often proper that there should be an anchor watch; but "the question of the necessity of an anchor watch upon a vessel at anchor seems to be a question depending upon the position of the anchored vessel. A vessel brought up in a frequented channel should keep an anchor watch ready to sheer her clear of an approaching vessel or to give her chain. But, if not in a frequented channel, the absence of a watch, with proper lights up, does not appear to be essential" (*The Porter,* 6 Ex. C. R. at p. 166); in the latter case, the person whose duty it was to keep the watch, left his post and neglected his duty, but, as it was clear that the absence of the anchor watch did not actively contribute to the collision, it was treated as immaterial (*The Porter,* 10 Ex. C. R. 154, 208). A vessel without a sufficient look-out has the burden cast upon her of proving that such fact did not contribute to the collision (*The Diana,* 11 Ex. C. R. 40).

Anchor watch.

Hove to

The latter case also illustrated the principle that a vessel "hove-to" with her wheel made fast by a becket, which could be removed instantly, her look-out and helmsman being properly stationed, and maintaining a steady course, is not, with reference to such circumstances, open to the charge of being negligently navigated (*The Diana, ubi supra*).

Tug and tow.

A tug and tow are treated usually as one ship in respect of collisions: "When one ship is in tow of another, the two ships

are for some purposes by intendment of law regarded as one, the command or governing power being with the tow, and the motive power with the tug. Thus, for the purpose of the regulations for preventing collision, the tug and her tow are treated as one ship, and that a steaming or sailing ship according as the towing ship is under steam or not" (*The Calvin Austin*, 9 Ex. C. R. at p. 174); but "the doctrine that the tug is servant of the tow is inapplicable when, not only the motive power, but also the command is with the tug" (*The Universe*, 10 Ex. C. R. at p. 372).

Therefore, if a collision is brought about by sudden manœuvering on the part of the tug which the tow could not control, the tow may be held blameless, but unless some such circumstance was present, the tug is deemed to be in the service of the tow, and, therefore, the tow is answerable for the negligence of her servant (*The Wandrian*, 38 S. C. R. 431, at pp. 440-447).

The American tug *A. L. Smith* was ascending the River St. Clair having in tow the barge *Chinook*, the two being engaged in the business of their common owner. *The Chinook* having no propelling power nor steering apparatus the navigation was controlled by the officers and crew of the tug, the tow being attached by a line fifteen feet long. They kept on the American side and the *A. L. Smith* sheered and collided with a barge being towed down, causing it to sink. It was held in the Exchequer Court and in the Supreme Court that the tug and tow must be regarded as one ship and that each was liable for the consequences of the collision (*The A. L. Smith*, 51 S. C. R. 39).

If the tug takes a step which would clear herself, were she unencumbered, she will be held in fault if, in making such a step, though clearing herself, she has brought about a collision with the tow (*The Shenandoah*, 8 Ex. C. R. at p. 41).

Although it is the duty of a tug with a ship in tow to comply as far as possible with the regulations, a certain measure of allowance is made for the encumbered state of the tug, and it is the duty of a vessel approaching the tug and tow to take additional care in consequence of the comparatively disabled state of the tug (*The Norwalk*, 12 Ex. C. R. at p. 455).

The Canada Shipping Act (R. S. C. 1906, cap. 113, sec. 920), re-enacting section 10 of chapter 79 of R. S. C. 1886, contains stringent provisions as to the duty of masters in cases of collisions:

Duties in case of collision.

"In every case of collision between two ships, the person in charge of each ship shall, if and so far as he can do so without danger to his own ship and crew, render to the other ship, her master, crew and passengers such assistance as is practicable and as is necessary to save them from any danger caused by such collision, and shall also give to the master or other person in charge of the other ship the name of his own ship and of her port of registry, or of the port or place to which she belongs, and also the names of the ports and places from and to which she is bound; and if he fails so to do, and no reasonable excuse for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect or default."

In *The Cutch* (3 Ex. C. R. 362), *The Joan* and *The Cutch* were leaving port together in broad daylight, and a collision occurred between them. *The Joan* received such injury as to be rendered helpless. *The Cutch* did not assist, or offer to assist, the disabled ship, but proceeded on her voyage. The excuse put forward by the master of *The Cutch* was that *The Joan* did not whistle for assistance, although the evidence showed that he must have been aware of the serious character of the damage sustained by her. He further attempted to justify his failure to assist by the fact that other ships were not far off; but it was shown that these ships were at anchor and idle. It was held that the circumstances disclosed no reasonable excuse for failure to assist on the part of *The Cutch,* and that the consequences of the collision were due to her default.

In *The Norwalk* (12 Ex. C. R. at p. 448), the special circumstances were held to exonerate the master from his failure to render assistance.

King's ship.

In the case of a collision between a ship of His Majesty and the ship of a subject, the Royal ship is not liable to arrest, and no action will lie against the King for the negligence of his officers or servants on board the ship; nor is such a case within the provisions of subsection (c) of section 20 of the Exchequer Court Act (R. S. C. 1906, cap. 140), which gives a remedy against the Crown in cases of injury to person or property on any public work resulting from the negligence of any officer or servant of the Crown (*Paul* v. *Rex,* 9 Ex. C. R. 245; 38 S. C. R. 126). The rule is not confined to ships of war, but extends to all vessels which are public property: in the case cited the damage was alleged to have been done by a government tug employed in towing the scows loaded with mud dredged

from the channel of the St. Lawrence River. It had already been held, in the case of *The Hamburg-American Packet Co.* v. *Rex* (33 S. C. R. 252), that the channel of the St. Lawrence River, after it had been deepened by the Department of Public Works, did not, in consequence of such improvement, become a public work within the meaning of the section in the Exchequer Court Act.

Nor in the case of a collision with a King's ship is the captain or commander liable to be sued for the negligence of his subordinates: in such a case the principle of master and servant, or principal and agent, has no application, and the only person who can be made liable is the actual wrongdoer or some person in the ascending scale who has actually given the order which has led to the disaster (*Nicholson* v. *Mounsey,* 15 East. 384). In England when proceedings are instituted against the commander of a King's ship it is usual for the Lords of the Admiralty to instruct the solicitor for the Treasury to enter an appearance on behalf of the commander (*The Volcano,* 2 W. Rob. 337; *H.M.S. Swallow,* Sw. 30; *H.M.S. Sanspareil,* 1900, P. 267): but there is no instance of an analogous practice in Canada.

The same rule of immunity from arrest is applied in the case of ships which are the public property of a foreign state or government (*The Parliament Belge,* 5 P. D. 107).

Right of navigation.

Before leaving the subject of damage, it may be well to note some decisions on the question of the right of navigation on navigable rivers, and the liability for obstruction in such rivers. A navigable river is a public highway, affording a right of passage to all His Majesty's subjects: this right, however, must be exercised in a reasonable manner, since each individual is entitled in common with every other person to its enjoyment: the enjoyment of it by one necessarily interferes to a certain extent with its exercise by another, but what constitutes reasonable use depends on the circumstances of each particular case (*The Mayfield,* 14 Ex. C. R. 331). Nothing short of legislative sanction can take from anything which hinders navigation the character of a nuisance, and where an interference with navigation is established, it is a public nuisance which anyone specially injured or damnified thereby is entitled to remove: but while no person has the right to continuously appropriate to himself any portion of the water, or bank or shore of navigable waters for the purpose of mak-

Obstructions in navigable rivers.

ing up a boom of logs, the use thereof in a reasonable manner and for a reasonable period, having regard to local conditions, will not amount to an interference with navigation (*The Surrey,* 10 Ex. C. R. 29). Apart from any statutory regulations as to lights, those who place obstructions across navigable waters even though lawfully authorized to do so, cannot complain if damage is done to their works by collision, brought about by the fact that a prudent navigator, proceeding with due care, was unable at a crucial moment, because of the absence of lights, to define his exact position in relation to such obstruction (*The Maagen,* 14 Ex. C. R. 323).

The Fisheries case

The whole subject of rights in the waters of Canada was most elaborately discussed in *The Fisheries Case* (26 S. C. R. 444; 1898, A. C. 700), and in *In re British Columbia Fisheries,* (47 S. C. R. 493).

Parties.

As regards the question of the parties to a cause of damage, the rule is that all persons injured in their persons or property in a collision caused by the fault of one or both ships, and who have not themselves or through their agents been guilty of negligence causing the loss, are entitled to recover damages (Marsden's Collisions at Sea, 6th Ed. 97). In *The Yosemite* (4 Ex. C. R. 241) a motgagee in possession was held entitled to maintain a suit for damages arising out of a collision.

Measure of damages.

In regard to the measure of the damages recoverable, the wrongdoer in a collision is liable for all such damages as flow directly and in the usual course of things from the wrongful act; there is no difference between the Admiralty and the common law rules as to what damages are recoverable (*The Argentino,* 13 P. D. 191, 14 A. C. 519: Marsden's Collisions at Sea, 6th Ed., cap. 5).

The owner of a ship wrongfully injured in a collision is entitled to have her fully and completely repaired, and if a ship is totally lost the owner is entitled to recover her market value at the time of the collision (*The Heather Belle,* 3 Ex. C. R. 40, 55). The profits that would have been made if the collision had not taken place are recoverable as part of the damages and are not too remote (*The Caspian,* 12 Ex. C. R. 483). Where a survey of the damage done to the injured vessel was made at the plaintiff's instance and notice of the result of the survey was given to the defendants, but notice of intention to have a survey made was only given to one of the

Loss of profits.

Costs of survey.

defendants, and that by posting a letter to his address on the day before the survey was made, the costs of the survey were held not to be recoverable from the defendants, because reasonable notice was not given to enable them to be present or represented thereat (*The Colorado,* 3 Ex. C. R. 263). In the same case damages for loss of time were refused on the ground that the injured vessel was lying idle at the time of the collision. Interest on the amount of the damages is allowed from the day of the collision, if the ship was not earning freight (*The Colorado, ubi supra*). If she was earning freight, the owner is entitled to the estimated value of the ship at the end of her voyage, together with the freight she would have earned, less the cost of completing the voyage, and to interest on the whole from the probable end of the voyage (Marsden's Collisions at Sea, 6th Ed., p. 102).

Loss of time.

Interest.

Loss of freight.

In a case of collision between a steamship and a fishing schooner owing to the fault of the former, by which the fishing vessel is so much injured as to prevent her continuing on her trip to the grounds, the fair measure of damages is the estimated value of a prospective catch of fish by the injured vessel had she been permitted to prosecute her trip (*The Cape Breton,* 15 Ex. C. R. 98).

Division of loss.

The most marked peculiarity of Admiralty law is what is known as the *judicium rusticum.* According to the rules of the common law if there is blame causing the accident on both side, however small that blame may be on one side, the loss lies where it falls. In Admiralty the rule of apportionment applies, and for the purpose of determining by whom and in what shares the loss is to be borne, collisions between ships have been divided into four classes. "In the first place the collision may happen without blame being imputable to either party, as where the loss is occasioned by a storm or other *vis major.* In that case the misfortune must be borne by the party on whom it happens to light, the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise where both parties are to blame—where there has been want of due diligence or of skill on both sides. In such a case the rule of law is that the loss must be apportioned between them, as having been occasioned by the fault of both of them. Thirdly it may happen by the misconduct of the suffering party only; and then the rule is that the sufferer must bear his own burden. Lastly it may have been the fault

of the ship which ran the other down; and in this case the innocent party would be entitled to an entire compensation from the other" (*The Woodrop Sims*, 2 Dods. at p. 85). It is then in the second class of cases that the maritime law differs from the common law, by imposing the burden of the loss on both ships when, but only when both are to blame, and to blame in a legal sense, that is to say when the act or default complained of has directly contributed to the loss.

In England up to the time of the passing of the Judicature Act (36 & 37 Vict., cap. 66) the *judicium rusticum* was applied only in Courts of Admiralty, but that Act by section 25, sub-section 9, rendered the incidence of loss where both ships are to blame, the same in all the Courts.

Canada Shipping Act.

The rule was introduced into Canada and made applicable in the common law Courts as well as in the Admiralty Court by the Act of 43 Vict., cap. 29, section 8, whose provisions on the subject were repealed by section 7 of chapter 79 of the Revised Statutes of 1886, and now appear as section 918 of the Canada Shipping Act (R. S. C. 1906, cap. 113):—

"In any cause or proceeding for damages arising out of a collision between two vessels, or a vessel and a raft, if both vessels or both the vessel and the raft are found to have been in fault, the rules in force in His Majesty's High Court of Justice in England, so far as they are at variance with the rules in force in the Courts of common law, shall prevail, and the damages shall be borne equally by the two vessels, or the vessel and the raft, one-half by each."

Apportionment of loss.

Where a collision is attributable to negligence on the part of both vessels, the loss must be equally apportioned between them notwithstanding the fact that the negligence of one contributed to the accident in a greater degree than that of the other (*The Yosemite*, 4 Ex. C. R. 241; *The Hiawatha*, 7 Ex. C. R. at p. 469, citing *Cayzer* v. *Carron Co.*, 9 A. C. 873).

Where no evidence is given of damage to one of the colliding ships, she must bear half the loss sustained by the other (*The Iroquois*, 18 B. C. R. 76; *The Hiawatha*, 7 Ex. C. R. 446).

Where there is a counterclaim or cross-action, each ship must contribute a moiety of the amount decreed against the other (*The Heather Belle*, 3 Ex. C. R. 40).

In cases of this kind, though the damage suffered by each ship is ascertained by a separate process, no monition is issued except for the moiety of the balance awarded to the one who has suffered the greater damage: so that in effect there is but one action and one final judgment for the balance between a moiety of the loss of the one and a moiety of the loss of the other (*Stoomvaat Maatschappy Nederland* v. *Peninsula and Oriental Steam Navigation Co.*, 7 A. C. 795).

Cargo owners.

As regards the cargo, the rule as to division of loss has no application in an action upon the contract of carriage, and the cargo-owner can, subject to the terms of the contract, recover full damages (*The Bushire*, 5 Asp. M. C. 416): in a cause of damage the rule does apply to the cargo-owner, but he is entitled to recover the whole of his loss against one or other, or both of the shipowners: in the first instance the decree goes against each shipowner for half the loss; and each shipowner has a remedy over against the other in respect of any balance of the damages which the latter fails to discharge.

The application of the rule is further complicated when one or both of the ships limit their liability, or when one or both of the ships is in charge of a compulsory pilot, or as regards the cargo-owner when the carrying ship is protected from liability for negligence by the terms of the contract of carriage: these and various other difficulties to which the rule gives rise are discussed in Marsden's Collisions at Sea in chapter 6.

Remedies *in rem* and *in personam*

A cause of damage may be instituted *in rem* or *in personam*: and a party who has resorted to one of these remedies may, if he does not get fully satisfied thereby, resort to the other (*The Orient*, L. R. 3 P. C. 696). Up till a very recent decision it had always been considered that the remedy afforded by proceedings *in rem* could not extend beyond the property proceeded against: where the owners do not appear, the decree was confined to the ship and freight, and where the owners appeared, it was always held, previously to the decision of the Court of Appeal in *The Gemma* (1899, P. 285), that they could not be made responsible, except for costs, beyond the value of the ship and freight: in that case the Court of Appeal adopted the reasoning of Sir Francis Jeune in *The Dictator* (1892, P. 304), and declared that, where in an action *in rem* the owners of the delinquent vessel appear, they render themselves personally liable for whatever the amount

The Gemma.

of the damage may be found to be, however much it may exceed the value of the *res*: the remarks of the Court on this subject were not necessary to the decision of the case, as in the form in which the matter came before the Court, it was "simply a case of a judgment creditor endeavouring to obtain satisfaction for his judgment." In the cause of damage bail had been given to the amount of the full value of the ship and freight, and judgment had been given for an amount in excess of the bail: the correctness of such a judgment was not in question before the Court of Appeal, and for reasons given in the last chapter, it is submitted that such a judgment was wrong in principle and unsustained by the authorities (*The Wild Ranger*, Br. & Lush, 84; *The Christiansborg*, 10 P. D. 141; *The Freedom*, L. R. 3 A. & E. 495; *The Germanic*, 1896, P. at p. 87).

Cross actions: one ship arrested; the other not: stay of proceedings.

There is an important provision on the subject of causes of damage contained in sec. 34 of the Admiralty Court Act, 1861 (24 Vict., cap. 10), which enacts as follows: "The High Court of Admiralty may on the application of the defendant in any cause of damage, and on his instituting a cross cause for the damage sustained by him in respect of the same collision, direct that the principal cause and the cross-cause be heard at the same time and upon the same evidence, and if in the principal cause the ship of the defendant has been arrested, or security given by him to answer judgment, and in the cross-cause the ship of the plaintiff cannot be arrested, and security has not been given to answer judgment therein, the Court may, if it think fit, suspend the proceedings in the principal cause until security has been given to answer judgment in the cross-cause."

This is a remedial section and should receive a liberal interpretation (per Sir Robert Phillimore in *The Charkieh*, L. R. 4 A. & E. at p. 122): it is applicable to a counterclaim as well as to a cross action (*The Newbattle*, 10 P. D. 33). The principal action has been stayed under this section where the cross-cause was *in personam* and both parties were foreigners resident out of the jurisdiction (*The Charkieh, ubi supra* 120); where the plaintiff in the principal action was a British subject resident within the jurisdiction (*The Cameo*, Lush. 408); where the plaintiff in the principal action was a foreign sovereign whose ship was privileged from arrest (*The Newbattle, ubi supra*). But the section only applies where the principal action is *in*

rem (*The Rougemont,* 1893, P. 275; *The James Westoll,* 1905, P. 47).

The powers conferred by the section will be exercised even though the plaintiff in the principal cause be the Crown *The Despatch* (Brit. Col. Admiralty Dis. as yet unreported, June 18th, 1915); but not if there be no cross-cause (*infra,* p. 547).

Plaintiff the Crown.

In Canada the employment of pilots is not compulsory, Canada Shipping Act (R. S. C. 1906, cap 113, sec. 473): and therefore there is no exemption on the ground of compulsory pilotage (*ibid.* sec. 474; *The Wavelet,* Young. 34).

Compulsory pilotage.

Section 9.—Damage to Cargo.

The Admiralty Court Act, 1861 (24 Vict., cap. 10), provides by sec. 6, that: "The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in (Canada), in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the owner, master or crew of the ship, unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause, any owner or part owner of the ship is domiciled in (Canada): provided always, that if in any such cause the plaintiff do not recover twenty pounds he shall not be entitled to any costs, charges or expenses incurred by him therein unless the Judge shall certify that the cause was a fit one to be tried in the said Court."

Admiralty Court Act, 1861.

This section does not create a maritime lien, but merely gives power to arrest the ship (*The Piève Superiore,* L. R. 5 P. C. 482): the remedy can only be exercised against the ship in which the goods are carried into Canada; where therefore the damaged goods were transhipped from the alleged wrongdoer, *The Ironsides, to The Valentine,* and by the latter ship carried into England, but *The Ironsides* afterwards came to England, it was held that she could not be arrested (*The Ironsides,* Lush. 458): but where the parties contemplated that the goods might be carried into and delivered in an English port, and it was so provided by the bill of lading, and the ship did in fact put into an English port for orders in part fulfilment of the contract of carriage, it was held that the jurisdiction arose, at least in respect of the existing causes of suit,

Goods carried into Canada.

and was not taken away by the ship being subsequently sent to a foreign port to be discharged (*The Piève Superiore, ubi supra; The Cap Blanco,* 1913, P. 130).

Who may sue. The claim must be made by the owner or consignee or an assignee to whom the property in the goods has passed, for notwithstanding the words of the section, a bare assignee to whom the property in the goods has not passed and who cannot therefore sue under R. S. C. 1906, cap. 118, is not entitled to sue (*The St. Cloud,* Br. & L. 4). This construction of the section was doubted by Sir Robert Phillimore in *The Figlia Maggiore* (L. R. 2 A. & E. 106), where, however, it was held that the property had passed; and in *The Nepoter* (*ibid.* 375), the same learned Judge was prepared to hold that the consignees named in the bill of lading were entitled to sue, although the property in the goods had not passed to them, but he inclined to the opinion that the property had passed in the case before him.

The question of whether the purchasers of a cargo are entitled to sue was raised in *The Lloyd S. Porter* (15 Ex. C. R. 126), but the facts regarding the bill of lading are not stated, it only appearing from the report that the plaintiff had not at the time of the accident paid for the goods nor taken delivery of them: leave was given to add the vendors as plaintiffs, and the question of the right of the purchaser to maintain the action was reserved.

Claims in contract and tort. The section gives a remedy both in the case of breach of contract and in the case of a tort (*The Nepoter, ubi supra,* at p. 378). But an attempt to extend the remedy given by the section was defeated in *The Victoria* (12 P. D. 105), where the ship was arrested for damage to cargo in a collision for which she was solely to blame, but the cargo was destined for and in fact discharged at Havre.

Where a ship was chartered to proceed to a port abroad and there take in cargo, and the charterers instituted a suit against the ship, and in their petition alleged that the master of the ship improperly refused to proceed with the ship to the agreed port of lading and proceeded with her to another port, it was held that such conduct on the part of the master did not constitute a breach of duty or breach of contract within the section: the section does not include a breach of the contract committed before the goods are put on board (*The Dannebrog,* L. R. 4 A. & E. 386).

Nor does the section include a breach of the contract to carry a passenger (*The Manauence,* 6 Ex. C. R. 193).

In the case of an alleged breach of the contract of carriage, the ordinary principles of mercantile law apply, and the ship is entitled to avail herself of any exemption clause in the charterparty or bill of lading (*The Notre Dame d'Arvor,* 16 B. C. R. 381).

Exemption clause.

A claim for short delivery is within the section (*The Danzig,* Br. & L. 102).

Special exemptions from liability are contained in Part XVII. of the Canada Shipping Act (R. S. C. 1906, cap. 113), and in the Water Carriage of Goods Act, 1910 (S. C. 1910, c. 61), but the latter Act does not apply in Admiralty causes, except where the vessel sails from a Canadian port (*The Lloyd S. Porter,* 15 Ex. C. R. 126).

Statutory exemptions.

No arrest of the ship can be made under the section when any owner or part owner is domiciled anywhere in Canada, and the fact that such owner or part owner is domiciled in a province of Canada other than that in whose port the ship may be found does not suffice to take the case out of the exception (*The Strathlorne,* 9 E. L. R. 119).

Domiciled in Canada

Section 10.—Limitation of Liability.

Since the year 1733 the legislature has introduced the principle of limiting the liability of shipowners in respect of harm caused without their actual fault or privity.

The first Act on the subject was the 7th of Geo. II., cap 15; subsequent Acts dealing with the subject were: 26 Geo. III., cap. 86; 53 Geo. III., cap. 159, and the Merchant Shipping Acts of 1854 and 1862.

The present provision is contained in sec. 503 of the Merchant Shipping Act, 1894 (57 & 58 Vict., cap. 60), which is copied in sec. 921 of the Canada Shipping Act (R. S. C. 1906, cap. 113): "the owners of any ship, whether British, Canadian or foreign, shall not, whenever without their actual fault or privity,—

Canada Shipping Act.

(*a*) Any loss of life or personal injury is caused to any person being carried in such ship; or

(*b*) Any damage or loss is caused to any goods, merchandise or other things whatsoever on board any such ship; or

(c) Any loss of life or personal injury is, by reason of the improper navigation of such ship as aforesaid, caused to any person in any other ship or boat; or

(d) Any loss or damage, is, by reason of the improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat;

be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise or other things, or in respect of loss or damage to ships, goods, merchandise or other things, whether there is in addition loss of life or personal injury or not, to an aggregate amount exceeding thirty-eight dollars and ninety-two cents for each ton of the ships tonnage."

Sections 922 and 923 prescribe the method of calculating the tonnage.

Parties entitled.

This privilege has been extended by subsequent statutes to charterers by demise: Merchants Shipping Act, 1906 (6 Edw. VII., cap. 48, sec. 71); owners, builders, or other parties interested in any ship built at any port or place in His Majesty's dominions from and including the launching of such ships until the registration thereof: Merchant Shipping Act, 1898 (61 & 62 Vict., cap. 14, sec. 1); Merchant Shipping Act, 1906 (6 Edw. VII., cap. 48, secs. 70, 85); owners of docks and canals, and harbour and conservancy authorities: Merchant Shipping Act, 1900 (63 & 64 Vict., cap. 32, sec. 2). These provisions extend to the whole of His Majesty's Dominions (57 & 58 Vict., cap 60, sec. 509), and the enactment in each amending Act provides that it shall be read together with the principal Act.

Unregistered ships.

Under the Merchant Shipping Act, 1894 (57 & 58 Vict., cap. 60, secs. 1, 2, 72), the ship in respect of which a limitation of liability was sought must, if British, have been registered, unless exempt from registration (*The Andalusian*, 3 P. D. 182). Now, however, by the conjoint effect of two of the amending Acts (61 & 62 Vict., cap. 14, sec. 1, and 6 Edw. VII., cap. 48, secs. 70, 85), unregistered ships are equally entitled when built in any part of His Majesty's Dominions until they have passed into foreign ownership.

Tug and tow.

The question has arisen in Canada whether the Limitation Acts apply to the case of a tug which by reason of faulty

navigation has caused injury to the tow, without any physical impact between tug and tow.

There appears to be no decided case on the subject in England, but having regard to the provisions of the Merchant Shipping Act, 1900 (63 & 64 Vict., cap. 32), there would seem no doubt that liability for loss or damage however caused could be limited: sec. 1 of the latter Act provides: "The limitation of the liability of the owners of any ship . . . in respect of loss or damage to vessels, goods, merchandise or other things, shall extend and apply to all cases where (without their actual fault or privity) any loss or damage is caused to property or rights of any kind, whether on land or water, or whether fixed or movable, by reason of the improper navigation or management of the ship."

This section applies to Canada (57 & 58 Vict., cap. 60, sec. 509; 63 & 64 Vict., cap. 32, sec. 5): but the point has also been decided independently in Canada in favour of the right of the owner of the tug to limit his liability under the provisions of the Canadian Statute. The question arose in this way: under the two earliest Acts of the Dominion, 31 Vict., cap. 58, and 43 Vict., cap. 29, the limitation section was found in a subdivision of the Acts under the caption "Liability of Owners as to Collisions"; and it was held that this had the effect of confining the operation of the section to cases of collisions (*Sewell* v. *British Columbia Towing and Transportation Company,* 9 S. C. R. 527). In the revision of the statutes in 1886 and 1906, the caption was altered to "Liability of Owners of Ships," and this alteration was held to have altered the law and extended the privilege to all cases where loss or damage had occurred, whether by collision or otherwise (*Waldie Bros.* v. *Fullum,* 12 Ex. C. R. 325).

Improper navigation.

The "improper navigation" mentioned in the section is not to be restricted merely to the negligent management of a vessel by her master and crew, but include faulty navigation arising from the negligence of any person who has been employed by the shipowner in connection with the construction, overlooking, or management of the ship (*The Warkworth,* 9 P. D. 20, 145). An owner cannot avail himself of the privilege when the ship is unfit for the duty which he undertakes, but a ship will not be deemed unseaworthy because loss has been caused by the misuse of proper gear by the crew (*The Diamond,* 1906, P. 282). It would seem that the burden of proof of the absence of "actual fault or privity" lies upon the owner (*The Dominion*

Unseaworthiness.

Fish Co. v. *Isbister,* 43 S. C. R. 637): but an owner will not necessarily lose the privilege because he happens to be on board (*The Obey,* L. R. 1 A. & E. 102)), and the fault or privity of one owner does not prevent his co-owners from limiting their liability *The Obey* (*ubi supra*). The fault or privity of an agent does not preclude the owner from limiting, and the paid agent of a company must not be taken to be the owner merely because he is registered as managing owner (*The Yarmouth,* 1909, P. 293).

The liability in respect of the matters mentioned in sec. 921 may be insured against (Canada Shipping Act, R. S. C. 1906, cap. 113, sec. 929).

Actions for limitation of liability.

When the privilege of limiting their liability was conferred upon owners by the legislature, it became necessary to provide some procedure by which the fund might be distributed rateably, so as to prevent a scramble among the persons entitled. By section 514 of the Merchant Shipping Act, 1854 (17 & 18 Vict., cap. 104), where several claims were made or apprehended the owner was empowered to bring an action to determine the amount of his liability and for the distribution of the amount: the 13th section of the Admiralty Court Act, 1861 (24 Vict., cap. 10), conferred jurisdiction on the Admiralty Court to entertain such actions when the ship or proceeds were under arrest: and now it is provided by sec. 504 of the Merchant Shipping Act, 1894 (57 & 58 Vict., cap. 60): "Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of loss of life, personal injury, or loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then, the owner may apply . . . in a British possession to any competent Court, and that Court may determine the amount of the owner's liability and may distribute that amount rateably among the several claimants, and may stay any proceedings pending in any other Court in relation to the same matter, and may proceed in such manner and subject to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the Court thinks just."

In view of the decision in *The Camosun* (1909, A. C. 597), it may be doubtful whether the Admiralty Court is a "competent Court" within this section: but the limitation may in

an action for damage, be claimed either by a counterclaim or in the statement of defence (*The Heather Belle,* 3 Ex. C. R. 40; *Waldie Bros.* v. *Fullum,* 12 Ex. C. R. 325).

Procedure. The procedure in such an action is set forth in Williams & Bruce's Admiralty Practice (cap. 8): liability must have been alleged to have been incurred by the person or body entitled to limit liability, but it is unnecessary that such person or body should, before commencing limitation proceedings, admit liability (*The Amalia,* Br. & L. 151; *The Sisters,* 1 P. D. 281); but liability must be admitted before a decree can be obtained (*Hill* v. *Audus,* 1 K. & J. 263; *The A. L. Smith,* 51 S. C. R. at p. 44).

Stay of proceedings. The Court may stay proceedings in any other Court, but will not do so where the case is one which should go before a jury (*Roche* v. *London & South Western Railway Co.,* 1899, 2 Q. B. 502; *The Dominion Fish Co.* v. *Isbister,* 43 S. C. R. 637).

The section does not exempt the person or body limiting liability from the payment of costs (*The Empusa,* 5 P. D. 6), nor from the obligation to pay interest on the amount of their liability from the time of the loss or damage until the time of payment into Court (*The Amalia,* 34 L. J. P. M. & A. 21).

In *The A. L. Smith* and *The Chinook* (51 S. C. R. 39) the foreign delinquent ship had limited her liability in the United States court and had been subsequently seized in Canada. The question was discussed, but not decided, as to whether, the collision having occurred in the domestic waters of the foreign ship, the extent of her liability must not be determined by the *lex loci commissi delicti.*

In any case it appears that the statutory limitation of a shipowner's liability is not part of the *lex fori* (*Cope* v. *Doherty,* 4 K. & J. 367, 384; 2 DeG. & J., 614).

Section 11.—Salvage.

High seas. Maritime lien. The High Court of Admiralty has inherent jurisdiction to entertain causes for salvage services performed on the high seas in saving a ship, her apparel, or cargo, or the wreck of them (*The Gas Float Witton, No. 2,* 1896, P., at p. 50); and such services create a maritime lien.

Admiralty Court Act, 1861. By the Admiralty Court Act, 1840 (3 & 4 Vict., cap. 65, sec. 6), jurisdiction was given to the Court of Admiralty "to decide all claims and demands whatsoever in the nature of

salvage for services rendered to . . . any ship or sea-going vessel . . . whether such ship or vessel may have been within the body of a county or upon the high seas, at the time when the services were rendered . . ." And it appears that salvage services rendered within the body of a county likewise create a maritime lien (*The Henrich Bjorn,* 11 A. C., at p. 282; *The Veritas,* 1901, P. at p. 311).

Intra corpus comitatis.

Life salvage.

With regard to life salvage, "prior to the passing of the Merchant Shipping Act, 1854, the Court of Admiralty, in a cause of salvage, where no property had been rescued from peril, but where life had been saved, had no power to award anything to the salvors. But where both property and life had been saved, it was the well-established practice of the Court to increase the amount of salvage, and thus indirectly remunerate the salvors for the merit due to their having saved life as well as property" (*The Fusileer,* Br. & L., at p. 351).

Merchant Shipping Act, 1854.

The Merchant Shipping Act, 1854 (17 & 18 Vict., cap. 104, sec. 458), provided that where services were rendered within the limits of the United Kingdom in saving life, there should be paid by the owners of the ship, boat, cargo, apparel, or wreck a reasonable salvage reward to the persons rendering the services: and by the Admiralty Court Act, 1861 (24 Vict., cap. 10, sec. 9), these provisions were extended to the salvage of life from any British ship anywhere and any foreign ship in British waters. These provisions are consolidated in secs. 544, 545, 546, of the Merchant Shipping Act, 1894 (57 & 58 Vict., cap. 60).

Admiralty Court Act, 1861.

Canada Shipping Act.

The matter has also been made the subject of legislation in Canada: the Canada Shipping Act (R. S. C. 1906, cap. 113) provides as follows:—

Section 757.—When services are rendered within the limits of Canada in saving life from any vessel, there shall be payable to the salvor by the owner of the vessel, freight, cargo, stores and tackle, a reasonable sum for salvage and expenses, in priority to all other claims for salvage.

Section 758.—In cases in which such vessel, stores, tackle and cargo are destroyed, or the value thereof, with the freight, if any, is insufficient, after payment of the actual expenses incurred to pay the amount of such salvage, the Minister (of Marine and Fisheries) may, in his discretion, award to the salvor, out of any funds at his disposal for that purpose, such remuneration as he thinks fit.

Section 759.—When, within the limits of Canada, any vessel is wrecked, abandoned, stranded, or in distress, and services are rendered by any person in assisting such vessel or in saving any wreck, there shall be payable to the salvor by the owner of such vessel or wreck, as the case may be, a reasonable amount of salvage including expenses properly incurred.

Conditions of award for life salvage.

Salvage of life, then, though strictly speaking it does not confer a maritime lien, has the same effect if any property is also saved; but in order that life salvage may be awarded some property must be saved (*The Renpor,* 8 P. D. 115): "The liability to pay a reasonable amount of salvage to life salvors is imposed upon owners of cargo as well as upon owners of the ship, and such liability is not a general personal liability to be enforced in any circumstances whether the ship and cargo are lost or not, but a liability limited to the value of the property saved from destruction" (*The Cargo ex Schiller,* 2 P. D., at p. 157); but the property need not necessarily have been saved on the same occasion, or by the same salvors (*The Cargo ex Schiller,* 2 P. D. 145).

Nature of salvage.

Salvage services, therefore, for which a cause can be instituted either under the inherent or statutory jurisdiction of the Court of Admiralty are services which save or contribute to the ultimate safety of a vessel, her apparel, cargo, or wreck, or to the lives of persons, including passengers, belonging to a vessel, when in danger on the high seas or within the waters of Canada, provided that such service is rendered voluntarily and not in the performance of any legal or official duty or merely in the interests of self preservation: but rafts, booms of logs, or structures afloat on the water not used in navigation are not the subject of salvage (*Raft of Timber,* 2 W. Rob. 251; *The Gas Float Whitton, No. 2,* 1896, P. 42).

Salvage services include towing (*The Madras,* 1898, P. 90; *The C. F. Sargent,* 3 Ex. C. R. 332; *The Gleniffer,* 3 Ex. C. R. 57), piloting (*The Anders Knape,* 4 P. D. 213), navigating (*The C. F. Sargent,* 3 Ex. C. R. 332; *Le Jonet,* L. R. 3 A. & E. 556); standing by a vessel in distress (*The Undaunted,* Lush. 90, 92); landing (*The Favorite,* 2 W. Rob. 255), or transhipping (*The Columbia,* 3 Hagg. 428; *The Erato,* 13 P. D. 163) cargo or persons belonging to a vessel in distress; floating a stranded vessel (*The Inchmaree,* 1899, P. 111; *The Cayo Bonito,* 1904, P. 310); raising a sunken vessel (*The Catherine,* 6 Notes of Cases, Supp. XLVIII.); or cargo (*The Cadiz,* 3 Asp. M. C. 332); saving a derelict (*The Janet Court,* 1897, P.

59); or wreck (*The Samuel,* 15 Jur. 407); setting in motion (*The Marguerite Molinos,* 1903, P. 160); fetching (*The Sarah,* 3 P. D. 39); or bringing (*The Undaunted, ubi supra*) assistance to a vessel in danger; giving advice or information in order to save a vessel from a local danger (*The Strathnaver,* 1 A. C. 58, 62, 63); supplying officers or crew (*The Skibladner* (3 P. D. 24); or tackle (*The Prince of Wales,* 6 Notes of Cases, 39); *The Gleniffer* (3 Ex. C. R. 57) to a vessel in need of them; rescuing persons who have had to take to the boats (*The Cairo,* L. R. 4 A. & E. 184); removing a vessel from a danger, such as a vessel or wreck which has fouled her (*The Vandyck,* 7 P. D. 42; 5 Asp. M. C. 17); an ice floe (*The Swan,* 1 W. Rob. 68); or an impending collision (*The Saratoga,* Lush. 318); putting out a fire on board (*The City of Newcastle,* 7 Asp. M. C. 546); saving property or life from a vessel on fire (*The Eastern Monarch,* Lush. 81); removing a vessel or cargo from a position in which it is in imminent danger of catching fire (*The Tees,* Lush. 505); protecting or rescuing a vessel, her cargo, or persons on board from pirates or plunderers (*The Calypso,* 2 Hagg. 209; *The Erato,* 13 P. D. 163); recovering and restoring a captured ship (*The Henry,* Edw. 192); and other instances in Pritchard's Admiralty Digest, 3rd ed., pp. 1920-2123.

What are not salvage services.

On the other hand, where a ship was stranded on a rocky shore with a point of rock protuding through her hull and the plaintiff was employed to blast it away and free the ship, it was held that this was not a salvage service (*The Costa Rica,* 3 Ex. C. R. 23); but nevertheless the Court had jurisdiction to and did award reasonable remuneration for the service (*The Costa Rica, ubi supra,* following *The Watt,* 2 W. Rob. 70, and *The Chetah,* L. R. 2 P. C. 205); and personal services not performed on the vessel, and the employment of a tug in an unsuccessful attempt to remove the vessel are not salvage services (*The Gleniffer,* 3 Ex. C. R. 57).

Express contract not necessary.

"The right to salvage may arise out of an actual contract, but it does not necessarily do so. It is a legal liability arising out of the fact that property has been saved, that the owner of the property who has had the benefit of it shall make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject" (Sir James Hannen in *Five Steel Barges,* 15 P. D. 142, approved in *The Cargo ex Port Victor,* 1901, P. 243).

Conditions of recovery.

The two conditions to the recovery of a salvage reward are danger and success: "Some property must be saved to give rise to a claim for salvage" (Brett, M. R., in *The Renpor,* 8 P. D. at p. 117). "Salvage means rescue from threatened loss or injury. If the ship were in no danger, there could be no salvage. If she were in danger, then the rescuers earn a salvage reward, which on the grounds of public policy is to be liberal; but which varies very much according to the imminence of the danger to the ship on the one hand, and the skill and enterprise and danger of the rescuers on the other. But the question of the ship's danger is the first thing to be considered. On a service of towing, for instance, the tug may display both skill and enterprise, and expose herself to risk, but if the ship be towed merely for the sake of expedition, and not to take her out of danger, actual or impending, it is towage merely, and not salvage. And the Court is to judge whether the danger really existed, and not the parties themselves" (*The C. F. Sargent,* 3 Ex. C. R., at p. 335).

Danger.

The Zambesi.

Where there was no immediate danger to life or ship, nor any difficulty or risk in the service performed and not above three hours delay, yet as the injured ship was utterly unmanageable and might have become in most imminent danger, and it was, therefore, highly important that she should be placed in a place of safety, it was held that bringing her to port was a salvage service (*The Zambesi,* 3 Ex. C. R. 67).

The Mapleleaf.

Where a yacht, with no one on board, broke loose from her moorings in a public harbour during a storm, and was boarded by men from the shore when she was in a position of peril, and by their skill and prudence rescued from danger, it was held they had performed a salvage service (*The Mapleleaf,* 6 Ex. C. R. 173).

The Berwindmoor.

The Berwindmoor was picked up some 70 miles S.S.E. of Sable Island in a disabled condition, in consequence of having lost her rudder, by *The Energie,* and brought into Halifax: the position in which the ship was found was a dangerous one at that time of year, and during the operation of bringing her to port heavy weather prevailed for the greater part of the time: it was held that *The Energie* had performed a salvage service (*The Berwindmoor,* 14 Ex. C. R. 23).

On the other hand, a service may fall short of being a salvage service, and yet may be entitled to be remunerated at a higher rate than ordinary towage.

In the same case of *The Berwindmoor*, when *The Energie* with her tow was within 13 miles of the mouth of Halifax Harbour, the weather at the time being fine and there being nothing to prevent *The Energie* completing her work without assistance, *The Mackay-Bennet* was taken down by the agent of the owners of *The Berwindmoor* and assisted to bring the latter ship into port: it was held that, having regard to the disabled condition of *The Berwindmoor*, and the size and power of *The Mackay-Bennett*, the latter vessel was entitled to towage remuneration on an enlarged scale (*The Berwindmoor, ubi supra*).

The Harold.

The Harold, having been stranded, was set afloat by her crew: she was leaking badly, and was not in a seaworthy condition: at the time of taking the tug *The Lorne*, she was not in actual danger, and the weather was calm: although she did subsequently appear in danger, it was not immediate, nor was it such that the crew, provided they were free to do so, could not have somewhat reduced it, even if they could not keep it under. It was contended under these circumstances that the service was merely one of towage. The learned Judge, however, said: "At the time of taking (*The Harold*) in tow, which I have adopted exclusively, in a salvage case, as the proper legal point of departure for my consideration, it is impossible in dealing with so mutable an element as the sea, and particularly at this stormy season of the year, not to be conscious that great and pressing danger to the ship might at any moment have arisen, when the men would either have been obliged to neglect the sails in order to work the pumps, or neglect the pumps, as they did when they slipped off the rock, to work the yards. . . . It is true that under the circumstances of wind, weather, tide and the like, under which the services of *The Lorne* were rendered, she could not be said to have saved *The Harold* from being lost, yet the fact remains that the services of *The Lorne*, rendered when they were, removed any possibility or probability of loss; and from a calm setting in, were of considerable value to *The Harold* in bringing her at once to a place absolutely safe, whatever might happen; and which she could not have gained, in a reasonable time, by her own resources." And it was held that *The Lorne* was entitled to be remunerated as for an extraordinary towage service (*The Harold*, 4 Ex. C. R. 222).

Real and appreciable.

The danger must be real and appreciable, but need not be actual and imminent (*The Strathnaver*, 1 A. C. 58, 65: The *B. B.* Appendix VII., *infra*); and the burden of proving the

existence of danger lies upon the alleged salvors (*The Calyx*, 27 T. L. R. 166).

Inasmuch as salvage claims rest, not upon contract, but upon the right to be paid out of the property salved, a salvor who has contributed, though to a small extent, to the ultimate safety of the disabled vessel, is not wholly disentitled to remuneration, because he acted under an express agreement which he has failed to perform (*The Hestia*, 1895, P. 193).

"The parties may by contract determine the amount to be paid; but the right to salvage is in no way dependent upon contract, and may exist, and frequently does exist, in the absence of any express contract, or of any circumstances to raise an implied contract."

Salvage agreement.

There may, however, be an express contract, and the way in which an agreement affects the question of salvage is laid down by Kennedy, J., (A Treatise on the Law of Civil Salvage, p. 42), thus: "A salvage agreement is an agreement which fixes, indeed, the amount to be paid for salvage, but leaves untouched all the other conditions necessary to support a salvage award, one of which is the preservation of some part at least of the *res*, that is, ship, cargo, or freight (*The Hestia, ubi supra*, at p. 199).

Master's authority.

The agreement need not be in writing, but it must be clearly proved by the parties alleging it (*The Graces*, 2 W. Rob. 294): a master has authority to bind his owners as to the amount of salvage to be paid, but not to bind them to submit the question of the amount to arbitration (*The City of Calcutta*, 8 Asp. M. C. 442).

Setting aside salvage agreements.

"Where the parties have made an agreement the Court will enforce it, unless it is manifestly unfair and unjust: but if it be manifestly unfair and unjust the Court will disregard it and decree what is fair and just" (*The Dracona*, 5 Ex. C. R., at p. 210): such an agreement is "*prima facie* binding, and the onus of proof is thrown on the defendant to shew that the price stipulated was unjust and exorbitant and the promise to pay it extorted under unfair circumstances" (*The Dracona, ubi supra*, at p. 149): "In determining the question as to whether such an agreement is to be upheld or not one must look at the service contemplated by the parties at the time, and the circumstances under which the agreement was entered into: if the agreement was just and reasonable when entered into, it will be enforced and will not be disregarded or set aside because

The Dracona.

something has happened subsequently or some contingency of which one party or the other has taken the risk has occurred, to make it more onerous on one or the other than was anticipated when it was entered into" (*The Dracona, ubi supra,* at p. 210).

Grounds for setting aside.

The Court applies the same rule in upholding or setting aside such agreements at the instance of either party. The instances in which such agreements have been set aside in favour of the salvors have been "where some material fact has been concealed by the master of the vessel, or where the service has been renderd by one who was ignorant of its value, and the amount agreed upon has manifestly been inadequate, or where the agreement was clearly inequitable. In general, however, the cases in which such agreements have been disregarded are cases in which some advantage has been taken of the master to extort from him terms that are not fair and just. It rarely happens that the master of a vessel in distress and need of assistance is on equal terms with those offering to assist him. Sometimes in such cases he is compelled to accede to unreasonable demands by threats openly made to leave him unless he agrees to the terms offered to him. At other times, although no such threat is openly made, he is subject to a like and equally effective compulsion to agree to terms that are unfair and unjust, because of the circumstances in which he finds himself. Again, he may recklessly, or through ungrounded fears, accede to demands manifestly extortionate. In all such cases the agreement will be disregarded" (*The Dracona, ubi supra,* at pp. 211, 212).

Where the mate of a ship in distress accepted an offer to tow her into port at a specified sum and held himself out as the master and failed to disclose the dangerous condition of the ship at the time of entering into the agreement, the agreement was set aside (*The Harold,* 4 Ex. C. R. 222).

Where the master of a steamer exacted an exorbitant contract for salvage service from the master of a sailing vessel, which, with the mate alone on board, was in imminent danger of shipwreck, the agreement was set aside, and a *quantum meruit* allowed (*The America,* 2 Stuart 214).

Where after making such an agreement the parties acquiesce in a change of the port of destination, a deduction must be made from the sum agreed upon if the distance is shortened by the change (*The John B. Ketcham,* 13 Ex. C. R. 413).

Property salved.

By agreement also, an exception may be created to the rule that services, in order to become entitled to a salvage reward, must have contributed to the ultimate safety of the *res*. Some property must in every case be saved to lay the foundation for a salvage award, but that property need not in every case have been saved by the exertions of those claiming salvage: for instance where a vessel stands by or renders services to another, upon request, even though no benefit results from her so doing, she is entitled to salvage remuneration (*The Cambrian,* 8 Asp. M. C. 263): and where a ship is engaged to render assistance to another ship in distress, without any fixed sum being agreed upon, and does remain by ready to give assistance, she cannot be deprived of her right to reward by reason of another vessel offering and being engaged to tow for a less sum than the former ship is willing to accept, but will be entitled to recover a fair sum which will remunerate her for the services rendered, and compensate her for the loss she has sustained (*The Maude,* 3 Asp. M. C. 338).

Services personal and voluntary.

In order to entitle salvors to a salvage reward, the services rendered must be personal and voluntary: "in order to entitle a person to share as salvor, he must, I conceive, have been personally engaged in the service" (*The Charlotte,* 3 W. Rob., at p. 72): but members of the crew of the salving ship are entitled to share in the reward, though they have taken no actual part in the services, and the owner or charterer by demise can claim salvage reward for the use of his vessel and the services of his servants (*The Palmyra,* 2 Stuart, 4; *The Scotswood,* Young, 25; *The Canterbury,* Young, 57; *The Regina,* Young, 107; *The Afton,* Young, 136; *The Auguste André,* Young, 201; *The Herman Ludwig,* Young, 211; *The C. F. Sargent,* 3 Ex. C. R. 332).

Crew of salved vessel.

In consequence of the rule that services to give rise to a right to salvage reward must be voluntary, the crew, pilot, agent and passengers of the salved vessel, the owner, master and crew of the tug towing her, and public servants are usually excluded from a share in the salvage reward. Thus seamen, while acting in the line of their strict duty, cannot entitle themselves to salvage; but extraordinary events may occur, in which their connection with the ship may be dissolved *de facto,* or by operation of law, or their services may exceed their proper duty, in which cases they may be permitted to claim as salvors (*The Robert & Anne,* 1 Stuart, 253; *The Flora,* 1 Stuart, 255; *The Sillery,* 1 Stuart, 182). Persons acting as pilots are not

Pilots. to be remunerated as salvors, but under extraordinary circumstances of peril or exertion, pilots may become entitled to an extra pilotage, as for a service in the nature of a salvage service (*The Adventurer*, 1 Stuart, 101). A receiver of wreck can only claim for salvage when the services rendered by him were outside his prescribed duties (*The W. G. Putnam*, Young. 271): a substitute of a receiver is not deprived by reason of acting for him of any right to salvage reward (Canada Shipping Act, R. S. C. 1906, cap. 113, sec. 745). A man of war or a transport of His Majesty is not allowed to claim salvage reward for services rendered to a ship in distress (*The John*, Young, 129; *The Herman*, Young, 111): but officers and men of the Royal Navy are entitled to salvage reward for their personal exertions (*The Cargoex Ulysses*, 13 P. D. 205; *The Wilsons*, 1 W. Rob. 172). In such cases the rights of the salvors are subject to the special provisions now contained in secs. 557 to 564 inclusive, of the Merchants Shipping Act, 1894 (57 & 58 Vict., cap. 60), under which the commanders and crews of His Majesty's ships are debarred from detaining the salvage property otherwise than as provided by the Act, but their rights as salvors are not otherwise diminished.

Receiver of wreck.

King's ships.

Apportionment. Salvors may agree among themselves as to the apportionment of the reward, provided the agreement is fairly and honestly made (*The Wilhelm Tell*, 1892, P. 337; *The Afrika*, 5 P. D. 192): as regards seamen it is provided by the Canada Shipping Act (R. S. C. 1906, cap. 113, sec. 237), that: "No assignment or sale of wages or of salvage made prior to the accruing thereof shall bind the person making the same. 2. No power of attorney or authority for the receipt of any wages or salvage shall be irrevocable." In cases where there is no agreement, the award is apportioned by the Court (*The Prince Albert*, Appendix VII., *infra*).

Assignment.

Construction of authority to receive salvage award. In *The Quebec* (3 Ex. C. R. 33), the crew of the salving vessel gave a power of attorney to the agent of the vessel in the following terms: "We, the undersigned, being all the crew of the Schooner *Iolanthe* at the time the said schooner rendered salvage services to the barque *Quebec*, do hereby irrevocably constitute and appoint Joseph O. Proctor our true and lawful attorney with power of substitution for us and in our name and behalf as crew of the said schooner to bring suit or otherwise settle and adjust any claim which we may have for salvage services rendered to the barque *Quebec* . . . hereby granting unto our said attorney full power and authority to act in

and concerning the premises as fully and effectually as we might do if personally present, and also power at his discretion to constitute and appoint, from time to time, as occasion may require, one or more agents under him or to substitute an attorney for us in his place, and the authority of all such agents or attorneys at pleasure to revoke." It was held that this instrument did not authorize the agent to receive the salvage payable to the crew or to release their lien upon the ship in respect of which the salvage services were performed; and that the payment of a sum agreed upon between the owners of such ship and the agent, and the latter's receipt therefor, did not bar the salvors from maintaining an action for their services (affirmed 20 S. C. R. 472).

Subjects of salvage.

Salvage is purely a conception of maritime law (*Falcke* v. *Scottish Imperial Insurance Co.*, 34 C. D. 234, 248, 249), and, as has been pointed out, the jurisdiction of the Admiralty over salvage does not extend to all property exposed to perils of the sea and used to assist navigation (*The Gas Float Whitton,* No. 2, 1897, A. C. 337). Salvage can therefore only be of a ship, her apparel, cargo, or wreck. Cargo includes all merchandise transported by a vessel, and perhaps even when not inside it (*ibid.*, at p. 345). Wreck "includes cargo, stores, and tackle of any vessel and all parts of the vessel separated therefrom, and also the property of shipwrecked persons" (Canada Shipping Act, R. S. C. 1906, cap. 113, sec. 732 (f)). Derelict is property, whether vessel or cargo, abandoned at sea by those in charge of it, without hope on their part of recovering or intention of returning to it (*The Marie Victoria,* 2 Stuart, 109; *Cossman* v. *West,* 13 A. C. 160, 180, 181: *The Escort, No. 2.* Brit. Col. Ad. Dis., 23rd Dec., 1914).

Derelict.

The schooner *Margaret,* when in a helpless condition, was fallen in with by *The Alfred Whalen,* and the captain of the latter persuaded *The Margaret's* crew to desert her and take to his vessel. He then sailed off, but returned and towed *The Margaret* into port. It was held that this did not constitute *The Margaret* a derelict (*The Margaret,* Young, 171).

Public vessels.

British and foreign government vessels, whether warships or not, and public property of any country cannot be made the subject of a salvage claim (*The Scotia,* 1903, A. C. 501; *Couette* v. *Regina,* 3 Ex. C. R. 82; *The Parlement Belge,* 5 P. D. 197; and see the reporter's note to *Paul* v. *Rex,* 9 Ex. C. R. at p. 271).

Remedies and procedure.

Salvors have a possessory lien on the thing salved while it remains in their possession (*Hartfort* v. *Jones*, 1 Ld. Raym. 393); they are also entitled to a maritime lien, and may proceed in the Admiralty Court *in rem* or *in personam* (*Five Steel Barges*, 15 P. D. 142; *Cargo ex Port Victor*, 1901, P. 243; *The Flora*, Young, 48); in addition, disputes as to salvage may be heard and determined by the receiver of wreck, and "any Court having jurisdiction in civil matters to the amount of the claim or value of the property liable, in the place where the services were rendered, or where the property is at the time of the making of the claim" (Canada Shipping Act, R. S. C. 1906, cap. 113, secs. 760-772). The receiver has only jurisdiction where there is no question in dispute between the parties, except as to the amount of salvage to be awarded (*The Mapleleaf*, 6 Ex. C. R. 173). Every dispute as to salvage may be determined on the application of the salvor, or of the owner of the property liable to the claim for salvage, or of the receiver of wreck, when the property is in his custody (Canada Shipping Act, R. S. C. 1906, cap. 113, sec. 765). When any property liable to a salvage claim is under arrest in any suit, an award of the receiver or of the Court having jurisdiction in salvage may be enforced against the property or its proceeds under arrest (*ibid.* sec. 772). Part X. of the Canada Shipping Act deals with the whole subject of wrecks and salvage, creates the office of receiver of wreck, and provides for the disposition of wreck. Whenever any person takes possession of wreck, he is to deliver the same as soon as posible to the receiver, and failure to do so may entail the forfeiture of any claim to salvage and the payment of a penalty (*ibid.* secs. 747, 814); but a salvor who has delayed the delivery to the receiver for a short time, not with the intention of retaining the wreck, but merely for the purpose of having the amount payable to him for salvage determined, before giving up possession, does not become liable to the forfeiture and penalties (*The Manhattan*, 11 Ex. C. R. 151).

Receiver of wreck.

Canada Shipping Act.

Salvage reward. Amount of.

In the absence of a special agreement, the amount of remuneration is limited by the value of the property or the interests in property saved (*The Cargo ex Port Victor*, 1901, P. at p. 256).

Subject to such limitation, the amount of the salvage reward is in the discretion of the Court, which considers all the circumstances of the case and apportions the reward among the salvors in proportion to their respective deserts.

"In estimating the value of salvage services, circumstances, among others, to be considered by the Court are the degree of danger to which the vessel was exposed, and from which she was rescued by the salvors, the mode in which the services of the salvors were applied, and the risk incurred by the salvors in rendering the services" (*The Lux,* 14 Ex. C. R. at p. 111).

The reward for salving a derelict is usually greater than for salving a vessel not abandoned; and it has been laid down that the rate of salvage in cases of derelict should not range below one-third, nor above a moiety of the value of the property (*The Marie Victoria,* 2 Stuart 109). But this rule is not invariable; in *Two Bales of Cotton* (Young 135), it was held that the salvors should have the full amount of the value realized after payment of the necessary costs, where no owner appeared to claim goods found derelict and their value was small; in *The Erato* (13 P. D. 163), where the value of the salved vessel was £3,750, the sum of £2,000 was awarded as salvage, though she was not derelict, the services rendered being very valuable in saving the vessel from wreckers on a wild coast; in *The Louisa* (1906, P. 145), the total proceeds of a derelict barque, which was on fire when rescued were awarded without a reference, where judgment had been allowed to go by default; and in *The Mercator* (26 T. L. R. 450), where the defendant had appeared, but did not put in a defence, the Court awarded to the salvors the total value of the property salved.

Apart from special circumstances, the Court awards what it considers a fair remuneration, not exceeding a moiety of the value of the property salved, having regard to the danger to life on board the salved or salving vessel, the risk to which the salved and salving vessel were respectively exposed, the value of the property salved, the skill and care and labour displayed and exerted by the salvors, the length of time involved in the salving operations, and any loss or expense suffered or incurred by the salvors. The principles on which the Court proceeds are best illustrated by a series of examples.

The Palmyra.

In *The Palmyra* (2 Stuart 4), the salved vessel, sunk in the St. Lawrence, was raised and salved by the very ingenious, novel, and excellent machinery on board *The Dirigo,* and the great skill and experience of the master and crew, most of whom were picked men and excellent mechanics: the Court allowed £1,000 as salvage.

The Pride of England. In *The Pride of England* (2 Stuart 189), the master and crew of the vessel were taken off by salvors in canoes, the former abandoning her under the apprehension that she would become a total wreck; but she was afterwards saved by the meritorious exertions of the salvors, who were awarded a moiety of the net value of the ship and cargo.

The Scotswood. In *The Scotswood* (Young 25), the salved vessel, meeting with tempestuous weather, became water-logged and completely disabled, the provisions, compasses and charts being washed away; in this condition she was found by *The F. W. Brown*, a fishing schooner, which, in response to signals of distress, came alongside and took off the captain and crew; putting nine of her own men on board in their place. The captain and crew of *The Scotswood*, the salved ship, never attempted to rejoin her again, but remained on board the schooner; the heavy weather still continuing, the schooner was unable to manage the ship, and the following day, on another schooner, *The Laura*, coming near, they hailed one another, and it was then decided between them that each schooner should send seven men on board *The Scotswood*, and that both should then take her in tow. After great exertion on the part of both crews, the ship was on the next day brought into port. The question of abandonment of *The Scotswood* was not decided, but two-fifths of the appraised value of the ship and cargo were awarded, to be divided equally between the two sets of salvors, the owners of the schooners to receive one-half the amount falling to each.

The Canterbury. In *The Canterbury* (Young 57), the ship was abandoned while bound from Quebec to London and found in a water-logged condition off the coast of Newfoundland; the mate and four seamen of the salving vessel took charge of the derelict and brought her into Sydney, after having run considerable risk and endured great hardship; the value of the derelict was appraised at $30,000. The sum of $8,000 was awarded as salvage, of which the mate received $1,000 and the four other salvors $500 each, $3,200 being allowed to the owners of the salving ship.

The Afton. In *The Afton* (Young 136), an abandoned vessel was discovered by the keeper of a lighthouse who hailed a steam tug and directed her to the vessel: the tug brought her into port; and the value of the ship and cargo was agreed at $2,250. The tug was awarded $450 and the lighthouse keeper $25.

The Tickler In *The Tickler* (Young 166), a fishing schooner, while returning from the grounds with a full cargo, fell in with

a derelict, and taking her in tow, brought her into port, remaining in possession until relieved by an officer of the Court, a delay of twelve days being thus occasioned on her home voyage: she was awarded one-third of the value of the ship and cargo.

The R. Robinson

In *The R. Robinson* (Young 168), the ship was found derelict by the mail steamship *Abyssinia,* and the third officer, with fifteen of the steamer's crew, after two days' extreme exertion, and considerable personal risk, brought her into Halifax: the appraised value of the ship and cargo came to $101.936, and $30,000 was awarded as salvage.

The Ida Barton.

In *The Ida Barton* (Young 240), the steamer *Naples,* with a valuable cargo, bound from Philadelphia to Liverpool, fell in with the *Ida Barton,* a derelict, about 320 miles from Halifax, and towed her to that port in 48 hours, breaking and spoiling several hawsers in so doing. The salvors were awarded one-half of the appraised value of the ship and cargo, all costs and charges to be deducted from the other half, and the owners of the salving ship were given one-half of the salvage awarded.

The Royal Arch.

In *The Royal Arch* (Young 260), the steamer *Zealand,* bound from Antwerp to Philadelphia, fell in with the *Royal Arch,* a derelict, and in 20 hours with but little difficulty, towed her into Halifax; the *Zealand* was valued at $275,000 for vessel and cargo, and *The Royal Arch* at $8,300. An award was made of $2,800.

The Marino.

In *The Marino* (Young 51), the brigantine *Marino* on a voyage from Boston to Sydney, encountered a heavy gale, which carried away her rigging and rendered her almost unmanageable, in which condition she drifted along the coast of Nova Scotia for several days. until fallen in with by the steamer *Commerce,* which took her in tow, and after 8 or 9 hours, brought her into Halifax: there was some evidence of an offer of $500 having been made: the value of *The Marino* was appraised at $6,000: The award made was for $800.

The Auguste André.

In *The Auguste André* (Young 201) a Belgian steamer, sailing between Antwerp and New York, encountered severe weather and had her rudder carried away: she continued her course in that crippled condition until fallen in with by the *Switzerland,* about 175 miles distant from Halifax, who took her in tow and brought her into port after 3 days towage:

the weather was moderate during all that time, and the services rendered, while extremely opportune and valuable, were not of a highly meritorious character: the values of the respective steamers and their cargoes and freight were—*The Auguste Andre,* vessel, $127,500; cargo, $122,500; freight, $3,592: *The Switzerland,* vessel, $325,000; cargo, $250,000. An award of $20,000 was made, of which $12,000 went to the owners of *The Switzerland,* $1,500 to the master, and the remainder among the crew, according to their ratings.

The Herman Ludwig.

In *The Herman Ludwig* (Young 211), the vessel, on a voyage from New York to Antwerp, broke her shaft when two days out, and *The California,* another steamer, coming up, an agreement was entered into by the master of the disabled steamer to be towed into Halifax, and to pay for the service such amount as should be decreed by the Admiralty Court at that port: this was accomplished within 24 hours without any mishap except the breaking of two hawsers. It was held that the service rendered was not a mere towage service and $10,000 was awarded, of which $7,000 went to the owners, and $750 to the master, the rest to the crew according to their ratings.

The Stella Marie.

In *The Stella Marie* (Young 16), the vessel, while on a voyage from St. Pierre to Halifax, stranded on Sable Island: only a fresh breeze was blowing at the time, and she received no serious injury, but her situation was one of considerable danger if not speedily rescued: under the master's direction the crew and passengers landed with all their clothes, provisions, etc., but the vessel was not stripped, and the master denied any intention of abandoning her: they all left her for the night, and the following morning the six passengers, taking a boat from the island, boarded the vessel, and without much difficulty, and at no personal risk, succeeded in floating her off, when the master and crew, joining her in their own boat, they completed the voyage in safety. The passengers having taken proceedings to recover salvage, as in a case of a derelict, the owner of the vessel paid the sum of £40 into Court, which was refused. There was much conflicting evidence upon two points: whether the master really intended to abandon the ship; and as to the merits of the services rendered. It was held that the tender of £40 was sufficient, but, in view of the conflict of evidence, each party was condemned to pay its own costs.

The Heindall. In *The Heindall* (Young 132), a foreign ship became disabled in the Gulf of St. Lawrence and her crew were taken off by one set of salvors and safely landed: subsequently another set of salvors fell in with the ship and brought her into an adjoining port: the services in both cases were highly meritorious, and were rendered while the disabled vessel was about 60 miles from the nearest land. It was held that both sets of salvors were entitled to salvage, and a sale of the ship having been effected for $2,560, the Court awarded the sum of $660 to be divided among the salvors of the crew, and $900 among the salvors of the ship.

The Foster Rice. In *The Foster Rice* (9 Ex. C. R. 6), salvage services were rendered to a sailing ship in distress on the high seas by a mail steamer: at the time the latter performed the services she was valued at $100,000 and besides passengers and mails, she carried a cargo estimated to be worth $7,000; the time occupied in the performance of such services was about two and one-half days, the weather being fine and no risk or danger threatening the steamer except some chance of collision with her tow through a narrow channel of some thirteen miles in length: on account of the delay occasioned by the services the steamer was obliged to consume additional coal to the value of $360 in making up her scheduled time on the voyage: the sailing ship was in a position of peril when sighted by the steamer, having been dismasted and at the time drifting broadside at the mercy of the seas: her cargo was worth $13,727, and her freight $1,332; the value of the salved ship when taken into port in her damaged condition was placed at $2,290; the amount of salvage in respect of the cargo and freight was settled before action brought. It was held that the sum of $400 was a fair salvage award in respect of the ship alone.

The Otter. In *The Otter* (12 Ex. C. R. 258), a freight steamer, fully laden with coal, had gone ashore: she had sprung a leak and the water had put out her fires: about ten feet of her forefoot were on the rock, while her stern was in deep water; *The Pilot* stood by her during the night and the next day hauled her off the reef and brought her into harbour: the services performed by *The Pilot,* while lacking the especially meritorious feature of saving life, and being without danger to herself and her crew, were yet held to have been as skilfully conducted as the nature of the case permitted and valuable,

even though of short duration, and salvage was awarded in the sum of $2,200.

The Berwindmoor.

In *The Berwindmoor* (14 Ex. C. R. 23), the salved ship was picked up in a disabled condition, having lost her rudder, and brought into Halifax: her position was dangerous and heavy weather prevailed during the greater part of the time consumed in the salving operations, which caused considerable damage to the salving vessel: the time spent in salving and in making the repairs necessitated by the damage sustained by the salving vessel amounted to eleven and one-half days: the salved vessel with her cargo and freight was valued at $310,379, and the salving vessel with her cargo and freight at $173,000. An award of $12,500 was made, of which $10,500 went to the owners of the salving ship, and $2,000 was apportioned among the officers and crew.

The Escort No. 2.

The tug *Escort No. 2* (with a crew of eleven men, estimated value $10,000) became disabled owing to a broken propeller on the 22nd of November, 1913, and was in such a position) a little to the S.E. of Hannah Bank, in the Sea Otter Group, Smith Sound) that in a short time she would, beyond reasonable doubt, have become a total wreck, had not the *S.S. Humboldt* (estimated value $150,000; cargo $150,737) come to her assistance. After an hour's manoeuvring in a position of peril to an appreciable degree (being from one-half to three-quarters of a mile from a reef), she made fast to the *Escort* and took her in tow, bringing her to Alert Bay, a distance of about 50 miles, with a divergence from her course of about five miles. The heavy swell made it impossible to take the master and crew off the *Escort,* and they had, before the arrival of the *Humboldt,* made preparations to abandon her, take to their boats, and make a hazardous trip of 15 miles to shore. In an action for salvage services, it was held that the value of the services rendered should be estimated in the ordinary way and not on the basis of the tug being regarded as a derelict, as she was not abandoned at the time she was taken in tow. The award was for $2,000 (*The Escort, No. 2,* Brit. Col. Ad. Dis., 23rd Dec., 1914).

The Bjorgvin.

A steamship of the approximate value of $45,000 carrying a cargo of deals of the value of $25,000 in respect of which the freight when earned would have amounted to $13,375, went aground on a shoal on the coast of Prince Edward Island, and lay in an exposed and dangerous position. The

plaintiff sent his salvage steamers to the grounded ship, pumped water from her hold, and set a gang of men to jettison part of her cargo, which was boomed and towed ashore where it was afterwards sold. It was agreed between the agent of the underwriters and the plaintiff that if the plaintiff failed to get the defendant ship off the shoal, the plaintiff should get $1,500 for loss of gear, but no arrangement was made for the event of success. The plaintiff succeeded in getting the ship afloat some three days after she had grounded. The ship then proceeded under her own steam to Halifax, but one of the plaintiff's steamers stood by her until she was docked. It was held that under all the circumstances and considering the respective values of the ship and cargo, the plaintiff was entitled to a salvage award of $8,000 (*The Bjorgviu,* 15 Ex. C. R. 105).

Misconduct and want of skill.

Any failure to show the reasonable degree of skill, care and knowledge appropriate to the occasion, or any misconduct on the part of the salvors will be a ground for reducing the amount of the reward, and may entail a forfeiture of all claim to reward.

The Charles Forbes.

In *The Charles Forbes* (Young 172), a vessel from a port in the United States bound for Portland and loaded with coal encountered heavy weather and her cargo shifted, but not so as to render her unmanageable: in this state she was found off the American coast by three American schooners, and abandoned by her master and crew without any justification for such a course: although many American ports were much nearer, the salvors brought her into Halifax: after the vessel had been taken possession of by the salvors, her master made efforts to return to her, but was prevented by one of the salvors: he then asked them to take the vessel into Portland, her destination, but they refused. It was held that the vessel was not derelict; that the salvors had misconducted themselves, and had not rendered any substantial service, and the reward was reduced; and it was further held that the captain of one of the salving schooners had so misconducted himself as to have forfeited his share of the salvage.

The Court regards as improper the taking of a vessel to a distant port from her known home port (*The Rowena,* Young 255).

Salvage by wrongdoing vessel.

In the case of services rendered by one of two colliding ships to the other, the rule appears to be that the wrongdoing

vessel cannot recover a salvage reward, when she has been wholly in fault (*The Diana,* 11 Ex. C. R. 40), but that, where both vessels are in fault, and salvage services are rendered by one to the other, the Court will make an award and direct one-half of the amount to be borne by each vessel (*The Zambesi,* 3 Ex. C. R. 67).

Relative liability of ship and cargo.

Where no specific agreement is made for a sum certain, the rule in a salvage action is that the interests in the ship and cargo are only severally liable, each for its proportionate share of the salvage remuneration (*The Stephie,* 15 Ex. C. R. 124).

Section 12.—Droits of Admiralty.

Wreck, etc.

By the general law, all goods found afloat and derelict on the high seas belong, as droits, to the Crown, in its office of Admiralty, not *jure coronae* (*The Little Joe,* Stewart, 394): the subjects which may be condemned by the Admiralty Court as droits of Admiralty are unclaimed wreck, things flotsam, jetsam, ligan and derelict found in or on the shores of the sea or any tidal water, as well as derelict found on the high seas: in order to constitute a legal wreck, the goods must come to land: if they continue at sea they are distinguished as flotsam, things which float on the surface, jetsam, things which sink, and ligan, things sunken with something attached to float (*Rex.* v. *Forty-nine casks of brandy,* 3 Hagg. 257). It is illegal to appropriate such articles: whatever property is found derelict must be restored upon the payment of salvage, to the owner, if he appear in due time; and otherwise it must be condemned as a droit of Admiralty, subject to the same right of salvage reward (*Rex* v. *Property derelict,* 1 Hagg. 383).

The jurisdiction over such droits is conferred and regulated by The Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict., cap. 27, secs. 2 and 8): section 8 provides

(1) Subject to the provisions of this section nothing in this Act shall alter the application of any droits of Admiralty or droits of or forfeitures to the Crown in a British possession; and such droits and forfeitures, when condemned by a Court of a British possession in the exercise of the jurisdiction conferred by this Act, shall, save as is otherwise provided by any other Act, be notified,

accounted for and dealt with in such manner as the Treasury from time to time direct, and the officers of every Colonial Court of Admiralty and of every other Court in a British possession exercising Admiralty jurisdiction shall obey such directions in respect of the said droits and forfeitures as may be, from time to time, given by the Treasury.

(2) It shall be lawful for Her Majesty the Queen in Council by Order to direct that, subject to any conditions, exceptions, reservations and regulations contained in the order, the said droits and forfeitures condemned by a Court in a British possession shall form part of the revenues of that possession either forever or for limited term or subject to such revocation as may be specified in the order.

(3) If and so long as any of such droits or forfeitures by virtue of this or any other Act form part of the revenues of the said possession the same shall, subject to the provisions of any law for the time being applicable thereto, be notified, accounted for and dealt with in manner directed by the Government of the possession, and the Treasury shall not have any power in relation thereto.

No order in council appears to have been issued under this section.

By the Imperial Statute of the 59 & 60 Vict., cap. 12, masters of ships are to notify Lloyds' agent of the existence on the high seas of any floating derelict vessel.

Wreck. There is little necessity for the exercise of the Court's jurisdiction in matters of wreck, owing to the extensive powers given to the receiver of wreck by Part X. of the Canada Shipping Act (R. S. C. 1906, cap. 113). Any person taking possession of wreck within Canada is to deliver the same to the receiver (sec. 747), who within 48 hours after taking possession, is to post up a notice containing a description of the wreck in the nearest custom house (sec. 748): the owner or in the case of wreck belonging to a foreign owner, the consul, may establish his claim within a year (secs. 749, 750): the receiver may sell the wreck, and if the owner neglects to pay the salvage, may pay all salvage fees and expenses out of the proceeds (secs. 751, 752): in the case of conflicting

claims, the receiver may interplead (sec. 755). If no claim is established within a year from the time when the wreck came into possession of the receiver it is to be sold and the proceeds form part of the Consolidated Revenue Fund of Canada (sec. 753).

Piracy.

The Court of Admiralty has inherent jurisdiction to entertain a suit, usually though not always instituted in a civil form, for restitution of goods piratically taken on the high seas, and may condemn goods belonging to pirates as droits of Admiralty, at the suit of the Crown, proceeding *pro vindicta publica* (*The Hercules*, 2 Dods. 353; *The Telegrafo*, L. R. 3 P. C. 673).

The Piracy Act, 1850.

The Court also exercises a statutory jurisdiction under The Piracy Act, 1850 (13 & 14 Vict., cap. 26): by section 2 the Court is empowered, whenever any of His Majesty's forces attack or are engaged ashore or afloat with any persons alleged to be pirates, to inquire and determine whether such persons were pirates: by section 5 it is provided that all ships and property taken from pirates may be proceeded against and condemned in the Admiralty Court as droits of Admiralty, saving the rights of the owners to restoration upon payment of salvage.

Section 13.—Forfeitures.

The most important proceedings which the Admiralty Court has jurisdiction to entertain for the condemnation and forfeiture of ships are those taken in pursuance of the provisions of the Imperial Acts, the Behring Sea Award Act, 1894 (57 & 58 Vict., cap. 2), the Seal Fisheries (North Pacific) Act, 1912 (2 & 3 Geo. V., cap. 10), and the Act to enable His Majesty to make regulations with respect to the taking and curing of fish on certain parts of the coasts of Newfoundland, Labrador, and His Majesty's other possessions in North America (59 Geo. III., cap. 38), and in pursuance of the provisions of The Customs and Fisheries Protection Act (R. S. C. 1906, cap. 47).

Sealing in Behring Sea.

The catching of seals in Behring Sea has been the subject of considerable legislation by the Imperial Parliament. Power was first given to Her Majesty to prohibit, by Order in Council, during a period to be specified by the Order, the catching of seals by British vessels in Behring Sea, by the Seal Fishery (Behring's Sea) Act, 1891 (54 & 55 Vict., cap.

19): this power was extended to other waters of the North Pacific Ocean adjacent to Behring Sea by the Seal Fishery (North Pacific) Act, 1893 (56 & 57 Vict., cap. 23), which was repealed and re-enacted by the Seal Fishery (North Pacific) Act, 1895 (58 & 59 Vict., cap. 21). Orders in Council in pursuance of the powers given by these Acts, were issued on the 23rd of June, 1891, the 9th of May, 1892, the 16th of May, 1893, the 4th of July, 1893, the 24th of January, 1894, and the 24th of August, 1895.

The last Act on this subject, the Seal Fisheries (North Pacific) Act, 1895, expired on the 31st of December, 1897, and the subject remained unregulated save for the provisions of the Behring Sea Award Act, 1894 (57 & 58 Vict., cap. 2) until 1911: in that year a treaty was concluded between the United Kingdom and the United States, which was ratified on the 7th of July, 1911 (Canada Gazette, Vol. XLV., p. 2404): by this treaty pelagic sealing was to be prohibited in certain parts of the Behring Sea and North Pacific Ocean, and provisions were made for compensation to be payable by the United States to Great Britain: the articles of the treaty were to remain in abeyance until the conclusion of an international agreement between Great Britain, the United States, Japan, and Russia. In conformity with this treaty, a convention between Great Britain, the United States, Japan and Russia was concluded and ratified on the 12th of December, 1911 (Canada Gazette, Vol. XLV., p. 2291). This convention provided that the high contracting parties should prohibit their subjects from engaging in pelagic sealing in the waters of the North Pacific Ocean, north of the thirtieth parallel of north latitude and including the Seas of Behring, Kamchatka, Okhotsk, and Japan; and contained supplementary provisions limiting the number of seals to be caught and for the payment of compensation to Great Britain.

Seal Fisheries (North Pacific) Act, 1912.

In order to carry out the terms of this convention, the Imperial Parliament has passed the Seal Fisheries (North Pacific) Act, 1912 (2 & 3 Geo. V., cap. 10). This Act appears to revive the Seal Fisheries (North Pacific) Act, 1895, and section 6 of the former Act provides that the two acts shall be construed together. The later Act substitutes the prohibited area specified in the convention for the more limited area contained in the earlier Act. By the conjoined effect of the two Acts, His Majesty the King may, by Order in Coun-

cil, prohibit, during the period specified in the Order, the catching of seals or sea otters by British ships within such parts of the Pacific north of the thirtieth parallel of north latitude including the Seas of Behring, Kamchatka, Okhotsk and Japan as are specified in the Order (58 & 59 Vict., cap. 21, sec. 1; 2 & 3 Geo. V., cap. 10, secs. 1, 2). While such an Order in Council is in force a person belonging to a British ship shall not kill, take, hunt, or attempt to kill or take, any seal during the period and within the seas specified in the Order, and a British ship shall not, nor shall any of the equipment or crew thereof, be used or employed in such killing, taking, hunting, or attempt (58 & 59 Vict., cap. 21, sec. 1, sub-sec. 2 (a) and (b)). Any contravention of these provisions renders the person guilty of a misdemeanour and the ship and her equipment liable to forfeiture (sub-section 3). Any offence under the Act may be prosecuted and any forfeiture incurred under the Act enforced as under the Merchant Shipping Act, 1894 (57 & 58 Vict., cap. 60): section 76 of the Merchant Shipping Act, 1894, provides that, where any ship is subject to forfeiture, any commissioned officer in the military or naval service of His Majesty and any officer of customs in His Majesty's dominions and any British Consular officer may seize and detain the ship and bring her for adjudication before the Admiralty Court. The Seal Fisheries (North Pacific) Acts, 1895 and 1912, also give power by Order in Council to regulate seal fishing, the keeping of logs, and to prohibit the using of ports for purposes of pelagic sealing and the importation of skins of seals captured in contravention of any Order in Council (58 & 59 Vict., cap. 21, sec. 2; 2 & 3 Geo. V., cap. 10, secs. 3, 4, 5). The earlier Act also makes provisions as to ships' papers and the evidence admissible in proceedings under the Act (secs. 4, 5).

The Canadian Act respecting Pelagic Sealing (3 & 4 Geo. V., cap. 48) enforces the prohibition of the use of ports for the purpose of equipping a ship intended to be used in hunting seals contrary to any Order in Council made under the Imperial Acts, and the prohibition of the importation of skins of seals taken in contravention of such Order, and provides for adjudication and forfeiture.

No Order in Council has yet been made under the Imperial Acts since the passing of the Seal Fisheries (North Pacific) Act, 1912; but it may be that the effect of this Act

is also to revive The Seal Fisheries (North Pacific) Order in Council, 1895 (Canada Gazette, Vol. XXIX., p. 631), by which the catching of seals is prohibited within certain areas, and power given to any officer in command of any war vessel of the Emperor of Russia to exercise the powers of a British officer.

Behring Sea Award Act, 1894.

In addition to these Acts, the subject of sealing in the North Pacific is also dealt with by the Behring Sea Award Act, 1894 (57 & 58 Vict., cap. 2), passed to carry into effect the Behring Sea Award. By this Act sealing is forbidden within a zone of 60 miles around the Pribiloff Islands at any time, and within an area north of the 35th degree of north latitude during the season from the 1st of May to the 31st of July in each year, and the use of firearms is prohibited in seal fishery (section 1 and articles 1 and 2 and 6 of the award). The Act also contains provisions as to forfeiture of offending ships and as to ships' papers and logs (secs. 1 and 2).

On the 30th of April, 1894, the Behring Sea Award Order in Council, 1894, was made, empowering the commanding officer of any vessel belonging to the naval or revenue service of the United States to seize any British ship liable to forfeiture and bring her for adjudication before the Admiralty Court.

The Seal Fisheries (North Pacific) Acts are to be in addition to and not in derogation of the provisions of the Behring Sea Award Act, 1894, and all the Acts, being statutes in *pari materia,* are to be read as one Act (*The Shelby,* 5 Ex. C. R. 1; 4 B. C. R. 342).

Burden of proof.

By sub-section 5 of section 1 of The Seal Fishery (Behring's Sea) Act, 1891 (54 & 55 Vict., cap. 19) and sub-section 6 of section 1 of The Seal Fishery (North Pacific) Act, 1893 (56 & 57 Vict., cap. 23) it was enacted that if a British ship were found having on board thereof fishing or shooting implements or sealskins or bodies of seals, it should lie on the owner or master of such ship to prove that the ship was not used or employed in contravention of the Act. This provision has been omitted in The Seal Fisheries (North Pacific) Act, 1895 (58 & 59 Vict., cap. 21). Under the two earlier Acts it was held that the presence of a ship within the prohibited zone fully manned and equipped for sealing, required the clearest evidence of *bona fides* to relieve the master from a presumption of an intention to violate the provisions of the

Act (*The Minnie*, 4 Ex. C. R. 151; 3 B. C. R. 161; 23 S. C. R. 478; *The Shelby*, 5 Ex. C. R. 1; 4 B. C. R. 342: *The Oscar and Hattie*, 23 S. C. R. 396): but it is doubtful if these decisions would apply under the present Acts. In any case the mere presence of a ship within the prohibited zone, owing to a *bona fide* mistake in the master's calculations, is not a contravention of the Act (*The Ainoko*, 4 Ex. C. R. 195; 3 B. C. R. 121).

Under the Behring Sea Award Act, 1894, it has been held that where a vessel is found within the prohibited zone, having on board certain skins with holes in them which appear to have been made by bullets, this is a sufficient reason for her arrest and that the burden of showing that firearms had not been used was imposed on the vessel (*The Aurora*, 5 Ex. C. R. 372; 5 B. C. R. 178): on the other hand where on a ship having 336 sealskins on board, one had a hole in it which might have been caused by a bullet, the Court seems to have required the captors to prove both that the hole was caused by a gun shot, and also that the gun was fired on board the suspected vessel, and in the absence of proof which the Court considered sufficient, the doubt was resolved in favour of the vessel (*The E. B. Marvin*, 4 Ex. C. R. 453; 4 B. C. R. 330).

Mistake of position.

