1920
Nov. 6.

IN ADMIRALTY

ON APPEAL FROM THE BRITISH COLUMBIA ADMIRALTY DISTRICT.

BETWEEN

THE *JESSIE MAC* AND OTHERS....PLAINTIFFS (Appellants)

AND

THE *SEA LION* AND OTHERS.....DEFENDANTS. (Respondents).

Admiralty Law—Foul berth—Inevitable accident—Common harbour of refuge—Negligence.

A number of tugs with their tow, including the tug *J.M.*, had sought shelter in Trail Bay off the B.C. coast, recognized as a proper harbour of refuge.

The *J.M.* being first in, was tied to the shore in a safe position; three other tugs with their tow subsequently came in and tied alongside of her. At 2 a.m. the next day the *Sea Lion* and tow also sought shelter in the same bay, and anchored some distance out, but not far enough to allow her tow to swing clear of these boats and the shore. At 3 p.m. on the day of the accident the *Sea Lion* and her tow swung towards the Island with the tide and wind, and the tail end of the boom caught on the shore. At 9.30 p.m. the *Sea Lion* realizing she was dragging anchor, attempted by pulling at right angles to get her tow off the land, using the stern of the boom as a fulcrum. In so doing the boom parted and swung towards the tugs tied at the shore fouling the boom of the 2nd from the shore, breaking the eastern and centre shore wires fastening the *J.M.*'S boom to the shore, shoving the rafts and tugs to the west, and landing the *J.M.* on a rock and foundering her.

Held, (reversing the judgment appealed from) that there being ample space from which to select a safe anchorage, the act of the captain of the *Sea Lion* in electing to anchor where he did and in not allowing sufficient space between the *Sea Lion* and her tow and the other vessels on the shore to permit of his tow having a good, clear, swing-berth, showed a want of ordinary maritime skill and ordinary prudence and care and constituted his anchorage a foul berth.

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2. That having taken a foul berth endangering other crafts, the *Sea Lion* was in fault and liable.
3. That a manoeuvre is *prima facie* wrong if it creates a risk of collision; but the best test is that when it creates such a risk and eventually actually contributes to the accident, it then becomes a fault.
4. That a vessel not under way but fastened to the shore and moored in a position of safety, and exhibiting proper lights, is entitled to assume she is as safe as moored at a wharf or pier.

AN appeal from the decision of the Honourable Mr. Justice Martin, L.J.A., of the British Columbia Admiralty District, which dismissed the action of plaintiffs (1).

Hume Robinson K.C. for appellants.

Wallace Nesbitt K.C. for respondents.

The appeal was heard before the Honourable Mr. Justice Audette, at Ottawa, on the 19th day of October, 1920.

The facts are stated in the reasons for judgment.

AUDETTE J. now (November 6, 1920) delivered judgment.

THIS is an appeal from the judgment of the local Judge of the British Columbia Admiralty District, pronounced on the 9th day of April, 1919, dismissing the plaintiffs' action.

To properly understand the facts of the case and the circumstances of the accident, which are clear and simple, it is well to keep before our eyes the plan of the *locus in quo*, filed as exhibit No. 2.

Owing to strong westerly winds producing heavy sea in the open, a number of tugs, about ten in number, towing raft of logs, sought shelter in Trail Bay, under the lee of Trail Island, off Sechelt, where it is custom-

(1) Reported 19 Can. Ex. C. R. 78.

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ary and proper to go for refuge in westerly winds; but unsafe with easterly winds, with perhaps the exception of the inside shore position between the S.W. point of the Island and a well known rock,—a position taken by the *Jessie Mac* upon her arrival in the Bay.

At various times between the 30th March and the 1st of April, 1918, inclusive, these tugs and rafts came into this haven. The *Jessie Mac* (39 tons net) was the first to come in, at about 3 o'clock a.m., on the 30th of March, and made fast to the shore with two 5/8 inch wires at the east end and centre and with one ½ inch wire at the west. Subsequently, the *Chieftain*, the *Stormer* and the *Volcan*, tugs of approximately the same size, came in with rafts and moored alongside the *Jessie Mac's* boom or rafts, in the manner, approximately shewn on Exhibit No. 2, with, however, some slight variations which have no bearing upon the case.

