LLOYD'S LIST LAW REPORTS

Reprinted (with additions) from
"LLOYD'S LIST and SHIPPING GAZETTE."

MICHAELMAS SITTINGS, 1926.

Edited by
J. A. EDWARDS and H. P. HENLEY,
of the Middle Temple, Barristers-at-Law.

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VOL. 26. No. 1.] THURSDAY, NOVEMBER 11, 1926. [BY SUBSCRIPTION

HOUSE OF LORDS.

Monday, Oct. 25, 1926.

DUKE OF PORTLAND AND OTHERS v. CLARKE AND OTHERS (ADAM WOOD'S TRUSTEES).

Before Viscount DUNEDIN, Lord ATKINSON, Lord SHAW, Lord WRENBURY and Lord CARSON.

Coal mines—Lease—Breach of covenant—Strike — "Safety men" withdrawn — Mines flooded—Measure of damages—Whether to be calculated by loss of royalties.

This was an appeal of James Alexander Clarke and others (Adam Wood's Trustees), which arose out of an action in the Court of Session, brought by the Duke of Portland and others, for damages for breach of certain stipulations contained in mineral leases.

The Duke of Portland let on separate leases to Mr. Adam Wood, coalmaster, Troon, two adjacent collieries in Ayrshire, designated the Titchfield Colliery and the Gauchalland and Goatfield Colliery. Mr. Wood possessed and worked the collieries until his death in September, 1917, when the leases were taken over by his trustees, who were in possession in March, 1921, when a miners' strike affecting the whole country began. The "safety men" having been withdrawn, no pumping was done at the collieries, with the result that both collieries were "drowned out" and had since remained so, though the respondents had been able to prevent any further accumulation of water since the trustees vacated the collieries.

The appellants being admittedly liable in damages for breach of contract in leaving the collieries flooded, the question arose whether the damages to which the Duke of Portland and the Commissioners were entitled was to be measured exclusively by "loss of royalties," or whether, as the royalty owners contended, they were to be calculated on the cost of restoring the collieries to the condition in which they ought to have been maintained by the tenants, and in which they ought to have been left at the termination of their tenancy, and upon the loss of royalties which the royalty owners would sustain during the period of unwatering the collieries. The sums claimed as damages amounted to £87,834 17s. 11d. The appellants, however, contended that the respondents were not entitled to the cost of restoration, and estimated the loss sustained at £15,000, which they said was the capitalised value of the royalties obtainable from the "unwrought coal under water."

The Lord Ordinary (Lord Murray), holding that the royalty owners were entitled to recover more than royalties, allowed proof, and his judgment was upheld by the First Division, where it was decided that the capitalised royalty value of the minerals included in the lease, but as yet unwrought, was not the sole legal measure of the loss.

The Dean of Faculty (Mr. Condie Sandeman, K.C.), Mr. R. Macgregor Mitchell, K.C., and Mr. David R. Scott appeared for the appellants (instructed by Messrs. Grahames & Co., Westminster, agents for Messrs. D. & J. Dunlop, Ayr, and Messrs. Bonar, Hunter & Johnstone, W.S., Edinburgh). The respondents were represented by Mr. C. E. E. Jenkins, K.C., Mr. J. C. Fenton, K.C., Mr. William Chree, K.C., and Mr. W. H. Stevenson (instructed by Messrs. Baileys, Shaw & Gillett, agents for Messrs. Melville & Lindesay, W.S., Edinburgh).

The DEAN OF FACULTY, opening the case for the appellants, said that on the analogy of repairing leases the Courts below had said that the damage sustained by the Duke of Portland ought to be assessed at £87,000. The contention of the appellants was that the true test in assessing the damages was this: What was the value of the minerals to the Duke of Portland at the date of

the flooding of the pits? The appellants would give the Duke that value. That was the issue between the parties. Under the leases the tenants were entitled to extract every ton of coal. Every ton might have been taken out, but notwithstanding that the tenants would have to leave the empty pits free from water and in good working order. The appellants admitted that if their method of assessing damages was right the Duke was quite free to show that the various items were not big enough, and should be added to. On behalf of the appellants, he (Counsel) still repeated the offer. The question between them was whether the respondents were entitled to ask the appellants to pay £87,000 in order to get into their (the respondents') pockets a matter of £20,000. If the methods of the appellants were right, Counsel submitted that the true estimate of the damage was the value to the respondents of the coal in the ground, and that the analogy of repairing leases was an entirely false one. The method of the appellants appealed to one's common sense, for the question ought to be, "What is the value of the coal to you?" and not, "What is the value to you of a hole in the ground with certain workings in it?" What the Duke of Portland was deprived of was the value of his minerals. The object of the contract was to get royalties for the Duke and coal for the lessees. In the light of that contract all the other obligations had to be read.

Lord SHAW said that if the covenant with the Duke was to leave him free of his property to do as he liked with, the appellants were certainly not entitled to say that the Duke would continue to be a royalty drawer.

Mr. SANDEMAN: He has not said that the value to him is something greater than the royalties.

Lord CARSON: Are we being asked to lay down as a matter of law that the only measure of the damages is what the coal would have brought him in under this lease?

COUNSEL said he did not want to tie the Duke down to royalties.

Lord DUNEDIN: Is it not rather difficult to say that the leases being put an end to the true measure of the damage is what the Duke would have got if the leases had gone on and he had been paid the royalties? With the leases at an end a new set of conditions might have emerged, and you might have had to pay royalties of three times the amount.

COUNSEL said he agreed, but the Duke did not say that the royalties represented the measure of his loss.

Lord DUNEDIN: He says, "You are not in a position to unwater the pit," and that he must do so himself.

Tuesday, Oct. 26, 1926.

JUDGMENT.

Viscount DUNEDIN, in moving that the appeal should be dismissed, said: My Lords, this is a case in which the Duke of Portland, who is the owner of certain minerals, sues the representatives of a certain Mr. Wood, to whom those minerals were let, for damages. The damages are claimed in respect that, under the lease, there was an obligation that, at the end of the lease, the tenant would hand over the pits without any accumulation of water. Now, as a matter of fact, the pits were allowed to be flooded. There was, under the arbitration clause, an arbitration as to whether the flooding of the pits was really due to the action of the tenants. The arbitrators found that it was, and no more question arises as to that, for, although the matter is to a certain extent raised in the defence and pleas of the defender in this action, nevertheless, in the interlocutor which was pronounced by the Lord Ordinary, these matters were disposed of, and in so far as they are concerned—and the Inner House confirmed the interlocutor *simpliciter*—no appeal was taken to your Lordships' House. Now the real plea which was argued in the Inner House was the seventh plea for the defence. It is this: "In any event, the pursuers' claim should be limited to loss of royalties only."