Under this Act also a master takes upon himself the responsibility of accurately ascertaining his position, and if through error, want of care or inability to ascertain his true position, he drifts within the prohibited zone, and seals there, he has committed a breach of the Act (*The Beatrice*, 5 Ex. C. R. 378; 5 B. C. R. 171). And it is the duty of a master to be quite certain of his position before he attempts to seal: if he is found contravening the Act, it is no excuse to say that he could not ascertain his position by reason of the unfavourable condition of the weather (*The Ainoko*, 5 Ex. C. R. 366; 5 B. C. R. 168).

British subjects and foreigners

Where a contravention of the Acts is established against a British vessel, she becomes liable to forfeiture, whether she is "employed" at the time of the infraction by a British subject or a foreigner (*The Viva*, 5 Ex. C. R. 360; 5 B. C. R. 170).

Order in Council, proof of.

The Admiralty Court is bound to take judicial notice of an Order in Council issued under the authority of the Acts (*The Minnie*, 4 Ex. C. R. 151; 3 B. C. R. 161; 23 S. C. R. 478).

The Seal Fisheries (North Pacific) Act, 1895, by section 5, enacts that: "A statement in writing, purporting to be signed by an officer having power in pursuance of this Act to stop and examine a ship, as to the circumstances under which or grounds on which he stopped and examined the ship, shall be admissible in any proceedings, civil or criminal, as evidence of the facts or matters therein stated." The Seal Fisheries (North Pacific) Act, 1895, by clause 2 provides that the powers of seizure may be exercised by "the captain or other officer in command of any war vessel of His Majesty the Emperor of Russia." Under similar language in the earlier Act and Order in Council it was held that a Russian cruiser manned by a crew in the pay of the Russian Government and in command of an officer of the Russian navy is a war vessel within the meaning of the Order in Council, and that where a protocol of the examination of an offending British ship by a Russian vessel did not disclose on its face that the person who signed was an officer in command of the examining vessel, or that that vessel was a Russian war vessel, it was nevertheless admissible in evidence and as proof of its contents (*The Minnie*, 4 Ex. C. R. 151; 3 B. C. R. 161; 23 S. C. R. 478).

Evidence.

The Behring Sea Award Order in Council, 1894, by clause 1, provides that: "The commanding officer of any vessel belonging to the naval or revenue service of the United States of America, and appointed for the time being by the President of the United States for the purpose of carrying into effect the powers conferred by this article, the name of which vessel shall have been communicated by the President of the United States to Her Majesty as being a vessel so appointed as aforesaid, may, if duly commissioned and instructed by the President in that behalf, seize and detain any British vessel which has become liable to be forfeited to His Majesty . . . and may bring her for adjudication before any such British Court of Admiralty as is referred to in section 103 of the Merchant Shipping Act, 1854 . . . or may deliver her to such British officer as is mentioned in the said section for the purpose of being dealt with pursuant to the Act." In *The Carlotta G. Cox* (11 Ex. C. R. 312; 13 B. C. R. 460) no proof was given of the official position of the captor nor of the communication of the name of the vessel, and the commander of the United States vessel who seized handed over the delinquent ship not to any British officer as provided in the section of

Irregularities of procedure.

The Merchant Shipping, but to the master of the Canadian Government steamer *Quadra*, then employed by the Department of Marine and Fisheries: the offending ship, however, was actually brought before the Court for adjudication by a proper officer; and it was held that where the offending vessel is properly before the Court and in the custody of its marshall, any antecedent irregularities in the manner in which she was originally seized or in the means whereby she was originally brought within the jurisdiction of the Court, will not vitiate the proceedings.

Official logs. Sub-section 3 of section 1 of The Behring Sea Award Act, 1894, enacts that the provisions of the Merchant Shipping Act, 1854, respecting official logs (including the penal clauses) shall apply to any vessel engaged in fur seal fishing: the penal clauses of section 284 of the latter Act merely subject the master to a penalty, in the nature of a fine, for not keeping an official log, and do not attach any penalty or forfeiture in respect of the ship: sub-section 2 of section 1 of the first mentioned Act provides that if there be any contravention of the Act, the ship employed in such contravention shall be forfeited. It was held in *The Beatrice* (5 Ex. C. R. 9; 4 B. C. R. 347) that inasmuch as the provision of The Merchant Shipping Act, 1854, inflicting a fine only upon the master was in seeming conflict with the general provisions of the principal Act, imposing forfeiture, such general provision must be read as expressly excepting a contravention by omission to keep a log.

Where the official log of a ship arrested under The Seal Fishery (North Pacific) Act, 1893, did not disclose the position and proceedings of the ship on certain material dates, an independent log kept by the mate was held not to be admissible in evidence, but the mate was allowed to refresh his memory by reference to it (*The Ainoko*, 4 Ex. C. R. 195).

Relief against forfeiture. The Behring Sea Award Act, 1894, by section 1, sub-section 2, gives power to the Court to release the ship, equipment, or thing, on payment of a fine not exceeding £500 (*The Viva*, 5 Ex. C. R. 360; *The Carlotta G. Cox*, 11 Ex. C. R. 312). And where the owner of a ship employs a competent master, and furnishes him with proper instruments, and the master uses due diligence, but for some unforeseen cause against which no precaution reasonably necessary to be taken can guard, is found sealing where sealing is forbidden,

the Court may properly exercise its discretion and impose a nominal fine only (*The Otto,* 6 Ex. C. R. 188).

Wrongful arrest.

Where a vessel was seized for contravention of the Act and found innocent of any infraction, she was awarded damages for the wrongful seizure and detention, together with interest, upon the ascertained amount of such damages, she having counterclaimed for such damages (*The Beatrice,* 5 Ex. C. R. 160; 5 B. C. R. 110).

Fishing by foreign vessels.

Special provision has been made by statute for the protection of the fisheries of Canada.

By the Convention of London, the 20th of October, 1818, subjects of the United States were given liberty to take fish on that part of the southern coast of Newfoundland which extends from Cape Ray to the Ramean Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands; and also on the coasts, bays, harbours, and creeks from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belle Isle; and thence northwardly indefinitely along the coast: and they were also permitted to dry and cure fish on the southern coast of Newfoundland and the coast of Labrador. It was also agreed that the United States should renounce any claim to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks or harbours of the British dominions in America not included within the above limits, while reserving to American fishermen the right to enter such bays and harbours for the purpose of shelter, and of repairing damage, and of obtaining wood and water.

This convention does not apply to the coast of British Columbia so far as fisheries are concerned (*The Valiant,* 19 B. C. R. 521).

59 Geo. III., Cap. 38.

The Imperial Act of the 59 Geo. III., cap. 38, was passed for the purpose of enforcing the provisions of the convention: section 2 provided that any foreign ship found fishing, or having been fishing, or preparing to fish within the prohibited zone should be forfeited by proceedings in the Court of Admiralty or common law.

Canadian legislation.

The Canadian Parliament has also legislated against illegal fishing by foreign fishermen: the provisions of the Acts of 31 Vict., cap. 61, 33 Vict., cap. 15, 34 Vict., cap. 23, and

Customs and Fisheries Protection Act.

49 Vict., cap. 114, on the subject were consolidated in R. S. C. 1886, cap. 94, and now appear in the Customs and Fisheries Protection Act (R. S. C. 1906, cap. 47). Section 10 enacts that: "Every ship, vessel or boat which is foreign, or not navigated according to the laws of the United Kingdom or of Canada which (a) has been found fishing or preparing to fish, or to have been fishing in British waters within three marine miles of any of the coasts, bays, creeks, or harbours of Canada, not included within the limits specified and described in the first article of the convention (of the 20th of October, 1818), or in or upon the inland waters of Canada, without a license then in force granted under this Act; or (b) has entered such waters for any purpose not permitted by treaty or convention, or by any law of the United Kingdom or of Canada for the time being in force, shall, together with the tackle, rigging, apparel, furniture, stores and cargo thereof, be forfeited."

The Act also contains provisions for granting licenses to fish (sec. 2), and to enter Atlantic ports to purchase bait and supplies (sec. 3), for the boarding and search of vessels (secs. 5 to 8 inclusive), for the imposition of penalties on masters refusing to answer (sec. 9) and vessels failing to bring to (sec. 11) and persons opposing any officer in the execution of duty (sec. 13), and for prohibiting the throwing overboard of cargo during chase (secs. 8 and 13).

Every penalty or forfeiture under the Act may be recovered or enforced in the Admiralty Court, or in any Superior Court in the province within which the cause of prosecution arose (sec. 18).

The Act also provides for the custody and sale of the things seized (secs. 16 and 17), and their redelivery on security being given (sec. 19).

Burden of proof.

Section 21 contains an important provision as to evidence; providing that "the burden of proving the illegality of any seizure, made for alleged violation of any of the provisions of the Act or that the officer or person seizing was not by the Act authorized to seize, shall lie upon the owner or claimant."

All actions under the Act must be brought within three years from the date of the commission of the offence (sec. 28).

Constitutionality of the Act.

The constitutional power of the Dominion Parliament to pass the Act and legislate on the subject in the mode followed was impugned and upheld in *The North* (11 Ex. C. R. 141; 11 B. C. R. 473).

Where a foreign vessel is seized as fishing within the prohibited zone, the burden of proving that she had a license to fish lies on the seized vessel (*The Henry L. Phillips,* 4 Ex. C. R. 419, 25 S. C. R. 691).

Burden of proof as to license.

The method of catching fish has no bearing upon a violation of the provisions of the Act: the fact of taking fish without a license in the territorial waters of Canada constitutes the offence (*The Samoset,* 9 Ex. C. R. 348).

Method of catching.

It may be, in view of the provisions of 59 Geo. III., cap. 38, that coming into the territorial waters of Canada to cure fish caught outside the limits of such waters will subject the offending vessel to forfeiture (*vide* per Macdonald, L.J., in *The Samoset, ubi supra,* at p. 351).

Curing.

The words "preparing to fish" have given rise to decisions apparently conflicting. In *The J. H. Nickerson* (Young 96), the vessel entered the bay of Ingonish in Cape Breton, for the alleged purpose of obtaining water, but the evidence showed that the real object of her entry was to obtain bait, and that a quantity of bait was obtained: she was seized by the Government cutter, after she had been warned off, and while she was still at anchor within three marine miles of the shore: it was held that she was guilty of procuring bait and preparing to fish within the prescribed limit, and was therefore liable to forfeiture.

Preparing to fish.

The J. H. Nickerson.

In *The White Fawn* (Stockton, 200) an American fishing vessel went into Head Harbour, in the province of New Brunswick, and the master there purchased bait: the vessel was seized, but it was held that the mere purchasing of bait was not "a preparing to fish" illegally in British waters; that the intention of the master, so far as appeared, might have been to prosecute his fishing outside the three-mile limit, and that the Court would not impute fraud or an intention to infringe the law in the absence of evidence. Hazen, J., construed the words "preparing to fish" as meaning "arranging nets, lines and fishing tackle for fishing, though not actually applied to fishing in British waters"; and he pointed out that, assuming the vessel had entered Head Harbour for other purposes than shelter and obtaining wood and water, this, although an infringement of section 3 of 59 Geo. III., cap. 38, was punishable by penalty only.

The White Fawn.

Since the date of the decision in *The White Fawn,* the law has been altered by rendering a vessel liable to forfeiture

when she has entered any waters for any purpose not permitted by treaty or convention (49 Vict., cap. 114, section 1, now contained in R. S. C. 1906, cap. 47, sec. 10).

Vessel's position.

In *The Kitty D.* (34 S. C. R. 673), an American vessel was seized by the Government cruiser *Petrel* for fishing on the Canadian side of Lake Erie: the evidence was conflicting as to the position of both vessels at the time of seizure, but it was held that, as *The Petrel* was furnished with the most reliable log known to mariners for registering distances and her compass had been carefully tested and corrected for deviation on the morning of the seizure, and as the seized ship and the two tugs in her vicinity at the time whose captains gave evidence carried no log nor chart and kept no log book, the evidence of the officers of *The Petrel* must be accepted.

Change of position while fishing.

Where the foreign vessel had thrown her seine outside the three-mile limit, but before all the fish in the seine had been secured, both it and the vessel drifted within the zone, it was held that she was guilty of illegal fishing within the meaning of the Acts (*The Frederick Gerring, Jr.*, 5 Ex. C. R. 164, 27 S. C. R. 271).

Seizure outside the zone.

A ship found fishing within the prohibited limits may be pursued and seized outside the three-mile limit, provided the pursuit be continuous (*The North,* 11 Ex. C. R. 141; 11 B. C. R. 473; *The Valiant,* 19 B. C. R. 521).

On the inland waters the prohibited zone is not confined to the three-mile limit, but includes the whole area on the Canadian side of the international boundary (*The Grace,* 4 Ex. C. R. 283).

Where the evidence as to the place of seizure of a vessel for unlawful fishing within Canadian waters is unsatisfactory, and leaves it doubtful whether or not the vessel seized was, at the time of seizure, within the three-mile limit of the Canadian coast, it is not permissible to condemn her. Where a charge of unlawful fishing within the territorial waters of Canada involves the condemnation of a foreign ship, the evidence must establish with accuracy and certainty that the offence was committed within such territorial waters (*R.* v. *Carlson,* 49 S. C. R. 180).

In cases of a charge of unlawful fishing, it is also necessary to consider the provisions of the First Article of the Convention of Commerce and Navigation between Great Britain and the United States of 1815 (19 B. C. R. at p. 523).

Under this article, however, no liberty or right is given to foreign vessels to carry on fisheries, but simply "to come with their cargoes to all such places, ports and rivers in the territories aforesaid, to which other foreigners are permitted to come, but subject always to the laws and statutes of the two countries respectively": so that it leaves unaffected the prohibition in section 186 of the Canada Customs Act, which makes it unlawful for a vessel to enter any place other than a port of entry, unless from stress of weather or other unavoidable cause (*The Valiant,* 19 B. C. R. 521).

National colours. The Admiralty Court has jurisdiction to impose fines for the improper use of national colours on any ship or boat belonging to any British subject; and to condemn as forfeited any ship owned by any person not qualified to own a British ship who has used the British flag and assumed the British national character, or any ship whose master or owner has concealed the British or assumed a foreign character of the ship (The Merchant Shipping Act, 1894, 57 & 58 Vict., cap. 60, secs. 73, 69, 70; *The S. G. Marshall,* 1 P. E. I. R. 316). Any interest, legal or equitable, in a British ship acquired by a person unqualified to own a British ship is also subject to forfeiture (*ibid* section 71).

Under the corresponding provisions of the Merchant Shipping Act, 1854 (17 & 18 Vict., cap. 104, sec. 103), where the words were "shall be forfeited," it was held that the property in the vessel was divested out of its former owners, and vested in the Crown immediately on the commission of any of the offences in respect of which the penalty of forfeiture was imposed, and that the plea of purchase for value in good faith and without notice was unavailing (*The Annandale,* 2 P. D. 218). The provisions which have taken the place of those in the repealed Act merely render the offending ship "subject to forfeiture under the Act" and it may be that the result of the change will be that the Court will uphold the title of a purchaser for value in good faith and without notice, if the sale has taken place before the commencement of the proceedings for forfeiture.

Dangerous goods. The Admiralty Court has also jurisdiction to condemn as forfeited any dangerous goods sent or carried, or attempted to be sent or carried, on board any vessel, British or foreign, without being properly marked, or without a written notice

having been given of the description of the goods, or under a false description or with a false description of the sender or carrier (Merchant Shipping Act, 1894. 57 & 58 Vict., cap. 60, secs. 446-449).

Foreign Enlistment Act. Slave Trade Act. Pacific Islanders Protection Acts.

The Admiralty Court has also jurisdiction under the Foreign Enlistment Act, 1870 (33 & 34 Vict., cap. 90, secs. 19, 30, and 53 & 54 Vict., cap. 27, sec. 2, sub-sec. 3); under the Slave Trade Act, 1873 (36 & 37 Vict., cap. 88, sec. 5, and 53 & 54 Vict., cap. 27, sec. 2, sub-sec. 3); and under the Pacific Islanders Protection Acts, 1872 and 1875 (35 & 36 Vict., cap. 19, sec. 18, 38 & 39 Vict., cap. 51, sec. 4, and 53 & 54 Vict., cap. 27, sec. 2, sub-sec. 3).

Section 14.—Pilotage.

Jurisdiction in pilotage.

The Admiralty Court also has jurisdiction in respect of pilotage dues (*The Nelson,* 6 Ch. Rob. 227; *The Benjamin Franklin, ibid.* 350); but where there has been a previous judgment of a pilotage authority upon the same cause of demand, the Court will not exercise jurisdiction (*The Phœbe,* 1 Stuart, 60.)

Duties of pilot.

A pilot who has the steering of a ship is liable to an action for an injury done by his personal misconduuct, although a superior officer is on board, and the damages occasioned to the ship by the misconduct of the pilot may be set off against his claim for pilotage (*The Sophia,* 1 Stuart, 96).

The mode, the time, and the place of bringing a vessel to anchor are within the peculiar province of the pilot in charge (*The Lotus,* 2 Stuart, 58; *The Lord John Russell,* 1 Stuart, 190): and the pilot in charge is responsible for getting the ship under weigh in improper circumstances (*The Anglo-Saxon,* 2 Stuart, 117). The duty of the pilot is to attend to the navigation of the ship, and of the master and crew is to keep a proper lookout (*The Secret,* 2 Stuart, 133).

Canada Shipping Act.

Part VI. of the Canada Shipping Act (R. S. C. 1906, cap. 113) deals with the subject of pilotage, and by sections 475, 476, and 477, amended by the 7 & 8 Edw. VII., cap. 65, sec. 11, every ship, with certain exceptions, which navigates within either of the pilotage districts of Quebec, Montreal, Halifax, or St. John, or within any pilotage district within the limits of which the payment of pilotage dues is, for the time being, made compulsory by Order in Council is compelled to pay pilotage dues.

Pilotage dues.

A barge which is proceeding on its course in charge of a steam collier within the Quebec pilotage district is not, however, liable to compulsory dues (*The Grandee*, 8 Ex. C. R. 54, 79). But a vessel, built for the purpose of carrying coal, and carrying sails so as to be able to run before the wind, but not so as to be safely navigated in the ordinary way as a sailing vessel is subject to compulsory dues (*The St. John Pilot Commissioners* v. *The Cumberland Railway & Coal Co.*, 1910, A. C. 208).

A ship employed on a sealing voyage from Halifax to the Newfoundland seal fisheries and back, calling on her outward voyage at Louisburg for coal, and at a port in Newfoundland for men and supplies, and again at Newfoundland, on her return, to dispose of her catch, is not an exempted ship within section 477, sub-section ii, of the Canada Shipping Act (*Farquhar* v. *McAlpine*, 35 N. S. R. 478).

By section 529 of the Canada Shipping Act (R. S. C. 1906, cap. 113), it is provided that when an Admiralty district has been established at Montreal, all the powers and jurisdiction of the Montreal Pilots' Court shall be transferred to the Exchequer Court on its Admiralty side. No such district has yet been established.

CHAPTER III.

Admiralty Practice and Procedure.

Power to make rules.

Provisions for making rules regulating the practice and procedure in Admiralty matters have been made by The Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict., cap. 27), and by The Admiralty Act, 1891 (54 & 55 Vict., cap. 29, now found in R. S. C. 1906, cap. 141).

The Colonial Courts of Admiralty Act. 1890, enacts as follows:

7. (1) Rules of Court for regulating the procedure and practice (including fees and costs) in a Court in a British possession in the exercise of the jurisdiction conferred by this Act, whether original or appellate, may be made by the same authority and in the same manner as rules touching the practice, procedure, fees and costs in the said Court in the exercise of its ordinary civil jurisdiction respectively are made:

Provided that the rules under this section shall not, save as provided by this Act, extend to matters relating to the slave trade, and shall not (save as provided by this section) come into operation until they have been approved by Her Majesty in Council, but on coming into operation shall have full effect as if enacted in this Act; and any enactment inconsistent therewith shall, so far as it is so inconsistent, be repealed.

(2) It shall be lawful for Her Majesty in Council, in approving rules made under this section, to declare that the rules so made with respect to any matters which appear to Her Majesty to be matters of detail or of local concern may be revoked, varied or added to, without the approval required by this section.

(3) Such rules may provide for the exercise of any jurisdiction conferred by this Act by the full Court, or by any Judge or Judges thereof, and subject to any rules, where the ordinary civil jurisdiction of the Court can, in any case, be exercised by a single Judge, any jurisdiction conferred by this Act may, in the like case, be exercised by a single Judge.

And The Admiralty Act (54 & 55 Vict., c. 29) provides:

25. Any rules or orders of Court made by the Exchequer Court of Canada for regulating the procedure and practice

therein (including fees and costs), in the exercise of the jurisdiction conferred by The Colonial Courts of Admiralty Act, 1890, and this Act, which require the approval of Her Majesty in Council, shall be submitted to the Governor in Council for his approval, and, if approved by him, shall be transmitted to Her Majesty in Council for Her approval.

This provision is now found in sec. 23 of The Admiralty Act (R. S. C. 1906, cap. 141).

In accordance with the statutory authority so conferred Imperial Orders in Council have been made on the 15th of March, 1893, and the 25th of June, 1903, as follows:

AT THE COURT OF WINDSOR,

The 15th day of March, 1893.

Order in Council 15th of March, 1893.

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY.

Lord President,
Lord Chamberlain,
Mr. Bryce.

Whereas *there was this day read at the Board a Memorial from the Right Honourable the Lords Commissioners of the Admiralty, dated the 24th day of February, 1893, in the words following, viz.:—*

"Whereas by an Act passed in the fifty-fourth year of Your Majesty's reign, entitled, The Colonial Courts of Admiralty Act, 1890, it was, amongst other things, provided that Rules of Court for regulating the procedure and practice (including fees and costs) in a Court in a British possession in the exercise of the jurisdiction conferred by this Act, whether original or appellate, may be made by the same authority and in the same manner as rules touching the practice, procedure, fees, and costs in the said Court in the exercise of its ordinary civil jurisdiction respectively, are made, but that such rules of Court shall not come into operation until they have been approved by Your Majesty in Council, but on coming into operation shall have full effect as if enacted in the said Act.

"And whereas it appears to Us and to Your Majesty's Secretary of State for the Colonies to be expedient that the Rules of Court hereto annexed, having been duly prepared by

the proper Authority as required by the said Act, should be established and be in force in the Exchequer Court of Canada in its Admiralty jurisdiction.

"And whereas the provisions of sub-section 2 of section 7 of the aforesaid Act empower Your Majesty in Council in approving rules made under this section to declare that the rules so made with respect to any matters which appear to Your Majesty to be matters of detail or of local concern may be revoked, varied, or added to, without the approval required by this section.

"And whereas it appears to Us that Rules 158 to 176 relating to appeals from the judgment or order of a local Judge in Admiralty to the Exchequer Court: Rule 224, as to cases in which half fees only should be allowed; and the Tables of Fees appended to the Rules should be considered to come within the scope of the sub-section in question, and be declared to be subject to revocation, variation or addition, without the approval of Your Majesty in Council.

"Now, therefore, We beg leave humbly to recommend that Your Majesty will be graciously pleased by Your Order in Council to direct that the Rules of Court hereto annexed shall be the Rules of Court for the said Exchequer Court of Canada in its Admiralty jurisdiction, and shall be established and be in force in the said Court, and to declare that Rules 158 to 176 (both inclusive), Rule 224, and the Tables of Fees appended to the Rules may be revoked, varied or added to without the approval of Your Majesty in Council."

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 to direct that the Rules of Court hereto annexed shall be the Rules of Court for the said Exchequer Court of Canada in its Admiralty jurisdiction and shall be established and be in force in the said Court, and to declare that Rules 158 to 176 (both inclusive), Rule 224, and the Tables of Fees appended to the Rules may be revoked, varied, or added to, without the approval of Her Majesty in Council. And the Right Honourable the Lords Commissioners of the Admiralty are to give the necessary direction herein accordingly.

C. L. PEEL.

AT THE COURT AT BUCKINGHAM PALACE,

The 25th day of June, 1903.

Order in Counil 25th June, 1903.

PRESENT:

THE KING'S MOST EXCELLENT MAJESTY.

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 June, 1903, in the words following, viz.:—

Whereas by an Order in Council of Her late Majesty bearing date the 15th day of March, 1893, the Rules of Court thereto annexed were established as the Rules of Court for the Exchequer Court of Canada in its Admiralty jurisdiction; and whereas it appears to us expedient that Rule 37 of the aforesaid Rules of Court, whereby it is amongst other things required that, in an action for necessaries supplied to a ship elsewhere than in the port to which she belongs, the affidavit leading to the warrant shall state to the best of the deponent's belief that no owner or part owner of the ship was domiciled within Canada at the time the necessaries were supplied, shall be amended so as to conform to the provisions of The Admiralty Act of 1861 (as extended to the Exchequer Court of Canada by The Colonial Courts of Admiralty Act, 1890) whereby jurisdiction is given to entertain such actions for necessaries upon it being shewn to the satisfaction of the Court that at the time of the institution of the cause no owner or part owner of the ship is domiciled in Canada.

We beg leave humbly to recommend that Your Majesty will be graciously pleased by Your Order in Council to direct that the present clause (b) of Rule 37 of the Rules of Court for the Exchequer Court of Canada shall be rescinded and that the following clause which has been duly prepared by the proper authority as required by the said Colonial Courts of Admiralty Act, 1890, and by the Admiralty Act, 1891 (Canada) shall be substituted therefor:—

'(*b*) In an action for necessaries the national character of the ship, and that to the best of the deponent's belief no owner or part owner of the ship is domiciled in Canada at the time of the institution of the action.'

Your Majesty's Principal Secretary of State for the Colonies has signified his concurrence herein.

His Majesty, having taken the said memorial into consideration, was pleased, by and with the advice of His 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.

A. W. FITZROY.

These documents and the accompanying Canadian Orders and Notices appear in the *Canada Gazette* of the 10th of June, 1893, and the 15th of August, 1903.

GENERAL RULES AND ORDERS

REGULATING THE

PRACTICE AND PROCEDURE IN

ADMIRALTY CASES IN THE EXCHEQUER COURT OF CANADA.

In pursuance of the provisions of The Colonial Courts of Admiralty Act, 1890, and of The Admiralty Act, 1891, (Canada), it is ordered that the following Rules of Court for regulating the practice and procedure (including fees and costs) of the Exchequer Court of Canada in the exercise of its jurisdiction, powers and authority as a Court of Admiralty shall be in force in the said Court.

Interpretation.

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:—

Singular or plural number.

(*a*) Words importing the singular number include the plural number, and words importing the plural number include the singular number;

Masculine gender.

(*b*) Words importing the masculine gender include females;

District.

(*c*) "District" shall mean an Admiralty district constituted by or by virtue of The Admiralty Act, 1891;

and in respect of proceedings in the registry of the Court at Ottawa shall include the whole of Canada;

(*d*) "Court" or "Exchequer Court" shall mean the Exchequer Court of Canada; Court.

(*e*) "Registry" shall mean the registry of the Court, or any district registry thereof; Registry.

(*f*) "Judge" shall mean the Judge of the Court, or a local Judge in Admiralty of the Court, or any person lawfully authorized to act as Judge thereof; Judge.

(*g*) "Registrar" shall mean the registrar of the Court, or any deputy, assistant or district registrar thereof; Registrar

(*h*) "Marshal" shall mean the marshal of the Court, or any deputy, assistant or district marshal thereof, or any sheriff or coroner authorized to perform the duties and functions of a sheriff in connection with the Court; Marshal.

(*i*) "Action" shall mean any action, cause, suit, or other proceeding instituted in the Court; Action.

(*j*) "Counsel" shall mean any advocate, barrister-at-law, or other person entitled to practice in the Court; Counsel.

(*k*) "Solicitor" shall mean any proctor, solicitor or attorney entitled to practice in the Court; Solicitor.

(*l*) "Plaintiff" shall include the plaintiff's solicitor, if he sues by a solicitor; Plaintiff.

(*m*) "Defendant" shall include the defendant's solicitor, if he appears by a solicitor; Defendant.

(*n*) "Party" shall include the party's solicitor, if he sues or appears by a solicitor; Party.

(*o*) "Person" or "party" shall include body corporate or politic; Person or party.

(*p*) "Ship" shall include every description of vessel used in navigation not propelled by oars only; Ship.

(*q*) "Month" shall mean calendar month. Month.

Actions.

2. Actions shall be of two kinds, actions *in rem* and actions *in personam*. Actions of two kinds.

With very few exceptions, any of the causes of action enumerated in the last chapter may be prosecuted by proceedings *in rem* or *in personam* (*The Raven,* 9 Ex. C. R. 404; 11 *In rem* or *in personam.*

Exceptions. Bottomry.

B. C. R. 486). The only exceptions to this rule are the cause of bottomry, an essential condition of the validity of which is that the element of personal security should be absent and that the bond should be void if the ship perish in itinere; and those cases where the existing owners have purchased the vessel by a voluntary sale from the former owner in good faith for value and without notice of the liens which have previously attached: in such cases the maritime lien travels with the thing into whosesoever possession it may come, but there is of course no personal liability in the new owner, though if the former owner were originally liable he would remain so.

Salvage.

Furthermore, although causes of salvage may be instituted *in rem* or *in personam*, it is a condition precedent to the right to recover salvage that some property or interest in property should have been saved.

Joinder of actions *in rem* and *in personam*.

It is not permissible to engraft proceedings *in rem* upon proceedings *in personam* (*The Hope*, 1 W. Rob. 154; *The Volant, ibid.*, 383), nor to join an action *in rem* with an action *in personam* (*The Buckeye State*, 12 Ex. C. R. 429); but, as has been pointed out above, the Court will allow a plaintiff who has obtained a decree in an action *in rem*, on his commencing an action *in personam* in the regular manner, to recover damages unsatisfied by the proceedings *in rem* (*The Orient*, L. R. 3 P. C. 696).

Concurrent remedies. *Res judicata.* *Castrique v. Imrie.*

The question of pursuing concurrent remedies *in personam* and *in rem* presents some difficulties. In the first place, it is clear that the judgment in an action *in rem*, whether of a domestic or of a foreign tribunal is conclusive and binding upon all the world as to the status of the thing adjudicated upon (*Castrique* v. *Imrie*, L. R. 4 E. & I. App. 414; *Minna Craig S.S. Co.* v. *Chartered Mercantile Bank of India, London & China*, 1897, 1 Q. B. 460): again wherever facts relative to a cause of action have been conclusively found by a competent tribunal in a proceeding to which the owners of ships are parties, whether the proceedings are in form *in personam* or *in rem*, the facts so found must, it is submitted, be regarded as *res judicata*, and if the finding is properly pleaded the facts found cannot again be made the subject of renewed litigation between the same parties in any form of proceeding. Moreover, "if a party were plaintiff in (the Admiralty) Court *in rem*, and the Court were satisfied by proof that there had been a judgment or proceeding on the same question *in personam*, the party proceeding here having been the plaintiff in the other

Court, this Court would not allow the suit to proceed, and that too, whether the proceedings *in personam* had been in a British or a foreign Court, provided always that the case did not fall within certain exceptions to the plea of *res judicata*" (*per* Dr. Lushington in *The Griefswald,* Sw. 430, at p. 435): in the last case it was held that a defendant relying on the judgment of a tribunal, summoned by a foreign consular Court, as a bar to the plaintiff proceeding in the Admiralty Court, was bound to prove that the tribunal had jurisdiction by treaty, usage, or voluntary submission. In *The Hattie and Lottie* (9 Ex. C. R. 11) the ship which was the subject of the proceedings was registered in an American port and owned by American citizens resident in the United States: by the judgment of a competent Court in the United States, the rights of two of the present defendants in the ship were finally adjudicated upon: the present plaintiff was the owner of seventeen shares in the ship and had notice of the suit in the American Court between these two defendants, and subsequently took part in some negotiations for the settlement of the claims of both: he then instituted proceedings in the Admiralty Court to obtain possession of the vessel while in a Canadian port, together with certain relief against one of the defendants: but it was held that, as by the proceedings taken in the Admiralty Court, the plaintiff sought to derogate from rights obtained by one of the parties under the judgment of a competent Court in the United States, the action must be dismissed.

The Griefswald.

The Hattie and Lottie.

Beyond this, however, it is doubtful how far the pendency of proceedings in another Court is a bar to a suit in the Admiralty Court. In *The Bold Buccleugh* (7 Moo. P. C. C. 267), a Scotch steamer ran down an English vessel in the Humber: an action was commenced in the Court of Admiralty in England by the owners of the English vessel, against the owners of the steamer, and a warrant of arrest issued against the steamer; but before she could be arrested, she had sailed for Scotland: a suit was then commenced by the owners of the English vessel against the owners of the steamer, in the Court of Sessions in Scotland, for the damage, and the steamer was arrested under process of that Court, but subsequently released upon bail: the proceedings in the Court of Sessions were still pending, when the steamer, having come within the jurisdiction of England, was again arrested under process of the High Court of Admiralty in England, and an action for damage commenced in that Court, for the same cause of action as was still pending in

Lis alibi pendens.

The Bold Buccleugh.

Scotland, instructions being sent to Scotland to abandon the proceedings in the Court of Sessions: on a plea of *lis alibi pendens*, it was held that the plea was bad, as the suit in Scotland was, in the first instance, *in personam*, the proceedings being commenced by process against the persons of the owners of the steamer, and the arrest of the vessel being only collateral to secure the debt, while the proceedings in the Admiralty Court were, in the first instance, *in rem*, against the vessel, and therefore, the two suits, being in their nature different, the pendency of the one suit could not be pleaded in suspension of the other.

The Peshawur. Where, in an action of damage *in personam* by the owners of *The Glenroy* against the owners of *The Peshawur*, it appeared that a cause of damage *in rem* relating to the same collision had prior to the institution of proceedings in the Admiralty Court, been instituted by the owners of *The Peshawur* against *The Glenroy* in a Vice-Admiralty Court abroad, and was then pending; the Court, on the application of the owners of *The Peshawur*, stayed the proceedings in the Admiralty Court until after the hearing of the cause in the Vice-Admiralty Court abroad (*The Peshawur*, 8 P. D. 32).

The Mali Ivo. In *The Mali Ivo* (L. R. 2 A. & E. 356), it was laid down by Sir Robert Phillimore that where there is a *lis alibi pendens* before a tribunal able to afford the plaintiff a complete remedy, whether the proceedings be *in rem* or *in personam*, the Court will suspend the proceedings, or put the party to his election as to which Court he will have recourse to.

The Christiansborg. In *The Christiansborg* (10 P. D. 141), the plaintiffs, the owners of the German vessel *Jessica*, commenced an action *in rem* against the Danish vessel *Christiansborg* in an Admiralty Court in Holland, in respect of a collision on the high seas, and *The Christiansborg* was arrested in this action: the plaintiff's agent in Holland and the Dutch Court allowed *The Christiansborg* to be released on the underwriters guaranteeing to the parties interested the compensation which *The Christiansborg* might eventually have to pay by decision of the Dutch Court: while these proceedings were pending in Holland, the plaintiffs began an action *in rem* in England in respect of the same collision, and *The Christiansborg* was arrested in the English action. It was held by Sir James Hannen and the majority of the Court of Appeal that *The Christiansborg* ought to be released, as it was *prima facie* oppressive to institute an action in another Court in respect of the same subject matter when there was no

evidence that the Court, in which the action was first brought, would not do full justice to the plaintiff.

The A. L. Smith and The Chinook.

The reasons for withholding the exercise of jurisdiction while proceedings are pending in a competent tribunal in which the plaintiffs have the right and opportunity to have their claim adjudicated have very recently been exhaustively discussed by Anglin, J., in *The A. L. Smith and The Chinook* (51 S. C. R. at pp. 76, *et seq.*).

Action *in rem*.

The action *in rem* is brought to enforce a maritime lien, or in pursuance of some special statutory provision authorizing the arrest of the *res*.

To enforce maritime lien.

The institution of such an action is the only way in which a maritime lien can be enforced, for it is not recognized in any but Courts of Admiralty, and the party in whose favour the lien exists cannot of his own power and authority sell the *res* or any part of it, or even take or retain possession of it under his hypothecal title (*The Brig Nestor,* 1 Sumner 78; *The Repulse,* 4 Notes of Cases 169; *The Tobago,* 5 C. Rob. 218). It is by virtue of their possessory, and not of their maritime lien that salvors are enabled to hold possession of the thing salved, but such possessory lien is not to be unreasonably availed of, and the remedy by proceeding *in rem* to enforce the maritime lien is so complete that any attempt on the salvor's part to retain exclusive possession by virtue of his possessory lien of the thing salved is severely discouraged, and unless the salvor can show that the *res* was derelict (*Cossman* v. *West,* 13 A. C. 160, at p. 181) or that by giving up possession he would have jeopardized his security (*The Glasgow Packet,* 2 W. Rob. 306, 312, 313), or that special circumstances justified the retention (*The Pinnas,* 6 Asp. M. C. 313; *The Elise,* 1899, W. N. 54), the Court will mark its dissatisfaction by diminishing the reward (*The Glasgow Packet, ubi supra*), or by condemning him in costs (*The Pinnas, ubi supra*), or even by withholding all reward whatsoever (*The Champion,* Br. & L. 69; *The Capella,* 1892, P. 70).

Detention of *res*.

Incidents of maritime lien.

The distinctive characteristics of a maritime lien on the one hand, and of the right of arrest conferred by statute on the other have been already adverted to in the first chapter: but it may be convenient to refer again shortly to some of the most prominent qualities of a maritime lien of a procedural character.

Attachment of lien to whole *res*.

The application of the lien to the *res* in universal: it is not limited to any part of the *res*, but covers the whole of it, one part as well as another, and no one part more than another (*The Neptune*, 1 Hagg. at p. 238): all ameliorations and repairs made by the parties liable to the claim subsequently to the attaching of the lien, are considered as accretions to the *res* and are equally liable, but if they have been made at the expense of a third party, his rights will be regarded by the Court (*The Aline*, 1 W. Rob. at pp. 119, 120; *The Gleniffer*, 3 Ex. C. R. 57). So, too, if the lien, as it may do, attaches on ship, cargo, and freight, they are all severally bound until full payment of the claim, though each of them may be sufficient of itself for payment (*The Bonaparte*, 7 Notes of Cases Suppl. lv.). The lien on cargo created by *respondentia* remains, although the cargo be trans-shipped into another vessel.

To ship freight, and cargo.

Unassignable.

Save in certain exceptional cases, a maritime lien for other causes than bottomry, is inalienable, and an attempted assignment does not vest in the assignee any right to proceed *in rem* (*The City of Manitowoc*, Cook 178): the exceptions have been noticed above (pp. 54, 166).

Extinction by laches, by payment, by giving bail, by loss of *res*, by sale, by making security.

A maritime lien is not indelible, and it may be lost by delay to enforce it when the rights of third parties have intervened (*The Haidee*, 2 Stuart 25). It may also be extinguished by payment; by bail being given (*The Christiansborg*, 10 P. D. 141: *The Kalamazoo*, 15 Jur. 886; *The Wild Ranger*, Br. & L. 87); by loss or destruction of the *res*; by a sale of the *res* under the authority of the Court of Admiralty; by the creditor electing to take and taking a security instead of payment in cash (*The William Money*, 2 Hagg. 136); and in the case of bottomry, by an agreement to postpone payment of the bond (*The Royal Arch*, Sw. 269).

What does not extinguish lien.

It is not affected by an extrajudicial sale to a *bona fide* purchaser for value without notice (*The Bold Buccleugh*, 7 Moo. P. C. C. 267); or by an agreement to refer (*The Purisima Concepcion*, 7 Notes of Cases 150); or by a release of the owner (*The Chieftain*, Br. & L. 215); or by the receipt of a promissory note from co-owners which has not been paid (*The Aura*, Young 54); or by the receipt of the promissory note of the managing owner who becomes insolvent before payment (*The Plover*, Stockton 129, and note thereto).

The most marked distinction between the incidents of a maritime lien and a mere statutory right of arrest flows from the principle that a maritime lien has effect from the moment

the event happens, giving rise to the lien, while the rights of a creditor proceeding against a ship by virtue of a statutory right of arrest are fixed at the moment of seizure (*The Henrich Bjorn,* 11 A. C. at p. 277). The important consequences as regards questions of priority have already been noticed (*supra,* pp. 55, 67, 72, 83, 102).

Action in name of Crown.

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.

Actions to be numbered.

4. All actions shall be entitled in the Court, and 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 the Court and of the title of an action will be found in the appendix hereto, Nos. 1, 2, 3 and 4.

Place for institution of action.

The place where an action may be instituted is determined by The Admiralty Act (R. S. C. 1906, cap. 141, secs. 18 and 19):

18. Any suit may be instituted in any registry when—

(*a*) The ship or property, the subject of the suit, is at the time of the institution of the suit within the district or division of such registry;

(*b*) The owner or owners of the ship or property, or the owner or owners of the larger number of shares in the ship, or the managing owner or the ship's husband reside at the time of the institution of the suit within the district or division of such registry;

(*c*) The port of registry of the ship is within the district or division of such registry; or—

(*d*) The parties so agree by a memorandum signed by them or by their attorneys or agents:

(2) When a suit has been instituted in any registry, no further suit shall be instituted in respect of the same matter in any other registry of the Court, without the leave of the Judge of the Court, which leave may be granted subject to such terms, as to costs and otherwise, as he directs.

19. When in any district there are more registries than one, all proceedings in any suit shall be carried on in the registry in which the suit is instituted, unless the Judge shall otherwise order.

(2) Any party to a suit may, at any stage of such suit by leave of the Court, and subject to such terms as to costs or otherwise as the Court directs, remove such suit pending in any registry to any other registry.

The power of removal given to the Court is not confined to removal from one registry to another registry within the same district; and a local Judge has jurisdiction to order the transfer of an action from the registry in his district to the registry of another Admiralty District in Canada (*The Norwalk,* 11 Ex. C. R. 320).

Districts. Section 6 of the Admiralty Act gives power to the Governor in Council to create and change Admiralty districts.

The presently existing districts are:

(i) The Province of Ontario, called The Toronto Admiralty District, with a registry at the city of Toronto.

(ii) The Province of Quebec, with a registry at the city of Quebec.

(iii) The Province of Nova Scotia, with a registry at the city of Halifax.

(iv) The Province of New Brunswick, with a registry at the city of St. John.

(v) The Province of British Columbia, with a registry at the city of Victoria.

(vi) The Province of Prince Edward Island, with a registry at the city of Charlottetown.

(vii) The Yukon Territory, with a registry at the city of Dawson.

There is at present only one registry in the Admiralty District of Quebec, the office at Montreal being merely an annex to the registry at Quebec, and there is therefore nothing to prevent a further proceeding being instituted in the office of the Deputy Registrar at Montreal in respect of the same matter in which prior proceedings have been instituted in the registry at Quebec (*The Gaspesien,* 11 Ex. C. R. 220).

Writ of Summons.

Writ to be indorsed with statement, &c. 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. 5, 6, 7, 9 and 10.

Style of cause.

The first difference to be noted between the practice of actions *in rem* and actions *in personam* is as to the style of cause in the writ of summons: an action *in personam* is described on the face of the writ as an action between the plaintiffs and defendants by name, except in the case of actions of limitation of liability, while an action *in rem* is described on the face of the writ as an action between the plaintiffs and the owners of the property proceeded against.

Subjects of action.

The indorsement on the writ distinguishes the nature of the lien, or the claim, as the case may be, and describes the *res* to which the lien attaches, or against which a statutory right has been conferred. Actions for salvage are brought against the salved vessel, cargo, and freight, or where there has been no cargo, against the vessel alone: actions for damage are brought against the ship and freight, if the offending vessel was laden at the time of the collision: actions for wages are brought against the vessel and freight, if the ship was laden at the time of the completion of the contract: actions on bottormy bonds are brought against the ship, or the ship and freight, according as one or both were hypothecated: actions on *respondentia* bonds are brought against the cargo: bottomry bonds may also cover ship, freight, and cargo, in which case the action is brought against all three: all other actions are brought against the ship alone.

Amount claimed.

The amount claimed is the sum calculated to be equal to the joint amount of the asserted lien or claim, with interest in proper cases, and of the estimated amount of costs: the amount should be reasonable, for the Court discourages exorbitant claims (*The Earl Grey,* 1 Spks. 180), and may, on the defendant's application reduce the amount for the purpose of taking bail (*The Dundee,* 1 Hagg. 125). If the amount claimed proves, during the proceedings, to be too small, the Court will increase the amount, on the plaintiff's application on terms (*The Meander,* Br. & L. 29; *The Johannes,* L. R. 3 A. & E. 127); and will also give leave to re-arrest the ship (*The Hero,* Br. & L. 447).

Increasing amount.

Indorsement may include claim to have an account taken.

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 mortgage action, 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.

See Rule 117 (*infra*).

Application for account.

By Rule 228 (*infra*), in all cases not provided for, the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England is to be followed. It is provided by Order XV. of the Rules of the Supreme Court (English), 1883, that if the defendant in an action where the writ is indorsed for an account, fails to appear, the plaintiff may apply for an order for the proper accounts, with all inquiries and directions usual in the Chancery Division in similar cases and thereupon an order shall forthwith be made.

Where an action is instituted by part owners against the managing owners for an account, and the indorsement on the writ claims an account, and an order for the filing of the accounts is made, and the account is proceeded with pursuant to order, and the registrar reports thereon, such report is to be treated as the usual report in an Admiralty action, and if the defendant seeks to take objection thereto, he must do so according to the provisions of Rule 129 (*infra*), otherwise the plaintiff will be entitled to judgment thereon. The Court will not extend the time for objecting to the report in a co-ownership action without special grounds being shown by the party seeking to object. It is too late to object to the order for accounts after the report, there having been no appeal against the order (*Gowan* v. *Sprott*, 5 Asp. M. C. 288).

The application for an order for accounts must be made by motion, and must, when necessary, be supported by an affidavit filed on behalf of the plaintiff, stating concisely the grounds of his claim to an account (Rule 80, *infra*).

Address for service to be indorsed.

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.

Preparation and issue of writ.

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.

Amendment of writ and indorsements.

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.

Parties.

Number of persons may be joined.

29. 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.

Adding a person interested.

30. 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.

Underwriter deemed a person interested.

31. For the purposes of the last preceding rule an underwriter or insurer shall be deemed to be a person interested in the action.

Terms upon which person may be made a party.

32. 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.

It seems better to deal with these rules together, as they treat of the proper constitution of the action, and the form of the writ.

Joinder of parties.

The effect of this fasciculus of rules seems to be the same as the old practice of the High Court of Admiralty in England. By that practice any number of parties might join as plaintiffs in an action, provided they had a common interest in the litigation, and it was sufficient to describe them as the owners of a ship or cargo or as the crew of a ship. "There is no doubt that the practice of this Court has been that all the persons interested in a salvage service might be joined together in one suit for the purpose of obtaining the reward for those services, and so also in collision cases, all those persons who had an interest in the ship which was damaged could be joined: in seamen's suits for wages, the same thing applied: the practice is based on convenience" (*The Maréchal Suchet,* 1896, P., at p. 236). "There is undoubtedly an old practice in the Admiralty Court of great value which enables the owners of a ship or cargo in any Admiralty action to sue as such . . . the Court of Admiralty allowed it for a very good reason, because what they were really dealing with was one ship against another, and so long as you had the names of the vessels you had really all that was material" (*The Assunta,* 1902, P., at p. 154).

Description of plaintiffs.

At first sight the requirement in Rule 7 that the writ shall be indorsed with the name and address of the plaintiff would

seem to create a difficulty in cases where the number of plaintiffs is great, and, as in the case of the crew, of a salving vessel, their names and addresses may be difficult of ascertainment; but a reference to the definition clause and the forms given in the appendix dissipates the difficulty: by Rule 1 plaintiff shall include the plaintiff's solicitor, if he sues by a solicitor; and Form No. 9 of "indorsements to be made on the writ before issue thereof" runs as follows:

> This writ was issued by the plaintiff in person, who resides at (state plaintiff's place of residence, with name of street and number of house, if any);
>
> OR,
>
> This writ was issued by C. D. of (state place of business) solicitor for the plaintiff.

As the prescribed form of indorsement is thus in the disjunctive, it is clear that where the plaintiffs sue by a solicitor it is not necessary to indorse the names and addresses of the plaintiffs: and the effect of Rule 7, together with the definition of the word plaintiff and the example given in the form, appears to be to preserve another part of the ancient practice of the Court, stated by Dr. Lushington in *The Wilhelmine* (1 W. Rob., at p. 337), a passage which was quoted with approval in *The Euxine* (L. R. 4 P. C. 8): "For a period of probably not less than 200 years, proctors have been permitted to appear on behalf of parties suing, without being called upon to exhibit any proxy . . . but . . . at any period of the cause . . . the Court has a right to call upon the proctor to state, not generally but specifically by name the whole of the parties for whom he is authorized to appear."

Partners.

The writ, therefore, should set out the names of the plaintiffs, and in the case of partners, the name of the firm, since, apparently, Order XLVIII. A. applies to Admiralty actions (*The Assunta,* 1902, P. 150, Rule 13), or if the plaintiffs are the owners, masters or crew of a ship, or the owners of property, and are proceeding as such owners or crew, it is sufficient so to describe them (*The Maréchal Suchet,* 1896, P. 233; *The Assunta, ubi supra; The Christine,* 11 Ex. C. R. 167).

The fact that the plaintiff and the defendant are partners, and that the suit relates to a partnership transaction will not prevent the Court entertaining the suit (*The Repulse,* 4 Notes of Cases 172; *The West Friesland,* Sw. 454).

Beneficial owner. The beneficial owner of a ship may sue, though the ship is registered in the name of another party (*The Ilos*, Sw. 100).

Indorsers of bills of lading. Where the plaintiffs in an action for damage to cargo had indorsed their bills of lading to a bank to secure advances, it was held that they retained an interest in the cargo sufficient to enable them to maintain their suit, the money recovered to be for the benefit of the parties shown to be entitled thereto (*The Glamorganshire*, 13 A. C. 454). The style of cause of this action is set out in the report and exemplifies the principles discussed above: it ran as follows:—

The Master, Owners and Crew of the American Ship "*Clarissa B. Carver*," plaintiffs,
and
The Owners of the British Steamship "*Glamorganshire*," defendants.

Intervention. Rules 30, 31 and 32 preserve the old practice as to intervention, which is embodied in the English Rules of the Supreme Court, 1883 (Order XIII., Rule 24): parties entitled to intervene have been held to be mortgagees (*The Regina del Mare*, Br. & L. 315, at p. 316; *The Louisa*, Br. & L. 59; *The Caledonia*, Sw. 17; *The Eastern Belle*, 3 Asp. M. C. 19; *The Tagus*, 1903, P. 44; *The Orienta*, 1894, P. 271); trustees in bankruptcy (*The Dowthorpe*, 2 W. Rob. 77; *The Riga*, L. R. 3 A. & E. 516); underwriters (*The Regina del Mare*, *ubi supra*); persons having possessory liens (*The Immacolata Concezione*, 8 P. D. 34, at p. 36); or competing maritime liens (*The Linda Flor*, Sw. 309; *The Veritas*, 1901, P. 304, at p. 308); and generally persons who are plaintiffs in other actions *in rem* against the same property (*The Chioggia*, 1898, P. 1, at p. 3; *The Two Ellens*, L. R. 3 A. & E. 345, at p. 355; *The Diana*, 2 Asp. M. C. 366). Where a bottomry bond had been granted on ship, freight and cargo, and the seamen were suing the ship and freight for wages, and claimed to have their wages paid in preference to the bond, the owners of the cargo were allowed to appear and defend in the wages suit, inasmuch as the claim for wages might throw a portion of the claim under the bond on the cargo, which otherwise would have been satisfied out of the ship and freight (*The Union*, Lush. 128). Where a bottomry suit was instituted against a ship, and the ship was sold, the bottomry bondholders were allowed to appear and defend a suit afterwards instituted for necessaries against the proceeds (*The India*, 32 L. J. Ad. 185). The

Parties added by the Court.

charterer may be the proper plaintiff in a salvage cause; as if the charterparty amounted to a demise (*The Scout*, L. R. 3 A. & E. 512). Where the registered owner was a mere cloak for evading the provisions of the Merchant Shipping Acts, the Court ordered the real owners to be made parties (*The Annandale*, 37 L. T. 364). Where an action *in rem* was brought for possession and an account, and no appearance was entered, the Court ordered the managing owner, from whom the account was sought, to be added as a defendant (*The Native Pearl*, 37 L. T. 542). But the Court will not add parties as defendants *in personam* in an action *in rem* (*The Bowesfield*, 51 L. T. 128).

Third party procedure.

There is no provision in the rules for bringing in third parties, and it would seem, therefore, that the English practice under Order XVI., Rules 48, *et seq.*, would be applicable (Rule 228). There is a decision, however, that no order can be made for the issue of a third party notice, where the party sought to be brought in is out of the jurisdiction (*The Pollux*, 11 Ex. C. R. 210). If the English practice applies, it is limited to claims for contribution or indemnity under a contract express or implied, and does not extend to every cause of action which the defendants may be able to assert (*The Jacob Christensen*, 1895, P. 281). The owners of property which has been completely lost cannot be called on to contribute to a salvage remuneration awarded against the owners of property which has been saved (*The Cargo ex Sarpedon*, 3 P. D. 28). In *The Bianca* (8 P. D. 91), an attempt was made, in a collision action, to bring in the tug which was towing the offending ship, but the Court refused to give directions on the ground that questions might arise between the defendants and the third parties different from those to be determined between the plaintiffs and defendants: it would now probably be held that, in the absence of express agreement, the contract of towage does not contain an implied contract to indemnify.

Wrong plaintiff.

In an action *in personam* for damage by collision, the name of the agent, instead of that of the owner of the cargo on board the plaintiff's vessel was, by a *bona fide* mistake, inserted in the writ as co-plaintiff. The case was carried to the House of Lords, with the result that the defendant's vessel was held to blame, and a decree made in favour of the plaintiffs: the mistake was then discovered, and to enable the claim of the cargo-owner for damages to be assessed, an order was made substituting the name of the owner of the cargo for that of his agent

(*The Duke of Buccleuch*, 1892, P. 201). In this case the consent of the cargo owner to be added as plaintiff was required, but it is doubtful whether this is necessary under Rule 30.

Infant plaintiff. A minor sues in the Admiralty Court by proxy (*The Albert Crosby*, Lush. 44).

Amendment. Rule 9 gives the widest powers to the Court as to amendments of the writ. In *The Dictator* (1892, P. 64), the plaintiff was allowed to amend after judgment by increasing the amount claimed.

Possession by mortgagee. If the dealings with a ship by the mortgagor are such as to jeopardize the security, the mortgagee may take possession although there has been no actual default on the part of the mortgagor under the mortgage, and although the mortgagee has not commenced any formal proceedings (*The Manor*, 1907, P. 339).

After the issue of the writ, a signed copy must be left in the registry, accompanied by a minute of filing (Rule 202).

The writ must be served within twelve months from the date thereof (Rule 17).

Concurrent writs. No express provision is made for the issue of concurrent writ, and therefore, under the English Rules of the Supreme Court, 1883 (Order VI., Rule 1), at the time of, or during twelve months after, the issue of the original writ, the plaintiff may issue one or more concurrent writ or writs, which when issued remain in force for the period during which the original writ is in force.

Service of Writ of Summons.

Service in action *in rem*. 10. In an action *in rem*, the writ of summons shall be served—

(*a*) **Upon ship or cargo, &c., on board ship.** 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 main-mast 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, &c., not on board ship.** 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.** 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.

If access cannot be obtained.

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.

Service in action *in personam.*

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.

Upon member or manager of firm.

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.

Upon a corporation or, &c.

Upon mayor or, &c.

14. 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.

Or in other mode, &c.

15. A writ of summons against a corporation or a public company may be served in any other mode provided by law for service of any other writ or legal process upon such corporation or company.

If person to be served is under disability, or, &c.

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.

Writ may be served by plaintiff or his agent within 12 months.

17. The writ of summons, whether *in rem* or *in personam,* may be served by the plaintiff or his agent within twelve months from the date thereof, and shall, after service, be filed with an affidavit of such service.

Affidavit of service.

18. The affidavit shall state the date and mode of service and shall be signed by the person who served the writ. A form of affidavit of service will be found in the appendix hereto, No. 11.

Undertaking in lieu of service.

19. No service of a writ or warrant shall be required when the defendant by his solicitor undertakes in writing to accept service thereof and enter an appearance thereto, or to put in

bail, or to pay money into Court in lieu of bail; and any solicitor not entering an appearance or putting in bail or paying money into Court in lieu of bail in pursuance of his written undertaking so to do, shall be liable to attachment.

Notice to all the world.

Under the old practice, where the warrant of arrest was in its form citatory, service of the warrant in the prescribed form was equivalent to a notice given to all the world of the suit (*The Dowthorpe,* 2 W. Rob., at p. 80), and under the present practice it seems that service of a writ of summons in the prescribed manner has the same effect, but service of the writ on the captain of the ship on board the ship, and the nailing of the warrant of arrest on the mast, are not sufficient notice of a suit *in rem* against the ship to all whom it may concern (*The Marie Constance,* 5 Asp. M. C. 505).

Person to serve writ.

The writ may be served before, at the time of, or after service of the warrant of arrest; and while the warrant must be served by the marshal or his officer (Rule 41), it seems that the writ may be served by the solicitor or his clerk or some one other than the marshal or his substitutes, although it is doubtful whether anyone other than the marshal and his officers has a right to go on board a ship, and nail a writ of summons on the mast (*The Solis,* 10 P. D. 62). Service of the writ is proved by affidavit (Rules 17, 18), while service of the warrant is proved by certificate (Rules 43, 44). The rules do not expressly require an indorsement on the writ of the day of the month and week of the service thereof, but, in view of Rule 228 and the English Rules of the Supreme Court, 1883, Order IX., Rule 15, it would be unwise to omit to do so.

Civic time.

In the service of its process as well as in its sittings and in the public hours of its registry, the Court will be guided by the civic time in use in the town where the Court sits, unless it is made to appear that such time is in fact incorrect (*The Abby Palmer,* 8 Ex. C. R. 470; 10 B. C. R. 381).

Amended writ.

An amended writ must be served in the same way as if it had been an original writ (*The Cassiopeia,* 4 P. D. 188).

When the writ in an action *in rem* has been served and filed, and afterwards the ship is sold and the proceeds brought into Court, and the writ is amended, it must be served on the registrar in the manner provided in Rule 10 (*d*) (*The Cassiopeia, ubi supra*). But service on the Registrar need not be verified by affidavit (*The Proceeds of the Berèngere,* 1905, W. N. 18).

Where in a collision action *in rem* solicitors for the defendants accepted service of the writ, and indorsed it with these words: "We accept service on behalf of the defendants, the owners of the (ship), and undertake to put in bail in a sum not exceeding the value of the said barque"; and in consequence of their authority being withdrawn by the defendants they did not enter an appearance, it was held that they did not thereby commit a breach of their undertaking so as to render themselves liable to attachment, inasmuch as they had never expressly undertaken to appear (*The Anna and Bertha,* 7 Asp. M. C. 31).

Order XXIX., Rule 14, of the English Rules of the Supreme Court, 1883, provides: A solicitor, commencing an action against any property in respect of which a *caveat* has been entered in the Caveat Warrant Book shall forthwith serve a copy of the writ upon the party on whose behalf the *caveat* has been entered or upon his solicitor (Rules 180, 228: *vide infra,* under Rule 115).

Service Out of Jurisdiction.

Service out of jurisdiction.

20. Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the Judge whenever:—

(*a*) Any relief is sought against any person domiciled or ordinarily resident within the territorial jurisdiction of the Court;

(*b*) The action is founded on any breach or alleged breach within the territorial jurisdiction of the Court of any contract wherever made, which according to the terms thereof ought to be performed within such jurisdiction;

(*c*) Any injunction is sought as to anything to be done within the territorial jurisdiction of the Court.

(*d*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within such territorial jurisdiction.

Application for leave to serve out of jurisdiction.

21. Every application for leave to serve a writ of summons, or notice of a writ of summons, on a defendant out of the jurisdiction shall be supported by affidavit, or other evidence, stating that, in the belief of the deponent, the plaintiff has a

good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the Judge that the case is a proper one for service out of the jurisdiction.

22. Any order giving leave to effect such service, or give such notice, shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country, where or within which, the writ is to be served or the notice given.

Order to limit time for appearance.

23. When the defendant is neither a British subject nor in British dominions, notice of the writ, and not the writ itself, is to be served upon him. A form of notice will be found in the appendix hereto, No. 8.

Defendant neither a British subject nor, &c.

24. Notice in lieu of service shall be given in the manner in which writs of summons are served.

Notice in lieu of service.

Rules 20 (*a*), (*b*), (*c*) and (*d*) expressly limit the cases where service of a writ of summons will be allowed out of the jurisdiction by providing that the cause of action must have arisen within the 'territorial' jurisdiction of the Court, thereby according with the English practice (*In re Smith,* 1 P. D. 300; *The Vivar,* 2 P. D. 29).

Territorial jurisdiction.

In *The Elton* (1891, P. 265), it was held that, where in an action *in personam* for alleged salvage services rendered to ship, freight, and cargo, the plaintiffs, the owners, master, and crew of the salving vessel, had served the writ upon the owners of the salved ship resident within the jurisdiction, leave might be obtained to serve the cargo owners, out of the jurisdiction, with notice of the writ. In this case, however, the attention of the Court was not drawn to *The Pyrénnée* (Br. & L. 189), where it was decided that ship and cargo must each pay its own share of salvage and that neither can be made liable for the salvage due from the other.

Ship and cargo.

Under Rule 20 (*d*) the criterion is due service within the territorial jurisdiction, not that the cause of action itself has arisen within the jurisdiction: so, where a collision occurred in the English channel, outside British territorial waters, between a British steamship and a French sailing vessel, which at the time was in tow of a British steam tug, and

Necessary or proper party.

the French vessel was towed into a French port, and the owners of the British steamship commenced proceedings *in personam* in England against the owners of the French vessel and the owners of the tug, who were duly served, leave was given to issue a concurrent writ and serve notice of it upon the owners of the French vessel (*The Duc d'Aumale*, 1903, P. 18).

Appearance.

Appearance to be filed. 25. A party appearing to a writ of summons shall file an appearance at the place directed in the writ.

Appearance on terms on expiry of time. 26. 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.

Indorsement of set-off or counter-claim on appearance. 27. If the party appearing has a set-off or counter-claim 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 counter-claim. But if in the opinion of the Judge such set-off or counter-claim cannot be conveniently disposed of in the action, the Judge may order it to be struck out.

Address for service to be indorsed on appearance. 28. 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 counter-claim will be found in the appendix hereto, Nos. 12 and 13.

The writ *in rem* calls upon "the owners and all others interested" in the ship or other property to enter an appearance in the action within one week after service, exclusive of the day of such service (Form 5). As has already been pointed out in the notes to Rules 29 *et seq.*, any person interested in the *res* under arrest may appear to protect his interest, but if separate appearances are unnecessarily entered, the Court may refuse to allow costs. (*The Nicolina*, 2 W. Rob. 175).

Separate appearances.

Entry and notice of appearance. The memorandum of appearance should contain the name, address and description of the defendant and state in what capacity he appears: the appearance must be filed with a minute of filing in the registry, and although there is no pro-

vision in the rules on the subject, a copy of it should be served on the plaintiffs.

Under the old practice which prevailed until 1883, where the defendant wished to raise an objection to the jurisdiction of the Court he appeared under protest, whether the action were *in rem* or *in personam*. (*The Vivar*, 2 P. D. 29); and this appears to be still the proper practice in actions *in rem* (*The Vera Cruz*, 9 P. D. 96; 10 A. C. 59; *The Seaward*, 3 Ex. C. R. 268).

Appearance under protest.

The English Supreme Court Rules 1883 (Order xii., Rule 30) now provide that a defendant before appearing shall be at liberty, without obtaining an order to enter, or entering a conditional appearance, to serve notice of motion to set aside the service upon him of the writ, or to discharge the order authorizing such service; and it may be that under Rule 228 this is now the correct practice.

Setting aside service of writ.

Where an appearance has been entered under protest, the defendant proceds by way of petition on protest (*The Parliament Belge*, 4 P. D. 129), or by way of motion. (Williams & Bruce, Part II., ch. 1, sec. 3).

An absolute appearance once given cannot be recalled (*The Blakeney*, Sw. 428); in *The Helgoland* (Sw. at p. 496). Dr. Lushington stated that it was doubtful whether a party omitting to take an objection to the jurisdiction in the first instance could be permitted to raise it afterwards, but in later cases he held that if the Court has not in fact jurisdiction, a defendant is not prejudiced by an absolute appearance (*The Ida*, Lush. 6; *The Eleonore*, Br. & L. 185; *The Louisa*, Br. & L. 59; *The Mary Anne*, 34 L. J. Ad. 73; *The Barbara Boscowitz*, 3 B. C. R. 445). It appears, however, that the giving of a bond to release the vessel under arrest constitutes a waiver of any objection to the jurisdiction of the Court, notwithstanding that the appearance has been entered under protest (*The Milwaukee*, 11 Ex. C. R. 179).

Objection to jurisdiction.

Waiver.

Where the solicitors for the defendant undertook to appear, in ignorance of the fact that there might be a good objection to the jurisdiction, it was held that they were not thereby precluded from subsequently entering an appearance under protest (*The Vivar*, 2 P. D. 29).

As to set off and counterclaim see notes to Rule 63.

For Rules 29 to 32 inclusive, see supra p. 204.

Consolidation of Actions.

Action may be consolidated.

33. 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.

Several actions may be tried at same time.

34. 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.

Test action.

It is within the discretion of the Judge whether he will order actions to be consolidated or merely to be tried together, and his discretion will not be interfered with (*The Thrift*, 10 Ex. C. R. 97): where an action of damage for collision is brought by the owner of the injured ship, and subsequently a similar action is brought by the charterer and owner of the cargo of such injured ship, the proper course appears to be not consolidation, but an order that the two actions be tried together, or an order for the stay of one action to abide the result of the other (*ibid*).

Similar actions.

Deputy Judge.

A deputy Judge has jurisdiction equally with the local Judge to make an order for consolidation (*The Gaspesien*, 11 Ex. C. R. 220).

Opposing consolidation.

Actions will be consolidated on the application of the defendants against the consent of the plaintiffs, and on the application of the plaintiffs against the consent of the defendants (*The William Hutt*, Lush. 25; *The Melpomene*, L. R. 4 A. & E. 129; *The Jacob Landstrom*, 4 P. D. 191; *The Pasithea*, 5 P. D. 5; *The Strathgarry*, 1895, P. 264).

Moreover, if the plaintiff successfully resists an application to consolidate, and the Court at the hearing pronounces for his claim, but finds that his resistance to consolidation was unreasonable, the defendants will have to pay only one set of costs, or only such costs as would have been incurred if the actions had been consolidated (*The Nicolina*, 2 W. Rob. 175; *The Bartley*, Sw. 198; *The Hestia*, 1895, P. 193).

Cross actions.

Cross-actions of damage *in personam* will not be consolidated, where there has been no service of the writ of summons in the principal action (*The Catalonia and The Helenslea*, 7 P. D. 57).

Where actions have been consolidated, the consolidated cause, subject to any special provisions made by the Court with respect to the conduct of the proceedings, proceeds as a single action, in which the several sets of plaintiffs in the actions consolidated are plaintiffs and the defendants in the same actions are defendants, but it is usual to give the conduct of the proceedings to the plaintiff in the first action with leave to the other plaintiffs to deliver separate statements of claim (*The Cosmopolitan,* 9 P. D. 35*n*; *The Bjorn, ibid,* 36*n*). The several plaintiffs may appear by separate counsel, but the costs occasioned thereby may be disallowed (*The Longford,* 6 P. D. at p. 67).

Conduct of action.

After an order for consolidation, the Court may sever the actions if necessary (*The William Hutt,* Lush. 25; *The Helen R. Cooper,* L. R. 3 A. & E. 339).

Severing.

As to the power of the Court under section 34 of The Admiralty Courts Act, 1861 (24 Vict. cap. 10), see *supra,* chapter 2, p. 151.

Warrants.

35. 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. 14.

Warrant in an action *in rem.*

The arrest of the *res* is the distinctive feature of Admiralty proceedings.

It is competent to the plaintiff to take out process for the arrest of the property proceeded against in almost all causes, as has been seen (notes to Rule 2): and in this, as in other respects, the Exchequer Court on its Admiralty side has as large a jurisdiction as the High Court of Admiralty (*The Raven,* 11 B. C. R. 486).

Arrest.

But it is an improper practice, and one which the Court will discourage, to arrest property to answer extravagant claims (*The Abby Palmer,* 8 Ex. C. R. 462; 10 B. C. R. 383).

Moreover if the arrest be unwarranted, the plaintiff may expose himself to an action for damages: damages for arresting a ship are not, however, given, except in cases where the

Damages for arrest.

arrest has been made in bad faith, or with crass negligence (*The Volant,* Br. & L. 321; *The Evangelismos,* Sw. 378); but where a vessel having been arrested in a cause of damage and the suit having been dismissed, the plaintiff obtained leave to detain her for twelve days, that he might have time to consider whether he would appeal, which he failed to do, it was held that the defendant was entitled to damages for the twelve days' detention (*The Cheshire Witch,* Br. & L. 362). Where the seizure of a vessel is due to bad faith or crass negligence, proof of actual damage is not necessary to sustain an action in a Court of Admiralty for wrongful arrest (*The Walter D. Wallett,* 1893, P. 202). In the *Margaret Jane* (L. R. 2 A. & E. 345), a salved vessel was valued by a Receiver of Wreck at £746 on the 3rd of December: on the 8th the salvors instituted a suit in the sum of £2,500: on the 18th day applied for an appraisement of the vessel: on the 14th of January following they gave notice that they proceeded no further in the suit: it was held that the salvors must have been aware within a short time of taking out the appraisement that the value fixed by the Receiver was substantially correct, and that they must be condemned in costs and in damages from the 22nd of December to the 14th of January.

King's ships. Kings' ships, and ships which are the property of a foreign state or sovereign are exempt from arrest.

Mail ships. Mail ships, are also, under certain conditions, exempt from arrest under the Mail Ships Acts, 1891 and 1902 (54 & 55 Vict. ch. 31; 2 Edw. VII., ch. 36).

Arrest on counter-claim. It seems that a defendant, who has appeared and has indorsed on his appearance a counterclaim under Rule 27 in respect of a subject matter which would entitle him to institute a cause *in rem* against any property of the plaintiff, can apply for and obtain a warrant for the arrest of such property (*The Julia Fisher,* 2 P. D. 115).

Affidavit to state nature of claim, &c. 36. The affidavit shall state the nature of the claim, and that the aid of the Court is required.

37. The affidavit shall also state:—

Also:— in action for wages, or, &c. (*a*) In an action for wages, or possession, 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 district within which the ship

is at the time of the institution of the suit; and a copy of the notice shall be annexed to the affidavit;

(b) In an action for necessaries the national character of the ship and that to the best of the deponent's belief no owner or part owner of the ship is domiciled in Canada at the time of the institution of the action.

Foreign company.

A company whose head office is in England and which is licensed to carry on business in the Admiralty district in which the action is brought is not "domiciled in Canada" within the meaning of the rule (*The Canada and The Triumph,* 18 B. C. R. 511; 15 Ex. C. R. 136).

Or building, &c;—

(c) In an action for building, equipping, or repairing any ship, the national character of the ship and that at the time of the institution of the action, the ship, or the proceeds thereof, are under the arrest of the Court;

In action between co-owners.

(d) In an action between co-owners relating to the ownership, possession, employment, or earnings of any ship registered in such district, the port at which the ship is registered and the number of shares in the ship owned by the party proceeding.

In an action for bottomry.

38. 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.

Issue of warrant though affidavit does not contain all the prescribed particulars.

39. 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.

The corresponding English rule is Order V., Rule 16, of the Supreme Court Rules, 1883.

Contents of affidavit.

The affidavit must be made by the party applying or his agent, and must in all cases state the name and description of the party at whose instance the warrant is to be issued, the nature of the claim, the name and nature of the property to be arrested, and that the claim has not been satisfied: if the action has been instituted on behalf of the owners, master or

crew of a named ship, the affidavit should follow the same form: it is also advisable that the affidavit should verify the cause of action for the purpose of subsequent proceedings on default of appearance (*The Hercules*, 11 P. D. 10).

Wages cause.

Further in the special cases mentioned, the provisions of the rules must be observed: omission to give the notice required in Rule 37 (a) may involve the dismissal of the action (*The Herzogin Marie,* Lush, 292). If the consul, by protest, objects to the prosecution of the suit, the Court of Admiralty will determine whether it is fit and proper that the suit should be stayed or proceed (*The Nina,* L. R. 2 P. C. 38); and in order to enable a Court of Appeal to overrule the discretion of the Court below as to entertaining the action, the Judge must be shown to have exercised it on wrong principles or wrongly or unfairly (*The Leon XIII.*, 8 P. D. 121).

Co-owners.

A ship may be arrested in an action between co-owners for an account (*The Raven,* 9 Ex. C. R. 404; 11 B. C. R. 486).

Registrar's discretion.

Under Rule 39 when the Registrar has seen fit to dispense with some of the required particulars in the affidavit, the Court will not review the exercise of his discretion (*The Tuladi,* 17 B. C. R. 170; 15 Ex. C. R. 134).

Supplementary affidavit.

Upon an application to vacate warrants issued against a ship under arrest in an action *in rem* for necessaries, although it appeared that on the facts disclosed in the affidavit filed before the Registrar, the Court would not have had jurisdiction to issue the warrant of arrest, the plaintiffs were allowed to file supplementary affidavits to show that there was jurisdiction to issue the warrants and that the case was one in which the discretion of the registrar could be properly exercised (*The Canada and The Triumph,* 18 B. C. R. 511; 15 Ex. C. R. 136).

Order V., Rule 16, already referred to, also provides by sub-rule (d) that: "In an action of distribution of salvage the affidavit shall state the amount of salvage money awarded or agreed to be accepted, and the name, address, and description of the party holding the same." Actions for distribution of salvage are still sometimes brought (*The Rosario,* 2 P. D. 41; *The Afrika,* 5 P. D. 192).

Warrant where prepared and by whom signed.

40. 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. 15.

41. 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.

To be served by marshal or his officer.

42. The warrant may be served on Sunday, Good Friday or Christmas Day, or any public holiday, as well as on any other day.

Service on Sunday, or, &c.

43. The warrant shall be filed by the marshal within *one week* after service thereof has been completed, with a certificate of service indorsed thereon.

Warrant to be filed by marshal, with, &c.

44. 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. 16.

Certificate of service.

The warrant is directed to the marshal of the Admiralty district, or to the Sheriff of the county, or to the collector of customs at the port where the property to be arrested is lying (Form 15; R. S. C. 1883, Appendix A., Pt. I., No. 17): it must be left with the marshal with written instructions for the execution thereof (Rule 200): the instructions should describe the property, state where it is situate, and request that the warrant be executed, and be signed by the solicitor.

Preparation of warrant.

It must be served within 12 months of its date, in the manner provided in Rule 10. After the warrant has been served, the property arrested remains in the custody of the Court until the action is determined or the property is released (Rules 53, *et seq.*): accordingly any person who interferes with the property while under arrest is liable to attachment (*The Harmonie,* 1 W. Rob. 178; *The Mathesis,* 2 W. Rob. 286, at p. 288). The marshal is liable to make good any loss of or damage to property while in his possession (*The Hoop,* 4 C. Rob. 145).

Time for service.

Notice of the issue of a warrant may be communicated by telegram, and anyone who, with knowledge of the issue of the warrant, intermeddles with the *res* may be guilty of contempt of Court (*The Seraglio,* 10 P. D. 120; *The Ishpeming,* 8 Ex. C. R. 379), if he had no reason to doubt that the telegram was genuine (*Curtice* v. *London City and Midland Bank,* 1908, 1 K. B. at p. 297).

Notice by telegram.

If during the time the property remains under arrest it has to be moved, or if cargo has to be unloaded from a ship

Removal or unloading.

under arrest, a motion must be made to the Judge for an order to that effect (Rule 148).

Departure of ship. A ship cannot be arrested when she has sailed on her voyage, and force may not be used to bring a vessel back to port (*Borjesson* v. *Carlberg,* 3 A. C. 1316).

What warrant covers. The warrant extends to the ship, her tackle and furniture, and the arrest will cover sails and riggings taken on shore for the purpose of safe custody (*The Alexander,* 1 Dods. 282; *The Dundee,* 1 Hagg. 124), and to other things of a like kind appurtenant to the ship, but not to personal luggage belonging to passengers (*The Willem III.,* L. R. 3 A. & E. 487).

Cargo. Cargo may be arrested in respect of any liability attaching to it; but in cases of collision the cargo on board the offending ship is not responsible for the damage (*The Victor,* Lush, 72): the freight, however, is attachable, being the property of the owners of the wrongdoing ship, and the cargo is usually arrested for the purpose of making the owners of the cargo, who at that time owe the freight to the shipowners, pay into Court the amount of the freight (*The Flora,* L. R. 1 A. & E. 48). Cargo arrested for freight will be released upon payment of the freight into Court with an affidavit of value (*The Victor, ubi supra*). But the owner of the cargo is only compellable to pay into Court the freight due from him to the shipowner; therefore in computing the amount of such freight, deductions which should, according to the charterparty, be made from the gross freight, will be allowed; and if the cargo is delivered at a place short of destination by reason of the collision, the cargo owner is entitled to such reasonable reduction as has been agreed upon between him and the shipowner (*The Leo,* Lush, 444). A plaintiff does not necessarily incur a liability to costs and damages by arresting cargo whereon no freight is due, but on affidavit by the shipowner that no freight is due and that he is prepared to carry it to its destination, the shipowner is entitled to have the cargo released (*The Victor, ubi supra; The Flora, ubi supra*). Where the ship and cargo belonged to the same owner, and at the time of arrest a portion only of the cargo remained on board, the whole of which was on board at the time of the collision, it was held that the freight due upon the whole cargo must be paid into Court, before the portion on board at the time of the arrest could be released (*The Roecliff,* L. R. 2 A. & E.

Freight.

Release of cargo.

Payment of freight into Court.

No freight due.

363). Where the wrongdoing ship, in a cause of damage, was, at the time of the collision, outward bound from Liverpool to Viborg, under charter to bring home a cargo of deals from Viborg to Liverpool, it was held that the freight on such deals was in course of being earned at the time of the collision, though the cargo was not then actually on board, and must contribute towards the plaintiff's claims (*The Orpheus*, L. R. 3 A. & E. 308).

Homeward freight.

The warrant is ordinarily issued as of course, unless a caveat against an arrest is entered: the due entry of a caveat warrant in the caveat warrant book does not prevent a warrant being taken out, but the party, at whose instance any property in respect of which a caveat has been entered is arrested, is liable to have the warrant discharged and to be condemned in costs and damages, unless he can show to the satisfaction of the Judge good reason for having taken out the warrant (Rules 180, *et seq.*)

Caveat warrant.

Where the property is already under arrest of the Court, any number of subsequent actions *in rem* may be instituted, and warrants in such actions may be taken out and served in the same manner as if no other actions were pending against the property (*The Europa*, 13 Jur. 856).

Subsequent actions.

Bail.

45. Whenever bail is required by these rules, it shall be given by filing one or more bailbonds, each of which shall be signed by two sureties, unless the Judge shall, on special cause shown, order that one surety shall suffice.

Bail, how to be given.

46. Every bailbond shall be signed before the registrar, or by his direction before a clerk in the registry, or before a commissioner having authority to take acknowledgments or recognizances of bail in the Court, or before a commissioner appointed by the Court, to take bail. Forms of bailbond and commission to take bail will be found in the appendix hereto, Nos. 17 and 18.

Bailbond to be signed before registrar, or, &c.

47. The sureties shall justify by affidavit and may attend to sign a bond either separately or together. A form of affidavit of justification will be found in the appendix hereto, No. 19.

Sureties to justify.

48. The commission to take bail and the affidavits of justification shall, with the bailbond, when executed, be returned to the registry by the commissioner.

Commission to take bail.

Not to be taken by solicitor or, &c.

49. 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.

Notice served on adverse party.

50. Before filing a bailbond, 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. 20.

Objection to surety.

51. If the adverse party is not satisfied with the sufficiency of any surety, he may file a notice of objection to such surety. A form of notice of objection to bail, will be found in the appendix hereto, No. 21.

Appointment to consider objection.

52. Upon such objection being filed with the registrar an appointment may be obtained for its consideration before him. Twenty-four hours' notice of such appointment shall be given to the plaintiff unless the Judge for special reasons allows a shorter notice to be given; and, on the return of the appointment, the registrar may hear the parties and any evidence they may adduce regarding the sufficiency of the sureties; and he may direct such sureties to submit themselves to cross-examination on their affidavits of justification; and he may allow or disallow the bond. He may adjourn the appointment from time to time if he thinks necessary, and shall himself make such inquiries respecting the sureties as he thinks fit.

Registrar may allow or disallow bond.

Release.

As soon as appearance has been entered, or the solicitor for the defendant has accepted service of the writ and undertaken to put in bail (Rule 20, *supra*), steps may be taken to release the property under arrest.

The release of the property under arrest may be obtained in various ways, one of which is by filing one or more bailbonds (Rules 53 *et seq.*, *infra*).

Caveat release.

A release will not be granted if a caveat release has been filed (rule 181, *infra*), except on application to the Judge (rules 53, 54, *infra*).

Sureties.

Sureties to a bail bond may not be partners (*The Corner*, Br. & L. 161).

Amount of bail.

Bail is not security for the amount of the claim, but simply for the value of the property arrested to the extent of the claim and costs; therefore, on the one hand, bail may always be exacted to the full value of the property where the claim in the action equals or exceeds that value; and, on the other, the bail cannot be enforced beyond the actual value of the property irrespective

of the amount for which bail may have been given (*The Duchesse de Brabant,* Sw. 264; *The Mellona,* 6 Notes of Cases, 65; *The Staffordshire,* L. R. 4 P. C. at p. 211). It is, therefore, usual to give bail to the amount claimed in the writ.

Where a wrongdoing vessel was arrested in a cause of collision, having been herself injured in the collision, and was then repaired and her value materially increased by the repairs, it was held that she must be released on bail being given to the extent of her value at the time of the arrest (*The St. Olaf,* L. R. 2 A. & E. 360; *The Flora,* L. R. 1 A. & E. 45).

Where limitation of liability. In a cause of damage, where the defendant is entitled to claim limitation of his liability, bail can only be required to an amount sufficient to cover the sum fixed by statute, together with interest and costs; and if the amount claimed exceeds the statutory limit, the defendant may file an affidavit, stating the tonnage of his ship and that the collision happened without the actual fault or privity of any of the owners, and, failing denial by the plaintiff, he will be entitled to a release of the ship, on giving bail to the extent of the statutory limit, interest and costs (*The Sisters,* 1 P. D. 281; *The Northumbria,* L. R. 3 A. & E. 6, 24).

Re-arrest after release. After property arrested has been released on bail, the plaintiff is not entitled to re-arrest it (*The Kalamazoo,* 15 Jur. 885; *The Flora,* L. R. 1 A. & E. 45), notwithstanding that the defendant has consented to have the amount of the action increased (*The Flora, ubi supra*); except for costs (*The Freedom,* L. R. 3 A. & E. 495); or in consequence of the bail becoming insolvent (*The City of Mecca,* 5 P. D. at p. 34).

Subsequent actions. After the ship has been bailed, she may be arrested again at the suit of another claimant; the bail in the first action is, of course, not responsible to the plaintiffs in any subsequent actions. The question whether the bail in the subsequent actions would be liable, notwithstanding the full amount of the value of the *res* has been paid by the bail in the first action, appears not to have been decided; if the *res* remains in the custody of the Court, it is liable to all just demands (*The Clara,* Sw. at pp. 3 and 4); but if a ship, having been released upon bail being given, is arrested subsequently in another suit and sold, and the proceeds brought into Court, upon the damages in the first action proving to exceed the amount for which bail was given in that action, the Court will not order the proceeds in Court

to be applied to satisfy such damages or interest or costs in the first action (*The Wild Ranger*, Br. & L. 84).