The *Sea Lion*, 129 feet long, 22 beam, drawing 15 feet, gross tonnage 218, with 46 swifters, in three rafts or booms, arrived on Sunday, the 31st March, at 2 o'clock a.m., and cast anchor at the place shewn on exhibit 2, and with westerly wind prevailing, her tow swung to eastward. She remained there all Sunday and the best part of Monday, when at 3 o'clock, p.m. on that day, her tow changed position, the tide having started to flood and the westerly wind having died out and a light wind having sprung from the northeast (p. 153), her tow swung to the west, in a southerly direction, and the tail end of the raft swung on the island and remained there fast, until 9.30 p.m. of the same day, when the Captain said he felt his anchor was dragging (148). Then being asked: "Q. And what did you do as a result of that?" (result of dragging anchor). "A. Well, I had to—

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when I was dragging my anchor I seen that was going to drag me into a very cautious position and I raised my anchor and steamed ahead." . . . . . .

"Q. Now, what position did you take up—looking at the chart—is your position practically shewn there? "A. After I had raised my anchor I headed more to the eastward so as to draw my tow—and I used the stern of the boom for a fulcrum." . . . . . "Q. And you used the stern of the boom as a fulcrum?" "A. Yes, I headed towards the eastward, and used the stern of my boom as a fulcrum to swing the boom—the whole tow, more to the eastward, so that I could draw it straight off, *so that the stern would not strike the boats on the beach.* In doing that the boom parted."

It is well to note, by way of testing his judgment and seamanship, that his raft went aground at 3 o'clock in broad day light in the afternoon, and that it is only at 9.30 p.m. when it is dark and his anchor is dragging that he ever awakes to the necessity of doing something. The boom parted at the end of the 9th swifter, leaving 6 swifters at the island. The tail end of the nine swifters, with the help of the tide and the wind, swung towards the four tugs and rafts fastened to the shore, and struck the head of the *Chieftain's* rafts. The two wires tying the *Jessie Mac's* rafts at the east and centre broke and the four tugs and rafts swung to the west, the western wire still holding, the *Jessie Mac* being dragged unto the rock shewn to the north west, she sunk and suffered damages for which she is now suing in the present case.

Some witnesses contend that these big tugs usually anchor far enough to clear the rock and the vessels fastened to the island (pp. 116, 137). Capt. Jones testifies that the trail of the tow fouling the shore, would indicate the *Sea Lion* was anchored too close.

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Now the learned trial judge found that, under such circumstances, the accident was inevitable.

What is an inevitable accident? Marsden, Collision at Sea, 7th Ed., p. 18, says: "In the *Europa* (1), Dr. Lushington states that inevitable accident is 'where one vessel doing a lawful act without any intention of harm, and using *proper precautions*, unfortunately happens to run into another vessel.' Again it has been said, 'to constitute inevitable accident, it is necessary that the occurrence should take 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 that degree of diligence which is generally to be found in persons who discharge their duty. The Privy Council adopting the language of Dr. Lushington, defined inevitable accident to be 'that which a party charged with an offence could not *possibly* prevent by exercise of ordinary care, caution, and maritime skill, and this must now be regarded as an authoritative definition.' "

In Lowndes, Collision at Sea, pp. 98 et seq, almost the same definition is to be found, but it adds: "In the subsequent case of the *Locklibo* (2) the same principle was laid down in almost the same words: 'By inevitable accident, I must be understood, as meaning, a collision which occurs when both parties have endeavoured by every means in their power, with *due care and caution, and a proper display of nautical skill*, to prevent the occurrence of the accident.' Again in the case of *W. U. Moses* the same learned Judge defined inevitable accident to be 'that accident, that

(1) [1850] 14 Jur. 627, at p. 629. (2) 3 Wm. Rob. 310, at 318.

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calamity, which occurs, without there being any *practicable means* of preventing its taking place; it is that accident which takes place when everything has been done which ordinary skill, care and ability could do to prevent the accident'." See also Williams' and Bruce's Admiralty Practice, p. 94.