The defenders aver that, inasmuch as the effect of drowning the pits was to make the coal unworkable, the only real damage which the pursuers suffered was the interest in that coal—that is the interest in that coal as measured by the royalties which they would have got for the coal had it been raised under lease — and that therefore they cannot ask for more; and that they were wrong in asking as they did for the cost of restoring the pits. The question was argued, and the Lord Ordinary repelled the plea and the Inner House adhered. The very last phrase of the Lord President's judgment is: "All we can and do decide at present is that the capitalised royalty value of the minerals included in the lease, but as yet unwrought, is not the sole legal measure of the pursuers' loss." My Lords, it was upon that question, and that question alone, that leave was granted to come before your Lordships' House, and now that the case has come, in the hands of the learned Dean of Faculty, it has been made to assume a somewhat different aspect. The learned Dean has practically given up plea 7, which was the only thing he came for, and he wishes to substitute for plea 7 a plea to this effect, that in any event the pursuers' claim should be limited to the value of the minerals and wayleaves as at Martinmas, 1892. Now the learned Dean has asked us to allow that plea and then to give judgment upon it. My Lords, I cannot advise your Lordships to do any such thing, for one compelling reason, that I do not

think it would be at all right to give judgment upon a new plea of that sort, where the learned Judges of the Court of Session have not had an opportunity of considering it Under the interlocutor as it stands it is perfectly clear that every argument of the sort that the learned Dean has been proposing to us now is still open. Lord Sands makes that perfectly clear in that portion of his opinion in which he says: "In particular I desire to reserve my opinion upon the questions — (1) Whether in the circumstances the measure of damages is the cost of unwatering the pits. (2) Whether, as the Lord Ordinary indicates in his view, this is in all circumstances the *prima facie* measure, and if so (3) How far and on what grounds this *prima facie* liability may be redargued."

It seems to me, therefore, that under the interlocutor as it stands all these questions are open, and that it would be very unwise for your Lordships' House to decide now the abstract question what is to be the exact measure of damage, and, as I said, the case only came here upon the original seventh plea. It would not have been allowed to come but for that; and I do not think the appeal can be utilised for really deciding what is more or less, I do not say altogether, a new case in this House on which the learned Judges of the Court of Session have not had an opportunity of giving an opinion. As the learned Dean knows, when the case goes back he does not need any leave to ask for leave in the Court of Session to add a new plea, and then the Court of Session will deal with it as they think fit. Therefore I move your Lordships that this appeal be dismissed, with costs.

Lord ATKINSON: My Lords, I concur.

Lord SHAW: My Lords, I concur. The learned Lord President wound up his opinion by saying this: "All that we can and do decide at present is that the capitalised royalty value of the minerals included in the lease, but as yet unwrought, is not the sole legal measure of the pursuers' loss." I agree with that proposition in law and as to the interlocutor pronounced, and I agree that remitting the case to proof before answer was a sound act of process.

Lord WRENBURY: My Lords, I agree. The proposition of law which we are affirming in this case, as I understand it, is this, that the measure of damages is not the value to the covenantee of the coal, but the value to the covenantee of the covenants. The covenantee says that it is £87,000, the cost of unwatering; the covenantor says that it is the cost of the coal which has been buried in the floods. It may be either the one or the other. What has to be done in measuring the damages is to see what loss has resulted to the covenantee from breach of the covenants contained in the lease, whatever they are.

Lord CARSON: My Lords, I concur, and I should merely like to say that I think the Lord President has most accurately laid down the law when he says: "The measures employed to estimate the money value of anything (including the damage flowing from a breach of contract) are not to be confounded with the value which it is sought to estimate; and the true value may only be found after employing more measures than one—in themselves all legitimate but none of them necessarily conclusive by itself—and checking one result with another." That seems to me to leave the whole question open, and it seems to me to be the proper way in which the matter should be tried.

The appeal was dismissed with costs.

COURT OF APPEAL.

Monday, Oct. 18, 1926.

GREGORIADES v. IMPERIAL OTTOMAN BANK.

Before Lord Justice BANKES, Lord Justice SCRUTTON and Lord Justice ATKIN.

Insurance (fire)—Loss of goods pledged to defendant bank—Alleged agreement by pledgees to insure pledgors' goods — Payment by underwriters—Claim by plaintiffs for account — Estoppel — Judgment for bank—Appeal—Security for costs.

In this case, which arose out of the Smyrna fire and involved a claim for just under £3000 in respect of goods held by the defendants as security for advances, the Imperial Ottoman Bank applied for security for the costs of an appeal which the plaintiffs are making from the judgment of Mr. Justice Greer, reported at 25 Ll.L. Rep. 70.

Mr. D. B. Somervell (instructed by Messrs. Bischoff, Coxe, Bischoff & Thompson) represented the bank. Mr. W. Higgins (instructed by Messrs. Thos. Cooper & Co.) represented the plaintiffs.

Mr. SOMERVELL explained that as originally framed plaintiffs' claim was that the bank had insured the goods and got money for which they must account, but the Judge held that it was clear on the documents that the goods had not been so insured; and the claim was amended by a plea that plaintiffs were told that the goods were insured and that the bank were estopped from setting up that they had not been. That was a pure question of fact, and the Judge decided that the plaintiffs' story was not correct. The costs had been taxed at £900, but had not been paid.

Mr. HIGGINS, for the respondent plaintiffs, argued that his clients had money owing to them by the bank in respect of

other matters, and no order should be made.

Lord Justice BANKES: We think the order should be for £75, to be paid within 14 days.

ADMIRALTY DIVISION.

Monday, June 14, 1926.

THE "STREAM FISHER."

Before Mr. Justice BATESON.

Ship—Collision actions—Rival claimants to fund in Court, insufficient to meet all claims—Maritime lien—Priorities—Held that claims should rank pari passu *and not in order of date of collision.*

This was a motion to determine priorities between rival claimants for damages by four collisions on four separate occasions. The vessels colliding, in the order named, with the steamship *Stream Fisher*, were the steamship *Squawk*, the steamship *Criterion*, the trawler *Enable* and the steamship *Roi Leopold*. The actions were all *in rem* and the *res* had been sold, but the proceeds were insufficient to meet all four claims.

Mr. K. S. Carpmael (instructed by Messrs. T. Cooper & Co.) appeared for the *Criterion* and for the *Enable*. Mr. E. W. Brightman (instructed by Messrs. W. A. Crump & Son) appeared for the *Squawk*. Mr. H. Stranger (instructed by Messrs. Downing, Middleton & Lewis) appeared for the *Roi Leopold*.