Commission of apraisement.

The Court discourages the arrest of property to answer extravagant claims (*The Abby Palmer*, 8 Ex. C. R. 462; 10 B. C. R. 383), and may condemn the plaintiff to pay the costs and expenses incurred by the defendants in giving bail for an exorbitant sum (*The George Gordon*, 9 P. D. 46; *The B. B.*, Appendix VII.). If the defendant is not satisfied with the value placed upon the *res*, he may apply for a commission of appraisement (rule 145, *infra*).

Commission to surety.

A commission or fee not exceeding one per centum on the amount in which bail is given is payable to each surety, and is recoverable on taxation (R. S. C. 1883, Order XII., rule 21 (*a*)).

Discharge of sureties.

The sureties are only liable to answer the judgment of the Court, as the bond is a security given, not to the parties, but to the Court (*The Cawdor*, 1900, P. at p. 52), and, therefore, any departure from the original terms by private arrangement between the parties to the action will discharge the sureties, and once discharged, their obligation cannot be revived (*The Harriet*, 1 W. Rob. at p. 188); and if the defendant is guilty of fraud, or there is any collusion between the parties to the suit, the sureties may apply to the Court for protection (*The Harriet*, *ubi supra*).

Bail given to answer judgment in a cause where the appearance is under protest will not be discharged on account of a change in the indorsement on the writ of summons, which renders the protest of no avail (*The City of Mecca*, 44 L. T. 750).

The Admiralty Courts Act, 1861 (24 Vict. cap. 10), provides by section 33:

Bail given in the Court of Admiralty good in the Court of Appeal.

In any cause in the High Court of Admiralty, bail may be taken to answer the judgment, as well of the said Court as of the Court of Appeal, and the said High Court of Admiralty may withhold the release of any property under its arrest until such bail has been given; and in any appeal from any decree or order of the High Court of Admiralty, the Court of Appeal may make and enforce its order against the surety or sureties who may have signed any such bail bond in the same manner as if the bail had been given in the Court of Appeal.

No form of bond to answer the judgment on appeal has, however, been issued by authority, and until that has been

done, it appears that the section is inoperative (*The Helene,* Br. & L. 425; *The Abby Palmer,* 8 Ex. C. R. 462; 10 B. C. R. 383). In the latter case, however, money paid into Court to obtain the release of a ship arrested to answer a claim for salvage was ordered to be retained in Court pending an appeal to the Exchequer Court to increase the award.

Form of bond. Restraint.

The bail bond is in the same form in all cases, except in actions of restraint, where the bail is limited to an amount not exceeding the value of the plaintiff's shares in the vessel proceeded against, and in this form of bond the sureties consent to execution issuing if the ship in question shall not safely return to a port within the jurisdiction of the Court from such voyage or voyages as are mentioned in the bond (*The Robert Dickinson,* 10 P. D. 15; *The Cawdor,* 1900, P. at p. 52).

Where the bond is given to secure the return of the ship to a named port within the jurisdiction, it is forfeited by taking the ship, at the end of the voyage, to another port out of the jurisdiction, and thence despatching her on another voyage (*The Cawdor, ubi supra*).

Objection to sureties.

A method of objecting to the sufficiency of any surety is provided by rule 51, but if the objection should prove groundless, the party objecting will be liable to be condemned in damages and costs (*The Corner,* Br. & L. 161; *The Don Ricardo,* 5 P. D. 121).

Discharge of sureties.

Where the action is settled, or where a tender has been accepted, an application may be made to the Judge to discharge the sureties (*The Countess of Levin and Melville,* 5 L. T. 290; *The Partridge,* 1 Hagg. 82). Mere lapse of time does not discharge the sureties (*The Vrede,* 1 Dods. 1); but where in an action of restraint two sureties executed a bond for the safe return of the ship, and no time was fixed in the bond when the liability of the sureties should cease, after the bond had been in existence for nearly three years and the owners of the majority of the shares were changed, upon the vessel coming within the jurisdiction, the sureties, on their application, were released and the bond was ordered to be cancelled (*The Vivienne,* 12 P. D. 185).

Arrest, &c., on counterclaim.

The provisions with regard to bail, caveat warrants, caveat releases, releases, and payment into Court, in lieu of bail, apply equally to arrests at the instance of defendants having a counterclaim as to arrests at the instance of plaintiffs.

Releases.

Release for property arrested.

53. A release for property arrested by warrant may be issued by order of the Judge.

When it may be issued from registry:—

54. A release may also be issued by the registrar, unless there is a caveat outstanding against the release of the property,—

on payment into court;

(*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;

on bail bond being filed;

(*b*) On one or more bailbonds being filed for the amount claimed, or for the appraised value of the property arrested, and on the allowance of the same if objected to; or if not objected to 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;

on application of party, &c.

(*c*) On the application of the party at whose instance the property has been arrested;

on consent in writing;

(*d*) On a consent in writing being filed signed by a party at whose instance the property has been arrested;

on discontinuance, or, &c.

(*e*) On discontinuance or dismissal of the action in which the property has been arrested.

Property arrested for salvage.

55. 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.

Registrar may refuse.

56. The registrar may refuse to issue a release without the order of the Judge.

Preparation and issue of release.

57. 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. 22.

Release, how served.

58. 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.

59. 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.

Property released from arrest on service of release, &c.

For the method of payment into Court, see rules 177, 178 (*infra*).

Separate releases.

If ship and cargo are at the same time ordered to be released, one release is sufficient for both, even though they may be in different places. But if portions of the property under arrest are ordered to be released at different times, separate releases may be necessary. If the ship, freight, and cargo are under arrest, and the owner of cargo has appeared separately, and paid the freight into Court, and taken the necessary proceedings to have the cargo released, he should apply for and obtain a release, not merely of the cargo, but a release "of the cargo from arrest, as well in respect of the plaintiff's claim against the cargo, as in respect of freight." If a release of the cargo merely is obtained, the cargo may still be detained in respect of freight (Williams and Bruce, Part II. cap. 1, sec. vi. (3)).

Release of cargo.

Marshal's fees and charges.

With regard to the marshal's fees and charges, he has, upon arrest, the security of the ship for his costs (*The North American*, Sw. at p. 467). He can in no case, however, charge a greater sum than ten cents a mile for executing the warrant (*The Aurora No. 2*, 20 B. C. R. 210; 15 Ex. C. R. 25). In ordinary cases, the expense of possession fees form a proper deduction from the gross proceeds, as against the plaintiff's claim, even though the proceeds may be insufficient to satisfy the plaintiff's claim (*The Europa*, Br. & L. 210); but where the defendant occasions unnecessary expense, he may be made to pay the costs so occasioned (*The Helen*, 14 W. R. 502).

Where the arrest is made, not by the marshal but by the party taking out the warrant, or his agent, he is responsible for the detention fees (*The North American*, Sw. 466). And where judgment goes against the plaintiff, or where the arrest has been improperly made, the Court may order the costs of the arrest to be paid by the plaintiff (*The Ironsides*, Lush. 467; *The India*, 1 W. Rob. 406).

Escape.

No ship, after being arrested can be released, except by order of the Judge, or by a release issued by the registrar; and where a ship escaped from the custody of the marshal, an order for pleadings was withheld until a bond was given (*The H. B. Tuttle*, 11 Ex. C. R. 174).

Instantaneous obedience must be paid to the release and any person unlawfully detaining the property in defiance of the release of the Court is liable to attachment (*The Towan*, 8 Jur. 220; *The Tritonia*, 5 Notes of Cases, 111).

Agreement.

Under rule 55, the value of the property arrested for salvage must be agreed upon or determined by the Judge: by R. S. C. 1883, Order LII., rule 23—" Any agreement in writing between the solicitors in Admiralty actions, dated and signed by the solicitors of both parties, may, if the Admiralty registrar thinks it reasonable and such as the Judge would, under the circumstances, allow, be filed, and shall thereupon become an order of the Court, and have the same effect as if such order had been made by the Judge in person."

Affidavits of value.

Where the question of value has come to be determined by the Judge, and the defendants have filed affidavits of value of the ship, freight, and cargo, which values have been accepted and agreed to by the plaintiffs, the defendants will not be allowed at the hearing to give evidence to decrease the value (*The Hanna*, 3 Asp. M. C. 503).

Appraisement.

In the absence of agreement, or of the acceptance of an affidavit of value filed by the defendants, the Judge may order an appraisement by valuers appointed by the marshal: the basis on which the appraisement of the salved vessel is to be made is the value to her owners in her damaged condition on the completion of the salvage service, and under ordinary circumstances such an appraisement is conclusive (*The Hohenzollern*, 1906, P. 339; *The Cargo ex Venus*, L. R. 1 A. & E. 50).

Release of cargo.

Where the suit is instituted against ship, freight and cargo, and one appearance has been entered for all three, and an agreement fixing the value, or an affidavit of value, has been filed, the release will be granted on bail being given, or money paid into Court (rules 54 (*a*) and (*b*)). But where the owners of the ship and the owners of the cargo appear separately, the practice is different; the owners of the cargo, if the freight and cargo are arrested, are not entitled to a release until the value of the cargo and the amount of unpaid freight have been agreed or proved, and the freight paid into Court, unless the shipowner has already appeared and obtained a release of the freight: in that case, the owner of the cargo may have the cargo released on proving the value of the cargo, and giving bail for the amount of the claim in the action, or for such proportion thereof as may be agreed upon, or as may be ordered by the Judge, with reference to the value of the separate interests of the parties in the

property. Where the freight has been released by the shipowner, the owner of the cargo may pay the freight to the person entitled in the usual way (Williams and Bruce, Part II., cap. i., sec. vi. (3)).

Payment into Court is regulated by rule 177, *infra*. Where the owner of cargo on board a ship sued for collision pays the freight into Court, he is entitled to deduct any sums which by the charterparty are to be deducted from the gross freight, and the costs of payment into Court (*The Leo*, Lush. 444).

Deductions from freight on payment into Court.

The successful party is not entitled to interest on money paid into Court, but the Judge may order the money to be invested (*The North American*, Lush. 79).

Interest.

Preliminary Acts.

60. 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:—

Preliminary Acts. **Contents.**

(1) The names of the ships which came into collision, and the names of their masters; **Names.**

(2) The time of the collision; **Time.**

(3) The place of the collision; **Place.**

(4) The direction and force of the wind; **Wind.**

(5) The state of the weather; **Weather.**

(6) The state and force of the tide, or, if the collision occurred in non-tidal waters, of the current; **Tide.**

(7) The course and speed of the ship when the other was first seen; **Course and speed.**

(8) The lights, if any, carried by her; **Lights.**

(9) The distance and bearing of the other ship when first seen; **Distance and bearing.**

(10) The lights, if any, of the other ship which were first seen; **Lights first seen.**

(11) The lights, if any, of the other ship, other than those first seen, which came into view before the collision; **Other lights.**

(12) The measures which were taken, and when, to avoid the collision; **Measures taken.**

(13) The parts of each ship which first came into collision; **Parts first collided with.**

(14) What fault or default, if any, is attributed to the other ship. **Fault or default.**

English practice.

The corresponding English rule is R. S. C. 1883, Order XIX., rule 28. The points of difference are: the statement of the state and force of the current in non-tidal waters required in (6); the statement of the fault or default attributed to the other ship required by (14); and the omission in the Canadian rules to require a statement of the sound signals given and heard. In addition, the English rule provides that the Judge may order the Preliminary Act to be opened and the evidence to be taken thereon without its being necessary to deliver any pleadings, and in such case, if either party intends to rely on the defence of compulsory pilotage, that he may do so, upon giving notice thereof in writing ot the other party, within two daysa from the opening of the preliminary act.

In what actions required.

The practice in England as to filing preliminary acts in actions of damage where the collision has occurred not between vessels has fluctuated (*The Secretary of State for India* v. *Hewitt & Co., Limited,* 6 Asp. M. C. 384, reporter's note); but it is now settled that the requirement of a preliminary act only applies to "actions of damage by collision between vessels" (*The Craighall,* 1910, P. 207). The Canadian rule, however, omits the words "between vessels," and accordingly preliminary acts may have to be filed in all actions of damage, whether by collision between vessels or otherwise, as, for instance, in actions of damage by owners of cargo against vessels, or actions of damage arising out of collisions between vessels and piers or other fixed structures. In any case, the rule is not limited to damage to ship or goods, but applies to all actions for personal injuries caused by collision; accordingly, preliminary acts must be filed in an action for loss of life caused by a collision (*Webster* v. *M. S. & L. Ry. Co.,* 1884, W. N. 1). It has been held, under the English practice, that a preliminary act was not required in an action brought by the owner of cargo against the ship on which it was carried for damage to the cargo caused by a collision with another vessel (*The John Boyne,* 36 L. T. 29); nor in an action brought by the owner of a barge against the owners of a tug for negligence in towing, in consequence of which the barge came into collision with another vessel, and was lost with her cargo (*Armstrong* v. *Gaselee,* 22 Q. B. D. 250).

Object of preliminary Act.

"The object of the preliminary act is to obtain from the parties statements of the facts at a time when they are fresh in their recollection" (*The Frankland,* L. R. 3 A. & E. at p. 511); and before either party knows how his opponent shapes

his case (*Secretary of State for India* v. *Hewitt,* 60 L. T. at p. 335). Consequently, the requirement of a preliminary act is imperative and in *The Morgengry and The Blackcock* (1900, P. at p. 7), the appearances for one set of defendants were struck out for default in filing one.

Default in filing.

In the case of *Canadian Development Co.* v. *Le Blanc* (8 B. C. R. 173), the plaintiff failed to file a preliminary act, but the circumstances were held (in the lower Court) to render a decision on the consequences of such failure unnecessary, and the matter was not considered on appeal: the head-note of this case is incorrect. It is a settled rule that an amendment of the preliminary act will not be allowed at the instance of the party who has filed it (*The Iroquois,* 17 B. C. R. 156; *The Dorothy,* 10 Ex. C. R. at p. 170; *The Seacombe and The Devonshire,* 1912, P. at p. 59). "An error or mis-statement of a material fact in the preliminary act is not, however, absolutely fatal or binding on the party making it: such a mistake may be rectified in the pleadings afterwards, and if so rectified, will be a subject for comment at the hearing: but if the parties go to trial without pleadings, or prepare pleadings which do not correct the error or mis-statements of the preliminary act, and do not afford the Court sufficient information, in those cases, the parties will be held most strongly to their preliminary acts" (*The Westmount,* 40 S. C. R. 160, at p. 176), and "a fault or neglect on the part of one vessel, which cannot be presumed and is not proved to have been known to the others at the time of the filing of the preliminary act, is not from (the circumstance that it is not set out in the preliminary act) to preclude its consideration in determining the liability of the ships" (*The Parisian,* 37 S. C. R. at p. 293). The preliminary act will, however, be ordered to be amended on the application of the other side (*The Godiva,* 11 P. D. 20).

Amendment.

The answer to paragraph 11 should state all alterations or combinations of lights seen after the vessel's lights are first seen (*The Monica,* 1912, P. 147).

As soon as the pleadings have been closed, the preliminary acts should be delivered to the opposite party (*The Ruby Queen,* Lush. 266; *The Two Friends, ibid.* 552).

Pleadings.

61. Every action shall be heard without pleadings, unless the Judge shall otherwise order.

No pleadings, when.

Statement of claim, defence and reply to be filed within one week in each case.

62. If an order is made for pleadings, the plaintiff shall, within *one week* from the date of the order, file his statement of claim, and, within *one week* from the filing of the statement of claim, the defendant shall file his statement of defence, and within *one week* from the filing of the statement of defence, the plaintiff shall file his reply, if any; and there shall be no pleading beyond the reply, except by permission of the Judge.

Defendant may plead set-off or counter-claim.

63. The defendant may, in his statement of defence, 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.

Paragraphs to be numbered, &c.

64. 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. 23.

As to setting out words of document.

65. 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.

Questions of fact or law raised may be decided forthwith.

66. 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.

Amendment of pleading.

67. Any pleading may at any time be amended, either by consent of the parties, or by order of the Judge.

Forms of pleadings.

"The forms appended to the rules are only to be taken as specimens of the character of the pleadings, and are not to be slavishly adhered to, though the pleader must endeavour to state the case in as succinct a form as possible . . . in salvage actions, it will usually be found necessary to adopt a form of pleading more nearly approaching to the old forms" (*The Isis*, 8 P. D. at p. 228, rule 220). The rule as to giving the opposite party particulars of any general allegation in pleadings is the same in the Admiralty Court as in other Courts (*The Rory*, 7 P. D. 117). If a plaintiff in a collision suit intends to rely upon a particular act of negligence by the defendant, he is bound specifically to allege that act in his pleadings, and it is not sufficient that the act may be included generally in an allegation in the pleadings, which do not clearly state such particular act (*The Marpesia*, L. R. 4 P. C. 212). No particulars, however, of the amount of damages claimed should be inserted, as all questions of damages are ordinarily assessed by the

Particulars.

Particulars of damage.

registrar and merchants. The statement of claim should, where bail has been put in, claim judgment, not only against the defendants, but also against their bail, and in cases where the property is under arrest or the action is against proceeds in Court, it should ask that the Court pronounce for the damages and condemn the defendants and the property, or the proceeds, in damages and costs.

Claim for relief.

Particulars of negligence.

In a cause of damage to cargo, the petition alleged that certain parcels of oil-cake were not delivered in good order and condition, according to the terms of the bills of lading, and that the damages were the consequences of breaches of the contracts in the bills of lading, or that they were occasioned by negligence or breach of duty on the part of the master or crew, and it was held that the plaintiffs were not bound to set out the particular acts or the character of the negligence which caused the damage (*The Freedom,* L. R. 2 A. & E. 346). But, in *The Wetterhorn* (34 L. T. 587), in a cause of damage to cargo, the Court, contrary to the practice in the Admiralty Court, made an order for particulars of the plaintiff's claim, so as to enable the defendants to pay into Court in respect of those items of the claim for which he was prepared to admit liability. And in *The N. P. Neilsen* (*ibid.* 588), where a ship was totally lost in a collision, the Court likewise made an order, in an action by the shipowners against the vessel doing the damage, for particulars of the plaintiff's claim to be delivered to the defendant.

Account of wages and disbursement.

A master suing for wages and disbursements is bound to furnish accounts before bringing his action; otherwise, he will not be entitled to his costs (*The Fleur de Lis,* L. R. 1 A. & E. 49).

Counter-claiming for limitation of liability.

A defendant, in an action of damage, who is entitled to institute a separate suit of limitation of liability, may, if he chooses, plead his right to have his liability limited, by way of defence in the action of damage in which he is defendant, and set up a counterclaim in the same action, claiming a decree of limitation of liability, such as he might have claimed as a plaintiff in a separate action of limitation of liability (*The Clutha,* 45 L. J. Ad. 108; *Wahlberg* v. *Young,* 45 L. J. C. P. D. 783; *The Satanita,* 1895, P. 248; 1897, A. C. 59).

Admiralty Court Act, 1861, sec. 34.

The jurisdiction of the Court under section 34 of the Admiralty Courts Act, 1861 (24 Vict. cap. 10), may be exercised in the case of a counterclaim (*The Newbattle,* 10 P. D. 33); and even where the plaintiff is a foreign sovereign (*ibid.*).

The jurisdiction of the Admiralty Court in respect of counterclaim and set-off was considered in the much litigated case of *The Camosun.*

Counterclaim and set-off.

The action was brought to enforce a mortgage on the ship, and the defendants, in the first instance, set up a counterclaim for damages for an alleged breach of an agreement on the part of the plaintiffs to build the ship in accordance with the terms of a certain contract, letters, plans and specifications referred to: a motion was made to strike out this counterclaim on the grounds that the Court had no jurisdiction to entertain it, and that it could not be conveniently disposed of in the action, and the Deputy Local Judge held that the Court had no jurisdiction to entertain such a counterclaim, and acceded to the motion to strike it out (12 B. C. R. 283): this decision was affirmed on appeal to the Exchequer Court (10 Ex. C. R. 348).

The Camosun.

The defendants then moved to amend their defence by alleging that the plaintiffs did not build the mortgaged ship in accordance with the terms of the contract, plans and specifications relating thereto, but, on the contrary, the said ship was built by the plaintiffs negligently and with defective work and materials and not in accordance with the plans and specifications, with the result that the defendants were forced to expend in repairs and replacements the sum of £3,638, and by claiming that they were entitled to set off and deduct from any money which might be payable by them to the plaintiffs the said sum of £3,638 so expended by them with interest and costs: the application was granted by the Judge (10 Ex. C. R. 403; 12 B. C. R. 368) and his decision was affirmed on appeal (11 Ex. C. R. 214).

The plaintiffs then raised an objection in law to the amended defence, which was overruled by the local Judge, whose judgment was affirmed by the Exchequer Court and the Supreme Court of Canada. On appeal, however, to the Privy Council, it was held that under the Admiralty jurisdiction as it formerly existed neither plaintiffs nor defendants could have enforced their claims in an Admiralty Court, but that section 11 of the Admiralty Court Act, 1861, extended that jurisdiction so as to include the claim of the plaintiffs which was in respect of a mortgage duly registered, while the amended defence, though pleaded by way of set-off, in reality involved a cross-claim for unliquidated damages under a contract distinct from the mortgage sued on, which the Court had

no jurisdiction to entertain whether the claim was against the ship or the plaintiffs (*The Camosun,* 1909, A. C. 598).

The effect of this decision would seem to be that no counterclaim or set-off can be pleaded in respect of any matter not within the jurisdiction of the Admiralty Court. A counterclaim cannot be set up in an action which has been discontinued (*The Salybia,* 1910, P. 25).

Demurrer. Under Rule 66, an objection in law may be raised to a plea, notwithstanding that leave has been given to plead it (*The Camosun,* British Columbia Admiralty District, September 25, 1907, unreported).

A motion may also be made to strike out the whole or any part of a plea, or to have a pleading amended (*The Camosun,* 10 Ex. C. R. 333; *The Antilope,* L. R. 4 A. & E. 33; *The Cybele,* 37 L. T. 165).

Interrogatories.

Leave to administer interrogatories. When and how to be obtained. 68. 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.

Objectionable interrogatory may be amended or struck out. 69. 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. 24 and 25.

Principles of discovery. The Court of Admiralty will allow interrogatories to be administered rather in accordance with the practice of the former Courts of Equity than of Common Law; and the principle by which the Court will be governed is, that the interrogatories should be such as tend *bona fide* to support the case of the party seeking to administer them, and to favour a complete inquiry into the truth of the issue which the Court has to decide (*The Mary or Alexandria,* L. R. 2 A. & E. 319). The Court will not compel a party to answer an interrogatory

which he states upon oath he believes will subject him to penalties (*ibid*).

Time for.

The Court has power to order interrogatories to be administered to the defendant, before the plaintiff has delivered a statement of claim (*The Murillo*, 28 L. T. 374).

In actions of damage by collision, it is not usual to allow interrogatories which seek to obtain information given in the preliminary act of the party interrogated (*The Biola*, 34 L. T. 185); but such interrogatories may in particular circumstances be allowed (*The Radnorshire*, 5 P. D. 172; *The Isle of Cyprus*, 15 P. D. 134).

Information and belief.

The party interrogated is bound to answer not only as his own knowledge, but also according to his information and belief (*The Minnehaha*, L. R. 3 A. & E. 148).

Discovery and Inspection.

Discovery on oath, how obtained.

70. 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.

Affidavit of discovery.

71. 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. 26.

Notice to produce for inspection or transcription.

72. 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. 27.

Order to produce, how obtained.

73. 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.

Time for.

The application for discovery is usually made by the plaintiff after delivery of the statement of claim, by the defendant, after delivery of the defence: but in special circumstances, discovery may be obtained before these steps are taken (*The Loch Maree*, Roscoe, Admiralty Practice (3rd Ed.), p. 340).

Previous demand for.

Before moving the Court for an order for inspection of documents, previous application should be made to the party in possession of them; unless the applicant does so, he may be condemned in costs (*The Memphis*, L. R. 3 A. & E. 23).

Where the party from whom discovery is sought is resident abroad, reasonable time will be allowed for compliance with the order (*The Emma,* 34 L. T. 742).

Admission of Documents and Facts.

74. 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. 28 and 29.

Notice to admit document or fact may be filed.

75. 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.

No costs unless notice be given.

Order XXXII. of the R. S. C., 1883, provides by Rule 6 for judgment upon admissions of fact in the pleadings or otherwise; but it is improbable that this rule applies to Admiralty actions *in rem.*

Judgment on admissions.

In *The Primula* (1894, P. 128) judgment was given on certain admitted facts, but this was an action *in personam* and the proceedings were by consent. Failure to admit in a proper case may be visited with costs (Rule 137, *infra*).

Where the plaintiff subpœnaed the receiver of wreck to attend and produce certain documents without calling on the defendants to admit copies the costs of the subpœna and the expenses of the attendance of the receiver of wreck were disallowed (*The Cromwell,* L. R. 3 A. & E. 316).

Special Case.

76. Parties may agree to state the questions at issue for the opinion of the Judge in the form of a special case.

Special case by agreement.

77. 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.

Question of law may be raised in special case.

78. Every special case shall be divided into paragraphs, numbered consecutively, and shall state concisely such facts

Paragraphs, &c.

and documents as may be necessary to enable the Judge to decide the question at issue.

Signed by parties.

79. Every special case shall be signed by parties, and may be filed by any party.

Directions as to the hearing of questions of law were made in *The Alps* (1893, P. 109), *The Glenlivet* (1893, P. 164), *The Brigella* (1893, P. 189), *The Alsace Lorraine* (1893, P. 209), *The Red Sea* (1895, P. 293), *The Pomeranian* (1895, P. 349).

Cases were stated in *The Bernina* (11 P. D. 31) and *The Glanystwyth* (1899, P. 118).

Motions.

Notice of motion.

80. 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.

What notice of motion shall state.

81. 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. 30.

When notice shall be filed.

82. 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.

Order may be made on proof of service of notice.

83. 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.

Power to vary or rescind.

84. The Judge may, on due cause shown, vary or rescind, any order previously made.

A copy of the notice of motion and of the affidavits, if any, should be served on the solicitor for the other side before the originals are filed (R. S. C. 1883, Order LII., Rule 10).

Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon must be stated in the notice of motion (R. S. C. 1883, Order LXX., Rule 3).

Tenders.

Tenders. Payment into court and filing of notice of tender.

85. 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. But the payment of money into Court shall not be deemed an admission of the cause of action in respect of which it is paid.

Filing of notice by adverse party, accepting or rejecting.

86. 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. 31 and 32.

Proceedings suspended.

87. Pending the acceptance or rejection of a tender, the proceedings shall be suspended.

Tender.

"According to the old practice in Admiralty, a tender was nothing more than an offer. If the offer was accepted there was an end of the action, and if it was not accepted, the fact that a tender had been made was a circumstance to be taken into consideration by the Court in the exercise of its discretion in awarding costs. It seems, according to the old practice, that tenders were often made informally out of Court, but disputes arising in many cases as to whether alleged tenders had really been made, the Court, in order to prevent this inconvenience, required the tender to be made by act in Court, and the money tendered to be brought into Court, so that no doubt could arise as to the fact of tender or the amount of the tender: see per Lord Stowell: *The Vrouw Margaretha* (4 C. Rob. at p. 106): and where a tender was made by Act in Court it was usual for the Court to name a day on or before which the plaintiffs should declare whether they accepted or rejected the tender. In *The General Palmer* (2 Hagg. at p. 180) Sir Christopher Robinson said that in future cases he should hold neither the Court nor the owners bound in any manner by a tender not accepted in due time, and the learned reporter, in a marginal note to the case, interprets the words of the Judge to mean that a tender, not accepted in due time, may be reduced by the Court" (*The Mona,* 1894, P. at p. 268). Accordingly where the tender is not accepted, the plaintiff will

Non-acceptance.

only be entitled to receive out of Court such an amount as the Court may find to be due, which may be less than the amount of the tender (*The Mona, ibid.* 265).

Tender of costs. It was laid down in *The Thracian* (L. R. 3 A. & E. 504) that a defendant in making a tender should either tender with costs or state that he tenders without costs, and specify the ground upon which he contends that the plaintiff is not entitled to costs: on the other hand in *The William Symington* (10 P. D. 1), it was held that a tender should not include any sum in respect of the plaintiff's costs. This latter case was, however, one of salvage, to which peculiar considerations apply, and the decision seems to have gone on a consideration of the Rules of the Supreme Court. Having regard to the wording of Form 31, it seems better to follow the earlier case of *The Thracian* (*ubi supra*). **Salvage action.** In salvage actions the defendant may tender in satisfaction of the plaintiff's claim, and reserve the question whether he is liable to pay costs (*The Hickman*, L. R. 3 A. & E. 15).

Costs. Where a tender by act in Court is accepted, or where after refusal the plaintiff recovers the same or a lesser sum, the plaintiff is generally entitled to the costs of the action up to the time of tender, and condemned in the costs incurred subsequently to the time of the tender (*The William Symington,* 10 P. D. 1, Rule 136, *infra*). But in a cause of salvage where the tender is sufficient but not liberal, the discretion of the Court may be exercised by ordering each party to bear his own costs (*The Lotus,* 7 P. D. 199).

Pleading tender. The tender by act in Court should be pleaded in the defence, but a plea of tender without payment into Court is bad (*The Nasmyth,* 10 P. D. 41). The plaintiff may reply to the plea of tender, alleging its insufficiency; and in salvage cases the plaintiff may, it seems, have a right to have the value of the property ascertained before he can be called upon to reply to the tender.

Tender in registry. After the liability of the defendant has been admitted, a tender may be made in the registry before the reference to assess the damages (*The Mona,* 1894, P. 265).

For methods of payment into and out of Court, see Rules 177, 178, 179 (*infra*).

Evidence.

88. Evidence shall be given either by affidavit or by oral examination, or partly in one mode, and partly in another.

Modes of giving evidence.

89. 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.

Evidence on motion or at hearing determined by consent of parties or order of judge.

90. 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.

Order to attend for cross-examination.

91. 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.

The order and manner in which witnesses may be examined, &c.

92. 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. 33.

Examination by interpretation.

For the general mode of proof see Williams and Bruce, Part II., ch. XIV.

In default actions *in rem,* and on references, and upon any motion, evidence may be given by affidavit (R. S. C. 1883, Order XXXVII., Rule 2, Rule 89). In references, it is in the discretion of the registrar to refuse, if he think fit, to give weight to evidence on affidavit unless and until the deponent has been cross-examined on his affidavit, and where the deponent is a party to the action, he may, though resident abroad, be required to attend in this country for such cross-examination (*The Parisian,* 13 P. D. 16).

By affidavit.

In other cases the evidence is usually taken *viva voce,* but owing to the exigencies of a seafaring life, it frequently becomes necessary to take the testimony of witnesses before the trial. In such cases, either by order of the Judge or consent

Before trial.

of the parties (Rule 89), the witnesses may be examined before the registrar or the Judge or a commissioner (Rules 91, 102, 103). Unless by leave of the Judge evidence may not be given at the trial by means of affidavit, and so where an affidavit was obtained, before action brought, from the pilot of a ship which had been in collision, imputing fault to himself in the management of the vessel under his control, it was ordered to be struck out of the record (*The Enmore,* Cook, 139); and it was intimated that obtaining statements or affidavits from persons on board an injured vessel, to be used as evidence against such vessel, would be viewed by the Court with strong disapprobation (*ibid*).

Canada Evidence Act.

Inasmuch as the Court of Admiralty is a federal Court, questions with regard to evidence are governed by the Canada Evidence Act (R. S. C. 1906, cap. 145).

The most important provisions of this Act are those relating to the competency of witnesses (sec. 3), incriminating questions (sec. 5), expert witnesses (sec. 7), comparison of disputed handwriting (sec. 8), contradicting an adverse witness (sec. 9), cross-examination as to previous written or oral statements (secs. 10 and 11), judicial notice (secs. 17 and 18), and documentary evidence (secs. 19 to 34 inclusive).

By section 35, the laws of evidence in force in the province, where the proceedings are taken, are made applicable to such proceedings: in this connection it is to be noted that copies of judicial proceedings, official documents of Canada, public books and documents, entries in books of Government departments, and notarial acts in Quebec, which are made admissible in evidence by sections 23, 24, 25, 26, and 27 respectively, cannot be received in evidence upon any trial unless the party intending to use them has before the trial given reasonable notice of such intention to the opposite party (sec. 28): by the laws of some of the provinces, such notice is not necessary except in the case of notarial acts in Quebec: it is submitted, however, that the provisions of section 35 do not enable such notice to be dispensed with, as this is a matter expressly dealt with by the Act. The laws of most of the provinces enable copies of mercantile documents to be given in evidence upon notice to the other side.

Part II. of the Act provides for the taking of evidence in Canada for use in proceedings in Courts out of Canada.

Logs.

The Court of Admiralty will admit in evidence a lightship log, on production by the officer, in whose custody such logs are kept, without requiring the evidence of the person who made the entries (*The Maria das Dores,* Br. & L., 27) : such logs are usually proved by examined copies: logs kept by officials, such as receivers of wreck, lighthouse-keepers, and others, appointed under Parts X. and XI. of the Canada Shipping Act (R. S. C. cap. 113) are probably admissible in evidence by means of examined copies under this rule of practice.

Protest.

In salvage cases the protest made by the master should be produced (*The Electric,* 1 Stuart, 333).

Coastguard's records.

In a cause of collision, the books, containing the entries made by the coastguard and sent to the coastguard's office, are admissible in evidence to prove the state of wind and weather at the time of the collision, without calling the person who made the entries (*The Catherina Maria,* L. R. 1 A. & E. 53).

Admissions.

A letter from the master of a ship to her owners is admissible as evidence against them in regard to the facts therein stated, but not the opinion of the master expressed in such letter (*The Solway,* 10 P. D. 137).

In an action of damage the engineer's log is admissible as evidence against the shipowner, his employer (*The Earl of Dumfries,* 10 P. D. 31).

Parol evidence.

An agreement varying the contract of wages in the ship's articles cannot be proved by parol (*The Sophia,* 1 Stuart, 219).

An entry of the desertion of a seaman in the official log is sufficient proof thereof, unless the seaman can shew, to the satisfaction of the Court that he had sufficient reason for leaving the ship (*The Washington Irving,* 2 Stuart, 97).

Expert evidence.

Expert testimony is usually receivable, but where the Court at the trial of a cause of collision has the assistance of assessors, the evidence of experts as to the management of the ships shortly previous to the collision is inadmissible (*The Universe,* 10 Ex. C. R. 305) : nor will the Court receive in causes of collision the depositions of persons professing to be skilled in nautical matters as to their opinions upon any stated case (*The Attila,* Cook, 199) ; nor in salvage cases will the Court be guided by the opinions of professedly skilled persons pronouncing upon the value of services in an hypothetical case (*The Victory,* Cook, 337).

All the authorities on the point were collected in the case of *Bryce* v. *Canadian Pacific Railway Company* (13 B. C. R. at p. 108), and the rule was there followed in a proceeding in the Supreme Court of British Columbia.

Weight of evidence. Affirmative testimony is entitled to greater weight than negative (*The Anglo-Saxon,* 2 Stuart, 117); and the Court will look to the education and condition in life of the witnesses, not only as entitling them to full credit for veracity, but also for greater accuracy of observation (*The Toronto,* 1 Stuart, 179).

Admission of facts pleaded. When the defendant admits all the facts pleaded in the statement of claim in a salvage action, the plaintiff will not be allowed to call evidence, except by leave of the Court, and on special grounds: such facts should be stated in a statement of claim as, if admitted, would constitute the whole of the plaintiff's case (*The Hardwick,* 9 P. D. 32).

Registered tonnage. In an action of limitation of liability, the defendants by their defence denied that the registered tonnage of the plaintiff's ship was the correct tonnage, and at the hearing were permitted to give evidence in support of their defence, although by so doing they had to go behind the register (*The Recepta,* 14 P. D. 131).

Oaths.

Oaths, persons to administer. 93. The Judge may appoint any person to administer oaths in Admiralty proceedings generally, or in any particular proceedings. Forms of appointments to administer oaths will be found in the appendix hereto, No. 34.

Declaration in lieu of oath. 94. 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 authorized 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. 35 and 36.

As to oaths and affirmations generally, see the Canada Evidence Act (R. S. C., 1906, cap. 145, secs. 13-16).

The Admiralty Court Act, 1861 (24 Vict. cap. 10), also provides as follows:

False oath or affirmation deemed perjury.

26. The registrar of the said Court of Admiralty shall have power to administer oaths in relation to any cause or matter depending in the said Court, and any person who shall wilfully depose or affirm falsely in any proceedings before the registrar or before any deputy or assistant registrar of the said Court, or before any person authorized to administer oaths in the said Court, shall be deemed to be guilty of perjury, and shall be liable to all the pains and penalties attaching to wilful and corrupt perjury.

Affidavits.

Affidavits to be divided into paragraphs, numbered &c.

95. Every affidavit shall be divided into short paragraphs numbered consecutively, and shall be in the first person.

Name, address, &c.

96. The name, address, and description of every person making an affidavit shall be inserted therein.

Names, &c., in jurat.

97. The names of all persons making an affidavit, and the dates when, and the places where it is sworn, shall be inserted in the jurat.

Affidavit by person blind or illiterate to be read over and certified.

98. 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.

Affidavit by interpretation, how made.

99. When an affidavit is made in English by a person who does not speak the English language, or in French by a person who does not speak the French 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. 37.

Affidavits, if in United Kingdom or British Possession.

100. 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 British possession, before any person authorized to administer oaths in the said United Kingdom or in such possession respectively;

Out of Her Majesty's dominions.

(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.

Affidavit sworn before solicitor of party may be objected to.

101. 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.

By the Exchequer Court Act (R. S. C. 1906, cap. 140, sec. 59), it is provided that all persons authorized to administer affidavits to be used in any Superior Courts of any province may administer oaths, affidavits and affirmations in such province to be used in the Exchequer Court; but it may be doubtful whether this provision applies to the case of affidavits to be used in the Exchequer Court on its Admiralty side.

Striking out.

The Court has power to order scandalous or irrelevant matter to be struck out of an affidavit, but it will rarely exercise this power (*The Neptunus*, Sw. 295; *The Schwalbe*, Sw. 521).

In the event of a trial being heard on affidavit, either by order of the Judge or consent of the parties, the provisions of R. S. C. 1883, Order XXXVIII., Part III., would apply.

Examination of Witnesses before Trial.

Examination before trial of witnesses who cannot attend trial.

102. 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. 38.

The Admiralty practice of the High Court admits of the examination before trial of witnesses who cannot be detained until the hearing.

See as to evidence generally, rule 88 and notes.

Examination before commissioner specially appointed.

103. If the witness cannot be conveniently examined before the Judge or the registrar, or is beyond the limits of the district, the Judge may order that he shall be examined before a commissioner specially appointed for the purpose.

104. 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. 39.

Power to swear witnesses.

105. 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.

Counsel and solicitors at examination.

106. The evidence of every witness shall be taken down in writing, and shall be certified as correct or approved of by the Judge, or registrar, or by the commissioner, as the case may be.

Evidence to be taken in writing and certified.

107. 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. 40.

Evidence lodged in registry. Transmitted to registry.

108. 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.

Evidence may be filed by either party.

An examination of witnesses before trial sometimes takes place in open Court (*The Two Friends*, Lush. 552), as when all the witnesses on one side can be heard, and the witnesses for the other side will be available within a short time: usually, however, an order is obtained on affidavit, setting out the facts showing the necessity for the examination before trial, for the examination of certain witnesses before the registrar: forty-eight hours' notice of the examination is generally required by the order.

In open Court.

In *The M. Moxham* (1 P. D. at p. 115), an application for a commission to take the evidence of experts in Spain as to the Spanish law applicable was refused.

On commission.

Rule 102 provides for the examination of witnesses before trial within the jurisdiction: Rule 103 makes similar provision for examinations without the jurisdiction. A special form of order under Rule 102 is provided (No. 38); but no form of order is provided for examinations under Rule 103. It seems therefore that under Rule 228 the English practice should be followed, and the short order and the long order taken out, as provided for in R. S. C. 1883, Order XXXVII., Rule 6; the forms being given in Appendix K., Nos. 36 and 37.

A commission should not be applied for until every effort has been made to obtain the evidence required by admissions of the opposite side (*The Augusta,* 26 T. L. R. 98).

Shorthand Writers.

Examination taken in shorthand.

109. 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. The shorthand writer shall, in addition to such transcript thereof, supply to the registrar three copies of such transcript, one of which shall be handed to the Judge, and the others given to the plaintiff and defendant respectively. A form of oath to be administered to the shorthand writer will be found in the appendix hereto, No. 41.

Official stenographer.

The notes taken by the authorized reporter are the only notes which are allowed to be used for the purpose of appeal. In *The Marbella* (Ad. Div. Dec. 1883, cited in Williams & Bruce), a shorthand writer, appointed by one of the parties to the cause, applied to Mr. Justice Butt to be sworn to take notes of the proceedings. The learned Judge declined to accede to the application and remarked: "Now I cannot agree that it is either right or proper that any gentleman who comes here, employed by one of the parties, has a right to be sworn, so that his note shall be the official note, so to speak, on which the proceedings are to go. There is a gentleman appointed by the Court permanently for that position, and the request now made is that the Court should upon each separate occasion and as often as the parties choose, appoint *pro hac vice* a shorthand writer. I do not think that was the intention of the rule at all, and I must say that the Judges of the Court, although they have nothing to say whatever to notes being taken for the use of the parties, have something to say as to the appointment of a gentleman upon whose notes their judgments are to be upheld or set aside, and I do not think there is any opinion I have ever expressed to clash with the view I now state, namely, that, although parties are at liberty to employ whom they wish to take notes for them, there is an official shorthand writer appointed and sworn by the

Court to take the notes, and that on his notes, and on his notes alone, appeals are to be proceeded with and argued."

If, after filing in the Admiralty Registry the transcript of the shorthand notes of the evidence of a witness taken before an examiner, a mistake is discovered to have been made by the shorthand writer in transcribing his notes, application should be made by the party grieved to the Court for an order directing that the transcript be taken off the file, and returned to the examiner for amendment, and the costs thereby incurred will be costs in the cause (*The Knutsford*, 1891, P. 219). **Mistake in transcription.**

Printing.

110. 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. **Printing of pleadings and written proofs.**

111. Preliminary Acts, if printed, shall be printed in parallel columns. **Preliminary acts.**

Assessors.

112. 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. **Appointment of assessors.**

113. The fees of the assessors shall be paid in the first instance by the plaintiff, unless the Judge shall otherwise order. **Fees of assessors.**

The proper time to apply for assessors is on the application to fix the date of trial (*The Abby Palmer*, 8 Ex. C. R. 469; 10 B. C. R. 380). **Time for application.**

Assessors will be appointed in salvage cases, when the Court considers they are necessary (*The Abby Palmer, ubi supra*). **Salvage actions.**

Assessors are present merely to advise the Judge, and the Judge ought to decide the case in accordance with his own opinion as to the law and the merits of the case (*The Euphemia*, 11 Ex. C. R. 234; *The Christiana*, 7 Moo. P. C. C. at p. 173; *The Aid*, 6 P. D. 84): but in matters of practical seamanship, great weight will be given to their opinions (*The Bermuda*, 15 W. L. R. 132; *The Beryl*, 9 P. D. at p. 144). **Function of assessors.**

An action of damage by collision between two vessels was tried without a jury, and after the evidence had been taken, the trial Judge, with the consent of both parties, consulted two master mariners, and adopted as his own their opinion, based on a consideration of conflicting testimony, as to the responsibility for the collision: it was held that this was a delegation of the judicial function, and a new trial was accordingly ordered (*Wright* v. *Collier*, 19 O. A. R. 298).

The Admiralty Court Act, 1861 (24 Vict. cap. 10, sec. 18), provides:

Inspection.

"Any party in a cause in the High Court of Admiralty shall be at liberty to apply to the said Court for an order for the inspection by the Trinity masters or others appointed for the trial of the said cause, or by the party himself, or by his witnesses, of any ship or other personal or real property, the inspection of which may be material to the issue of the cause, and the Court may make such order in respect of the costs arising thereon, as to it shall seem fit."

The persons appointed to inspect may be accompanied by the solicitors of the parties (*The Germania*, 37 L. J. Ad. 59).

Setting Down for Trial.

Filing notice of trial.

114. 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. 42.

If there has been no appearance

115. 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*,—

In an action *in personam* or against proceeds. In an action *in rem*.

(*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.

If an appearance.

116. If there has been an appearance, either party may set down the action for trial,—

After expiration of one week.

(*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.

If pleadings have been ordered. Default in pleading.

In collision cases, the Preliminary Acts may be opened as soon as the action has been set down for trial.

Opening Preliminary Acts.

117. 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.

Where claim to have account taken.

The ordinary methods of obtaining judgment by default in the Common Law Courts are not applicable in Admiralty actions, and the practice in the High Court of Admiralty in force before the Judicature Acts is preserved by Rule 115 (The *Polymede,* 1 P. D. 121; *The Sfactoria,* 2 P. D. 3).

Judgment by default.

No notice is required to be given to the owners (*The Sfactoria, ubi supra,* at p. 4), but after the expiration of the appointed times (*The Avenir,* 9 P. D. 84), application may be made to the Judge for leave to set down the action for trial and to file affidavits by way of proof (*The Sfactoria, ubi supra,* at p. 4; *The Lady Blessington,* 34 L. J. Ad. 73; Rule 88).

It is submitted that it is not necessary to obtain leave to file a statement of claim, if the writ contains sufficient particulars of claim: even under the English practice, which requires the filing of a statement of claim, it has been dispensed with (*The Hulda,* 6 Asp. M. C. 244), where the writ contained the particulars of claim: but where the claim is not fully disclosed by the writ, it may be advisable to obtain leave under Rule 61 to file a statement of claim.

Filing statement of claim.

No notice of trial is necessary, but the order of the Judge is filed in the registry, and on the day fixed for the trial, a motion is made to the Court for judgment. The Judge has power, either with or without appraisement and either with or without notice to order a sale of the property under arrest (Rule 145, *infra*).

Notice of trial.

In special cases, where a ship has been sold in the same or another cause, and the proceeds remain in the registry, and no appearance has been entered, all preliminary proceedings

Summary judgment.

may be waived and the money due paid out of Court (*The Julina,* 35 L. T. 410; *The Aurora,* 18 B. C. R. 449; 15 Ex. C. R. 31): both of these cases were actions for wages.

Evasion of service.

In *The Nautik* (1895, P. 121), a writ *in rem* was duly served within the jurisdiction by nailing it to the mast of a foreign vessel proceeded against for damage to cargo, and a warrant for her arrest was issued, but before it could be served, the master clandestinely put to sea: on motion for judgment by default, it was held that the Court had jurisdiction to pronounce judgment, for, though, according to the ordinary practice, the property proceeded against must be under the arrest of the Court, still the service of the writ by which actions *in rem* are commenced is notice to all persons interested in the property of the claim indorsed on the writ, and has the same effect, so far as notice is concerned, as the service of the warrant under the former practice.

It seems, however, that, in view of the express provision of Rule 115 (*b*), such a course would not be adopted in the Admiralty Court in Canada.

Bottomry.

In a cause of bottomry, where a copy of the original bond was produced, a decree was granted for the validity of the bond, subject to the original being produced in the registry (*The Rowena,* 37 L. T. 366): but the learned Judge remarked that the practice of producing the original bond must be strictly adhered to as well in causes by default as in other cases.

Viaticum.

Foreign seamen discharged in Canada, and who recover wages in a suit against a foreign ship, in which they have served, are not entitled as of course to their passage money home, but will obtain it when their consul certifies they have gone or are about to go home: and it seems that their shipping in another vessel as seamen, even for their voyage home, would disentitle them (*The Raffaelluccia,* 37 L. T. 365).

Seamen's wages paid to foreign consul.

The Court will not pay seamen's wages out of the proceeds in Court to a foreign counsel at his request, but will require the solicitor of the parties to satisfy any claims the consul may have before receiving the money out of Court (*The Julina,* 35 L. T. 410).

Fatal Accidents Act.

In *The Orwell* (13 P. D. 80), an action for damages under the Fatal Accidents Act was commenced in the Admiralty Division of the High Court of Justice, and on default in pleading, the plaintiff was allowed to enter interlocutory judgment and to have the damages assessed by a jury. This was doubtless

correct under the powers of the Admiralty Division in England, which is a branch of the High Court, but in view of the decisions in *The Vera Cruz* (10 A. C. 59), and *The Camosun* (1909, A. C. 597) such a course would not be adopted in the Admiralty Court in Canada.

Caveat warrant.

Where a caveat against the issue of a warrant has been entered, the question of the practice to be followed presents some difficulty. Rule 180 (*infra*) provides that 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, brought against the property. The corresponding English Rule (R. S. C. 1883, Order XXIX, Rule 12) requires the person entering the caveat to also file an undertaking to appear, and by Rule 14 of the same order, a solicitor commencing an action against any property in respect of which a caveat has been entered, is required to serve a copy of the writ upon the party on whose behalf the caveat has been entered, or upon his solicitor. Rules 16 and 17 of the same Order then provide: "After the expiration of twelve days from the service of the writ or copy thereof, if the party on whose behalf the caveat has been entered shall not have given bail . . . or paid the same into the registry, the plaintiff's solicitor may proceed with the action by default, and on filing his proofs in the registry may have the action placed on the list for hearing": "If when the action comes before the Judge, he is satisfied that the claim is well founded, he may pronounce for the amount which appears to him to be due, and may enforce the payment thereof by attachment against the party on whose behalf the caveat has been entered, and by the arrest of the property, if it then be or thereafter come within the jurisdiction of the Court."

It may be that Rule 228 (*infra*) has the effect of bringing this practice into force, but as the entry of a caveat warrant does not prevent the issue of a warrant (Rule 184 *infra*), it seems safer to issue and serve the warrant, inasmuch as where the procedure outlined above has been adopted the judgment is only in the nature of a judgment against the party on whose behalf the caveat has been entered, and therefore the property cannot be sold, nor can any final judgment be pronounced affecting the rights of other persons interested in the property until steps have been taken to arrest the *res* (*The City of Mecca*, 5 P. D. 28, 33, 34).

Trial.

Time and place of trial. 118. After the action has been set down for trial, any party may apply to the Judge, on notice to any other party appearing, for an order fixing the time and place of trial; or he may upon giving the opposite party ten days' notice, set the action down for trial at any sitting of the Court duly appointed to be held by the Judge.

Who shall begin. 119. 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.

If several plaintiffs or defendants. 120. If there are several plaintiffs or several defendants, the Judge may direct which plaintiff or which defendant shall begin.

Order of proceeding in the trial of an action. 121. 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.

Counsel. 122. 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.

Uncontested action. 123. If the action is uncontested, the Judge may, if he thinks fit, give judgment on the evidence adduced by the plaintiff.

Jury. The Judge of the Admiralty Court has power to direct a trial by jury of any issue or question arising in any action: the substance and form of the issue are to be specified by the Judge at the time of directing the issue; and if the parties differ in drawing the issue, it must be referred to the Judge for settlement. The trial of the issue takes place before some Judge of Assize. **New trial.** The Court may, on application made within three months, direct one or more new trials of any such issue; and the granting or refusing to grant an issue, or a new trial, may be appealed from to His Majesty in Council. The record of the issue and the verdict is transmitted to the registrar of the Court of Admiralty, and unless set aside, is conclusive upon all parties to the action. The costs of the issue and of the trial and any new trial are in the discretion of the Court

(The Admiralty Court Act, 1840, 3 & 4 Vict., cap. 65, secs. 11-16).

"It was only intended that the Court should exercise the power (of directing an issue) where some important issue was involved, and not in cases . . . where the principal difficulty lies in discrepant evidence as to the terms of a contract." (*The Flecha,* 1 Spks. p. 440).

When granted.

In *The Harriott* (1 W. Rob. 439), an issue was directed to try the existence of an alleged custom in the South Sea Fisheries for vessels to render assistance to each other gratuitously; and in the same case a new trial wes refused.

In England the matter is now governed by R. S. C. 1883, Order XXXVI., Rules 4 and 7*a,* under which the Judge has a discretionary power to allow trial by a jury (*The Temple Bar,* 11 P. D. 6).

With regard to the right to begin, Sir Robert Phillimore in *The Otter* (L. R. 4 A. & E., at p. 205), laid down the rule that the plaintiffs must begin in all cases of damage: in that case the only defence raised was that of inevitable accident; and from analogy it is submitted that the plaintiff still has the right to begin, notwithstanding that the plaintiff's vessel was at anchor at the time of the collision. Where the Crown undertakes the defence, counsel for the Crown has the right to reply on the whole case (*The Parliament Belge,* 4 P. D., at p. 144).

Right to begin.

In a salvage suit where there are rival salvors, the salvor who first enters his suit has the right to begin, unless special circumstances be shown (*The Morocco,* 24 L. T. 598): in such an action, each salvor may be represented by separate counsel (*The Scout,* L. R. 3 A. & E., at p. 514), and rival salvors have a right to cross-examine each other's witnesses, but only on a point at which they are at issue (*The Morocco, ubi supra*).

Salvage action.

Separate counsel.

Cross-examination.

The Court is not accustomed to assess damages in the first instance, but directs a reference to the registrar: to avoid expense, however, the Court, if it can satisfactorily dispose of the question, will refrain from ordering a reference, and itself make an award of damages (*The Eleonore,* Br. & L. at p. 187). When consequential damages are claimed, the Court will deal, at the hearing, with the question whether such damages are recoverable (*The Maid of Kent,* 6 P. D. 178). The Court will also, sometimes, give directions to the registrar as to the principle to be applied in assessing the damages (*The St. Cloud,* Br. & L., at p. 18; *The Hansa,* 6 Asp. M. C. 268): but the

Damages.

Court cannot devolve upon the registrar the solution of any point of law (*The Ocean,* 10 Jur. at p. 506).

References.

Assessment of damages, and taking accounts.

124. 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.

Rules of evidence in case of reference.

125. The rules as to 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.

Counsel fees on reference.

126. 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.

Report in cases of reference.

127. 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. 43.

Notice of report being ready.

128. When the report is ready, notice shall be sent to the parties, and either party may thereupon take up and file the report.

Notice of motion to vary report.

129. 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.

Hearing of motion to vary.

130. 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.

When report shall stand confirmed.

131. 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.

The powers of the registrar are dealt with in sections 23 to 26, inclusive, of the Admiralty Court Act, 1861 (25 Vict., cap. 10, *infra*).

The registrar is usually assisted by two merchants, except in default actions *in rem,* where the reference is usually to the registrar alone, or to the registrar assisted by one merchant.

In the following cases the ordinary course is to order a reference sometimes before, and sometimes after, the Judge in Court has decided the question of liability; in actions of damage where either the plaintiff's or the defendant's vessel is to blame for the collision and has suffered damage, or where the two vessels involved are both damaged, and found to blame (in which latter case two references, *i.e.*, one in respect of the claim of the plaintiffs and the other in respect of the claim of the defendants, may be necessary); in actions of damage where after the collision there has been subsequent damage or an abandonment of either or both of the vessels requiring the question of consequential damage to be decided; in actions of limitation of liability, in which, after the decree limiting the amount of the plaintiffs' liability has been made in Court, the right of the claimants to share in the limited amount and the amounts respectively due to each of them is determined at a reference and reported upon to the Court; and in actions of salvage where the salving vessel has been damaged in rendering the services, and the details of the damage have to be accurately ascertained.

Orders for reference.

References are also frequently ordered in actions of co-ownership, mortgage, wages, disbursements, damage to cargo, bottomry, and necessaries, or whenever there are accounts to investigate.

The Court will, where it is convenient to do so, order one of several consolidated causes to be referred to the registrar separately (*The Helen R. Cooper*, L. R. 3 A. & E. 339).

Consolidated actions.

Within twenty-one days from the day when the order for the reference is made, the solicitor for the claimant must file the claim and any affidavits, and within twelve days from the day when the claim and affidavits are filed the adverse solicitor must file his counter affidavits. The claim is headed in the action, and consists of a statement of the particulars of the claim proposed to be made at the reference, arranged in numbered items. Any other documentary evidence required to prove the items of the claim, such as vouchers or receipts not made exhibits to the affidavits, should be numbered to correspond with the items of claim, and should be filed within the twelve days. It is not necessary to bring in any affidavits if it is intended that the claimant's case at the reference should be proved by oral evidence without affidavits. In all actions other than actions of limitation, a copy of the claim and of the documentary evidence and of any affidavits intended to be filed

Practice on references.

should be supplied to the adverse solicitors, and similarly copies of any counter affidavits should be supplied to the claimants' solicitors (Order LVI. R. S. C. 1883; Halsbury, Vol. I., p. 118).

Cross-examination.

The registrar has a discretion to require a deponent to attend for cross-examination on his affidavit (*The Parisian*, 13 P. D. 16).

Inspection of documents.

In *The Pacuare* (1912, P. 179), in an action of damage by collision, the defendants, who admitted liability and agreed to a reference, were held to be entitled to an order to inspect the plaintiff's books with a view to ascertaining the figures upon which the plaintiffs based the value which they set upon their vessel.

The registrar possesses full powers of inspection of ship or cargo (*The Spray,* 10 W. L. R. 448; 14 B. C. R. 191).

At the time appointed for the reference, if the counsel or solicitor for any party be present, the reference may be proceeded with, but the registrar may adjourn the reference (R. S. C. 1883, Order LVI., Rule 5, Rule 125).

One counsel is usually allowed when *viva voce* evidence is given (Roscoe, Admiralty Practice, 3rd ed., 383).

Special case.

The registrar may state a special case for the opinion of the Court either on any special point arising in the course of the proceedings at the reference, or as to the questions involved in the reference generally (*The John Bellamy,* L. R. 3 A. & E. 129; *The Immacolata Concezione,* 9 P. D. 37; *The Parisian,* 13 P. D. 16).

Interest.

In causes of damage by collision between two ships the registrar also awards interest: where the injured ship carried cargo, such interest runs from the date or estimated date of the completion of the voyage (*The Kong Magnus,* 1891, P. 223); where the injured ship carried no cargo, interest is given upon the value of the ship or the amount of the compensation from the day of the collision (*The Northumbria,* L. R. 3 A. & E., at p. 12); and where the owner of the offending ship takes steps to limit his liability, he is liable to pay interest on the amount of the limitation (*The Northumbria, ubi supra,* 6).

In a cause of bottomry interest runs from the date of the bond (*The Edmond,* Lush. 211).

In other actions interest runs from the date of entry of judgment, and in the case of costs from the date of the signing of the allocatur (*The Jones Brothers,* 37 L. T. 164).

Costs.

The registrar shall in his report make such order as he shall think fit as to the costs of the reference (R. S. C. 1883, Order LVI., Rule 8).

The costs of the reference as to damages in an action of damage do not follow the costs of the action, but are in the discretion of the Judge as the costs of a fresh litigation (*The Consett,* 5 P. D. 77).

Where in an action of damage the defendants set up a counterclaim relating to the same collision, and both ships are held to blame, and a reference is ordered to ascertain the amount of damage sustained by each ship, each party is, as a general rule, entitled to the costs of establishing his claim before the registrar, provided that not more than one-fourth of his claim has been disallowed (*The Mary,* 7 P. D. 201). But the old Admiralty rule that when more than a fourth is struck off a claim, each party pays his own costs, and when more than a third the claimant pays the other party's costs, is wrong, and the Court must exercise its discretion according to the circumstances of each particular case (*The Friedeberg,* 10 P. D. 112).

The Reading.

An action of damage by collision was settled on the terms that the plaintiffs should receive 60 per cent., and the defendants 40 per cent. of the amount of the damage sustained by their respective vessels: but, before the reference, the plaintiffs' solicitors wrote to the defendants' solicitors offering to agree the defendants' claim at 40 per cent. of £4,500 with interest. This offer the defendants declined to accept unless made in accordance with the rules as to tender. The investigation into the respective claims resulted in a small balance in favour of the plaintiffs being found due; but the registrar, in his report, although he reduced the defendants' claim below £4,500, gave the defendants their costs of proving their claim on the ground that the plaintiffs' offer had not been followed up by the ordinary procedure in the case of a tender. It was held that the plaintiffs were entitled to the costs in respect of the proof of the defendants' claim subsequent to the offer by letter, as the word "tender" did not apply to the proposed agreement, which, if accepted, would have saved the expense attending the assessment of the defendants' claim (*The Reading,* 1908, P. 162).

Limitation of liability.

In an action for limitation of liability, the general rule is that the plaintiff must pay the costs; but this rule is not in-

variable, and the registrar has a discretion in a proper case to make such recommendation as to costs as he thinks just (*The Rijnstroom,* 8 Asp. M. C. 538).

Bottomry. In a cause of bottomry, where the bond is admitted to be valid, and referred to the registrar to ascertain the amount due, the plaintiff is usually entitled to the general costs of the reference (*The Kepler,* Lush. 201).

Improper conduct. A party who has persisted in claims which cannot be sustained will be condemned in costs (*The Kepler, ubi supra*); and so also will a party who has improperly declined to appear before the registrar (*The Mellona,* 3 W. Rob., at p. 24).

Motion to vary. The notice of motion to vary the report should be served on the adverse solicitor (R. S. C. 1883, Order LVI., Rule 11).

The time for filing the notice to vary may be extended (*The Thyatira,* 32 W. R. 276, 279).

On the hearing of the motion to vary, the Judge may summon assessors (*The Pensher,* Sw., at p. 213).

Both sides may file a notice to vary the report (*The Otter,* 12 Ex. C. R., at p. 259).

Fresh evidence. The Court may admit fresh evidence on the hearing of the motion to vary, but the discretion to admit such evidence is to be exercised with great caution, and with a careful regard to the peculiar circumstances of each case (*The Flying Fish,* Br. & L. 436). Such evidence may be on affidavit or *viva voce* (*The Harmonides,* 1903, P. 1, at pp. 3 and 5). But fresh evidence will not be admitted unless the Court is satisfied that it could not have been produced before the registrar by the exercise of proper diligence (*The Thuringia,* 41 L. J. Ad. 20). A motion to admit such evidence by reason of surprise should be founded upon affidavits, setting forth the names of the proposed witnesses, and the character of their testimony (*ibid.*).

Registrar's discretion. The Court attaches great weight to the registrar's report and it will not be varied unless some question of principle is involved or the sum allowed is quite unreasonable (*The Clyde,* Sw. 23; *The Amerika,* 30 T. L. R. 569).

It is within the discretion of the registrar to reduce the amount of a bottomry bond (*The Pontida,* 9 P. D. 102).

Referring back. The Court may refer the matter back to the registrar for a further report, either on the case generally, or on any particular point (*The Minnetonka,* 1904, P., at p. 210).

In *The Otter* (12 Ex. C. R. 258), the registrar, in finding the value of a freight steamer and her cargo, had allowed a yearly depreciation in the value of the ship of 7 per cent., following a practice with reference to wooden vessels said to prevail in British Columbia. It was held that whatever might be said of the allowance of such a depreciation in the case of wooden vessels as a rule, it must always very largely depend upon the manner in which the vessel was originally constructed, and the care she had subsequently received, and that in the case of the vessel under consideration, which was better built than the average ship and had been well maintained, such a rule could not be fairly applied. The Court also took into consideration the amount at which the ship was insured.

Costs.

Costs in general to follow result.

132. In general costs shall follow the result; but the Judge may in any case make such order as to costs as to him shall seem fit.

Lump sum.

133. The Judge may direct payment of a lump sum in lieu of taxed costs.

Special rules.

The discretion of the Court as to costs is in many instances exercised in accordance with special rules which have been worked out in practice.

Misleading defence.

Thus, although costs usually follow the result, a defendant, who has set up a misleading defence calculated to invite unnecessary controversy, will be deprived of his costs, even though in the event successful (*The Johnson,* 14 Ex. C. R. 321).

Causes of damage.

The common law rule by which the costs of issues are apportioned is not applied in Admiralty. Thus in actions of damage, an unsuccessful plaintiff is not entitled to any portion of the costs of the action, notwithstanding that the defendant may have failed on some of the issues raised by the defence (*The Schwan,* L. R. 4 A. & E. 187): where in such actions neither party admits negligence and both vessels are found to blame, each party has to bear his own costs (*The Lombard,* Cook 289; *The Hector,* 8 P. D. 218; *The Beryl,* 9 P. D., at p. 144): and where one party is found solely to blame in the Court of first instance, and succeeds on appeal in establishing that there was fault on both sides, each party must bear his own costs in the Court below and of the appeal (*The Lake St.*

Clair, 2 A. C. 389; *The Harvest Home,* 1905, P. 177): but where one party admits by his pleading that he is to blame, and only asks for a decree of both to blame, which the other party resists, and seeks to have the first party held solely to blame, the second party if also held to blame will be condemned in the whole costs of the action (*The General Gordon,* 6 Asp. M. C. 533): and where one party admitting on the appeal though not in the Court below, that his vessel is to blame, appeals on the ground that the other party's vessel is also to blame, the practice is settled that each party bears his own costs in the Court of first instance, and the successful appellants are entitled to their costs of the appeal (*The Ceto,* 14 A. C. 670; *The London,* 1905, P. 152).

Inevitable accident.

Where a collision is found to be the result of inevitable accident, it is a rule of the Admiralty Court to make no order as to costs, unless it can be shown that the suit was brought unreasonably, and without sufficient *prima facie* grounds; and where one vessel is held solely to blame in the Court of first instance, and that vessel appeals and the collision is found to be the result of inevitable accident in the Appellate Court, inasmuch as the respondent comes to the Appellate Court to support the decree he has obtained, each party bears his own costs of the appeal (*The Marpesia,* L. R. 4 P. C. 212). This rule has been now departed from in the Admiralty Division in England (*The Monkseaton,* 14 P. D. 51), but on the grounds that that Division is now merely a branch of the High Court of Justice, and that there should be an uniform practice in all the divisions of the Court on the subject of costs: these reasons have no application in Canada, and it is submitted that the rule established by *The Marpesia* still holds good in the Canadian Court of Admiralty.

Compulsory pilotage.

Where, in actions of damage by collision, the sole defence raised is one of compulsory pilotage, and the defendant succeeds on that ground, he is entitled to his costs (*The Oakfield,* 11 P. D. 34): but where the defence of compulsory pilotage is raised along with other defences, and the defence of compulsory pilotage alone succeeds, each party bears his own costs of the trial (*The Winestead,* 1895, P. 170), and of any appeal (*The Daioz,* 3 Asp. M. C. 477). Where the defendant relies on the defence of compulsory pilotage, which succeeds, and also sets up a counterclaim which fails, the plaintiff's claim will be dismissed without costs, and the counterclaim with costs (*The Mercedes de Larrinaga,* 1904, P. 215).

One defendant condemned in costs.

Where the owners of a barge in tow of a tug having been damaged by collision with a steamship, instituted an action against the owners of both tug and steamer, and the steamer, which alleged that the collision was due to the negligence of the tug, was found alone to blame, the Court ordered the owners of the steamer to pay the costs of the plaintiff and of the successful defendants (*The River Lagan,* 6 Asp. M. C. 281). And where the plaintiffs in a cause of damage, acted reasonably in joining two defendants, one of whom threw the blame on the other, but was found alone to blame, such defendant was condemned to bear the costs of the plaintiffs against both defendants, and also the costs of the innocent defendant, both in the Court below and on appeal (*The Mystery,* 1902, P. 115).

Causes of salvage.

In actions of salvage the rule is generally that the salvors are entitled to all the costs of the action (*The Princess Alice,* 3 W. Rob. 138; *The Ranger,* 9 Jur. 119; *The Vine,* 2 Hagg. 1; *The Francis and Eliza,* 2 Dods. 115); even where the award is diminished by want of skill on the part of the salvors, they are nevertheless entitled to their costs (*The Dwina,* 1892, P. 58): and where a salvage agreement is set aside as inequitable, if the salvors recover a substantial sum on their alternative claim for salvage services generally, they will be allowed their costs (*The Rialto,* 1891, P. 175).

Where in salvage actions the assistance is found to have been unnecessary, an award will be refused and the plaintiffs condemned in a nominal sum for costs (*The Henrietta,* 3 Hagg. 345 note); or each party may be left to bear his own costs (*The Little Joe,* Lush. 88). Where, however, the misconduct of the salvors has led to a forfeiture of salvage reward, they will be condemned in costs (*The Yan-Yean,* 8 P. D. 147; *The Capella,* 1892, P. 70).

Where a plaintiff named an extravagant sum for salvage services in his statement of claim, but the services were meritoriously rendered and the defendant did not tender or pay into Court any money to meet the demand, the Court refused to deprive the plaintiff of costs, although awarding a sum quite disproportionate to the amount claimed (*The Uranium,* 15 Ex. C. R. 102).

Where the plaintiff's contract of service excluded a claim for salvage, his action was dismissed, but without costs (*The Ganges,* L. R. 2 A. & E. 370).

Where there are several sets of salvors, the Court may award a sum for costs to each (Rule 133; *The Kathleen*, 31 L. T., at p. 211).

Contribution. Where salvage services have been rendered to ship and cargo and salvage has been awarded against both, the owners of the ship and the owners of the cargo must contribute to the costs in proportion to the values on which the award is made (*The Peace*, Sw. 115; *The Elton*, 1891, P. 265); but this is without prejudice to the salvors' right to recover the whole costs from either (*The Elton*, *ubi supra*, at p. 271).

Causes of wages. Costs are not usually given against masters or seamen who are unsuccessful in a wages suit (*The Washington Irving*, 2 Stuart 97; *The Vibilia*, 2 Hagg. 228): the reason given being that it would be an ineffectual relief to decree costs against a mariner who would probably not be in a condition to pay them (*ibid.*).

Where, however, the claim of the master is excessive, he may be condemned in costs (*The William*, Lush. 199): and where the master makes an exorbitant claim, and the owner sets up an exorbitant counterclaim, each party must bear his own costs (*The Lemuella*, Lush. 147).

Witnesses. A party is not bound to examine any of his witnesses before trial, and if judgment is given in his favour with costs, he is in general entitled, with respect to seamen who are reasonably detained by him as necessary witnesses, to the expense of maintaining them to the time of the hearing, and in the case of witnesses who are foreign seamen, a reasonable charge for an interpreter may be allowed (*The Karla*, Br. & L. 367). The expenses of material and necessary witnesses may be allowed, even though they may not have been called at the trial (*The Biddick*, 38 L. J. Ad. 24).

Costs of sale of *res*. Where there are several claimants against the proceeds of a vessel in the registry, and she has been sold at the suit of one, the costs of such sale will be paid before all claims, as such sale was for the benefit of all (*The Panthea*, 25 L. T. 389); and when a fund, by a sale of a ship, is placed in Court by one set of claimants, so as to be available for other claimants, the former are entitled to their costs up to and inclusive of the sale, though they do not rank first in respect of their actual claim (*The Immacolata Concezione*, 9 P. D. 37). Where a party in an action *in rem* has incurred costs which have benefited not only himself but parties in other actions against the *res*, the costs so incurred by him will, if the proceeds of the property are insufficient to satisfy all claims in the various

actions, be paid to him out of the fund in Court before any other payment is made thereout (*The City of Windsor*, 5 Ex. C. R. 223).

Action for accounts. In actions for account between co-owners the rule as to the incidence of costs followed by the Courts of law in partnership suits may be adopted in the Admiralty Courts (*The Dominion*, 5 Ex. C. R. 190).

Crown. Costs are not given against the Crown (*The Minnie Gordon*, Stockton 95).

Costs of interlocutory motion. After an appeal has been decided, it is too late to apply for the costs of an interlocutory motion, which have been reserved to the trial judge and not disposed of (*The Tecumseh*, 10 Ex. C. R. 153).

Bond for bail. A party putting in bail in the form of a guarantee company's bond is entitled to tax the costs of the bond at the rate of one per cent. of the bond (*The Cape Breton*, 11 Ex. C. R. 227; *The Universe*, *ibid.* 229).

Possession fees. Where the marshal seizes under a number of warrants issued in different suits, he is only entitled to one set of possession fees (*The Saga*, 6 Ex. C. R. 305; 6 B. C. R. 522).

Upon a proper construction of Part V. of the Title of Fees no greater sum than ten cents a mile can, in any circumstances, be allowed for executing a warrant of arrest (*The Aurora* (No. 2), 15 Ex. C. R. 25; 20 B. C. R. 210).

It is the duty of the marshall to keep and present proper accounts, and if he fails to do so, he will be visited with the costs of any application rendered necessary by his failure (*The Glory of the Seas*, Appendix VII.).

Counsel fees. In an action of damage by collision, where damage had been done to the amount of £2,000, the costs of a third counsel were allowed (*The Mammoth*, 9 P. D. 126).

The Court has no power to increase counsel fees (*The Skeena*, 20 B. C. R. 481).

Motion to vary report. The costs of the reference have already been dealt with (*supra*, 271): the costs of a motion to vary the registrar's report usually follow the result (*The Black Prince*, Lush. 568).

Costs of appeal in salvage causes. The costs of an appeal usually follow the result: in causes of salvage, however, where the award is reduced on appeal, it is the rule that no order is made as to costs (*The Inca*, 12 Moo. P. C. C. 189; *The Chetah*, L. R. 2 P. C. 205; *The Amerique*, L. R. 6 P. C. 468); but a salvor who succeeds in an appeal to increase the award usually has the costs given to him (*The Glenduror*, L. R. 3 P. C. 589).

Where relief is given in the Court of Appeal which has not been asked for in the Court below, each party must bear his own costs of appeal (*The Thrift*, 10 Ex. C. R. 97).

Solicitor's lien. A solicitor in the Admiralty Court has the same lien for his costs as a solicitor in the common law Courts, on sums of money decreed by the Court to be paid (*The Araminta*, Sw. 81; *The Phillipine*, L. R. 1 A. & E. 309).

The Exchequer Court Act (R. S. C. 1906, cap. 140, secs. 16, 17, 18), provides, that all persons who are barristers or advocates in any of the provinces, or who are attorneys or solicitors of the Superior Courts in any of the provinces, may practice as barristers, advocates, counsel, attorneys, solicitors, and proctors in the Exchequer Court, and shall be officers of that Court. Rule 227 (*infra*) provides that if the same practitioner acts as both counsel and solicitor in an action, he shall not be entitled to receive fees in both capacities.

Solicitor and counsel.

A solicitor's lien on a fund in Court is not affected by a garnishee order, and he is entitled to be paid his costs in priority to the claim of the garnishor (*The Jeff Davis*, L. R. 2 A. & E. 1; *The Leader*, L. R. 2 A. & E. 314). But in *The Olive* (Sw. 423), it was held that a garnishee order cannot be reviewed by the Admiralty Court, and therefore the payment under a garnishee order of costs pronounced to be due to a successful party by decree of the Court is satisfaction of the decree, even as against that party's solicitor claiming his lien.

The Heinrich. A foreign vessel was arrested in a suit instituted under the 6th section of the Admiralty Court Act, 1861 (24 Vict., cap. 10): the master, who was part owner, acting on behalf of himself and his co-owners, instructed solicitors to defend the suit: the solicitors defended the suit, which was dismissed with costs: afterwards suits were instituted against the vessel and freight in respect of claims for necessaries: in these suits claims were made for necessaries furnished after the institution of the former suit: the vessel, having been sold, and the proceeds and freight having been brought into Court, and the solicitors for the owners of the vessel being unable to obtain payment of the costs incurred by them in defending the former suits, it was held that the solicitors were entitled to be paid out of the proceeds in Court such costs in priority to the claims in respect of necessaries supplied after the institution of the first suit (*The Heinrich*, L. R. 3 A. & E. 505).

The Livietta.

In the same case, it was held that the claim of the solicitors for such costs was entitled to take priority of a claim made by the master for his wages. But in *The Livietta* (8 P. D. 209), salvage actions were brought against an Italian vessel and she was sold by order of the Court: after the salvors had been remunerated, the balance of the fund in Court was insufficient to satisfy the costs of the solicitors who had appeared in the salvage actions for the parties interested in the ship, and who sought to enforce their claim for such costs by virtue of 23 & 24 Vict., cap. 127, sec. 28, as well as the claim of the Italian consul in respect of the expenses of sending the crew back to Italy: it was proved that by the law of Italy such expenses and the keep of the master and crew ranked next to the salvage payments, and it was held that the claim of the Italian Consul had priority to that of the solicitors.

A solicitor was also held entitled to a lien on the sum found by an award in an action of damage by collision in *The Paris* (1896, P. 77).

Bail for costs.

134. 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 district in which the action is instituted, the Judge may, on the application of the adverse party, order him to give bail for costs.

Time for application.

An application for security for costs should be made in the earliest stage of the proceedings (*The Volant,* 1 W. Rob. 383): but this rule is not invariable, and in *The Lake Simcoe* (9 Ex. C.R. 361), a plaintiff was ordered to give security for costs after he had filed particulars of his statement of claim.

Plaintiff out of the jurisdiction.

Security for costs may be ordered to be given by a plaintiff resident out of the jurisdiction, though temporarily within it (*The Zufall,* 44 L. J. Ad. 16): but the Court will sometimes exercise its jurisdiction by refusing to order security in such a case (*The Don Ricardo,* 5 P. D. 122).

Where the plaintiff or the defendant making a counterclaim resides out of the jurisdiction, an order for security for costs is made as of course (*The Johann Freiderich,* 1 W. Rob., at p. 39; *The Lord Cochrane, ibid.* 312; *The Sophie, ibid.* 326);

even though the plaintiff may be a foreign government (*The Beatrice,* 36 L. J. Ad. 10). But a foreign defendant, who raises no counterclaim is not bound to give security for costs, even though it may happen that the burden of proof of the issues in the cause lies upon him (*The Beatrice, ubi supra*).

Bankrupt plaintiff. Where a plaintiff has recently executed a deed of assignment of all his property to an assignee he will be required to give security for costs, unless he satisfies the Court that he is solvent, and the fact that he is carrying on business is not sufficient proof of solvency (*The Lake Megantic,* 3 Asp. M. C. 382; Rule 228).

Limitation of liability. A foreign ship-owner resident out of the jurisdiction, who has been condemned as a defendant in a cause of damage, will be required to give security for costs as plaintiff in an action of limitation of liability (*The Wild Ranger,* Lush. 553).

Counterclaim. It appears that a defendant in an action *in rem* having a counterclaim is liable to give security for the plaintiff's costs of the whole action (*The Julia Fisher,* 2 P. D. 115).

Compliance with order. The proceedings in the action will be stayed until the order is complied with, and if it is not complied with within a reasonable time, the action or counterclaim may be dismissed (*The Julia Fisher,* 2 P. D. 115).

Undertaking as to costs. In *The Ratata* (1897, P. 118), the plaintiff, residing out of the jurisdiction, gave security for costs: on judgment being given for the defendants, the costs were paid over to the defendants: the plaintiff successfully appealed and claimed the return of the costs: it was held by the Court of Appeal that a stay would be granted, unless the plaintiffs' solicitors gave an undertaking to refund any costs in the event of the defendant's appeal to the House of Lords being successful.

Security for damages. Plaintiffs beyond the jurisdiction of the Court will not be required to give security for damages as well as costs (*The D. H. Peri,* Lush. 543; *The Mary or Alexandra,* L. R. 1 A. & E. 335); except in cases falling within sec. 34 of the Admiralty Court Act, 1861 (24 Vict., cap. 10, *ante*).

Party claiming an excessive amount. 135. A party claiming an excessive amount, either by way of claim, or of set-off or counterclaim, may be condemned in all costs and damages thereby occasioned.

136. 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.

Tender rejected but afterwards accepted or held sufficient.

See notes to Rules 85, 86. *supra.*

137. 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.

Party not admitting fact.

See Rules 74, 75, *supra,* as to admission of documents and facts.

138. Any party pleading at unnecessary length or taking any unnecessary proceeding in an action may be condemned in all costs thereby occasioned.

Pleading at unnecessary length.

See note to Rule 220.

Taxation of Costs.

Taxation of costs.

139. A party desiring to have a bill of costs taxed shall file the bill, and shall procure an appointment from the registrar for the taxation thereof, and shall serve the opposite party with notice of the time at which such taxation will take place.

Bill to be filed. Appointment and notice.

140. At the time appointed, if either party is present, the taxation shall be proceeded with.

Either party present.

141. Within *one week* from the completion of the taxation application may be made, by either party, to the Judge to review the taxation.

Review within one week.

142. Costs may be taxed either by the Judge or by the registrar, and as well between solicitor and client, as between party and party.

Who may tax costs.

143. 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.

Costs when one-sixth struck off in taxation between solicitor and client

144. The fees to be taken by any district registrar shall, if either party desires it, be taxed by the Judge.

Fees of District Registrar.

As to costs generally, see Rule 132 and notes.

The Court will not ordinarily interfere with the taxation of costs by the registrar, unless the decision of the registrar is shown to have been erroneous in principle (*The Neera,* 5 P. D. 118).

Appraisement and Sale, Etc.

Property under arrest may be ordered to be appraised and sold. 145. 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, and may direct what notice by advertisement or otherwise shall be given or may dispense with the same.

Property deteriorating. 146. If the property is deteriorating in value, the Judge may order it to be sold forthwith.

Property of small value. 147. 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.

Removal of property under arrest. 148. 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.

Vessel condemned under Slave Trade Act. 149. 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. 44 to 49.

Commission to be filed with a return. 150. 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.

Payment of proceeds into court. 151. 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.

Marshal's or deputy marshal's account to be taxed. 152. 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.

Review of such taxation. 153. Application may be made to the Judge on motion to review the registrar's taxation.

Inspection of property under arrest. 154. 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. 50.

An appraisement is usually ordered as a preliminary step to a sale, but sometimes a commission of appraisement is only required, as where there is a dispute as to the value of property sought to be released; or where it is necessary to ascertain the value of the plaintiff's shares in the ship in an action of restraint.

Appraisement.

The commission is directed to the marshal of the Admiralty district, or the sheriff of the county, and commands the persons to whom it is directed to reduce into writing an inventory of the property, and having chosen one or more experienced person or persons, to swear him or them to appraise the property according to the true value thereof, and to have a certificate of the value reduced into writing and signed by the person executing it and the appraiser or appraisers and to file the certificate in the registry, together with the commission (Form 44).

A commission of appraisement can only be executed by the marshall or his substitutes (R. S. C. 1883, Order LI., Rule 14).

If, owing to the property being out of the jurisdiction, appraisers cannot value the property, the Court may itself determine the value at the hearing (*The Werra,* 12 P. D. 52).

Property out of the jurisdiction.

In causes of damage and of salvage, in the absence of agreement, or of the acceptance of the affidavit of value filed by the defendants, the value of the ship to her owners in her damaged condition after the collision or the completion of the salvage services is the basis on which the appraisement of the vessel is to be made, and under ordinary circumstances such an appraisement is conclusive (*The Cargo ex Venus,* L. R. 1 A. & E. 50; *The Georg,* 1894, P. 330; *The Harmonides,* 1903, P. 1; *The Hohenzollern,* 1906, P. 339).

Appraisement, basis and conclusiveness of.

The amount of the expenses incurred in respect of the appraisement must be paid into the marshal's office (Appendix, Part II., sec. 5). Each appraiser is entitled to a fee of from $2.50 to $30 (*ibid.,* sec. 6), and in addition the travelling expenses of the appraiser will be allowed when such expenses have been necessarily incurred. If the marshall or his officer is required to go any distance, a reasonable sum may be allowed for travelling, boat hire, or other necessary expenses, not exceeding ten cents for every mile traversed (*ibid.,* sec 5 note; *The Aurora No. 2,* 20 B. C. R. 210; 15 Ex. C. R. 25).