What is the first and elementary duty of a captain picking out a berth? Todd & Whall, Practical Seamanship, under the chapter, intituled "Coming to An anchor," says at page 81: "Supposing many vessels are lying about, look out and pick out a good, clear swing-berth" and further on he guards against *bringing up close to other* vessels and against being too near the ground to be pleasant.

Marsden, p. 461: "In coming to an anchor caution must be used not to injure or embarrass other ships. A vessel rounding up to, so as to bring her head upon tide, should, before altering her helm, look round and see that all is clear, and that her manoeuvre will not endanger other ships." *The Ceres* (1); *The Shannon* (2); *The Philotaxe* (3).

Then at p. 462: "After *coming to an anchor*, those on board must show proper skill and seamanship in keeping their vessel from driving and endangering other crafts."

Lowndes, p. 76: "A ship which anchors too near another ship, so as to give her what is called 'foul berth,' or which neglects to drop a second anchor when she ought to do so, and when in a gale drifts foul of the other vessel, will be held answerable in damages."

The Secret (4): "Inevitable accident is where the collision could not have been prevented by *proper care* and seamanship in the particular circumstances of the case.

(1) [1857], Swab. 250.
(2) [1842] 1 W. Rob. 463.
(3) [1878] 37 L.T. 540.
(4) 1 Asp. N.S. 318.

"A defendant, in order to support a defence of inevitable accident, is bound to show that everything ordinary and usual was done which could and ought to have been done to avoid a collision."

See also *The Saima* v. *Wilmore* (1); *The City of Seattle* (2).

A number of cases bearing upon the facts of the case in question are hereafter cited:—

In Marsden's Collisions at Sea, 7th ed. article 29, p. 459, we find: "If one ship properly lighted (if at night) is fast to the shore, or lying at established moorings, it can scarcely happen that the other would not be held in fault for the collision (3).

Then at p. 460: "A ship in bringing must not give another a foul berth. If one vessel anchors there, and another here, there should be that space left for swinging to the anchor that in ordinary circumstances the two vessels cannot come together. If that space is not left, I apprehend it is a foul berth" (4).

In an American case it was held that a ship at anchor is entitled to have room to swing, not only with the scope of cable which she has out at the time when the other ship takes up her berth, but with as long a scope as may be necessary to enable her to ride in safety (5).

(1) 4 Lloyd's L.L. Rep. 218 et seq.
(2) 9 Ex. C.R. 146, at 152 et seq.
(3) See *The Secret* (1872), 1 Asp. M. C. 318; and *Culbertson* v. *Shaw*, 18 How (59 U.S.) 584; *Portevant* v. *The Bella Donna*, Newb. Adm. 510; *The Bridgeport*, 7 Blatchf. 361; 14 Wall. (81 U.S.) 116; *The Granite State*, 3 Wall. 310; *The Helen Cooper* and *R.L. Mabey*, 7 Blatchf. 378.
(4) Per Dr. Lushington in *The Northampton* (1853), 1 Spinks, Ecc & Adm. 152, 160.
(5) *The Queen of the East and the Calypso*, 4 Bened. 103.

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"If a ship gives another a foul berth she cannot require the latter to take extraordinary precautions to avoid a collision. (1) It has been held that in the Mersey a cable's length between the two ships is a clear berth (2). This, however, cannot be laid down as a general rule, for at this distance a laden vessel riding to the tide might, in swinging, come dangerously close to a light vessel riding athwart the tide. And not only must a vessel *not bring up so close to another* as not to *giver her room to swing*, but she must not bring up in such a place that she *endangers* the other ship. She should not bring up directly ahead, or in the stream of another ship, having regard to the current and also the prevailing winds. If she brings up directly in the hawse of another ship, or elsewhere in the neighbourhood of another ship there should be such a distance between them that if either of them drives or parts from her anchors, she may have the opportunity to keep clear (3). Where a ship in bad weather, took up a berth two cables' length to windward of another, in an anchorage where there was plenty of room, and then rode with only one anchor down and that not her best, she was held in fault for a collision with the ship to leeward, against which she was driven when her cable parted in a heavy squall (4)..........

"If a vessel takes up a berth alongside another where she takes the ground and falls over and injures

(1) *The Vivid* (1872), 1 Asp. M.C. 601; *The Meanatchy* (1897) A. C. 351.

(2) *The Princeton* (1878), 3 P.D. 90.