Mr. K. S. CARPMAEL submitted that the proper order should be that there was priority in the order of the collisions. The first collision was in November, 1924, between the *Squawk* and the *Stream Fisher*. The next collision was between the *Criterion* and the *Stream Fisher* on Feb. 6, 1925. The next two collisions were on Feb. 7, first between the trawler *Enable* and the *Stream Fisher*, and the next between the *Roi Leopold* and the *Stream Fisher*. Counsel said that unfortunately his solicitors in July, 1925, wrote to the solicitors for the *Roi Leopold* agreeing that payment out of Court should be *pro rata*. That, he submitted, was not right. There was very little authority about it. There was a statement in Maclachlan on Merchant Shipping that claims such as these took priority in order of date of collision, and that was repeated in Halsbury's "Laws of England." He thought a great deal of the confusion arose partly because of Dr. Lushington's decision in the *Saracen*, which went to the Privy Council, but that arose under the old practice where priorities had not been reserved. Dr. Lushington held, and the Privy Council upheld him, that priority went in order of judgment. That had all gone now in present-day practice. He submitted that these claims ranked in order of date of collision. The Admiralty Marshal's charges came first (the *Stream Fisher* having been sold by the Court in the action by the *Enable*); next the costs of the *Enable* in her action, for bringing the fund into Court, up to the date of the order for sale, May 11, 1925; third, the collisions; and fourth the disbursements.

Mr. E. W. BRIGHTMAN said that he adopted Mr. Carpmael's argument.

Mr. CARPMAEL said he was willing to give Mr. Brightman's clients priority.

Mr. H. STRANGER said that he was for the owners of the *Roi Leopold*. His clients had a letter from Messrs. T. Cooper & Co. saying that the claims would have to rank *pro rata*. He submitted that on that letter there was an agreement, and it took him by surprise to hear that the matter was going to be argued. Of course, that letter did not bind Mr. Brightman's clients. He said that there was no authority to support the view that the claims did not rank *pari passu* and that they should rank in the order in which the collisions occurred, except the statement in Maclachlan's book. That statement was not consistent with the judgment in the case of the *Saracen*, 6 Mo. P.C. 56. In the present case all the suits were brought before any judgment was obtained. He submitted that what Messrs. T. Cooper & Co. wrote was reasonable and proper, and was the right view of the law. It was a point of considerable interest and importance, and there was little authority of any kind. There was no general principle of law which indicated that one claim should be preferred before another. The Court had to administer equity in all these matters, and equity indicated that all these claims should rank *pari passu*.

Mr. CARPMAEL said there was no authority for Mr. Stranger's proposition that order of judgment indicated order of priority. There was no authority for the proposition that the claims ranked in order of date of collision, because the matter was so plain.

Mr. Justice BATESON said it must have happened hundreds of times. He should have thought it had always been done rateably, or Messrs. T. Cooper & Co. would not have written that letter from their experience.

Mr. CARPMAEL said he understood that they wrote that letter relying on the decision in the *Saracen*, but that decision no longer held good. It was a misreading of the judgment.

Monday, July 12, 1926.

Mr. CARPMAEL, continuing, said that in the action by the *Squawk*, the judgment was dated Mar. 22, 1926. In the action by the *Criterion* the judgment was dated May 26, 1925. In the case of the *Enable* the judgment was dated Apr. 22, 1925. In that action an order was obtained for appraisement and sale. In the case of the *Roi Leopold* there was an admission of liability on Apr. 17, 1925,

which was equivalent to judgment, and her claim was agreed on May 14, 1925. The dates of the writs were: *Squawk*, Oct. 7, 1925, *Enable* and *Roi Leopold*, Feb. 10, 1925, and *Criterion*, Apr. 27, 1925. His contention was that the priorities ranked according to the dates of the collisions. There was no English decision in point, but since the last hearing he had found two American decisions which he contended were directly in point. Maclachlan, in his text-book on Merchant Shipping, laid down that damage liens ranked in direct order of their attachment. In the case of the *Saracen*, Dr. Lushington said that the claims ranked according to priority of judgment, but the *Saracen* was no longer an authority on this point at the present date since the judgment in the *Africano*, [1894] P. 141. Not being able to find any direct authority for his proposition in English or in Scottish law, he had examined the American cases and had found two. The first was the *Frank G. Fowler*, (1883) 17 Fed. Rep. 653, and the second that of the *J. W. Tucker*, 20 Fed. Rep. 129.

Mr. BRIGHTMAN, supporting Mr. Carpmael's arguments, contended that after the first collision the *Stream Fisher* was a vessel sailing the seas with a maritime lien attached to her in respect of that collision. There was a subtraction from the absolute property of the owner. That was the effect of the judgment in the *Ripon City* (1897 P., 226). A lien attached in respect of each of the subsequent collisions, notwithstanding that the whole value of the ship was absorbed by its liability in respect of the first collision. Value had nothing to do with lien.

Mr. STRANGER submitted that Mr. Brightman's contention, if correct, would lead to most disastrous consequences. Once there was a collision, and a lien attached for damage exceeding the value of the wrongdoing boat, then the wrongdoer could sail the seas free of all liability for some time, not caring how many collisions she had. The Cyclopædia of Law and Procedure in America contained a very good digest of American case law. The 26th volume, published in 1907, page 809, said there was a difference of opinion in such cases as to priority of lien. He had looked at all the American cases since 1907, and he could find no case which varied the American law since that date.

Judgment was reserved.

Monday, July 26, 1926.

JUDGMENT.

Mr. Justice BATESON, in giving judgment, said: This is a motion to settle priorities, if any, between four claimants for damages by four collisions on four separate occasions. The actions were all *in rem* and the *res* has been sold, but the proceeds are not sufficient to satisfy all the four claims. The dates of the various claims are these: 1924, Nov. 30, is the *Squawk* collision, and that is a claim for the master's effects. The collision action by the owners of the *Squawk* appears to have been settled. The master held back and did not proceed with his action until considerably later. The second collision was in 1925, on Feb. 6, when the *Criterion* was in collision with the *Stream Fisher*. The third collision was on Feb. 7, 1925, at 1.45 p.m., the vessel called the *Enable* being in collision with the *Stream Fisher*; on the same day, but later in the day, what time I am not told, the *Roi Leopold* was in collision with the *Stream Fisher*. The writs in the various actions were Feb. 10, 1925—the *Roi Leopold* —and on the same day the *Enable* sued a claim in the County Court. The next one was the *Criterion* claim in the County Court on Apr. 27, 1925; and the last one was on Oct. 7, 1925, in the *Squawk* case by the master. In the *Squawk* case also I think there was a writ. The *Roi Leopold* got an admission of liability on Apr. 17, 1925; the *Enable* got judgment in the County Court on Apr. 22, 1925; and on the 25th that action was transferred to the High Court. On May 25, 1925, the *Criterion* got judgment in the County Court; on Mar. 22, 1926, the master of the *Squawk* got a default judgment in the High Court; and on May 24, 1926, the *Roi Leopold* claim figures were agreed. No one contended that any date was material except the date of the collision. Mr. Carpmael and Mr. Brightman, for the claimants in the first three collisions, the *Squawk*, the *Criterion* and the *Enable*, contended that their claims ranked in order of date at the time of collision. Mr. Stranger contended either that they should rank in inverse order or at any rate *pari passu*.