Expenses of appraisement.

If either party is dissatisfied with the appraisement, he may apply to have it set aside and a fresh appraisement made:

Application to vary.

but such application should be made speedily, as otherwise the appraisement will be conclusive (*supra*).

Costs of. Where the circumstances of the case render an appraisement necessary, the costs thereof will be costs in the cause; but where an appraisement is insisted upon improperly, the party demanding it will have to bear the cost: "A commission of appraisement ought never to be taken out except on good grounds, viz., that the value stated by the owners is wholly below the real value: it is not enough to say that a few pounds more are obtained by the appraisement" (*The Commodore*, 1 Spks. 175, note; *The Margaret Jane*, L. R. 2 A. & E. 345; *The Paul*. L. R. 1 A. & E. 57; *The Persian*, 1 W. Rob. 327).

Where the Court has made an order for the sale of the *res*, a commission of sale must as a rule be taken out.

Sale. The commission of sale is directed to the marshal of the Admiralty district or the sheriff of the county, and commands him to reduce into writing an inventory of the property and to cause the property to be sold by public auction for the highest price, and thereafter to pay the proceeds into Court, and file his accounts together with the commission (Form 45).

Appraisement. and sale. When an appraisement has not been made before the order for sale, a combined commission of appraisement and sale must usually be taken out (Form 46); as it is necessary to have the *res* appraised before sale, because the Court will not suffer the *res* to be sold for less than the appraised value. But where no appearance had been entered in an action of damage, the Court ordered the sale of a foreign ship on the report of the marshal that it was desirable she should be sold, and subject to the filing of an affidavit, verifying the cause of action and stating that no appearance had been entered (*The Hercules*, 11 P. D. 10).

Advertisement. The notice of sale should be advertised in the *Gazette*, and in a local paper of good circulation in the neighbourhood of the place where the *res* is to be sold: and an affidavit of advertisement must be filed with the copies of the newspaper annexed.

Balance of proceeds. The whole of the *res* must be sold, whether it be a ship or cargo: and if any balance remain of the purchase money, the Court will be a trustee for those who shall shew themselves to be entitled to it (*The Neptune*, 1 Hagg. at p. 238.

The Court will order a sale of the vessel, although it may be in possession of the sheriff (*The Flora,* 1 Hagg. 298). But an order will not be made for the sale of a ship, even upon the application of the owner, where such vessel is not proceeded against in the Court (*The Wexford,* 13 P. D. 10).

When order for sale made.

If no sale be effected owing to there being no bid made at the auction which has come up to the appraised value, the Court will direct the *res* to be again exposed for sale by public auction, and sold for the highest price that can be obtained, but not under the sum which was the highest bid made on the first occasion; and should this latter sum appear to the Court unfair or inadequate, it will name a higher sum as the limit. The same commission is still operative, the directions of the Court being certified to the marshal by means of an office copy of the order containing the further directions. Where the *res* is of small value, the Court, on proof that the appraised value cannot be obtained, the bidding at the auction being very much under it, will allow the *res* to be sold at the highest price that can be obtained without any limitation (Coote's Admiralty Practice, 1st ed., 108).

Second exposure.

Although the commission directs the sale to be publicly made, the Court will sanction a private sale under the same commission whenever it will conduce to the interests of the parties, at a price not less than the appraised value (*The Planet,* 49 L. T. 204).

Private sale.

Where, in a case of salvage, there is no market value for the ship in the port where it is brought by the salvors the *res* should be valued not on the basis of a forced sale but as a "going concern" in the hands of a solvent owner using it for the particular purposes of his trade at the sum for which the owner, as a reasonable man, would be willing to sell it (*The Abby Palmer,* 8 Ex. C. R. 446).

The Court will, on application being made, permit the mortgagee of a vessel, ordered to be sold, to bid as a purchaser when the vessel is put up for sale (*The Wilsons,* 1 W. Rob. 172).

Leave to mortgagee to bid.

Sales under the order of the Court are not within the Statute of Frauds, and therefore no memorandum in writing of the sale is necessary (*The Blakeley,* 8 Ex. C. R. 327; 9 B. C. R. 430).

Statute of Frauds

Bill of sale.

The purchaser is generally allowed fourteen days to pay the balance of the purchase price to the marshal, a deposit having to be paid at the time of sale: and it is the practice for the purchaser to procure a bill of sale of the *res* from the marshal (*Chasteauneuf* v. *Capeyron*, 7 A. C. at p. 135). By the Merchant Shipping Act, 1894 (57 & 58 Vict. cap. 60, sec. 29), where any Court . . . orders the sale of any ship or share therein, the order of the Court shall contain a declaration vesting in some person named by the Court the right to transfer that ship or share, and that person shall thereupon be entitled to transfer the ship or share in the same manner and to the same extent as if he were the registered owner thereof and every registrar shall obey the requisition of the person so named in respect of any such transfer to the same extent as if such person were the registered owner. An office copy of the order must be produced to the registrar along with the bill of sale, duly executed by the marshal.

Merchant Shipping Act, 1894.

Purchaser failing to complete.

Where a ship is sold at auction, and the purchaser refuses to complete, the marshal may resell without further order and recover the deficiency on the resale from the purchaser (*The Blakeley*, 8 Ex. C. R. 327; 9 B. C. R. 430).

Title.

By the sale a perfect title is vested in the purchaser, free from all claims of every kind: all demands against the ship can, after the sale, only be enforced against the proceeds (*Castrique* v. *Imrie*, L. R. 4 E. & I. App. 414; *Minna Craig SS. Co.* v. *Chartered Mercantile Bank of India, &c.*, 1897, 1 Q. B. 460; *Attorney-General* v. *Norstedt*, 3 Price 97; *The Tremont*, 1 W. Rob. 163; *Hughs* v. *Cornelius*, Sir T. Raym. 473; *The Martin of Norfolk*, 4 C. Rob. 293).

Removal, &c.

Where the *res* is deteriorating in value, a commission of removal, or discharge, and of appraisement and sale should be applied for (*The Nordstjernen*, Sw. 260; *The Kathleen*, L. R. 4 A. & E. at p. 271).

Discontinuance.

Plaintiff may discontinue by filing notice; costs in such case.

155. 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 counter-claim 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. 51 and 52.

Not to prejudice other parties.

Notice of discontinuance.

Under the English rules it has been held that a written notice by the plaintiff's solicitors that "we are instructed to proceed no further with the action" is a sufficient notice of discontinuance (*The Pommerania*, 4 P. D. 195).

Costs.

In *The J. H. Henkes* (12 P. D. 106), a cause of damage was instituted, to which the defendants pleaded, *inter alia*, the defence of compulsory pilotage: the plaintiffs discontinued their action and were condemned to pay the defendants' costs. It may be doubted whether this decision is an authority in Canada, as the learned Judge remarked that as the Admiralty Court was now merged in a Division of the High Court, it was desirable that the practice of the Admiralty Division should be the same as in the other Divisions, a reason which of course has no application in the Exchequer Court: the learned Judge, however, went on to say: "no doubt when the defendants, after an action has been tried, have succeeded on the ground of compulsory pilotage, the Court, in the exercise of its discretion, has been in the habit of making each side pay their own costs; but this judicial discretion can only be properly exercised after the facts of the case have been ascertained at the trial of the action: if, however, a plaintiff elects to discontinue his action before trial, there are no materials by which the Judge's discretion can be guided." And this reason seems to be of universal acceptance.

The Bellcairn.

In an action for damages by collision by the owners of *The Britannia* against the owners of *The Bellcairn*, the Court, by consent of the parties, made a decree dismissing the action: subsequently another action was brought by the owners of the cargo on *The Britannia* against *The Bellcairn* in respect of the same collision, and the Court found both vessels to blame: the owners of *The Bellcairn* then commenced an action against the owners of cargo on *The Britannia* for the purpose of limiting their liability in respect of all claims arising out of the collision, and paid the amount of their statutory liability into Court: subsequently, again by consent of the owners of *The Britannia* and *The Bellcairn*, the registrar rescinded the decree by consent in the first action, and the owners of *The Britannia* then brought in a claim in the limitation action against the

fund in Court: it was held that, as the owners of the two ships could not by consent rescind the decree of the Court, the decree by consent was a bar to a claim against the fund in Court, as it estopped the owners of *The Britannia* from bringing any further action against *The Bellcairn* (*The Bellcairn*, 10 P. D. 161; *The Karo*, 13 P. D. 24).

The Ardandhu.

But when in a cause of damage by collision, an agreement was drawn up between the parties to the action, the owners of the two ships, that the action be "discontinued without costs on the ground of inevitable accident." and an order in these terms was drawn up in the registry; and subsequently in a cargo owner's action both ships were held to blame, and the owners of *The Ardandhu* obtained a decree limiting their liability and paid a sum into Court; and the owners of the *Kronprinz* with the consent of the owners of *The Ardandhu* obtained a rescission of the order for discontinuance, and claimed against the fund in Court; it was held that the agreement and order did not amount to a release of all claims, and that the owners of *The Kronprinz* were not precluded from claiming against the fund (*The Ardandhu*, 12 A. C. 256).

The Western Ocean.

Where the defendant paid money into Court to release a ship, of which he had taken possession under a mortgage, and the plaintiff, when the action was ripe for hearing, abandoned the action, he was condemned in costs, and ordered to pay to the defendant interest on the money in Court from the date of payment in to the date of payment out (*The Western Ocean*, L. R. 3 A. & E. 38.)

Consents.

Consent in writing an order of court.

156. Any consent in writing signed by the parties may, by permission of the registrar, be filed, and shall thereupon become an order of Court.

The effect of consents has been dealt with under the last preceding rule.

Agreements are usually made between the solicitors of the parties with regard to the value of the *res*, or as to having cross-causes of damage tried at the same time and on the same evidence; or for the admission of liability and a reference to ascertain the damage.

Certificate of State of Action.

157. Upon the application of any person the registrar shall, upon payment of the usual fee, certify as shortly as he conveniently can, the several proceedings had in his office in any action or matter, and the dates thereof.

Certificate of state of action.

Certificates may be necessary upon various applications to proceed, whenever it is necessary to show the stage at which the proceedings have arrived.

Appeal from the Judgment or Order of a Local Judge in Admiralty to the Exchequer Court.

158. Any person who desires to appeal to the Exchequer Court, from any judgment or order of a Local Judge in Admiralty of the said Court, shall give security in the sum of two hundred dollars if such judgment or order is final, or if interlocutory, in the sum of one hundred dollars, to the satisfaction of such lecal Judge, or of the Judge of the Exchequer Court, that he will effectually prosecute his appeal and pay such costs as may be awarded against him by the Exchequer Court. If the appeal is by or on behalf of the Crown, no security shall be necessary.

Appeal to Exchequer Court, appellant to give security.

The Crown not required to give security.

159. All appeals to the Exchequer Court from any judgment or order of any Local Judge in Admiralty of the Court shall be by way of rehearing, and shall be brought by notice of motion in a summary way, and no petition, case or other formal proceeding other than such notice of motion shall be necessary. The appellant may by the notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part. A form of notice of motion on appeal will be found in the appendix hereto, No. 53.

All appeals to be by way of rehearing;

and may be from whole or part of judgment.

160. The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Exchequer Court may direct notice of the appeal to be served on all or any parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may be just, and may give such judgment and make such order as might have been

Notice of appeal, service of.

Notice may be amended.

given or made if the persons served with such notice had been originally parties. Any notice of appeal may be amended at any time as the Exchequer Court may think fit.

161. Notice of appeal from any judgment, whether final or interlocutory, or from a final order, shall be *twenty days'* notice, and notice of appeal from any interlocutory order shall be a *ten days'* notice.

Power in appeal to receive further evidence.

162. The Exchequer Court shall in any appeal have all its powers and duties as to amendment and otherwise, together with full discretionary power to receive further evidence upon questions of fact,—such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after the trial or hearing of any cause or matter upon their merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court. The Court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require. The powers aforesaid may be exercised in the said Court, notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and such power may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision. The Court shall have power to make such order as to the whole or any part of the costs of the appeal as may be just.

Costs of appeal.

New trial.

163. If, upon the hearing of any appeal, it shall appear to the Exchequer Court, that a new trial ought to be had, it shall be lawful for the said Court, if it shall think fit, to order that the verdict and judgment shall be set aside, and that a new trial shall be had.

Respondent need not give notice of motion by way of cross-appeal.

164. It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross-appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the local Judge in Admiralty should be varied, he shall within the time specified

in the next rule, or such time as may be prescribed by special order, give notice of such intention to any parties who may be effected by such contention. The omission to give such notice shall not in any way interfere with the power of the Court on the hearing of the appeal to treat the whole case as open, but may, in the discretion of the Court, be ground for an adjournment of the appeal, or for a special order as to costs.

What notice respondent to give. 165. Subject to any special order which may be made, notice by a respondent under the last preceding rule shall, in the case of any appeal from a final judgment, be a *fourteen days'* notice, and, in the case of an appeal from an interlocutory order, a *seven days'* notice.

Entering appeal. 166. The party appealing from a judgment or order shall produce to the registrar of the Exchequer Court the judgment or order or an office copy thereof, and shall leave with him a copy of the notice of appeal to be filed, and such officer shall thereupon set down the appeal by entering the same in the proper list of appeals, and it shall come on to be heard according to its order in such list unless the Judge of the Exchequer Court shall otherwise direct, but so as not to come into the paper for hearing before the day named in the notice of appeal.

Appeal from refusal of *ex parte* application. 167. Where an *ex parte* application has been refused by the Local Judge in Admiralty, an application for a similar purpose may be made to the Exchequer Court *ex parte* within *ten days* from the date of such refusal, or within such enlarged time as the Judge of the Exchequer Court may allow.

Questions of fact, evidence. 168. When any question of fact is involved in an appeal, the evidence taken before the Local Judge in Admiralty bearing on such question shall, subject to any special order, be brought before the Exchequer Court as follows:—

(*a*) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed;

(*b*) As to any evidence given orally, by the production of a copy of the Judge's notes, or such other materials as the Court may deem expedient.

Judge may order evidence to be printed. 169. Where evidence has not been printed in the proceedings before the Local Judge in Admiralty, the Local Judge in Admiralty, or the Judge of the Exchequer Court, may order the whole or any part thereof to be printed for

the purpose of the appeal. Any party printing evidence for the purpose of an appeal without such order shall bear the costs thereof, unless the Judge of the Exchequer Court shall otherwise order.

Questions as to ruling of Local Judge.

170. If, upon the hearing of an appeal, a question arise as to the ruling or direction of the local Judge, the Exchequer Court shall have regard to verified notes or other evidence, and to such other materials as the Court may deem expedient.

Interlocutory order not appealed from not to bar Exchequer Court.

171. Upon any appeal to the Exchequer Court no interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Exchequer Court from giving such decision upon the appeal as may be just.

Limitation of time for appeal.

172. No appeal to the Exchequer Court from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Exchequer Court, be brought after the expiration of *thirty days*, and no other appeal shall, except by such leave, be brought after the expiration of *sixty days*. The said respective periods shall be calculated, in the case of an appeal from an order in Chambers, from the time when such order was pronounced or when the appellant first had notice thereof, and in all other cases, from the time at which the judgment or order is signed, entered, or otherwise perfected, or in the case of the refusal of an application, from the date of such refusal.

Stay of proceedings if ordered.

173. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the local Judge in Admiralty, or the Exchequer Court may order; and no intermediate act or proceeding shall be invalidated, except so far as the Judge of the Exchequer Court may direct.

Application, first to local judge.

174. Wherever under Rules 158 to 176 an application may be made either to the local Judge in Admiralty or to the Exchequer Court, or the Judge thereof, it shall be made in the first instance to the local Judge in Admiralty.

By motion.

175. Every application in respect to any appeal to the Exchequer Court or the Judge thereof shall be by motion.

Interest.

176. On appeal from a local Judge in Admiralty, interest for such time as execution has been delayed by the appeal shall be allowed unless the local Judge otherwise orders, and the taxing officer may compute such interest without any order for that purpose.

The subject of appeals is dealt with by The Colonial Courts of Admiralty Act, 1890, (53 & 54 Vict. cap. 27), and by The Admiralty Act (R. S. C. 1906, cap. 141).

The Colonial Courts of Admiralty Act, 1890, provides (section 15):—

"the expression 'appeal' means any appeal, rehearing, or review; and the expression 'local appeal' means an appeal to any Court inferior to His Majesty in Council,"

and (sections 5 and 6):

Local Admiralty appeal.

5. Subject to rules of Court under this Act, judgments of a Court in a British possession given or made in the exercise of the jurisdiction conferred on it by this Act, shall be subject to the like local appeal, if any, as judgments of the Court in the exercise of its ordinary civil jurisdiction, and the Court having cognizance of such appeal shall for the purpose thereof, possess all the jurisdiction by this Act conferred upon a Colonial Court of Admiralty.

Admiralty appeal to the Queen in Council.

6. (1) The appeal from a judgment of any Court in a British possession in the exercise of the jurisdiction conferred by this Act, either where there is as of right no local appeal or after a decision on local appeal, lies to Her Majesty the Queen in Council.

(2) Save as may be otherwise specially allowed in a particular case by Her Majesty the Queen in Council, an appeal under this section shall not be allowed—

(*a*) from any judgment not having the effect of a definitive judgment unless the Court appealed from has given leave for such appeal, nor—

(*b*) from any judgment unless the petition of appeal has been lodged within the time prescribed by rules, or if no time is prescribed within six months from the date of the judgment appealed against, or if leave to appeal has been given, then from the date of such leave.

(3) For the purpose of appeals under this Act, Her Majesty the Queen in Council and the Judicial Committee of the Privy Council shall, subject to rules under this section, have all such powers for making and enforcing judgments, whether interlocutory or final, for punishing contempts, for requiring the

payment of money into Court, or for any other purpose, as may be necessary, or as were possessed by the High Court of Delegates before the passing of the Act transferring the powers of such Court to Her Majesty in Council, or as are, for the time being, possessed by the High Court in England or by the Court appealed from in relation to the like matters as those forming the subject of appeals under this Act.

(4) All Orders of the Queen in Council or the Judicial Committee of the Privy Council for the purposes aforesaid or otherwise in relation to appeals under this Act shall have full effect throughout Her Majesty's dominions, and in all places where Her Majesty has jurisdiction.

(5) This section shall be in addition to and not in derogation of the authority of Her Majesty in Council or the Judicial Committee of the Privy Council arising otherwise than under this Act, and all enactments relating to appeals to Her Majesty in Council or to the powers of Her Majesty in Council or the Judicial Committee of the Privy Council in relation to those appeals, whether for making rules and orders or otherwise shall extend, save as otherwise directed by Her Majesty in Council, to appeals to Her Majesty in Council under this Act.

Admiralty Act.

The Admiralty Act (R. S. C. 1906, c. 141, sec. 20) provides:—

Any appeal from any final judgment, decree or order of any local Judge in Admiralty, may be made,—

(*a*) To the Exchequer Court; or

(*b*) Subject to the provisions of the Exchequer Court Act regarding appeals, direct to the Supreme Court of Canada.

(2) On security for costs being first given, and subject to such provisions as are prescribed by general rules and orders, an appeal, with the leave of the Judge of the Exchequer Court or of any local Judge, may be made to the Exchequer Court from any interlocutory decree or order of such local Judge.

Exchequer Court Act.

The provisions relating to appeals from the Exchequer Court to the Supreme Court of Canada are contained in sections 82 to 86 inclusive of the Exchequer Court Act (R. S. C. 1906, cap. 140).

Final judgment. Thus, in the case of a final judgment, decree or order of a local Judge, an appeal lies to the Exchequer Court, and also direct to the Supreme Court of Canada, subject, however, as to the latter appeal, to the provisions of the Exchequer Court Act. An appeal lies, in the case of a final judgment or of a judgment upon demurrer, from the Exchequer Court to the Supreme Court of Canada subject to the like provisions (Exchequer Court Act, R. S. C. 1906, cap. 140).

Interlocutory judgment. In the case of an interlocutory decree or order of a local Judge, there is an appeal by leave, to the Exchequer Court; but there is no appeal to the Supreme Court of Canada from either the local Judge or the Exchequer Court.

Privy Council. Moreover, an appeal lies without leave to His Majesty in Council from the Exchequer Court or from the Supreme Court of Canada (*The Cape Breton*, 1907, A. C. 112).

Rules. No rules appear to exist with regard to appeals to His Majesty in Council. The matter is not dealt with in the Admiralty Rules while Rule 230 (*infra*) repeals the rules for the Vice-Admiralty Courts, established by Order in Council of the 23rd of August, 1883, and Rule 228 (*infra*) is of no assistance, inasmuch as no one of the rules of the High Court of Justice in England applies to appeals to the Privy Council. Vice-Admiralty Courts Act. The Vice-Admiralty Courts Rules provided for appeals to the Privy Council by sections 150 to 155 inclusive, and these seem to be followed with some variations in the actual practice on appeal from the Supreme Court of Canada: the rules are as follows:

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.

151. Notwithstanding the filing of the notice of appeal, the Judge may at any time before the service of the inhibition proceed to carry the decree or order appealed from into effect, provided that the party in whose favour 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.

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 transmitted by the Registrar to the Registrar of the Appellate Court.

Practice on appeal to the Privy Council.

The practice which now prevails in the Supreme Court of Canada is as follows: the party desiring to appeal gives a notice of appeal, and then gives notice of an application to the Court or a Judge for an order fixing the bail, pursuant to section 150. In *The Cape Breton* (36 S. C. R. at p. 592) the application was made to a Judge in Chambers, who fixed bail in the sum of £300. In *The Parisian* (37 S. C. R. at pp. 302 and 702) the application was made to the Court, who fixed the bail in a like sum.

The appellant's bail must be to the satisfaction of the Registrar, and must be given on or before a day fixed by the order: the practice now is to have the bond executed as in ordinary cases, and presented to the Registrar for his approval on notice to the opposite party: where the bond is not that of a guarantee company, the usual affidavits of justification must be filed: instead of giving a bond, the appellant may pay money into Court, and obtain an order approving the security in the form used on appeals to the Supreme Court of Canada. A form of bail and of the order approving the bail will be found in the Appendix (*infra*).

Rehearing.

In addition to the right of appeal given by statute, it is well settled that the Admiralty Court has power to rehear causes, and, in its discretion, to vary its decrees in cases where it has proceeded upon a mistake (*The Monarch,* 1 W. Rob. 21; *The Markland,* L. R. 3 A. & E. 340; *The James Armstrong,* L. R. 4 A. & E. 380; *The S. B. Hume,* Young, 228; *The Royal Arch,* Young, 260): but this power ought to be exercised rarely, and with great caution (*The Georg,* 1894, P. at p. 333).

In *The Alliance No. 2* (19 B. C. R. 529) the master of a fishing boat had sued his owners for wages, and the owners had counterclaimed for the value of certain fishing gear which

was missing: judgment was reserved at the close of the trial, and before delivery of judgment the master applied for leave to give further evidence with regard to the missing gear. It was held that such an application should only be granted in a very special case, and in circumstances which would not put the opposing party in an unfair position. As the attention of the plaintiff had been drawn to the owners' claim by the pleadings, the evidence at the trial and on the argument, the plaintiff could not contend that he was taken by suprise, and therefore his application could not be acceded to.

What is final decree.

For the purpose of fixing the time for appealing a decree in an Admiralty action, fixing the liability, but leaving the damages to be assessed, is not a final decree (*The Duke of Buccleuch*, 1892, P. 201).

Time for appealing.

The time for appealing runs, except in the case of an order in chambers, from the date when the judgment or order is perfected (Rule 172) and not from the time when it is delivered or pronounced (*Robertson* v. *Wigle*, 15 S. C. R. 214).

Relief on appeal.

Rule 159 provides that all appeals shall be by way of rehearing, but where a motion made on appeal was different from that made in the Court below, and the matter was one in which relief could still be given in the Court below, the Appellate Court refused to entertain the motion (*The Camosun*, 10 Ex. C. R. 333).

New ground of appeal.

An Appellate Court will not consider a ground not relied on in the Court below unless it is satisfied that it has all the evidence bearing upon it which could have been produced at the trial and that the party against whom it is urged could not have satisfactorily explained it under examination (*The Euphemia*, 41 S. C. R. 154).

Fresh evidence.

With regard to the admission of fresh evidence provided for by Rule 162, and for which permission is very grudgingly accorded in the common law Courts (*Woodford* v. *Henderson*, 15 B. C. R. 495; *Young* v. *Kershaw*, 81 L. T. 531; *Warham* v. *Selfridge*, 30 T. L. R. 344), Courts of Admiralty have displayed a liberal tendency (*The Ship Thirteenth of June*, 4 Moo. P. C. C. 167; *The Newport*, 11 Moo. P. C. C. 155): in one case, indeed, the appeal was decided entirely on the evidence of witnesses called and examined at the hearing of the appeal (*The C. S. Butler*, L. R. 4 A. & E. 238). But in *The Scindia* (L. R. 1 P. C. at p. 246) the Judicial Committee said: "Now, where parties have gone to a trial of the question at issue

upon the evidence which they have at the time, and which they were able then to adduce, and have made no application to the Court below to suspend the trial until further evidence can be brought forward, it evidently requires a very strong case to induce any Court of Appeal to admit further evidence, in order to adjudicate upon that question which has been determined in the Court below."

The Court of Appeal, in admitting further evidence, may direct that further evidence be taken before the Judge of the Court below (*The Abby Palmer,* 9 Ex. C. R. 1).

Salvage.

An Appellate Court is always reluctant to review cases of salvage, but will, if the justice of the case requires increase (*The Scindia,* L. R. 1 P. C. 241), or reduce (*The Nanna,* 41 S. C. R. 168; Can. Rep., 1911 (2) A. C. 392) the amount of the salvage award.

Questions of fact.

The decision of the trial Judge on disputed questions of fact will not be reversed, unless it is clearly shown that the evidence is against the finding (*The Reliance,* 31 S. C. R. 653; *The Bernadette,* 4 Ex. C. R. 280; *The Astrid,* 6 Ex. C. R. 218; *The Hamilton,* 11 Ex. C. R. 231).

In Admiralty cases, the Supreme Court of Canada must weigh the evidence for itself unassisted by expert advice and will, if the evidence warrants it, reverse the judgment appealed from on a question of seamanship or navigation (*The Nanna,* 41 S. C. R. 168; Can. Rep. 1911 (2) A. C. 392): but the Supreme Court will not set aside the finding of a nautical assessor on questions of navigation adopted by the trial Judge unless the appellant can point out his mistake and shew conclusively that the judgment is erroneous (*The Arranmore,* 38 S. C. R. 176).

Security for award on appeal.

Under Rule 173 an application by the defendant for the payment out of Court of money, paid in by him to obtain the release of his ship arrested in a cause of salvage will, if the defendant be resident out of the jurisdiction, be stayed, wholly or partially, pending an appeal to increase the amount of the salvage award (*The Abby Palmer,* 8 Ex. C. R. 462; 10 B. C. R. 383).

Payments into Court.

Receivable order.

177. 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 Dominion of Canada to

be approved by the Judge, or, with the sanction of the treasury board, into the treasury of the Dominion. A form of receivable order will be found in the appendix hereto, No. 54.

178. A bank or treasury receipt for the amount shall be filed, and thereupon the payment into Court shall be deemed to be complete. **Receipt.**

Payments out of Court.

179. 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 treasurer in such form as the treasury board shall direct. A form of order for payment out of Court will be found in the appendix hereto, No. 55. **Payment out on judge's order.**

Caveats.

180. 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, brought against the property, and thereupon the registrar shall enter a caveat in the caveat warrant book hereinafter mentioned. Forms of notice and a caveat warrant will be found in the appendix hereto, Nos. 56 and 57. **Caveat warrant.**

181. 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. 58 and 59. **Caveat release.**

182. 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. 60 and 61. **Caveat payment.**

183. If the 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. **Address of caveator.**

Arrest of property against caveat.

184. 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.

Caveator liable for costs, when.

185. 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.

Caveat in force six months.

186. A caveat shall not remain in force for more than *six months* from the date of entering the same.

Withdrawal of caveat.

187. 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. 62.

Overruling.

188. The Judge may overrule any caveat.

The matter of caveat warrants and caveat releases has been dealt with in the notes to rules 53, *et seq.* (*supra*). It only remains to note that where a caveat release is entered and groundless objections are taken to the sufficiency of bail, the party entering the caveat will be condemned in damages as well as costs (*The Don Ricardo,* 5 P. D. 121); and that similarly a plaintiff who causes a warrant to issue, notwithstanding a caveat warrant, without taking a reasonable time to make inquiry whether the undertaking, under Rule 180, is satisfactory, will be likewise condemned in damages and costs (*The Crimdon,* 1900, P. 171).

Subpœnas.

Subpœna.

189. 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. 63 and 64.

Names of witnesses

190. A subpœna may contain the names of any number of witnesses, or may be issued with the names of the witnesses in blank.

191. Service of the subpœna must be personal, and may be made by the party or his agent, and shall be proved by affidavit. **Service.**

"The process of the Exchequer Court shall be tested in the name of the Judge of the Court and shall run throughout Canada" (Exchequer Court Act, R. S. C. 1906, cap. 140, sec. 73).

Orders for Payment.

192. 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. **Orders for payment out of court;**

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. 65. **or by party liable.**

See notes to rule 195 (*infra*).

An action may always be brought against proceeds in the registry; but the Court, in certain cases, adopts a shorter course and directs payment to be made out of a fund upon motion anly, **Applications for payment out.**

Thus, the Court will order payment out of the wages of foreign seamen, either to the seamen themselves or to a person who has obtained permission to advance the wages (*The Henrietta Cornelia,* 1 N. R. 52; *The Kammerhevie Rosenkrants,* 1 Hagg. 62; *The William F. Safford,* Lush. 71). **Wages.**

The Court will also, upon a like application, direct freight, general average, and possessory liens in general to be satisfied out of a fund in its hands (*The Gustaf,* Lush. 507). **Freight, &c.**

If there is a balance remaining over, after payment of all claims, it will be paid out to the owner of the *res,* from which the fund arose, or to his assignee or to a mortgagee (*The Neptune,* 3 Knapp, 94). **Balance.**

The application of the owner or of a mortgagee must be supported by proof of title, as, for instance, the bill of sale under which the ship was purchased, or the bill of lading under which the cargo was carried, or the indenture of mortgage.

The Court will pay over a balance of a fund, or part of it, to a judgment creditor (*The Flora,* 1 Hagg. 298).

Attachments.

Attachment for contempt.

193. 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. 66.

Committal.

194. 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. 67 and 68.

Executed by marshal.

The order for committal shall be executed by the marshal.

Attachment.

Prior to the Admiralty Court Act, 1861 (24 Vict. cap. 10), attachment was the means of enforcing the decrees and orders of the High Court of Admiralty, as well as of asserting the authority of the Court, but now that the Court has the power of enforcing its judgments and orders against property (rule 195, *infra*), the most usual occasions for the process of attachment are when persons meddle with property under arrest of the Court (*The Friends,* 1 Stuart, 72; *The Petrel,* 3 Hagg. 299; *The Westmoreland,* 4 Notes of Cases, 173; *The Harmonie,* 1 W. Rob. 178); or when they resist the process of the Court (*The Delta,* 1 Stuart, 207; *The Towan,* 8 Jur. at p. 223); or when witnesses fail to obey a subpoena (*The Victor,* Pritchard's Admiralty Digest, vol. II., 1625).

But no attachment will issue when the Court has no jurisdiction over the person whose acts are complained of (*The Tritonia,* 5 Notes of Cases, 110); and when a person has been illegally arrested in a foreign country, and brought within the jurisdiction and committed, the Court will order his release (*The Mathesis,* 2 W. Rob. 286).

In *The Sarah* (1 Stuart, 86), an attachment was refused, when the statement of the officer of the Court, alleged to have been obstructed, was contradicted by the affidavits of two other persons present at the time.

In *The Isabella* (1 Stuart, 134), an application for the attachment of a magistrate, first seized of a suit for wages, for having issued a warrant and arrested the seaman whilst attend-

ing his proctor for the purpose of bringing a suit in the Admiralty Court, was rejected.

In attempting to enforce an order for the payment of money by attachment, regard must be had to any provincial statute, prohibiting the taking in execution of any person liable under any judgment, as, for instance, the Execution Act (Revised Statutes of British Columbia, 1911, cap. 79, sec. 6); and to the provisions of section 78 of the Exchequer Court Act (R. S. C. 1906, cap. 140).

Where it is an order which it is sought to enforce, it should be endorsed in the manner directed by R. S. C. 1883, Order XLI., rule 5; and should be personally served, notwithstanding section 20 of the Admiralty Court Act, 1861 (24 Vict. cap. 10). The application should be by motion, supported by an affidavit of service of the order, and an affidavit that the order has not been obeyed. Copies of the notice of motion and of the affidavits should also be personally served.

Execution.

195. Any decree or order of the Court, made in the exercise of its Admiralty jurisdiction, may be enforced in the same manner as a decree or order made in the exercise of the ordinary civil jurisdiction of the Court may be enforced.

Enforcing decrees or orders.

The Exchequer Court Act (R. S. C. 1906, cap. 140) provides, with regard to execution, as follows:—

Section 54. In addition to any writs of execution which are prescribed by general rules or orders, the Court may issue writs of execution against the person or the goods, lands or other property of any party, of the same tenour and effect as those which may be issued out of any of the Superior Courts of the province in which any judgment or order is to be executed; and when, by the law of the province, an order of a Judge is required for the issue of any writ of execution, the Judge of the Court may make a similar order, as regards like executions, to issue out of the Court.

Exchequer Court Act.

Section 56. All writs of execution against real or personal property, as well as those prescribed by general rules and orders as those hereinbefore authorized, shall, unless otherwise provided by general rule or order, be executed, as regards the property liable to execution and the mode of seizure and sale, as nearly

as possible in the same manner as similar writs, issued out of the Superior Courts of the province in which the property to be seized is situated, are by the law of the province, required to be executed; and such writs shall bind property in the same manner as such similar writs, and the rights of purchasers thereunder shall be the same as those of purchasers under such similar writs.

Section 78. No attachment as for contempt shall issue for the non-payment of money only.

The rules of the Exchequer Court dealing with execution are Nos. 215 to 250 inclusive.

In addition to these powers, the Admiralty Court Act, 1861 (24 Vict. cap 10), provides as follows:—

Decrees and orders of Court of Admiralty to have effect of judgments at common law.

15. All decrees and orders of the High Court of Admiralty whereby any sum of money or any costs, charges, or expenses shall be payable to any person, shall have the same effects as judgments in the Superior Courts of Common Law, and the persons to whom any such moneys, or costs, charges, or expenses, shall be payable, shall be deemed judgment creditors, and all powers of enforcing judgments possessed by Superior Courts of Common Law, or any Judge thereof, with respect to matters depending in the same Courts as well against the ships and goods arrested as against the person of the judgment debtor, shall be possessed by the said Court of Admiralty with respect to matters therein depending; and all remedies at common law possessed by judgment creditors shall be in like manner possessed by persons to whom any moneys, costs, charges, or expenses are by such orders or decrees of the said Court of Admiralty directed to be paid.

As to claims to goods taken in execution.

16. If any claim shall be made to any goods or chattels taken in execution under any process of the High Court of Admiralty, or in respect of the seizure thereof, or any Act or matter connected therewith, or in respect of the proceeds or value of any such goods or chattels, by any landlord for rent, or by any person not being the party against whom the process has issued, the registrar of the said Court may, upon application of the officer charged with the execution of the process, whether before or after any action brought against such officer, issue a summons calling before the said Court, both the party issuing such process and the party making the claim, and thereupon any action which shall have been brought in any of Her Majesty's Superior Courts of Record, or in any local or inferior Court, in respect of such

claim, seizure, act or matter as aforesaid, shall be stayed, and the Court in which such action shall have been brought, or any Judge thereof, on proof of the issue of such summons, and that the goods and chattels were so taken in execution, may order the party bringing the action to pay the costs of all proceedings had upon the action after issue of the summons out of the said Admiralty Court, and the Judge of the said Admiralty Court shall adjudicate upon the claim, and make such order between the parties in respect thereof and of the costs of the proceedings, as to him shall seem fit, and such order shall be enforced in like manner as any order made in any suit brought in the said Court. Where any such claim shall be made as aforesaid, the claimant may deposit with the officer charged with the execution of the process either the amount or value of the goods claimed, the value to be fixed by appraisement in the case of dispute, to be by the officer paid into Court to abide the decision of the Judge upon the claim, or the sum which the officer shall be allowed to charge as costs for keeping possession of the goods until such decision can be obtained, and in default of the claimant so doing, the officer may sell the goods as if no such claim had been made, and shall pay into the Court the proceeds of the sale, to abide the decision of the Judge.

Power to issue new writs or other process.

22. Any new writ or other process necessary or expedient for giving effect to any of the provisions of this Act may be issued from the High Court of Admiralty in such form as the Judge of the said Court shall from time to time direct.

The Court has thus the fullest powers for enforcing its judgments and orders; and it will cause writs of execution to issue not only to recover the amount due under a judgment, including costs, in an action *in personam;* but also in actions *in rem,* the amount due in respect of costs (*The Freedom,* L. R. 3 A. & E. 495), and any balance of damages unpaid over and above the amount of bail, notwithstanding that bail has been put in to the full value of the *res,* and notwithstanding that the property sought to be seized in execution is the very *res* already previously arrested and released on bail (*The Dictator,* 1892, P. 304; *The Gemma,* 1899, P. 285; *The Dupleix,* 1912, P. 8; *The Aurora,* 18 B. C. 355; 15 Ex. C. R. 23).

Receiver.

The Court has power to appoint a receiver of ship, freight, claims for general or particular average on policies of assurance, and all other outstanding debts and liabilities (*The Faust,* 6

Asp. M. C. 126; *The Ampthill*, 5 P. D. 224; *Williamson* v. *The Bank of Montreal*, 6 B. C. R. 486); in England, this power is derived from the Judicature Acts, which, of course, do not enable the Exchequer Court, but the powers given by the Admiralty Court Act, 1861 (24 Vict. cap. 10), and the Exchequer Court Act (R. S. C. 1906, cap. 140, *supra*) amply suffice.

Moreover, where property is in the possession of a receiver appointed by the Admiralty Court, it cannot be seized by a sheriff under a writ of execution issued out of one of the common law or equity Courts, and such Court has no jurisdiction to direct the trial of an interpleader issue between the claimants in Admiralty and the suitors to itself (*Williams* v. *The Bank of Montreal, ubi supra*).

Seals.

Seals.

196. The seals to be used in the registry and district registries shall be such as the Judge of the Exchequer Court may from time to time direct.

Instruments, Etc.

Instruments prepared in registry.

197. 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.

Date and sealing.

198. 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.

Served within 12 months.

199. Every document requiring to be served shall be served within *twelve months* from the date thereof, otherwise the service shall not be valid.

Left with marshal.

200. 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.

Notices from the registry.

201. Any notice from the registry may be either left at, or sent by post by registered letter, to the address for service of the party to whom notice is to be given; and the day next after

the day on which the notice is so posted shall be considered as the day of service thereof, and the posting thereof as aforesaid shall be a sufficient service.

Filing.

202. 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. 69.

Filing documents.

203. Any number of documents in the same action may be filed with one and the same minute.

Time.

204. 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.

Time.

205. 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.

First day exclusive.

206. 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.

Judge may enlarge or abridge time.

Sittings of the Court.

207. The Judge shall appoint proper and convenient times for sittings in Court and in Chambers, and may adjourn the proceedings from time to time and from place to place as to him shall seem fit.

Judge to appoint sittings.

Registry and Registrar.

208. The registry shall be open to suitors during fixed hours to be appointed by the Judge.

Registry hours.

Attendance at sittings.

209. The registrar shall obey all the lawful directions of the Judge. He shall in person, or by a deputy approved of by the Judge, 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 not act as counsel or solicitor in the Court.

Marshal.

Marshal to execute instruments.

210. The marshal shall execute by himself or his officer all instruments issued from the Court which are addressed to him, and shall make returns thereof.

Or employ competent person.

211. 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.

Holidays.

212. The registry and the marshal's office shall be closed on Sundays, Good Friday, Easter Monday, Easter Tuesday, and Christmas Day, and on such days as are appointed by law or by proclamation to be kept as holidays or fast days.

Records of the Court.

Records of court; minute book.

213. 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 or 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. 70 to 73.

Forms.

Caveat books.

214. 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.

Inspection by solicitors.

215. Any solicitor may inspect the minute and caveat books.

216. 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.

By parties.

217. 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.

No other persons.

218. In an action which is terminated, any person may, on payment of a search fee, inspect the records in the action.

If action terminated; search fee.

Copies.

219. 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.

Office copies.

Forms.

220. 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.

Forms.

Fees.

221. Subject to the following rules, the fees set forth in the tables of fees in the appendix hereto shall be allowed on taxation.

Fees.

222. In any proceeding instituted in the registry at Ottawa, the fees to be taken by the registrar shall be paid in stamps, and the proceeds of the sale of such stamps shall be paid into the Consolidated Revenue Fund of Canada.

In registry at Ottawa to be in stamps.

223. Where the fee is per folio, the folio shall be counted at the rate of 100 words, and every numeral, whether contained in columns or otherwise written, shall be counted and charged for as a word.

Folio, 100 words.

224. Where the sum in dispute does not exceed $200, or the value of the *res* does not exceed $400, one-half only of the fees (other than disbursements) set forth in the table hereto annexed shall be charged and allowed.

Half-fees.

225. 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.

"Sum in dispute."

Half-fees.

226. The Judge may, in any action, order that half fees only shall be allowed.

Acting both as counsel and solicitor.

227. 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.

Cases not Provided for.

Practice in Admiralty, H. C. J. England.

228. In all cases not provided for by these rules, the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England shall be followed.

Commencement of Rules.

These Rules in force on notice in *Gazette*.

229. These rules shall come into force on the day on which notice of the approval thereof by His Excellency the Governor-General in Council, and by Her Majesty in Council, shall be published in the *Canada Gazette,* and shall apply to all actions then pending in the Exchequer Court of Canada on its Admiralty side, as well as to actions commenced on and after such day.

Repealing Clause.

Rules repealed.

230. From and after the day on which the notice of the approval of these rules by His Excellency the Governor-General in Council and by Her Majesty in Council, is published in the *Canada Gazette,* the following rules and regulations, together with all forms thereto annexed, and the table of fees now in force in the Exchequer Court in Admiralty proceedings, shall, in respect to any such proceeding in such Court be repealed:—

V. A. Rules, 1883.

(*a*) The rules and tables of fees for the Vice-Admiralty Courts established by an Order of Her Majesty in Council of the 23rd of August, 1883; and

M. C. Ontario Rules.

(*b*) The rules and regulations and the table of fees previously in force in the Maritime Court of Ontario, and made by the Judge of such Court on the 31st day of January, 1889, and approved by His Excellency the Governor-General in Council on the 14th day of February, 1879, and all rules of the said Maritime Court of Ontario.

Dated, at Ottawa, this 5th day of December, A.D. 1892.

GEO. W. BURBIDGE,
J. E. C.

APPENDIX I.

I. FORMS.

No 1. [Rule 4.

TITLE OF COURT.

IN THE EXCHEQUER COURT OF CANADA.
IN ADMIRALTY.

or (*if instituted in a District Registry*)
IN THE EXCHEQUER COURT OF CANADA.
THE QUEBEC (*or as the case may be*) ADMIRALTY DISTRICT.

No 2. [Rule 4.

TITLE OF ACTION IN REM.

[*Title of Court.*]

No. [*here insert the number of the action.*]

A. B., Plaintiff.
against

(*a*) The ship
or (*b*) The ship and freight.
or (*c*) The ship her cargo and freight.
or (*if the action is against cargo only*),
(*d*) The cargo *ex* the ship [*state name of ship on board of which the cargo now is or lately was laden*].
or (*if the action is against the proceeds realized by the sale of the ship or cargo*),
(*e*) The proceeds of the ship
or (*f*) The proceeds of the cargo *ex* the ship.
or as the case may be.

Action for [*state nature of action, whether for damage by collision, wages, bottomry, &c., as the case may be*].

Rule 4.]

No. 3.

TITLE OF ACTION IN PERSONAM.

[*Title of Court.*]

No. [*here insert the number of the action.*]

A. B., Plaintiff
against
The owners of the ship [*or as the case may be*].
Action for [*state nature of action as in preceding form*].

Rule 4.]

No. 4.

TITLE OF ACTION IN THE NAME OF THE CROWN

[*Title of Court.*]

No. [*insert number of action*].
Our Sovereign Lady the Queen.
[*add, where necessary,* in Her office of Admiralty].
against
(*a*) The ship , [*or as the case may be*],
or,
(*b*) A. B. &c.,[*the person or persons proceeded against.*]
Action for [*state nature of action*].

Rule 5.]

No. 5.

WRIT OF SUMMONS IN REM.

(L.S.) [*Title of Court and action.*]

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, Empress of India.

To the owners and all others interested in the ship [her cargo and freight, etc., *or as the case may be*].

We command you that, within *one week* after the service of this writ, exclusive of the day of such service, you do cause an appearance to be entered for you in our Exchequer Court of

Canada in the above-named action; and take notice that in default of your so doing the said action may proceed, and judgment may be given, in your absence.

Given at Ottawa (*or as the case may be*) in our said Court, under the seal thereof, this day of 18 .

Memorandum to be subscribed on the writ.

This writ may be served within *twelve months* from the date thereof, exclusive of the day of such date, but not afterwards.

The defendant (*or* defendants) may appear hereto by entering an appearance (*or* appearances). either personally or by solicitor at the registry of the said Court situate at Ottawa (*or as the case may be*).

No. 6. [Rule 5.

WRIT OF SUMMONS IN PERSONAM.

[*Title of Court and action.*]

(L.S.) VICTORIA, by the grace of God, etc.

To C. D., of , and E. F., of .

We command you that, within *one week* after the service of this writ, exclusive of the day of such service, you do cause an appearance to be entered for you in our Exchequer Court of Canada, in the above-named action; and take notice that in default of your so doing the said action may proceed, and judgment may be given, in your absence.

Given at Ottawa (*or as the case may be*) in our said Court, under the seal thereof, this day of 18 .

Memorandum to be subscribed on the Writ.

This writ may be served within *twelve months* from the date thereof, exclusive of the day of such date, but not afterwards.

The defendant (*or* defendants) may appear hereto by entering an appearance (*or* appearances) either personally or by solicitor at the registry of the said Court situate at Ottawa (*or as the case may be*).

Rules 5-20-23.]

No. 7.

WRIT OF SUMMONS IN PERSONAM FOR SERVICE OUT OF JURISDICTION.

(L.S.) [*Title of Court and action.*]

VICTORIA, by the grace of God, etc.

To C. D., of , E. F., of .

We command you that within (*here insert the number of days directed by the judge ordering the service or notice*) after the service of this writ (*or notice of this writ, as the case may be*), on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Exchequer Court of Canada, in the above-named action, and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

Given at Ottawa (*or as the case may be*) in our said Court, under the seal thereof, this day of 18 .

Memorandum to be subscribed on Writ as in Form No. 6.
Indorsement to be made on the Writ before the issue thereof.

N.B.—This writ is to be used where the defendant or all the defendants, or one or more defendant or defendants is or are out of the jurisdiction. When the defendant to be served is not a British subject, and is not in British dominions, notice of the writ and not the writ itself, is to be served upon him.

Rules 23-24.]

No. 8.

NOTICE IN LIEU OF WRIT FOR SERVICE OUT OF JURISDICTION.

[*Title of Court and action.*]

To C. D., of .

Take notice that A. B., of , has commenced an action against you, C. D., in the Exchequer Court of Canada at Ottawa, (*or* in the Admiralty District, *as the case may be*), by writ of that Court, dated the day of , A.D. 18 , which writ is indorsed as follows: (*Copy in full the indorsements*), and you are required within days after the receipt of this notice, inclusive of

the day of such receipt, to defend the said action, by causing an appearance to be entered for you in the said Court to the said action, and in default of your so doing the said A.B. may proceed therein, and judgment may be given in your absence.

You may appear to the said writ by entering an appearance personally or by your solicitor at the office of the registrar of the said Court at Ottawa (*or* at in the Admiralty District, *as the case may be*).

(Signed) A. B., of etc.
Or X. Y., of
Solicitor for A. B.

No. 9. [Rule 5.

INDORSEMENTS TO BE MADE ON THE WRIT BEFORE ISSUE THEREOF.

(1) The plaintiff claims [*insert description of claim as given in Form No. 10*].

(2) This writ was issued by the plaintiff in person, who resides at [*state plaintiff's place of residence, with name of street and number of house, if any*].

or,

This writ was issued by C. D., of [*State place of business*] solicitor for the plaintiff.

(3) All documents required to be served upon the said plaintiff in the action may be left for him at [*insert address for service within three miles of the registry*].

or,

Where the Action is in the Name of the Crown.

(1) A. B., etc., claims [*insert description of claim as given in Form No. 10*].

(2) This writ was issued by A. B. [*state name and address of person prosecuting in the name of the Crown, or his solicitor, as the case may be*].

(3) All documents required to be served upon the Crown in this action may be left at [*insert address for service within three miles of the registry*].

Rule 5.]

No. 10.

INDORSEMENTS OF CLAIM.

(1) *Damage by collision:*

The plaintiffs as owners of the ship "*Mary*" [her cargo and freight, &c., *or as the case may be*] claim the sum of $ against the ship "*Jane*" for damage occasioned by a collision which took place [*state where*] on the day of , and for costs.

(2) *Salvage:*

The plaintiffs, as the owners, master, and crew of the ship "*Mary*" claim the sum of $ for salvage services rendered by them to the ship "*Jane*" [her cargo and freight, &c., *or as the case may be*] on the day of 18 , in or near [*state where the services were rendered*], and for costs.

(3) *Pilotage:*

The plaintiff claims the sum of $ for pilotage of the ship "*Jane*" on the day of 18 , from [*state where pilotage commenced*] to [*state where pilotage ended*], and for costs.

Rule 6.]

(4) *Towage:*

The plaintiffs, as owners of the ship "*Mary*," claim the sum of $ for towage services rendered by the said ship to the ship "*Jane*" [her cargo and freight, *&c., or as the case may be*], on the day of 18 , at or near [*state where the services were rendered*], and for costs.

(5) *Master's wages and disbursements:*

The plaintiff claims the sum of $, for his wages and disbursements as master of the ship "*Mary*," and to have an account taken thereof, and for costs.

(6) *Seamen's wages:*

The plaintiffs, as seamen on board the ship "*Mary*" claim the sum of $, for wages due to them, as follows, and for costs:

to A. B., the mate, $, for two months' wages from the day of .

to C. D., able seaman, $, &c., &c.;
[and the plaintiffs claim to have an account taken thereof.]

(7) *Necessaries, repairs, &c.:*

The plaintiffs claim the sum of $, for necessaries supplied (*or* repairs done,, &c., *as the case may be*) to the ship "*Mary*" at the port of on the day of , and for costs [and the plaintiffs claim to have an account taken thereof].

(8) *Possession:*

(*a.*) The plaintiff, as sole owner of the ship "*Mary*" of the port of , claims possession of the said ship.

(*b.*) The plaintiff, as owner of 48-64th shares of the ship "*Mary*" of the port of , claims possession of the said ship against C. D., owner of 16-64th shares of the same ship.

(9) *Mortgage:*

The plaintiff, under a mortgage dated the day of , claims against the ship "*Mary,*" [*or* the proceeds of the ship "*Mary,*" *or as the case may be*], the sum of $, as the amount due to him for principal and interest, and for costs.

(10) *Claims between Co-Owners:*

(*a.*) The plaintiff, as part owner of the ship "*Mary,*" claims against C. D., part owner of the same ship, the sum of $ as part of the earnings of the said ship due to the plaintiff, and for costs; and to have an account taken thereof.

(*b.*) The plaintiff, as owner of 24-64th shares of the ship "*Mary*" being dissatisfied with the management of the said ship by the co-owners, claims that his co-owners shall give bail in the sum of $, the value of his said shares, for the safe return of the ship to the Dominion of Canada [*or to the District, as the case may be*].

(11) *Bottomry:*

The plaintiff, as assignee of a bottomry bond, dated the day of , and granted by *C. D.*, as master of the ship "*Mary*" of , to A. B. at the port of , claims the sum of $ against the ship "*Mary*" [her cargo and freight, *&c., or as the case may be*], as the amount due to him under the said bond, and for costs.

(12) *Derelict:*

A. B., claims to have the derelict ship "*Mary*" [*or cargo, &c., as the case may be*], condemned as forfeited to Her Majesty in Her Office of Admiralty.

(13) *Piracy:*

A. B., Commander of H.M.S. "*Torch,*" claims to have the Chinese junk "*Tecumseh*" and her cargo condemned as forfeited to Her Majesty as having been captured from pirates.

(14) *Slave Trade:*

A. B., Commander of H.M.S. "*London,*" claims to have the vessel, name unknown [together with her cargo and 12 slaves] seized by him on the day of 18 , condemned as forfeited to Her Majesty, on the ground that the said vessel was at the time of her seizure engaged in or fitted out for the slave trade, in violation of existing treaties between Great Britain and Zanzibar (*or* of the Act 5 Geo. IV. c. 113, *or as the case may be*).

or

C. D., the owner of the vessel [and cargo, *or as the case may be*] captured by H.M.S. "*London*" on the day of 18 , claims to have the said vessel [and cargo, *or as the case may be*] restored to him [together with costs and damages for the seizure thereof].

(15) *Under Pacific Islander's Protection Acts:*

A. B., as Commander of H.M.S. "*Lynx,*" claims to have the British ship "*Mary*" and her cargo condemned as forfeited to Her Majesty, for violation of the Pacific Islander's Protection Acts, 1872 and 1875.

(16) *Under Foreign Enlistment Act:*

A. B., claims to have the British ship "*Mary,*" together with the arms and munitions of war on board thereof, condemned as forfeited to Her Majesty for violation of the Foreign Enlistment Act, 1870.

(17) *Under Customs Acts*:

A. B. claims to have the ship "*Mary*" [*or as the case may be*] condemned as forfeited to Her Majesty for violation of [*state Act under which forfeiture is claimed*].

(18) *Recovery of pecuniary forfeiture or penalty*:

A. B. claims judgment against the defendant for penalties for violation of [*state Act under which penalties are claimed.*]

No. 11. [Rule 18.

AFFIDAVIT OF SERVICE OF A WRIT OF SUMMONS.

[*Title of Court and action.*]

County of

I, A. B., of in the county of [*calling or occupation*] make oath and say:

1. That I did on the day of 18 , serve the writ of summons herein by [*here state the mode in which the service was effected, whether on the owner or on the ship, cargo or freight, &c., as the case may be*] on the day of 18 .

(Signed)

A. B.

SWORN before me, &c.

A Commissioner, &c.

No. 12. [Rule 28.

APPEARANCE.

(1) *By defendant in person.*

[*Title of Court and action.*]

Take notice that I appear in this action,

Dated this day of 18 .

(Signed) C. D., *defendant.*

My address is
My address for service is

(2) *By Solicitor defendant.*

[*Title of Court and action.*]

Take notice that I appear for C. D. of [*insert address of C. D.*] in this action.

Dated this day of 18 .

(Signed) X.Y.
Solicitor for C. D.

My place of business is
My address for service is

Rule 28.]

No. 13.

Indorsement of Set-off or Counter-claim.

The defendant [*or, if he be one of several defendants* the defendant C. D.] owner of the ship "*Mary*" [*or as the case may be*] claims from the plaintiff [*or* claims to set-off against the plaintiff's claim] the sum of for [*state the nature of the set-off or counter-claim and the relief or remedy required as in form No. 10, mutatis mutandis*] and for costs.

Rule 35.]

No. 14.

Affidavit to Lead Warrant.

[*Title of Court and action.*]

I, A. B., *state name and address*] make oath and say that I have a claim against the ship "*Mary*" for [*state nature of claim*].

And I further make oath and say that the said claim has not been satisfied, and that the aid of this Court is required to enforce it.

On the day of 18 the said A. B. was duly sworn to the truth of this affidavit at } (Signed) A. B.

Before me,
E. F., &c.

or

Where the Action is in the name of the Crown,

I, *A. B., &c.* [*state name and address of person suing in the name of the Crown*] make oath and say that I claim to have the ship "*Mary*" and her cargo [*or* the vessel, name unknown, *or* the cargo *ex* the ship "*Mary,*" *&c., or as the case may be*] condemned to Her Majesty;—

(*a*) as having been fitted out for or engaged in the slave trade in violation of [*state Act or Treaty alleged to have been violated*];

or (*b*) as having been captured from pirates;

or (*c*) as having been found derelict;

or (*d*) for violation of [*State Act alleged to have been violated, or as the case may be*].

I further make oath and say that the aid of this Court is required to enforce the said claim.

On the day of 18 , the said A. B. was duly sworn to the truth of this affidavit at } (Signed) A.B.

Before me,
E. F., &c.

No. 15. [Rule 40.

WARRANT.

[*Title of Court and action.*]

VICTORIA, &c.

To the Marshal of the Admiralty District of [or Sheriff of the county of *or as the case may be*].

We hereby command you to arrest the ship her cargo and freight, &c. [*or as the case may be*], and to keep the same under safe arrest, until you shall receive further orders from us.

Given at in our said Court, under the seal thereof, this day of 18 .

Warrant

Taken out by

(Signed) E. F.,
Registrar (*or District Registrar, as the case may be.*)

No. 16. [Rule 44.

CERTIFICATE OF SERVICE TO BE INDORSED ON THE WARRANT AFTER SERVICE THEREOF.

This warrant was served by [*state by whom and in what mode service was effected*] on the day of 18 .

(Signed) G.H.,
Marshal of the Admiralty District of [*or, sheriff of the county of* , *or as the case may be*].

Rule 46.]

No. 17.

BAILBOND.

[*Title of Court and action.*]

Know all men by these presents that we [*insert names, addresses and descriptions of the sureties in full*] hereby jointly and severally submit ourselves to the jurisdiction of the said Court, and consent that if the said [*insert name of party for whom bail is to be given, and state whether plaintiff or defendant*], shall not pay what may be adjudged against him in the above named action, with costs [*or,* for costs, *if bail is to be given only for costs*], execution may issue against us, our heirs, executors and administrators, goods and chattels, for a sum not exceeding [*state sum in letters*] dollars.

This bailbond was signed by the said and the sureties, the day of 18 , in the registry of the Exchequer Court of Canada [*or as the case may be*].	*Signatures of sureties.*

Before me,

E. F.,

Registrar, *or* District Registrar, [*or* clerk in the registry, *or* Commissioner to take bail, *or as the case may be*].

Rule 46.]

No. 18.

COMMISSION TO TAKE BAIL.

[*Title of Court and action.*]

[L.S.] VICTORIA, ETC.

To [*state name and description of commissioner*], greeting.

Whereas in the above-named action bail is required to be taken on behalf of [*state name of party for whom bail is to be given, and whether plaintiff or defendant*] in the sum of [*state sum in letters*] dollars, to answer judgment in the said action.

We, therefore, hereby authorize you to take such bail on behalf of the said from two sufficient sureties, upon the bailbond hereto annexed, and to swear the said sureties to the truth of the annexed affidavits as to their sufficiency, in the form indorsed hereon.

And we command you, that upon the said bond and affidavits being duly executed and signed by the said sureties, you do transmit the same, attested by you, to the registry of our said Court.

Given at in our said Court, under the seal thereof, this day of 18 .

(Signed) E. F.,
Registrar *or* District Registrar.

Commission to take bail.
Taken out by

Form of Oath to be administered to each Surety.

You swear that the contents of the affidavit, to which you have subscribed your name, are true.

So help you God.

No. 19. [Rule 47.

AFFIDAVIT OF JUSTIFICATION.

[*Title of Court and action.*]

I [*state name, address and description of surety*] one of the proposed sureties for [*state name, address and description of person for whom bail is to be given*], make oath and say that I am worth more than the sum of [*state in letters the sum in which bail is to be given*] dollars, after the payment of all my debts.

On the day of 18 , the said was duly sworn to the truth of this affidavit at , Before me, E. F., Registrar. *or* district registrar *or* Commissioner [*or as the case may be.*]	*Signature of Surety.*

Rule 50.]

No. 20.

NOTICE OF BAIL.

[*Title of Court and action.*]

Take notice that I tender the under-mentioned persons as bail on behalf of [*state name, address and description of party for whom bail is to be given, and whether plaintiff or defendant*] in the sum of [*state sum in letters and figures*] to answer judgment in this action [*or* judgment and costs, *or* costs *only, or as the case may be.*]

Names, addresses, and descriptions of

SURETIES.	REFEREES.
(1)	
(2)	

Dated this day of 18 .

(Signed) X. Y.

Rule 51.]

No. 21.

NOTICE OF OBJECTION TO BAIL.

[*Title of Court and action.*]

Take notice that I object to the bail proposed to be given by [*state name, address, and description of surety or sureties objected to*] in the above-named action.

Dated the day of 18 .

(Signed) A. B.

Rule 57.]

No. 22.

RELEASE.

[L.S.] [*Title of Court and action.*]

VICTORIA, &c.

To the marshal of the Admiralty District of (*or* the sheriff of the County of , *or as the case may be*) Greeting:

Whereas by our warrant issued in the above-named action on the day of 18—, we did command you

to arrest [*state name and nature of property arrested*] and to keep the same under safe arrest until you should receive further orders from us. We do hereby command you to release the said [*state name and nature of property to be released*] from the said arrest upon payment being made to you of all fees due to and charges incurred by you in respect of the arrest and custody thereof.

Given at , in Our said Court, under the seal thereof, day of 18—.

Release
Taken out by

(Signed) E. F.
Registrar [*or* District Registrar].

No. 23. [Rule 64.

PLEADINGS.

(1) *In an Action for damages by collision*:

a. (*The "Atlantic."*)

STATEMENT OF CLAIM.

[*Title of Court and action.*]

Writ issued 18—.

1. Shortly before 7 p.m. on the 31st January, 1878, the brig "*Anthes,*" of 234 tons register, of which the plaintiff, George De Garis, was then owner, whilst on a voyage from Cardiff to Granville, in France, laden with coals, and manned with a crew of nine hands, all told, was about fifteen miles S. E. ½ E. from the Lizard Light.

2. The wind at that time was about E. N. E., a moderate breeze, the weather was fine, but slightly hazy, and the tide was about slack water, and of little force. The "*Anthes*" was sailing under all plain sail, close hauled on the port tack,

heading about S. E. and proceeding through the water at the rate of about five knots per hour. Her proper regulation side sailing lights were duly placed and exhibited and burning brightly, and a good look-out was being kept on board of her.

3. At that time those on board the "*Anthes*" observed the red light of a sailing vessel, which proved to be the "*Atlantic,*" at the distance of about from one mile and a half to two miles from the "*Anthes,*" and bearing about one point on her port bow. The "*Anthes*" was kept close hauled by the wind on the port tack. The "*Atlantic*" exhibited her green light and shut in her red light, and drew a little on to the starboard bow of the "*Anthes,*" and she was then seen to be approaching and causing immediate danger of collision. The helm of the "*Anthes*" was thereupon put hard down, but the "*Atlantic,*" although loudly hailed from the "*Anthes,*" ran against and with her stem and starboard bow struck the starboard quarter of the "*Anthes*" abaft the main rigging, and did her so much damage that the "*Anthes*" soon afterwards sank, and was with her cargo wholly lost, and four of her hands were drowned.

4. There was no proper look-out kept on board the "*Atlantic.*"

5. Those on board the "*Atlantic*" improperly neglected to take in due time proper measures for avoiding a collision with the "*Anthes.*"

6. The helm of the "*Atlantic*" was ported at an improper time.

7. The said collision, and the damages and losses consequent thereon, were occasioned by the negligent and improper navigation of those on board the "*Atlantic.*"

The plaintiff claims—

1. A declaration that he is entitled to the damage proceeded for.
2. The condemnation of the defendants [and their bail] in such damage and in costs.
3. To have an account taken of such damage with the assistance of merchants.
4. Such further or other relief as the nature of the case may require.

Dated the day of 18—.

(Signed) A. B., plaintiff.

Defence and Counter-Claim.

[*Title of Court and action.*]

1. The defendants are the owners of the Swedish barque "*Atlantic*," of 988 tons register, carrying a crew of nineteen hands all told, and at the time of the circumstances hereinafter stated bound on a voyage to Cardiff.

2. A little before 6.30 p.m., on the 31st of January, 1878, the "*Atlantic*" was about fifteen miles S. E. by S. of the Lizard. The wind was E. N. E. The weather was hazy. The "*Atlantic*," under foresail, fore and main topsails, main topgallant sail, and jib, was heading about W. S. W., making from five to six knots an hour with her regulation lights duly exhibited and burning, and a good look-out being kept on board her.

3. In these circumstances the red lights of two vessels were observed pretty close together, about half mile off, and from two to three points on the starboard bow. The helm ot the "*Atlantic*" was put to port in order to pass on the port sides of these vessels. One, however, of the vessels, which was the "*Anthes*," altered her course, and exhibited her green light, and caused danger of collision. The helm of the "*Atlantic*" was then ordered to be steadied, but before this order could be completed was put a hard-a-port. The "*Anthes*" with her starboard side by the main rigging struck the stem of the "*Atlantic*" and shortly afterwards sank, her master and four of her crew being saved by the "*Atlantic*."

4. Save as hereinbefore admitted, the several statements in the statement of claim are denied.

5. The "*Anthes*" was not kept on her course as required by law.

6. The helm of the "*Anthes*" was improperly starboarded.

7. The collision was caused by one or both of the things stated in the fifth and sixth paragraphs hereof, or otherwise by the negligence of the plaintiffs, or of those on board the "*Anthes*."

8. The collision was not caused or contributed to by the defendants, or by any of those on board the "*Atlantic*."

And by way of counter-claim, the defendants say—

They have suffered great damage by reason of the collision.

And they claim as follows:—

1. Judgment against the plaintiff [and his bail] for the damage occasioned to the defendants by the collision, and for the costs of this action.
2. To have an account taken of such damage with the assistance of merchants.
3. Such further and other relief as the nature of the case may require.

Dated the day of 18 .

(Signed) C. D., &c., defendants.

Reply.

[*Title of Court and action.*]

The plaintiff denies the several statements contained in the statement of defence and counter-claim, [*or* admits the several statements contained in paragraphs and of the statement of defence and counter-claim, but denies the other statements contained therein.]

Dated day of 18 .

(Signed) A. B., plaintiff.

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b. (*The "Julia David."*)

Statement of Claim.

[*Title of Court and action.*]

Writ issued 18 .

1. At about 2 a.m. on the 4th day of September, 1876, the steamship "*Sarpedon,*" of 1,556 tons register, and 225 horse power, of which the plaintiffs were owners, whilst on a voyage from Shanghai, and other ports to London, with a cargo of tea and other goods, was about eighty miles south-west of Ushant.

2. The wind at such time was about south-west, the weather was a little hazy and occasionally slightly thick, and the "*Sarpe-*

don" was under steam and sail, steering north-east, and proceeding at the rate of about ten knots per hour. Her proper regulation masthead and side lights were duly exhibited and burning brightly, and a good lookout was being kept.

3. At such time the masthead and red lights of a steam vessel, which proved to be the above-named vessel "*Julia David*," were seen at the distance of about two miles from and ahead of the "*Sarpedon*," but a little on her port bow. The helm of the "*Sarpedon*" was ported and hard a-ported, but the "*Julia David*" opened her green light to the "*Sarpedon*," and although the engines of the "*Sarpedon*" were immediately stopped, and her steam whistle was blown, the "*Julia David*" with her stem struck the "*Sarpedon*" on her port side, abreast of her red light, and did her so much damage that her master and crew were compelled to abandon her, and she was lost with her cargo. The "*Julia David*" went away without rendering any assistance to those on board the "*Sarpedon*," and without answering signals which were made by them for assistance.

4. Those on board the "*Julia David*" neglected to keep a proper look-out.

5. Those on board the "*Julia David*" neglected to duly port the helm of the "*Julia David*."

6. The helm of the "*Julia David*" was improperly starboarded.

7. The "*Julia David*" did not duly observe and comply with the provisions of article 16 of the "Regulations for Preventing Collisions at Sea."

8. The said collision was occasioned by the improper and negligent navigation of the "*Julia David*."

The plaintiffs claim—

1. A declaration that they are entitled to the damage proceeded for, and the condemnation of the said steamship "*Julia David*," and the defendants, therein, and in costs.
2. To have an account taken of such damage with the assistance of merchants.
3. Such further and other relief as the nature of the case may require.

Dated the day of 18 .

(Signed) A. B., &c., plaintiffs.

DEFENCE AND COUNTER-CLAIM.

[*Title of Court and action.*]

1. The defendants are the owners of the Belgian screw steamship "*Julia David*," of about 1,274 tons register, and worked by engines of 140 horse power nominal, with a crew of 30 hands, which left Havre on the 2nd of September, 1876, with a general cargo, bound to Alicante and other ports in the Mediterranean.

2. About 2.45 a.m. of the 4th of September, 1876, the "*Julia David*" in the course of her said voyage, was in the Bay of Biscay. The weather was thick with a drizzling rain, and banks of fog and a stiff breeze blowing from S. S. W., with a good deal of sea. The "*Julia David*" under steam alone, was steering S. S. W. ½ W. by bridge steering compass, or S. W. ½ W. magnetic, and was making about five knots an hour. Her regulation lights were duly exhibited and burning brightly, and a good look-out was being kept on board her.

3. In the circumstances aforesaid those on board the "*Julia David*" saw the green and masthead lights of a steamship, the "*Sarpedon*," about two miles off, and about two points on the starboard bow. The "*Julia David*" was kept on her course. But after a short time the "*Sarpedon*" opened her red light and caused danger of collision. The helm of the "*Julia David*" was thereupon put hard-a-port, and her engines stopped and almost immediately reversed full speed, but, nevertheless, the "*Sarpedon*" came into collision with the "*Julia David*," striking with the port side her stem and port bow, and doing her considerable damage.

4. The vessels separated immediately. The engines of the "*Julia David*" were then stopped, and her pumps sounded. She was making much water, and it was found necessary to turn her head away from the wind and sea. As soon as it could be done without great danger, she was steamed in the direction in which those on board her believed the "*Sarpedon*" to be, but when day broke and no traces of the "*Sarpedon*" could be discovered, the search was given up, and the "*Julia David*," being in a very disabled state, made her way to a port of refuge.

5. Save as hereinbefore appears, the several statements contained in the statement of claim are denied.

6. A good look-out was not kept on board the "*Sarpedon.*"

7. The helm of the "*Sarpedon*" was improperly ported.

8. Those on board the "*Sarpedon*" improperly neglected or omitted to keep her on her course.

9. Those on board the "*Sarpedon*" did not observe the provisions of Article 16 of the "Regulations for Preventing Collisions at Sea."

10. The collision was occasioned by some or all of the matters and things alleged in the 6th, 7th, 8th and 9th paragraphs hereof, or otherwise by the default of the "*Sarpedon*" or those on board her.

11. No blame in respect of the collision is attributable to the "*Julia David*" or to any of those on board her.

And by way of counter-claim the defendants say that the collision caused great damage to the "*Julia David.*"

And they claim—

(1) The condemnation of the plaintiffs [and their bail] in the damage caused to the "*Julia David,*" and in the costs of this action.

(2) To have an account taken of such damage with the assistance of merchants.

(3) Such further and other relief as the nature of the case may require.

Dated the day of 18 .

(Signed) C. D., &c., defendants.

REPLY.

[*Title of Court and action.*]

The plaintiffs deny the several statements contained in the statement of defence and counter-claim [*or, as the case may be*].

Dated the day of 18 .

(Signed) A. B., &c., plaintiff.

(2) *In an Action for Salvage*:

a. (*The "Crosby."*)

STATEMENT OF CLAIM.

[*Title of Court and action.*]

Writ issued 18 .

1. The "*Asia*" is an iron screw steamship of 902 tons net register tonnage, fitted with engines of 120 horse-power nominal, is of the value of $, and was at the time of the service hereinafter stated manned with a crew of twenty-three hands under the command of George Hook Bawn, her master.

2. At about 9 a.m. on the 29th of April, 1877, while the "*Asia*"—which was in ballast proceeding on a voyage to Nikolaev to load a cargo of grain—was between Odessa and Ochakov, those on board her saw a steamship ashore on a band situated about ten miles to the westward of Ochakov. The "*Asia*" immediately steamed in the direction of the distressed vessel which made signals for assistance.

3. On nearing the distressed vessel, which proved to be the "*Crosby*," one of the "*Asia's*" boats was sent to the "*Crosby*," in charge of the second mate of the "*Asia*," and subsequently the master of the "*Crosby*" boarded the "*Asia*," and at the request of the master of the "*Crosby*" the master of the "*Asia*" agreed to endeavour to tow the "*Crosby*" afloat.

4. The "*Crosby*" at this time was fast aground, and was lying with her head about N. N. W.

5. The master of the "*Asia*" having ascertained from the master of the "*Crosby*" the direction in which the "*Crosby*" had got upon the bank, the "*Asia*" steamed up on the starboard side of the "*Crosby*" and was lashed to her.

6. The "*Asia*" then set on ahead and attempted to tow the "*Crosby*" afloat, and so continued towing without effect until the hawser which belonged to the "*Asia*" broke.

7. The masters of the two vessels being then both agreed in opinion that it would be necessary to lighten the "*Crosby*" before she could be got afloat, it was arranged that the cargo from the "*Crosby*" should be taken on board the "*Asia*."

8. The "*Asia*" was again secured alongside the "*Crosby*" and the hatches being taken off cargo was then discharged from the "*Crosby*" into the "*Asia*," and this operation was continued until about 6 p.m., by which time about 100 tons of such cargo had been so discharged.

9. When this had been done both vessels used their steam, and the "*Asia*" tried again to get the "*Crosby*" off, but without success. The "*Asia*" then towed with a hawser ahead of the "*Crosby*," and succeeded in getting her afloat, upon which the "*Crosby*" steamed to an anchorage and then brought up.

10. The "*Asia*" steamed after the "*Crosby*" and again hauled alongside of her and commenced putting the transhipped cargo again on board the "*Crosby*," and continued doing so until about 6 a.m. of the 30th of April, by which time the operation was completed, and the "*Crosby*" and her cargo being in safety the "*Asia*" proceeded on her voyage.

11. By the services of the plaintiffs the "*Crosby*" and her cargo were rescued from a very dangerous and critical position, as in the event of bad weather coming on whilst she lay aground she would have been in very great danger of being lost with her cargo.

12. The "*Asia*" encountered some risk in being lashed alongside the "*Crosby*" and she ran risk of also getting aground and of losing her charter, the blockade of the port of Nikolaev being at the time imminent.

13. The value of the hawser of the "*Asia*" broken as herein stated was $.

14. The "*Crosby*' is an iron screw steamship of 1,118 tons net, (1,498 gross) register tonnage. As salved, the "*Crosby*" and her cargo and freight have been agreed for the purpsoes of this action at the value of $.

The plaintiffs claim—

1. Such an amount of salvage, regard being had to the said agreement, as the Court may think fit to award.
2. The condemnation of the defendants [and their bail] in the salvage and in costs.
3. Such further and other relief as the case may require.

Dated the day of , 18 .

(Signed) A. B., &c., plaintiffs.

DEFENCE.

[*Title of Court and action.*]

1. The defendants admit that the statement of facts contained in the statement of claim is substantially correct, except that the reshipment of the cargo on board the "*Crosby*" was completed by 4 a.m. on the 30th April.

2. The defendants submit to the judgment of the Court to award such a moderate amount of salvage to the plaintiffs under the circumstances aforesaid as to the said Court shall seem meet.

(Signed) C. D., &c., defendants.

REPLY.

[*Title of Court and action.*]

The plaintiffs deny the statement contained in the 1st paragraph of the statement of defence that the shipment of the cargo was completed by 4 a.m. on the 30th April.

Dated the day of , 18 .

(Signed) A. B., &c., plaintiffs.

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b. ("*The Newcastle.*")

STATEMENT OF CLAIM.

[*Title of Court and action.*]

Writ issued 18 .

1. The "*Emu*" is a steam tug belonging to the Whitby Steam Boat Company, of six tons register, with engines of 40 horse-power, nominal, and was at the time of the circumstances hereinafter stated manned by a crew of five hands.

2. Just before midnight on the 22nd of July, 1876, when the "*Emu*" was lying in Whitby harbour, her master was informed that a screw steamship was ashore on Kettleness Point. He at once got up steam, but was not able, owing to the tide, to leave the harbour till about 1.45 a.m. of the 23rd.

3. About 2 a.m. the "*Emu*" reached the screw steamship, which was the "*Newcastle*," which was fast upon the rocks, with a kedge and warp out. The wind was about N., blowing fresh; the sea was smooth, but rising; the tide was flood.

4. The master of the "*Emu*" offered his services, which were at first declined by the master of the "*Newcastle*"; shortly afterwards the kedge warp broke and the "*Newcastle*" swung square upon the land and more upon the rocks. The master of the "*Newcastle*" then asked the master of the "*Emu*" to tow him off, and after some conversation it was agreed that the remuneration should be settled on shore.

5. About 3 a.m. those on board the "*Emu*" got a rope from the "*Newcastle*" on board, and began to tow. After some towing this rope broke. The tow-line of the "*Newcastle*" was then got on board the "*Emu*," and the "*Emu*" kept to wing and twisting the "*Newcastle*," but was unable to get her off till about 5 a.m., when it was near high water. The master of the "*Emu*" then saw it was necessary to try a click or jerk in order to get the "*Newcastle*" off, and accordingly, at the risk of straining his vessel, he gave a strong click in a northerly direction, and got the "*Newcastle*" off.

6. The master of the "*Emu*" then asked if the "*Newcastle*" was making water, and was told a little only, but as he saw that the hands were at the pumps he kept the "*Emu*" by the "*Newcastle*" until she was abreast of Whitby. He then inquired again if any assistance was wanted, and being told that the "*Newcastle* was all right, and should proceed on her voyage, he steamed the "*Emu*" back into Whitby harbour about 7 a.m.

7. About 8 a.m. a gale from N.E. which continued all that day and the next, came on to blow with a high sea. If the "*Newcastle*" had not been got off before the gale came on she would have gone to pieces on the rocks.

8. By the services aforesaid the "*Newcastle*" and her cargo and the lives of those on board her were saved from total loss.

9. The "*Newcastle*" is a screw steamship of 211 tons register, and was bound from Newcastle to Hull with a general

cargo and 19 passengers. The value of the "*Newcastle,*" her cargo and freight, including passage money, are as follows:

The "*Newcastle,*" $, her cargo, $; freight and passage money, $; in all, $.

Plaintiffs claim——

(1) The condemnation of the defendants [and their bail] in such an amount of salvage remuneration as to the Court may seem just, and in the costs of this action.

(2) Such further and other relief as the nature of the case may require.

Dated day of , 18 .

(Signed) A. B., &c., plaintiffs.

DEFENCE.

[*Title of Court and action.*]

1. At about 6.45 p.m. on the 22nd of July, 1876, the iron screw steamship "*Newcastle,*" of 211 tons register, propelled by engines of 45 horse-power, and manned by 12 hands, her master included, whilst proceeding on a voyage from Newcastle to Hull with cargo and passengers, ran aground off Kettleness Point, on the coast of Yorkshire.

2. The tide at this time was the first quarter ebb, the weather was calm, and the sea was smooth, and the "*Newcastle,*" after grounding as aforesaid, sat upright and lay quite still, heading about E. S. E. Efforts were than made to get the "*Newcastle*" again afloat by working her engines, but it was found that this could not be done in the then state of the tide.

3. At about 10 p.m. of the said day a kedge, with a warp attached to it, was carried out from the "*Newcastle*" by one of her own boats and dropped to seaward, and such warp was afterwards hove taut and secured on board the "*Newcastle*" with the view of its being hove upon when the flood tide made. Several cables came to the "*Newcastle*" from Runswick, and then the men in them offered their assistance, but their services, not being required, were declined.

4. At about 2 a.m. of the following morning the steam tug "*Emu*," whose owners, master, and crew are the plaintiffs in this action, came to the "*Newcastle*" and offered assistance, which was also declined.

5. The flood tide was then making, and by about 2.45 a.m. the "*Newcastle*" had floated forward, and attempts were made to get the stern of the "*Newcastle*" also afloat, and the warp attached to the aforesaid kedge was attempted to be hove in, but the said warp having parted, the master of the "*Newcastle*" endeavoured ineffectually to make an agreement with the master of "*Emu*" to assist in getting the "*Newcastle*" afloat, and at about 3 a.m. a rope was given to the "*Emu*" from the port bow of the "*Newcastle*," and directions were given to the "*Emu*" to keep the head of the "*Newcastle*" to the eastward in the same way as it had been kept by the aforesaid kedge anchor and warp. The "*Emu*" then set ahead and almost immediately the said rope was broken. A coir hawser was thereupon given to the "*Emu*," and those on board were directed not to put any strain on it, but to keep the "*Emu*" paddling ahead sufficiently to steady the head of the "*Newcastle*," and to keep her head to the eastward. This the "*Emu*" did and continued to do until about 4.40 a.m., when the "*Newcastle*," by means of her own engines, was moved off from the ground, and the "*Emu*" was brought broad on the port bow of the "*Newcastle*," and the "*Emu*" had to stop towing and to shift the rope from her port bollard, where it was fast to her towing hook; but the "*Newcastle*" continuing to go ahead, the said rope had to be let go on board the "*Emu*," and it was then hauled in on board the "*Newcastle*." The "*Newcastle*," under her own steam, then commenced proceeding south, the wind at the time being N. N. W. and light, and the weather fine. It was afterwards ascertained that the "*Newcastle*" was making a little water in her afterhold, and her hand pumps were then worked, and they kept the "*Newcastle*" free.

6. The "*Emu*" proceeded back with the "*Newcastle*" as far as Whitby, and the "*Newcastle*" then continued on her voyage and arrived in the Humber at about 2.45 p.m. of the same day.

7. During the time aforesaid, the master, crew and passengers of the "*Newcastle*" remained on board the "*Newcastle*," and no danger was incurred in their so doing.

8. Save as herein appears, the defendants deny the truth of the several statements contained in the statement of claim.

9. The defendants have paid into Court and tendered to the plaintiffs for their services the sum of $, and have offered to pay their costs, and the defendants submit that such tender is sufficient.

Dated the day of , 18 .

(Signed) C. D., &c., defendants.

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(3) *In an action for distribution of salvage:*

STATEMENT OF CLAIM.

[*Title of Court and action.*]

Writ issued , 18 .

1. Describe briefly the salvage services, stating the part taken in them by the plaintiffs, and the capacity in which they were serving.

2. The sum of $ has been paid by the owners of the ship, &c. [*state name of ship or other property salved*] to the defendants, as owners of the ship [*state name of salving ship*], and has been accepted by them in satisfaction of their claim for salvage, but the said defendants have not paid and refused to pay any part of that sum to the plaintiffs for their share in the said salvage services.

The plaintiffs claim—

1. An equitable share of the said sum of $, to be apportioned among them as the Court shall think fit and the costs of this action.

2. Such other relief as the nature of the case may require.

Dated the day of , 18 .

(Signed) A. B., &c., plaintiffs.

(4) *In an action for master's wages and disbursements*

a ("*The Princess.*")

STATEMENT OF CLAIM.

[*Title of Court and action.*]

Writ issued , 18 .

1. The plaintiff, on the 10th day of February, 1877, was appointed by the owner of the British barque "*Princess,*" proceeded against in this action, master of the said barque, and it was agreed between the plaintiff and the said owner that the wages of the plaintiff as master should be $ per month.