(3) The *Cumberland* (Vice-Ad. Court, Lower Canada), Stuart's Rep. (1858), p. 75; *The Egyptian* (1862), 1 Moore. P.C.N.S. 373.

(4) *The Volcano* (1844), 2 W. Rob. 337; *The Maggie Armstrong* and *The Blue Bell* (1866), 14 L.T. 340.

the other, she will be held in fault (1). A vessel voluntarily taking up such a berth in a dock does so at her own risk (2). So where two colliers were beached near each other for the purpose of discharging cargo, it was held that it was the duty of the last comer to moor head and stern, and in such a way as not to foul the other when the wind shifted (3)."

"The omission to warn a ship astern of her intention to bring up has been held neglect of a precaution required by the special circumstances of the case" (4).

"A tug in charge of an unwieldy tow of car floats in New York harbour was overpowered by her tow in a heavy squall, and, having let go her anchor, which did not hold, she drove against a third ship. It was held that she was in fault for not having an anchor that would hold her (5) p. 463........

"Vessels navigating in an unusual manner or by an improper course do so at their own risk. p. 472......

"A tug took her tow so close to a ship at anchor that, upon her suddenly altering her course to clear the ship at anchor, the tow line parted, and the tow fouled the ship at anchor. The tug was held in fault for the collision (6) p. 476.

In Lowndes, Collision at Sea, pp. 57 et seq.: "The next subject for consideration is the case where one of the colliding ships is at anchor. Here, supposing

(1) The *Indian* and the *Jessie* (1865), 12 L.T. 586; The *George* and the *Lidskjalf* (1857), Swab. 117; *The America*, 38 Fed. Rep. 256; The *Addie Schlaeger*, 37 Fed. Rep. 382; The *Behara*, 6 Fed. Rep. 400.

(2) *The Patrioto* and *The Rival* (1860) 2 L.T. 301.

(3) *The Vivid* (1872), 1 Asp. N.S. 601.

(4) *The Philotaxe* (1874), 3 Asp. M.C. 512; and see *The Queen Victoria* (1891), 7 Asp. M.C. 9; *The Helen Keller*, 50 Fed. Rep. 142.

(5) *The J.H. Rutter*, 35 Fed. Rep. 365.

(6) *The City of Philadelphia* v. *Cavagnin*, 62 Fed. Rep. 617.

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that a proper light has been exhibited by the ship at anchor, the presumption of law is that the vessel which runs into her is in fault and the burden of enculpating herself rests with the latter." Thus, in the case of the *Percival Forster*, Dr. Lushington said: "She had anchored in a place respecting which no fault could be found, that is, she had a right to be anchored where she was. The result of that is, that if any vessel in motion comes into collision with her while at anchor, the burden of proof lies on the vessel so coming into collision, to show either the collision was inevitable from circumstances, or that the vessel at anchor was to blame. The justice of this, which is a rule of law, is obvious, because a ship lying at anchor has very little means of avoiding a collision; to a certain extent she may possibly manœuvre, but to a small extent; whereas the vessel driving up with the tide, whether under steam or sail, has much greater means of doing whatever may be necessary.

"Even though the ship should have been anchored in an improper place, the same rule must hold good.... Supposing a carriage be standing still, and be on the wrong side of the road, it would be no justification for another carriage, which might be on the right side of the road, to run into that carriage, if the driver could avoid it without risk to himself."

See also Pritchard's Admiralty Digest, p. 288, et seq, Nos. 884, 885, 886, 887 and 888.

See also *Culbertson* v. *Shaw* (1): "where a boat is fastened to the shore, especially at a place set apart for such boats, lights are not required." "A vessel tied to the shore is helpless." "Ordinary care, under such circumstances, *will not excuse a steamer for a wrong done*," etc.

(1) 18 How. Rep. 584 et seq: at page 587.

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In Parsons, on Shipping and Admiralty, Vol. 1, p. 573 et seq: "If a ship at anchor and one in motion come into collision, the presumption is, that it is the fault of the ship in motion, unless the anchored vessel was where she should not have been. The rule of law is the same when a vessel aground or one lying at a wharf, is run into...... If a vessel is at anchor, another must not anchor so near as to cause damage to her...... If a vessel about to get under way is so near to a vessel at anchor that there is danger of a collision, she should notify such vessel of her intention to get under way."