In my judgment they rank *pari passu*. There is no English authority for Mr. Carpmael's and Mr. Brightman's contention except a passage in Maclachlan on Merchant Shipping, the earliest edition; and the passage that is mainly relied on is at p. 598 of the first edition:—

> Liens in the nature of reparation for wrong done, usually arise out of collision, and form the subject of proceedings in damage causes. They have their origin in positive law, and in the policy of quieting strife by distributing compensation for injuries done at the expense of the wrongdoer. They are severally co-extensive in point of right with the value of the ship and the gross amount of the freight being earned; they furnish, therefore, to sundry sufferers by the same collision the claim to rank equally and share *pro rata* in the common fund. Of two successive collisions with the same ship, the sufferers by the earlier standing to the sufferers by the later in no relation of demerit or obligation, retain their priority of claim against the fund, on the principle of the legal maxim: *Qui prior in tempore, potior est in jure.*

Mr. Carpmael said that that meant that whoever was first in time had priority. No authority is cited for that proposition in the original edition of Maclachlan, and nowhere else is that statement supported. Abbott contains no support for it in the editions by him, though a passage does appear in the 14th edition (that is, a later edition) in which he says that "maritime liens *ex delicto* rank in the order of their attachment," and cites in support of that the *Hope*, 1 Asp. 563; but when the *Hope* is looked at it does not support that view. Later on at p. 1027, in dealing with the case of the *Elin*, 8 P.D. 39, 129, which was a case as to wages subsequent to a collision, he says :—

> There seems, however, to be no decision that such a claim is to be postponed if the seamen, from the bankruptcy of the owner, or some similar cause, have no other remedy for the recovery of what is due to them.

So that in the learned author's opinion the question of seamen's wages on a bankruptcy might easily be preferred to a collision lien.

In Halsbury's Laws of England the author of the shipping portion of that work repeats the passage in the later page and again cites the *Hope*. No such authority could be found by Counsel in the Scottish cases. There is some support in two cases in an American District Court and in a Circuit Court of a kind, and elsewhere there is authority to the contrary. I will deal with the American cases later.

Mr. Stranger pointed out that there was authority to the contrary and referred me to Mr. Carver's book on Carriage of Goods by Sea, Sect. 320, and especially to p. 466. In dealing with priority of creditors on the ship he states what the maritime liens are, including damage done by the ship, and the broad rule he says is

> that among themselves these claims rank inversely to their order of date. The last comes first. One ground for this is, that claims for services which have conserved the *res* should come before earlier charges upon the *res* which have been thereby preserved. Another ground is that one who has a lien on the ship holds that subject to the chances of the ship's voyage, which may give rise to fresh liens. The lien is ordinarily a charge upon a ship in course of an adventure, not upon a ship in safety. Whether willingly or unwillingly the holder of it has become a party to the adventure; and may properly be considered to take the risks of it, as against those who may render services to the adventure, or who may suffer by the negligent conduct of it.

The other books I have give no support to Mr. Carpmael's and Mr. Brightman's contention; nor in Roscoe on Admiralty Practice can any such support be found. His view is set out on pp. 117 and 118 :—

> Liens arising *ex delicto* take precedence over prior liens arising *ex contractu*, including salvage, and in respect of damage claimants *inter se* their claims in actions *in rem*, based on lien, in respect of the same collision, rank in the order of the judgments; for on obtaining judgment in a damage action the lien may be enforced to the exclusion of another damage claimant subsequently instituting his action even on the same day, but if instituted before judgment the damage is assessed rateably;

and he cites for that the *Clara*, Swabey 1, and the *Africano*, [1894] P. 141. In Williams & Bruce I can find nothing to support this argument. Williams & Bruce is a mine of learning and knowledge in all matters connected with Admiralty; see pp. 85, 289 and 312. Nor can I find any support for it in Marsden from the first edition downwards. On p. 91 of the last edition (which I think is merely a repetition of the earlier editions) he says :—

> Where several claimants for damages in several actions *in rem* in respect of the same collision obtain successive judgments against the ship, their respective liens are enforceable against the ship in the order of the judgments. A plaintiff who institutes his action after another has been instituted, but before judgment, is entitled to damages rateably with the plaintiff in the earlier action.

Mr. Stranger further contended that all maritime liens are the same, but the Court has never held that the order of date of lien arising gives any priority. If one maritime lien does, one would suppose that all would. He also relied on the principles and reasoning of the *Africano*, *sup.*, and the fact that all the arguments and decisions of the great number of priority cases were unnecessary if claimants were right here, that is, the claimants in the earlier collision.

In my judgment, all maritime liens are the same. They are defined in the *Bold Buccleugh*, 7 Mo. P.C. 267, and the important passages are at pp. 284 and 285. It is to be noted that in those pages it was thought that the maritime lien is the foundation of the 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.

In later times that has been held not to be so; but in the old days I have very little doubt myself that the two things are the same. Then :—

> This claim or privilege travels with the thing, into whosesoever possession it may

come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached.

This is considering throughout the collision between the owners of the *res* and the person who has suffered damage and is not a question of priority between two persons who have suffered damage. Then it goes on to cite the *Aline*, 1 Wm. Rob. 111, which seems to be the foundation of the view of Mr. Carpmael :—

> So by the collision the interest of the claimant attached, and dating from that event, the ship in which he was interested having been repaired, was put in bottomry by the master acting for all parties, and he would be bound by that transaction.

The *Aline* was a case of preference of a bondholder, and that passage seems to me to make it obvious that the damage lien does not necessarily take priority even of bottomry. Therefore there is no magic in the first attachment of the lien.

In the *Ripon City*, [1897] P. 242, Gorell Barnes, J., says :—

> Such a lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another—a *jus in re aliena*. It is, so to speak, a subtraction from the absolute property of the owner in the thing.