2. The plaintiff acted as master of the said barque from the said 10th day of February until the 25th day of October, 1877, and there is now due to him for his wages as master during that time the sum of $.

3. The plaintiff as master of the said barque expended various sums of money for necessary disbursements on account of the said barque; and there is now due to him in respect of the same a balance of $.

The plaintiff claims—

1. A decree pronouncing the said sums, amounting in the whole to $, to be due to him for wages and disbursements, and directing the said vessel to be sold and the amount due to him to be paid to him out of the proceeds.
2. Such further and other relief as the nature of the case may require.

Dated the day of , 18 .

(Signed) A. B., plaintiff.

b. ("*The Northumbria.*")

STATEMENT OF CLAIM.

[*Title of Court and action.*]

Writ issued , 18 .

1. In or about the month of July, 1873, the plaintiff was engaged by the owners of the British ship "*Northumbria*" to serve on board her as her master, at wages after the rate of $ per month, and he entered into the service of the said ship as her master accordingly, and thenceforward served on board her in that capacity and at that rate of wages until he was discharged, as hereinafter stated.

2. When the plaintiff so entered into the service of the said ship, she was lying at the port of North Shields in the county of Northumberland, and she thence sailed to Point de Galle, and thence to divers other ports abroad, and returned home to Cardiff, where she arrived on the 1st day of October, 1875.

3. The "*Northumbria,*" after having received divers repairs at Cardiff, left that port on the 5th day of November, 1875, under the command of the plaintiff on a voyage, which is thus described in the ship's articles signed by the plaintiff and her crew before commencing the same, viz.: "A voyage from Cardiff to Bahia or Pernambuco, and any ports or places in the Brazils, or North or South America, United States of America, Indian, Pacific, or Atlantic Oceans, China or Eastern Seas, Cape Colonies, West Indies, or Continent of Europe, including the Mediterranean Sea or Seas adjacent, to and fro if required for any period not exceeding three years, but finally to a port of discharge in the United Kingdom or Continent of Europe."

4. The "*Northumbria,*" after so leaving Cardiff, met with bad weather and suffered damage, and was compelled to put back to Falmouth for repairs before again proceeding on her voyage.

5. The plaintiff was ready and willing to continue in the service of the "*Northumbria,*" and to perform his duty as her master on and during the said voyage, but the defendants, the owners of the "*Northumbria,*" wrongfully and without reasonable cause, discharged the plaintiff on the 23rd of November

from his employment as master, and appointed another person as master of the "*Northumbria*" on the said voyage in the place of the plaintiff, and thereby heavy damage and loss have been sustained by the plaintiff.

6. The plaintiff, whilst he acted as master of the "*Northumbria*," earned his wages at the rate aforesaid; and he also, as such master, made divers disbursements on account of the "*Northumbria*;" and there was due and owing to the plaintiff in respect of such his wages and disbursements, at the time of his discharge, a balance of $, which sum the defendants without sufficient cause have neglected and refused to pay to the plaintiff.

The plaintiff claims—

1. Payment of the sum of $, the balance due to the plaintiff for his wages and disbursements with interest thereon.
2. Ten days' double pay, according to the provisions of section 187 of "The Merchant Shipping Act, 1854."
3. Damages in respect of his wrongful discharge by the defendants.
4. The condemnation of the defendants and their bail, in the amounts claimed by or found due to the plaintiff.
5. To have an account taken [with the assistance of merchants] of the amount due to the plaintiff in respect of the said wages and disbursements, and for damages in respect of such wrongful discharge.
6. Such further and other relief as the nature of the case may require.

Dated the day of , 18 .

(Signed) A. B., plaintiff.

DEFENCE.

[*Title of Court and action.*]

1. The defendants admit the statements made in the 1st, 2nd, 3rd and 4th paragraphs of the plaintiff's statement of claim.

2. Whilst the "*Northumbria*" was upon her voyage in the said 3rd pargraph mentioned, and before and until she put

into Falmouth, as in the said 4th paragraph mentioned, the plaintiff was frequently under the influence of drink.

3. During the night of the 10th November, 1875, and the morning of the 11th November, 1875, whilst a violent gale was blowing, and the ship was in danger, the plaintiff was wholly drunk and was incapable of attending to his duty as master of the said ship; and in consequence of the condition of the plaintiff much damage was done to the said ship, and the said ship was almost put ashore.

4. The damage in the 4th paragraph of the statement of claim mentioned was wholly or in part occasioned by the drunken condition of the plaintiff during the said voyage from Cardiff to Falmouth.

5. The defendants having received information of the above facts on the arrival of the said ship at Falmouth, and having made due inquiries concerning the same had reasonable and probable cause to and did discharge the plaintiff from their employment as master of the said ship on the 23rd November, 1875.

6. The plaintiff, on the 12th day of November, 1875, whilst the said ship was at Falmouth, wrongfully and improperly tore out and destroyed certain entries which had been made by the mate of the said ship in her log-book relating to said sea voyage from Cardiff to Falmouth; and the plaintiff substituted in the said log-book entries made by himself with intent to conceal the true facts of said voyage from the defendants.

7. The defendants bring into Court the sum of $ in respect of the plaintiff's claim for wages and disbursements, and say that the said sum is enough to satisfy the plaintiff's said claim in that behalf. The defendants offered to pay the plaintiff's costs to this time in respect of those two causes of action.

Dated the day of , 18 .

(Signed) C. D., E. F., etc., defendants.

REPLY.

[*Title of Court and action.*]

The plaintiff denies the several statements contained in the statement of defence [*or as the case may be*].

Dated the day of 18 .

(Signed) A. B., plaintiff.

(5) *In an action for seamen's wages*:

STATEMENT OF CLAIM.

[*Title of Court and action.*]

Writ issued 18 .

1. The plaintiff, A. B., was engaged as mate of the British brig "*Bristol*," at the rate of $ per month, and in pursuance of that engagement served as mate on board the said brig from the day of 18 , to the day of 18 , and during that time as mate of the said brig earned wages amounting to $. After giving credit for the sum received by him on account, as shown in the schedule hereto, there remains due to him for his wages a balance of $.

2. The plaintiffs C. D., E. F. and G. H. were engaged as able seamen on board the said brig, and having in pursuance of that engagement served as able seamen on board the said brig during the periods specified in the schedule hereto, earned thereby as wages the sums set forth in the same schedule, and after giving credit for the sums received by them respectively, on account of the said wages, there remain due to them the following sums, namely:

To C. D. the sum of $.
To E. F. " $.
To G. H. " $.

3. The plaintiffs I. K. and L. M. were engaged as ordinary seamen on board the said brig, and having served on board the same in pursuance of the said engagement during the periods specified in the schedule hereto, earned thereby the sums set forth in the same schedule, and after giving credit for the sums received by them respectively, on account of the said wages, there remain due to them the following sums, namely:—

To I. K. the sum of $.
To L. M. " $.

SCHEDULE REFERRED TO ABOVE.

Wages due to A. B., mate, from the 18 , to the 18 , months and days at $ per month.

	$: :
Less received on account	$: :
Balance due	$: :

Wages due to C. D., able seaman, from the 18 , to the 18 , months and days, at $ per month.

	$: :
Less received on account	$: :
Balance due	$: :

[*So on with the wages due to the other plaintiffs.*]

The plaintiffs claim:

1. The several sums so due to them respectively with the costs of this action.
2. Such double pay as they may be entitled to under sec. 187 of The Merchant Shipping Act, 1854.
3. Such other relief as the nature of the case may require.

Dated the day of 18 .

(Signed) A. B., etc., plaintiffs.

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(6) *In an action for bottomry*:

STATEMENT OF CLAIM.

[*Title of Court and action.*]

Writ issued 18 .

1. In the month of July, 1876, the Italian barque "*Roma Capitale*" was lying in the port of Rangoon in the Pegu Division of British Burmah, and Pietro Ozilia, her master, being in want of funds, was compelled to borrow on bottomry of the said barque and her freight from the Cassa Marittima di Genova the sum of $ for the necessary and indispens-

able repairs, charges and supplies of the said vessel in the said port of Rangoon, and to enable her to prosecute her voyage from Rangoon to Akyab and thence to .

2. Accordingly, by a bond of bottomry dated the 11th day of the said month of July and duly executed by him the said Pietro Ozilia, in consideration of the sum of $, lent by the said Cassa Marittima di Genova upon the said adventure upon the said barque and freight at the maritime premium of 23 per cent., bound himself and the said barque and the freight to become payable in respect of the said voyage to pay to the said Cassa Marittima di Genova, their successors or assigns, the sum of $, (which included the principle charges and the maritime interest due thereon), within 30 days after the said barque should arrive at her port of discharge; and the said bond provided that the said Cassa Marittima di Genova should take upon themselves the maritime risk of the said voyage.

3. The "*Roma Capitale*" has since successfully prosecuted her said intended voyage for which the aforesaid bond was granted, and arrived at as her port of discharge or on about the 30th day of March, 1877.

4. Before the issue of the writ in this action the said bond became due and payable, and was duly endorsed by the said Cassa Marittima di Genova to the plaintiffs who thereby became and are the legal holders thereof, and the said sum of $, is now due and owing thereon to the plaintiffs.

The plaintiffs claim—

1. A declaration for the force and validity of the said bond.
2. The condemnation of the said barque "*Roma Capitale*" and her freight in the sum of $, with interest thereon at per cent. per annum from the time when the said bond became payable, and in costs.
3. A sale of the said barque and the application of the proceeds of her sale and of her freight in payment to the plaintiffs of the said amount and interest and costs.
4. Such further and other relief as the case may require.

Dated the day of 18 .

(Signed) A. B., etc., plaintiffs.

(7) *In an action for mortgage*:

STATEMENT OF CLAIM.

[*Title of Court and action.*]

Writ issued 18 .

1. The above-named brigantine or vessel "*Juniper*" is a British ship belonging to the port of , of the registered tonnage of 109 tons or thereabouts, and at the time of the mortgage hereinafter mentioned, Thomas Brock, of was the registered owner of the said brigantine.

2. On the 4th day of July, 1876, $\frac{32}{64}$th parts or shares of the said brigantine were mortgaged by the said Thomas Brock to the plaintiff, to secure the payment by the said Thomas Brock to the plaintiff of the sum of $, together with interest thereon at the rate of per cent. per annum on or before the 1st day of July, 1877.

3. The said mortgage of the "*Juniper*" was made by an instrument dated the 4th day of July, 1876, in the form prescribed by the 66th section of The Merchant Shipping Act, 1854, and was duly registered in accordance with the provisions of the said Act.

4. No part of the said principal sum or interest has been paid, and there still remains due and owing to the plaintiff on the said mortgage security the principal sum of $, together with a large sum of money for interest and expenses, and the plaintiff, although he has applied to the said Thomas Brock for payment thereof, cannot obtain payment without the assistance of this Court.

The plaintiff claims—

1. Judgment for the said principle sum of $, together with interest and expenses.
2. To have an account taken of the amount due to the plaintiff.
3. Payment out of the proceeds of the said brigantine now remaining in Court, of the amount found due to the plaintiff, together with costs [*or* to have the said brigantine sold, *&c., as the case may be*].
4. Such further and other relief as the nature of the case may require.

Dated the day of 18 .

(Signed) A. B., plaintiff.

(8) *In an action between co-owners (for account)*:

STATEMENT OF CLAIM.

[*Title of Court and action.*]

Writ issued 18 .

1. The *Horlock* is a sailing ship of about 40 tons register, trading between and .

2. By a bill of sale duly registered on the 11th day of June, 1867, the defendant, John Horlock, who was then sole owner of the above named ship "*Horlock*," transferred to Thomas Worraker, of $\frac{32}{64}$th parts of shares of the ship for the sum of $.

3. By a subsequent bill of sale duly registered on the 16th December, 1876, the said Thomas Worraker transferred his said $\frac{32}{64}$th shares of the ship of George Wright, the plaintiff, for the sum of $.

4. The defendant, John Horlock, has had the entire management and the command of the said ship from the 11th day of June, 1867, down to the present time.

5. The defendant has from time to time up to and including the 24th September, 1874, rendered accounts of the earnings of the ship to the aforementioned Thomas Worraker, but since the said 24th of September, 1874, the defendant has rendered no accounts of the earnings of the ship.

6. Since the 16th December, 1876, the ship has continued to trade between and , and the plaintiff has made several applications to the defendant, John Horlock, for an account of the earnings of the ship, but such applications have proved ineffectual.

7. The plaintiff is dissatisfied with the management of the ship, and consequently desires that she may be sold.

The plaintiff claims—

1. That the Court may direct the sale of the said ship "*Horlock*."
2. To have an account taken of the earnings of the said ship, and that the defendant may be condemned in the amount which shall be found due to the plaintiff in respect thereof, and in the costs of this action.
3. Such further or other relief as the nature of the case may require.

Dated the day of 18 .

(Signed) A. B., plaintiff.

DEFENCE.

[*Title of Court and action.*]

1. The defendant denies the statements contained in paragraph 2 of the statement of claim.

2. The defendant further says that he never at any time signed any bill of sale transferring any shares whatever of the said ship "*Horlock*" to the said Thomas Worraker, and further says that if any such bill was registered as alleged on the 11th June in the said 2nd paragraph (which the defendant denies) the same was made and registered fraudulently and without the knowledge, consent or authority of the defendant.

3. The defendant does not admit the statements contained in the 3rd paragraph of the statement of claim, and says that if the said Thomas Worraker transferred any shares of the said ship to the plaintiff as alleged (which the defendant does not admit), he did so wrongfully and unlawfully, and that he had not possession of or any right to or in respect of said shares.

4. The defendant denies the statements contained in paragraph 5 of the statement of claim, and says that he never rendered any such accounts as alleged therein.

5. The defendant does not admit the statements contained in paragraph 6 of the statement of claim.

Dated the day of 18 .

(Signed) C. D., defendant.

REPLY.

[*Title of Court and action.*]

The plaintiff denies the several statements in the statement of defence.

Dated the day of 18 .

(Signed) A. B., plaintiff.

(9) *In an action for possession:*

STATEMENT OF CLAIM.

[*Title of Court and action.*]

Writ issued 18 .

1. The plaintiffs are registered owners of $\frac{44}{64}$ shares in the British ship "*Native Pearl,*" and such shares are held by them respectively as follows:—

Morgan Parsall Griffiths is owner of $\frac{16}{64}$ shares, Edmund Nicholls of $\frac{8}{64}$ shares, William Meagher of $\frac{4}{64}$ shares, Isaac Butler of $\frac{8}{64}$ shares, and William Herbert of $\frac{8}{64}$ shares.

2. The only owner of the said ship other than the plaintiffs is John Nicholas Richardson, who is the registered owner of the remaining $\frac{20}{64}$ shares of the said ship, and has hitherto acted as managing owner and ship's husband of the said ship, and has possession of and control over the said ship and her certificate of registry.

3. The defendant, the said John Nicholas Richardson, has not managed the said ship to the satisfaction of the plaintiffs, and has by his management of her occasioned great loss to the plaintiffs; and the plaintiffs in consequence thereof before the commencement of this action gave notice to the defendant to cease acting as managing owner and ship's husband of the said ship, and revoked his authority in that behalf, and demanded from the defendant the possession and control of the said ship, and of her certificate of registry, but the defendant has refused and still refuses to give possession of the said ship and certificate to the plaintiffs, and the plaintiffs cannot obtain possession of them without the assistance of this Court.

4. The defendant has neglected and refused to render proper accounts relating to the management and earnings of the said ship, and such accounts are still outstanding, and unsettled between the plaintiffs and the defendant.

The plaintiffs claim—

1. Judgment giving possession to the plaintiffs of the said ship and of her certificate of registry.

2. To have an account taken, with the assistance of merchants, of the earnings of the ship.

3. A sale of the defendant's shares in the said ship.

4. Payments out of the proceeds of such sale of the balance (if any) found due to the plaintiffs and of the costs of this action.

5. Such further and other relief as the nature of the case may require.

Dated the day of 18 .

(Signed) A. B., &c., plaintiffs.

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(10) *In an Action for necessaries:*

STATEMENT OF CLAIM.

[*Title of Court and action.*]

Writ issued 18 .

1. The plaintiffs at the time of the occurrences hereinafter mentioned carried on business at the port of , as bonded store and provision merchants and ship chandlers.

2. The "*Sfactoria*" is a Greek ship, and in the months of June, July, August and September, 1874, was lying in the said port of , under the command of one George Lazzaro, a foreigner, her master and owner, and in the said month of September she proceeded on her voyage to .

3. The plaintiffs, at the request and by the direction of the said master, supplied during the said months of June, July, August and September, 1874, stores and other necessaries for the necessary use of the said ship upon the said then intended voyage to the value of $, for which sum an acceptance was given by the said George Lazzaro to the plaintiffs; but on the 4th day of February, 1875, the said acceptance, which then became due, was dishonoured, and the said sum

of $ with interest thereon from the said 4th day of February, 1875, still remains due and unpaid to the plaintiffs.

4. In the month of August aforesaid the plaintiffs, at the request of the said master, advanced to him the sum of $ for the necessary disbursements of the said ship at the said port of , and otherwise on account of the said ship; and also at his request paid the sum of $, which was due for goods supplied for the necessary use of the said ship on the said voyage; and of the sums so advanced and paid there still remains due and unpaid to the plaintiffs the sum of $, with interest thereon from the 5th day of January, 1875, on which last mentioned day a promissory note given by the said George Lazzaro to the said plaintiffs for the said sum of $, was returned to them dishonoured.

5. The plaintiffs also at the said master's request, between the 1st of September, 1874, and the commencement of this action paid various sums amounting to $, for the insurance of their said debt.

6. The said goods were supplied and the said sums advanced and paid by the plaintiffs upon the credit of the said ship, and not merely on the personal credit of the said master.

The plaintiffs claim—

1. Judgment for the said sums of $, and $, together with interest thereon.

2. That the defendant [and his bail] be condemned therein, and in costs.

or

2. A sale of the said ship, and payment of the said sums and interest out of the proceeds of such sale, together with costs.

3. Such further and other relief as the case may require.

Dated the day of 18 .

(Signed) A. B., &c., plaintiffs.

(11) *In an Action for condemnation of a ship or cargo, &c.:*

STATEMENT OF CLAIM.

[*Title of Court and action.*]

Writ issued , 18 .

State briefly the circumstances of the seizure, or, if on affidavit of the circumstances has been filed, refer to the affidavit.

A. B. [*state name of person suing in the name of the Crown*] claims—

The condemnation of the said ship [and her cargo, and of the said slaves, *or as the case may be*], on the ground that the said ship, &c., was at the time of the seizure thereof fitted out for or engaged in the Slave Trade [*or* as having been captured from pirates, *or* for violation of the Act S. *or as the case may be*].

Dated the day of 18 .

(Signed) A. B.

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(12) *In an Action for Restitution of a Ship or Cargo*:

STATEMENT OF CLAIM.

[*Title of Court and action.*]

Writ issued , 18 .

State briefly the circumstances of the seizure.

C. D. [*State name of person claiming restitution*] claims—

The restitution of the said vessel , [and her cargo, *or as the case may be*] together with costs and damages for the seizure thereof [*or as the case may be*].

Dated the day of 18 .

(Signed) C. D., &c., plaintiffs.

(13) *In a Piracy case, where the captors intend to apply for Bounty, add*:

A. B. further prays the Court to declare—

(1) That the persons attacked or engaged were pirates.

(2) That the total number of pirates so engaged or attacked was of whom were captured.

(3) That the vessel [*or* vessels and boats] engaged was [*or* were] [ ] and [ ].

Dated the day of 18 .

(Signed) A. B.

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(14) *In an Action for recovery of any pecuniary forfeiture or penalty*:

STATEMENT OF CLAIM.

[*Title of Court and action.*]

Writ issued , 18 .

State briefly the circumstances, and the Act and section of Act under which the penalty is claimed.

I, A.B., claim to have the defendant condemned in a penalty of $, and in the costs of this action.

Dated the day of 18 .

(Signed) A.B.

No. 24.

INTERROGATORIES.

[*Title of Court and action.*]

Interrogatories on behalf of plaintiff A. B. [*or* defendant C.D.] for the examination of the defendants C.D. and E.F. [*or* plaintiff A.B. *or as the case may be*].

1. Did not, &c.

2. Have not, &c.

The defendant C.D. is required to answer the interrogatories numbered .

The defendant E.F. is required to answer the interrogatories numbered .

Dated the day of 18 .

(*Signed*) A.B. [*or* C.D. *as the case may be.*]

ANSWERS TO INTERROGATORIES.

Rule 69.]

No. 25.

[*Title of Court and action.*]

The answers of the defendant C.D. [*or* plaintiff A.B. &c.] to the interrogatories filed for his examination by the plaintiff A.B. [*or* defendant C.D., &c.].

In answer to the said interrogatories I, the above-named C.D. [*or* A.B., &c.], make oath and say as follows:—

1. .
2. .

&c. &c. &c.

On the day of 18 , the said C.D. [*or* A.B., &c.] was duly sworn to the truth of this affidavit at } (Signed) C.D. [*or* A.B.]

Before me,
E.F., &c.

Rule 71.]

No. 26.

AFFIDAVIT OF DISCOVERY.

[*Title of Court and action.*]

I, the defendant C.D. [*or* plaintiff A.B., &c.], make oath and say as follows:—

1. I have in my possession or power the documents relating to the matters in question in this action, set forth in the first and second parts of the first schedule hereto.

2. I object to produce the documents set forth in the second part of the said first schedule on the ground that [*state grounds of objection, and verify the facts as far as may be.*]

3. I have had, but have not now, in my possession or power the documents relating to the matters in question in this action as set forth in the second schedule hereto.

4. The last mentioned documents were last in my possession or power on [*state when*].

5. [*Here state what has become of the last mentioned documents, and in whose possession they now are*].

6. According to the best of my knowledge, information, and belief, I have not now and never had in my possession, custody, or power, or in the possession, custody or power of my solicitor or agent, or of any other person or persons on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this action, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto.

SCHEDULE No. I.

Part 1.

[*Here set out documents.*]

Part 2.

[*Set out documents.*]

SCHEDULE No. II.

[*Set out documents.*]

On the day of 18 , said C.D. [*or* A.D. &c.] was duly sworn to the truth of this affidavit at . } (Signed) C.D. [*or* A.B.]

Before me,

E. F., &c.

Rule 73.]

No. 27.

NOTICE TO PRODUCE.

[*Title of Court and action.*]

Take notice that the plaintiff A. B. [*or* defendant C.D.] requires you to produce for his inspection, on or before the day of , the following documents.

[*Here describe the documents required to be produced.*]

Dated day of , 18 .

(Signed) A. B., plaintiff,
[*or* C.D., defendant.]

To C. D., defendant,
[*or as the case may be.*]

Rule 74.]

No. 28.

NOTICE TO ADMIT DOCUMENTS.

[*Title of Court and action.*]

Take notice that the plaintiff, A. B. [*or* defendant C.D.] in this action proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [or plaintiff], his solicitor or agent, at on , between the hours of and ; and the defendant [*or* plaintiff] is hereby required, within *forty-eight hours* from the last mentioned hour, to admit that such of the said documents as are specified as originals were respectively written, signed or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and that such documents as are

stated to have been served, sent, or delivered, were so served, sent or delivered respectively; saving all just exceptions to the admissibility of all such documents are evidence in this action.

Description of Documents.	Dates.	Time and mode of service or delivery, &c.
[*Here briefly describe documents*]. (*1*) *Originals.* (*2*) *Copies.*	[*Here state the date of each document*].	[*Here state whether the original or a duplicate was sent by post, or served or delivered, and when and by whom*].

Dated the day of , 18 .

(Signed) A. B., plaintiff [*or* C.D., defendant].

To C. D., defendant,
[*or as the case may be*].

No. 29. [Rule 74.

NOTICE TO ADMIT FACTS.

[*Title of Court and action.*]

Take notice that the plaintiff A. B. [*or* defendant C. D.], demands admission of the under mentioned facts, saving all just exceptions.

1.

2.

[*Here state briefly the facts of which admission is demanded*].

Dated the day of , 18 .

(Signed) A. B., plaintiff [*or* C.D., defendant].

To C. D., defendant,
[*or as the case may be*].

Rule 81.]

No. 30.

NOTICE OF MOTION.

[*Title of Court and action.*]

Take notice that on (*state day of week*) the day of , the plaintiff (*or* defendant) will (by counsel, *or* by his solicitor, *if the motion is to be made by counsel or solicitor*) move the Judge in Court (*or* in chambers, *as the case may be*) to order that (*state nature of order to be moved for. In a notice of motion to vary a report of the registrar, the items objected to must be specified*).

Dated the day of , 18 .

(Signed) A. B., plaintiff (*or* C. D., defendant).

Rule 86.]

No. 31.

NOTICE OF TENDER.

[*Title of Court and action.*]

Take notice that I have paid into Court, and tender in satisfaction of the plaintiff's claim (*or, as the case may be*) *if the tender is for costs also, add* including costs, the sum of (*state sum tendered, both in letters and figures, and on what terms, if any, the tender is made*).

Dated the day of , 18 .

(Signed) C. D., defendant.

Rule 86.]

No. 32.

NOTICE ACCEPTING OR REJECTING TENDER.

[*Title of Court and action.*]

Take notice that I accept (*or reject*) the tender made by the defendant in this action.

Dated the day of , 18 .

(Signed) A. B., plaintiff.

No. 33. [Rule 92.

INTERPRETER'S OATH.

You swear that you are well acquainted with the English and languages (*or as the case may be*) and that you will faithfully interpret between the Court and the witnesses.

So help you God.

No. 34. [Rule 93.

APPOINTMENT TO ADMINISTER OATHS.

(1) *In Admiralty proceedings generally:*

(L.S.) [*Title of Court.*]

To [*State name and address of Commissioner*].

I hereby appoint you to be a Commissioner to administer oaths in all Admiralty proceedings in this Court.

(Signed) A. B.,
Judge *or Local Judge in Admiralty.*

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(2) *In any particular proceeding:*

(L.S.) [*Title of Court and action.*]

To [*State name and address of appointee*].

I hereby authorize you to administer an oath [*or oaths as the case may be*] to [*state name of person or persons to whom, and proceeding in which the oath is to be administered, or as the case may be*].

(Signed) A. B.,
Judge, or Local Judge in Admiralty.

Rule 94.]

No. 35.

Form of Oath to be Administered to a Witness.

You swear that the evidence given by you shall be the truth, the whole truth, and nothing but the truth.

So help you God.

Form of Declaration in Lieu of Oath.

I solemnly promise and declare that the evidence given by me shall be the truth, the whole truth, and nothing but the truth.

Rule 94.]

No. 36.

Form of Oath to be Administered to a Deponent.

You swear that this is your name and handwriting, and that the contents of this affidavit are true.

So help you God.

Form of Declaration in Lieu of Oath to be made by a Deponent.

I solemnly declare that this is my name and handwriting and that the contents of this deposition are true.

No. 37. [Rule 99.

FORM OF JURAT.

[*Where Deponent is sworn by Interpretation*].

On the day of , 18 , the said A. B. was duly sworn to the truth of this affidavit by the interpretation of C. D., who was previously sworn, that he was well acquainted with the English and languages, (*or as the case may be*), and that he would faithfully interpret the said affidavit, at .

Before me,
E. F., etc.

(Signed) A. B.

No. 38. [Rule 102.

ORDER FOR EXAMINATION OF WITNESSES.

[*Title of Court and action.*]

On the day of , 18 .

Before , Judge, etc.

It is ordered that (*state the names of the witnesses so far as it can be done*), witnesses for the plaintiff (*or defendant*), shall be examined before the Judge (*or registrar*), at (*state place of examination*), on (*state day of week*), the day of instant (*or as the case may be*), at o'clock in the noon.

(Signed) E. F.,
Registrar, *or* District Registrar.

Rule 104.]

No. 39.

COMMISSION TO EXAMINE WITNESSES.

(L.S.) [*Title of Court and action.*]

VICTORIA, &c.

To [*state name and address of commissioner*]. Greeting:

Whereas the Judge of our Exchequer Court of Canada, [*or the Local Judge in Admiralty of the Exchequer Court for the Admiralty District of*] has decreed that a commission shall be issued for the examination of witnesses in the above-named action. We, therefore, hereby authorize you, upon the day of , 18 , at , in the presence of parties, their counsel, and solicitors, or, in the absence of any of them, to swear the witnesses who shall be produced before you for examination in the said action, and cause them to be examined, and their evidence to be reduced into writing. We further authorize you to adjourn, if necessary, the said examination from time to time, and from place to place, as you may find expedient. And we command you, upon the examination being completed, to transmit the evidence duly certified, together with this commission to the registry of our said Court at .

Given at , in our said Court, under the seal thereof, this day of , 18 .

(Signed) E. F.,
Registrar, *or* District Registrar.

Commission to examine witnesses.
Taken out by

Rule 107.]

No. 40.

RETURN TO COMMISSION TO EXAMINE WITNESSES.

[*Title of Court and action.*]

I, A. B., the commissioner named in the commission hereto annexed, bearing date the day of , 18 , hereby certify as follows:—

(1) On the day of , 18 , I opened the said commission at , and in the presence of

[*state who were present, whether both parties, their counsel, or solicitors, or as the case may be,*] administered an oath to and caused to be examined the under-named witnesses who were produced before me on behalf of the [*state whether plaintiff or defendant*] to give evidence in the above-named action, viz.:—

[*Here state name of witnesses.*]

(2) On the day of , 18 , I proceeded with the examination at the same place [*or, at some other place, as the case may be,*] and in the presence of [*state who were present, as above*], administered an oath to and caused to be examined the under-named witnesses who were produced before me on behalf of [*state whether plaintiff or defendant*] to give evidence in the said action, viz.:—

[*State names of witnesses.*]

(3) Annexed hereto is the evidence of all the said witnesses certified by me to be correct.

Dated the day of , 18 .

(Signed) G. H.,
Commissioner.

No. 41. [Rule 109.

SHORTHAND WRITER'S OATH.

You swear that you will faithfully report the evidence of the witnesses to be produced in this action.

So help you God.

No. 42. [Rule 114.

NOTICE OF TRIAL.

[*Title of Court and action.*]

Take notice that I set down this action for trial.

Dated the day of , 18 .

(Signed) A. B., plaintiff,
[*or* C. D., defendant].

Rule 127.]

No. 43.

Registrar's Report.

(L.S.) [*Title of Court and action.*]

To the Honourable the Judge of the Exchequer Court of Canada [*or* to the Honourable the Local Judge in Admiralty of the Exchequer Court for the Admiralty district of].

Whereas by your decree of the , 18 , you were pleased to pronounce in favour of the plaintiff [*or* defendant] and to condemn the defendant [*or* plaintiff] and the ship [*or as the case may be*] in the amount to be found due to the plaintiff [*or* defendant] [and in costs], and you were further pleased to order that an account should be taken, and to refer the same to the registrar [assisted by merchants] to report the amount due.

Now, I do report that I have, with the assistance of [*here state names and description of assessors, if any*], carefully examined the accounts and vouchers and the proofs brought in by the plaintiff [*or* defendant] in support of his claim [*or* counterclaim], and having on the day of , heard the evidence of [*state names*] who were examined as witnesses on behalf of the plaintiff and of [*state names*] who were examined as witnesses on behalf of the defendant, [and having heard the solicitors (*or* counsel) on both sides, *as the case may be*], I find that there is due to the plaintiff [*or* defendant] the sum of , [*state sum in letters and figures*], together with interest thereon, as stated in the schedule hereto annexed. I am also of opinion that the plaintiff [*or* defendant] is entitled to the costs of this reference [*or as the case may be*].

Dated , 18 .

(Signed) E. F.,
Registrar *or* District Registrar.

SCHEDULE ANNEXED TO THE FOREGOING REPORT.

No.		Claimed. $	Claimed. Cts.	Allowed. $	Allowed. Cts.
1	*[Here state as briefly as possible the several items of the claim with the amount claimed and allowed on each item in the columns for figures opposite the item.]*				
2					
3					
4					
5					
&c					

With interest thereon from the day of , 18 , at the rate of per cent. per annum until paid.

(Signed) E. F.,
Registrar *or* District Registrar.

No. 44. [Rule 49.

COMMISSION OF APPRAISEMENT.

(L.S.) [*Title of Court and action.*]

VICTORIA, ETC.

To the marshal of our Admiralty district of [*or* the sheriff of the county of , *or as the case may be*], greeting:

Whereas the Judge of our said Court [*or* the local Judge in Admiralty of our said Court for the Admiralty district of] has ordered [*state whether ship or cargo and state name of ship and, if part only of cargo, state what part*] shall be appraised.

We, therefore, hereby command you to reduce into writing an inventory of the said ship (*or cargo, etc., as the case may be*), and having chosen one or more experienced person or persons, to swear him or them to appraise the same according to the true value thereof, and upon a certificate of such value having been reduced into writing, and signed by yourself and by the appraiser or appraisers, to file the same in the registry of our said Court, together with this commission.

Given at , in our said Court, under the seal thereof, this day of , 18 .

(Signed) E. F.,
Registrar *or* District Registrar.

Commission of appraisement.
Taken out by .

Rule 149.] No. 45.

COMMISSION OF SALE.

(L.S.) [*Title of Court and action.*]

VICTORIA, ETC.

To the marshal of our Admiralty district of (*or* the sheriff, *etc., as in Form No. 44*), greeting:

Whereas the Judge of our said Court (*or* the local Judge, etc., *as in Form No. 44*) has ordered that (*state whether ship or cargo and state name of ship, and if part only of cargo, what part*) shall be sold. We, therefore, hereby command you to reduce into writing an inventory of the said (ship *or* cargo, etc., *as the case may be*), and to cause the said (ship *or* cargo, etc.), to be sold by public auction for the highest price that can be obtained for the same.

And we further command you, as soon as the sale has been completed, to pay the proceeds arising therefrom into our said

Court, and to file an account sale signed by you, together with this commission.

Given at , in our said Court, under the seal thereof, this day of , 18 .

(Signed) E. F.,
Registrar *or* District Registrar.

Commission of sale.
Taken out by .

No. 46. [Rule 149.

COMMISSION OF APPRAISEMENT AND SALE.

(L.S.) [*Title of Court and action.*]

VICTORIA, ETC.

To the marshal of our Admiralty district of (*or* the sheriff, *etc., as in Form No. 44*), greeting:

Whereas the Judge of our said Court (*or* the local Judge, *etc., as in Form No. 44*) has ordered that (*state whether ship or cargo, and state name of ship, and if part only of cargo, what part*) shall be sold. We, therefore, hereby command you to reduce into writing an inventory of the said (ship *or* cargo, *etc., as the case may be*), and having chosen one or more experienced person or persons to swear him or them to appraise the same according to the true value thereof, and when a certificate of such value has been reduced into writing and signed by yourself and by the appraiser or appraisers, to cause the said [ship *or* cargo, etc., *as the case may be*] to be sold by public auction for the highest price, not under the appraised value thereof, that can be obtained for the same.

And we further command you, as soon as the sale has been completed, to pay the proceeds arising therefrom into our said Court, and to file the said certificate of appraisement and an account sale signed by you, together with this commission.

Given at , in our said Court, under the seal thereof, this day of , 18 .

(Signed) E. F.,
Registrar *or* District Registrar.

Commission of appraisement and sale.
Taken out by .

Rule 149.]

No. 47.

Commission of Removal.

(L.S.) [*Title of action.*]

Victoria, &c.

To the marshal of our Admiralty district of
[*or* the sheriff, &c., as in form No. 44.] Greeting:

Whereas the Judge of our said Court [*or* the local Judge, &c., as in Form No. 44] has ordered the [*state name and description of ship*] shall be removed from to on a policy of insurance in the sum of $, being deposited in the registry of our said Court; and whereas a policy of insurance for the said sum has been so deposited. We, therefore, hereby command you to cause the said ship to be removed accordingly. And we further command you, as soon as the removal has been completed, to file a certificate thereof, signed by you in the said registry, together with this commission.

Given at , in our said Court, under the seal thereof, this day of 18 .

(Signed) E. F.,
Registrar *or* District Registrar.

Commission of removal.
Taken out by .

Rule 149.]

No. 48.

Commission for Discharge of Cargo.

(L.S.) [*Title of Court and action.*]

Victoria, &c.

To the marshal of our Admiralty district of
[*or* the sheriff, &c., as in Form No. 44]. Greeting:

Whereas the Judge of our said Court [*or* the local Judge, &c., *as in Form No. 44*] has ordered that the cargo of the ship shall be discharged. We therefore, hereby command you to discharge the said cargo from on board the said

ship, and to put the same into some fit and proper place of deposit. And we further command you, as soon as the discharge of the said cargo has been completed, to file your certificate thereof in the registry of our said Court, together with this commission.

Given at in our said Court, under the seal thereof, this day of 18 .

(Signed) E. F.,
Registrar *or* District Registrar.

Commission for discharge of cargo.
Taken out by .

No. 49. [Rule 149.

COMMISSION FOR DEMOLITION AND SALE.

(In a Slave Trade case.)

(L.S.) [*Title of Court and action.*]

VICTORIA, &c.

To the marshal of our Admiralty district of [*or* the sheriff, &c., as in Form No. 44]. Greeting:

We hereby command you, in pursuance of a decree of the Judge of our said Court (*or* the local Judge, etc., *as in Form No. 44*) to that effect, to cause the tonnage of the vessel to be ascertained by Rule No. 1 of the 21st section of *The Merchant Shipping Act*, 1854, (*or by such rule as shall, for the time being be in force for the admeasurement of British vessels*), and further to cause the said vessel to be broken up, and the materials thereof to be publicly sold in separate parts (together with her cargo *if any*) for the highest price that can be obtained for the same.

And we further command you, as soon as the sale has been completed, to pay the proceeds arising therefrom into our said

Court, and to file an account sale signed by you, and a certificate signed by you of the admeasurement and tonnage of the vessel, together with this commission.

Given at , in the said Court, under the seal thereof, this day of 18 .

(Signed) E. F.,
Registrar *or* District Registrar.

Commission for demolition and sale.
Taken out by .

Rule 154.]

No. 50.

ORDER FOR INSPECTION.

[*Title of Court and action.*]

On the day of 18 .

Before Judge, etc.

The Judge, on the application of (*state whether plaintiff or defendant*) ordered that the ship should be inspected by (*state whether by the marshal or by the assessors of the Court or as the case may be*), and that a report in writing of the inspection should be lodged by him (*or* them) in the registry.

(Signed) E. F.,
Registrar *or* District Registrar.

Rule 155.]

No. 51.

NOTICE OF DISCONTINUANCE.

[*Title of Court and action.*]

Take notice that this action is discontinued.

Dated the day of , 18 .

(Signed) A. B., plaintiff.

No. 52. [Rule 155.

NOTICE TO ENTER JUDGMENT FOR COSTS.

[*Title of Court and action.*]

Take notice that I apply to have judgment entered for my costs in this action.

Dated the day of , 18 .

(Signed) C. D., defendant.

No. 53. [Rule 159.

NOTICE OF MOTION ON APPEAL.

In the Exchequer Court of Canada.

In Admiralty.

Between A. B., plaintiff;
and
C. D., defendant.

Take notice that this Honourable Court will be moved on the the day of , 18 , or so soon thereafter as counsel can be heard, on behalf of the above named plaintiff A. B. (*or defendant C. D.*), that the judgment (*or order*) of the Local Judge in Admiralty for the Admiralty District of made herein and dated the day of , 18 , (*or if only part of the judgment or order is appealed from say*) that so much of the judgment (*or* order) of the Local Judge in Admiralty for the Admiralty District of made herein and dated the day of , 18 , as adjudges (*or directs or orders as the case may be*) that (*here set out the part or parts of the judgment or order which are appealed from*) may be reversed (*or rescinded*) and that—(*here set out*

the relief or remedy, if any, sought) and that the costs of this appeal, and before the local Judge in Admiralty, may be paid by the to the

Dated, etc.

Yours, etc.,
X. Y.,
Solicitor, etc., *or*, Agent, etc.

(To the above named defendant), (or plaintiff) and to , his solicitor or agent.

Rule 177.]

No. 54.

RECEIVABLE ORDER.

Registry of the Exchequer Court of Canada (*or*, for the Admiralty District of)

No.

18 .

[*Title of Court and action.*]

Sir,—

I have to request that you will receive from (*state name of person paying in the money*) the sum of dollars on account in the above named action, and place the same to the credit of the account of the Registrar of the Exchequer Court of Canada (*or*, for the Admiralty District of).

(Signed) E. F.,
Registrar, *or* District Registrar.

To the Manager of (*state name or style of bank to which the payment is to be made*), *or*

To the Deputy of the Minister of Finance and Receiver-General of Canada.

No. 55. [Rule 179.

ORDER FOR PAYMENT OUT OF COURT.

[*Title of Court and action.*]

I, , Judge of the Exchequer Court of Canada (*or, as the case may be*), hereby order payment of the sum of (*state sum in letters ond figures*), being the amount (*state whether found due for damages or costs, or tendered in the action or, as the case may be*) to be made to (*state name and address of party or solicitor to whom the money is to be paid*) out of the (proceeds of sale of ship, &c., *or as the case may be*) now remaining in Court.

Dated the day of 18 .

Witness, (Signed) J. K.,
E. F., Judge,

Registrar, (*or as the case may be*).
or District Registrar.

No. 56. [Rule 180.

NOTICE FOR CAVEAT WARRANT.

[*Title of Court, or title of Court and action.*]

Take notice that I, A. B., of , apply for a caveat against the issue of any warrant for the arrest of [*state name and nature of property*], and I undertake, within three days after being required to do so, to give bail to any action or counterclaim that may have been or may be brought against the same in this Court in a sum not exceeding [*state sum in letters*] dollars, or to pay such sum into Court.

My address for service is

Dated the day of , 18 .
(Signed) A. B.

Rule 180.]

No. 57.

CAVEAT WARRANT.

[*Title of Court, or title of Court and action.*]

[*State Name of Ship, &c.*]

Caveat entered day of 18 . against the issue of any warrant for the arrest of [*state name and nature of property*] without notice being first given to [*state name and address of person to whom, and address at which, notice is to be given*], who has undertaken to give bail to any action or counterclaim that may have been or may be brought in the said Court against the said [*state name and nature of property*].

On withdrawal of caveat add:—

Caveat withdrawn the day of 18 .

Rule 181.]

No. 58.

NOTICE FOR CAVEAT RELEASE.

[*Title of Court and action.*]

Take notice that I. A.B., plaintiff [*or* defendant] in the above-named action, apply for a caveat against the release of [*State name and nature of property*].

[*If the person applying for the caveat is not a party to the action, he must also state his address and an address for service within three miles of the registry*].

Dated the day of 18 .

(Signed) A.B.

No. 59. [Rule 181.

CAVEAT RELEASE.

[*Title of Court and action.*]

Caveat entered this day of 18 , against the issue of any release of [*state name and nature of property*] by [*state name and address of person entering caveat, and his address for service*].

On withdrawal of caveat, add:—

Caveat withdrawn this day of 18 .

No. 60. [Rule 182.

NOTICE FOR CAVEAT PAYMENT.

[*Title of Court and action.*]

Take notice that I, A.B., plaintiff [*or* defendant] in the above named action, apply for a caveat against the payment of any money [*if for costs, add* for costs, *or as the case may be*] out of the proceeds of the sale of [*state whether ship or cargo, and name of ship, &c.*] now remaining in Court, without notice being first given to me.

[*If the person applying for the caveat is not a party to the action, he must also state his address, and an address for service within three miles of the registry.*]

Dated the day of 18 .

(Signed) A.B.

No. 61. [Rule 182.

CAVEAT PAYMENT.

[*Title of Court and action.*]

Caveat entered this day of 18 , against the payment of any money [*if for costs, add* for costs, *or as the case may be*] out of the proceeds of the sale of [*state*

, &c.} now
en to [*state*
.*ress at which,*

Rule 180.]

No. 57.

CAVEAT WARRA.

[*Title of Court, or title*

[*State No*

.y of 18 .

Caveat entered
against the issue
name and nature
to [*state name*
which, notic
to any ac
brough
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No. 62.

NOTICE FOR WITHDRAWAL OF CAVEAT.

[*Title of Court and action.*]

Take notice that I withdraw the caveat [*state whether caveat warrant, release, or payment*] entered by me in this action [*or as the case may be*].

Dated the day of 18 .

(Signed) A.B.

Rule 189.]

No. 63.

SUBPŒNA.

(L.S.) [*Title of Court and action.*]

VICTORIA, &c.

To Greeting:

We command you that, all other things set aside, you appear in person before the Judge [*or* the registrar, *or* G.H., a commissioner appointed by an order of our said Court] at on the day of 18 , at o'clock in the noon of

the same day, and so from day to day as may be required, and give evidence in the above named action.

And herein fail not at your peril.

Given at , in our said Court, under the seal of, this day of , 18 .

poena.

ken out by .

No. 64. [Rule 189.

SUBPŒNA DUCES TECUM.

The same as the preceding form, adding before the words "And herein fail not at your peril," *the words* "and that you bring with you for production before the said Judge (*or* registrar *or* commissioner, *as the case may be*) the following documents, viz.:

(*Here state the documents required to be produced.*)

No. 65. [Rule 192.

ORDER FOR PAYMENT.

(L.S.) [*Title of Court and action.*]

On the day of , 18 .
Before ,
Judge, etc., (*or* Local Judge of the Admiralty district of).

It is ordered that A. B. (plaintiff *or* defendant, &c.), do pay to C. D. (defendant *or* plaintiff, &c.), within *days* from the date hereof the sum of $, (*state sum in letters and figures*) being the amount (*or* balance of the amount) found due from the said A. B. to C. D. for (*state whether for damages, salvage, or costs, or as the case may be*) in the above-named action.

(Signed) E. F.,
Registrar *or* District Registrar.

Rule 193.]

No. 66.

ATTACHMENT.

(L.S.) [*Title of Court and action.*]

VICTORIA, etc.

To the marshal of our Admiralty district of , (*or* the sheriff, etc., as in Form No. 44) greeting:

Whereas the Judge of our said Court (*or* the Local Judge in Admiralty, etc., as in Form No. 44) has ordered (*state name and description of person to be attached*) to be attached for (*state briefly the ground of attachment*).

We, therefore, hereby command you to attach the said , and to bring him before our said Judge.

Given at , in our said Court, under the seal thereof, this day of , 18 .

(Signed) E. F.,
Registrar *or* District Registrar.

Attachment.
Taken out by .

Rule 194.]

No. 67.

ORDER FOR COMMITTAL.

(L.S.) [*Title of Court and action.*]

On the day of , 18 .
Before ,
Judge, etc.
(*or* Local Judge in Admiralty for the Admiralty District of).

Whereas A. B. (*state name and description of person to be committed*) has committed a contempt of Court in that (*state in what contempt consists*) and, having been this day brought

before the Judge on attachment, persists in his said contempt, it is now ordered, that he be committed to prison for the term of from the date hereof, or until he shall clear himself from his said contempt.

(Signed) E. F.,
Registrar *or* District Registrar.

No. 68. [Rule 194.

COMMITTAL.

[*Title of Court.*]

To ,

Receive into your custody the body (*or* bodies of herewith sent to you, for the cause hereinunder written; that is to say,

For (*state briefly the ground of attachment*).

Dated the day of , 18 .

(Signed) J. K.,
Judge, etc.
(*or* Local Judge in Admiralty for the Admiralty district of .

Witness,
E. F.,
Registrar
or District Registrar.

No. 69. [Rule 202.

MINUTE ON FILING ANY DOCUMENT.

[*Title of Court and action.*]

I, A. B., (*state whether plaintiff or defendant*), file the following documents, viz.:

(*Here describe the documents filed*).

Dated the day of , 18 ,

(Signed) A. B.

Rule 213.]

No. 70.

Minute of Order of Court.

(*Title of Court and action.*)

On the day of , 18 .

Before ,
Judge, etc.
(*or* Local Judge in Admiralty for the Admiralty district of).

The Judge, on the application of *state whether plaintiff or defendant*) ordered (*state purport of order*).

Rule 213.]

No. 71.

Minute on Examination of Witnesses.

(*Title of Court and action.*)

On the day of , 18 .
Before ,
Judge, etc.
(*or* Local Judge, etc., *as the case may be*).

A. B. (*state whether plaintiff or defendant*) produced as witnesses,

(*Here state names of witnesses in full.*)

who, having been sworn (*or as the case may be*), were examined orally (*if by interpretation, add* by interpretation of).

No. 72. [Rule 218.

MINUTE OF DECREE.

(*Title of Court and action.*)

On the day of , 18 .

Before ,
Judge, etc.
(*or* Local Judge, etc., *as the case may be*).

(1) *Decree for an unascertained sum:*

The Judge having heard (*state whether plaintiff and defendant, or their counsel or solicitors, or as the case may be*), and having been assisted by (*state names and descriptions of assessors, if any*), pronounced the sum of (*state sum in letters and figures*) to be due to the plaintiff (*or* defendant), in respect of his claim (*or* counter-claim), together with costs (*if the decree is for costs*). And he condemned—

(*a*) *in an action in rem where bail has not been given;* the ship (*or* cargo *ex* the ship , or proceeds of the ship , *or* of the cargo *ex* the ship *or as the case may be*) in the said sum (and in costs).

(*b*) *in an action in personam, or in rem where bail has been given;*
the defendant (*or* plaintiff) and his bail (*if bail has been given*) in the sum of (*and in costs*).

---

(2) *Decree for a sum not ascertained:*

The Judge having heard, etc., (*as above*) pronounced in favour of the plaintiff's claim (*or* defendant's counter-claim) and condemned the ship (or cargo, etc., *or* the defendant *or* plaintiff) and his bail (*if bail has been given*) in the amount to be found due to the plaintiff (*or* defendant) (and in costs). And he ordered that an account should be taken, and

(*a*) *If the amount is to be assessed by the Judge,* that all accounts and vouchers, with the proofs in support thereof, should be filed within days (*or as the case may be*).

(*b*) *If the Judge refers the assessment to the registrar,* referred the same to the registrar (assisted by merchants), to report the amount due, and ordered that all accounts, &c., (*as above*).

---

(3) *Decree on dismissal of action:*

The Judge having heard, etc., (*as above*) dismissed the action (*if with costs, add*) and condemned the plaintiff and his bail (*if bail has been given*) in costs.

---

(4) *Decree of condemnation of a derelict subject to salvage:*

The Judge, having heard, etc., (*as above*) pronounced the sum of (*state sum in letters and figures*) to be due to A. B., etc., for salvage, together with costs, and subject thereto condemned the said ship , (*or* cargo *or* proceeds of ship *or* of cargo, etc., *as the case may be*) as a droit and perquisite of Her Majesty in Her office of Admiralty.

---

(5) *Decree in action for possession:*

The Judge having heard, &c., decreed that possession of the ship should be given to the plaintiff, and condemned the defendant (and his bail) in costs.

---

(6) *Decree of condemnation in a slave trade action:*

The Judge having heard, etc. (*as above*), pronounced that the vessel, name unknown (*or as the case may be*), seized by H.M.S. *Torch* on the day of , 18 , had

been at the time of her seizure engaged in or fitted out for the slave trade in contravention of the treaties existing between Great Britain and , *or* in violation of the Acts 6 Geo. IV., cap. 113, and 36 & 37 Vict., cap. 88, *or as the case may be*), and he condemned the said vessel (together with the slaves, goods, and effects on board thereof) as forfeited to Her Majesty (*or* condemned the said vessel and slaves as forfeited, &c., but ordered that the cargo should be restored to the claimant, *or, as the case may be*).

The Judge further ordered that the said slaves (*or* the slaves then surviving), consisting of , men, women, and boys and girls, should be delivered over to (*state to whom, or how the slaves are to be disposed of*).

If the vessel has been brought into port, add:—

The Judge further ordered that the tonnage of the vessel should be ascertained by the rule in force for the admeasurement of British vessels, and that the vessel should be broken up, and that the materials thereof should be publicly sold in separate parts, together with her cargo (*if any*);

or

If the vessel has been abandoned or destroyed by the seizors prior to adjudication, and the Court is satisfied that the abanment or destruction was justifiable, add:—

The Judge further declared that, after full consideration by the Court of the circumstances of the case, the seizors had satisfied the Court that the abandonment (*or* destruction) of the vessel was inevitable or otherwise under the circumstances proper and justifiable.

---

(7) *Decree of restitution in a slave trade action:*

The Judge having heard, &c., pronounced that it had not been proved that the vessel was engaged in or fitted out for the slave trade, and ordered that the said vessel should be restored to the claimant, together with the goods and effects on board thereof:

add, as the case may be,

but without costs or damages,

or

on payment by the said claimant of the costs incurred by the seizors in this action;

or

and awarded to the said claimant costs and damages in respect of the detention of the said vessel, and (referred the same to the registrar (assisted by merchants) to report the amount thereof, and) directed that all accounts and vouchers with the proofs in support thereof, if any, should be filed within *days.*

---

(8) *Decree in case of capture from pirates:*

The Judge having heard, &c., pronounced that the said junk *Tecumseh* (and her cargo) had been at the time of the capture thereof by H.M.S. *Torch,* the property of pirates, and condemned the same as a droit and perquisite of Her Majesty in Her office of Admiralty;

or

pronounced that the said junk *Tecumseh* (and her cargo) had prior to her re-capture by H.M.S. *Torch,* etc., been captured by pirates from the claimant (*state name and description of former owner*), and he decreed that the same should be restored to the said claimant as the lawful owner thereof, on payment to the re-captors of *one-eighth* part of the true value thereof in lieu of salvage. The Judge also directed that the said junk (and her cargo) should be appraised;

If the junk, etc., has been captured after an engagement with the pirates, and if there is a claim for bounty, add:—

The Judge further declared that the persons attacked or engaged by H.M.S. *Torch,* etc., on the occasion of the capture of the said junk were pirates, that the total number of pirates so attacked or engaged was about that of that number were captured, and that the only vessel engaged was H.M.S. *Torch* (*or, as the case may be*).

(9) *Decree of condemnation under Pacific Islanders Protection Acts:*

The Judge, having heard, etc., pronounced that the ship had been at the time of her seizure (*or* during the voyage on which she was met) employed (*or* fitted out for employment) in violation of the Pacific Islanders Protection Acts, 1872 and 1875, and he condemned the said ship (and her cargo, and all goods and effects found on board, *or, as the case may be*), as forfeited to Her Majesty.

The Judge further ordered that the said ship (and her cargo, and the said goods and effects) should be sold by public auction, and that the proceeds should be paid into Court.

---

(10) *Decree of condemnation under Foreign Enlistment Act:*

The Judge, having heard, etc., pronounced that the ship had been (built, equipped, commissioned, despatched, or used, *as the case may be*) in violation of the Foreign Enlistment Act, 1870, and he condemned the said ship and her equipment (and the arms and munitions of war on board thereof, *or as the case may be*) as forfeited to Her Majesty.

---

(11) *Decree of condemnation under Customs of Revenue Acts:*

The Judge, having heard, etc., condemned the ship (*or* cargo *or* proceeds, etc., *as the case may be*) as forfeited to Her Majesty for violation of the Act (*state what Act*).

---

(12) *Decree for pecuniary forfeiture or penalty under Customs Act or other Act:*

The Judge having heard, etc., pronounced the said goods to have been landed (*or other illegal act to have been done*) in violation of the Act (*state what Act*) and condemned the defendant C. D. (the owner of the said goods, *or as the case may be*) in the penalty of imposed by the said Act (and in costs).

Rule 213.]

No. 73.

Minutes in an Action for Damage by Collision.

A. B., &c.,

No. . against

The Ship "*Mary.*"

18 .

Jan. 3 A writ of summons (and a warrant) was (*or* were) issued to X. Y. on behalf of A. B., etc., the owners of the ship "*Jane*" against the ship "*Mary*" (and freight, *or as the case may be*) in an action for damage by collision. Amount claimed $1,000.

" 5 X.Z. filed notice of appearance on behalf of C.D., &c., the owners of the ship "*Mary.*"

" 6 X.Y. filed writ of summons.

" 6 The Marshal filed warrant.

" 7 Y.Z. filed bailbond to answer judgment as against the defendants (*or as the case may be*) in the sum of $1,000, with affidavit of service of notice of bail.

" 7 A release of the ship "*Mary*" was issued to Y.Z.

" 8 X.Y. filed Preliminary Act (and notice of motion for pleadings).

" 8 Y.Z. filed Preliminary Act.

" 10 The Judge having heard solicitors on both sides (*or as the case may be*), ordered pleadings to be filed.

" 11 X.Y. filed statement of claim.

" 14 Y.Z. filed defence (and counter-claim).

" 15 X.Y. filed reply.

" 16 The Judge having heard solicitors on both sides (*or as the case may be*) ordered both plaintiffs and defendants to file affidavits of discovery, and to produce, if required, for mutual inspection, the documents therein set forth within *three days.*

" 18 X.Y. filed affidavit of discovery.

" 19 Y.Z. filed affidavits of discovery.

" 22 X.Y. filed notice of trial.

Jan. 26. X.Y. produced as witnesses (*state names of witnesses*), who, having been sworn, were examined orally in Court, the said (*state names*) having been sworn and examined by interpretation of (*state name and interpreter*) interpreter of the language. Present (*state names of assessors present, if any*) assessors.

Y. Z. produced as witnesses, etc. (*as above*).

The Judge having heard (*state whether plaintiffs and defendants, or their counsel or solicitors, as the case may be*), and having been assisted by (*state name and descriptions of assessors if any*), pronounced in favour of the plaintiffs (*or* defendants) and condemned the defendants (*or* plaintiffs) and their bail (*if bail has been given*) in the amount to be found due the plaintiffs (*or* defendant) (and in costs). And he ordered that an account should be taken, and referred the same to the registrar (assisted by merchants) to report the amount due, and ordered that all accounts and vouchers, with the proofs in support thereof, should be filed within days (*or as the case may be*).

Feb. 5 X.Y. filed claim, with accounts and vouchers in support thereof (numbered 1 to), and affidavits of (*state names of deponents, if any*).

" 8 Y.Z. filed accounts and vouchers (numbered 1 to) in answer to claim.

" 9 X.Y. filed notice for hearing of reference.

" 15 X.Y. (*or* Y.Z.) filed registrar's report, etc.

Here insert address for service of documents required to be served on the defendants.

Here insert address for service of documents required to be served on the plaintiffs.

NOTE.—The above minutes are given as such as might ordinarily be required in an action *in rem* for damage by collision, where pleadings have been ordered. In some actions many of these minutes would be superfluous. In others additional minutes would be required.

II. TABLES OF FEES TO BE TAKEN BY THE REGISTRARS, MARSHALS AND PRACTITIONERS, &c., IN ADMIRALTY PROCEEDINGS IN THE EXCHEQUER COURT OF CANADA.

I.—BY THE REGISTRAR.

I. *For sealing or preparing Instruments, &c.*

	$ cts.
For sealing any writ of summons or other document required to be sealed	50
For preparing any warrant, release, commission, attachment, or other instrument, required to be sealed, or for attending the execution of any bailbond..	2 00
For preparing a receivable order or a receipt for money to be paid out of Court	1 00
For preparing and sending any notice, or issuing any apportionment	50
For preparing any other document for every folio....	30

NOTE.—The fees for preparing shall include drawing and fair-copying or engrossing.

2. *For Filing.*

On filing any instrument or other document	$ 20

3. *For Evidence, &c.*

For attending at examination of any witness, per hour.	1 00
For administering any oath or declaration..........	20
For taking down and certifying the evidence of any witness examined before him, when the same is not taken down by a shorthand writer, for every folio	20

4. *For the Trial, &c.*

On setting down action for trial	$ 1 00
For attendance at the trial of an action, to be paid by the party whose case is proceeding, per hour....	1 00
Swearing each witness	20

On a final decree in an uncontested action	$2 00
On a final decree in a contested action	4 00
For attendance before the Judge when any order is made or act done, other than pronouncing a final decree	1 00

NOTE.—The above fees shall include the entry of the decree or order in the minute book.

Fees.

5. *For References.*

For hearing any reference, according to the case, per day	From $5 00 To 15 00
For preparing the report of a reference..............	5 00

6. *For Taxations.*

For taxing a bill of costs:—	
If the bill does not exceed *ten* folios	2 00
For every folio beyond *ten*	20

7. *For Office Copies, Searches, &c.*

For a copy of any document, for every folio (in addition to the fee for sealing)	10
For search	20
For a general search	50

NOTE.—No search-fee is to be charged to a party to the action, while the action is pending, or for one year after its termination, or to any seaman.

II.—BY THE ASSESSORS.

For each nautical or other assessor, whether at the examination of witnesses or at the trial of an action, or upon any assessment of damages, or taking of an account, according to the case, in the discretion of the Judge, per day	From $5 00 To 25 00

NOTE.—The above fees shall be paid to the registrar, for the assessors, and *in the first instance* by the party preferring the claim.

III.—By a Commissioner to Examine Witnesses.

For administering any oath or declaration .... $ 20

For taking down and certifying the evidence of any witness examined before him, when the same is not taken down by a shorthand writer, for every folio 20

IV.—By a Commissioner to Take Bail.

For attending the execution of any bailbond 2 00

For taking any affidavit of justification 50

V.—By the Marshal or Sheriff.

For the service of a writ of summons or subpœna, if served by the marshal or a sheriff 1 00

For executing any warrant or attachment 4 00

For keeping possession of any ship, goods, or ship and goods (exclusive of any payments necessary for the safe custody thereof), for each day 50

Note.—No fee shall be allowed to the marshal for the custody and possession of property under arrest, if it consists of money in a bank, or of goods stored in a bonded warehouse, or if it is in the custody of a custom-house officer or other authorized person.

On release of any ship, goods, or person from arrest... 2 00

For attending the unlivery of cargo, for each day.... 8 00

For executing any commission of appraisement, sale, or appraisement and sale, exclusive of the fees, if any, paid to the appraiser and auctioneer 4 00

For executing any other commission or instrument... 4 00

On the gross proceeds of any ship, or goods, etc., sold by order of the Court: —

If not exceeding $400 .... 4 00

For every additional $400, or part thereof 2 00

Note.—If the marshal, being duly qualified, acts as auctioneer, he shall be allowed a double fee on the gross proceeds.

For attendance at trial of an action to be paid by the party whose case is proceeding, per hour......... $1 00
Calling each witness 20

NOTE.—If the marshal or his officer is required to go any distance in execution of his duties, a reasonable sum may be allowed for travelling, boat-hire, or other necessary expenses in addition to the preceding fees, but not to exceed 10 cents per mile travelled.

Provided always that in the Yukon Territory the marshal shall be entitled to take the same fees as those from time to time authorised to be taken for similar services by the sheriff in civil cases in the Yukon Territorial Court, subject in any case of doubt to the discretion of the Local Judge in Admiralty for the Yukon Territory Admiralty District. (General order of the 27th day of January, 1902).

VI.—FEES TO BE TAKEN BY APPRAISERS.

Each, per appraisement .... From $2 50 To 10 00

(This fee may be increased to a sum not exceeding $30.00 in the discretion of the Judge).

VII.—BY THE SOLICITOR.

Retaining fee 2 00
For preparing a writ of summons (to include attendances in the registry for sealing the same)...... 2 50
For bespeaking and extracting any warrant or other instrument prepared in the registry (to include attendances) 1 00
For serving a writ of summons or a subpœna 1 00
For taking instructions for a statement of claim or defence 4 00
For drawing a statement of claim or defence 4 00
For taking instructions for any further pleading...... 1 00
For drawing any further pleading 2 00
For drawing any other document, for every folio.... 20
For fair-copying or engrossing any document, for every folio 10

Item		Fee
For taking instructions for any affidavit (unless made by the solicitor or his clerk) or for interrogatories or answers, according to the nature or importance thereof	From	$1 00
	To	4 00
For taking instructions for brief	From	1 00
	To	4 00
For attending counsel in conference of consultation..		2 00
For attending to fee counsel		2 00
For attendance on any motion before the Judge:—		
If with counsel		2 00
If without counsel		4 00
For attending the examination of witnesses before the trial, for each day:—		
If with counsel........		4 00
If without counsel		8 00
For attendance at the trial, for each day......	From	4 00
	To	12 00
For attendance at the delivery of judgment, if reserved		2 00
For attendance at a hearing of a reference to the registrar, for each day:—		
If with counsel	From	4 00
	To	8 00
If without counsel	From	4 00
	To	20 00
For any other necessary attendance for the Judge, or in the registry, or on the marshal, or on the adverse party or solicitor, in the course of the action....		1 00

NOTE.—Where more than one document can conveniently be filed, or one document can be filed, and another bespoken, at the same time, the fee for one attendance only shall be allowed.

Item	Fee
For any necessary letter to the adverse party	$ 50
For serving any notice.............	20
For extracting and collating any office copy obtained from the registry office, for every folio	10
For correcting the press, for every folio	5
For attending the taxation of any bill of costs, not exceeding *ten* folios	2 00
For every folio beyond *ten*.......................	10

VIII.—BY COUNSEL.

Retaining fee		$ 5 00
For settling any pleading, interrogatories, or answers, &c.	From To	5 00 20 00
For any necessary consultation in the course of the action	From To	5 00 10 00
For any motion	From To	5 00 15 00
For the examination of witnesses before the trial; for each day	From To	10 00 20 00
For the trial of an uncontested action		10 00
For the trial of a contested action, for the first day	From To	15 00 50 00
For each day after the first	From To	10 00 25 00
For attending judgment if reserved	From To	5 00 10 00
For the hearing of a reference to the registrar, for each day	From To	10 00 25 00

NOTE.—Where the same practitioner acts as both counsel and solicitor, he may, for any proceeding in which a counsel's fee might be allowed, charge such fee in lieu of a solicitor's fee.

IX.—BY SHORTHAND WRITERS.

For taking down and transcribing the evidence, certifying the transcript and transmitting the same to the registrar and supplying three copies thereof to the registrar, per folio	20
If for any reason the evidence is not required to be transcribed, for each hour occupied by the examination	1 50

Such fees shall in the first instance be paid to the registrar for the shorthand writer by the party calling the witness.

If any such fee is not paid by the party liable therefor it may be paid by any other party to the proceeding and allowed as a necessary disbursement in the cause, or the Judge may make such order in respect of such evidence and the disposal of the action or proceeding as to him seems just.

NOTE.—If evidence is taken down by a shorthand writer no fee for taking down and certifying to such evidence shall be allowed to the registrar or commissioner.

X.—BY WITNESSES.

To witness residing not more than three miles from the place to which summoned, per day	$1 00
To witnesses residing over three miles from such place	1 25
Barristers and attorneys and solicitors, phyicians and surgeons, when called upon to give evidence in consequence of any professional service rendered by them, or to give opinions..................	5 00
Engineers and surveyors, when called upon to give evidence of any professional service rendered by them, or to give evidence depending upon their skill or judgment, per day	5 00

If the witnesses attend in one cause only, they will be entitled to the full allowance.

If they attend in more than one cause they will be entitled to a proportionate part in each cause only.

The travelling expenses of witnesses over ten miles, shall be allowed according to the sums reasonably and actually paid, but in no case shall exceed ten cents per mile travelled.

APPENDIX II.

Bail.

In the Supreme Court of Canada on appeal to His Majesty in His Privy Council.

I. Order fixing bail.

In the Supreme Court of Canada.

In Chambers,
before the Honourable Mr. Justice . the day of 18 .

Between

Plaintiff or defendant,
Appellant.

and

Defendant or plaintiff,
Respondent.

Upon motion this day made by Mr. , of counsel for the appellant, for an order fixing the bail to be given by the appellant upon his appeal to His Majesty the King in Council, from the judgment of this Court dated the day of 19 , to answer the costs of the said appeal.

Upon reading the said judgment of this Court, the notice of appeal served on the day of 19 , the notice of application to fix the bail served herein on the day of 19 , and upon hearing counsel for the appellant and respondent.

It is ordered that the above-named appellant do give bail to answer the costs of the appeal to His Majesty the King in Council in the sum of pounds sterling to the satisfaction of the Registrar of this Court, on or before the day of 19 .

And it is further ordered that the costs of this application be costs in the cause.

II. Bailbond.

(Title of Court and Style of Cause).

Know all men by these presents that we (*insert names, addresses and descriptions of the sureties in full*), hereby jointly and severally submit ourselves to the jurisdiction of this Court and consent that if the said (*insert name of party for whom bail is given, and state whether plaintiff or defendant*), shall not pay what may be adjudged against him in the above action for costs, execution may issue against us, our heirs, executors and administrators, for a sum not exceeding pounds sterling.

In witness whereof the said and the said have hereunto set our respective hands and seals this day of 19 .

III. Order allowing bail.

(Title of Court and Style of Cause.)

Upon the application of counsel on behalf of the above-named appellant in the presence of counsel for the above-named respondent, and upon hearing what was alleged by counsel aforesaid.

It is ordered that a certain bond bearing date the day of 19 , and filed this day of 19 , as security that the above-named appellant will pay such costs as may be awarded against him by His Majesty in Council upon his appeal to His Majesty in Council from the judgment of this Court dated the day of 19 , be and the same is hereby approved and allowed as good and sufficient security.

And it is further ordered that the costs of this application be costs in the said appeal.

By the Court,

Registrar.

APPENDIX III.

FORMS FOR BOTTOMRY AND RESPONDENTIA.

BOTTOMRY BOND ON SHIP AND FREIGHT.

KNOW all men by these presents, that I, A.B., master of the ship *Albany,* of London, am held and firmly bound unto C. D., of Bombay, merchant, in the sum of lawful British money, to be paid to the said C. D., or his certain attorney, executors, administrators, or assigns, for which payment well and truly to be made, I bind myself, my heirs, executors and administrators, and also the said ship, her tackle, apparel, and furniture, and the freight to be earned by her on the voyage after mentioned, firmly by these presents. Sealed with my seal. Dated this day of one thousand eight hundred and

Whereas the said ship is lately arrived in the roadstead of Bombay from London, having on her said voyage sustained damage [*describe the damage*], and being in want of repairs and provisions to enable her to proceed on her voyage from Bombay to London, for which port she is now bound and about to return, and the said A. B., in order to be enabled to procure the said repairs and provisions, and to pay for the same and for the lawful and necessary disbursements and expenses of the said ship at the said port of Bombay, hath requested the said C. D. to lend the sum of for the aforesaid purposes, and the said C. D. hath accordingly lent the said sum for the aforesaid purposes, on the hazard and adventure of the said vessel on her said intended voyage from Bombay to London.

Now the condition of the above obligation is such, that if the said ship do and shall, with all reasonable and convenient speed, sail from the port of Bombay aforesaid, on the said intended voyage to London, and that without deviation (the perils, damages, accidents and casualties of the seas and navigation excepted); and if the above bounden A. B., his heirs, executors, or administrators, or the owners of the said ship, do

and shall within ten days after the said vessel shall arrive at London aforesaid, well and truly pay, or cause to be paid, unto the said C. D., his agent, attorney, executors, administrators, or assigns, the said sum of lawful British money, together with pounds per centum, bottomry premium thereon; or if on the said voyage, the said vessel shall be utterly lost, cast away, or destroyed in consequence of fire, enemies, pirates, storms, or other the unavoidable perils, dangers, accidents, or casualties of the seas and navigation, to be sufficiently shown or proved by the said A. B., his executors or administrators, or by the owners of the said ship, their executors or administrators; then the above written bond or obligation or bond to be void; otherwise to remain in full force and virtue.

Signed, sealed, and delivered, where no stamped paper is to be had, in the presence of } A. B. (Seal)

BOTTOMRY BILL, ON SHIP, FREIGHT AND CARGO.

To all men to whom these presents shall come. I, A. B., of Bengal, [part owner and] master of the ship called the *Exeter,* of the burden of five hundred tons and upwards, now riding at anchor in Table Bay, at the Cape of Good Hope, send greeting:

Whereas I, the said A. B., [part owner and] master of the aforesaid ship, called the *Exeter,* now in prosecution of a voyage from Bengal to the port of London, having put into Table Bay for the purpose of procuring provisions and other supplies necessary for the continuation and performance of the voyage aforesaid, am at this time necessitated to take up upon the adventure of the said ship called the *Exeter,* the sum of £1,000 lawful monies of Great Britain, for setting the said ship to sea, and furnishing her with provisions and necessaries for the said voyage, which sum C. D., of the Cape of Good Hope, master attendant, hath at my request lent unto me, and supplied me with at the rate of £1,220 sterling for the said £1,000, being at the rate of £122 for every £100, advanced as aforesaid, during the voyage of the said ship from Table Bay to London. Now know ye that I, the said A. B., by these presents, do, for me,

my executors and administrators, covenant and grant to and with the said C. D., that the said ship shall, [with the first convoy that shall offer for England] [*or*, with all reasonable and convenient speed] after the date of these presents, sail and depart for the port of London, there to finish the voyage aforesaid, and that, without deviation during the course thereof (the perils, damages, accidents and casualties of the seas and navigation excepted). And I, the said A. B., in consideration of the sum of £1,000 sterling to me in hand paid by the said C. D. at and before the sealing and delivery of these presents, do hereby bind myself, my heirs, executors, and administrators, my goods and chattels, and particularly the said ship, the tackle and apparel of the same, and also the freight of the said ship which is or shall become due for the aforesaid voyage from Bengal to the port of London, and also the cargo shipped on board the said vessel for the voyage aforesaid to pay unto the said C. D., his executors, administrators or assigns, the sum of £1,220 of lawful British money, within thirty days next after the safe arrival of the said ship at the port of London from the same intended voyage.

And I, the said A. B., do, for me, my executors and administrators, covenant and grant to and with the said C. D., his executors and administrators by these presents, that I, the said A. B., at the time of sealing and delivering of these presents, am [a true and lawful part owner and] master of the said ship, and have power and authority to charge and engage the said ship with her freight and cargo as aforesaid, and that the said ship, with her freight and cargo, shall at all times, after the said voyage, be liable and chargeable for the payment of the said £1,220 according to the true intent and meaning of these presents.

And lastly, it is hereby declared and agreed by and between the said parties to these presents, that in case the said ship shall be utterly lost, miscarry, be cast away, or otherwise destroyed in consequence of fire, enemies, pirates, and any other perils and dangers of the seas and navigation, before her arrival at the said port of London from the said intended voyage, that then the payment of the said £1,220 shall not be demanded, or be recoverable by the said C. D., his executors, administrators, or assigns, but shall cease and determine, and the loss thereby be wholly borne and sustained by the said C. D., his executors and administrators, and that then and from thenceforth every act, matter and thing herein mentioned on the part and behalf of

the said A. B., shall be void, anything herein contained to the contrary notwithstanding.

In witness whereof the parties have interchangeably set their hands and seals to four bonds of this tenor and date, one of which being paid, the others to be null and void.

At the Cape of Good Hope, this fifteenth day of November, in the year of our Lord one thousand eight hundred and

Witness, { E. F.
G. H.
I. K. } A. B. (L.S.)

RESPONDENTIA BOND.

Know all men by these presents, that I, A. B., master of the ship *Albany*, am held and firmly bound unto C. D., of Odessa, merchant, in the sum of lawful British money, to be paid to the said C. D., his certain attorney, or his executors, administrators, or assigns, to which payment I bind myself firmly by these presents. Sealed with my seal. Dated this day of one thousand eight hundred and

Whereas the said ship *Albany*, having laden on board a cargo of corn, was accidentally stranded and suffered great damage, and was taken into the harbour of Odessa by salvors, and her cargo discharged, some being damaged; and whereas, great expense for salvage and other charges were necessarily incurred, and were charged on the said cargo, and which the said master was unable to pay; and whereas the said C. D. did contract and agree with the said A. B. to advance the sums of money necessary to enable him to pay the same charges and expenses upon the goods and merchandise, lately the cargo of the said ship *Albany*, to be re-shipped and forwarded from Odessa to their destination, that is to say, to the port of London in England, it being expressly agreed before any part of such advance was made, that such advance should be by way of *respondentia* on the said cargo on the voyage last aforesaid; and whereas under and pursuant to the agreement last aforesaid the sum of was advanced as aforesaid, and a part of the said merchandise was laden at Odessa in and on board the ship *Otseonthe*, to be carried

to London aforesaid, in a voyage to be thereafter commenced and prosecuted by the said ship *Otseonthe;* and while the process of lading the same was going on, the said ship *Otseonthe* took fire, and together with a part of the said merchandise then on board was destroyed, and the residue of the said merchandise on board was so damaged as to render a sale thereof necessary.

Now, in pursuance of the original agreement, and in execution of the same, so far as the execution thereof has not been rendered impossible by the act of God, and without intending to displace or prejudice any claim, right, or lien of the said C. D., in or to what was saved from the merchandise so shipped on board the *Otseonthe,* but on the contrary expressly admitting and declaring that according to the understanding of the undersigned A. B., in equity and good conscience, the same is to stand affected and bound unto him the said C. D., in like manner as the residue of the said goods and merchandise which have now been laden at Odessa on board the ship called the *Tempest,* and bound for London, are hypothecated and assigned over by way of *respondentia* security, as the same are hereby declared to be hypothecated and assigned over for that end, and that the same are to be delivered to no other use whatsoever.

Now the condition of the above-written obligation is such, that if the said ship *Tempest* do and shall depart from Odessa, and sail to and arrive at London, and if the said A. B. shall pay unto the said C. D., or his legal representatives, within ten days after such arrival, the full sum of together with a premium thereon of pounds per centum; or if in the said voyage an utter loss of the said ship by any perils of the sea which are insured against under policies, a form of which is hereto annexed, shall unavoidably happen, and the said A. B. or those for whom he acts shall well and truly, without delay, account with the said C. D., or his representatives or assigns, for the just salvage which shall be received from and on account of the said hypothecated merchandise, and shall well and truly pay or deliver the same unto him or them, and shall not deliver the said merchandise to any other use whatsoever, without payment of the principal and interest, and premium due on this bond. Then this obligation shall be void, otherwise to remain in full force.

Signed, sealed, and delivered, where no stamped paper is to be had, in the presence of } A. B. (Seal)

FORM OF NOTICE TO CONSUL OF INSTITUTION OF ACTION AGAINST A FOREIGN SHIP.

The day of A.D., 1877.

The [*state nationality*] ship or vessel *Golubchick*.

, Master.

Sir,—I hereby give you notice that I have this day instituted an action in the Exchequer Court of Canada in Admiralty, in the district, against the above-named ship, now lying in the port of to enforce payment of wages due to *A. B.*, ordinary seaman on board the said ship, on her voyage from to [*or* an action of possession, as the case may be].

I am, sir,

Your obedient servant.

C. D.,

Solicitor for the above-named A. B.

To

Consul, etc. [*state government*].

PROTEST OF A CONSUL AGAINST THE EXERCISE OF THE JURISDICTION OF THE COURT.

I, the undersigned, am the Consul of [*state government*] at

2-3. [*Set out in numbered paragraphs the facts upon which the Consul relies in support of his protest.*]

4. Under the above circumstances, I, therefore, respectfully submit that this Honourable Court should not entertain the plaintiff's claim, and as Consul of it is my duty respectfully and formally to protest against the exercise of the jurisdiction of this Honourable Court in and about the said action, because [*summarise the reasons of the Consul*].

Signed and sealed with the official seal of this Consulate in the day of , 18 .

T. C.,

[L.S.] *Consul.*

SALES UNDER ORDER OF COURT.

CONDITIONS OF SALE.

The following are the usual conditions of sales by the marshal under a commission of sale subject to any variation as the Judge may direct, viz.:

Conditions of Sale.

1. The buyer is to take the said vessel, her tackle, apparel, and furniture, with all faults, in the condition in which they now lie, without any allowance or abatement for weights, lengths, qualities, quantities, errors of description, or any defects, or injuries whatsoever, and neither the age, tonnage, or description of the vessel or stores as expressed in the inventories, are warranted.

2. The buyer is immediately to pay into the hands of W. B., Esq., marshal of the said Court [or his deputy] one-fourth part of the purchase money, and ten dollars to the auctioneer to bind the bargain, and the remainder thereof within fourteen days unto the marshal [or his deputy]; and upon payment thereof to be put into possession of the said vessel, her tackle, apparel and furniture, as aforementioned. But in case of non-payment of the remainder of the purchase money within the time beforementioned, the deposit aforesaid of one-fourth part shall and is hereby declared to be forfeited, and the said vessel, her tackle, apparel and furniture, may again be exposed to sale and sold at public or private sale, and the deficiency, if any, by such resale shall be made good by the defaulter at this sale, together with the expenses attending such re-sale; and neither the Judge, nor the marshal, or his deputy, nor the broker shall be sued for the said money paid in part and forfeited as aforesaid: but the buyer so neglecting shall be liable for all loss, costs and damages which may arise thereby.

3. The buyer, if he requires it, may have the marshal's [or his deputy's] bill of sale for the said vessel.

4. The vessel is at the risk of the buyer immediately after he receives an order for the delivery of the vessel.

Lastly, the marshal [or his deputy] is to be the Judge who is the lawful buyer of the said vessel. Not less than dollars to be advanced at each bidding.

APPENDIX IV.

THE COLONIAL COURTS OF ADMIRALTY ACT, 1890.

(53 & 54 Vict., cap. 27).

[*25th July*, 1890.]

An Act to amend the Law respecting the exercise of Admiralty Jurisdiction in Her Majesty's Dominions and elsewhere out of the United Kingdom.

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 as the Colonial Courts of Admiralty Act, 1890.

Colonial Courts of Admiralty.

2.—(1.) Every court of law in a British possession, which is for the time being declared in pursuance of this Act to be a Court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a Court of Admiralty, with the jurisdiction in this Act mentioned, and may, for the purpose of that jurisdiction, exercise all the powers which it possesses for the purpose of its other civil jurisdiction; and such court, in reference to the jurisdiction conferred by this Act, is in this Act referred to as a Colonial Court of Admiralty. Where in a British possession the Governor is the sole judicial authority, the expression "court of law" for the purposes of this section includes such Governor.

(2.) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations.

(3.) Subject to the provisions of this Act any enactment referring to a Vice-Admiralty Court, which is contained in an

Act of the Imperial Parliament or in a Colonial law, shall apply to a Colonial Court of Admiralty, and be read as if the expression "Colonial Court of Admiralty" were therein substituted for "Vice-Admiralty Court" or for other expressions respectively referring to such Vice-Admiralty Courts or the judge thereof; and the Colonial Court of Admiralty shall have jurisdiction accordingly.

Provided as follows:—

(*a.*) Any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction of the High Court in England, when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were therein substituted for England and Wales; and—

(*b.*) A Colonial Court of Admiralty shall have, under the Naval Prize Act, 1864, and under the Slave Trade Act, 1873, and any enactment relating to prize or the slave trade, the jurisdiction thereby conferred on a Vice-Admiralty Court and not the jurisdiction thereby conferred exclusively on the High Court of Admiralty or the High Court of Justice; but, unless for the time being duly authorized, shall not, by virtue of this Act, exercise any jurisdiction under the Naval prize Act, 1864, or otherwise in relation to prize; and—

26 & 28 Vict. c. 25.

36 & 37 Vict. c. 88.

(*c.*) A Colonial Court of Admiralty shall not have jurisdiction under this Act to try or punish a person for an offence which according to the law of England is punishable on indictment; and—

(*d.*) A Colonial Court of Admiralty shall not have any greater jurisdiction in relation to the laws and regulations relating to Her Majesty's Navy at sea, or under any Act providing for the discipline of Her Majesty's Navy, than may be, from time to time, conferred on such court by Order in Council.

(4.) Where a Court in a British possession exercises in respect of matters arising outside the body of a county or other like part of a British possession any jurisdiction exerciseable under this Act, that jurisdiction shall be deemed to be exercised under this Act and not otherwise.