And in *The City of Seattle* (1), Martin, J. said: "Her position there was tantamount to that set in the preliminary act, that is to say, in being fast to the shore; and she was not a ship 'at anchor' or 'under way' within the proper meaning of these terms as understood by seafaring men......She was moored ......in a position of safety and entitled to assume that she was safe......

"The fact that......was in the position I have referred to and that she was run down, as aforesaid, establish a *prima facie* case of negligence against the defendant ship that the rule of law set out in the case of *The Merchant Prince* (2), is properly invoked against her. That is to say, the defence has failed to sustain the plea of inevitable accident, because to do so it was necessary to show *what was the cause of the accident*, and that, though *exercising ordinary care and caution and maritime skill*, the *result of that accident was inevitable*.

The *Jessie Mac* fastened to the shore, not under way, moored to a position of safety, exhibiting proper light, was entitled to assume that she was safe.

(1) 9 Ex. C.R. 146, at 150 et seq. (2) [1892] P.D. 179.

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See also *The Bridgeport* (1), as to light, and *The Northampton* (2); Lloyd's List Law Reports, Vol. 4, p. 283; *The Ship Wandrian* (3); *The Helen Cooper* (4); *The Volcano* (5); *The Granite Slate* (6); *Neptune the Second* (7).

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Having set forth, perhaps at too great a length, a number of cases and extracts from text books on the question at issue, let us follow the modern tendency of the courts and view the facts of the case in the light of the first principles of law that must guide in the present case. *Craig* v. *Glasgow Corporation* (8) —.

I am of opinion that the captain of the *Sea Lion* in selecting his berth,—he being the first of the 6 large tugs to come in at anchor in the open on the northwest of the island,—failed to show ordinary maritime *skill*, ordinary *prudence*, and failed to exercise *care*, *caution*, and maritime skill. As laid down by Todd & Wall,—and it is of ordinary common sense prudence for a mariner,—the first duty incumbent upon a captain bringing his vessel to anchor is to pick out a *good*, *clear*, *swing-berth* and to guard against bringing her up *close to another vessel* or the shore.

The berth selected by the *Sea Lion*, when there was plenty of space available, placed her in the position that if the tide turned and flowed to the west and if the wind, when changing from west, did change to southeast, instead of northeast as it did, she would swing unto the tugs fastened at the shore. It is too obvious. Looking at exhibit No. 2, placing a rule on the bow of the *Sea Lion*—although it should be placed above her anchor which is still more to the west, the tug and tow

(1) 14 Wall. (81 U.S.) 116.
(2) [1853], Spinks 152-160.
(3) 11 Ex. C.R. 1.
(4) 7 Blatch. 378.
(5) 2 W. Rob. 337.
(6) 3 Wall. (70 U.S.) 310.
(7) 1 Dodson 467.
(8) [1919] 35 T.L.R. 214, 216.

would swing directly north, west and south upon the well known rock and the four tugs and tow fastened to the shore. That alone would denote bad seamanship, want of ordinary maritime skill, etc.

However, the wind happened to shift from west to northeast and with the tide, the *Sea Lion's* tow swung upon the island, grounded hard and fast, on an exposed beach. This wrong anchoring, foul anchoring, resulted in taking the raft to the shore, moreover followed, as said by her captain, by the dragging of her anchor as too much stress was placed upon it from the grounding of the raft and the tide,—a position circumspect of consequences of danger. He then steamed up harder, as he said (p. 150) and pulled his raft at right angle, to the east, with the object of freeing her from the shore. Pulling thus at right angle especially with the tail end of the raft grounded at the beach,—placed a much heavier strain on the raft, as admitted in the evidence (pp. 173, 206) with the result that it broke at the end of the 9th swifter—leaving six swifters to the shore, that raft being of fifteen swifters altogether. The tail end of these 9 swifters swung to the west and struck the eastern end of the *Chieftain's* boom,—the 2nd from the shore—breaking the eastern and centre shore wires fastening the *Jessie Mac's* boom to the shore, and shoving the rafts and tugs to the west and landing the *Jessie Mac* on the rock and foundering her.