Then he goes on to deal with the facts of that case as showing that the right must be a right against the owner as well as against the *res*. In the *Tervaete*, [1922] P. 259, at p. 270, Scrutton, L.J., says :—

> The so-called maritime lien has nothing to do with possession, but is a priority in claim over the proceeds of sale of the ship in preference to other claimants.

And lower down, on the same page, he says :—

> But for a lien to arise, in my view, some person having by permission of the owner temporary ownership or possession of the vessel must be liable for the collision. If he is so liable, a privilege or lien at once arises in this sense, that if the vessel comes within English territorial waters it may be arrested, and the claim or privilege on it will date back to the time of the lien. Any purchaser after collision takes the ship subject to this possibility of claim.

He is not there considering priority of claims *inter se* : he is considering priority of claim as against another person. He also says at p. 271 :—

> To hold that a lien would come into existence, if the Government sold the ship to a private purchaser, would be to deprive the Belgian Government of part of their property, for such a lien about to arise must reduce the price paid to the Government and so affect the property of the Government.

There he is speaking again of the subtraction from the property of the owner. Atkin, L.J., says at p. 274 :—

> It is not a right to take possession or to hold possession of the ship. It is confined to a right to take proceedings in a Court of law to have the ship seized, and, if necessary, sold.

There, again, that is a case of a claim as against the owner of the *res* and not a claim as between competing liens. The *Tervaete* is an interesting case as showing that the maritime lien does not necessarily always attach for damage to a ship, because in that case, the vessel being owned by a foreign Government or Sovereign, there is no claim at all. I see no indication in any of these cases of any difference between one maritime lien and another.

Before dealing with the priority cases I want to say a word as to necessaries. Previous to 1840, a necessaries man who had supplied necessaries within the body of a county had no remedy in the Admiralty Court. The Admiralty Act of 1840 gave in certain cases jurisdiction *in rem* over claims for necessaries. Following the *Bold Buccleugh*, necessaries men under the Act were held to have maritime liens; and so it was for something like 40 years: see, e.g., the *West Friesland*, Swabey 454. Such was the law down to 1886, when the *Heinrich Björn*, 11 App. Cas. 270, was decided. That decision was that claimants for necessaries had no maritime lien. The treatment of priorities in necessaries cases during that period of enjoyment of a maritime lien is, however, quite instructive. I could not follow Mr. Carpmael's argument that the maritime lien in a necessaries case was different from any other maritime lien. Questions of priorities have constantly arisen and been decided; but so far as I know no similar case of separate claimants for damage by separate collisions as distinguished from separate claimants for damages by the same collision, has ever been raised and decided, although one would think it would have occurred. Two or three collisions are common. Not long ago there was a case of five, followed by a limitation suit. Moreover, the eminent solicitors acting for the second, third and fourth collisions here both thought—I say " both " because there were only two solicitors—that a rateable distribution was the right one, and so stated in their letters of July 15 and 17 which were put in.

The priority cases divide themselves into two groups: (1) Competing claims for similar causes of action; and (2) competing claims for different causes of action; and one finds that in these cases the rule is not always the same.

It has always been held that necessaries men shared *pari passu* excepting where one

had got priority of decree. Salvage is in inverse order; bottomry is in inverse order. Wages I think are *pari passu*, although I do not know that the question has ever been definitely raised. My attention was not drawn to any case where one seaman had served and earned wages long before another seaman, and as far as I know they have always been treated as sharing *pari passu*: see the *Salacia*, Lush. 578. Where the causes of action have been different, equitable grounds have been relied upon to give various priorities according to what was thought to be right. In necessaries and damage cases, priority of decree was the only priority ever argued or recognised. It is significant that date of supply or date of damage was never suggested: see the *Clara*, Swabey 1; the *Desdemona*, Swabey 158; the *William F. Safford*, Lush. 69; and the *Saracen*, 4 Notes of Cases 498. In salvage, the later salvor was always preferred to the earlier. That was on equitable grounds; because the later salvor made it possible that the earlier salvor should get payment. In bottomry it was the same rule as in salvage.

I have not dealt with the master's lien for wages and disbursements. That, of course, stood on rather a different footing, because the master was occasionally postponed to the seamen. Subsequently his lien for disbursements was statutory. The damage lien generally was treated as coming first, but not always: the reason being that all the other claims were with regard to voluntary dealings with the ship. Cases other than cases of damage were described as arising out of contract or *quasi*-contract; salvage (apart from a bargain to salve) is not contract at all. As between bottomry and wages, equitable grounds gave sometimes one and sometimes another priority: see the *Veritas*, [1901] P. 304, at pp. 310, 312, 313 and 314; the *Union*, Lush. 128; and the *Gustaf*, Lush. 506. In the *Gustaf*, I think the shipwright who had a possessory lien was preferred to the necessaries man. "With regard to the claims for necessaries, I am of opinion that they cannot compete with the shipwright's lien." That is Dr. Lushington in the *Gustaf*.

Lastly, in damage cases where the damage claimants for the same collision are competing, that is to say, ship and cargo, it was decree here that gave priority, otherwise they must rank *pari passu*; although it may well be that the damage to the cargo occurred later than the damage to the ship.

The result as to priority of lien seems to be this. First of all you could get priority if you obtained judgment first. Secondly, you could get priority by later lien, as in salvage and bottomry; and thirdly, there were the cases where they rank *pari passu*.

Now the first of those is not contended for here at all, probably because all judgments are now given subject to the question of priority being determined hereafter. In the second case of priority in inverse order—that is, by the later lien—I see no reason to apply this except possibly as to the *Squawk* case, owing to the delay; because the master of the *Squawk* could quite well have put forward his case at the same time as his owners put forward their case, and either have got bail or have got paid. But, the other three collisions all happening within a very short time of each other—in one case only a few hours, and in the other case only a few days—I do not think it would be equitable or fair to give any priority for such as that. With regard to the *Squawk* case, if I had to decide whether there were laches or not, I should want to have all the facts before me. So far as the facts in this case are concerned, if anybody had to be postponed, certainly a man who waited such a long time as the master of the *Squawk* would have to be postponed, because he had an option whether he should allow the ship to go free of his claim, or for some considerable time. The other people had no option.