Power of Colonial legislature as to Admiralty jurisdiction.

3. The legislature of a British possession may, by any Colonial law,—

(a.) declare any court of unlimited civil jurisdiction, whether original or appellate, in that possession to be a Colonial Court of Admiralty, and provide for the exercise by such court of its jurisdiction under this Act, and limit territorially or otherwise, the extent of such jurisdiction; and—

(b.) confer upon any inferior or subordinate court in that possession such partial or limited Admiralty jurisdiction, under such regulations and with such appeal (if any), as may seem fit:

Provided that any such Colonial law shall not confer any jurisdiction which is not, by this Act, conferred upon a Colonial Court of Admiralty.

Reservation of Colonial law for Her Majesty's assent.

4. Every Colonial law, which is made in pursuance of this Act, or affects the jurisdiction of or practice or procedure in any court of such possession in respect of the jurisdiction conferred by this Act, or alters any such Colonial law as above in this section mentioned, which has been previously passed, shall, unless previously approved by Her Majesty through a Secretary of State, either be reserved for the signification of Her Majesty's pleasure thereon, or contain a suspending clause providing that such law shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British possession in which it has been passed.

Local Admiralty appeal.

5. Subject to rules of court under this Act, judgments of a court in a British possession given or made in the exercise of the jurisdiction conferred on it by this Act, shall be subject to the like local appeal, if any, as judgments of the court in the exercise of its ordinary civil jurisdiction, and the court having cognisance of such appeal shall, for the purpose thereof, possess all the jurisdiction by this Act conferred upon a Colonial Court of Admiralty.

Admiralty appeal to the Queen in Council.

6.—(1.) The appeal from a judgment of any court in a British possession in the exercise of the jurisdiction conferred by this Act, either where there is as of right no local appeal or after a decision on local appeal, lies to Her Majesty the Queen in Council.

(2.) Save as may be otherwise specially allowed in a particular case by Her Majesty the Queen in Council, an appeal under this section shall not be allowed—

(*a.*) from any judgment not having the effect of a definitive judgment unless the court appealed from has given leave for such appeal, nor—

(*b.*) from any judgment unless the petition of appeal has been lodged within the time prescribed by rules, or if no time is prescribed within six months from the date of the judgment appealed against, or if leave to appeal has been given then from the date of such leave.

(3.) For the purpose of appeals under this Act, Her Majesty the Queen in Council and the Judicial Committee of the Privy Council shall, subject to rules under this section, have all such powers for making and enforcing judgments, whether interlocutory or final, for punishing contempts, for requiring the payment of money into court, or for any other purpose, as may be necessary, or as were possessed by the High Court of Delegates before the passing of the Act transferring the powers of such court to Her Majesty in Council, or as are, for the time being, possessed by the High Court in England or by the court appealed from in relation to the like matters as those forming the subject of appeals under this Act.

(4.) All Orders of the Queen in Council or the Judicial Committee of the Privy Cuoncil for the purposes aforesaid or otherwise in relation to appeals under this Act shall have full effect throughout Her Majesty's dominions, and in all places where Her Majesty has jurisdiction.

(5.) This section shall be in addition to and not in derogation of the authority of Her Majesty in Council or the Judicial Committee of the Privy Council arising otherwise than under this Act, and all enactments relating to appeals to Her Majesty in Council or to the powers of Her Majesty in Council or the Judicial Committee of the Privy Council in relation to those appeals, whether for making rules and orders or otherwise, shall extend, save as otherwise directed by Her Majesty in Council, to appeals to Her Majesty in Council under this Act.

Rules of court.

7.—(1.) Rules of court for regulating the procedure and practice (including fees and costs) in a court in a British possession in the exercise of the jurisdiction conferred by this Act, whether original or appellate, may be made by the same authority and in the same manner as rules touching the practice, procedure, fees and costs in the said court in the exercise of its ordinary civil jurisdiction respectively are made:

Provided that the rules under this section shall not, save as provided by this Act, extend to matters relating to the slave trade, and shall not (save as provided by this section) come into operation until they have been approved by Her Majesty in Council, but on coming into operation shall have full effect as if enacted in this Act; and any enactment inconsistent therewith shall, so far as it is so inconsistent, be repealed.

(2.) It shall be lawful for Her Majesty in Council, in approving rules made under this section, to declare that the rules so made with respect to any matters which appear to Her Majesty to be matters of detail or of local concern may be revoked, varied or added to, without the approval required by this section.

(3.) Such rules may provide for the exercise of any jurisdiction conferred by this Act by the full court, or by any judge or judges thereof, and subject to any rules, where the ordinary civil jurisdiction of the court can, in any case, be exercised by a single judge, any jurisdiction conferred by this Act may, in the like case, be exercised by a single judge.

Droits of Admiralty and of the Crown.

8.—(1.) Subject to the provisions of this section nothing in this Act shall alter the application of any droits of Admiralty or droits of or forfeitures to the Crown in a British possession; and such droits and forfeitures, when condemned by a court of a British possession in the exercise of the jurisdiction conferred by this Act, shall, save as is otherwise provided by any other Act, be notified, accounted for and dealt with in such manner as the Treasury from time to time direct, and the officers of every Colonial Court of Admiralty and of every other court in a British possession exercising Admiralty jurisdiction shall obey such directions in respect of the said droits and forfeitures as may be, from time to time, given by the Treasury.

(2.) It shall be lawful for Her Majesty the Queen in Council by Order to direct that, subject to any conditions, exceptions, reservations and regulations contained in the Order, the said droits and forfeitures condemned by a court in a British possession shall form part of the revenues of that possession either for ever or for such limited term or subject to such revocation as may be specified in the Order.

(3.) If and so long as any of such droits or forfeitures by virtue of this or any other Act form part of the revenues of the said possession the same shall, subject to the provisions of

any law for the time being applicable thereto, be notified, accounted for and dealt with in manner directed by the Government of the possession, and the Treasury shall not have any power in relation thereto.

9.—(1.) It shall be lawful for Her Majesty, by commission, under the Great Seal, to empower the Admiralty to establish in a British possession any Vice-Admiralty Court or Courts.

Power to establish Vice-Admiralty Courts.

(2.) Upon the establishment of a Vice-Admiralty Court in a British possession, the Admiralty, by writing under their hands and the seal of the office of Admiralty, in such form as the Admiralty may direct, may appoint a judge, registrar, marshal and other officers of the court, and may cancel any such appointment; and in addition to any other jurisdiction of such court, may (subject to the limits imposed by this Act or the said commission from Her Majesty) vest in such court the whole or any part of the jurisdiction by or by virtue of this Act conferred upon any courts of that British possession; and may vary or revoke such vesting, and while such vesting is in force the power of such last-mentioned courts to exercise the jurisdiction so vested shall be suspended.

Provided that—

(*a.*) nothing in this section shall authorize a Vice-Admiralty Court so established in India or in any British possession having a representative legislature, to exercise any jurisdiction except for some purpose relating to prize, to Her Majesty's Navy, to the slave trade, to the matters dealt with by the Foreign Enlistment Act, 1870, or the Pacific Islanders Protection Acts, 1872 and 1875, or to matters in which questions arise relating to treaties or conventions with foreign countries, or to international law; and—

33 & 34 Vict. c. 90. 35 & 36 Vict. c. 19. 38 & 39 Vict. c. 51.

(*b.*) in the event of a vacancy in the office of judge, registrar, marshal or other officer of any Vice-Admiralty Court in a British possession, the Governor of that possession may appoint a fit person to fill the vacancy until an appointment to the office is made by the Admiralty.

(3.) The provisions of this Act with respect to appeals to Her Majesty in Council from courts in British possessions in the exercise of the jurisdiction conferred by this Act, shall apply to appeals from Vice-Admiralty Courts, but the rules and orders made in relation to appeals from Vice-Admiralty

Courts may differ from the rules made in relation to appeals from the said courts in British possessions.

(4.) If Her Majesty at any time by commission under the Great Seal so directs, the Admiralty shall, by writing under their hands and the seal of the office of Admiralty, abolish a Vice-Admiralty Court established in any British possession under this section, and upon such abolition the jurisdiction of any Colonial Court of Admiralty in that possession which was previously suspended shall be revived.

Power to appoint a vice-admiral.

10. Nothing in this Act shall affect any power of appointing a vice-admiral in and for any British possession or any place therein, and whenever there is not a formally appointed vice-admiral in a British possession or any place therein, the Governor of the possession shall be *ex-officio* vice-admiral thereof.

Exception of Channel Islands and other possessions.

11.—(1.) The provisions of this Act with respect to Colonial Courts of Admiralty shall not apply to the Channel Islands.

(2.) It shall be lawful for the Queen in Council by Order to declare, with respect to any British possession which has not a representative legislature, that the jurisdiction conferred by this Act on Colonial Courts of Admiralty shall not be vested in any court of such possession, or shall be vested only to the partial or limited extent specified in the Order.

Application of Act to courts under Foreign Jurisdiction Acts.

12. It shall be lawful for Her Majesty the Queen in Council by Order to direct that this Act shall, subject to the conditions, exceptions and qualifications (if any) contained in the Order, apply to any Court established by Her Majesty for the exercise of jurisdiction in any place out of Her Majesty's dominions which is named in the Order as if that Court were a Colonial Court of Admiralty, and to provide for carrying into effect such application.

Rules for procedure in slave trade matters.

13.—(1.) It shall be lawful for Her Majesty the Queen in Council by Order to make rules as to the practice and procedure (including fees and costs) to be observed in and the returns to be made from Colonial Courts of Admiralty and Vice-Admiralty Courts in the exercise of their jurisdiction in matters relating to the slave trade, and in and from East African Courts as defined by the Slave Trade (East African Courts) Acts, 1873 and 1879.

36 & 37 Vict. c. 59. 42 & 43 Vict. c. 38.

(2.) Except when inconsistent with such Order in Council, the rules of court for the time being in force in a Colonial

Court of Admiralty or Vice-Admiralty Court shall, so far as applicable, extend to proceedings in such court in matters relating to the slave trade.

(3.) The provisions of this Act with respect to appeals to Her Majesty in Council, from courts in British possessions in the exercise of the jurisdiction conferred by this Act, shall apply, with the necessary modifications, to appeals from judgments of any East African court made or purporting to be made in exercise of the jurisdiction under the Slave Trade (East African Courts) Acts, 1873 and 1879.

Orders in Council.

14. It shall be lawful for Her Majesty in Council from time to time to make Orders for the purposes authorized by this Act, and to revoke and vary such Orders; and every such Order while in operation shall have effect as if it were part of this Act.

Interpretation.

15. In the construction of this Act, unless the context otherwise requires,—

The expression "representative legislature" means, in relation to a British possession, a legislature comprising a legislative body of which at least one-half are elected by inhabitants of the British possession.

The expression "unlimited civil jurisdiction" means civil jurisdiction unlimited as to the value of the subject-matter at issue, or as to the amount that may be claimed or recovered.

The expression "judgment" includes a decree, order, and sentence.

The expression "appeal" means any appeal, rehearing, or review; and the expression "local appeal" means an appeal to any court inferior to Her Majesty in Council.

The expression "Colonial law" means any Act, ordinance or other law having the force of legislative enactment in a British possession and made by any authority, other than the Imperial Parliament or Her Majesty in Council, competent to make laws for such possession.

Commencement of Act.

16.—(1.) This Act shall, save as otherwise in this Act provided, come into force in every British possession on the first day of July, one thousand eight hundred and ninety-one.

Provided that—

(*a.*) This Act shall not come into force in any of the British possessions named in the First Schedule to

this Act until Her Majesty so directs by Order in Council, and until the day named in that behalf in such Order; and—

(*b.*) If before any day above mentioned rules of court for the Colonial Court of Admiralty in any British possession have been approved by Her Majesty in Council, this Act may be proclaimed in that possession by the Governor thereof, and on such proclamation shall come into force on the day named in the proclamation.

(2.) The day upon which this Act comes into force in any British possession shall, as regards that British possession, be deemed to be the commencement of this Act.

26 & 27 Vict. c. 24.

(3.) If, on the commencement of this Act in any British possession, rules of court have not been approved by Her Majesty in pursuance of this Act, the rules in force at such commencement under the Vice-Admiralty Courts Act, 1863, and in India the rules in force at such commencement regulating the respective Vice-Admiralty Courts or Courts of Admiralty in India, including any rules made with reference to proceedings instituted on behalf of Her Majesty's ships, shall, so far as applicable, have effect in the Colonial Court or Courts of Admiralty of such possession, and in any Vice-Admiralty Court established under this Act in that possession, as rules of court under this Act, and may be revoked and varied accordingly; and all fees payable under such rules may be taken in such manner as the Colonial Court may direct, so however that the amount of each such fee shall, so nearly as practicable, be paid to the same officer or person who but for the passing of this Act would have been entitled to receive the same in respect of like business. So far as any such rules are inapplicable or do not extend, the rules of court for the exercise by a court of its ordinary civil jurisdiction shall have effect as rules for the exercise by the same court of the jurisdiction conferred by this Act.

(4.) At any time after the passing of this Act any Colonial law may be passed, and any Vice-Admiralty Court may be established and jurisdiction vested in such Court, but any such law, establishment, or vesting shall not come into effect until the commencement of this Act.

17. On the commencement of this Act in any British possession, but subject to the provisions of this Act, every Vice-Admiralty Court in that possession shall be abolished; subject as follows:—

Abolition of Vice-Admiralty Courts.

(1.) All judgments of such Vice-Admiralty Court shall be executed and may be appealed from in like manner as if this Act had not passed, and all appeals from any Vice-Admiralty Court pending at the commencement of this Act shall be heard and determined, and the judgment thereon executed as nearly as may be in like manner as if this Act had not passed:

(2.) All proceedings pending in the Vice-Admiralty Court in any British possession at the commencement of this Act shall, notwithstanding the repeal of any enactment by this Act, be continued in a Colonial Court of Admiralty of the possession in manner directed by rules of court, and, so far as no such rule extends, in like manner, as nearly as may be. as if they had been originally begun in such court:

(3.) Where any person holding an office, whether that of judge, registrar or marshal, or any other office in any such Vice-Admiralty Court in a British possession, suffers any pecuniary loss in consequence of the abolition of such court, the Government of the British possession, on complaint of such person, shall provide that such person shall receive reasonable compensation (by way of an increase of salary or a capital sum, or otherwise) in respect of his loss, subject nevertheless to the performance, if required by the said Government, of the like duties as before such abolition.

(4.) All books, papers, documents, office furniture and other things at the commencement of this Act belonging or appertaining to any Vice-Admiralty Court, shall be delivered over to the proper officer of the Colonial Court of Admiralty or be otherwise dealt with in such manner as, subject to any directions from Her Majesty, the Governor may direct:

(5.) Where, at the commencement of this Act in a British possession, any person holds a commission to act as advocate in any Vice-Admiralty Court abolished by this Act, either for Her Majesty or for the Admir-

alty, such commission shall be of the same avail in every court of the same British possession exercising jurisdiction under this Act, as if such court were the court mentioned or referred to in such commission.

Repeal.

18. The Acts specified in the Second Schedule to this Act shall, to the extent mentioned in the third column of that schedule, be repealed as respects any British possession as from the commencement of this Act in that possession, and as respects any courts out of Her Majesty's dominions as from the date of any Order applying this Act:

Provided that—

(*a*.) Any appeal against a judgment made before the commencement of this Act may be brought and any such appeal and any proceedings or appeals pending at the commencement of this Act may be carried on and completed and carried into effect as if such repeal had not been enacted; and—

(*b*.) All enactments and rules at the passing of this Act in force touching the practice, procedure, fees, costs, and returns in matters relating to the slave trade in Vice-Admiralty Courts and in East African Courts shall have effect as rules made in pursuance of this Act, and shall apply to Colonial Courts of Admiralty, and may be altered and revoked accordingly.

SCHEDULES.

FIRST SCHEDULE.

BRITISH POSSESSIONS IN WHICH OPERATION OF ACT IS DELAYED. Section 16.

New South Wales.	Victoria.
St. Helena.	British Honduras.

SECOND SCHEDULE.

ENACTMENTS REPEALED. Section 17.

Session and Chapter.	Title of Act.	Extent of Repeal.
56 Geo. 3. 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.
2 & 3 Will. 4, c. 51	An Act to regulate the practice and the fees in the Vice-Admiralty Courts abroad, and to obviate doubts as to their jurisdiction.	The whole Act.
3 & 4 Will. 4, c. 41	An Act for the better administration of justice in His Majesty's Privy Council.	Section two.
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.	In section two, the words "or "from any Admiralty or "Vice-Admiralty Court," and the words "or the "Lords Commissioners of "Appeals in prize causes "or their surrogates." In section three, the words "and the High Court of "Admiralty of England," and the words "and from "any Admiralty or Vice-"Admiralty Court."

Session and Chapter.	Title of Act.	Extent of Repeal.
		In section five, from the first "the High Court of Ad-"miralty" to the end of the section. In section seven, the words "and from Admiralty or "Vice-Admiralty Courts." Sections nine and ten, so far as relates to maritime causes. In section twelve, the words "or maritime." In section fifteen, the words "and Admiralty and Vice-"Admiralty."
7 & 8 Vict., c. 69..	An Act for amending an Act passed in the fourth year of the reign of His late Majesty intituled: "An Act for "the better adminis-"tration of justice "in His Majesty's "Privy Council," and to extend its jurisdiction and powers.	In section twelve, the words "and from Admiralty and "Vice-Admiralty Courts," and so much of the rest of the section as relates to maritime causes.
26 Vict., c. 24....	The Vice - Admiralty Courts Act, 1863.	The whole Act.
30 & 31 Vict., c. 45	The Vice - Admiralty Court Act Amendment Act, 1867.	The whole Act.
36 & 37 Vict., c. 59	The Slave Trade (East African Courts) Act, 1873.	Sections four and five.
36 & 37 Vict., c. 88	The Slave Trade Act, 1873.	Section twenty as far as relates to the taxation of any costs, charges, and expenses which can be taxed in pursuance of this Act. In section twenty-three, the words "under the Vice-"Admiralty Courts Act, "1863."
38 & 39 Vict., c. 51	The Pacific Islanders Protection Act, 1875.	So much of section six as authorizes Her Majesty to confer Admiralty jurisdiction on any court.

II. THE ADMIRALTY ACT, 1891.

(R. S. C. 1906, cap. 141.)

An Act to provide for the exercise of Admiralty Jurisdiction within Canada in accordance with the Colonial Courts of Admiralty Act, 1890.

NOTE.—This consolidation of the Admiralty Act, 1891, and amending Acts was duly approved by His Majesty pursuant to section 4 of the Colonial Courts of Admiralty Act, 1890 (Imperial).

Short Title.

1. This Act may be cited as the Admiralty Act. 54-55 V., c. 29, s. 1.

Short title.

Interpretation.

2. In this Act, unless the context otherwise requires, "the Exchequer Court" or "the Court" means the Exchequer Court of Canada. 54-55 V., c. 29, s. 2.

Definitions.

Jurisdiction.

3. The Exchequer Court is and shall be, within Canada, a Colonial Court of Admiralty, and, as a Court of Admiralty, shall, within Canada, have and exercise all the jurisdiction, powers and authority conferred by the *Colonial Courts of Admiralty Act, 1890,* and by this Act. 54-55 V., c. 29, s. 3.

Jurisdiction of Exchequer Court.

4. Such jurisdiction, powers and authority shall be exercisable and exercised by the Exchequer Court throughout Canada, and the waters thereof, whether tidal or non-tidal, or naturally navigable or artificially made so, and all persons shall, as well in such parts of Canada as have heretofore been beyond the reach of the process of any Vice-Admiralty court as elsewhere therein, have all rights and remedies in all matters, including cases of contract and tort and proceedings *in rem* and *in personam,* arising out of or connected with navigation, shipping, trade or commerce, which may be had or enforced in any Colonial Court of Admiralty under the *Colonial Courts of Admiralty Act, 1890.* 54-55 V., c. 29, s. 4.

Throughout Canada.

Under Colonial Courts of Admiralty Act, 1890.

Jurisdiction not impaired.

5. Nothing herein contained shall limit, lessen or impair the jurisdiction of the Judge of the Exchequer Court in respect of the Admiralty jurisdiction of the Court or otherwise. 54-55 V., c. 29, s. 24.

Admiralty Districts and Registries.

Governor in Council may constitute Admiralty districts. Under a special name. With limits. And Admiralty registries. And divide the territory of a district into two or more registries

6. The Governor in Council may from time to time,—

(*a.*) constitute any part of Canada an Admiralty district for the purposes of this Act;

(*b.*) assign a name to any such district and change such name as he may think proper;

(*c.*) fix and change the limits of any such district;

(*d.*) establish at some place within any Admiralty district a registry of the Exchequer Court on its Admiralty side; and,

(*e.*) divide the territory comprised in any Admiralty district into two or more registry divisions, and establish a registry of the Exchequer Court on its Admiralty side at some place in each of such divisions. 63-64 V., c. 45, s. 1.

Provisional districts and registries.

7. Until otherwise provided by the Governor in Council, the following provinces shall each constitute an Admiralty district for the purposes of this Act, and a registry of the Exchequer Court on its Admiralty side shall be established and maintained within such districts at the places following, that is to say:—

(*a.*) The province of Ontario, under the name of "The Toronto Admiralty District," with a registry at the city of Toronto;

(*b.*) The province of Quebec, with a registry at the city of Quebec;

(*c.*) The province of Nova Scotia, with a registry at the city of Halifax;

(*d.*) The province of New Brunswick, with a registry at the city of St. John;

(*e.*) The province of British Columbia, with a registry at the city of Victoria;

(*f.*) The province of Prince Edward Island, with a registry at the city of Charlottetown. 54-55 V., c. 29, ss. 17 and 18.

Local Judges and Officers.

8. The Governor in Council may, from time to time, appoint any judge of a superior or county court, or any barrister of not less than seven years' standing, to be a local judge in Admiralty of the Exchequer Court in and for any Admiralty district.

Local judges in Admiralty.

2. Every such local judge shall hold office during good behaviour, but shall be removable by the Governor General, on address of the Senate and House of Commons.

Tenure.

3. Such judge shall be designated a local judge in Admiralty of the Exchequer Court. 54-55 V., c. 29, s. 6.

How designated.

9. Every such local judge in Admiralty shall, previously to his entering on the duties of his office, take, before the judge of the Exchequer Court or a judge of any superior court, an oath in the form following, that is to say:—

Oath of office.

"I, do solemnly and sincerely swear that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as local judge in Admiralty in and for the Admiralty district of (*as the case may be*). So help me God." 54-55 V., c. 29, s. 7.

10. Every local judge in Admiralty shall, within the Admiralty district for which he is appointed, have and exercise the jurisdiction, and the powers and authority relating thereto, of the judge of the Exchequer Court in respect of the Admiralty jurisdiction of such court. 54-55 V., c. 29, s. 9.

Powers of local judges.

11. A local judge in Admiralty may, from time to time, with the approval of the Governor in Council, appoint a deputy judge; and such deputy judge shall have and exercise all such jurisdiction, powers and authority as are possessed by the local judge.

Deputy judges.

2. The appointment of a deputy judge shall not be determined by the occurrence of a vacancy in the office of the judge.

Tenure.

3. A local judge in Admiralty may, with the approval of the Governor in Council, at any time revoke the appointment of a deputy judge. 54-55 V., c. 29, s. 10.

Tenure of office.

12. The Governor in Council may, from time to time appoint, for any district or portion of a district, a surrogate judge or judges; and any such surrogate judge shall have such jurisdiction, powers and authority, and be paid such fees, as are, from time to time, prescribed by general rules or orders.

Surrogate judges.

Tenure of office.

2. A surrogate judge shall hold office during pleasure; and his appointment shall not be determined by the occurrence of a vacancy in the office of the local judge of his district. 54-55 V., c. 29, s. 11.

Oath of office.

13. Every deputy and surrogate judge shall, previously to entering on the duties of office, take, before the judge of the Exchequer Court, or the judge of any superior court, an oath similar in form to that to be taken by a local judge. 54-55 V., c. 29. s. 12.

Registrar, marshal and clerks.

14. The Governor in Council may from time to time appoint for any district or for any registry division of any district a registrar, a marshal and such other officers and clerks as are necessary. 63-64 V., c. 45, s. 2.

As to judges of Vice-Admiralty Courts.

15. Every person who, at the coming into force of the *Colonial Courts of Admiralty Act, 1890,* held in Canada the office of judge of a Vice-Admiralty court, shall, until his death, resignation or removal from such office, or from the office by virtue of which he is such judge of a Vice-Admiralty court, or until an arrangement is made with him under the seventeenth section of the said Act, have and exercise, within the Admiralty district corresponding to the limits of his former jurisdiction as such judge of a court of Vice-Admiralty, all the jurisdiction, powers and authority of a local judge in Admiralty. 54-55 V., c. 29, s. 19.

As to officers of Vice-Admiralty Courts.

16. Every person who, at the coming into force of the *Colonial Court of Admiralty Act, 1890,* was a registrar, marshal or other officer of a Vice-Admiralty court in Canada, shall, during the pleasure of the Governor in Council, and within the Admiralty district corresponding to the limits of the jurisdiction of such Vice-Admiralty court, have and exercise the like office in the Exchequer Court in respect of its Admiralty jurisdiction, and shall, subject to any general rule or order. have the like powers and authority, and perform the like duties, as he might have had or performed, as such registrar, marshal or other officer of a Vice-Admiralty court. 54-55 V., c. 29, s. 21.

Registrar and marshal of Maritime Court of Ontario.

17. The registrar and marshal of the Maritime Court of Ontario holding office respectively on the second day of October, one thousand eight hundred and ninety-one, shall, during the pleasure of the Governor in Council, be the registrar and marshal, respectively, of the Toronto Admiralty district. 54-55 V., c. 29, s. 22.

Procedure.

18. Any suit may be instituted in any registry when,— Where suits may be instituted.

(*a.*) the ship or property, the subject of the suit, is at the time of the institution of the suit within the district or division of such regstry:

(*b.*) the owner or owners of the ship or property, or the owner or owners of the larger number of shares in the ship, or the managing owner, or the ship's husband reside at the time of the institution of the suit within the district or division of such registry;

(*c.*) the port of registry of the ship is within the district or division of such registry; or,

(*d.*) the parties so agree by a memorandum signed by them or their attorneys or agents.

2. When a suit has been instituted in any registry, no further suit shall be instituted in respect of the same matter in any other registry of the Court without the leave of the Judge of the Court, which leave may be granted subject to such terms as to costs and otherwise as he directs. 63-64 V., c. 45, s. 3. Suit pending previous to institution of further suit.

19. When in any district there are more registries than one, all proceedings in any suit shall be carried on in the registry in which the suit is instituted, unless the judge shall otherwise order. When more registries than one in a district.

2. Any party to a suit may, at any stage of such suit by leave of the Court, and subject to such terms as to costs or otherwise as the Court directs, remove such suit pending in any registry to any other registry. 54-55 V., c. 29, s. 15; 63-64 V., c. 45, s. 4. Removal of suit.

20. Any appeal from any final judgment, decree or order of any local judge in Admiralty, may be made,— Appeal.

(*a.*) to the Exchequer Court; or,

(*b.*) subject to the provisions of the Exchequer Court Act regarding appeals, direct to the Supreme Court of Canada.

2. On security for costs being first given, and subject to such provisions as are prescribed by general rules and orders, an appeal, with the leave of the Judge of the Exchequer Court or of any local judge, may be made to the Exchequer Court Interlocutory appeal.

from any interlocutory decree or order of such local judge. 54-55 V., c. 29, s. 14.

Fees, &c.

21. A scale of costs, charges and fees in Admiralty causes shall be prescribed by general rules or orders. 54-55 V., c. 29, s. 16.

Ontario.

22. In the province of Ontario,—

Remedy *in rem*, when it may be enforced.

(*a*.) no right or remedy *in rem* given by this Act only shall be enforced as against any subsequent *bona fide* purchaser or mortgagee of a ship, unless the proceedings for the enforcement thereof are begun within ninety days from the time when such right or remedy accrued:

Effect of prior mortgage.

(*b*.) no right or remedy *in rem* given by this Act, except a right or remedy *in rem* for the wages of seamen and other persons employed on board a ship on any river, lake, canal or inland water, of which the whole or part is in the province of Ontario shall be enforced as against any *bona fide* mortgagee under a mortgage duly executed and registered prior to the first day of October, one thousand eight hundred and seventy-eight. R.S., c. 137, s. 14; 54-55 V., c. 29, s. 23.

Rules and Orders.

Rules of Court.

23. Any rules or orders of court made by the Exchequer Court for regulating the procedure and practice therein, including fees and costs, in the exercise of the jurisdiction conferred by the *Colonial Courts of Admiralty Act, 1890,* and this Act, which require the approval of His Majesty in Council, shall be submitted to the Governor in Council for his approval, and, if approved by him, shall be transmitted to His Majesty in Council for his approval. 54-55 V., c. 29, s. 25.

III. THE ADMIRALTY COURT ACT, 1840.

(3 & 4 Vict., cap. 65.)

An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England.

[*7th August*, 1840.]

WHEREAS the Jurisdiction of the High Court of Admiralty of *England* may be in certain respects advantageously extended, and the Practice thereof improved:" 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, That it shall be lawful for the Dean of the Arches for the Time being to be assistant to and to exercise all the Power, Authority, and Jurisdiction, and to have all the Privileges and Protections, of the Judge of the said High Court of Admiralty, with respect to all Suits and Proceedings in the said Court, and that all such Suits and Proceedings, and all Things relating thereto, brought or taking place before the Dean of the Arches, whether the Judge of the said High Court of Admiralty be or be not at the same Time sitting or transacting the Business of the same Court, and also during any Vacancy of the Office of Judge of the said Court, shall be of the same Force and Effect in all respects as if the same had been brought or had taken place before the Judge himself, and all such Suits and Proceedings shall be entered and registered as having been brought and as having taken place before the Dean of the Arches sitting for the Judge of the High Court of Admiralty.

Dean of Arches to sit for Judge of Court of Admiralty in certain Cases.

II. And be it declared and enacted, That all Persons who now are or at any Time hereafter may be entitled to practise as Advocates in the Court of Arches are and shall be entitled to practise as Advocates in the said High Court of Admiralty; and that all Persons who now are or hereafter may be entitled to act as Surrogates or Proctors in the Court of Arches shall be entitled respectively to practise and act, or to be admitted to practise and act, as the Case may be, as Surrogates and Proctors in the said High Court of Admiralty, according to the Rules and Practice now prevailing and observed or hereafter to

Advocates, Surrogates, and Proctors of Court of Arches to be admitted in the Court of Admiralty.

be made in and by the said High Court of Admiralty touching the Admission and practising of Advocates, Surrogates, and Proctors in the said Court respectively.

Whenever a vessel shall be arrested, or proceeds brought into registry, the court to have jurisdiction over claims of mortgagees.

III. And be it enacted, That after the passing of this Act, whenever any Ship or Vessel shall be under Arrest by Process issuing from the said High Court of Admiralty, or the Proceeds of any Ship or Vessel having been so arrested shall have been brought into and be in the Registry of the said Court, in either such Case the said Court shall have full Jurisdiction to take cognizance of all Claims and Causes of Action of any Person in respect of any Mortgage of such Ship or Vessel, and to decide any Suit instituted by any such Person in respect of any such Claims or Causes of Action respectively.

Court to decide questions of title in all causes of possession, salvage, &c.

IV. And be it enacted, That the said Court of Admiralty shall have Jurisdiction to decide all Questions as to the Title to or Ownership of any Ship or Vessel, or the Proceeds thereof remaining in the Registry, arising in any Cause of Possession, Salvage, Damage, Wages, or Bottomry, which shall be instituted in the said Court after the passing of this Act.

Appeals may be made to the Court of Admiralty on distribution.

V. And be it enacted, That whenever any Award shall have been made by any Justices of the Peace, or by any Person nominated by them, or within the Jurisdiction of the Cinque Ports by any Commissioners, respecting the Amount of Salvage to be paid, or respecting any Claims and Demands for Services or Compensation, which such Justices and Commissioners within their several Jurisdictions are empowered to decide under the Provisions of Two Acts passed in the Second Year of the Reign of King *George* the Fourth, for remedying certain Defects relative to the Adjustment of Salvage, or whenever any Sum shall have been voluntarily paid on any such Account of Salvage, Services, or Compensation, it shall be lawful for any Person interested in the Distribution of the Amount awarded or paid to require Distribution to be forthwith made thereof, and the Person or Persons by whom such Amount shall be awarded, or in the Case of voluntary Payment the Person by whom the same shall have been received, shall forthwith proceed to the Distribution thereof among the several Persons entitled thereunto, to be certified in the Case of an Award under the Hand of the Person or Persons by whom such Amount shall be awarded, and an Account of every such Distribution shall be annexed to the Award, and if any Person interested in the Distribution shall think himself aggrieved on

account of its not being made according to the Award, or otherwise, it shall be lawful for him, within Fourteen Days after the making of the Award, or Payment of the Money, but not afterwards, to take out a Monition from the said Hign Court of Admiralty, requiring any Person being in Possession of any Part of the Amount awarded or voluntarily paid to bring in the same, to abide the Judgment of the Court concerning the Distribution thereof; and in the Case of an Award the Person or Persons by whom the Award shall have been made shall, upon Monition, send without Delay to the said High Court of Admiralty a Copy of the Proceedings before him and them, and of the Award, on unstamped Paper, certified under his or their Hand; and the same shall be admitted by the Court as Evidence, and the Amount awarded or voluntarily paid shall be distributed according to the Judgment of the Court.

VI. And be it enacted, That the High Court of Admiralty shall have Jurisdiction to decide all Claims and Demands whatsoever in the Nature of Salvage for Services rendered to or Damage received by any Ship or Sea-going Vessel, or in the Nature of Towage, or for Necessaries supplied to any Foreign Ship or Sea-going Vessel, and to enforce the Payment thereof, whether such Ship or Vessel may have been within the Body of a County, or upon the High Seas, at the Time when the Services were rendered or Damage received, or Necessaries furnished, in respect of which such Claim is made.

The court, in certain cases, may adjudicate on claims for services and necessaries, although not on the High Seas.

VII. And be it enacted, That in any Suit depending in the said High Court of Admiralty the Court (if it shall think fit) may summon before it and examine or cause to be examined Witnesses by Word of Mouth, and either before or after Examination by Deposition, or before a Commissioner, as herein-after mentioned; and Notes of such Evidence shall be taken down in Writing by the Judge or Registrar, or by such other Person or Persons, and in such Manner, as the Judge of the said Court shall direct.

Evidence may be taken vivâ voce in open court.

VIII. And be it enacted, That the said Court may, if it shall think fit, in any such Suit, issue One or more Special Commissions to some Person, being an Advocate of the said High Court of Admiralty of not less than Seven Years standing, or a Barrister at Law of not less than Seven Years standing, to take Evidence by Word of Mouth, upon Oath, which every such Commissioner is hereby empowered to administer, at such Time or Times, Place or Places, and as to such Fact or

Evidence may be taken vivâ voce before a Commissioner.

Facts, and in such Manner, Order, and Course, and under such Limitations and Restrictions, and to transmit the same to the Registry of the said Court, in such Form and Manner as in and by the Commission shall be directed; and that such Commissioner shall be attended, and the Witnesses shall be examined, cross-examined, and re-examined by the Parties, their Counsel, Proctors, or Agents, if such Parties, or either of them, shall think fit so to do; and such Commission shall, if need be, make a Special Report to the Court touching such Examination, and the Conduct or Absence of any Witness or other Person thereon or relating thereto; and the said High Court of Admiralty is hereby authorized to institute such Proceedings, and make such Order or Orders, upon such Report, as Justice may require, and as may be instituted or made in any Case of Contempt of the said Court.

Attendance of witnesses and production of papers may be compelled by subpœna.

IX. And be it enacted, That it shall be lawful in any Suit depending in the said Court of Admiralty for the Judge of the said Court, or for any such Commissioner appointed in pursuance of this Act, to require the Attendance of any Witnesses, and the Production of any Deeds, Evidences, Books, or Writings, by Writ, to be issued by such Judge or Commissioner in such and the same Form, or as nearly as may be, as that in which a Writ of Subpœna ad testificandum, or of Subpœna duces tecum, is now issued by Her Majesty's Court of Queen's Bench at *Westminster;* and that every Person disobeying any such Writ so to be issued by the said Judge or Commissioner shall be considered as in Contempt of the said High Court of Admiralty, and may be punished for such Contempt in the said Court.

Provisions of 3 & 4 W. 4. c. 42 extended to Court of Admiralty.

X. And be it enacted, That all the Provisions of an Act passed in the Fourth Year of the Reign of His late Majesty, intituled *An Act for the further Amendment of the Law, and better Administration of Justice,* with respect to the Admissibility of the Evidence of Witnesses interested on account of the Verdict or Judgment, shall extend to the Admissibility of Evidence in any Suit pending in the said Court of Admiralty, and the Entry directed by the said Act to be made on the Record of Judgment shall be made upon the Document containing the final Sentence of the said Court, and shall have the like Effect as the Entry on such Record.

Power to direct issues.

XI. And be it enacted, That in any contested Suit depending in the said Court of Admiralty the said Court shall have

Power, if it shall think fit so to do, to direct a Trial by Jury of any Issue or Issues on any Question or Questions of Fact arising in any such Suit, and that the Substance and Form of such Issue or Issues shall be specified by the Judge of the said Court at the Time of directing the same; and if the Parties differ in drawing such Issue or Issues, it shall be referred to the Judge of the said Court to settle the same; and such Trial shall be had before some Judge of Her Majesty's Superior Courts of Common Law at *Westminster*, at the Sittings at Nisi Prius in *London* or *Middlesex*, or before some Judge of Assize at Nisi Prius, as to the said Court shall seem fit.

Costs of issues and commissions to be in the discretion of the court.

XII. And be it enacted, That the Costs of such Issues, or of such Commission as aforesaid, as the Judge of the said High Court of Admiralty shall under this Act direct, shall be paid by such Party or Parties, Person or Persons, and be taxed by the Registrar of the said High Court of Admiralty, in such Manner as the said Judge shall direct, and that Payment of such Costs shall be enforced in the same Manner as Costs between Party and Party may be enforced in other proceedings in the said Court.

Power to direct new trials.

XIII. And be it enacted, That the said Court of Admiralty, upon Application to be made within Three Calendar Months after the Trial of any such Issue by any Party concerned, may grant and direct One or more new Trials of any such Issue, and may order such new Trial to take place in the Manner herein-before directed with regard to the first Trial of such Issue, and may by Order of the same Court direct such Costs to be paid as to the said Court shall seem fit upon any Application for a new Trial, or upon any new Trial, or second or other new Trial, and may direct by whom and to whom and at what Times and in what Manner such Costs shall be paid.

Granting or refusing new trial, matter of appeal.

XIV. And be it enacted, That the granting or refusing to grant an Issue, or a new Trial of any such Issue, may be matter of Appeal to Her Majesty in Council.

Bills of exceptions to be allowed on trials of issues.

XV. And be it enacted, That at the Trial of any Issue directed by the said High Court of Admiralty, either Party shall have all the like Powers, Rights, and Remedies with respect to Bills of Exceptions as Parties impleaded before Justices may have, by virtue of the Statute made in that Behalf in the Thirteenth Year of the Reign of King *Edward* the First.

with respect to Exceptions alleged by them before such Justices, or by any other Statute made in the like Behalf; and every such Bill of Exceptions, sealed with the Seal of the Judge or Judges to whom such Exceptions shall have been made, shall be annexed to the Record of the Trial of the said Issue.

Record of the issue to be transmitted to the Court of Admiralty.

XVI. And be it enacted, That the Record of the said Issue, and of the Verdict therein, shall be transmitted by the Associate or other proper Officer to the Registrar of the said Court of Admiralty; and the Verdict of the Jury upon any such Issue (unless the same shall be set aside) shall be conclusive upon the said Court, and upon all such Persons; and in all further Proceedings in the Cause in which such Fact is found the said Court shall assume such Fact to be as found by the Jury.

Provisions of 2 & 3 W. 4, c. 92, as to Appeals to apply to suits in Court of Admiralty under this Act.

XVII. And be it enacted, That every Person who, if this Act had not been passed, might have appealed and made Suit to Her Majesty in Council against any Proceeding, Decree, or Sentence of the said High Court of Admiralty under or by virtue of an Act passed in the Third Year of the Reign of His late Majesty, intituled *An Act for transferring the Powers of the High Court of Delegates, both in Ecclesiastical and Maritime Causes, to His Majesty in Council*, may in like Manner appeal and make Suits to Her Majesty in Council against the Proceedings, Decrees, and Sentences of the said Court in all Suits instituted and Proceedings had in the same by virtue of the Provisions of this Act, and that all the Provisions of the said last-mentioned Act shall apply to all Appeals and Suits against the Proceedings, Decrees, and Sentences of the said Court in Suits instituted and Proceedings had by virtue of the Provisions of this Act; and such Appeals and Suits shall be proceeded in in the Manner and Form provided by an Act passed in the Fourth Year of the Reign of His late Majesty, intituled *An Act for the better Administration of Justice in His Majesty's Privy Council;* and all the Provisions of the said last-mentioned Act relating to Appeals and Suits from the High Court of Admiralty shall be applied to Appeals and Suits from the said Court in Suits instituted and Proceedings had by virtue of the Provisions of this Act: Provided always, that in any such Appeal the Notes of Evidence taken as herein-before provided by or under the Direction of the Judge of the said High Court of Admiralty shall be certified by the said Judge to Her Majesty in Council, and shall be admitted to prove the oral Evidence given in the said Court of Admiralty, and that no Evidence shall be admitted on such Appeal to contradict

3 & 4 W. 4, c. 41, to apply in same manner.

Certified notes of evidence taken may be admitted on appeal.

the Notes of Evidence so taken and certified as aforesaid, but this Proviso shall not enure to prevent the Judicial Committee of the Privy Council from directing Witnesses to be examined and re-examined upon such Facts as to the Committee shall seem fit, in the Manner directed by the last-recited Act.

XVIII. And be it enacted, That it shall be lawful for the Judge of the said High Court of Admiralty from Time to Time to make such Rules, Orders, and Regulations respecting the Practice and Mode of Proceeding of the said Court, and the Conduct and Duties of the Officers and Practitioners therein, as to him shall seem fit, and from Time to Time to repeal or alter such Rules, Orders, or Regulations: Provided always, that no such Rules, Orders, or Regulations shall be of any Force or Effect until the same shall have been approved by Her Majesty in Council.

Power for Judge of Admiralty tc make Rules of Court.

XIX. And be it declared and enacted, That no Action shall lie against the Judge of the said High Court of Admiralty for Error in Judgment, and that the said Judge shall be entitled to and have all Privileges and Protections in the Exercise of his Jurisdiction as Judge of the said Court which by Law appertain to the Judges fo Her Majesty's Superior Courts of Common Law in the Exercise of their several Jurisdictions.

Protection of the Judge of the Court of Admiralty.

XX. And be it enacted, That the Keeper for the Time being of every Common Goal or Prison shall be bound to receive and take into his Custody all Persons who shall be committed thereunto by the said Court of Admiralty, or who shall be committed thereunto by any Coroner appointed by the Judge of the said Court of Admiralty, upon any Inquest taken within or upon the High Seas adjacent to the County or other Jurisdiction to which such Gaol or Priosn belongs; and every Keeper of any Gaol or Prison who shall refuse to receive into his Custody any Person so committed, or wilfully or carelessly suffer such Person to escape and go at large without lawful Warrant, shall be liable to the like Penalties and Consequences as if such Person had been committed to his Custody by any other lawful Authority.

Gaolers to receive prisoners committed by the Court of Admiralty or by Admiralty Coroners.

XXI. And be it enacted, That it shall be lawful for the Judge of the said High Court of Admiralty to order the Discharge of any Person who shall be in Custody for Contempt of the said Court, for any Cause other than for Nonpay-

Prisoners in contempt may be discharged.

ment of Money, on such Conditions as to the Judge shall seem just: Provided always, that the Order for such Discharge shall not be deemed to have purged the original Contempt in case the Conditions on which such Order shall be made be not fulfilled.

Jurisdiction to try questions concerning booty of war.

XXII. And be it enacted, That the said High Court of Admiralty shall have Jurisdiction to decide all Matters and Questions concerning Booty of War, or the Distribution thereof, which it shall please Her Majesty, Her Heirs and Successors, by the Advice of Her and Their Privy Council, to refer to the Judgment of the said Court; and in all Matters so referred the Court shall proceed as in Cases of Prize of War, and the Judgment of the Court therein shall be binding upon all Parties concerned.

Jurisdiction of Courts of Law and Equity not taken away.

XXIII. Provided always, and be it enacted, That nothing herein contained shall be deemed to preclude any of Her Majesty's Courts of Law or Equity now having Jurisdiction over the several Subject Matters and Causes of Action hereinbefore mentioned from ocntinuing to exercise such Jurisdiction as fully as if this Act had not been passed.

Act may be amended this session.

XXIV. And be it enacted, That this Act may be repealed or amended by any Act to be passed in this Session of Parliament.

IV. THE ADMIRALTY COURT ACT, 1861.

(24 Vict., cap. 10).

An Act to extend the Jurisdiction and improve the Practice of the High Court of Admiralty.

[*17th May,* 1861.]

WHEREAS it is expedient to extend the Jurisdiction and improve the Practice of the High Court of Admiralty of *England*": Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Short title. 1. This Act may be cited for all Purposes as "The Admiralty Court Act, 1861."

Interpretation of terms. 2. In the Interpretation and for the Purposes of this Act (if not inconsistent with the Context or Subject) the following Terms shall have the respective Meanings herein-after assigned to them; that is to say,

"Ship" shall include any Description of Vessel used in Navigation not propelled by Oars:

"Cause" shall include any Cause, Suit, Action, or other Proceeding in the Court of Admiralty.

Commencement of Act. 3. This Act shall come into operation on the First Day of *June* One thousand eight hundred and sixty-one.

As to claims for building, equipping, or repairing of ships. 4. The High Court of Admiralty shall have Jurisdiction over any Claim for the building, equipping, or repairing of any Ship, if at the Time of the Institution of the Cause the Ship or the Proceeds thereof are under Arrest of the Court.

As to claims for necessaries. 5. The High Court of Admiralty shall have Jurisdiction over any Claim for Necessaries supplied to any Ship elsewhere than in the Port to which the Ship belongs, unless it is shown to the Satisfaction of the Court that at the Time of the Institution of the Cause any Owner or Part Owner of the Ship is domiciled in *England* or *Wales*: Provided always, that if in any such Cause the Plaintiff do not recover Twenty Pounds he shall not be entitled to any Costs, Charges, or Expenses incurred by him therein, unless the Judge shall certify that the Cause was a fit one to be tried in the said Court.

As to claims for damage to cargo imported.

6. The High Court of Admiralty shall have Jurisdiction over any Claim by the Owner or Consignee or Assignee of any Bill of Lading of any Goods carried into any Port in *England* or *Wales* in any Ship, for Damage done to the Goods or any Part thereof by the Negligence or Misconduct of or for any Breach of Duty or Breach of Contract on the Part of the Owner, Master, or Crew of the Ship, unless it is shown to the Satisfaction of the Court that at the Time of the Institution of the Cause any Owner or Part Owner of the Ship is domiciled in *England* or *Wales*: Provided always, that if in any such Cause the Plaintiff do not recover Twenty Pounds he shall not be entitled to any Costs, Charges, or Expenses incurred by him therein, unless the Judge shall certify that the Cause was a fit one to be tried in the said Court.

As to claims for damage by any ship.

7. The High Court of Admiralty shall have Jurisdiction over any Claim for Damage done by any Ship.

High Court of Admiralty to decide questions as to ownership, &c., of ships.

8. The High Court of Admiralty shall have jurisdiction to decide all Questions arising between the Co-owners, or any of them, touching the Ownership, Possession, Employment, and Earnings of any Ship registered at any Port in *England* or *Wales*, or any Share thereof, and may settle all Accounts outstanding and unsettled between the Parties in relation thereto, and may direct the said Ship or any Share thereof to be sold, and may make such Order in the Premises as to it shall seem fit.

Extending 17 & 18 Vict. c. 104, as to claims for salvage of life.

9. All the Provisions of "The Merchant Shipping Act, 1854," in regard to Salvage of Life from any Ship or Boat within the Limits of the United Kingdom, shall be extended to the Salvage of Life from any *British* Ship or Boat, wheresoever the Services may have been rendered, and from any Foreign Ship or Boat, where the Services have been rendered either wholly or in part in *British* Waters.

As to claims for wages and for disbursements by master of a ship.

10. The High Court of Admiralty shall have Jurisdiction over any Claim by a Seaman of any Ship for Wages earned by him on board the Ship, whether the same be due under a special Contract or otherwise, and also over any Claim by the Master of any Ship for Wages earned by him on board the Ship, and for Disbursements made by him on account of the Ship: Provided always, that if in any such Cause the Plaintiff do not recover Fifty Pounds, he shall not be entitled to any Costs, Charges or Expenses incurred by him therein, unless the Judge shall certify that the Cause was a fit one to be tried in the said Court.

11. The High Court of Admiralty shall have Jurisdiction over any Claim in respect of any Mortgage duly registered according to the Provisions of "The Merchant Shipping Act, 1854," whether the Ship or the Proceeds thereof be under Arrest of the said Court or not.

3 & 4 Vict., c. 65, in regard to mortgages;

12. The High Court of Admiralty shall have the same Powers over any *British* Ship, or any Share therein, as are conferred upon the High Court of Chancery in *England* by the Sixty-second, Sixty-third, Sixty-fourth, and Sixty-fifth Sections of "The Merchant Shipping Act, 1854."

17 & 18 Vict., c. 104, ss. 62-65;

13. Whenever any Ship or Vessel, or the Proceeds thereof, are under Arrest of the High Court of Admiralty, the said Court shall have the same Powers as are conferred upon the High Court of Chancery in *England* by the Ninth Part of "The Merchant Shipping Act, 1854."

And Part 9 of 17 & 18 Vict., c. 104, extended to Court of Admiralty.

14. The High Court of Admiralty shall be a Court of Record for all Intents and Purposes.

Court to be a Court of Record.

15. All Decrees and Orders of the High Court of Admiralty, whereby any Sum of Money, or any Costs, Charges, or Expenses, shall be payable to any Person, shall have the same Effect as Judgments in the Superior Courts of Common Law, and the Persons to whom any such Monies, or Costs, Charges, or Expenses, shall be payable, shall be deemed Judgment Creditors, and all Powers of enforcing Judgments possessed by the Superior Courts of Common Law, or any Judge thereof, with respect to Matters depending in the same Courts, as well against the Ships and Goods arrested as against the Person of the Judgment Debtor, shall be possessed by the said Court of Admiralty with respect to Matters therein depending; and all Remedies at Common Law possessed by judgment creditors shall be in like manner possessed by Persons to whom any Monies, Costs, Charges, or Expenses are by such Orders or Decrees of the said Court of Admiralty directed to be paid.

Decrees and orders of Court of Admiralty to have effect of judgments at Common Law.

16. If any Claim shall be made to any Goods or Chattels taken in Execution under any Process of the High Court of Admiralty, or in respect of the Seizure thereof, or any Act or Matter connected therewith, or in respect of the Proceeds or Value of any such Goods or Chattels, by any Landlord for Rent, or by any Person not being the Party against whom the Process has issued, the Registrar of the said Court may, upon Application of the Officer charged with the Execution of the

As to claims to goods taken in execution.

Process, whether before or after any Action brought against such Officer, issue a Summons calling before the said Court both the Party issuing such Process and the Party making the Claim, and thereupon any Action which shall have been brought in any of Her Majesty's Superior Courts of Record, or in any local or inferior Court, in respect of such Claim, Seizure, Act, or Matter as aforesaid, shall be stayed, and the Court in which such Action shall have been brought, or any Judge thereof, on Proof of the Issue of such Summons, and that the Goods and Chattels were so taken in Execution, may order the Party bringing the Action to pay the Costs of all Proceedings had upon the Action after Issue of the Summons out of the said Admiralty Court, and the Judge of the said Admiralty Court shall adjudicate upon the Claim, and make such Order between the Parties in respect thereof and of the Costs of the Proceedings, as to him shall seem fit, and such Order shall be enforced in like manner as any Order made in any suit brought in the said Court. Where any such Claim shall be made as aforesaid the Claimant may deposit with the Officer charged with the Execution of the Process either the Amount or Value of the Goods claimed, the Value to be fixed by Appraisement in case of Dispute, to be by the Officer paid into Court to abide the Decision of the Judge upon the Claim, or the Sum which the Officer shall be allowed to charge as Costs for keeping Possession of the Goods until such Decision can be obtained, and in default of the Claimant so doing the Officer may sell the Goods as if no such Claim had been made, and shall pay into Court the Proceeds of the Sale, to abide the Decision of the Judge.

Powers of Superior Courts extended to Court of Admiralty.

17. The Judge of the High Court of Admiralty shall have all such Powers as are possessed by any of the Superior Courts of Common Law or any Judge thereof to compel either Party in any Cause or Matter to answer Interrogatories, and to enforce the Production, Inspection, and Delivery of Copies of any Document in his Possession or Power.

Party in Court of Admiralty may apply for an order for inspection by Trinity Masters.

18. Any Party in a Cause in the High Court of Admiralty shall be at liberty to apply to the said Court for an order for the Inspection by the Trinity Masters or others appointed for the Trial of the said Cause, or by the Party himself or his Witnesses, of any Ship or other Personal or Real Property, the Inspection of which may be material to the Issue of the Cause, and the Court may make such Order in respect of the Costs arising thereout as to it shall seem fit.

19. Any Party in a Cause in the High Court of Admiralty may call on any other Party in the Cause by Notice in Writing to admit any Document, saving all just Exceptions, and in case of Refusal or Neglect to admit, the Costs of proving the Document shall be paid by the Party so neglecting or refusing, whatever the Result of the Cause may be, unless at the Trial the Judge shall certify that the Refusal to admit was reasonable.

Admission of documents.

20. Whenever it shall be made to appear to the Judge of the High Court of Admiralty that reasonable Efforts have been made to effect personal Service of any Citation, Monition, or other Process issued under Seal of the said Court, and either that the same has come to the Knowledge of the Party thereby cited or monished, or that he wilfully evades Service of the same, and has not appeared thereto, the said Judge may order that the Party on whose Behalf the Citation, Monition, or other Process was issued be at liberty to proceed as if personal Service had been effected, subject to such Conditions as to the Judge may seem fit, and all Proceedings thereon shall be as effectual as if personal Service of such Citation, Monition, or other Process had been effected.

Power to Court of Admiralty, when personal service of citation has not been effected, to order parties to proceed.

21. The Service in any Part of *Great Britain* or *Ireland* of any Writ of Subpœna ad testificandum or Subpœna duces tecum, issued under Seal of the High Court of Admiralty, shall be as effectual as if the same had been served in *England* or *Wales.*

As to the service of subpœna out of England and Wales.

22. Any new Writ or other Process necessary or expedient for giving Effect to any of the Provisions of this Act may be issued from the High Court of Admiralty in such Form as the Judge of the said Court shall from Time to Time direct.

Power to issue new writs or other process.

23. All the Powers possessed by any of the Superior Courts of Common Law or any Judge thereof, under the Common Law Procedure Act, 1854, and otherwise, with regard to References to Arbitration, Proceedings thereon, and the enforcing of Awards of Arbitrators, shall be possessed by the Judge of the High Court of Admiralty in all Causes and Matters depending in the said Court, and the Registrar of the said Court of Admiralty shall possess as to such Matters the same Powers as are possessed by the Masters of the said Superior Courts of Common Law in relation thereto.

Judge and Registrar to have same power as to arbitration as Judges and Masters at Common Law.

24. The Registrar of the High Court of Admiralty shall have the same Powers under the Fifteenth Section of the Mer-

17 & 18 Vict. c. 104, s. 15

extended to Registrar of Court of Admiralty.

chant Shipping Act, 1854, as are by the said Section conferred on the Masters of Her Majesty's Court of Queen's Bench in *England* and *Ireland*.

Powers of Registrar and of Deputy or Assistant Registrar.

25. The Registrar of the High Court of Admiralty may exercise, with reference to Causes and Matters in the said Court, the same Powers as any Surrogate of the Judge of the said Court sitting in Chambers might or could have heretofore lawfully exercised; and all Powers and Authorities by this or any other Act conferred upon or vested in the Registrar of the said High Court of Admiralty may be exercised by any Deputy or Assistant Registrar of the said Court.

False oath or affirmation deemed perjury.

26. The Registrar of the said Court of Admiralty shall have Power to administer Oaths in relation to any Cause or Matter depending in the said Court; and any Person who shall wilfully depose or affirm falsely in any Proceeding before the Registrar or before any Deputy or Assistant Registrar of the said Court, or before any Person authorized to administer Oaths in the said Court, shall be deemed to be guilty of Perjury, and shall be liable to all the Pains and Penalties attaching to wilful and corrupt Perjury.

Appointment of Registrar and Deputy, &c.

27. Any Advocate, Barrister-at-Law, Proctor, Attorney, or Solicitor of Ten Years' Standing may be appointed Registrar or Assistant or Deputy Registrar of the said Court.

Appointment of examiners.

28. Any Advocate, Barrister-at-Law, Proctor, Attorney, or Solicitor may be appointed an Examiner of the High Court of Admiralty.

Stamp duty not payable on subsequent admissions of proctors or solicitors.

29. Any Person who shall have paid on his Admission in any Court as a Proctor, Solicitor, or Attorney the full Stamp Duty of Twenty-five Pounds, and who has been or shall hereafter be admitted a Proctor, Solicitor, or Attorney, (if in other respects entitled to be so admitted), shall be liable to no further Stamp Duty in respect of such subsequent Admission.

Proctor may act as agent of solicitors.

30. Any Proctor of the High Court of Admiralty may act as Agent of any Attorney or Solicitor, and allow him to participate in the Profits of and incident to any Cause or Matter depending in or connected with the said Court; and nothing contained in the Act of the Fifty-fifth Year of the Reign of King *George* the Third, Chapter One hundred and sixty, shall be construed to extend to prevent any Proctor from so doing, or to render him liable to any Penalty in respect thereof.

2 Hen. 4, c. 11, repealed.

31. The Act passed in the Second Year of the Reign of King *Henry* the Fourth, intituled *A Remedy for him who is*

wrongfully pursued in the Court of Admiralty, is hereby repealed.

32. Any Party aggrieved by any Order or Decree of the Judge of the said Court of Admiralty, whether made *ex parte* or otherwise, may, with the Permission of the Judge, appeal therefrom to Her Majesty in Council, as fully and effectually as from any final Decree or Sentence of the said Court.

Power of appeal in interlocutory matters.

33. In any Cause in the High Court of Admiralty Bail may be taken to answer the Judgment as well of the said Court as of the Court of Appeal, and the said High Court of Admiralty may withhold the Release of any Property under its Arrest until such Bail has been given; and in any Appeal from any Decree or Order of the High Court of Admiralty the Court of Appeal may make and enforce its Order against the Surety of Sureties who may have signed any such Bail Bond in the same Manner as if the Bail had been given in the Court of Appeal.

Bail given in the Court of Admiralty good in the Court of appeal.

34. The High Court of Admiralty may, on the Application of the Defendant in any Cause of Damage, and on his instituting a Cross Cause for the Damage sustained by him in respect of the same Collision, direct that the Principal Cause and the Cross Cause be heard at the same Time and upon the same Evidence; and if in the Principal Cause the Ship of the Defendant has been arrested or Security given by him to answer Judgment, and in the Cross Cause the Ship of the Plaintiff cannot be arrested, and Security has not been given to answer Judgment therein, the Court may, if it think fit, suspend the Proceedings in the Principal Cause, until Security has been given to answer Judgment in the Cross Cause.

As to the hearing of causes and cross causes.

35. The Jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by Proceedings in rem or by Proceedings in personam.

Jurisdiction of the Court

V. REGULATIONS FOR PREVENTING COLLISIONS AT SEA.

ORDER IN COUNCIL.

At the Government House at Ottawa, Tuesday, the 9th day of February, 1897.

Present: His Excellency the Governor-General in Council.

Whereas, by the fourteenth section of the Act intituled "An Act respecting navigation of Canadian Waters," being chapter 79 of the Revised Statutes of Canada, it is enacted, that if Her Majesty, by Order in Council, annuls or modifies any of the regulations for preventing collisions on navigable waters which, by order of Her Majesty in Council of the fourteenth day of August, 1879, were substituted for those theretofore in force for like purposes in the United Kingdom, or makes new regulations in addition thereto, or in substitution therefor, the Governor in Council may from time to time make corresponding charges, as respects Canadian waters, in the regulations contained in the second section of the Act hereinbefore quoted.

And whereas, by an order of Her Majesty in Council, dated the 27th day of November, 1896, the existing regulations for preventing collisions at sea were annulled, and new regulations submitted therefor:

His Excellency, under the provisions of the fourteenth section of the said Act, chapter 79 of the Revised Statutes, and by and with the advice of the Queen's Privy Council for Canada, is pleased to order that the following Rules and Regulations, which are in conformity with the regulations approved by the order of Her Majesty in Council of the 27th of November, 1896, be substituted for the existing second section of the said Act, chapter 79 of the Revised Statutes; and that the said new Rules and Regulations shall come into operation on and from the first day of July, 1897:

And His Excellency doth further order that the Minister of Marine and Fisheries do bring the provisions of the sections thus amended to the notice of the owners and masters of Canadian vessels.

Regulations for Preventing Collisions and for Distress Signals.

(2) The following rules with respect to lights, for signals, distress signals, steering and sailing, and rafts, shall apply to all rivers, lakes and other navigable waters within Canada, or within the jurisdiction of the Parliament thereof, that is to say:—

Preliminary.

In the following rules every steam vessel which is under sail and not under steam is to be considered a sailing vessel, and every vessel under steam, whether under sail or not, is to be considered a steam vessel.

The word "steam vessel" shall include any vessel propelled by machinery.

A vessel is "under way" within the meaning of these rules, when she is not at anchor, or made fast to the shore or ground.

Rules Concerning Lights, etc.

The word "visible" in these rules, when applied to lights, shall mean visible on a dark night with clear atmosphere.

Article 1. The rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed lights shall be exhibited.

Article 2. A steam vessel when under way shall carry:

(*a.*) On or in front of the foremast, or if a vessel without a foremast, then in the forepart of the vessel, at a height above the hull of not less than 20 feet, and if the breadth of the vessel exceeds 20 feet, then at a height above the hull not less than such breadth, so, however, that the light need not be carried at a greater height above the hull than 40 feet, a bright white light, so constructed as to show an unbroken light over an arc of the horizon of 20 points of the compass, so fixed as to throw the light 10 points on each side of the vessel, viz., from right ahead to 2 points abaft the beam on either side, and of such a character as to be visible at a distance of at least 5 miles.

(*b.*) On the starboard side a green light, so constructed as to show an unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw the light from right

ahead to 2 points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least 2 miles.

(*c.*) On the port side, a red light so constructed as to show an unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw the light from right ahead to 2 points abaft the beam on the port side, and of such a character as to be visible at a distance of at least 2 miles.

(*d.*) The said green and red side lights shall be fitted with inboard screens projecting at least 3 feet forward from the light, so as to prevent these lights from being seen across the bow.

(*e.*) A steam vessel when under way may carry an additional white light similar in construction to the light mentioned in subdivision (*a*). These two lghts shall be so placed in line with the keel that one shall be at least 15 feet higher than the other, and in such a position with reference to each other that the lower light shall be forward of the upper one. The vertical distance between these lights shall be less than the horizontal distance.

Article 3. A steam vessel when towing another vessel shall, in addition to her side-lights, carry two bright white lights in a vertical line one over the other, not less than 6 feet apart, and when towing more than one vessel shall carry an additional bright white light 6 feet above or below such lights, if the length of the tow, measuring from the stern of the towing vessel to the stern of the last vessel towed, exceeds 600 feet. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light mentioned in article 2 (*a*), except the additional light, which may be carried at a height of not less than 14 feet above the hull.

Such steam vessel may carry a small white light abaft the funnel or aftermast for the vessel towed to steer by, but such light shall not be visible forward of the beam.

Article 4 (*a.*). A vessel which from any accident is not under command shall carry at the same height as the white light mentioned in article 2 (*a*), where they can best be seen, and, if a steam vessel, in lieu of that light, two red lights, in a vertical line one over the other, not less than 6 feet apart, and of such a character as to be visible all around the horizon at a distance of at least 2 miles; and shall by day carry in a

vertical line one over the other not less than 6 feet apart, where they can best be seen, two black balls or shapes each 2 feet in diameter.

(*b.*) A vessel employed in laying or in picking up a telegraph cable shall carry in the same position as the white light mentioned in article 2 (*a*), and if a steam vessel, in lieu of that light, three lights in a vertical line one over the other, not less than 6 feet apart. The highest and lowest of these lights shall be red, and the middle light shall be white, and they shall be of such a character as to be visible all round the horizon, at a distance of at least 2 miles. By day she shall carry in a vertical line one over the other, not less than 6 feet apart, where they can best be seen, three shapes not less than 2 feet in diameter, of which the highest and lowest shall be globular in shape and red in colour, and the middle one diamond in shape and white.

(*c.*) The vessel referred to in this article when not making way through the water, shall not carry sidelights, but when making way shall carry them.

(*d.*) The lights and shapes required to be shown by this article are to be taken by other vessels as signals that the vessel showing them is not under command, and cannot therefore get out of the way.

These signals are not signals of vessels in distress and requiring assistance. Such signals are contained in article 31.

Article 5. A sailing vessel under way, and any vessel being towed, shall carry the same lights as are prescribed by article 2 for a steam vessel under way, with the exception of the white lights mentioned therein, which they shall never carry.

Article 6. Whenever, as in the case of small vessels under way during bad weather, the green and red sidelights cannot be fixed, these lights shall be kept at hand lighted and ready for use; and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision in such manner as to make them most visible, and so that the green light shall not be seen on the port side nor the red light on the starboard side, nor, if practicable, more than 2 points abaft the beam on their respective sides.

To make the use of these portable lights more certain and easy, the lanterns containing them shall each be painted outside with the colour of the light they respectively contain, and shall be provided with proper screens.

Article 7. Steam vessels of less than 40, and vessels under oars or sails of less than 20 ton gross tonnage respectively, and rowing boats, when under way, shall not be obliged to carry the lights mentioned in article 2 (*a*), (*b*) and (*c*), but if they do not carry them, they shall be provided with the following lights:—

1. Steam vessels of less than 40 tons shall carry:—

(*a*) In the forepart of the vessel, or on or in front of the funnel, where it can best be seen, and at a height above the gunwale of not less than 9 feet, a bright white light, constructed and fixed as prescribed in article 2 (*a*), and of such a character as to be visible at a distance of at least 2 miles.

(*b*.) Green and red side-lights constructed and fixed as prescribed in article 2 (*b*) and (*c*), and of such a character as to be visible at a distance of at least one mile, or a combined lantern showing a green light and a red light from righ ahead to 2 points abaft the beam on their respective sides. Such lantern shall be carried not less than 3 feet below the white light.

2. Small steamboats, such as are carried by sea-going vessels, may carry the white light at a less height than 9 feet above the gunwale, but it shall be carried above the combined lantern, mentioned in subdivision 1 (*b*).

3. Vessels under oars or sails, of less than 20 tons, shall have ready at hand a lantern with a green glass on one side and a red glass on the other, which, on the approach of or to the other vessels, shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.

4. Rowing boats, whether under oars or sails, shall have ready at hand a lantern showing a white light, which shall be temporarily exhibited in sufficient time to prevent collision.

The vessels referred to in this article shall not be obliged to carry the lights prescribed by article (*a*) and article 11, last paragraph.

Article 8. Pilot vessels, when engaged on their station on pilotage duty, shall not show the lights required for other vessels, but shall carry a white light at the masthead, visible all round the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed 15 minutes. On the near approach of or to other vessels they shall have their side-lights lighted, ready for use, and shall flash or show them at short intervals, to indicate the direction

in which they are heading, but the green light shall not be shown on the port side, nor the red light on the starboard side.

A pilot vessel of such a class as to be obliged to go alongside of a vessel to put a pilot on board, may show a white light instead of carrying it at the masthead, and may, instead of the coloured lights above mentioned, have at hand ready for use a lantern with a green glass on one side and a red glass on the other, to be used as prescribed above.

Pilot vessels when not engaged on their station on pilotage duty, shall carry lights similar to those of other vessels of their tonnage.

Article 9.[1]

Article 10. A vessel which is being overtaken by another shall show from her stern to such last mentioned vessel a white light or a flare-up light.

The white light required to be shown by this article may be fixed and carried in a lantern, but in such case the lantern shall be so constructed, fitted and screened that it shall throw an unbroken light over an arc of the horizon of 12 points of the compass, viz., for 6 points from right aft on each side of the vessel so as to be visible at a distance of at least one mile. Such light shall be carried as nearly as practicable on the same level as the side-lights.

Article 11. A vessel under 150 feet in length, when at anchor, shall carry forward where it can best be seen, but at a height not exceeding 20 feet above the hull, a white light in a lantern so constructed as to show a clear, uniform and unbroken light visible all round the horizon at a distance of at least one mile.

A vessel of 150 feet or upwards in length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than 20 and not exceeding 40 feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall not be less than 15 feet lower than the forward light, another such light.

The length of a vessel shall be deemed to be the length appearing on her certificate of registry.

A vessel aground in or near a fairway shall carry the above light or lights, and the two red lights prescribed by article 4 (*a*).

[1] Amended by Order in Council of June 28, 1909 (see p. 18).

Article 12. Every vessel may, if necessary, in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up or use any detonating signal that cannot be mistaken for a distress signal.

Article 13. Nothing in these rules shall interfere with the operation of any special rules made by the government of any nation with respect to additional station and signal lights for two or more ships of war or for vessels sailing under convoy, or with the exhibition or recognition signals adopted by shipowners, which have been authorized by their respective governments and duly registered and published.

Article 14. A steam vessel proceeding under sail only, but having her funnel up, shall carry in day time forward, where it can best be seen, one black ball or shape 2 feet in diameter.

Sound Signals for Fog, etc.

Article 15. All signals prescribed by this article for vessels under way shall be given:

1. By "steam vessels," on the whistle or siren.

2. By "sailing vessels and vessels towed," on the fog horn.

The words "prolonged blast" used in this article, shall mean a blast of from 4 to 6 seconds duration.

A steam vessel shall be provided with an efficient whistle or siren, sounded by steam or some substitute for steam, so placed that the sound may not be intercepted by any obstruction, and with an efficient fog horn, to be sounded by mechanical means, and also with an efficient bell. A sailing vessel of 20 tons gross tonnage or upwards shall be provided with a similar fog horn and bell. In fog, mist, falling snow, or heavy rain storms, whether by day or night, the signals described in this article shall be used as follows:—

(*a.*) A steam vessel having way upon her shall sound, at intervals of not more than 2 minutes, a prolonged blast.

(*b.*) A steam vessel under way, but stopped and having no way upon her, shall sound at intervals of not more than 2 minutes, two prolonged blasts, with an interval of about one second between them.

(*c.*) A sailing vessel under way shall sound, at intervals of not more than one minute, when on the starboard tack, one blast, when on the port tack, two blasts in succession, and when with the wind abaft the beam, three blasts in succession.

(*d.*) A vessel when at anchor shall, at intervals of not more than one minute, ring the bell rapidly for about 5 seconds.

(*e.*) A vessel, when towing a vessel employed in laying or in picking up a telegraph cable, and a vessel under way, which is unable to get out of the way of an approaching vessel through being not under command, or unable to manœuvre as required by these rules, shall, instead of the signals prescribed in subdivisions (*a*) and (*c*) of this article, at intervals of not more than 2 minutes, sound three blasts in succession, viz., one prolonged blast, followed by two short blasts. A vessel towed may give this signal and she shall not give any other.

Sailing vessels and boats of less than 20 tons gross tonnage shall not be obliged to give the above mentioned signals, but if they do not, they shall make some other efficient sound-signal at intervals of not more than one minute.

Speed of Ships to be Moderate in Fog, etc.

Article 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

STEERING AND SAILING RULES.

Preliminary—Risk of Collision.

Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk shall be deemed to exist.

Article 17. When two sailing vessels are approaching one another so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, viz.:—

(*a.*) A vessel which is running free shall keep out of the way of a vessel which is close hauled.

(*b.*) A vessel which is close hauled on the port tack shall keep out of the way of a vessel which is close hauled on the starboard tack.

(*c*) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(*d*) When both are running free, with the wind on the same side, the vessel which is to the windward shall keep out of the way of the vessel which is to leeward.

(*e*) A vessel which has the wind aft shall keep out of the way of the other vessel.

Article 18. When two steam vessels are meeting end on, or nearly end on, so as to involve risks of collision, each shall alter her course to starboard so that each may pass on the port side of the other.

This article only applies to cases where vessels are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two vessels which must, if both keep on their respective courses, pass clear of each other.

The only cases to which it does apply are when each of the two vessels is end on, or nearly end on, to the other; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own; and by night, to cases in which each vessel is in such a position as to see both the side-lights of the other.

It does not apply, by day, to cases in which a vessel sees another ahead crossing her own course; or by night, to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

Article 19. When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other.

Article 20. When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

Article 21. Where by any of these rules one or two vessels is to keep out of the way, the other shall keep her course and speed.

NOTE.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot

be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision.

(See articles 27 and 29.)

Article 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

Article 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel, shall, on approaching her, if necessary, slacken her speed or stop or reverse.

Article 24.—Notwithstanding anything contained in these rules, every vessel, overtaking any other, shall keep out of the way of the overtaken vessel.

Every vessel coming up with another vessel from any direction more than 2 points abaft her beam, *i.e.,* in such a position, in reference to the vessel which she is overtaking, that at night she would be unable to see either of that vessel's side-lights, shall be deemed to be an overtaking vessel, and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

As by day the overtaking vessel cannot always know with certainty whether she is forward of or abaft this direction from the other vessel, she should, if in doubt, assume that she is an overtaking vessel and keep out of the way.

Article 25. In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

Article 26. Sailing vessels under way shall keep out of the way of sailing vessels or boats fishing with nets, or lines, or trawls. This rule shall not give to any vessel or boat engaged in fishing the right of obstructing a fairway used by vessels other than fishing vessels or boats.

Article 27. In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

Sound Signals for Vessels in Sight of One Another.

Article 28. The word "short blast" used in this article shall mean a blast of about one second's duration.

When vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren, viz.:—

One short blast to mean: "I am directing my course to starboard."

Two short blasts to mean: "I am directing my course to port."

Three short blasts to mean: "My engines are going full speed astern."

No Vessel under any Circumstances to Neglect Proper Precautions.

Article 29. Nothing in these rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Reservation of Rules for Harbours and Inland Navigation.

Article 30. Nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbour, river or inland waters.

Distress Signals.

Article 31. When a vessel is in distress and requires assistance from other vessels or from the shore, the following shall be the signal to be used or displaced by her, either together or separately, viz.:—

In the day time—

1. A gun or other explosive signal fired at intervals of about a minute;
2. The International Code signal of distress indicated by N.C.;

3. The distant signal, consisting of a square flag, having either above or below it a ball or anything resembling a ball;
4. A continuous sounding with any fog-signal apparatus.

At night—

1. A gun or other explosive signal fired at intervals of about a minute.
2. Flames on the vessel (as from a burning tar-barrel, oil-barrel, &c.);
3. Rockets or shells, throwing stars of any colour or description, fired one at a time, at short intervals;
4. A continuous sounding with any fog-signal apparatus.

Rafts and Harbour of Sorel.

Article 32. Rafts, while drifting or at anchor on any of the waters of Canada, shall have a bright fire kept burning on them from sunset to sunrise. Whenever any raft is going in the same direction as another which is ahead, the one shall be so navigated as not to come within 20 yards of the other, and every vessel meeting or overtaking a raft shall keep out of the way thereof.

Rafts shall be so navigated and anchored as not to cause any unnecessary impediment or obstruction to vessels navigating the same waters.

Article 33. Unless it is otherwise directed by the Harbour Commissioners of Montreal, ships and vessels entering or leaving the harbour of Sorel shall take the port side, anything in the preceding articles to the contrary notwithstanding.

Article 34. The rules of navigation contained in articles 32 and 33 shall be subject to the provisions contained in articles 27 and 29.

JOHN J. MCGEE,
Clerk of the Privy Council.

AT THE GOVERNMENT HOUSE AT OTTAWA.

Monday, the 28th day of June, 1909.

Present: His Excellency the Administrator in Council.

Whereas by an order of His Majesty in Council, dated the 4th day of April, 1906, His Majesty was pleased to amend article 9, regarding lights and signals of fishing vessels and boats, of the regulations for the prevention of collisions at sea and as to signals of distress;

And whereas, it is desirable that such provisions of the said article 9 as are applicable should be incorporated in the regulations for preventing collisions in Canadian waters;

Therefore His Excellency in Council is pleased, under the provisions of Part XIV. of the Canada Shipping Act, chapter 113, Revised Statutes of Canada, 1906, to order and direct that article number 9 of the regulations for preventing collisions, as established by Order in Council of the 9th day of February, 1897, shall be and the safe is hereby rescinded, and the annexed article number 9, containing those provisions of the Imperial regulations in that regard as are applicable to Canadian waters, substituted therefor;

And His Excellency in Council is further pleased to order and declare, with a view to removing any doubt as to the waters in which the regulations for preventing collisions and as to signals of distress, annexed to the Order in Council of the 9th February, 1897, and as herein amended are in operation, that the said regulations shall apply to all the navigable waters within Canada or within the jurisdiction of the Parliament thereof, except the waters of Lakes Superior and Huron, Georgian Bay, Lakes Erie and Ontario, their connecting and tributary waters, and the St. Lawrence river as far east as the lower exit of the Lachine canal and the Victoria bridge at Montreal.

RODOLPHE BOUDREAU,
Clerk of the Privy Council.

Regulations for Preventing Collisions of Ships.

Article 9. Fishing vessels and fishing boats, when under way and when not required by this article to carry or show the lights hereinafter specified, shall carry or show the lights prescribed for vessels of their tonnage under way.

(*a.*) Open boats, by which it is to be understood boats not protected from the entry of sea water by means of a continuous deck, when engaged in any fishing at night with outlying tackle extending not more than 150 feet horizontally from the boat into the seaway, shall carry one all-round white light.

Open boats when fishing at night, with outlying tackle extending more than 150 feet horizontally from the boat into the seaway, shall carry one all-round white light, and in addition, on approaching or being approached by other vessels, shall show a second white light at least 3 feet below the first light and at a horizontal distance of at least 5 feet away from it in the direction in which the outlying tackle is attached.

(*b.*) Vessels and boats, except open boats as defined in subdivision (*a*), when fishing with drift-nets, shall, so long as the nets are wholly or partly in the water, carry two white lights where they can best be seen. Such lights shall be placed so that the vertical distance between them shall be not less than 6 feet and not more than 15 feet, and so that the horizontal distance between them, measured in a line with the keel, shall be not less than 5 feet and not more than 10 feet. The lower of these two lights shall be in the direction of the nets, and both of them shall be of such a character as to show all round the horizon, and to be visible at a distance of not less than 3 miles.

(*c.*) Vessels and boats, except open boats as defined in subdivision (*a*), when line-fishing with their lines out and attached to or hauling their lines, and when not at anchor or stationary, within the meaning of subdivision (*g*), shall carry the same lights as vessels fishing with drift-nets. When shooting lines or fishing with towing lines, they shall carry the lights prescribed for a steam or sailing vessel under way, respectively.

(*d.*) Oyster dredges and other vessels fishing with dredge nets, shall—

1. If steam vessels, carry in the same position as the white light mentioned in article 2 (*a*), a tri-coloured lantern so constructed and fixed as to show a white light from right ahead to 2 points on each bow. and a green light and a red light over an arc of the horizon from 2 points on each bow to 2 points abaft the beam on the starboard and port sides, respectively; and not less than 6 nor more than 12 feet below the tri-coloured lantern a white light in a lantern, so constructed as to show a clear uniform and unbroken light all round the horizon.

2. If sailing vessels, shall carry a white light in a lantern, so constructed as to show a clear uniform and unbroken light all round the horizon, and shall also, on the approach of or to other vessels, show where it can best be seen a white flare-up light or torch in sufficient time to prevent collision.

All lights mentioned in subdivision (*d*) 1 and 2 shall be visible at a distance of at least 2 miles.

(*e.*) Fishing vessels and fishing boats may at any time use a flare-up light in addition to the lights which they are by this article required to carry and show, and they may also use working lights.

(*f.*) Every fishing vessel and every fishing boat under 150 feet in length, when at anchor, shall exhibit a white light visible all round the horizon at a distance of at least one mile.

Every fishing vessel of 150 feet in length or upwards, when at anchor, shall exhibit a white light visible all round the horizon at a distance of at least one mile, and shall exhibit a second light as provided for vessels of such length by article 11.

Should any such vessel, whether under 150 feet in length or of 150 feet in length or upwards, be attached to a net or other fishing gear, she shall on the approach of other vessels show an additional white light at least 3 feet below the anchor light, and at a horizontal distance of at least 5 feet away from it in the direction of the net or gear.

(*g.*) If a vessel or boat when fishing becomes stationary in consequence of her gear getting fast to a rock or other obstruction, she shall in day time haul down the day signal required by subdivision (*i.*); at night show the light or lights prescribed for a vessel at anchor; and during fog, mist, falling snow, or heavy rain storms, make the signal prescribed for a vessel at anchor. (See the last paragraph of article 15.)

(*h.*) In fog, mist, falling snow, or heavy rain storms, drift-net vessels attached to their nets, and vessels when dredging, or when line-fishing with their lines out, shall, if of 20 tons gross tonnage or upwards, respectively, at intervals of not more than one minute, make a blast; if steam vessels, with the whistle or siren, and if sailing vessels, with the fog-horn; each blast to be followed by ringing the bell. Fishing vessels and boats of less than 20 tons gross tonnage shall not be obliged to give the above mentioned signals; but if they do not, they shall make some other efficient sound signal at intervals of not more than one minute.

(*i.*) All vessels or boats fishing with nets or lines, when under way, shall in day time indicate their occupation to an approaching vessel by displaying a basket or other efficient signal where it can best be seen. If vessels or boats at anchor have their gear out, they shall, on the approach of other vessels, show the same signal on the side on which those vessels can pass.

The vessels required by this article to carry or show the lights hereinbefore specified shall not be obliged to carry the lights prescribed by article 4 (*a.*), and the last paragraph of article 11.

VI. RULES.

FOR NAVIGATING THE GREAT LAKES

Including Georgian Bay, their connecting and tributary waters and the St. Lawrence River as far East as the lower exit of the Lachine Canal and the Victoria Bridge at Montreal.

Preliminary.

Steam vessels under sail or under steam.

In the following rules every steam vessel which is under sail, and not under steam is to be considered a sailing vessel; and every vessel under steam, whether under sail or not, is to be considered a steam vessel.

The word "steam vessel" shall include any vessel propelled by machinery.

A vessel is "under way" within the meaning of these rules, when she is not at anchor or made fast to the shore or ground.

Rules Concerning Lights, etc.

Definition of visibility.

The word "visible" in these rules, when applied to lights, shall mean visible on a dark night with clear atmosphere.

When lights shall be carried.

Article 1. The rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed lights shall be exhibited.

Article 2. A steam vessel when under way shall carry:—

By a steam vessel under way.

In fore part of vessel.