The following question was put to one of the expert witnesses for the defence: "Q. So, according to you, you would just as soon have your boom ashore as in open waters?" "A. No. No." "Q. Then it must be worse to have it ashore?" "A. Well, you try to keep it off, if you can." (p. 192. See also 137).

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The answer is obvious, although some witnesses contend it could be done. Some witnesses testified, in an irresponsible manner, that it was a proper manoeuvre to intentionally anchor close enough to the shore to allow the boom to come in contact with the beach and ground thereon. It is hard to believe good experienced mariners,—outside of a law suit—would assert such a proposition. Why! All seafaring men, mariners, worthy of the name—as a rule seek as much as possible to navigate in open waters and keep away from land. It was further contended at Bar, that one of the reasons why the *Sea Lion* dropped anchor where she did, was because she knew the island protected the four tugs fastened to the shore, in that the end of the rafts would be stopped by the island. Overlooking that if the raft had swung north, west and south, that then it came directly in contact with the rock and the four tugs at the shore.

However, the irony of such an afterthought and specious argument would not commend itself to a competent mariner. That was the cause of the accident; anchoring where he did eventually led to and created the accident. A manoeuvre is *prima facie* wrong if it creates a risk of collision; but the best test is when it creates such a risk and eventually actually contributes to the accident, and in that case it then becomes a fault. It is a bad thing to have your boom hung on the shore (p. 137) Good and, competent seamen and skippers always seek good, deep and open waters to manoeuvre—they always endeavour to get away from the shore and where there is plenty of water.

It is contended at bar that the *Sea Lion* had a right to anchor where she did. No doubt that *per se* she had that right; but having taken a foul berth endanger-

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ing other crafts, she is responsible for all that might result therefrom. She anchored too close to the shore, too close to other vessels, and she did so at her own risk and peril and she must bear the consequences of a contingency to which she exposed herself. She must extricate herself at her own risk and peril. *The Hope* (1); *The Cape Breton* (2); *The Lancashire* (3); *The Patrioto* and *The Rival* (4).

A significant fact which should be noted is that when finally the *Sea Lion* succeeded in freeing her raft from the shore, she did not go back to her old anchoring. She anchored, according to her own reckoning, about 1,000 feet further out.

The want of due diligence in picking up a clear swung berth and the wrong and initial manoeuvre of the *Sea Lion* in anchoring at such a place, endangering other ships, dragging her anchor, etc., thus departing from good and cautious seamanship, destroyed the safe position and by her error and want of ordinary maritime skill, prudence, care and caution she became and was the cause of the accident—ignoring the dictates of good seamanship. She failed to show that degree of skill and that degree of diligence which is generally to be found in persons who discharge the duty of master on board ships and which amount in other words, to what is termed good seamanship. The tugs fastened to the shore, in a like position to vessels moored at a wharf or pier, had the right to expect that incoming large vessels anchoring outside, would anchor far enough to avoid colliding with them. If the *Sea Lion* had anchored far enough away from

(1) 2 W. Rob. 8.
(2) 9 Ex. C.R. 67, 116; 36 S.C.R. 564, 579; (1907) A.C. 112.
(3) 2 Asp. N.S. 202.
(4) [1860, 2 L.T. 301.

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the shore, as far as she did after the accident, her boom would have swung free from the shore and there would have been no accident.

Under the circumstances I am unable to adopt the finding of inevitable accident. An accident that can be avoided by mere ordinary seamanship cannot, in any manner, be termed inevitable. The fallacy of such a conclusion lies in the premises of the syllogism; *The Volcano* (1); the *Sea Lion* having been guilty of wrong and faulty seamanship, in anchoring as she did, as above set forth. She was primarily at fault in choosing her anchoring without first ascertaining she had a clear berth that would not endanger other ships. *The Ceres, The Shannon, The Philotaxe* (ubi supra). After coming to an anchor, her master had to show proper skill and seamanship, in keeping his vessel from driving and endangering other crafts.

The appeal is allowed and with costs.

Judgment accordingly.

Solicitor for appellants: *Hume B. Robinson.*

Solicitors for Respondents: *D. G. Marshall.*

(1) 2 W. Rob. 337.