Now the third remains, and I think that certainly is equitable as regards the last three. I should mention that Mr. Stranger did not strongly contend to postpone the *Squawk* as distinct from the other ships' claims. The general result of the examination of the cases on priorities leads me to this: that no such rule as contended for by Mr. Carpmael and Mr. Brightman has ever been applied, and I do not think it ought to be. I think the origin of the lien and its uncertainty of attachment in some of the cases points to the same conclusion. The *Linda Flor*, Swabey 309, points to the same view; because there, although Dr. Lushington gave priority to a claimant for damage by collision over a claim for wages, he specially reserved the case of a bankrupt owner. He says, after deciding that the damage lien took priority of the wages lien in that case: "This is not the case of a bankrupt owner: it will be time to consider such a case when it arises." Again, in the *Markland*, in 3 Adm. & E. 340, that is a useful case when dealing with these matters; because in that case a suitor had obtained a decree, but payment out had not been made, and the decision was this:—

> The rule that the Court will give priority to the suitor who first obtains a decree applies only as between claimants *in pari conditione*. Where, in a suit *in rem*, a decree has been made *per incuriam* for the payment of money out of the proceeds in Court to satisfy the claim of the plaintiff [so there had been a decree for payment out] the Court may, before the money has been paid, revoke or vary the decree.

That case points to the fact that so long as the Court has possession of the proceeds it will see that they are properly distributed. Then in the *Sea Spray*, [1907] P. 133, Bargrave Deane, J., postponed a claimant in possession of a maritime lien for damage to the claimant by collision for services of the Thames Conservancy who had raised the ship and incurred expenses in so doing, on the ground that

> as the *res* had been preserved through the instrumentality of the Conservators, their claim ranked first, and therefore they would be at liberty to sell the vessel and her cargo, reimbursing themselves for their expenses and costs, in the first instance, out of the proceeds of the cargo, and then out of the proceeds of the vessel, paying the surplus, if any, of proceeds into Court for the benefit of the parties entitled thereto;

clearly showing that he did not consider that a damage lien took precedence over all others.

Lastly, in the *Africano*, [1894] P. 141, which was a question of rival necessaries men, the President, Sir Francis Jeune, at p. 147 says :—

> If priority in distribution follows the attachment of lien or security, and if a sounder view of the law has transferred that attachment from the date of supply of necessaries to the date of action brought in respect of it, we should expect to find it held in the less enlightened period before the *Heinrich Björn* that funds in Court should be distributed among material men according to the priority of their acts of service. But, such was not the view of the Judge;

and then he refers to the *Desdemona*, Swabey 158, and the *William F. Safford*, Lush. 69 :—

> It is not, perhaps, easy to understand why Dr. Lushington limited, as he appears to have done in that case, the advantages of priority to the earliest decree; but it is clear that he contemplated a decree as alone capable of conferring priority.

That seems to be the effect of all the cases where any priority is given at all. The same view was taken in an Irish case decided in 1869.

So that, on the whole, I have come to the conclusion that *pari passu* is the right method of dealing with these different claims.

The American cases referred to by Mr. Carpmael were two, the *J. W. Tucker*, (1884), 20 Fed. Rep. 129, and the *Frank G. Fowler*, 17 Fed. Dep. 653, The *J. W. Tucker*, was a District Court case before Judge Brown; that was a case of competing liens for towage, where the rule in America seems to be that towage or necessaries in the same season on the Great Lakes rank *pro rata*. In that case the same rule was applied to canal boats on Connecticut River for liens arising in the same season. The judgment refers to the *Frank G. Fowler* as establishing for that Circuit the principle that a lien is a vested proprietary interest in the *res* itself from the time when it accrues—and then proceeds to deal with the various rules of inverse order and *pro rata* applied in ranking of similar and different causes of action, finally deciding in favour of *pro rata* in the case before him.

In the Cyclopædia of Law, edited by Mr. William Mack, in Vol. XXVI., p. 809, title : Maritime Liens, the author, Mr. Hughes, after referring to the *Frank G. Fowler* and *John G. Stevens*, 63 Davis Rep. 113, says :—

> In view of the nature of maritime lien as a *jus in re*, so firmly established by the most recent decisions, the view that the last tort lien is to be preferred seems best sustained by principle.

That is apparently Mr. Carver's view. And in 1897, in the Supreme Court from Circuit Court of Appeals, the *John G. Stevens*, 63 Davis Rep., at p. 120, Gray, J., delivering the opinion of the Court, said that this case does not

> present a question of precedence between two claims for distinct and successive collisions, as to which there has been a difference of opinion in the Southern District of New York; Judge Choate . . . giving the preference to the later claim upon the ground that the interest created in the vessel by the first collision was subject, like other proprietary interests in her, to the ordinary marine perils, including the second collision.

Blatchford, J., reversed the decree because the vessel had not been benefited, but had been injured by the second collision. That is the effect of the *Frank G. Fowler* in the 1881 and 1883 Federal Reporter.

This statement of American law is not enough to alter my view after full argument and such consideration of the cases as I have been able to give them.

There is one further matter, and that is this. If it be true that all maritime liens for damage attach at the moment of the damage occurring, then when the ship gets into the hands of the Court she is in the hands of the Court with all the several liens attaching to her. One would think that the proper thing to do under those circumstances would be to see that everybody was equally treated. Under these circumstances the motion will be dismissed.

ADMIRALTY DIVISION.

Oct. 15 and 18, 1926.

THE "BRITISH EARL."

Before Mr. Justice HILL, sitting with Captain O. P. MARSHALL and Captain H. C. BIRNIE, Elder Brethren of Trinity House.

Collision between steamships in North Sea during fog—Plaintiff vessel found alone to blame on ground of excessive speed and of improper helm action—Inconsistencies of plaintiffs' evidence.

In this action the owners of the cargo laden on board the *Marie Therese* claimed from the defendants, the British Tanker

Company, Ltd., for damage to their cargo resulting from a collision between the *Marie Therese* and the defendants' steamship *British Earl*.

For the plaintiffs, Mr. G. P. Langton, K.C., and Mr. Alfred Bucknill (instructed by Messrs. Stokes & Stokes) appeared, and for defendants Mr. D. Stephens, K.C., and Mr. E. A. Digby (instructed by Messrs. Wm. A. Crump & Son) appeared.

According to the plaintiffs' case, shortly before 11 16 p.m. on Feb. 12, 1926, the *Marie Therese*, a steel screw steamship of Danzig, of 1581 tons gross register and 278 ft. long, manned by a crew of 23 hands, was about two miles to the southward and eastward of the Cross Sand Light-vessel, bound from West Hartlepool to Cagliari with a cargo of coal. The wind at the time was light easterly. There was a fog of varying density, and the tide was the first of the ebb, of unknown force. The *Marie Therese* was steering a course of S. ½ W. mag., and was making a speed of about four knots, and was sounding her whistle a prolonged blast at intervals of a minute. The *Marie Therese* was exhibiting the regulation masthead and side lights, and a fixed stern light, which were burning brightly; and a good look-out was being kept on board.