(*a*.) On or in front of the foremast, or if a vessel without a foremast, then in the forepart of the vessel, at a height above the hull of not less than 20 feet, and if the breadth of the vessel exceeds 20 feet, then at a height above the hull not less than such breadth, so however, that the light need not be carried at a greater height above the hull than 40 feet, a bright white light, so constructed as to show an unbroken light over an arc of the horizon of 20 points of the compass, so fixed as to throw the light 10 points on each side of the vessel, viz., from right ahead to 2 points abaft the beam on either side and of such a character as to be visible at a distance of at least 5 miles.

On starboard side.

(*b*.) On the starboard side a green light, so constructed as to show an unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw the light from right ahead to 2 points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least 2 miles.

On port side.

(*c*.) On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw the light from right ahead to 2 points abaft the beam on the port side, and of such a character as to be visible at a distance of at least 2 miles.

How to be fitted.

(*d*.) The said green and red sidelights shall be fitted with inboard screens projecting at least 3 feet forward from the light, so as to prevent these lights from being seen across the bow.

Additional light.

(*e*.) A steam vessel over 150 feet register length, when under way, shall carry an additional white light, visible all around the horizon at a distance of at least 3 miles. These two lights shall be so placed in line with the keel that one shall be at least 15 feet higher than the other, and in such a position with reference to each other, that the lower light shall

be forward of the upper one. The vertical distance between these lights shall be less than the horizontal distance.

Article 3 (*a.*) A steam vessel when towing another vessel shall, in addition to her sidelights, carry two bright white lights in a verticle line one over the other, not less than 6 feet apart, and when towing more than one vessel shall carry an additional bright white light 6 feet above or below such lights, if the length of the tow measuring from the stern of the towing vessel to the stern of the last vessel towed exceed 600 feet. Each of these lights shall be of the same construction and character and shall be carried in the same position as the white light mentioned in article 2 (*a*), except the additional light which may be carried at a height of not less than 14 feet above the hull.

By a steam vessel towing.

Such steam vessel shall carry a small white light above the funnel or aftermast for the vessel towed to steer by, but such light shall not be visible forward of the beam.

Steering light.

(*b.*) A steam vessel having a raft in tow shall, instead of the forward lights mentioned in clause (*a*) of this rule carry on or in front of the foremast, or if a vessel without a foremast, then in the fore part of the vessel, at a height above the hull of not less than 20 feet, and if the breadth of the vessel exceeds 20 feet, then at a height not less than the breadth, but such height need not exceed 40 feet, 2 bright white lights in a horizontal line athwart ships and not less than 8 feet apart, each so fixed as to throw a light all around the horizon and of such a character as to be visible at a distance of at least 5 miles; such steamer shall also carry the small white steering light described in Clause (*a*).

Article 4 (*a.*) A vessel which from any accident is not under command shall carry at the same height as the white light mentioned in article 2 (*a*), where they can best be seen and, if a steam vessel, in lieu of that light, 2 red lights, in a vertical line, one over the other, not less than 6 feet apart, and of such a character as to be visible all around the horizon at a distance of at least 2 miles; and shall by day carry in a vertical line one over the other not less than 6 feet apart. where they can best be seen, 2 black balls or shapes each two feet in diameter.

Lights and day marks by a vessel when not under command.

(*b.*) A vessel employed in having or in picking up a telegraph cable shall carry in the same position as the white light mentioned in article 2 (*a*), and if a steam vessel, in lieu of

By a cable vessel.

that light, 3 lights in a vertical line one over the other, not less than 6 feet apart. The highest and lowest of these lights shall be red, and the middle light shall be white, and they shall be of such a character as to be visible all around the horizon, at a distance of at least 2 miles. By day she shall carry in a vertical line one over the other, not less than six feet apart, where they can best be seen, three shapes not less than 2 feet in diameter, of which the highest and lowest shall be globular in shape, and red in colour, and the middle diamond in shape and white.

When to carry side-lights.

(*c.*) The vessel referred to in this article when not making way through the water, shall not carry the sidelights, but when making way shall carry them.

What to denote.

(*d.*) The lights and shapes required to be shown by this article are to be taken by other vessels as signals that the vessel showing them is not under command, and cannot therefore get out of the way.

These signals are not signals of vessels in distress and requiring assistance, such signals are contained in article 31.

By a sailing vessel in motion.

Article 5. A sailing vessel under way, and any vessel being towed shall carry the same lights as are prescribed by article 2 for a steam-vessel under way, with the exception of the white lights mentioned therein, which they shall never carry.

By a small vessel in bad weather.

Article 6. Whenever, as in the case of small vessels under way during bad weather, the green and red sidelights cannot be fixed, these lights shall be kept at hand lighted and ready for use; and shall on the approach of or to other vessels be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side nor the red light on the starboard side, nor, if practicable, more than two points abaft the beam on their respective sides.

Lanterns to be painted outside.

To make the use of these portable lights more certain and easy, the lanterns containing them shall each be painted outside with the colour of the light they respectively contain, and shall be provided with proper screens."

Exceptions to above rules.

Article 7. Steam vessels of less than 40, and vessels under oars or sails of less than 20 gross tonnage, respectively, and rowing boats when under way, shall not be obliged to carry the lights mentioned in article 2 (*a*), (*b*) and (*c*), but if they

do not carry them they shall be provided with the following lights:—

1. Steam vessels of less than 40 tons shall carry:—

Lights to be carried by a steam vessel of less than 40 tons.

(*a*.) In the forepart of the vessel on or in the front of the funnel, where it can be best seen, and at a height above the gunwale of not less than 9 feet, a bright white light constructed and fixed as prescribed in atricle 2 (*a*), and of such a character as to be visible at a distance of at least 2 miles.

(*b*.) Green and red side-lights constructed and fixed as prescribed in article 2 (*b*) and (*c*) and of such a character as to be visible at a distance of at least 1 mile, or a combined lantern showing a green light and a red light from right ahead to 2 points abaft the beam on their respective sides. Such lanterns shall be carried not less than 3 feet below the white light.

By a small steamboat.

2. Small steamboats, such as are carried by sea-going vessels, may carry the white light at a less height than 9 feet above the gunwale, but it shall be carried above the combined lantern mentioned in subdivision 1 (*b*).

By a vessel less than 20 tons under oars or sails.

3. Vessels under oars or sails, of less than 20 tons, shall have ready at hand a lantern with a green glass on one side and a red glass on the other, which on the approach of or to the other vessels, shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.

By a rowing boat.

4. Rowing boats, whether under oars or sail, shall have ready at hand a lantern showing a white light which shall be temporarily exhibited in sufficient time to prevent collision.

The vessels referred to in this article shall not be obliged to carry the lights prescribed by article 4 (*a*) and article 11 (*c*).

By a pilot vessel on duty

Article 8. Pilot vessels when engaged on their station on pilotage duty, shall not show the lights required for other vessels, but shall carry a white light at the masthead, visible all around the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall not exceed 15 minutes. On the near approach of or to other vessels, they shall have their side-lights lighted, ready for use, and shall flash or show them at short intervals, to indicate the direction in which they are heading but the green light shall not be shown on the port side, nor the read light on the starboard side.

By a boarding pilot vessel.

A pilot vessel of such a class as to be obliged to go alongside of a vessel to put a pilot on board may show the white light instead of carrying it at the masthead, and may, instead of the coloured lights above mentioned, have at hand ready for use a lantern with a green glass on the one side and a red glass on the other to be used as above prescribed.

When not on duty.

Pilot vessels when not engaged on their station on pilotage duty, shall carry lights similar to those of other vessels of their tonnage.

Fishing boats.

Article 9. Fishing boats shall show such lights as are prescribed for vessels of their tonnage, and shall be under such further regulations as may be adopted for their protection.

By a vessel being overtaken.

Article 10. A vessel which is being overtaken by another shall show from her stern to such last mentioned vessel a white light or a flare-up light.

The white light required to be shown by this article may be fixed and carried in a lantern, but in such case the lantern shall be so constructed, fitted, and screened that it shall throw an unbroken light over an arc of the horizon of 12 points of the compass, viz., for 6 points from rights aft on each side of the vessel so as to be visible at a distance of at least one mile. Such light shall be carried as nearly as practicable on the same level as the side lights.

By a vessel at anchor under 150 feet in length.

Article 11 (*a.*) A vessel under 150 feet in length, when at anchor, shall carry forward, where it can best be seen, but at a height not exceeding 20 feet above the hull, a white light in a lantern so constructed as to show a clear, uniform, and unbroken light visible all around the horizon, at a distance of at least one mile.

Over 150 feet in length.

(*b.*) A vessel of 150 feet or upwards in length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than 20, and not exceeding 40 feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall not be less than 15 feet lower than the forward light, another such light.

The length of a vessel shall be deemed to be the length appearing on her certificate of registry.

By a vessel aground near a fairway.

(*c.*) A vessel aground in or near a fairway shall carry the above light or lights and the 2 red lights prescribed by article 4 (*a*).

(*d.*) Produce boats, canal boats, fishing boats, rafts and other water-craft navigating any bay, harbour or river, by

hand-power, horse-power, by sail or current or which shall be moored or anchored in or near the channel or fairway of any bay, harbour or river, and otherwise not provided for, shall carry one bright white light forward not less than 6 feet above the deck.

Rafts shall carry in each case on a pole not less than 6 feet high, a bright white light visible all around the horizon as follows:—Rafts of 1 crib in width and not more than two in length shall carry 1 such light. Rafts of 3 or more cribs in length, 1 such light on each end of the raft. Rafts of more than one crib abreast shall carry one such light on each outside corner, making 4 lights in all.

Bag or boom rafts navigating or anchored in the fairway of any harbour, bay or river, shall carry a bright white light at least 6 feet high at each end of the raft and one-such light on each side midway between the forward and after end. All double ended ferryboats shall carry a range of bright white lights showing all around the horizon, placed at equal heights forward and aft, and shall also carry the lights specified in article 2, clauses (*b*) and (*c*).

To attract attention.

Article 12. Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these rules require to carry, show a flare-up light or use any detonating signal that cannot be mistaken for a distress signal.

Special rules in certain cases not to be interfered with.

Article 13. Nothing in these rules shall interfere with the operation of any special rules made by the Government of any nation with respect to additional station and signal lights for two or more ships of war or for vessels sailing under convoy, or with the exhibition of recognition signals adopted by ship owners which have been authorized by their respective governments and duly registered and published.

A vessel showing a funnel not under steam to carry a day mark.

Article 14. A steam vessel proceeding under sail only, but having her funnel up, shall carry in day time, forward, where it can best be seen, one black ball or shape 2 feet in diameter.

Sound Signals for Fog, etc.

Means of producing signals.

Article 15. All signals prescribed by this article for vessels under way shall be given:—

1. By "steam vessels" on the whistle or siren.

2. By "sailing vessels" on the fog horn.

Definition of prolonged blast.

The words "prolonged blast" used in this article, shall mean a blast from 4 to 6 seconds' duration.

A steam vessel to have certain sound signals.

A steam vessel shall be provided with an efficient whistle or siren, sounded by steam or some substitute for steam, so placed that the sound may not be intercepted by any obstruction, and with an efficient fog-horn, to be sounded by mechanical means, and also with an efficient bell. A sailing vessel of 20 tons gross tonnage or upwards shall be provided with a similar fog-horn and bell. In fog, mist, falling snow, or heavy rain storms, whether by day or night, the signals described in this article shall be used as follows, viz.:—

Signal by a steam vessel having way upon her.

(*a.*) A steam vessel under way, excepting only a steam vessel with a raft in tow, shall sound at intervals of not more than 1 minute, three distinct blasts of her whistle.

(*b.*) Every vessel in tow of another vessel shall, at intervals of 1 minute, sound 4 bells on a good and efficient properly placed bell as follows:—By striking the bell twice in quick succession, followed by a little longer interval, and then against striking twice in quick succession (as in striking 4 bells, to indicate time).

(*c.*) A steam vessel with a raft or a string of booms in tow, shall sound at intervals of not more than one minute a screeching or modoc whistle from 3 to 5 seconds. Only steam vessels, rafts or booms in tow, shall sound this screeching whistle in thick weather.

By a sailing vessel under way.

(*d.*) A sailing vessel under way shall sound, at intervals of not more than one minute, when on the starboard tack, 1 blast, when on the port tack, 2 blasts in succession, and when with the wind abaft the beam, 3 blasts in succession.

By a vessel at anchor.

(*e.*) A vessel when at anchor shall, at intervals of not more than one minute, ring the bell rapidly for about 5 seconds.

By vessels of less than 20 tons.

Sailing vessels and boats of less than 20 tons gross tonnage shall not be obliged to give the above-mentioned signals, but if they do not, they shall make some other efficient sound-signal at intervals of not more than 1 minute.

Speed of Ships to be Moderate in Fog, etc.

Speed restricted in fog.

Article 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

A steam vessel to stop if another vessel signalling forward of her beam.

Steering and Sailing Rules.

Preliminary—Risk of Collision.

Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist.

How risk of collision can be ascertained.

Article 17. When two sailing vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other as follows, viz.:—

Sailing ships meeting.

(*a.*) A vessel which is running free shall keep out of the way of a vessel which is close hauled.

(*b.*) A vessel which is close hauled on the port tack shall keep out of the way of a vessel which is close hauled on the starboard tack.

(*c.*) When both are running free with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(*d.*) When both are running free, with the wind on the same side, the vessel which is to the windward shall keep out of the way of the vessel which is to the leeward.

(*e.*) A vessel which has the wind aft shall keep out of the way of the other vessel.

Article 18. When two steam vessels are meeting end on or nearly end on, so as to involve risk of collision, each shall alter her course to the starboard, so that each may pass the port side of the other.

Steam vessels meeting.

This article only applies to cases where vessels are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two vessels which must, if both keep to their respective courses, pass clear of each other.

Limitation of this article. Cases to which it applies.

The only case to which it does apply are when each of the two vessels is end on, or nearly end on, to the other; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line with her own; and, by

night, to cases in which each vessel is in such a position as to see both the side-lights of the other.

Cases to which it does not apply. It does not apply, by day, to cases in which a vessel sees another vessel crossing her own course; or by night to cases where the red light of one vessel is opposed to the red light of the other or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

Steam vessels crossing. Article 19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

A steam vessel and a sailing vessel. Article 20. When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

Vessel not affected by rules to keep her course and speed, unless other action required to avert collision. Article 21. Where by any of these rules one of two vessels is to keep out of the way the other shall keep her course and speed.

NOTE.—When in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert the collision.

(See articles 27 and 29.)

Vessels keeping out of the way. Article 22. Every vessel which is directed by these Rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

Steam vessel nearing another vessel. Article 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed, or stop or reverse.

Vessel overtaken by another. Article 24. Notwithstanding anything contained in these Rules, every vessel overtaken by another, shall keep out of the way of the overtaken vessel.

Definition of overtaking. Every vessel coming up with another vessel from any direction more than two points abaft her beam, *i.e.*, in such position, in reference to the vessel which she is overtaking, that at night she would be unable to see either of the vessel's side-lights, shall be deemed to be an overtaking vessel, and no sub-

sequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these Rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

As by day the overtaking vessel cannot always know with certainty whether she is forward of, or abaft of this direction from the other vessel, she should if in doubt, assume that she is an overtaking vessel and keep out of the way.

A steam vessel in a narrow channel.

Article 25 (*a.*) In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

(*b.*) In all narrow channels where there is a current, and in the Rivers St. Mary, St. Clair, Detroit, Niagara and St. Lawrence, when two steamers are meeting, the descending steamers shall have the right of way, and shall before the vessels have arrived within the distance of half a mile of each other give the signal necessary to indicate which side she intends to take.

A sailing vessel to avoid nets, &c. But no right given to fishing vessels to obstruct a fairway.

Article 26. Sailing vessels under way shall keep out of the way of sailing vessels or boats, fishing nets, or lines, or trawls. This Rule shall not give to any vessel or boat engaged in fishing the right of obstructing a fairway used by vessels other than fishing vessels or boats.

Regard to be had to dangers of navigation.

Article 27. In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

Sound Signals for Vessels in Sight of One Another.

How vessels shall signal by steam.

Article 28. The word "short blast" used in this article shall mean a blast of about half a second's duration.

When vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren, viz.:—

(*a.*) One short blast to mean: "I am directing my course to starboard."

(b.) Two short blasts to mean: "I am directing my course to port."

Vessels approaching each other from opposite directions are forbidden to use what has become known among pilots as "cross-signals," answering one whistle with two and with answering two whistles with one.

If a pilot of a steam vessel to which a passing signal is sounded deems it unsafe to accept and assent to said signal he shall not sound a cross-signal; but in that case, and in every case where the pilot of one steamer fails to understand the course or intention of an approaching steamer, whether from signals being given or answered erroneously, or from other causes, the pilot of such steamer so receiving the first passing signal, or the pilot so in doubt, shall sound several short and rapid blasts of the whistle, not less than five; and if the vessels shall have approached within half a mile of each other shall reduce their speed to bare steerage way, and if necessary stop and reverse.

(c.) Whenever a steamer is nearing a short bend or curve in the channel where from the height of the banks or other cause a steamer approaching from the opposite direction cannot be seen for a distance of half a mile, the pilot of such steamer when he shall have arrived within half a mile of such bend or curve, shall give a signal by one long blast of the whistle, which signal shall be answered by a similar blast given by the pilot of any approaching vessel that may be within hearing. Should such signal be so answered by a steamer on the further side of the bend, then the usual signal for meeting and passing shall immediately be given and answered, but if the first alarm signal of such pilot be not answered, he is to consider the channel clear.

No Vessel under any Circumstances to Neglect Proper Precautions.

Rules not to excuse.

Article 29. Nothing in these rules shall exonerate any vessel, or the owner, or master, or crew thereof from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or to the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case.

Reservation of Rules for Harbours and Inland Navigation.

Article 30. Nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbour, river or inland waters.

Rules by local authorities.

Distress Signals.

Article 31. When a vessel is in distress and requires assistance from other vessels or from the shore, the following shall be the signals to be used or displayed by her, either together or separately, viz.:—

A vessel in distress.

In the day time:—

Day signals.

1. A gun or other explosive signal fired at intervals of about a minute.
2. The International Code signal of distress indicated by N.C.
3. The distant signal, consisting of a square flag, having either above or below it a ball or anything resembling a ball.
4. A continuous sounding with any fog-signal apparatus.

At night:—

Night signals.

1. A gun or other explosive signal fired at intervals of about a minute;
2. Flame from the vessel (as from burning a tar-barrel, oil barrel, &c.);
3. Rockets or shells, throwing stars of any colour or decription, fired one at a time, at short intervals;
4. A continous sounding with any fog-signal apparatus.

Article 32. Rafts, while drifting or at anchor shall be governed as regards lights to be carried by article 11, clause (*d*). Whenever any raft is going in the same direction as another which is ahead, the one shall be so navigated as not to come within twenty yards of the other and every vessel meeting or overtaking a raft shall keep out of the way thereof.

Rules for rafts.

Rafts shall be so navigated and anchored as not to cause any unnecessary impediment or obstruction to vessels navigating the same waters.

Not to obstruct vessels.

The Governor General in Council, in accordance with the provisions of section 854 of chapter 113 of the Revised Statutes

of Canada, 1906, intituled "The Canada Shipping Act," is pleased to order and it is hereby ordered that the General Regulations for the government of ports in the Provinces of Nova Scotia, New Brunswick, Quebec, Ontario, British Columbia, and Prince Edward Island, to which the said Act applies, as approved by the Order in Council of 12th June, 1889, be amended by adding thereto the following clause:—

43. All through-bound vessels in passing through the St. Clair river in the vicinity of Stag Island, in the harbour of Sarnia, shall keep to the right, that is to say, all up-bound boats shall pass through the eastern channel and all down bound boats shall pass through the western channel. This rule shall apply to through-bound vessels only, and not to vessels running between local points on the river, which vessels may take either channel, conforming to the ordinary rules of the road at sea.

VII. MERCHANT SHIPPING ACT, 1894.

(57 & 58 Vict., cap. 60.)

[*25th August,* 1894.]

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:

PART I.

Registry.

Qualification for owning British Ships.

Qualification for owning British ship.

1. A ship shall not be deemed to be a British ship unless owned wholly by persons of the following description (in this Act referred to as persons qualified to be owners of British ships); namely,—

(*a.*) Natural-born British subjects:

(*b.*) Persons naturalized by or in pursuance of an Act of Parliament of the United Kingdom, or by or in pursuance of an Act or ordinance of the proper legislative authority in a British possession:

(*c.*) Persons made denizens by letters of denization; and

(*d.*) Bodies corporate established under and subject to the laws of some part of Her Majesty's dominions, and having their principal place of business in those dominions:

Provided that any person who either—

(i.) being a natural-born British subject has taken the oath of allegiance to a foreign sovereign or state or has otherwise become a citizen or subject of a foreign state; or

(ii.) has been naturalized or made a denizen as aforesaid; shall not be qualified to be owner of a British ship unless, after taking the said oath, or becoming a citizen or subject of a foreign state, or on or after being naturalized or made denizen as aforesaid, he has taken the oath of allegiance to Her Majesty the Queen, and is during the time he is owner of the ship either resident in Her Majesty's dominions, or partner in a firm actually carrying on business in Her Majesty's dominions.

Obligation to register British Ships.

Obligation to register British ships.

2.—(1.) Every British ship shall, unless exempted from registry, be registered under this Act.

(2.) If a ship required by this Act to be registered is not registered under this Act she shall not be recognised as a British ship.

(3.) A ship required by this Act to be registered may be detained until the master of the ship, if so required, produces the certificate of the registry of the ship.

Exemptions from registry.

3. The following ships are exempted from registry under this Act:—

(1.) Ships not exceeding fifteen tons burden employed solely in navigation on the rivers or coasts of the United Kingdom, or on the rivers or coasts of some British possession within which the managing owners of the ships are resident:

(2.) Ships not exceeding thirty tons burden and not having a whole or fixed deck, and employed solely in fishing or trading coastwise on the shores of Newfoundland or parts adjacent thereto, or in the Gulf of St. Lawrence, or on such portions of the coasts of Canada as lie bordering on that gulf.

Procedure for Registration.

4.—(1.) The following persons shall be registrars of British ships:—

Registrars of British ships.

(*a.*) At any port in the United Kingdom, or Isle of Man. approved by the Commissioners of Customs for the registry of ships, the chief officer of customs:

(*b.*) In Guernsey and Jersey, the chief officers of customs together with the governor:

(*c.*) In Malta and Gibraltar, the governor:

(*d.*) At Calcutta, Madras, and Bombay, the port officer:

(*e.*) At any other port in any British possession approved by the governor of the possession for the registry of ships, the chief officer of customs, or, if there is no such officer there resident, the governor of the possession in which the port is situate, or any officer appointed for the purpose by the governor:

(*f.*) At a port of registry established by Order in Council under this Act, persons of the description in that behalf declared by the Order.

(2.) Notwithstanding anything in this section Her Majesty may by Order in Council declare, with respect to any British possession named in the Order, not being the Channel Islands or the Isle of Man, the description of persons who are to be registrars of British ships in that possession.

(3.) A registrar shall not be liable to damages or otherwise for any loss accruing to any person by reason of any act done or default made by him in his character of registrar, unless the same has happened through his neglect or wilful act.

Register book.

5. Every registrar of British ships shall keep a book to be called the register book, and entries in that book shall be made in accordance with the following provisions:—

(i.) The property in a ship shall be divided into sixty-four shares:

(ii.) Subject to the provisions of this Act with respect to joint owners or owners by transmission, not more than sixty-four individuals shall be entitled to be registered at the same time as owners of any one ship; but this rule shall not affect the beneficial title of any number of persons or of any company repre-

sented by or claiming under or through any registered owner or joint owner:

(iii.) A person shall not be entitled to be registered as owner of a fractional part of a share in a ship; but any number of persons not exceeding five may be registered as joint owners of a ship or of any share or shares therein:

(iv.) Joint owners shall be considered as constituting one person only as regards the persons entitled to be registered, and shall not be entitled to dispose in severalty of any interest in a ship, or in any share therein in respect of which they are registered:

(v.) A corporation may be registered as owner by its corporate name.

Survey and measurement of ship.

6. Every British ship shall before registry be surveyed by a surveyor of ships and her tonnage ascertained in accordance with the tonnage regulations of this Act, and the surveyor shall grant his certificate specifying the ship's tonnage and build, and such other particulars descriptive of the identity of the ship as may for the time being be required by the Board of Trade, and such certificate shall be delivered to the registrar before registry.

Marking of ship.

7.—(1.) Every British ship shall before registry be marked permanently and conspicuously to the satisfaction of the Board of Trade as follows:—

(*a.*) Her name shall be marked on each of her bows, and her name and the name of her port of registry must be marked on her stern, on a dark ground in white or yellow letters, or on a light ground in black letters, such letters to be of a length not less than four inches, and of proportionate breadth:

(*b.*) Her official number and the number denoting her registered tonnage shall be cut in on her main beam:

(*c.*) A scale of feet denoting her draught of water shall be marked on each side of her stem and of her stern post in Roman capital letters or in figures, not less than six inches in length, the lower line of such letters or figures to coincide with the draught line denoted thereby, and those letters or figures must be marked by being cut in and painted white or yellow on a dark ground, or in such way as the Board of Trade approve.

(2.) The Board of Trade may exempt any class of ships from all or any of the requirements of this section, and a fishing boat entered in the fishing boat register, and lettered and numbered in pursuance of the Fourth Part of this Act, need not have her name and port of registry marked under this section.

(3.) If the scale of feet showing the ship's draught of water is in any respect inaccurate, so as to be likely to mislead, the owner of the ship shall be liable to a fine not exceeding one hundred pounds.

(4.) The marks required by this section shall be permanently continued, and no alteratoin shall be made therein, except in the event of any of the particulars thereby denoted being altered in the manner provided by this Act.

(5.) If an owner or master of a British ship neglects to cause his ship to be marked as required by this section, or to keep her so marked, or if any person conceals, removes, alters, defaces, or obliterate or suffers any person under his control to conceal, remove, alter, deface, or obliterate any of the said marks, except in the event aforesaid, or except for the purpose of escaping capture by an enemy, that owner, master, or person shall for each offence be liable to a fine not exceeding one hundred pounds, and on a certificate from a surveyor of ships, or Board of Trade inspector under this Act, that a ship is insufficiently or inaccurately marked the ship may be detained until the insufficiency or inaccuracy has been remedied.

Application for registry.

8. An application for registry of a ship shall be made in the case of individuals by the person requiring to be registered as owner, or by some one or more of the persons so requiring if more than one, or by his or their agent, and in the case of corporations by their agent, and the authority of the agent shall be testified by writing, if appointed by individuals, under the hands of the appointers, and, if appointed by a corporation, under the common seal of that corporation.

Declaration of ownership on registry.

9. A person shall not be entitled to be registered as owner of a ship or of a share therein until he, or in the case of a corporation the person authorised by this Act to make declarations on behalf of the corporation, has made and signed a declaration of ownership, referring to the ship as described in the certificate of the surveyor, and containing the following particulars:—

(i.) A statement of his qualification to own a British ship, or in the case of a corporation, of such circumstances of the constitution and business thereof as prove it to be qualified to own a British ship:

(ii.) A statement of the time when and the place where the ship was built, or, if the ship is foreign built, and the time and place of building unknown, a statement that she is foreign built, and that the declarant does not know the time or place of her building; and, in addition thereto, in the case of a foreign ship, a statement of her foreign name, or, in the case of a ship condemned, a statement of the time, place and court at and by which she was condemned:

(iii.) A statement of the name of the master:

(iv.) A statement of the number of shares in the ship of which he or the corporation, as the case may be, is entitled to be registered as owner:

(v.) A declaration that, to the best of his knowledge and belief, no unqualified person or body of persons is entitled as owner to any legal or beneficial interest in the ship or any share therein.

Evidence on first registry.

10.—(1.) On the first registry of a ship the following evidence shall be produced in addition to the declaration of ownership:—

(*a.*) In the case of a British-built ship, a builder's certificate, that is to say, a certificate signed by the builder of the ship, and containing a true account of the proper denomination and of the tonnage of the ship, as estimated by him, and of the time when and the place where she was built, and of the name of the person (if any) on whose account the ship was built, and if there has been any sale, the bill of sale under which the ship, or a share therein, has become vested in the applicant for registry:

(*b.*) In the case of a foreign-built ship, the same evidence as in the case of a British-built ship, unless the declarant who makes the declaration of ownership declares that the time and place of her building are unknown to him, or that the builder's certificate cannot be procured, in which case there shall be required only the bill of sale under which the ship, or a share therein, became vested in the applicant for registry:

(*c.*) In the case of a ship condemned by any competent court, an official copy of the condemnation.

(2.) The builder shall grant the certificate required by this section, and such person as the Commissioners of Customs recognise as carrying on the business of the builder of a ship. shall be included, for the purposes of this section, in the expression "builder of the ship."

(3.) If the person granting a builder's certificate under this section wilfully makes a false statement in that certificate he shall for each offence be liable to a fine not exceeding one hundred pounds.

Entry of particulars in register book.

11. As soon as the requirements of this Act preliminary to registry have been complied with the registrar shall enter in the register book the following particulars respecting the ship:

(*a.*) The name of the ship and the name of the port to which she belongs:

(*b.*) The details comprised in the surveyor's certificate:

(*c.*) The particulars respecting her origin stated in the declaration of ownership: and

(*d.*) The name and description of her registered owner or owners, and if there are more owners than one, the proportions in which they are interested in her.

Documents to be retained by registrar.

12. On the registry of a ship the registrar shall retain in his possession the following documents; namely, the surveyor's certificate, the builder's certificate, any bill of sale of the ship previously made, the copy of the condemnation (if any), and all declarations of ownership.

Port of registry

13. The port at which a British ship is registered for the time being shall be deemed her port of registry and the port to which she belongs.

Certificate of Registry.

Certificate of registry.

14. On completion of the registry of a ship, the registrar shall grant a certificate of registry comprising the particulars respecting her entered in the register book, with the name of her master.

Custody of certificate.

15.—(1.) The certificate of registry shall be used only for the lawful navigation of the ship, and shall not be subject to detention by reason of any title, lien, charge, or interest whatever had or claimed by any owner, mortgagee, or other person to, on, or in the ship.

(2.) If any person, whether interested in the ship or not, refuses on request to deliver up the certificate of registry when in his possession or under his control to the person entitled to the custody thereof for the purposes of the lawful navigation of the ship, or to any registrar, officer of customs, or other person entitled by law to require such delivery, any justice by warrant under his hand and seal, or any court capable of taking cognizance of the matter, may summon the person so refusing to appear before such justice or court, and to be examined touching such refusal, and unless it is proved to the satisfaction of such justice or court that there was reasonable cause for such refusal, the offender shall be liable to a fine not exceeding one hundred pounds, but if it is shown to such justice or court that the certificate is lost, the person summoned shall be discharged, and the justice or court shall certify that the certificate of registry is lost.

(3.) If the person so refusing is proved to have absconded so that the warrant of a justice or process of a court cannot be served on him, or if he persists in not delivering up the certificate, the justice or court shall certify the fact, and the same proceedings may then be taken as in the case of a certificate mislaid, lost, or destroyed, or as near thereto as circumstances permit.

Penalty for use of improper certificate.

16. If the master or owner of a ship uses or attempts to use for her navigation a certificate of registry not legally granted in respect of the ship, he shall, in respect of each offence, be guilty of a misdemeanor, and the ship shall be subject to forfeiture under this Act.

Power to grant new certificate.

17. The registrar of the port of registry of a ship may, with the approval of the Commissioners of Customs, and on the delivery up to him of the certificate of registry of a ship, grant a new certificate in lieu thereof.

Provision for loss of certificate.

18.—(1.) In the event of the certificate of registry of a ship being mislaid, lost, or destroyed, the registrar of her port of registry shall grant a new certificate of registry in lieu of her original certificate.

(2.) If the port (having a British registrar or consular officer) at which the ship is at the time of the event, or first arrives after the event—

(*a*) is not in the United Kingdom, where the ship is registered in the United Kingdom; or,

(*b*) is not in the British possession in which the ship is registered; or,

(*c*) where the ship is registered at a port of registry established by Order in Council under this Act, is not that port;

then the master of the ship, or some other person having knowledge of the facts of the case, shall make a declaration stating the facts of the case, and the names and descriptions of the registered owners of such ship to the best of the declarant's knowledge and belief, and the registrar or consular officer, as the case may be, shall thereupon grant a provisional certificate, containing a statement of the circumstances under which it is granted.

(3.) The provisional certificate shall within ten days after the first subsequent arrival of the ship at her port of discharge in the United Kingdom, where she is registered in the United Kingdom, or in the British possession in which she is registered, or where she is registered at a port of registry established by Order in Council under this Act at that port, be delivered up to the registrar of her port of registry, and the registrar shall thereupon grant the new certificate of registry; and if the master without reasonable cause fails to deliver up the provisional certificate within the ten days aforesaid, he shall be liable to a fine not exceeding fifty pounds.

Endorsement of change of master on certificate.

19. Where the master of a registered British ship is changed, each of the following persons; (that is to say),

(*a*.) if the change is made in consequence of the sentence of a naval court, the presiding officer of that court; and

(*b*.) if the change is made in consequence of the removal of the master by a court under Part VI. of this Act, the proper officer of that court; and

(*c*) if the change occurs from any other cause, the registrar, or if there is none the British consular officer, at the port where the change occurs,

shall endorse and sign on the certificate of registry a memorandum of the change, and shall forthwith report the change to the Registrar-General of Shipping and Seamen; and any officer of customs at any port in Her Majesty's dominions may refuse to admit any person to do any act there as master of a British ship unless his name is inserted in or endorsed on her certificate of registry as her last appointed master.

20.—(1.) Whenever a change occurs in the registered ownership of a ship, the change of ownership shall be endorsed on her certificate of registry either by the registrar of the ship's port of registry, or by the registrar of any port at which the ship arrives who has been advised of the change by the registrar of the ship's port of registry.

Endorsement of change of ownership on certificate.

(2.) The master shall, for the purpose of such endorsement by the registrar of the ship's port of registry, deliver the certificate of registry to the registrar, forthwith after the change if the change occurs when the ship is at her port of registry, and if it occurs during her absence from that port and the endorsement under this section is not made before her return then upon her first return to that port.

(3.) The registrar of any port, not being the ship's port of registry, who is required to make an endorsement under this section may for that purpose require the master of the ship to deliver to him the ship's certificate of registry, so that the ship be not thereby detained, and the master shall deliver the same accordingly.

(4.) If the master fails to deliver to the registrar the certificate of registry as required by this section he shall, for each offence, be liable to a fine not exceeding one hundred pounds.

21.—(1.) In the event of a registered ship being either actually or constructively lost, taken by the enemy, burnt, or broken up, or ceasing by reason of a transfer to persons not qualified to be owners of British ships ,or otherwise, to be a British ship, every owner of the ship or any share in the ship shall, immediately on obtaining knowledge of the event, if no notice thereof has already been given to the registrar, give notice thereof to the registrar at her port of registry, and that registrar shall make an entry thereof in the register book.

Delivery up of certificate of ship lost or ceasing to be British owned.

(2.) In any such case, except where the ship's certificate of registry is lost or destroyed, the master of the ship shall, if the event occurs in port immediately, but if it occurs elsewhere then within ten days after his arrival in port, deliver the certificate to the registrar, or, if there is none, to the British consular officer there, and the registrar, if he is not himself the registrar of her port of registry, or the British consular officer, shall forthwith forward the certificate delivered to him to the registrar of her port of registry.

(3.) If any such owner or master fails, without reasonable cause, to comply with this section, he shall for each offence be liable to a fine not exceeding one hundred pounds.

Provisional certificate for ships becoming British owned abroad.

22.—(1.) If at a port not within Her Majesty's dominions and not being a port of registry established by Order in Council under this Act, a ship becomes the property of persons qualified to own a British ship, the British consular officer there may grant to her master, on his application, a provisional certificate, stating—

(*a*.) the name of the ship;

(*b*.) the time and place of her purchase, and the names of her purchasers;

(*c*.) the name of her master; and

(*d*.) the best particulars respecting her tonnage, build, and description which he is able to obtain;

and shall forward a copy of the certificate at the first convenient opportunity to the Registrar-General of Shipping and Seamen.

(2.) Such a provisional certificate shall have the effect of a certificate of registry until the expiration of six months from its date, or until the ship's arrival at a port where there is a registrar (whichever first happens), and on either of those events happening shall cease to have effect.

Temporary passes in lieu of certificates of registry.

23. Where it appears to the Commissioners of Customs, or to the governor of a British possession, that by reason of special circumstances it would be desirable that permission should be granted to any British ship to pass, without being previously registered, from any port in Her Majesty's dominions to any other port within Her Majesty's dominions, the Commissioners or the governor may grant a pass accordingly, and that pass shall, for the time and within the limits therein mentioned, have the same effect as a certificate of registry.

Transfers and Transmissions.

Transfer of ships or shares.

24.—(1.) A registered ship or a share therein (when disposed of to a person qualified to own a British ship) shall be transferred by bill of sale.

(2.) The bill of sale shall contain such description of the ship as is contained in the surveyor's certificate, or some other description sufficient to identify the ship to the satisfaction of the registrar, and shall be in the form marked A in the first part of the First Schedule to this Act, or as near thereto as circumstances permit, and shall be executed by the transferor in the presence of, and be attested by, a witness or witnesses.

25. Where a registered ship or a share therein is transferred, the transferee shall not be entitled to be registered as owner thereof until he, or, in the case of a corporation, the person authorised by this Act to make declarations on behalf of the corporation, has made and signed a declaration (in this Act called a declaration of transfer) referring to the ship, and containing—

Declaration of transfer.

(*a.*) a statement of the qualification of the transferee to own a British ship, or if the transferee is a corporation, of such circumstances of the constitution and business thereof as prove it to be qualified to own a British ship; and

(*b.*) a declaration that, to the best of his knowledge and belief, no unqualified person or body of persons is entitled as owner to any legal or beneficial interest in the ship or any share therein.

26.—(1.) Every bill of sale for the transfer of a registered ship or of a share therein, when duly executed, shall be produced to the registrar of her port of registry, with the declaration of transfer, and the registrar shall thereupon enter in the register book the name of the transferee as owner of the ship or share, and shall endorse on the bill of sale the fact of that entry having been made, with the day and hour thereof.

Registry of transfer.

(2.) Bills of sale of a ship or of a share therein shall be entered in the register book in the order of their production to the registrar.

27.—(1.) Where the property in a registered ship or share therein is transmitted to a person qualified to own a British ship on the marriage, death, or bankruptcy of any registered owner, or by any lawful means other than by a transfer under this Act—

Transmission of property in ship on death, bankruptcy, marriage, &c.

(*a.*) That person shall authenticate the transmission by making and signing a declaration (in this Act called a declaration of transmission) identifying the ship and containing the several statements herein-before required to be contained in a declaration of transfer, or as near thereto as circumstances admit, and also a statement of the manner in which and the person to whom the property has been transmitted.

(*b.*) If the transmission takes place by virtue of marriage, the declaration shall be accompanied by a copy of the register of the marriage or other legal evidence of the

celebration thereof, and shall declare the identity of the female owner.

(*c.*) If the transmission is consequent on bankruptcy, the declaration of transmission shall be accompanied by such evidence as is for the time being receivable in courts of justice as proof of the title of persons claiming under a bankruptcy.

(*d.*) If the transmission is consequent on death, the declaration of transmission shall be accompanied by the instrument of representation, or an official extract therefrom.

(2.) The registrar, on receipt of the declaration of transmission so accompanied, shall enter in the register book the name of the person entitled under the transmission as owner of the ship or share the property in which has been transmitted, and, where there is more than one such person, shall enter the names of all those persons, but those powers, however numerous, shall, for the purpose of the provision of this Act with respect to the number of persons entitled to be registered as owners, be considered as one person.

Order for sale on transmission to unqualified person.

28.—(1.) Where the property in a registered ship or share therein is transmitted on marriage, death, bankruptcy, or otherwise to a person not qualified to own a British ship, then—

if the ship is registered in England or Ireland, the High Court; or

if the ship is registered in Scotland, the Court of Session; or

if the ship is registered in any British possession, the court having the principal civil jurisdiction in that possession; or

if the ship is registered in a port of registry established by Order in Council under this Act, the British court having the principal civil jurisdiction there;

may on application by or on behalf of the unqualified person, order a sale of the property so transmitted, and direct that the proceeds of the sale, after deducting the expenses thereof, be paid to the person entitled under such transmission or otherwise as the court direct.

(2.) The court may require any evidence in support of the application they think requisite, and may make the order on any terms and conditions they think just, or may refuse to

make the order, and generally may act in the case as the justice of the case requires.

(3.) Every such application for sale must be made within four weeks after the occurrence of the event on which the transmission has taken place, or within such further time (not exceeding in the whole one year from the date of the occurrence) as the court allow.

(4.) If such an application is not made within the time aforesaid, or if the court refuse an order for sale, the ship or share transmitted shall thereupon be subject to forfeiture under this Act.

Transfer of ship or sale by order of Court.

29. Where any court, whether under the preceding sections of this Act or otherwise, order the sale of any ship or share therein, the order of the court shall contain a declaration vesting in some person named by the court the right to transfer that ship or share, and that person shall thereupon be entitled to transfer the ship or share in the same manner and to the same extent as if he were the registered owner thereof; and every registrar shall obey the requisition of the person so named in respect of any such transfer to the same extent as if such person were the registered owner.

Power of Court to prohibit transfer.

30. Each of the following courts; namely,—

(*a.*) in England or Ireland the High Court,

(*b.*) in Scotland the Court of Session,

(*c.*) in any British possession the court having the principal civil jurisdiction in that possession; and

(*d.*) in the case of a port of registry established by Order in Council under this Act, the British court having the principal civil jurisdiction there,

may, if the court think fit (without prejudice to the exercise of any other power of the court), on the application of any interested person make an order prohibiting for a time specified any dealing with a ship or any share therein, and the court may make the order on any terms or conditions they think just, or may refuse to make the order, or may discharge the order when made, with or without costs, and generally may act in the case as the justice of the case requires; and every registrar, without being made a party to the proceeding, shall on being served with the order or an official copy thereof obey the same.

Mortgages.

Mortgage of ship or share.

31.—(1.) A registered ship or a share therein may be made a security for a loan or other valuable consideration, and the instrument creating the security (in this Act called a mortgage) shall be in the form marked B in the first part of the First Schedule to this Act, or as near thereto as circumstances permit, and on the production of such instrument the registrar of the ship's port of registry shall record it in the register book.

(2.) Mortgages shall be recorded by the registrar in the order in time in which they are produced to him for that purpose, and the registrar shall by memorandum under his hand notify on each mortgage that it has been recorded by him, stating the day and hour of that record.

Entry of discharge of mortgage.

32. Where a registered mortgage is discharged, the registrar shall, on the production of the mortgage deed, with a receipt for the mortgage money endorsed thereon, duly signed and attested, make an entry in the register book to the effect that the mortgage has been discharged, and on that entry being made the estate (if any) which passed to the mortgagee shall vest in the person in whom (having regard to intervening acts and circumstances, if any), it would have vested if the mortgage had not been made.

Priority of mortgages.

33. If there are more mortgages than one registered in respect of the same ship or share, the mortgagees shall, notwithstanding any express, implied, or constructive notice, be entitled in priority, one over the other, according to the date at which each mortgage is recorded in the register book, and not according to the date of each mortgage itself.

Mortgagee not treated as owner.

34. Except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof.

Mortgagee to have power of sale.

35. Every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase money; but where there are more persons than one registered as mortgagees of the same ship or share, a subsequent mortgagee shall

not, except under the order of a court of competent jurisdiction, sell the ship or share without the concurrence of every prior mortgagee.

Mortgage not affected by bankruptcy. 36. A registered mortgage of a ship or share shall not be affected by any act of bankruptcy committed by the mortgagor after the date of the record of the mortgage, notwithstanding that the mortgagor at the commencement of his bankruptcy had the ship or share in his possession, order, or disposition, or was reputed owner thereof, and the mortgage shall be preferred to any right, claim, or interest therein of the other creditors of the bankrupt or any trustee or assignee on their behalf.

Transfer of mortgages. 37. A registered mortgage of a ship or share may be transferred to any person, and the instrument effecting the transfer shall be in the form marked C in the first part of the First Schedule to this Act, or as near thereto as circumstances permit, and on the production of such instrument the registrar shall record it by entering in the register book the name of the transferee as mortgagee of the ship or share, and shall by memorandum under his hand notify on the instrument of transfer that it has been recorded by him, stating the day and hour of the record.

Transmission of interest in mortgage by death, bankruptcy, marriage, &c. 38.—(1.) Where the interest of a mortgagee in a ship or share is transmitted on marriage, death, or bankruptcy, or by any lawful means, other than by a transfer under this Act, the transmission shall be authenticated by a declaration of the person to whom the interest is transmitted, containing a statement of the manner in which and the person to whom the property has been transmitted, and shall be accompanied by the like evidence as is by this Act required in case of a corresponding transmission of the ownership of the ship or share.

(2.) The registrar on the receipt of the declaration, and the production of the evidence aforesaid, shall enter the name of the person entitled under the transmission in the register book as mortgagee of the ship or share.

Certificates of Mortgage and Sale.

Powers of mortgage and sale may be conferred by certificate. 39. A registered owner, if desirous of disposing by way of mortgage or sale of the ship or share in respect of which he is registered at any place out of the country in which the port of registry of the ship is situate, may apply to the registrar,

and the registrar shall thereupon enable him to do so by granting a certificate of mortgage or a certificate of sale.

Requisites for certificates of mortgage and sale.

40. Before a certificate of mortgage or sale is granted, the applicant shall state to the registrar, and the registrar shall enter in the register book, the following particulars; (that is to say),

(i.) the name of the person by whom the power mentioned in the certificate is to be exercised, and in the case of a mortgage the maximum amount of charge to be created, if it is intended to fix any such maximum, and in the case of a sale the minimum price at which a sale is to be made, if it is intended to fix any such minimum:

(ii.) the place where the power is to be exercised, or if no place is specified, a declaration that it may be exercised anywhere, subject to the provisions of this Act:

(iii.) The limit of time within which the power may be exercised.

Restrictions on certificates of mortgage and sale.

41. A certificate of mortgage or sale shall not be granted so as to authorise any mortgage or sale to be made—

If the port of registry of the ship is situate in the United Kingdom, at any place within the United Kingdom; or

If the port of registry is situate within a British possession, at any place within the same British possession; or

If the port of registry is established by Order in Council under this Act, at that port, or within such adjoining area as is specified in the order; or

By any person not named in the certificate.

Contents of certificates of mortgage and sale.

42. A certificate of mortgage and a certificate of sale shall contain a statement of the several particulars by this Act directed to be entered in the register book on the application for the certificate, and in addition thereto an enumeration of any registered mortgages or certificates of mortgage or sale affecting the ship or share in respect of which the certificate is given.

Rules as to certificates of mortgage.

43. The following rules shall be observed as to certificates of mortgage:—

(1.) The power shall be exercised in conformity with the directions contained in the certificate:

(2.) Every mortgage made thereunder shall be registered by the endorsement of a record thereof on the certificate by a registrar or British consular officer:

(3.) A mortgage made in good faith thereunder shall not be impeached by reason of the person by whom the power was given dying before the making of the mortgage:

(4.) Whenever the certificate contains a specification of the place at which, and a limit of time not exceeding twelve months within which, the power is to be exercised, a mortgage made in good faith to a mortgagee without notice shall not be impeached by reason of the bankruptcy of the person by whom the power was given:

(5.) Every mortgage which is so registered as aforesaid on the certificate shall have priority over all mortgages of the same ship or share created subsequently to the date of the entry of the certificate in the register book; and, if there are more mortgages than one so registered, the respective mortgagees claiming thereunder shall, notwithstanding any express, implied, or constructive notice, be entitled one before the other according to the date at which each mortgage is registered on the certificate, and not according to the date of the mortgage:

(6.) Subject to the foregoing rules, every mortgagee whose mortgage is registered on the certificate shall have the same rights and powers and be subject to the same liabilities as he would have had and been subject to if his mortgage had been registered in the register book instead of on the certificate:

(7.) The discharge of any mortgage so registered on the certificate may be endorsed on the certificate by any registrar or British consular officer, on the production of such evidence as is by this Act required to be produced to the registrar on the entry of the discharge of a mortgage in the register book; and on that endorsement being made, the interest, if any, which passed to the mortgagee shall vest in the same person or persons in whom it would (having regard to intervening acts and circumstances, if any), have vested, if the mortgage had not been made:

(8.) On the delivery of any certificate of mortgage to the registrar by whom it was granted he shall, after recording in the register book, in such manner as to

preserve its priority, any unsatisfied mortgage registered thereon, cancel the certificate, and enter the fact of the cancellation in the register book; and every certificate so cancelled shall be void to all intents.

Rules as to certificates of sale.

44. The following rules shall be observed as to certificates of sale:—

(1.) A certificate of sale shall not be granted except for the sale of an entire ship:

(2.) The power shall be exercised in conformity with the directions contained in the certificate:

(3.) A sale made in good faith thereunder to a purchaser for valuable consideration shall not be impeached by reason of the person by whom the power was given dying before the making of such sale:

(4.) Whenever the certificate contains a specification of the place at which, and a limit of time not exceeding twelve months within which, the power is to be exercised, a sale made in good faith to a purchaser for valuable consideration without notice shall not be impeached by reason of the bankruptcy of the person by whom the power was given:

(5.) A transfer made to a person qualified to be the owner of a British ship shall be by a bill of sale in accordance with this Act:

(6.) If the ship is sold to a person qualified to be the owner of a British ship the ship shall be registered anew; but notice of all mortgages enumerated on the certificate of sale shall be entered in the register book:

(7.) Before registry anew there shall be produced to the registrar required to make the same the bill of sale by which the ship is transferred, the certificate of sale, and the certificate of registry of such ship:

(8.) The last-mentioned registrar shall retain the certificates of sale and registry, and after having endorsed on both of those instruments an entry of the fact of a sale having taken place, shall forward them to the registrar of the port appearing thereon to be the former port of registry of the ship, and the last-mentioned registrar shall thereupon make a memorandum of the sale in his register book, and the regis-

try of the ship in that book shall be considered as closed, except as far as relates to any unsatisfied mortgages or existing certificates of mortgage entered therein:

(9.) On such registry anew the description of the ship contained in her original certificate of registry may be transferred to the new register book, without her being re-surveyed, and the declaration to be made by the purchaser shall be the same as would be required to be made by an ordinary transferee:

(10.) If the ship is sold to a person not qualified to be the owner of a British ship, the bill of sale by which the ship is transferred, the certificate of sale, and the certificate of registry shall be produced to a registrar or British consular officer, and that registrar or officer shall retain the certificates of sale and registry, and, having endorsed thereon the fact of that ship having been sold to a person not qualified to be the owner of a British ship, shall forward the certificates to the registrar of the port appearing on the certificate of registry to be the port of registry of that ship; and that registrar shall thereupon make a memorandum of the sale in his register book, and the registry of the ship in that book shall be considered as closed, except so far as relates to any unsatisfied mortgages or existing certificates of mortgage entered therein:

(11.) If, on a sale being made to a person not qualified to be the owner of a British ship, default is made in the production of such certificates as are mentioned in the last rule, that person shall be considered by British law as having acquired no title to or interest in the ship; and further, the person upon whose application the certificate of sale was granted, and the person exercising the power, shall each be liable to a fine not exceeding one hundred pounds:

(12.) If no sale is made in conformity with the certificate of sale, that certificate shall be delivered to the registrar by whom the same was granted; and he shall thereupon cancel it and enter the fact of the cancellation in the register book; and every certificate so cancelled shall be void for all intents and purposes.

Power of commissioners of customs in case of loss of certificate of mortgage or sale.

45. On proof at any time to the satisfaction of the Commissioners of Customs that a certificate of mortgage or sale is lost or destroyed, or so obliterated as to be useless, and that the powers thereby given have never been exercised, or if they have been exercised, then on proof of the several matters and things that have been done thereunder. the registrar may, with the sanction of the Commissioners, as circumstances require, either issue a new certificate, or direct such entries to be made in the register books, or such other things to be done, as might have been made or done if the loss, destruction, or obliteration had not taken place.

Revocation of certificates of mortgage and sale.

46.—(1.) The registered owner of any ship or share therein in respect of which a certificate of mortgage or sale has been granted, specifying the places where the power thereby given is to be exercised, may, by an instrument under his hand, authorise the registrar by whom the certificate was granted to give notice to the registrar or British consular officer at every such place that the certificate is revoked.

(2.) Notice shall thereupon be given accordingly and shall be recorded by the registrar or British consular officer receiving it, and after it is recorded the certificate shall be deemed to be revoked and of no effect so far as respects any mortgage or sale to be thereafter made at that place.

(3.) The notice after it has been recorded shall be exhibited to every person applying for the purpose of effecting or obtaining a mortgage or transfer under the certificate.

(4.) A registrar or British consular officer on recording any such notice shall state to the registrar by whom the certificate was granted whether any previous exercise of the power to which such certificate refers has taken place.

Name of Ship.

Rules as to name of ship.

47.—(1.) A ship shall not be described by any name other than that by which she is for the time being registered.

(2.) A change shall not be made in the name of a ship without the previous written permission of the Board of Trade.

(3.) Application for that permission shall be in writing, and if the Board are of opinion that the application is reasonable they may entertain it, and thereupon require notice thereof to be published in such form and manner as they think fit.

(4.) On permission being granted to change the name, the ship's name shall forthwith be altered in the register book, in the ship's certificate of registry, and on her bows and stern.

(5.) If it is shown to the satisfaction of the Board of Trade that the name of any ship has been changed without their permission they shall direct that her name be altered into that which she bore before the change, and the name shall be altered in the register book, in the ship's certificate of registry, and on her bows and stern accordingly.

(6.) Where a ship having once been registered has ceased to be so registered no person unless ignorant of the previous registry (proof whereof shall lie on him) shall apply to register, and no registrar shall knowingly register, the ship, except by the name by which she was previously registered, unless with the previous written permission of the Board of Trade.

(7.) Where a foreign ship, not having at any previous time been registered as a British ship, becomes a British ship, no person shall apply to register, and no registrar shall knowingly register, the ship, except by the name which she bore as a foreign ship immediately before becoming a British ship, unless with the previous written permission of the Board of Trade.

(8.) If any person acts, or suffers any person under his control to act, in contravention of this section, or omits to do, or suffers any person under his control to omit to do, anything required by this section, he shall for each offence be liable to a fine not exceeding one hundred pounds, and (except in the case of an application being made under the section with respect to a foreign ship which not having at any previous time been registered as a British ship has become a British ship) the ship may be detained until this section is complied with.

Registry of Alterations, Registry anew, and Transfer of Registry.

Registry of alterations.

48.—(1.) When a registered ship is so altered as not to correspond with the particulars relating to her tonnage or description contained in the register book, then, if the alteration is made at any port having a registrar, that registrar, or, if it is made elsewhere, the registrar of the first port having a registrar at which the ship arrives after the alteration, shall, on application being made to him, and on receipt of a certificate from the proper surveyor stating the particulars of the alter-

ation, either cause the alteration to be registered, or direct that the ship be registered anew.

(2.) On failure to register anew a ship or to register an alteration of a ship so altered as aforesaid, that ship shall be deemed not duly registered, and shall not be recognised as a British ship.

Regulations for registry of alterations.

49.—(1.) For the purpose of the registry of an alteration in a ship, the ship's certificate of registry shall be produced to the registrar, and the registrar shall, in his discretion, either retain the certificate of registry and grant a new certificate of registry containing a description of the ship as altered, or endorse and sign on the existing certificate a memorandum of the alteration.

(2.) The particulars of the alteration so made, and the fact of the new certificate having been granted, or endorsement having been made, shall be entered by the registrar of the ship's port of registry in his register book; and for that purpose the registrar to whom the application for the registry of the alteration has been made (if he is not the registrar of the ship's' port of registry), shall forthwith report to the last-mentioned registrar the particulars and facts as aforesaid, accompanied, where a new certificate of registry has been granted, by the old certificate of registry.

Provisional certificate and endorsement where ship is to be registered anew.

50.—(1.) Where any registrar, not being the registrar of the ship's port of registry, on an application as to an alteration in a ship directs the ship to be registered anew, he shall either grant a provisional certificate, describing the ship as altered, or provisionally endorse the particulars of the alteration on the existing certificate.

(2.) Every such provisional certificate, or certificate provisionally endorsed, shall, within ten days after the first subsequent arrival of the ship at her port of discharge in the United Kingdom, if she is registered in the United Kingdom, or, if she is registered in a British possession, at her port of discharge in that British possession, or, if she is registered at a port of registry established by Order in Council under this Act, at that port, be delivered up to the registrar thereof, and that registrar shall cause the ship to be registered anew.

(3.) The registrar granting a provisional certificate under this section, or provisionally endorsing a certificate, shall add to the certificate or endorsement a statement that the same is made provisionally, and shall send a report of the particulars

of the case to the registrar of the ship's port of registry, containing a similar statement as the certificate or endorsement.

Registry anew on change of ownership.

51. Where the ownership of any ship is changed, the registrar of the port at which the ship is registered may, on the application of the owners of the ship, register the ship anew, although registration anew is not required under this Act.

Procedure for registry anew.

52.—(1.) Where a ship is to be registered anew, the registrar shall proceed as in the case of first registry, and on the delivery up to him of the existing certificate of registry, and on the other requisites to registry, or in the case of a change of ownership such of them as he thinks material, being duly complied with, shall make such registry anew, and grant a certificate thereof.

(2.) When a ship is registered anew, her former register shall be considered as closed, except so far as relates to any unsatisfied mortgage or existing certificates of sale or mortgage entered thereon, but the names of all persons appearing on the former register to be interested in the ship as owners or mortgagees shall be entered on the new register, and the registry anew shall not in any way affect the rights of any of those persons.

Transfer of registry.

53.—(1.) The registry of any ship may be transferred from one port to another on the application to the registrar of the existing port of registry of the ship made by declaration in writing of all persons appearing on the register to be interested therein as owners or mortgagees, but that transfer shall not in any way affect the rights of those persons or any of them, and those rights shall in all respects continue in the same manner as if no such transfer had been effected.

(2.) On any such application the registrar shall transmit notice thereof to the registrar of the intended port of registry with a copy of all particulars relating to the ship, and the names of all persons appearing on the register to be interested therein as owners or mortgagees.

(3.) The ship's certificate of registry shall be delivered up to the registrar either of the existing or intended port of registry, and, if delivered up to the former, shall be transmitted to the registrar of the intended port of registry.

(4.) On the receipt of the above documents the registrar of the intended port of registry shall enter in his register book all the particulars and names so transmitted as aforesaid, and grant a fresh certificate of registry, and thenceforth such ship

shall be considered as registered at the new port of registry, and the name of the ship's new port of registry shall be substituted for the name of her former port of registry on the ship's stern.

Restrictions on re-registration of abandoned ships.

54. Where a ship has ceased to be registered as a British ship by reason of having been wrecked or abandoned, or for any reason other than capture by the enemy or transfer to a person not qualified to own a British ship, the ship shall not be re-registered until she has, at the expense of the applicant for registration, been surveyed by a surveyor of ships and certified by him to be seaworthy.

Incapacitated Persons.

Provision for cases of infancy or other incapacity.

55.—(1.) Where by reason of infancy, lunacy, or any other cause any person interested in any ship, or any share therein, is incapable of making any declaration or doing anything required or permitted by this Act to be made or done in connexion with the registry of the ship or share, the guardian or committee, if any, of that person, or, if there is none, any person appointed on application made on behalf of the incapable person, or of any other person interested, by any court or judge having jurisdiction in respect of the property of incapable persons, may make such declaration, or a declaration as nearly corresponding thereto as circumstances permit, and do such act or thing in the name and on behalf of the incapable person; and all acts done by the substitute shall be as effectual as if done by the person for whom he is substituted.

(2.) The Trustee Act, 1850, and the Acts amending the same, shall, so far as regards the court exercising jurisdiction in lunacy in Ireland, apply to shares in ships registered under this Act as if they were stock as defined by that Act.

Trusts and Equitable Rights.

Notice of trusts not received.

56. No notice of any trust, express, implied, or constructive, shall be entered in the register book or be receivable by the registrar, and, subject to any rights and powers appearing by the register book to be vested in any other person, the registered owner of a ship or of a share therein shall have power absolutely to dispose in manner in this Act provided of the ship or share, and to give effectual receipts for any money paid or advanced by way of consideration.

57. The expression "beneficial interest," where used in this Part of this Act, includes interests arising under contract and other equitable interests; and the intention of this Act is, that without prejudice to the provisions of this Act for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by this Act on registered owners and mortgagees, and without prejudice to the provisions of this Act relating to the exclusion of unqualified persons from the ownership of British ships, interests arising under contract or other equitable interests may be enforced by or against owners and mortgagees of ships in respect of their interest therein in the same manner as in respect of any other personal property.

Equities not excluded by Act.

Liability of Beneficial Owner.

58. Where any person is beneficially interested, otherwise than by way of mortgage, in any ship or share in a ship registered in the name of some other person as owner, the person so interested shall, as well as the registered owner, be subject to all pecuniary penalties imposed by this or any other Act on the owners of ships or shares therein, so nevertheless that proceedings may be taken for the enforcement of any such penalties against both or either of the aforesaid parties, with or without joining the other of them.

Liability owners.

Managing Owner.

59.—(1.) The name and address of the managing owner for the time being of every ship registered at a port in the United Kingdom shall be registered at the custom house of that port.

Ship's managing owner or manager to be registered.

(2.) Where there is not a managing owner there shall be so registered the name of the ship's husband or other person to whom the management of the ship is entrusted by or on behalf of the owner; and any person whose name is so registered shall, for the purposes of this Act, be under the same obligations, and subject to the same liabilities, as if he were the managing owner.

(3.) If default is made in complying with this section the owner shall be liable, or if there are more owners than one each owner shall be liable in proportion to his interest in the ship,

to a fine not exceeding in the whole one hundred pounds each time the ship leaves any port in the United Kingdom.

Declarations, Inspection of Register, and Fees.

Power of registrar to dispense with declarations and other evidence.

60. When, under this Part of this Act, any person is required to make a declaration on behalf of himself or of any corporation, or any evidence is required to be produced to the registrar, and it is shown to the satisfaction of the registrar that from any reasonable cause that person is unable to make the declaration, or that the evidence cannot be produced, the registrar may, with the approval of the Commissioners of Customs, and on the production of such other evidence, and subject to such terms as they may think fit, dispense with the declaration or evidence.

Mode of making declarations.

61.—(1.) Declarations required by this Part of this Act shall be made before a registrar of British ships, or a justice of the peace, or a commissioner for oaths, or a British consular officer.

(2.) Declarations required by this Part of this Act may be made on behalf of a corporation by the secretary or any other officer of the corporation authorised by them for the purpose.

Application of fees.

62. All fees authorised to be taken under this Part of this Act, shall, except where otherwise in this Act provided, if taken in any part of the United Kingdom, be applied in payment of the general expenses of carrying into effect this Part of this Act, or otherwise as the Treasury may direct; if taken in a British possession, be disposed of in such way as the Executive Government of the possession direct; and if taken at any port of registry established by Order in Council under this Act, be disposed of as Her Majesty in Council directs.

Returns, Evidence, and Forms.

Returns to be made by registrars.

63.—(1.) Every registrar in the United Kingdom shall at the expiration of every month, and every other registrar at such times as may be fixed by the Registrar-General of Shipping and Seamen, transmit to him a full return, in such form as the said Registrar-General may direct, of all registries, transfers, transmissions, mortgages, and other dealings with ships which have been registered by or communicated to him in his character of registrar, and of the names of the persons

concerned in the same, and of such other particulars as may be directed by the said Registrar-General.

(2.) Every registrar at a port in the United Kingdom shall on or before the first day of February and the first day of August in every year transmit to the Registrar-General of Shipping and Seamen a list of all ships registered at that port, and also of all ships whose registers have been transferred or cancelled at that port since the last prceeding return.

Evidence of register book certificate of registry, and other documents.

64.—(1.) A person, on payment of a fee not exceeding one shilling, to be fixed by the Commissioners of Customs, may on application to the registrar at a reasonable time during the hours of his official attendance, inspect any register book.

2. The following documents shall be admissible in evidence in manner provided by this Act; namely,—

(*a.*) Any register book under this Part of this Act on its production from the custody of the registrar or other person having the lawful custody thereof;

(*b.*) A certificate of registry under this Act purporting to be signed by the registrar or other proper officer;

(*c.*) An endorsement on a certificate of registry purporting to be signed by the registrar or other proper officer;

(*d.*) Every declaration made in pursuance of this Part of this Act in respect of a British ship.

(3.) A copy or transcript of the register of British ships kept by the Registrar-General of Shipping and Seamen under the direction of the Board of Trade shall be admissible in evidence in manner provided by this Act, and have the same effect to all intents as the original register of which it is a copy or transcript.

Forms of documents, and instructions as to registry.

65.—(1.) The several instruments and documents specified in the second part of the First Schedule to this Act shall be in the form prescribed by the Commissioners of Customs, with the consent of the Board of Trade, or as near thereto as circumstances permit; and the Commissioners of Customs may, with the consent of the Board of Trade, make such alterations in the forms so prescribed, and also in the forms set out in the first part of the said schedule, as they may deem requisite.

(2.) A registrar shall not be required without the special direction of the Commissioners of Customs to receive and enter in the register book any bill of sale, mortgage, or other instrument for the disposal or transfer of any ship or share, or any

interest therein, which is made in any form other than that for the time being required under this Part of this Act, or which contains any particulars other than those contained in such forms; but the said commissioners shall, before altering the forms, give such public notice thereof as may be necessary in order to prevent inconvenience.

(3.) The Commissioners of Customs shall cause the said forms to be supplied to all registrars under this Act for distribution to persons requiring to use the same, either free of charge, or at such moderate prices as they may direct.

(4.) The Commissioners of Customs, with the consent of the Board of Trade, may also, for carrying into effect this Part of this Act, give such instructions to their officers as to the manner of making entries in the register book, as to the execution and attestation of powers of attorney, as to any evidence required for identifying any person, as to the referring to themselves of any question involving doubt or difficulty, and generally as to any Act or thing to be done in pursuance of this Part of this Act, as they think fit.

Forgery and false Declarations.

Forgery of documents.

66. If any person forges, or fraudulently alters, or assists in forging or fraudulently altering, or procures to be forged or fraudulently altered, any of the following documents, namely, any register book, builder's certificate, surveyor's certificate, certificate of registry, declaration bill of sale, instrument of mortgage, or certificate of mortgage or sale under this Part of this Act, or any entry or endorsement required by this Part of this Act to be made in or on any of those documents, that person shall in respect of each offence be guilty of felony.

False declarations.

67.—(1.) If any person in the case of any declaration made in the presence of or produced to a registrar under this Part of this Act, or in any document or other evidence produced to such registrar—

(i.) wilfully makes, or assists in making, or procures to be made any false statement concerning the title to or ownership of, or the interest existing in any ship, or any share in a ship; or

(ii.) utters, produces, or makes use of any declaration, or document containing any such false statement knowing the same to be false,

he shall in respect of each offence be guilty of a misdemeanor.

(2.) If any person wilfully makes a false declaration touching the qualification of himself or of any other person or of any corporation to own a British ship or any share therein, he shall for each offence be guilty of a misdemeanor, and that ship or share shall be subject to forfeiture under this Act, to the extent of the interest therein of the declarant, and also, unless it is proved that the declaration was made without authority, of any person or corporation on behalf of whom the declaration is made.

National Character and Flag.

National character of ship to be declared before clearance.

68.—(1.) An officer of customs shall not grant a clearance or transire for any ship until the master of such ship has declared to that officer the name of the nation to which he claims that she belongs, and that officer shall thereupon inscribe that name on the clearance or transire.

(2.) If a ship attempts to proceed to sea without such clearance or transire, she may be detained until the declaration is made.

Penalty for unduly assuming British character.

69.—(1.) If a person uses the British flag and assumes the British national character on board a ship owned in whole or in part by any persons not qualified to own a British ship, for the purpose of making the ship appear to be a British ship, the ship shall be subject to forfeiture under this Act, unless the assumption has been made for the purpose of escaping capture by an enemy or by a foreign ship of war in the exercise of some belligerent right.

(2.) In any proceeding for enforcing any such forfeiture the burden of proving a title to use the British flag and assume the British national character shall lie upon the person using and assuming the same.

Penalty for concealment of British or assumption of foreign character.

70. If the master or owner of a British ship does anything or permits anything to be done, or carries or permits to be carried any papers or documents, with intent to conceal the British character of the ship from any person entitled by British law to inquire into the same, or with intent to assume a foreign character, or with intent to deceive any person so entitled as aforesaid, the ship shall be subject to forfeiture under this Act; and the master, if he commits or is privy to the commission of the offence, shall in respect of each offence be guilty of a misdemeanor.

Penalty for acquiring ownership if unqualified.

71. If an unqualified person acquires as owner, otherwise than by such transmission as herein-before provided for, any interest, either legal or beneficial, in a ship using a British flag and assuming the British character, that interest shall be subject to forfeiture under this Act.

Liabilities of ships not recognised as British.

72. Where it is declared by this Act that a British ship shall not be recognised as a British ship, that ship shall not be entitled to any benefits, privileges, advantages, or protection usually enjoyed by British ships nor to use the British flag or assume the British national character, but so far as regards the payment of dues, the liability to fines and forfeiture, and the punishment of offences committed on board such ship, or by any persons belonging to her, such ship shall be dealt with in the same manner in all respects as if she were a recognised British ship.

National colours for ships, and penalty on carrying improper colours.

73.—(1.) The red ensign usually worn by merchant ships without any defacement or modification whatsoever, is hereby declared to be the proper national colours for all ships and boats belonging to any British subject, except in the case of Her Majesty's ships or boats, or in the case of any other ship or boat for the time being allowed to wear any other national colours in pursuance of a warrant from Her Majesty or from the Admiralty.

(2.) If any distinctive national colours, except such red ensign or except the Union Jack with a white border, or if any colours usually worn by Her Majesty's ships or resembling those of Her Majesty, or if the pendant usually carried by Her Majesty's ships or any pendant resembling that pendant, are or is hoisted on board any ship or boat belonging to any British subject without warrant from Her Majesty or from the Admiralty, the master of the ship or boat, or the owner thereof, if on board the same, and every other person hoisting the colours or pendant, shall for each offence incur a fine not exceeding five hundred pounds.

(3.) Any commissioned officer on full pay in the military or naval service of Her Majesty, or any officer of customs in Her Majesty's dominions, or any British consular officer, may board any ship or boat on which any colours or pendant are hoisted contrary to this Act, and seize and take away the colours or pendant, and the colours or pendant shall be forfeited to Her Majesty.

(4.) A fine under this section may be recovered with costs in the High Court in England or Ireland, or in the Court of Session in Scotland, or in any Colonial Court of Admiralty or Vice-Admiralty Court within Her Majesty's dominions.

(5.) Any offence mentioned in this section may also be prosecuted, and the fine for it recovered, summarily, provided that—

(*a.*) where any such offence is prosecuted summarily, the court imposing the fine shall not impose a higher fine than one hundred pounds; and

(*b.*) nothing in this section shall authorize the imposition of more than one fine in respect of the same offence.

Penalty on ship not showing colours.

74.—(1.) A ship belonging to a British subject shall hoist the proper national colours—

(*a.*) on a signal being made to her by one of Her Majesty's ships (including any vessel under the command of an officer of Her Majesty's navy on full pay), and

(*b.*) on entering or leaving any foreign port, and

(*c.*) if of fifty tons gross tonnage or upwards, on entering or leaving any British port.

(2.) If default is made on board any such ship in complying with this section, the master of the ship shall for each offence be liable to a fine not exceeding one hundred pounds.

(3.) This section shall not apply to a fishing boat duly entered in the fishing boat register and lettered and numbered as required by the Fourth Part of this Act.

Saving for Admiralty.

75. The provisions of this Act with respect to colours worn by merchant ships shall not affect any other power of the Admiralty in relation thereto.

Forfeiture of Ship.

Proceedings on forfeiture of ship.

76.—(1.) Where any ship has either wholly or as to any share therein become subject to forfeiture under this Part of this Act,

(*a.*) any commissioned officer on full pay in the military or naval service of Her Majesty;

(*b.*) any officer of customs in Her Majesty's dominions; or

(*c.*) any British consular officer,

may seize and detain the ship, and bring her for adjudication before the High Court in England or Ireland, or before the

Court of Session in Scotland, and elsewhere before any Colonial Court of Admiralty or Vice-Admiralty Court in Her Majesty's dominions, and the court may thereupon adjudge the ship with her tackle, apparel, and furniture to be forfeited to Her Majesty, and make such order in the case as to the Court seems just, and may award to the officer bringing in the ship for adjudication such portion of the proceeds of the sale of the ship, or any share therein, as the court think fit.

(2.) Any such officer as in this section mentioned shall not be responsible either civilly or criminally to any person whomsoever in respect of any such seizure or detention as aforesaid. notwithstanding that the ship has not been brought in for adjudication, or if so brought in is declared not liable to forfeiture, if it is shown to the satisfaction of the court before whom any trial relating to such ship or such seizure or detention is held that there were reasonable grounds for such seizure or detention; but if no such grounds are shown the court may award costs and damages to any party aggrieved. and make such other order in the premises as the court thinks just.

Measurement of Ship and Tonnage.

Rules for ascertaining register tonnage.

77.—(1.) The tonnage of every ship to be registered. with the exceptions herein-after mentioned, shall, previously to her being registered, be ascertained by Rule I. in the Second Schedule to this Act, and the tonnage of every ship, to which that Rule I. can be applied, whether she is about to be registered or not, shall be ascertained by the same rule.

(2.) Ships which, requiring to be measured for any purpose other than registry, have cargo on board, and ships which, requiring to be measured for the purpose of registry, cannot be measured by Rule I., shall be measured by Rule II. in the said schedule, and the owner of any ship measured under Rule II. may at any subsequent period apply to the Board of Trade to have the ship re-measured under Rule I., and the Board may thereupon, upon payment of such fee not exceeding seven shillings and sixpence for each transverse section as they may authorise, direct the ship to be re-measured accordingly, and the number denoting the register tonnage shall be altered accordingly.

(3.) For the purpose of ascertaining the register tonnage of a ship the allowance and deductions herein-after mentioned

shall be made from the tonnage of the ship ascertained as aforesaid.

(4.) In the measurement of a ship for the purpose of ascertaining her register tonnage, no deduction shall be allowed in respect of any space which has not been first included in the measurement of her tonnage.

(5.) In ascertaining the tonnage of open ships Rule IV. in the said schedule shall be observed.

(6.) Throughout the rules in the Second Schedule to this Act the tonnage deck shall be taken to be the upper deck in ships which have less than three decks, and to be the second deck from below in all other ships, and in carrying those rules into effect all measurements shall be taken in feet, and fractions of feet shall be expressed in decimals.

(7.) The Board of Trade may make such modifications and alterations as from time to time become necessary in the rules in the Second Schedule to this Act for the purpose of the more accurate and uniform application thereof, and the effectual carrying out of the principle of measurement therein adopted.

(8.) The provisions of this Act relating to tonnage, together with the rules for the time being in force, are in this Act referred to as the tonnage regulations of this Act.

Allowance for engine-room space in steam-ships.

78.—(1.) In the case of any ship propelled by steam r other power requiring engine rom, an allowance shall be made for the space occupied by the propelling power, and the amount so allowed shall be deducted from the gross tonnage of the ship ascertained as in the last preceding section mentioned. and the remainder shall (subject to any deductions herein-after mentioned) be deemed to be the register tonnage of the ship, and that deduction shall be estimated as follows; (that is to say),

(*a*.) As regards ships propelled by paddle wheels in which the tonnage of the space solely occupied by and necessary for the proper working of the boilers and machinery is above twenty per cent. and under thirty per cent. of the gross tonnage of the ship, the deduction shall be thirty-seven one-hundredths of the gross tonnage; and in ships propelled by screws, in which the tonnage of such space is above thirteen per cent. and under twenty per cent. of the gross tonnage, the deduction shall be thirty-two one-hundredths of the gross tonnage:

(*b.*) As regards all other ships, the deduction shall, if the Board of Trade and the owner both agree thereto, be estimated in the same manner; but either they or he may, in their or his discretion, require the space to be measured and the deduction estimated accordingly; and whenever the measurement is so required, the deduction shall consist of the tonnage of the space actually occupied by or required to be enclosed for the proper working of the boilers and machinery, with the addition in the case of ships propelled by paddle wheels of one half, and in the case of ships propelled by screws of three-fourths of the tonnage of the space; and in the case of ships propelled by screws, the contents of the shaft trunk shall be added to and deemed to form part of the space; and the measurement of the space shall be governed by Rule III. in the Second Schedule to this Act.

(2.) Such portion of the space above the crown of the engine room and above the upper deck as is framed in for the machinery or for the admission of light and air shall not be included in the measurement of the space occupied by the propelling power, except in pursuance of a request in writing to the Board of Trade by the owner of the ship, but shall not be included in pursuance of that request unless—

(*a.*) that portion is first included in the measurement of the gross tonnage; and

(*b*) a surveyor of ships certifies that the portion so framed in is reasonable in extent and is so constructed as to be safe and seaworthy, and that it cannot be used for any purpose other than the machinery or for the admission of light and air to the machinery or boilers of the ship.

(3.) Goods or stores shall not be stowed or carried in any space measured for propelling power, and if the same are so carried in any ship, the master and owner of the ship shall each be liable to a fine not exceeding one hundred pounds.

Deductions for ascertaining tonnage.

79.—(1.) In measuring or re-measuring a ship for the purpose of ascertaining her register tonnage, the following deductions shall be made from the space included in the measurement of the tonnage, namely:—

(*a*.) In the case of any ship—

(i.) any space used exclusively for the accommodation of the master; and any space occupied by seamen or apprentices and appropriated to their use, which is certified under the regulations scheduled to this Act with regard thereto.

(ii.) any space used exclusively for the working of the helm, the capstan, and the anchor gear, or for keeping the charts, signals, and other instruments of navigation, and boatswains stores; and

(iii.) the space occupied by the donkey engine and boiler, if connected with the main pumps of the ship; and

(*b*.) In the case of a ship wholly propelled by sails, any space set apart and used exclusively for the storage of sails.

(2.) The deductions allowed under this section, other than a deduction for a space occupied by seamen or apprentices, and certified as aforesaid, shall be subject to the following provisions; namely,—

(*a*.) The space deducted must be certified by a surveyor of ships as reasonable in extent and properly and efficiently constructed for the purpose for which it is intended:

(*b*.) There must be permanently marked in or over every such space a notice stating the purpose to which it is to be applied, and that whilst so applied it is to be deducted from the tonnage of the ship:

(*c*.) The deduction on account of space for storage of sails must not exceed two and a half per cent. of the tonnage of the ship.

Provisions as to deductions in case of certain steamships.

80. In the case of a screw steamship which, on the twenty-sixth day of August, one thousand eight hundred and eighty-nine, had an engine-room allowance of thirty-two per cent. of the gross tonnage of the ship, and in which any crew space on deck has not been included in the gross tonnage, whether its contents have been deducted therefrom or not, the crew space shall, on the application of the owner of the ship, or by direction of the Board of Trade, be measured and its contents ascertained and added to the register tonnage of the ship; and

if it appears that with that addition to the tonnage the engine room does not occupy more than thirteen per cent. of the tonnage of the ship, the existing allowance for engine room of thirty-two per cent. of the tonnage shall be continued.

Measurement of ships with double bottoms for water ballast.

81. In the case of a ship constructed with a double bottom for water ballast, if the space between the inner and outer plating thereof is certified by a surveyor of ships to be not available for the carriage of cargo, stores, or fuel, then the depth required by the provisions of Rule I. relating to the measurement of transverse areas shall be taken to be the upper side of the inner plating of the double bottom, and that upper side shall, for the purposes of measurement, be deemed to represent the floor timber referred to in that Rule.

Tonnage once ascertained to be the tonnage of ship.

82. Whenever the tonnage of any ship has been ascertained and registered in accordance with the tonnage regulations of this Act, the same shall thenceforth be deemed to be the tonnage of the ship, and shall be repeated in every subsequent registry thereof, unless any alteration is made in the form or capacity of the ship, or unless it is discovered that the tonnage of the ship has been erroneously computed; and in either of those cases the ship shall be re-measured, and her tonnage determined and registered according to the tonnage regulations of this Act.

Fees for measurement.

83. Such fees as the Board of Trade determine shall be paid in respect of the measurement of a ship's tonnage not exceeding those specified in the Third Schedule to this Act, and those fees shall be paid into the Mercantile Marine Fund.

Tonnage of ships of foreign countries adopting tonnage regulations.

84.—(1.) Whenever it appears to Her Majesty the Queen in Council that the tonnage regulations of this Act have been adopted by any foreign country, and are in force there, Her Majesty in Council may order that the ships of that country shall, without being re-measured in Her Majesty's dominions, be deemed to be of the tonnage denoted in their certificates of registry or other national papers, in the same manner, to the same extent, and for the same purposes as the tonnage denoted in the certificate of registry of a British ship is deemed to be the tonnage of that ship.

(2.) Her Majesty in Council may limit the time during which the Order is to remain in operation, and make the Order subject to such conditions and qualifications (if any) as Her Majesty may deem expedient, and the operation of the Order shall be limited and modified accordingly.

(3.) If it is made to appear to Her Majesty that the tonnage of any foreign ship, as measured by the rules of the country to which she belongs, materially differs from that which would be her tonnage if measured under this Act, Her Majesty in Council may order that, notwithstanding any Order in Council for the time being in force under this section, any of the ships of that country may, for all or any of the purposes of this Act, be re-measured in accordance with this Act.

Space occupied by deck cargo to be liable to dues.

85.—(1.) If any ship, British or foreign, other than a home trade ship as defined by this Act, carries as deck cargo, that is to say, in any uncovered space upon deck, or in any covered space not included in the cubical contents forming the ship's registered tonnage, timber, stores, or other goods, all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by those goods at the time at which the dues become payable.

(2.) The space so occupied shall be deemed to be the space limited by the area occupied by the goods and by straight lines enclosing a rectangular space sufficient to include the goods.

(3.) The tonnage of the space shall be ascertained by an officer of the Board of Trade or of Customs in manner directed as to the measurement of poops or other closed-in spaces by Rule I. in the Second Schedule to this Act, and when so ascertained shall be entered by him in the ship's official log-book, and also in a memorandum which he shall deliver to the master, and the master shall, when the said dues are demanded, produce that memorandum in like manner as if it were the certificate of registry, or, in the case of a foreign ship, the document equivalent to a certificate of registry, and in default shall be liable to the same penalty as if he had failed to produce the said certificate or document.

(4.) Nothing in this section shall apply to any ship employed exclusively in trading or going from place to place in any river or inland water of which the whole or part is in any British possession, or to deck cargo carried by a ship while engaged in the coasting trade of any British possession.

Surveyors and regulations for measurement of ships.

86. All duties in relation to the survey and measurement of ships shall be performed by surveyors of ships under this Act in accordance with regulations made by the Board of Trade.

Levy of tonnage rates under local Acts on the registered tonnage.

87. Any persons having power to levy tonnage rates on ships may, if they think fit, with the consent of the Board of Trade, levy those tonnage rates upon the registered tonnage of the ships as determined by the tonnage regulations of this Act, notwithstanding that any local Act under which those rates are levied provides for levying the same upon some different system of tonnage measurement.

Ports of Registry in Place under Foreign Jurisdiction Act.

Foreign ports of registry. 53 & 54 Vict., c. 37.

88. Where, in accordance with the Foreign Jurisdiction Act, 1890, Her Majesty exercises jurisdiction within any port, it shall be lawful for Her Majesty, by Order in Council, to declare that port a port of registry, and by the same or any subsequent Order in Council to declare the description of persons who are to be registrars of British ships at that port of registry, and to make regulations with respect to the registry of British ships thereat.