In these circumstances, those in charge of the *Marie Therese* heard a long blast from a steamship which proved to be the *British Earl*, apparently on the port bow, and at once stopped their engines and sounded a long blast in reply. After a short interval a long blast was again sounded on the whistle of the *Marie Therese* and her engines were kept stopped, and when her headway was run off her whistle was sounded a signal of two long blasts. Shortly afterwards those in charge of the *Marie Therese* sighted the two masthead lights of the *British Earl* in line and about three ship's lengths distant and between two to three points on the port bow, and at the same time one long blast was heard from her. The helm of the *Marie Therese* was immediately put hard-a-port, her whistle was sounded one short blast and her engines were ordered slow ahead, but immediately afterwards were ordered and put full speed astern and her whistle was sounded three short blasts; and this signal was twice repeated. The *British Earl*, which appeared to be swinging with her head to port when first seen by those in charge of the *Marie Therese*, came on at high speed and then appeared to be altering to starboard and sounded three short blasts; and very shortly afterwards the stem of the *British Earl* struck the port side of the *Marie Therese* near No. 3 hatch, doing such damage to her that she sank soon after the collision and the plaintiffs' property on board was lost.

Plaintiffs alleged that those in charge of the *British Earl* were negligent in that they did not keep a good look-out; were steaming at an excessive speed in fog; did not stop their engines on hearing the fog signal of the *Marie Therese* forward of their beam and thereafter navigate with caution; were not sounding their whistle for fog as required by the Collision Regulations; improperly and at an improper time altered their course to port; failed to indicate their manœuvres by the appropriate whistle signals; failed to reverse their engines in due time or at all; and did not comply with Arts. 15, 16, 27, 28 and 29 of the Collision Regulations.

According to the defendants' case, shortly before 11 19 p.m. on Feb. 12, 1926, the *British Earl*, a steel screw steamship of London, of 6298 tons gross, 3772 tons net register and 421 ft. long, fitted with triple expansion engines of 511 h.p. nom., and manned by a crew of 36 hands all told, was about four miles to the southward of the Cross Sand Light-vessel on a voyage from the Thames to the Tyne in ballast. The wind at this time was N.E. a light breeze, the weather thick fog and the tide about slack or just commencing to set to the northward. The *British Earl* was on a course of N. mag. and was proceeding at a speed of about three knots. She was exhibiting the regulation masthead (two), side and stern lights, which were burning brightly, her whistle was being sounded prolonged blasts at intervals in accordance with the regulations, and a good look-out was being kept on board of her. In these circumstances those on board of the *British Earl* heard on the starboard bow a whistle from a vessel which afterwards proved to be the *Marie Therese*. The engines of the *British Earl* were at once stopped and her whistle sounded a prolonged blast in reply. Shortly afterwards the masthead and green lights of the *Marie Therese* came in sight, bearing about 1½ points on the starboard bow and distant about 750 ft.; and at the same time the *Marie Therese* was heard to sound another long blast. The *British Earl* again replied with one long blast; and in order to give more room the helm of the *British Earl* was put hard-a-starboard, two short blasts were sounded on her whistle and her engines were kept stopped. The *Marie Therese*, however, instead of passing the *British Earl* green to green as she could and ought to have done, was observed to open her red light. The engines of the *British Earl* were at once put full speed astern, her helm hard-a-port, and three short blasts sounded. The *Marie Therese*, notwithstanding that she sounded three short blasts and repeated this signal, came on at a speed, and with her port side abaft amidships struck the stem and port bow of the *British Earl*, doing damage.

Defendants alleged that those responsible for the navigation of the *Marie Therese* were negligent in that they failed to keep a good look-out; improperly and at an improper time ported their helm; proceeded at an excessive speed and failed to ease, stop or reverse their engines in due time or at all; failed to stop on hearing forward of their beam the whistle of the *British Earl*, and then to navigate with caution; having ported their helm and attempted to

cross ahead of the *British Earl* failed to starboard their helm; failed to sound their whistle in accordance with the regulations, and sounded improper and misleading signals; and failed to comply with Arts. 15, 16, 27, 28 and 29 of the Collision Regulations.

Tuesday, Oct. 19, 1926.

JUDGMENT.

Mr. Justice HILL, in giving judgment, said: This is a claim by the owners of cargo lately laden on board the steamship *Marie Therese* against the owners of the steamship *British Earl*. The *Marie Therese* is of 1581 tons gross, 278 ft. long, was laden, and was in the North Sea southward bound. The *British Earl* is of 6298 tons gross and 421 ft. long; she was in ballast and was bound north. The collision happened near the Cross Sand Light-vessel shortly after 11 p.m. on Feb. 12, 1926. Plaintiffs' time is 11 16; defendants' time is 11 19. Directly after the collision the masters of both vessels thought the place was four miles to the south of the Cross Sand Light-vessel. The wreck of the *Marie Therese* has since been located at 1¾ miles S.E. by S. of the Cross Sand. I think that that must be approximately the place of collision, because it happened in slack water and the *Marie Therese* sank a very short time afterwards. I take the position of the wreck as approximately the place of collision. The stem of the *British Earl* came into contact with the port side abaft the bridge of the *Marie Therese* in the way of No. 3 hatch in the aft hold. There is general agreement, apart from the master of the *Marie Therese*, that the angle of the blow was 45 to 50 degrees. The master put it a little finer, but I find on the evidence generally, which agrees with the surveyors' on both sides, that the angle was from 45 to 50 degrees.

Now, the cases as made on the pleadings and in evidence cannot possibly be reconciled. One side or other is not telling the truth or attempting to tell the truth. Put shortly, the case for the plaintiffs is that after passing the Cross Sand Light-vessel the *Marie Therese* was on a course of S. ½ W. mag., making three or four knots and sounding for fog. A long blast was heard on the port bow, the engines were stopped and when her way was run off two long blasts were sounded. While the *Marie Therese* was stationary two masthead lights were seen in line heading for the port bow two to three points on the port bow, and a second long blast was heard from the other ship, the *British Earl*. The helm of the *Marie Therese* was immediately put hard-a-port, her engines were ordered slow ahead and then ordered full speed astern. three short blasts were sounded twice and the collision followed. According to the plaintiffs' pleadings, no side lights of the *British Earl* were seen at any time; and so said the plaintiffs' witnesses, except the look-out, who said that he saw the red light of the *British Earl* about 50 ft. away.

The defendants' case is that approaching the Cross Sand Light-vessel their course was N. mag. and at not more than 3½ to 4 knots, said the master, and the whistle was being sounded for fog. A long blast was heard, the engines were stopped and a long blast was blown in reply. A second long blast was heard and the masthead and green lights of the *Marie Therese* came into sight about 1½ points on the starboard bow at a distance which in evidence was put at 650 to 700 ft. and in the preliminary act at about 750 ft. Another long blast was blown in reply, the helm was ordered hard-a-starboard and two short blasts were blown, but before the wheel was hard over the red of the *Marie Therese* opened and the green was shut. The helm of the *British Earl* was put hard-a-port, the engines were put full astern and three short blasts were blown. The *Marie Therese* came on at speed under a port helm and brought her aft port down on the stem of the *British Earl*, which according to the master had at the time of the collision no way on her. According to the defendants, they stopped two minutes before the collision and went full astern a minute before the collision.

I am quite unable to accept the plaintiffs' evidence or to act upon it. To my mind it is impossible. You start with their case of two masthead lights in line to the look-out, 2½ to 3 points on the port bow, the *Marie Therese* stationary heading S. ½ W., and possibly altering one point. The angle of the blow was 45 to 50 degrees. To get to that angle the *British Earl* must have ported, but if she ported, unless she afterwards starboarded, which is not suggested, the angle must have been less than that pleaded, or, even if the *Marie Therese* did alter a point while stationary, still you cannot get 45 degrees. But plaintiffs' evidence is that her head did go to starboard. Plaintiffs said that her head seemed to be first going a little to port and afterwards came to starboard, and unless she did port again how did she strike the *Marie Therese* aft if the *Marie Therese* was stationary? The case is to my mind impossible and untrue.

In many details the plaintiffs' evidence is full of contradictions and difficulties. In regard to speed: when the *British Earl* was first seen the master and second officer said that the *Marie Therese* was at half-speed. The engineer said she was at slow. The master, while saying that she was at half speed, also said that she was making three or four knots. He had already told us that his normal half speed was five to six knots. The statement of claim says four knots. The preliminary act uses a phrase which is never used by an experienced pleader when he is pleading half speed. He pleads that she was proceeding at reduced speed. Whenever I find that put in by an

experienced pleader I nearly always find that the speed was not less than half speed.

As to the course: I have not got any trustworthy evidence about the course any more than I have about the speed.

There are also discrepancies in the times given between hearing the whistles, seeing the *British Earl* and the collision. The second officer says that from hearing to seeing was four to five minutes, and that he saw the other ship at half a mile, which means several more minutes before the collision. The master says that he gave two long blasts several times. Other witnesses say two long blasts were blown once. No two long blasts were blown on the *British Earl*.

As to the distance at which the ships were seen: it is only estimate, but you do not expect the master and the second officer of the *Marie Therese*, giving a true account, to form such different estimates as they did. The master said about three lengths, 700 or 800 ft., and the second officer said half a mile. They agree that full astern followed immediately upon slow ahead when the ship was sighted, yet after the second officer saw the ship at half a mile there was no stern way being gathered by the *Marie Therese* during the period that the *British Earl* travelled that half a mile.

I am unable to check the witnesses for the plaintiffs by documents. In one way no doubt that is a disadvantage to them. They have no contemporary records and are casting their minds back to what happened some months ago. For that reason one should not attach too much weight to small discrepancies. One should expect them. But there is one document that was almost contemporary and that is the master's letter; and I think that it is impossible to accept his evidence in the box as consistent with the account which he related in the letter. The pleaded time of the collision in the preliminary act is 11 16. The master says that he was given that time at or shortly after the collision; and when he wrote this letter he was aware that the collision was at 11 16. He begins his story by saying that he first heard the fog signal of the *British Earl* at 11 15, one minute before the collision. The second officer's half mile in evidence is as foolish in the light of that letter as the masters' series of two long-blast signals. The whole of their evidence has no relation to the realities of the case. Moreover, they all, except the look-out man at a late stage, swear that they saw no side lights—and the side lights of the *British Earl* were 40 ft. above water and no attack has been made on the quality of the lamps.

Why did they come and say that there were no side lights? To my mind it is incredible that they did not see any side lights: and the question is whether they saw first one and then the other. But they are concealing from the Court the fact that they saw any side lights.

Well, now, I have said that I cannot accept this evidence at all, and I must try the case upon the defendants' evidence with such criticisms as ought to be made upon it.

As to the blame, on her own case I find that the *Marie Therese* was going at an excessive speed. It will presently be found when I examine the defendants' case that as I accept their evidence it leads me to find that the *Marie Therese* wrongly ported. As to her speed, she says that she altered a point while stationary; and it is rather difficult to see, in the short time her engines were going astern without giving her any way in any direction, how her heading should have altered a point unless she had some forward way all the time. The master, as I have pointed out, admits half speed, which is five or six knots. That exactly fits in with the evidence of the look-out and the place of collision. That she should have been going at half speed without stopping until a minute before the collision, spoken to in the master's letter, is entirely consistent with the practice which he said he had been pursuing as he came down past the light-vessel, because he said that if he heard a vessel right ahead he stopped, but that if he heard one on either side he continued his speed whatever it happened to be; and, whichever bow the *British Earl* was on when she was heard by the *Marie Therese*, she certainly was not ahead. Now if, as I think, the evidence points to the *Marie Therese* being at half speed, and one minute before the collision the master hears the other ship, orders the helm hard-a-port and the engines slow ahead followed immediately by full astern, she might very well alter a point. She would certainly still have substantial way at the time of the collision. Rejecting as I do the plaintiffs' evidence, is there any reason why I should reject the defendants' evidence? In some respects the evidence of the plaintiffs corroborates it.

As to what was seen, the bearings, the distances and the times, in substance I accept defendants' evidence. I am unable to reject the evidence of the master and others that what they first saw was the masthead and green lights of the *Marie Therese* on the starboard bow. That is common ground. The only difficulty about that is that I do not know why the master should hard-a-starboard to a green on a starboard bow. It was a position of safety, but he still starboarded. The ships were, as I find, at that time a short distance apart, and the speed of the *British Earl* at the time was slow. As to the "stop" and "full astern," I accept their evidence; and as to the whistle signals I find that they gave them.

The question of speed before the "stop" requires some careful consideration. Mr. Langton very properly directed my attention to the logs of the *British Earl* and the distances. But before I investigate that question with any closeness—and it all depends on distances of a few miles and the precise force of the tide—I have to ask myself, do I accept this evidence? Is it a truthful record? Is the evidence true that the engines were stopped at 10 15, put slow ahead at 11 9 and so remained until stopped at 11 17 after hearing the other ship? If that is a true record, if it be true that the