Registry in Colonies.

Powers of governors in colonies.

89. In every British possession the governor of the possession shall occupy the place of the Commissioners of Customs with regard to the performance of anything relating to the registry of a ship or of any interest in a ship registered in that possession, and shall have power to approve a port within the possession for the registry of ships.

Terminable certificates of registry for small ships in colonies.

90.—(1.) The governor of a British possession may, with the approval of a Secretary of State, make regulations providing that, on an application for the registry under this Act in that possession of any ship which does not exceed sixty tons burden, the registrar may grant, in lieu of a certificate of registry as required by this Act, a certificate of registry to be terminable at the end of six months or any longer period from the granting thereof, and all certificates of registry granted under any such regulations shall be in such form and have effect subject to such conditions as the regulations provide.

(2.) Any ship to which a certificate is granted under any such regulations shall, while that certificate is in force, and in relation to all things done or omitted during that period, be deemed to be a registered British ship.

Application of Part I.

91. This Part of this Act shall apply to the whole of Her Majesty's dominions, and to all places where Her Majesty has jurisdiction.

Application of Part I.

VIII. WRECK.

CANADA SHIPPING ACT.

R. S. C. 1906, cap. 113.

Superintendence.

733. The Minister shall, throughout Canada, have the general superintendence of all matters relating to wrecks and shipping casualties. R.S., c. 81, s. 3.

Minister to have superintendence.

Appointment of Receivers of Wrecks.

734. The Governor in Council may, from time to time,—

Appointment of receivers of wreck.

(*a*.) appoint any officer of Customs or, when it appears to him more convenient, any other person to be a receiver of wrecks;

(*b*.) by order in council, establish, alter or abolish districts for the purposes of this Part, and assign a district to any receiver, and vary such district;

(*c*.) make and vary regulations for the conduct of receivers, subject to the provisions of this Part. R.S., c. 81, s. 15.

735. If, at any time, there is not any receiver for any district in which the city of Quebec, the city of Halifax, or the city of St. John is included, then the agent of the Department of Marine and Fisheries at such city shall be the receiver for such district.

Where no receivers, who to act at Quebec, Halifax and St. John.

2. If, at any time, there is not a receiver for any other district, then the principal officer of Customs at the principal port in such district, shall be the receiver for such district. R.S., c. 81, s. 15.

In other districts.

Powers of Receivers as to Inquiries.

Powers.

736. A receiver acting in execution of his duties in pursuance of this Part shall have all the powers and authorities of a principal officer of Customs or other person acting or appointed under the foregoing provisions of this Part. R.S., c. 81, s. 16.

Vessels Wrecked or in Distress.

Powers as to vessels wrecked, &c.

737. When any British or foreign vessel is wrecked, stranded or in distress at any place within the limits of Canada, the receiver shall, upon being made acquainted with such stranding or distress, forthwith proceed to such place; and, upon his arrival there, he shall take the command of all persons present and assign such duties and issue such directions to each person as he thinks fit for the preservation of such vessel and of the wreck, and of the lives of shipwrecked persons. R.S., c. 81, s. 17.

Not to take charge contrary to wish of owner.

738. Nothing in this Part shall be construed to authorise the receiver to take charge of any ship, cargo or materials contrary to the expressed wish of the master or owner of such ship or cargo, or of their agents. R.S., c. 81, s. 18.

Powers of Receivers.

Further powers.

739. The receiver may, with a view to the preservation of the vessel, or of the shipwrecked persons or wreck,—

(*a*.) require such persons as he thinks necessary to assist him;

(*b*.) require the master of any vessel near at hand to give such aid with his men or vessel as is in his power;

(*c*.) demand the use of any wagon, cart, horses, tackle, ropes or appliances that are near at hand. R.S., c. 81, s. 19.

Power of receiver to suppress plunder and disorder by force.

740. The receiver may cause to be apprehended and kept in custody, until he can be conveniently taken before a justice of the peace to be dealt with according to law, any person who plunders, creates disorder or obstructs the preservation of a vessel wrecked, stranded or in distress within the limits of Canada, and may use force for the suppression of any such plundering, disorder or obstruction and may command all His Majesty's subjects to assist him in the use of such force. R.S., c. 81, s. 23.

741. If, when the receiver or any person acting under his orders is engaged in the execution of the duties by this Part committed to the receiver, any person resists such receiver or person, and is killed, maimed or hurt by reason of such resistance, no action, suit or prosecution against such receiver or other person for or by reason of or on account of such killing, maiming or hurting, shall be instituted or maintained, either on behalf of His Majesty or of the person so maimed or hurt, or the representatives of any person so killed. R.S., c. 81, s. 23.

Persons killed, &c., while resisting.

Protection of receiver.

Passage over Adjoining Lands.

742. Whenever any vessel is wrecked, stranded or in distress within the limits of Canada, all persons for the purpose of rendering assistance to such vessel, or of saving any wreck or the lives of any shipwrecked persons, may, unless there is some public road equally convenient pass and repass, either with or without carriages or horses, over any adjoining lands, without being subject to interruption by the owner or occupier, if they do so with as little damage as possible; and may also, on the like condition, deposit on such lands any wreck saved. R.S., c. 81, s. 20.

Passage over adjoining lands.

743. All damage sustained by any owner or occupier in consequence of any such passing, repassing or deposit, shall be a charge on the vessel or wreck in respect of which such damage was occasioned.

Damage by such passage.

2. Such damage shall, in default of payment, be recoverable, and, in case of dispute, the amount thereof be determined, in the same manner as salvage may by this Part be recovered and, in case of dispute as to amount, be determined.

How recoverable.

3. No such compensation shall be recoverable in respect of damage to any gate, wall, fence or other obstruction which has been unreasonably erected or placed by such owner or occupier so as to impede such passing, repassing or deposit. R.S., c. 81, s. 21.

No compensation in certain cases.

Power of Master.

744. Every person, not being a receiver or a person acting for or under the orders of a receiver, who endeavours to board any vessel wrecked, stranded or in distress within the limits of Canada, without the leave of the master of such vessel, may

Unauthorized person may be repulsed by force.

be repelled by force; and the master and every person under his orders so repelling such person by force, are hereby indemnified for so doing. R.S., c. 81, s. 24.

Officers Acting as Receivers.

Certain officers to exercise powers of receiver in his absence.

745. When a receiver is not present, any principal officer of Customs, fishery officer, or stipendiary magistrate on board of any vessel belonging to or in the service of the Government of Canada and employed in the service of protecting the fisheries, officer of inland revenue, sheriff, justice of the peace, commissioned officer on full pay in the naval service of His Majesty, or commissioned officer on full pay in the military service of His Majesty, or lighthouse keeper employed by the Government of Canada, may do all matters and things by this Part authorized to be done by the receiver, for the preservation of vessels, shipwrecked persons and wreck.

Priority where more than one present.

2. If any two or more of such officers or persons are present when any act as aforesaid is required to be done, they shall respectively have priority in relation to any such act in the order in which they are named in this section.

Fees and right to salvage

3. Any officer or person so acting shall, in respect to any wreck the delivery of which to the receiver is hereby required, be considered as the agent of the receiver, and shall place the same in the custody of the receiver, and he shall not be entitled to any fees payable to receivers, or be deprived, by reason of his so acting, of any right to salvage to which the would otherwise be entitled. R.S., c. 81, s. 25.

Persons when deemed acting under receiver.

746. Any person acting under the orders of an officer or person acting in pursuance of the provisions of the last preceding section shall, for the purposes of this Part, be deemed to be acting under the orders of a receiver. R.S., c. 81, s. 25.

Wreck.

Duty of persons finding wreck in Canada.

747. Whenever any person takes possession of wreck within the limits of Canada, he shall, as soon as possible, deliver the same to the receiver: Provided that the Minister may dispense with any such delivery in the case of any wreck, upon such conditions as he thinks fit. R.S., c. 81, s. 26.

Notice of wreck to be given to receiver.

748. Every receiver shall, within forty-eight hours after taking possession of any wreck, cause to be posted up in the Custom-house nearest to the place where such wreck was found

or was seized by, or delivered to him, a description of the same and of any marks by which it is distinguished, and shall also transmit a similar description to the Minister, who may give such publicity to the same as he thinks fit. R.S., c. 81, s. 28.

Owner may claim wreck within one year.

749. The owner of any wreck in the possession of the receiver, upon establishing his claim to the same to the satisfaction of the Minister, within one year from the time at which such wreck came into the possession of the receiver shall, upon paying the salvage, fees and expenses due, be entitled to have such wreck or the proceeds thereof delivered up to him or his agent. R.S., c. 81, s. 29.

Foreign consul deemed agent for foreign wreck.

750. If any such wreck is proved to the satisfaction of the Minister to belong to a foreign owner, the consul general in Canada of the country to which the owner of such wreck belongs, or any consular officer of that country authorized in that behalf by any treaty or arrangement with such country, shall, in the absence of the owner or his agent, be deemed to be the agent of the owner so far as relates to the custody and disposal of the wreck. R.S., c. 81, s. 29.

Sale of Wreck.

Sale if for general advantage, or if goods are dangerous.

751. If, in his opinion, it is for the advantage of all parties to sell wreck in his custody, or, if such wreck consists of goods of a dangerous nature, the receiver may sell the same; and the proceeds of such sale, after defraying the expenses thereof, shall be held by the receiver for the same purposes and subject to the same claims, rights and liabilities as if the wreck had remained unsold. R.S., c. 81, s. 30.

If salvage is not paid.

752. If the owner of any wreck is known or has established his title to the same, but neglects to pay the salvage, fees or expenses due thereon for twenty days after notice in writing from the receiver, the receiver may sell such wreck, or a sufficient part thereof, and may, out of the proceeds of such sale, after defraying the expenses of sale, pay the salvage, fees and expenses due, and shall deliver any remaining portion of the wreck and pay the surplus proceeds, if any, of such sale to the persons entitled to receive the same. R.S., c. 81, s. 30.

Unclaimed Wreck.

Sale of unclaimed wreck.

753. If no owner setablishes a claim to wreck before the expiration of a year from the date at which the same has come

into the possession of the receiver, such wreck, if unsold, shall be sold by such persons and in such manner as the Minister directs.

Disposal of proceeds.

2. The proceeds of such sale shall, after payment of expenses, costs, fees and salvage, be paid over to the Minister of Finance, to form part of the Consolidated Revenue Fund of Canada. R.S., c. 81, s. 31.

Claims to Wreck.

Delivery of wreck by receiver not to prejudice title.

754. Upon delivery of wreck or payment of the proceeds of wreck by a receiver, in pursuance of the provisions of this Part, such receiver shall be discharged from all liability in respect thereof; but such delivery or payment shall not prejudice or affect any question which is raised by third parties concerning such wreck. R.S., c. 81, s. 32.

Interpleader in case of wreck.

755. Whenever two or more persons claim any wreck or proceeds of wreck of any value or amount in the possession of a receiver, any court sitting and having jurisdiction in civil matters to the value or amount of the wreck or proceeds in question, in the district of such receiver, may, on the application of such receiver, or of any of such persons, summon such persons before it, and may hear and adjudicate upon their claims, and make such order, between the parties in respect thereof and of the costs of the proceedings as to such court seems fit.

Enforcement of order.

2. Such order may be enforced in like manner as any order made in any suit brought in the same court. R.S., c. 81, s. 33.

APPENDIX V.

Prize Jurisdiction.

Prize jurisdiction in Canada is vested in the Exchequer Court of Canada on its Admiralty side.

The Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), provides by section 2, sub-section 3 (b):—

> "A Colonial Court of Admiralty shall have, under the Naval Prize Act, 1864, . . . and any enactment relating to prize . . . the jurisdiction thereby conferred on a Vice-Admiralty Court and not the jurisdiction thereby conferred exclusively on the High Court of Admiralty or the High Court of Justice; but, unless for the time being duly authorized, shall not, by virtue of this Act, exercise any jurisdiction under the Naval Prize Act, 1864, or otherwise in relation to prize."

Originally prize jurisdiction was exercised under a Commission of the Admiralty, but the existing jurisdiction in Canada is derived from the Prize Courts Act, 1894 (57 & 58 Vict. c. 39), which authorizes the issuance of a commission and warrant to any Colonial Court of Admiralty. The history of the past and present jurisdiction of the Canadian Prize Court is elaborately treated by the Deputy Minister of Justice in his opening in the case of *The Bellas,* and that case has therefore been reproduced in *extenso* and follows this note. The Deputy Minister appears, however, to have assigned a wrong date to the warrant which was issued pursuant to the Commission of the 10th of July, 1899; the actual date of the warrant being the 17th of August, 1899, and not the 10th of April, 1900, as stated: the commission and warrant, together with the covering despatch from Mr. Chamberlain, then Secretary of State for the Colonies, are found in the Canada Gazette of the 11th November, 1899, vol. 33, p. 913.

It should be noted that the Prize Courts (Procedure) Act, 1914 (4 & 5 Geo. V., c. 13) repeals the provisions of the Naval Prize Act, 1864, relating to practice and procedure as from the date of the coming into operation of the Prize Court Rules: as explained in *The Bellas,* these Rules came into force in Canada on the 22nd August, 1914, and on the 23rd September, 1914, a further order was added by the President of

the Canadian Prize Court, numbered XLVII., and dealing with the time for service of process, the execution of the marshal's duty by the Sheriff of any district for which there is no marshal, and the provision of a seal; on the 3rd October, 1914, certain amendments were made in the rules by Order in Council.

There has apparently been no instance of the exercise of prize jurisdiction in British North America since 1812: the cases which occurred previously to that date, and which all seem to have been tried in the Vice-Admiralty Court of Nova Scotia, are collected in volume 3 of the Canadian Reports of Appeal Cases.

Prohibition does not lie to a Court of Admiralty exercising prize jurisdiction (*Key and Hubbard* v. *Pearse, temp. Wilmington,* cited in *Le Caux* v. *Eden,* Douglas 606).

The prize jurisdiction of the High Court of Justice in England extends throughout His Majesty's Dominions (Naval Prize Act, 1864, 27 & 28 Vict., c. 25, sec. 4), but a Vice-Admiralty Court or a Colonial Court of Admiralty has only a local jurisdiction "confined to the adjudication of property brought within their own limits" (*The Carel and Magdalena,* 3 C. Rob. at p. 59).

An appeal from the Exchequer Court of Canada in Prize lies to His Majesty in Council (Naval Prize Act, 1864, 27 & 28 Vict. c. 25, s. 5).

IN THE EXCHEQUER COURT OF CANADA.

No. 1.

(IN PRIZE.)

Tuesday, 15th December, 1914.

Before The Honourable Mr. Justice Cassels (President).

THE BELLAS.

(Transcript of the Official Stenographer's notes.)

Mr. E. L. Newcombe, K.C., Deputy Minister of Justice, appeared for the Crown, and Mr. A. C. Hill, for the claimant.

Mr. Newcombe: If your Lordship please, while we are accustomed to meet your Lordship here daily, sitting in the exercise of Exchequer jurisdiction, and also but less frequently

at Instance or in the hearing of appeals from the Local Judges in Admiralty, this, I think, is the first occasion for one hundred years in which a Prize Court has assembled for adjudication of capture in British North America. The occasion is certainly without precedent in the Dominion of Canada which was constituted in 1867; I have no record of any case during the Crimean war, and I think we may go back as far as the war of 1812 and the Napoleonic wars. In those circumstances, possibly, I may ask your Lordship's indulgence before we enter upon the particulars of this case, which is the case of the German barque *Bellas* detained at Quebec at the outbreak of the war, in order to refer briefly to the history of the Court in Canada, and to explain the jurisdiction which your Lordship is now exercising.

Like many other things of value in the Dominion, the Prize Court finds its Canadian origin in the ancient Province of Nova Scotia. There is a very interesting note, to which I would like to refer, in Stewart's Reports of the Admiralty decisions of the province.

His Lordship: Those were Dr. Croke's judgments?

Mr. Newcombe: Yes. They were published in 1813. This volume is edited with great care, a collection of the judgments of the time, both at Instance and at Prize, in the Admiralty Court; and it was brought out by James Stewart, one of the counsel of the Court, who says in his prefatory note:

> "The Court, in which these decisions were given, was established upon its present basis in the year 1801. The irregularities which had prevailed in the Vice-Admiralty courts having given occasion for complaint, both at home and abroad, at length drew the attention of His Majesty's Ministers, and of the Legislature. It was thought proper, by lessening their number, by extending their jurisdiction, and, by increasing the salaries of the Judges, to give them greater consequence and dignity, and to induce gentlemen acquainted with the law, and the practice of the courts in England, and, particularly, some of the advocates of the civil law, to accept of these judicial offices. With this view His Majesty, by a letter of Lord Grenville, dated the 22nd day of January, 1801, directed the Lords Commissioners of the Admiralty, to revoke the prize commissions which had been granted to the Vice-Admiralty Courts in the West Indies, and in the colonies upon the American

continent, except Jamaica and Martinico. An Act of Parliament was then passed, in July, 1801 (41 Geo. III. c. 96), by which each and every of the Vice-Admiralty Courts established in any two of the islands in the West Indies, and at Halifax in America, were empowered to issue their process to any other of His Majesty's colonies or territories in the West Indies or America, including therein the Bahamas and Bermuda Islands, as if such court was established in the island, colony or territory, within which its functions were to be exercised. His Majesty was authorized to fix salaries for the Judges, not exceeding the sum of Two Thousand Pounds per annum for each Judge, and it was then enacted, 'that the profits and emoluments of the said Judges should in no case exceed Two Thousand Pounds each in any one year, over and above their salary.' Martinique having been given up at the peace in 1801, a Vice-Admiralty Court was erected at Barbadoes in lieu of it. By another Act (43 Geo. III., c. 160) in 1803, provision was made for the Judges of Vice-Admiralty Courts to be established in the Bahama and Bermuda Islands, and at Malta.

"In August, 1801, Alexander Croke, LL.D., an advocate of the civil law, and a barrister at law, had the honour of being offered, without solicitation, the first appointment upon this new establishment, with the choice of his station; in which he preferred the severe, yet healthy air of Nova Scotia, to the luxuriant but hazardous climate of the West Indies, and has presided in it ever since that period."

The author (after omitting a paragraph which is not material for the present purpose) referring to Dr. Croke, says:

"He has not only distinguished himself as an advocate in Doctor's Commons, but his vindication of our belligerent rights, in his excellent answer to Schlegel, and his introduction to the case of Horner and Lydiard, have brought his talents into that notice which cannot but add a value to his judicial decisions.

"Whether or not these cases may be received as authorities in other Courts, is not for the Reporter to enquire. He begs leave, however, to remark, that the judgments of Vice-Admiralty Courts, are not, in matter of prize, strictly speaking, colonial, and may therefore be considered as

more immediately proceeding from the voice of the nation. The great and good man who has presided for so many years, in the High Court of Admiralty of England, has raised his own reputation, as well as that of his country, for national justice, to an eminence of which Englishmen may proudly boast. This boon has been acquired by a system of independent, just, and humane principles, which have been followed, it is hoped, with strict attention by the inferior tribunals—among them the Vice-Admiralty Court of Nova Scotia, the Reporter may be allowed, without vanity, to assert, is not the least distinguished for an adherence to that admirable system, a system which all those who entertain the wish of *Esto perpetua* with respect to the safety, the independence, and the glory of the British Empire will ever feel the obligation of adopting."

A note is added with regard to Dr. Croke's antecedents which I think is also very interesting,—

"Dr. Croke is the descendant and the representative of the family of Sir George Croke, the Reporter, who so ably defended the cause of national liberty in the cases of the ship money, and Hampden's imprisonment. The history of this family is given in Ward's lives of the Gresham Professors, and in Sir Harbottle Grimstone's preface, to the Reports. The latter mentions a curious circumstance which I shall copy in his own words.

"This reverend Judge, Sir George Croke, was descended of an ancient and illustrious family called Le Blount, his ancestor in the time of the civil dissention between York and Lancaster, being a fautor and assistant unto the house of Lancaster, was inforced to subduct and conceal himself under the name of Croke, till such time as King Henry the Seventh most happily reconciling those different titles, this our ancestor (Grimston, who was the progenitor of the present peer of that name, married one of Sir George Croke's daughters) in his postliminum, assuming his ancient name, wrote himself Croke, alias Blount, that of Blount being altogether omitted by our Judge's father upon the marriage of his son and heir, Sir John Croke, with the daughter of Sir Michael Blount, of Maple Durham, in the County of Oxford."

Thus remarkably enough, Dr. Croke, the immediate predecessor of your Lordship, in point of the exercise of prize

jurisdiction in Canada, was therefore the direct lineal descendant of the younger and more celebrated of the two Crokes of the time of the Stuarts to whom we are indebted for the three series of reports of Elizabeth, James and Charles.

It would seem that the prize jurisdiction, originally exercised under a Commission of the Admiralty, by the Vice-Admiralty Court, was continued, with certain modifications of the procedure which are not necessary to mention, until the Imperial Prize Courts Act of 1894,—

His Lordship: 1864?

Mr. Newcombe: There was the Naval Prize Act of 1864, but the Act which I refer to is the Act of 1894 under which the warrants are issued constituting the jurisdiction of this court. That Act is in the pamphlet published by the Justice Department under the title "Naval Prize Acts, &c.," on page 19, and it is cited as the Prize Courts Act, 1894. By section 2 of that Act it is provided:

> "2. (1) Any commission, warrant, or instructions from Her Majesty the Queen or the Admiralty for the purpose of commissioning or regulating the procedure of a prize court at any place in a British possession may, notwithstanding the existence of peace, be issued at any time, with a direction that the court shall act only upon such proclamation as hereinafter mentioned being made in the possession.
>
> "(2) Where any such commission, warrant, or instructions have been issued, then, subject to instructions from Her Majesty, the Vice-Admiral of such possession may, when satisfied by information from a Secretary of State or otherwise, that war has broken out between Her Majesty and any foreign State, proclaim that war has so broken out, and thereupon, the said commission, warrant, and instructions shall take effect as if the same had been issued after the breaking out of such war and such foreign state were named therein."
>
> "(3) The said commission and warrant may authorize either a Vice-Admiralty Court, or a Colonial Court of Admiralty, within the meaning of the Colonial Courts of Admiralty Act, 1890, to act as a prize court, and may establish a Vice-Admiralty Court for that purpose."

Under the authority of this statute, the letters patent of the 10th July, 1899, and the Admiralty warrant of the

10th April, 1900, were issued. I have copies of those. The letters patent were issued under the Queen's sign manual of the 10th July, in the 63rd year of the Queen's reign, and were directed to the Commissioners for executing the office of the Lord High Admiral of the United Kingdom, naming them, and to the Commissioners for executing that office for the time being, authorizing them by warrant from time to time notwithstanding the existence of peace, to will and require any such Courts or persons as follows, that is to say:—

> "Vice-Admiralty Courts, which shall be duly commissioned within our Dominions, Possessions or Colonies (other than our United Kingdom of Great Britain and Ireland) and Courts of Law or persons being Colonial Courts of Admiralty within the meaning of the Colonial Courts of Admiralty Act, 1890, as you our said Commissioners now and for the time being or any two or more of you shall select, upon proclamation being made in that part of our Dominions, Possessions or Colonies within which such Court or person has jurisdiction in Admiralty by our Vice-Admiral thereof that War has broken out between Us and some Foreign State or States, and not otherwise, to take cognizance of and judicially to proceed upon all and all manner of captures, recaptures, seizures, prizes and reprisals of all ships, vessels and goods, then already seized and taken and which thereafter shall be seized and taken, and all other matters of prize falling within the jurisdiction of Prize Courts, and to hear and determine the same; and according to the course of Admiralty and the Law of Nations and the Statutes, Rules and Regulations in that behalf for the time being in force, to adjudge and condemn all such ships, vessels and goods as shall belong to the State or States named in the Proclamation aforesaid, or to the subjects of such State or States, or to any other persons inhabiting within any of the countries, territories or dominions of such State or States or be otherwise condemnable as Prize; and such Courts or Persons are hereby authorized and required to proceed accordingly: And we do hereby further authorize you our said Commissioners now and for the time being and any two or more of you by Warrant to revoke or alter any Warrant which shall have been issued, granted or made by you or any two or more of you as aforesaid."

Pursuant to that authority, the Commissioners by Warrant under their hand and seal of office of the 10th April, 1900, authorized the Exchequer Court of Canada to exercise Prize jurisdiction. The words of the Warrant are:—

> "These are in Her Majesty's name, and ours, to will and require the Exchequer Court of Canada, and you the Judge of the said Court, and all others the Judges or Judge for the time being of the said Court, and all local Judges in Admiralty for the time being of the said Court, or other the persons or person executing the duties of the office of Judge or local Judge in Admiralty of the said Court for the time being, and you are hereby authorized and required from time to time upon any Proclamation . . ."

and so on in the terms of the letters patent.

The Colonial Courts of Admiralty Act is chapter 27, of 53-54 Victoria, enacted on the 25th July, 1890, and it was of course in pursuance of the authority of that Act that the Admiralty jurisdiction of the Exchequer Court was constituted.

The Governor-General is also *ex officio* Commander in Chief of the Dominion of Canada, and Vice-Admiral of the same, and by his proclamation of the 19th August, 1914, published in an extra number of the *Canada Gazette* of the same date, His Royal Highness, after stating that he was satisfied thereof by information received by him, proclaimed that war had broken out between His Majesty and the German Empire.

By section 3, subsection 1, of the Prize Courts Act, 1894, it is provided that,

> "Her Majesty the Queen in Council may make rules of court for regulating, subject to the provisions of the Naval Prize Act, 1864, and this Act, the procedure and practice of Prize Courts within the meaning of that Act, and the duties and conduct of the officers thereof, and of the practitioners therein, and for regulating the fees to be taken by the officers of the Courts, and the costs, charges and expenses to be allowed to the practitioners therein."

Under this provision His Majesty by Order-in-Council of the 6th August, 1914, approved the prize rules of the Court known as the Prize Rules, 1914. Of these Order XLVI., which is the last order in the volume, provides that the Rules shall not come into operation in any court in a British pos-

session outside the United Kingdom until they are proclaimed in the possession by the Governor thereof.

By a proclamation, dated the 22nd August and published in the *Canada Gazette* of the 29th of that month, it was declared that the said Prize Rules, 1914, should come into force and effect upon the date of the Proclamation.

Thus we have the Court and the procedure of the Court established.

On the 5th August an Order of the Governor-General in Council was passed concerning the days of grace to be allowed to German ships in Canadian ports at the outbreak of war to leave Canada pursuant to the Convention relative to the status of enemy merchant ships at the outbreak of hostilities, signed at The Hague on the 18th of October, 1907.

That Order-in-Council of the 5th August is published in an Extra of the *Canada Gazette* of the same date, and it corresponds substantially with the Imperial Order-in-Council of the 4th August, which is published at page 138 of the Manual of Emergency Legislation, 1914, issued by the King's Printer.

Now, this Order-in-Council, citing from the Order of the Governor-General in Council of the 5th August, 1914, as it appears in the *Canada Gazette* of that date, provides:

> "I. From and after the publication of this Order, no enemy merchant ship shall be allowed to depart, except in accordance with the provisions of this Order, from any Canadian port.
>
> "2. In the event of the Governor-General being informed by His Majesty's Government that information had reached His Majesty's Government, not later than midnight on Friday, the seventh day of August, that the treatment accorded to British Merchant Ships and their cargoes which, at the date of the outbreak of hostilities were in the ports of the enemy or which subsequently entered them is not less favourable than the treatment accorded to Enemy Merchant Ships by Articles 3 to 7 of this Order, the Secretary of State for External Affairs shall notify the Minister of Customs and the Minister of the Naval Service accordingly, and public notice thereof shall forthwith be given in the *Canada Gazette,* and Articles 3 to 8 of this Order shall thereupon come into full force and effect.

"3. Subject to the provisions of this Order, enemy merchant ships which—

"(i) At the date of the outbreak of hostilities were in any port in which this Order applies; or

"(ii) Cleared from their last port before the declaration of war, and, after the outbreak of hostilities, enter a port to which this Order applies with no knowledge of the war;

"Shall be allowed up till midnight (Greenwich mean time) on Friday, the 14th day of August, 1914, for loading or unloading their cargoes and for departing from such port. Provided that such vessels shall not be allowed to ship any contraband of war, and any contraband of war already shipped on such vessels must be discharged."
Paragraph 9 reads as follows:

"9. If no information reaches His Majesty's Government within the time allowed by it for the receipt of such information to the effect that the treatment accorded to British Merchant Ships and their cargoes which were in the ports of the enemy at the date of the outbreak of hostilities, or which subsequently entered them, is, in its opinion, not less favourable than that accorded to enemy merchant ships by Articles 3 to 8 of this Order, every enemy merchant ship which, on the outbreak of hostilities, was in any port to which this Order applies and also every enemy ship which cleared from its last port before the declaration of war, but which, with no knowledge of the war enters a port to which this Order applies, shall, together with the cargo on board thereof, be liable to capture, and shall be brought before the Prize Court forthwith for adjudication."

Now, my Lord, that is the provision which applies to *The Bellas*, a vessel of German nationality, having certain cargo on board within a Canadian port at the outbreak of the war, the condition of immunity provided by the earlier clause of the Order not being satisfied.

In a despatch, dated the 19th August, 1914, from the Secretary of State for the Colonies to the Governor-General, it was stated that at midnight, August the 7th, the Secretary of State for Foreign Affairs formally notified the Lords Commissioners of the Admiralty that Articles 3 to 8 of the Order in Council would not come into operation as regards Germany.

The documents with regard to that notification are published in the red book of Emergency Legislation to which I have referred, at page 141.

So much, my Lord, for the status of the court, and the procedure, and the instructions by which the present case is to be governed.

His Lordship: Would you allow me to suggest, in order to give everything—as your interesting statement will be of great use to those outside of Ottawa—to refer to the Act of the 5th August, 1914, which repealed certain provisions of the Naval Prize Act, 1864. It will be found at page 21 of the blue book.

Mr. Newcombe: Yes, my Lord, I thank your Lordship. That is the Act to amend the law relating to procedure in Prize Courts. It was enacted on the 5th August last, the day after the war began,—and it provides:

> "(1) As from the date when rules under an Order in Council made after the passing of this Act in pursuance of section three of the Prize Courts Act, 1894, regulating the procedure and practice in prize courts, come into operation, such of the provisions of the Naval Prize Act, 1864, as are specified in the Schedule to this Act (being enactments relating to the practice and procedure in prize courts) shall be repealed:
>
> "Provided that nothing in such repeal shall have the effect of extending section 16 of that Act to ships of war taken as prize, and accordingly that section shall have effect as if the following words were inserted therein:— 'Nothing in this section shall apply to ships of war taken as prize.'
>
> "(2) Any cause or proceeding commenced in any prize court before such rules as aforesaid come into operation as respects that court may, as the court directs, be either,—
>
> "(*a*) recommenced and proceeded with in accordance with the said rules; or
>
> "(*b*) continued in accordance with the said rules subject to such adaptations as the court may deem necessary to make them applicable to the case; or
>
> "(*c*) continued to the determination thereof in accordance with the procedure applicable to the case at the commencement of the cause or proceeding."

Of course the former practice is very greatly modified by the rules made in pursuance of the legislation.

The Court as your Lordship perceives is enjoined by the warrant to proceed according to the "course of Admiralty and the Law of Nations, and the Statutes, Rules and Regulations in that behalf for the time being in force."

Now a prize trial is, if I apprehend the character of it, in the nature of an inquest held by the State upon the captured property, to ascertain whether it has been lawfully captured.

The jurisdiction descends from that which the Admiral originally exercised on the quarter deck to adjudge the status and distribution of the prize, and under more modern international practice it became recognized as customary in time of war that the Admiralty of a maritime belligerent should institute a court to determine whenever a prize was taken by its public vessels or privateers, whether the capture was lawful or not. Therefore, the court proceeds according to the course of Admiralty, as evidenced by the instructions of its own Sovereign; and subject to these, instructions, according to the law of Nations, or perhaps, with great deference, I may more accurately say, the practice of Nations, as embodied in the municipal system of the country, and so far as the international practice is consistent with the Statutes, rules and regulations for the time being in force.

Proceeding then to the facts and the application of these principles, my Lord, the barque *Bellas* is a German ship as appears from her ship's papers, her home port being Hamburg in the German Empire. The papers are produced with the affidavit of E. N. Chinic, Collector of Customs at Quebec. He brings the papers into court under his affidavit sworn the 12th of September, 1914. I offer the ship's papers in evidence. (The file is marked Exhibit Number 1 by the Registrar.) That file includes the affidavit of Mr. Chinic. These ship's papers appear to be in three parts. They are headed with the name and arms of the German Empire, and show that *The Bellas* is a bark ship with the registered home port of Hamburg, Germany. The papers produced are the muster roll, the ship's certificate, and the certificate of admeasurement, showing beyond any question the German nationality of the vessel.

The writ was issued on the 16th of September, 1914, against the ship and cargo, "for the condemnation thereof as good and lawful prize, and droits and perquisites of us in our office of Admiralty," directed to "the owners and parties interested in the ship *Bellas* of the port of Hamburg, in the

German Empire, and the goods laden therein, seized and taken of prize by our officers of customs at the port of Quebec."

Then there was a notice of appearance entered on the 28th of September, for one Orlando De Mello Do Rego of the City of Lisbon, in the Kingdom of Portugal, claiming to be the owner of the ship.

Then, my Lord, a document was served on me as the proper officer of the Crown, but by what authority I am not aware, which purports to be an affidavit of Conrod Bollen, master of the sailing ship *Bellas*, sworn to at Quebec, on the 28th of September, before J. Alexander Lapirere, a Commissioner of the Superior Court, in which he says:

> "1. That Dr. Orlando De Mello Do Rego, of Lisbon, citizen of the Portuguese Republic, is the sole owner of the said barque *Bellas*, having purchased her at the City of Lisbon aforesaid on the 3rd day of July last, 1914.
>
> "2. That the said barque *Bellas* reached the port of Rimouski on the 29th day of July, 1914, five days before the declaration of war.
>
> "3. That on the third day of August the said vessel was put under seizure by the Canadian authorities and has since been under detention in the port of Quebec.
>
> "4. That for the reasons set forth above, I respectfully submit that the said vessel be released."

His Lordship: That third paragraph of the affidavit is not in accordance with the defence put in.

Mr. Newcombe: No, my Lord, it is not.

His Lordship: The defence filed is not correct if that affidavit is right. The defence admits she was seized after the declaration of war. That is admitted there.

Mr. Hill: That is a clerical error. The 3rd day of August should be the 5th in that affidavit.

His Lordship: I noticed that error. The defence admits the seizure on the 5th.

Mr. Hill: She was seized on the 5th August.

Mr. Newcombe: Then there was an application for discovery, and Captain Bollen made an affidavit of discovery on the 16th of October, in which he sets out the schedules of the documents which are or have been in his possession. I need not refer to those at present.

On the 21st of November, your Lordship made an Order for pleadings in these terms:

"I do Order that the proper officer of the Crown file a petition in the Registry of this Court on or before the second day of November, 1914; and I do further order that Orlando De Mello Do Rego claiming to be the owner of the ship *Bellas* do have until the 12th day of November, 1914, in which time to file his answer to the said Petition."

In pursuance of that I filed a petition showing that *The Bellas* is a German vessel, as appears by her ship's papers filed in this Court with the affidavit of Eugene Chinic, Collector of Customs of the port of Quebec, sworn on the 12th of September, 1914; that the vessel was seized by His Majesty's Collector of Customs on the 5th of August, 1914, and that the vessel is good and lawful prize as droit, and perquisite of Admiralty.

The firm of Messrs. Taschereau, Roy, Cannon, Parent & Fitzpatrick, attorneys at Quebec, filed what they call a statement of defence of Dr. Orlando de Mello do Rego of the City of Lisbon, in the Republic of Portugal,, trader, the owner of the said vessel *Bellas,* in which they show that:

"1. The first allegation of the petition of the proper officer of the Crown that *The Bellas* is a German vessel is denied.

"2. It is admitted, as alleged in the 2nd paragraph of said petition, that the vessel was seized by His Majesty's Collector of Customs since the declaration of war between His Majesty the King and the German Empire, but it is alleged that said vessel was not a German vessel at the time of said seizure.

"3. It is denied, as alleged in paragraph 3 of said petition, that the vessel, which is a merchant ship, is a good and lawful prize as droits and perquisites of Admiralty.

"4. The vessel was owned by a German firm known as J. Wimmer and Co. previous to the date of the 3rd July last (1914), but at the said date the property of the vessel was transferred to the said Orlando de Mello do Rego according to a legal sale of same as appears by a letter from the said J. Wimmer & Co. to the said Orlando de Mello do Rego dated 3rd of July, 1914.

"5. The vessel *Bellas* was on the Atlantic Ocean at the time of the said sale, having sailed from the Port of Oporto, Portugal on the 24th of June, 1914, on her usual voyage

to Rimouski, and only reached the Port of Rimouski on the 29th of July, 1914.

"6. The sale above mentioned to the said Orlando de Mello do Rego, who is a Portuguese subject, is a *bona fide* sale."

"Wherefore it is respectfully claimed that the said vessel should be released."

Your Lordship will perceive that they allege a sale of the vessel during the course of her voyage.

Then there was an order fixing the trial, and notice was given pursuant to the rules by the Registrar on the 24th of November, 1914, also notice of trial was served in my name on the attorneys for the claimant.

The gross tonnage of the vessel according to her registry is 930.94 tons. She is said to have been engaged for a number of years in the lumber trade, and she has on board, as I am informed, a part of a cargo of lumber, loading not having been completed at the declaration of war on the 4th of August. She was then at Rimouski. Notice of detention was given to the captain, by Omer Beaulieu, Detaining Officer at the port of Rimouski, P.Q., on the 7th of August. The notice of detention was directed to the master of the barque *Bellas,* Capt. C. Bollen, as follows:

"You are hereby to take notice that the above named vessel is under detention at this port, and that any attempt to move the vessel without the written authority of the Detaining Officer in charge at this port will be a breach of detention for which you and all other members of the crew thereof will be held responsible, and may result in the seizure or destruction of the vessel.

"Possession has been taken of the ship's papers together with the following documents: ship's articles, ship's certificate, ship's mess brief, 4 revolvers."

On the 10th of August the vessel was handed over to Commander Atwood, R.N., to be towed to Quebec City and it was there delivered into the charge of E. N. Chinic, Collector of Customs at the Port of Quebec.

The writ, as I have said, was issued under the authority of the proper officer of the Crown for the condemnation of the ship and cargo, as good and lawful prize and as droits and perquisites of Admiralty, on the 16th of September, and it was served on the ship on the 22nd of September.

Your Lordship will perceive that we have here a ship established by her papers to be a German ship, and flying the German flag. Notwithstanding that, there is an appearance and a claim pleaded in favour of a Portuguese subject, claiming the vessel as his property, as being a Portuguese vessel.

His Lordship: The plea refers to a letter of some person who is not made a party to the plea.

Mr. Newcombe: No, my Lord, I do not think that any of the essentials to make a valid transfer have been alleged.

His Lordship: Mr. Hill was good enough to show the letter to me on the application to fix the trial, but he does not show any transfer at all.

Mr. Newcombe: I am asking for the detention of the ship —of course it is a proceeding *in rem*—and in addition for the dismissal of the claim pleaded here on the part of the alleged Portuguese owner.

His Lordship: By referring to the 4th paragraph of the defence, you will observe:

> "The vessel was owned by a German firm known as J. Wimmer & Co., previous to the date of the 3rd July last (1914), but at the said date the property of the vessel was transferred to the said Orlando de Mello do Rego according to a legal sale of same, as appears by a letter from the said J. Wimmer & Co., to the said Orlando de Mello do Rego dated 3rd of July, 1914."

That letter goes in as part of the defence, otherwise it would not be intelligible; and by that letter there appears to be no transfer at all.

Mr. Newcombe: I think the disposition of the claim, so far as that is concerned, is a comparatively simple matter, and probably the disposition of the case beyond that is equally simple; but I have to show that the ship is properly before your Lordship, in order to ask your Lordship for an order of detention, and so I point out that the notice of the issue and service of the writ was in accordance with Order II., Rule 21, inserted by the Registrar of the Court five times in each of the newspapers, the *Montreal Gazette* and the *Quebec Chronicle*.

His Lordship: You have an affidavit proving the correctness of the translation. I thought I saw it. There is a provision in the Order for translation. One of these orders provides for translation.

Mr. Newcombe: Yes. There is no affidavit. It can be supplied. I understood that the translation was made under the direction of the court.

His Lordship: No.

Mr. Newcombe: Then I am misinformed.

His Lordship: There is some rule applying to it. You ask as against the German owners nothing more than detention of the vessel.

Mr. Newcombe: That the ship and cargo be detained by the marshal until a further order is issued by the court.

His Lordship: That there would be an order similar to the one issued by Sir Samuel Evans?

Mr. Newcombe: Order XV., Rule 20, of the Prize Court Rules, 1914, with respect to the translation of documents is as follows:

> "20. Where any ship papers or other documents have to be translated for use in a cause, such translation shall be made by an interpreter, appointed by the party who desires to use such translation, or, if necessary, by a person appointed for the purpose by the Judge. The parties to any proceeding may agree, or if there is no party other than the Crown or the captor, the proper officer of the Crown may direct, which and what parts, if any, of the ship papers and documents shall be translated."

They have all been translated.

His Lordship: It rests on the other side to show any error. There is no necessity for any affidavit.

Mr. Newcombe: The translation is an accurate one.

Mr. Newcombe then produced as a witness for the Crown, Eugene Chinic of the city of Quebec, in the province of Quebec, Dominion of Canada, Collector of Customs at Quebec aforesaid, who having been sworn was examined orally by Mr. Newcombe, K.C., Deputy Minister of Justice, as follows:—

Q. You are the Collector of Customs at Quebec, Mr. Chinic?

A. Yes, sir.

Q. You are aware of the facts with regard to the detention of *The Bellas?*

A. Yes, sir.

Q. When did she come to Quebec?

A. On the 13th August, 1914. She was handed over to me by Commander Atwood.

Q. By Commander Atwood?

A. Yes.

Q. Did you take possession of her papers?

A. Yes, sir. The papers were all handed over to me also.

Q. And you made the affidavit of ship's papers which has been filed?

A. Yes, sir.

Q. Is the vessel loaded?

A. The vessel was supposed to be partly loaded.

Q. Partly loaded with lumber?

A. Yes.

Q. And she is still lying in Quebec with her cargo on board?

A. Yes, sir.

Q. Are you aware of the notice which was served on the captain at Rimouski?

A. No, sir.

Q. You did not know anything about that?

A. No.

Q. You know she was brought to Quebec from Rimouski?

A. Yes, sir.

(There was no cross-examination.)

His Lordship: Is navigation closed at Quebec? A. Yes.

(This concluded the examination of this witness.)

Mr. Newcombe: That is the case, my Lord, and I propose to ask, subject to what my learned friend has to say, for the dismissal of the Portuguese claim, and for an Order for the detention of the vessel and cargo.

His Lordship: Similar to the Order in the *Chile* case?

Mr. Newcombe: Yes. It is very much like the case of *The Chile.*

Mr. Hill: My Lord, I wish to put upon the record our claim for what it is worth, I desire to call Captain Bollen, the commander of *The Bellas.*

The claimant, Orlando de Mello do Rego, produced as a witness Conrad Bollen, master of the barque *Bellas,* who having been sworn, was examined orally by Mr. Hill, as follows:—

Q. You are the master of the ship *Bellas?*

A. Yes.

Q. She was seized at Rimouski last August?

A. Yes.

Q. From what port did you sail to Canada?

A. Oporto.

Q. From Oporto in Lisbon?

A. Portugal.

Q. When did you leave Oporto?

A. On the 24th June, 1914.

Q. Rimouski was the first port you reached after the 24th June?

A. Yes.

Q. Had you any communication with Oporto with respect to your ship from the time you left Oporto until you reached Rimouski?

A. No.

Q. Who were the owners of *The Bellas* at the time you left Oporto?

A. J. Wimmer & Company.

Q. You had heard nothing from them whatever up to the time you reached Canada?

A. No, sir.

Q. After you reached Rimouski, did you communicate with your firm, J. Wimmer & Company?

A. I sent them a telegram.

Q. When did you send them a telegram?

A. The day after I arrived.

Q. That was on what date?

A. That was the evening of the 29th July.

Q. Did you get a reply to your telegram?

A. No, sir. The telegram I received was about the sailing of the ship. The first telegram I received.

Q. What was the nature of this cablegram you sent?

A. It was in code words saying that the ship arrived and everything was in good order.

Q. When did you communicate with them again?

A. After the seizure of the ship.

Q. And on what date was the ship seized?

A. The ship was seized on the fifth of August, 1914; but the detention paper was only got on the seventh of August.

Q. I have a copy of a cablegram here purporting to be dated Lisbon, 7th August, signed J. Wimmer & Company, addressed to you. When did you receive that cablegram?

A. I think it was on the 8th August, I received it.

Q. Was that reecived by you in reply to your notice to J. Wimmer & Company that the ship had been detained?

A. No. It was after that. I communicated a second time. I was detained on board; I could not go ashore. Price Brothers sent this telegram down to me—Price Brothers in Rimouski. They sent this down to me, and told me they noti-

fied the Portuguese Consul about the sending of the ship, to give a certificate.

(Mr. Hill put in a telegram dated Lisbon, Portugal, 7th August, 1914, from J. Wimmer & Company to Captain Bollen —Exhibit "A.")

Q. Was this the first notification you had received that *The Bellas* had been sold to this Portuguese owner? A. Yes.

Q. In your productions you have a document here apparently written in the Portuguese language, and this document Exhibit Number 2, which you also produce, purports to be a translation of this Portuguese document. Where did you get these documents?

A. I received these documents from Price Brothers. They were sent from Lisbon to London, and from London here.

(Objected to by Mr. Newcombe).

Mr. Newcombe: Let him state what he knows personally about it.

The Witness: Every communication my owners took with Price & Pierce, Ltd., in London, they sent them down here to Price Brothers & Company.

(Mr. Hill put in Part 1, Part 2 and Part 3—Exhibit "B.")

Q. Now there is a cablegram from Orlando Mello Rego to you dated the 15th October, 1914, reading as follows:

> "Apply Portuguese Consul who received orders Portuguese government emit provisory Portuguese flag certificate to Lisbon secure from British authorities safe conduct until Lisbon overpaint aft Hamburg substituting Lisbon ask Price telegraph offer 280 stands Lisbon composition."

—What is the meaning of that telegram?

A. That is the meaning, that the Portuguese Consul received orders from his government, that the sale was made before the declaration of war, and that he, Orlando De Mello Do Rego is the owner of the ship now.

Q. And what is the meaning of this "Portuguese flag certificate to Lisbon?

A. That he should give me a certificate that I have a right to carry the Portuguese flag.

Q. And bring the ship back under that flag?

A. And give me a permit to bring the ship back under that flag.

(Mr. Hill put in the cablegram dated Lisbon, 15th October, 1914, from Orlando Mello Rego to the witness as Exhibit "C.")

Q. There is another cablegram addressed to Price Brothers Care of *Bellas*, Quebec, signed by J. Wimmer & Company; dated October 15th, 1914, reading as follows: "*Bellas* duly delivered new owner Orlando Millo Rego you must "execute his orders." Where did you get that cablegram from?

A. I did not get that telegram; it came to Price Brothers.

Q. And they handed it over to you?

A. Yes.

(Mr. Hill put in this telegram as Exhibit "D.")

Q. There is another cablegram dated October 14th, 1914, directed to the Portuguese Consul at Quebec, and it is signed by the Minister of Foreign Affairs at Lisbon—it is a cablegram in French: "Sauf opposition autorites motif guerre veuillez accorder passeport provisoire bateau portugais bellas qui se trouve rimonoki et faciliter son depart avec tripulation?" (Exhibit "E.")

(Objected to by Mr. Newcombe, K.C.)

Q. What is that document (Exhibit "F")? A. This is a document that the ship was sold, that the new owner took the ship over on the 3rd July. That is the document asked for all the time, and did not turn up. I received this yesterday morning. The Portuguese Consul gave it to me. It is not translated yet. It is in Portuguese.

Mr. Newcombe: Can you translate it? A. No.

His Lordship: What does that purport to be?

Mr. Hill: It is dated Lisbon, the 10th November, 1914. This purports to be a legal transfer of the ship.

His Lordship: A bill of sale?

Mr. Hill: Yes. And there is a letter from Orlando De Mello Do Rigo to the Portuguese Consul at Quebec, which reads as follows:

Lisbon, November 9th, 1914.

To the Hon. Portuguese Consul,
Quebec.

"Sir,—Corresponding to the request expressed in your cable to the Portuguese Foreign Office the contents of which were communicated to me, I hasten to inform you of the conditions under which the sale of *The Bellas* was effected remitting at the same time the documents of the said sale.

"As you will see from these and specially from the business letter dated July 3rd of the present year the contract of sale was concluded the forthgoing Monday—29th

of June—also of the present years, and *The Bellas* remained from that date, *i.e.*, 3rd of July, for account of the present owner Dr. Orlando de Mello do Rego.

"Consequently, the contract of sale of *The Bellas* was concluded very long before the outbreak of hostilities.

"If only later, on the 6th of August, the notary act was made this was merely as issues from the letter of July 27th done on account of the convenience of the parties, as they were over busy and one of the partners was abroad.

"The nationalizing and enregistering under Portuguese flag of the bark *Bellas* was authorized in a meeting of the Council of Ministers of Portugal on the 7th of October of the present year and in conformity with the law and without—just for this reason—any observation being made by any one of the belligerent nations.

"This is what I have to inform you and I trust that hereby all doubts are dispelled and that I thus fully satisfy the wish expressed in your cable.

"As the Portuguese Government has authorized owing to the impossibility of sending a crew from here that the ship may come over with a foreign crew I have this day given instructions to my agents to sign on a crew of subjects of your country or any other friendly nationality.

"I am, dear sir, your humble servant,

"Orlando do Mello de Rego. "(Exhibit "G.")

Q. His Lordship: He had not the right to fly the Portuguese flag until the 7th October?

Mr. Hill: We do not dispute that.

(Mr. Hill puts in Exhibits "E.," " H." and "G.")

Cross-examined by Mr. Newcombe, K.C.

Q. Did you receive a notice from the Detaining Officer at Rimouski, a notice in writing of the detention of the vessel?

A. He only told me that on the 5th August, and I received a written notice on the 7th August.

Q. You did receive a writing from him?

A. On the seventh.

Q. Have you got it here?

A. Yes.

Q. Let me see it please?

A. No, I have not got that here. He took that back, but he made out another one. (Witness produces a notice and hands it to counsel.)

Q. Well, I may read this one:

"Notice of Detention of Vessel.—To the Master of the barque *Bellas,* Capt. C. Bollen. You are hereby to take notice that the above named vessel is under detention, and that any attempt to move the vessel without the written authority of the detaining officer in charge will be a breach of detention for which you and all other members of the crew thereof will be held responsible and may result in the seizure or destruction of the vessel. Possession has been taken of the ship's papers, together with the following documents: Ship's articles; ship's certificate; 4 revolvers, August 7th, 1914.

"H. W. Atwood, Detaining Officer for Department of Naval Service."

—That is the notice you received on the 7th August?

A. No. Commander Atwood came up. He took the ship over, and he wrote another one out, and the Custom House Officer, the Collector of Customs, took the other one back.

Q. This comes out of your possession, you just handed me this notice?

A. Yes.

Q. Where did you get it?

A. I got it that day when *The Margaret* brought me up.

Q. What day was that, the 7th August?

A. The 13th August.

Q. The 13th August, you think it was?

A. Yes.

Q. You had that notice ever since?

A. Yes.

Q. Was this the first written notice you received?

A. I had another one, but with the same meaning.

Q. Now, what was the first notification that you received of any pretended sale to a Portuguese owner?

A. It was the first telegram.

Q. Have you got the telegram here, let me see it. (Counsel examines Exhibit "A."). This message purports to be dated at Libson, the 7th August, 1914—what day did you receive it? A. I cannot say exactly. As soon as it arrived it was handed over to me.

Q. At Rimouski?

A. At Rimouski. It was sent on board because I was detained.

Q. And you do not know what date you got it?

A. No.

Q. You say you got this document, dated the 9th November, which you produce (Exhibit "G.")—where did you get it?

A. I got it yesterday morning from the Portuguese Consul. It just arrived in the mail from London. It was sent to Price Brothers in another envelope.

His Lordship: Will you have that translated?

Mr. Hill: I ask permission to have it translated later.

Mr. Newcombe: It is immaterial.

His Lordship: Still if it has got to be in, we might as well understand what it is.

Mr. Newcombe: Well, it will be subject to the objection I made.

Mr. Hill: I file another cable from the Minister of Foreign Affairs to the Portuguese Consul, dated the 16th October, 1914. And attached is the affidavit of the Portuguese Consul proving the receipt of the cablegram and his reply. (This cable and affidavit was put in as Exhibit "H."). (This concluded the examination of this witness).

Mr. Hill: There is only one point my learned friend has not made out. There is no proper seizure. There is no evidence to show who Commander Atwood was; that he was acting in accordance with Admiralty instructions. The onus is upon the Crown to prove a proper seizure.

His Lordship: You have admitted it in the answer. It is admitted in the second paragraph that the ship was seized by the Collector of Customs on the declaration of war.

Mr. Hill: I submit, my Lord, that if an order is to be made, it should be made following the order in the *Chile* case. That case seems to be on all fours with ours. We are making a claim, not as an alien enemy but as a Portuguese owner.

His Lordship: You contend that it should be detained against Germany until the end of the war?

Mr. Hill: We are satisfied it should be detained, and not condemned as a prize of war. We are satisfied with that order.

His Lordship: Reserving costs.

Mr. Newcombe: Except this, that as I intimated at the opening: a claim has been interposed here, and we are entitled to have that claim dismissed with costs.

His Lordship: It would not prejudice you.

Mr. Hill: I quite agree with that. But if the order you make that ship belongs to an alien enemy, that disposes of our claim.

His Lordship: If your claim is dismissed I would have to do it under the authorities. It will not prejudice you later when the ship is released; but the order will be as against the German ship detained as against further orders following the *Chile* case.

Mr. Newcombe: There was no claim in *The Chile* case.

His Lordship: If the claim is disallowed it would not prejudice the claim when the vessel is subsequently released. I would have to hold under the authorities that she was still a German ship at the time of the seizure.

Mr. Newcombe: I have not burdened your Lordship with authorities because the position is so well established under both the ancient and modern practice.

His Lordship: Both under the old authorities and under the decisions of our own courts, the transfer must be perfected before declaration of war by a proper bill of sale. Here there is no claim put forward that would entitle this defendant, a Portuguese subject, to have this ship handed over. I do not know whether it is necessary for me to reserve judgment. I have looked into the subject very thoroughly.

Mr. Hill: The law is very clearly against us. I quite appreciate your Lordship's view.

His Lordship: I think your claim had better be dismissed with costs, and the order for detention will be against the German owners, and go as in *The Chile* case.

Mr. Newcombe: That the ship be detained by the marshal until the further order of the Court?

His Lordship: Yes.

Mr. Newcombe: And also her cargo?

His Lordship: Yes.

APPENDIX VI.

Courts of Investigation.

The subject of investigations into shipping casualties is dealt with in Part X. of the Canada Shipping Act (R. S. C. 1906, c. 113) as amended by chapter 65 of the 7th and 8th Edw. VII.

Unfortunately the proceedings of these Courts are not reported, but by the kindness of the Judge in Admiralty for British Columbia, it is possible to reproduce here the decision of the Court which inquired into the circumstances of the collision between *The Tartar* and *The Charmer*, and which in view of the importance of the matters discussed is given in *extenso*.

RE THE CANADA SHIPPING ACT.

Court of investigation into the collision between the steamships *Tartar* and *Charmer*, on October 17th, 1907.

Before the Honourable Mr. Justice Martin, Judge in Admiralty for British Columbia; and James Douglas Warren, master mariner, and David Llewellyn Jones, master mariner, assessors.

Our decision has been unavoidably delayed by the unexpected absence of the presiding Judge on circuit.

In view of the conclusions arrived at, it will not be necessary to follow in detail the voluminous evidence of the opposing parties; it will suffice to consider their conduct on their own statements.

The Tartar is a single screw steamship, length 376 feet, gross tonnage 4,425, speed 11 knots.

The Charmer is a single screw steamship, length 200 feet, gross tonnage 1,044, speed 11½ knots.

First then, as to *The Tartar*. Assuming the statement of her pilot (H. R. Jones) and officers (particularly third officer Winter) to be correct, she left Vancouver for Victoria en route for China, with about 152 passengers, on October 17th, 1907, at 4.10 p.m., weather, fine light airs; cleared the Nar-

rows at 4.40 just a mile off Point Grey at 5.06; and at 5.25 course set down the Gulf, S. 20E., and proceeded thereon a distance of 5½ miles to the point of collision. From a considerable distance, over 5 miles, the pilot had seen a fog bank ahead and as he approached it, about a mile and a half off, at 5.45 he heard ahead of him an indistinct whistle, the position of which neither he nor the third officer could determine, "it seemed to be ricochetting off the ragged edge of the fog," as he put it. At 5.50 he sounded his own fog whistle, and repeated it at 5.51 and 5.52, when the signal to "stand by the engines" was given, *The Tartar* being, as Winter says, "then in somewhat of a mist, previous to entering the fog"; and as she entered it (as Chief Officer Davis says), her engines, then giving her a speed of 11 knots, were put to slow. Just upon entering the fog there was "heard one short blast nearly ahead," as Winter gives it in his note book, and "we immediately answered one short blast," and ported the helm one point. At 5.54 *The Tartar* heard two short blasts on her port bow, upon which she stopped her engines, ported a little more, according to the pilot, and answered with one short blast. Then almost immediately she heard two short blasts from the other ship on the port bow, which were answered by one short blast, and then almost simultaneously, and at 5.55 *The Charmer* was sighted on the port bow, whereupon the engines were put full speed astern and the helm hard aport, but too late to prevent *The Charmer* from crashing into *The Tartar's* port bow. There are, as might be expected, some slight discrepancies in the different accounts given by those on *The Tartar's* bridge, but substantially, that is her case. The only additional fact that need be mentioned is that pilot Jones had, as the signals came closer, satisfied himself that the approaching vessel was *The Charmer,* which helped to satisfy him that she must be inside of his course, for, as he explains, "as it always happens the local boats are always inside our course, we always meet them on the port side."

The foregoing situation is primarily covered by Article 16 as follows: "Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, forward of her beam, the fog signal of a vessel, *the position of which is not ascertained,* shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

Now taking the facts to be as stated, it is clear that whatever may be said as to the duty of *The Tartar* before she entered the fog (and it should be noted that according to the decision of the Court of Admiralty in the *Bernard Hall* (1902) 9 Asp. 300, she was, in the circumstances, before she actually entered it, already within the scope of Article 16. There can be no doubt that as she was doing so and after she had done so, her duty was to have stopped the engines upon hearing the signal of another vessel fine on her port bow, i.e., nearly ahead of her, "the position of which was not ascertained." There was nothing in the circumstances which did not admit of that precaution being taken, and the uncertainty of sounds in a fog has been repeatedly remarked upon in these collision cases, and as the Lord Chancellor recently said in the *Naworth Castle* v. *The Vaderland,* Smith's Leading Cases on Collision Regulations (1907) 152, and in the House of Lords on November 25th, 1907 (The Times, Nov. 27th, 1907) "sounds in a fog are notoriously unreliable." She also the report of the Trinity House, Fog Signal Committee, in 1901, in Smith, supra, p. 296. In the last mentioned case the Lord Chancellor also said: "The object of the rule is not to keep two ships permanently stationary in a fog, but to require them to stop and then to move only with great caution."

According to the intent of said Article the pilot of *The Tartar* was not justified in the circumstances in going ahead, relying on the accuracy of his location of *The Charmer* by means of said signals, nor upon his assumption as to the course usually pursued by her. Had he stopped after he entered the fog and upon hearing the whistle ahead of him, and ascertained *The Charmer's* real position, before moving ahead, the collision would, in all probability, have been averted. As was recently said in *The Aras* (1906), 76 L. F. Ad. 37. "It is so absolutely well known that one cannot rely upon the direction of whistles in a fog, that no man is justified in relying with certainty upon what he hears when the whistle is fine on the bows like this was undoubtedly, or is justified in thinking it is broadening unless he can make sure of it. That is the view I entertain very strongly because as it is well established that the direction is a certainty it is of no use of trying to rely upon it as a certainty by saying you looked at the compass."

And see to the same effect, *The Resolution* (1889), 6 Asp. 363; *The Cattray* (1899), 9 Asp. 35, and *The Ebor* (1886), 11

P. D. 25, wherein, at p. 27 the matter is considered in its various aspects by the Court of Appeal.

Then as to *The Charmer*. Her Master admits that on her customary run from Victoria to Vancouver, from the time he left Active Pass, Gossip Reef at 4.35 p.m. on a course N.W. by N' ¼ N. to clear the sandheads, with 55 passengers, she ran full speed 11½ knots through the dense fog till 5.44 when he heard the bell of the sandheads lightship, which was abeam, whereupon he altered the course to N. by W. ½ West and continued at full speed till 5.54 when he heard the fog signal of another vessel, close to bearing about a point and a half to two points on the starboard bow, whereupon he starboarded his helm one point, blowed two blasts and slowed down the engines, and kept on that course, for four minutes, without getting another signal and blowing his own fog signals every ten seconds, till he sighted the other vessel at 5.58 broad on his starboard bow, whereupon he reversed his engines full speed astern, but too late to avoid the collision, he had only heard a second blast from that steamer just as she was coming out of the fog.

On these facts we simply have to repeat what has been said with respect to the conduct of the pilot of *The Tartar,* viz.: that *The Charmer* should have been stopped on not hearing the second whistle from the other vessel known to be close at hand, we also add that Article 16 was further violated by running through the fog at full speed, in regard to which we content ourselves by citing the following recent observations from the Admiralty Court in the case of *The Empress* (Nov. 1, 1906), Smith's Leading Cases on Collisions, supra, 91-2, wherein it was said:

"It does not require more than a statement of the defendant's case to show what a hopeless case theirs was and why they were obliged to admit that their navigation was negligent. Here you have a steamer of high power, whose full speed, I am told, is 18 knots, and which had on board at this time a crew of 46 hands all told, and 100 passengers. On her own case she was steaming at 10 knots in a very dense fog. That is positively shocking to my mind, and I think it is a gross breach of Article 16, which requires vessels to proceed at a moderate speed in a fog. In a locality such as this round the Isle of Man, where plenty of traffic is to be expected, and with a whole lot of people on board, it seems to me terrible

that so little care should be taken with regard to speed—that a vessel should go at that speed."

And in *The Nereus* (1907), Smith's Leading Cases, supra, 159, it was held that, "On the evidence of the master of *The Oravia,* that vessel was going 10 knots at least—it may have been a little more—in a fog which was so thick that he could not see more than 300 or 400 yards, and the case of *The Oracia* is hopeless for that reason."

And the Lord Chancellor ends his judgment in *The Naworth Castle* case, supra, by saying:—"No qualification ought, however, to be allowed in the strictness of the Rule requiring caution in a fog."

Further, with respect to the fog signals blown by *The Charmer,* we are not satisfied that the prolonged blasts were of the duration required by the regulations, viz., from 4 to 6 seconds.

The necessity of carefully conforming to the regulations in this respect is obvious, though we are aware that a laxity of usage exists, which makes it desirable to draw attention to the matter.

With respects to the helm signals given by *The Charmer,* presumably under Article 28, when in the fog and out of sight, of *The Tartar,* and responded to by *The Tartar,* we think it proper to remark that there does not appear to be any warrant for so doing, because those signals are only authorized "when vessels are in sight of one another." This is pointed out in Marsden on Collisions (1904), pp. 462-3, and in Roscoe's Admiralty Practice (1903), 244. In giving unauthorized signals under 28, there is a danger of confusing them with those that are elsewhere authorized, e.g. under Art. 15, particularly if they are not given with accuracy.

Our decision is that both vessels were in fault and contributed to the collision; but *The Charmer* was more to blame than *The Tartar,* having infringed Article 15, as well as 16.

With respect to the consequences for the failure of certain officers to perform their duty, we are of the opinion that the case is not one that requires the cancellation or suspension of certificates, for the following reasons: (1) No injury to life or limb resulted, nor any damage other than to the owners; (2) the vessels being owned by the same company there are no conflicting interests; (3) the good seamanship displayed after the collision; and (4) we recognize that it has been here-

tofore more or less generally understood that masters are expected to try and make connections without at all times having due regard to the state of the weather. But in the future all concerned should take notice that this last element will not be considered in extenuation, for the time has come, consequent upon the greatly increased amount of shipping in these waters, when for the protection of the public the regulations must be strictly observed. Bearing in mind the foregoing extenuating circumstances, the judgment we think proper to pronounce is:

(1) That William Henry Whitely, master of *The Charmer,* should be and is hereby severely censured;

(2) That Harry Robson Jones, pilot of *The Tartar,* be, and is hereby censured.

(3) That Archibald Neurtley Reed, master of *The Tartar,* be and is hereby exonerated from all blame and is commended for the prompt assistance given to *The Charmer* after the collision.

Dated at Victoria this 28th day of January, A.D., 1908.

Archer Martin,
J. D. Warren,
David Llwellyn Jones.

APPENDIX VII.

The following cases not having been reported in any series of reports, it has been thought advisable, in view of the importance of the matters decided, to reproduce them in full.

IN THE EXCHEQUER COURT OF CANADA IN ADMIRALTY.

PETERSON AND OTHERS v. THE "GLORY OF THE SEAS."

Mr. Tait, for the marshal.

Mr. Morphy, for the plaintiffs.

Mr. Prior, for the owners.

The case of *The Glory of the Seas* arose out of the taxation of the marshal's fees: the bill as originally rendered included an item of $440 for the safe custody of the ship during a period of 88 days at $5 a day: this item was reduced by the registrar to $95, and was again increased on the appeal to $194: the importance of the case, however, lies in the remarks of the learned Judge as to the duties of the marshal.

Judgment of THE HONOURABLE MR. JUSTICE MARTIN:—

After carefully considering the affidavits and depositions before me on this appeal of the marshal from the taxation of the Registrar of his bill for necessary expenses incurred in the safe custody of the ship, I have come to the conclusion, not without much difficulty and some hesitation, that the appeal should be allowed to a considerable extent, and increased from $95 to $194 as follows:

E. P. Siddall's bill, as allowed by the registrar, at	$14
Bebbington's bill, before Senior went on board, allowed for 20 days at $1.50 per day (Jan. 29th to Feb. 17th, incl.)	30
Senior's bill, allowed at 60 days at $2.50	150
	$194

In ordinary circumstances the marshal would be entitled to the costs of this appeal, but as I am satisfied that all this

from his failure in his duty as an officer of the Court to keep and present proper accounts and from the unfortunate error in his affidavit, I feel that I cannot in justice refuse the request of the owners and plaintiffs that he should bear all the costs of this application.

Archer Martin, J. Adm.

Victoria, B.C.,
June 27th, 1911.

IN THE EXCHEQUER COURT OF CANADA.

B. C. Admiralty District.

VANCOUVER TUGBOAT CO., LTD. v. THE "PRINCE ALBERT."

The Prince Albert was tried at Victoria on the 29th October, and the 3rd November, 1913, before the Judge in Admiralty for British Columbia; the assessors being Commander Frederick H. Walter, R.N., H.M.S. *Shearwater,* and Commander Walter Hose, R.C.N., H.M.C.S. *Rainbow*: Mr. Bodwell, K.C., appearing for the plaintiff, and Mr. W. J. Taylor, K.C., for the defendant. The facts appear from the judgment, which deals with the important question of apportionment of a salvage award.

Judgment of The Honourable Mr. Justice Martin.

After consultation with the assessors, I have reached the conclusion that the proper sum to be awarded for the substantial salvage services rendered in this case is $3,300, which, in the circumstances, we think should be apportioned as follows:

To the owners of the tug *Lorne*	$2,590
" her master	300
" the 1st officer	75
" the 1st engineer	75
" the 2nd engineer	50
" the wireless operator	30
" the crew, 9 at $20	180
Total	$3,300

The allowance to the owners includes $300 for damage to the hawser. The allowance of $300 to the master out of a total allowance of $710 to the master and crew is a little in excess of the "very good working principle" of apportionment by which, in the case of salvage by a steamer (as here), the master's share is usually one-third of that allotted to the master and crew, but as Lord Esher observed in *The Gipsy Queen* (1895), p. 176, "while the working principle is very good, there is no such rule. The apportionment must in each case depend upon the particular circumstances." In the present case there was a special burden of responsibility placed upon the master which he skilfully discharged and which should be recognized. *The Dunottar Castle* (1902), W. N. 70, wherein also the case of the non-navigating portion of the crew is considered. A recent illustration of the application of the one-third principle is to be found in this Court in *Pickford* v. *The Lux* (1912), 14 Ex. C. R. 108. The whole subject of apportionment will be found lucidly considered in Lord Justice Kennedy's valuable work on Civil Salvage (1907), pp. 168 *et seq.*, and at p. 175 is a note on the case of *The Atlantis* wherein "out of a total award of 3,000 pounds the Court apportioned to the captain only 225 pounds because he did not act with quite the full amount of skill."

Let judgment be entered accordingly with costs.

Archer Martin, J. Adm.

Victoria, B.C.,
November 3rd, 1913.

THE EXCHEQUER COURT OF CANADA.

B. C. ADMIRALTY DISTRICT.

GRAND TRUNK PACIFIC COAST S. S. CO., LTD. v. THE "B. B."

The *B. B.* was tried at Vancouver on the 2nd and 3rd of March, 1914, before the Judge in Admiralty for British Columbia: Mr. Alexander appearing for the plaintiff and Mr. Bird for the ship. The facts appear from the judgment, which decided that the services rendered fell within the definition

of salvage services, and dealt with the consequences of preferring an excessive claim.

Judgment of THE HONOURABLE MR. JUSTICE MARTIN.

This is an action brought by the owners of the S.S. *Prince George* to recover $2,000 for alleged salvage services rendered to the gasoline launch "*B. B.*" about 6.15 p.m. on the 29th of November last off Prospect Bluff when approaching the entrance to the First Narrows in Burrard Inlet. *The Prince George* is a twin screw high-powered passenger vessel of 3,379 tons gross, 320 feet long, with a speed of about 18½ knots and valued at half a million dollars. *The B. B.* is a small launch, 60 feet in length, valued at $3,000, carrying passengers and freight between Vancouver and Howe Sound, and at the time in question it is admitted in the defence that she had 15 or 16 passengers on board, and a crew of two, the master and the engineer. She had become disabled because the gasoline was exhausted, and was drifting about in the track of vessels approaching the Narrows, about two miles west of Prospect Bluff. I note here that the one boat on *The B. B.* could only hold ten persons. The night was dark but clear; the wind from the west was, I find, a fresh breeze, strong enough to raise a fairly rough sea against the strong ebb tide, though not sufficiently so to make it dangerous to *The B. B.*, but the situation was doubtless alarming to the passengers whose calls for help attracted the attention of the master of *The Prince George,* who was on the bridge and went to their assistance, and finally, after breaking one line, after towing her for about a mile, made fast with another and towed her into Vancouver Harbour. This service delayed *The Prince George* not more than half an hour, and the question is whether it is to be considered as a salvage or a towage service. The defence submits that there was no element of danger in it and that it should be deemed to be merely a towage service to satisfy which the sum of $100 is brought into Court. A good deal of evidence was given as to the state and direction of the tide at the point where the launch was picked up, and the evidence is conflicting in this respect and as to the varying positions of both vessels. I am, however, of the opinion that, whatever may be said about danger to the launch, no valid reason has been shown why credence should not be given

to the testimony of the master and first officer of *The Prince George* as to the different positions that she was forced into, and then there is no escape from the fact that there was an element of appreciable risk to her in the position close to the land, that she was carried by the tide during her manoeuvres, which, I am satisfied, were expeditiously and skilfully carried out. The case must therefore be dealt with on a salvage basis, and I award the sum of $500 as an adequate compensation.

Objection was taken to the fact that *The B. B.* was arrested to answer an extravagant claim of $2,000, two-thirds of her value, and the case of *Vermont S.S.* v. *The Abbey Palmer* (1904), 8 Ex. C. R. 462, was cited in support of an application to reduce the costs for that reason, as bail had to be furnished for $2,000. I am of opinion that the claim, in all the circumstances, upon which each case must depend, was so excessive as to be within the rule there laid down as to oppression and therefore it is ordered that the costs of furnishing bail be costs to the defendant; in other respects they will follow the event.

(Sgd.) Archer Martin, J. Adm.

Victoria, B.C.,
25th March, 1914.

THE EXCHEQUER COURT OF CANADA,

B. C. ADMIRALTY DISTRICT.

THE KING v. THE DESPATCH.

This was a motion to rehear an application for security to answer judgment, which was previously decided on the 18th June, 1915.

Decision of THE HONOURABLE MR. JUSTICE MARTIN.

Under Rule 84, the plaintiff moves to "vary or rescind" the order made herein on the 18th of June last, reported in 32 W. L. R. 13, on the ground of lack of jurisdiction to make the same. This objection was not raised upon the former motion which, as is noted in the reasons, was only opposed on the one point therein mentioned: pp. 14, 16, and in an

ordinary case it would not be proper to re-open the matter, but as a question of jurisdiction is now raised which could be raised at the trial, it is conceded that in the circumstances of this case it would be convenient and desirable to dispose of it at the outset, and the defendant offers no opposition to this being done.

It is first objected that sec. 34 of the Admiralty Court Act, 1861, has no application to this Court, because it is submitted to be a section relating to practice only, and one which does not confer jurisdiction, with respect to which it is conceded that this Court possesses the same as the High Court of Admiralty, "to extend the jurisdiction and improve the practice," whereof is stated in the preamble to be the object of the said Act of 1861. Assuming the matter to be one of practice, it is urged that since, in our Rules (made under sec. 7 of the Colonial Courts of Admiralty Act, 1890, and sec. 25 of the Admiralty Act, 1891), there is none corresponding to said sec. 34, therefore there is nothing empowering this Court to exercise the practice jurisdiction conferred thereby. In my opinion, however, that section is one which "gives or defines the right" (as Lord Justice Lush puts it in *Poyser* v. *Minors* (1881), 7 Q. B. D. 329 at 333) now under ocnsideration, which is one of those "more extensive powers conferred upon the" High Court of Admiralty which it did not formerly possess—*Williams & Bruce* Ad. Prac. 370-1, and cases there cited, particularly *The Seringapatam* (1848), 3 W. Rob. 33), and *The Rougemont* (1893 P), p. 275—and, therefore, this Court falls heir to the same jurisdiction. It is no objection to the conferring of jurisdiction that the statute which does so, at the same time "denotes the mode of proceeding by which (the) legal right is enforced"—per Lush, L.J., *supra.*

But if I should be wrong in this, and the matter is to be considered as one of practice, then reliance is placed on our Rule No. 228, as follows:—

> "In all cases not provided for by these Rules, the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England shall be followed."

In my opinion, this covers the case, and I am justified in this view by the decision of my learned predecessor in this Court in *Williamson* v. *The Mananause* (1899), 19 C. L. T.

23, and in *Williamson* v. *Bank of Montreal* (1899), 6 B. C. 486.

Then the further objection is taken, secondly, that in any event said section 34 is inapplicable to the present situation, because in the true sense of the expression, the defendant has "not instituted a cross cause" against the plaintiff. This, also, is a change of front on the part of the Crown since the order now complained of was made, because then the matter was argued and disposed of on the obvious assumption that the Crown in Canada was following the established practice of the Crown in England of assuming responsibility in the Admiralty Court for the act of its servant (McDougal), the master of its ship, under circumstances similar to these, as set out in the cases cited in my judgment. The Crown now takes the position that as there is no action here against it, either *in personam* or in *rem*, but only *in personam* against its servant, the master, whose actions, even if negligent, it is not liable for, and now repudiates, on the authority of *Paul* v. *The King* (1906), 38 S. C. 126, and *cf. Imperial Japanese Government* v. *Peninsular & Oriental S. N. Co.* (1895), A. C. 644, consequently there is no "cross cause," and so it is in strict law a stranger to the proceedings of the defendant against said McDougal. Such an unusual position required corresponding consideration, and after the examination of a large number of authorities, I am forced to the conclusion that the objection must prevail. The expression "cross cause" has been often considered, *e.g.*, in *The Rougemont, supra,* wherein the scope of the section is in one respect defined, and wherein there is a very instructive argument: *The Charkieh* (1873), 4 L. R. A. & Ec. 120; and see *Williams and Bruce Prac., supra,* and whatever else may be said of it, it is clear, to my mind, that there cannot be a "cross cause" unless one at least of the plaintiffs in the principal cause is a defendant in the cross cause. On the other hand, the mere fact that a party is a co-plaintiff does not of itself entitle the defendant in the cross cause to obtain security, as is shown by *The Carnarvon Castle* (1878), 3 Asp. 607, wherein the owners of the cargo, who to save multiplicity and expense had joined in an action with the owners of the ship, were absolved from liability to give bail. It must be borne in mind that, as Lord Watson said in *Morgan* v. *Castlegate,* S. S. A. (1893), A. C. 38 at 52, "every proceeding *in rem* is in substance a proceeding against the owner of the ship." The contenton that the section applies

only to cases where both the principal and cross cause are *in rem*, was rejected in *The Charkieh, supra*. The exact point raised herein has not come up before; at least, no similar case has been cited, and I have been unable to find any. In, for example, *The Charkieh*, the cross cause was instituted by the Foreign Sovereign Prince. and in *The Newbattle* (1885), 10 P. D. 33, the action was brought by "the owners, master, and crew of the *Louise Marie*," and though that ship was admittedly the property of the King of the Belgians, yet the question was raised by a counterclaim in the same action, and in such circumstances the point now in question did not require consideration. Lord Justice Cotton said, p. 35:—

> "It is a reasonable principle that a plaintiff whose ship cannot be seized, and against whom a cross action has been brought, shall put the defendant in the same position as if he (the defendant) were a plaintiff in an original action, etc., etc."

This brings out the force of the objection now taken: *viz.*, that in fact no cross action has been brought against the plaintiff herein.

The result is, that as the case now presents itself, the order which was properly made on the facts then before me, must now be rescinded, as it appears the case is not within the said section 34.

I am fully alive to the injustice which it was strongly pressed upon me, might result from this refusal of the Crown to adhere to "the well-established practice in England" in cases of this description (*cf.*. *Eastern Trust Co.* v. *McKenzie, Mann & Co.* (1915), A. C. 750, at 759, on the duty of the Crown in general to ascertain and obey the law); but in the face of the decision in *Paul* v. *The King, supra,* I am powerless to adopt any other course, though my attention has been directed to the apt remarks of Mr. Justice Idington, at p. 136 of that case:

> "It certainly seems at this time of day unsatisfactory to find that one of the vessels, the property of which is in the Crown, engaged in the business of the Crown, can destroy, through grossest negligence, the property of a subject, and he have no remedy at law, unless against the possibly penniless man who has been thus negligent."

With respect to the costs of this motion, the plaintiff must pay them in any event of the cause, because the application

has been made necessary solely by the omission of the plaintiff to raise these new questions at the outset, and an unusual indulgence was granted in opening up the matter. In the very unusual circumstances, it is impossible now to dispose of the costs of the original motion upon any fixed principle, so I think the most appropriate course to adopt, is not to make any order regarding them.

Sgd. ARCHER MARTIN,
J. Adm.

Argued at Victoria, on 9th Sept. and 7th Oct., 1915.

Moresby, for plaintiff.
Bodwell, K.C., for defendant.

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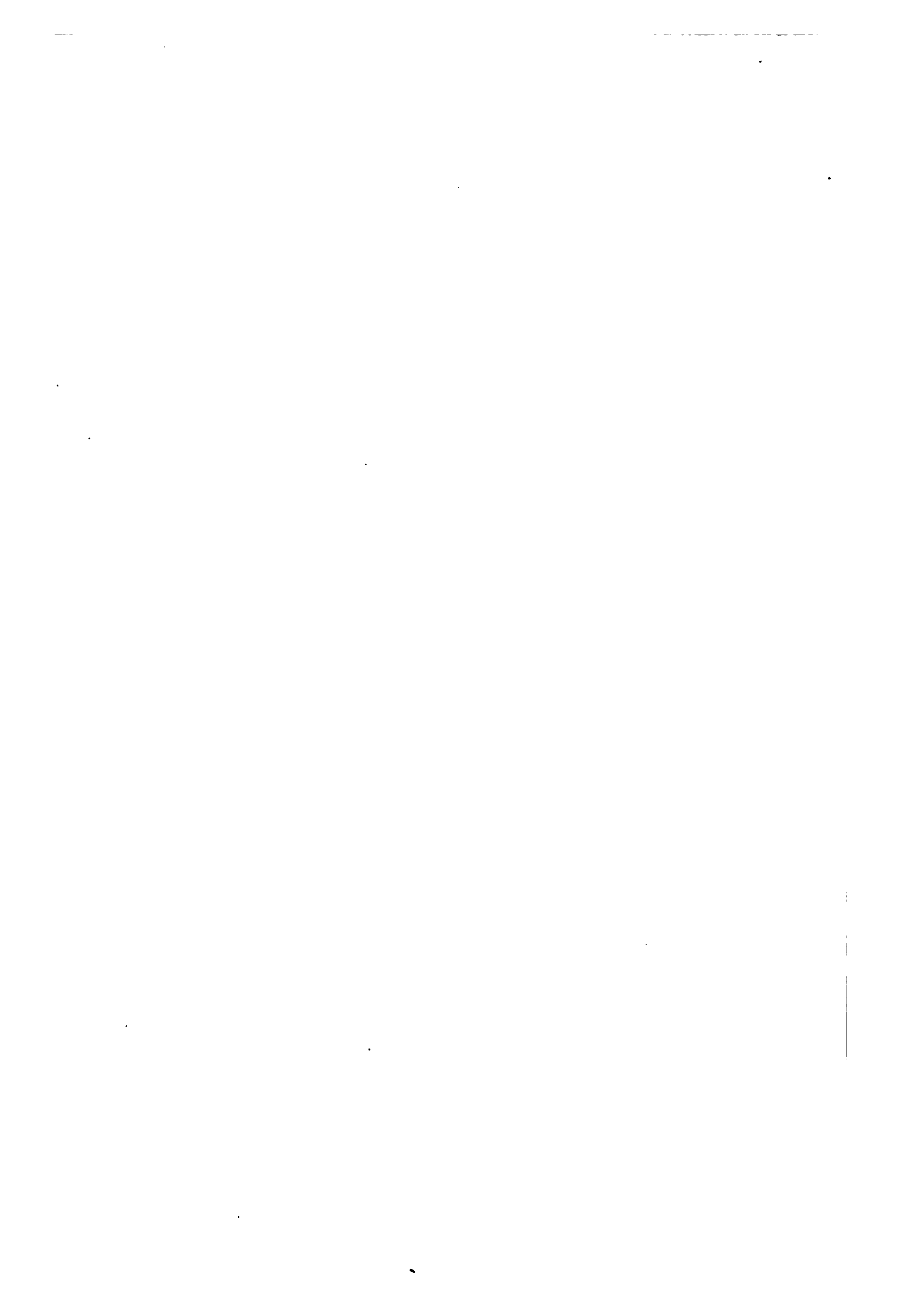

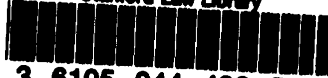
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