ON APPEAL FROM TORONTO ADMIRALTY DISTRICT.

BETWEEN

WALDIE BROTHERS, LIMITED, (DEFENDANTS) ..... } APPELLANTS; 1909 June 2.

AND

WALTER R. FULLUM AND ANNIE FITZGERALD (PLAINTIFFS)..... } DEFENDANTS.

*Tug and Tow—Inland waters—Damage to Tow—Negligence of Tug—Liability—Limitation—Change in Statute by Revisors—Effect of.*

*Held* (affirming the finding of the Local Judge) that where a barge while being towed by a steam tug in the waters of Lake Huron was stranded by the careless navigation of the tug, such carelessness subsisting in the faulty steering of the tug and failure to give proper directions as to the steering of the tow, coupled with the absence of a proper look-out on the tug, the tug was liable in damages to the owners of the barge.

2. *Held* (reversing the finding of the Local Judge) that under the circumstances of the case the appellants were entitled to the benefit of the limitation of liability mentioned in R. S. C. (1886) c. 79, s. 12, namely $38.92 for each ton of the tug's tonnage, without deduction on account of engine room. *Sewell* v. *The British Columbia Towing and Transportation Company* (9 S. C. R. 527) explained and distinguished.

3. In revising and consolidating the Act 31 Vict. c. 58, the commission of revision in 1886 omitted a heading to sec. 12 of such Act as originally passed, which was held per Strong, J. in the case of *Sewell* v. *The British Columbia Towing and Transportation Company* (*supra*), to restrict the apparent generality of the terms of that section.

*Held*, assuming that the omission of the heading was legislating so as to make the law in Canada harmonize with the English law, that the action of the revisors in omitting such heading from the statute was validated by the provisions of Chap. 4 of 49 Vict. 1886 respecting the Revised Statutes.

THIS was an appeal from a judgment of the Local Judge of the Toronto Admiralty District.

The facts of the case are set out in the following judgment of the trial judge, dated the 4th January, 1909 :—

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HODGINS, L. J.—This is an action by the owners of the barge *James G. Blain* against the defendant company, as owners of the tug *J. H. McDonald*, for damages caused to their barge by the said tug in stranding her on Pandora shoal rock in the north channel of Lake Huron, while towing her from her anchorage to Algoma Mills with a cargo of coal, on the 20th July, 1906.

The defence contends that the damage was caused (a) by "inevitable accident," and not owing to any negligence on the part of the owners of the tug; that (b) the said tow did not follow directly in the course steered by the said tug, but steered to the right and to the left; that (c) the damage was caused by the negligent steering of the said tow; and that (d) the said tug was under the command and control of the master of the said tow, and that it was his duty to direct the course to be steered by the said tug, and that it was his failure to give proper directions for that purpose that caused the damage to the said tow.

In the case of the *St. Clair Navigation Company* v. the ship *D. C. Whitney* (1), I reviewed the cases dealing with the Admiralty doctrine of "inevitable accident;" and although my finding on the question of the jurisdiction of the Admiralty Court over ships of the United States in collision cases, was reversed by the Supreme Court (2), on the ground that the Ashburton Treaty of 1842, having Article by VII (which Article has never been confirmed by any legislative Act of Great Britain Canada, or the United States), (3) made the Canadian channel of the Detroit River "equally free and open to the ships, vessels and boats, of both nations," that the arrest of the America ship *Whitney* under a warrant issued from this Admiralty Court, "while exercising her right of innocent passage in Canadian waters, in accord-

(1) [1905] 10 Ex. C. R. 1.
(2) 38 S. C. R. 303.
(3) See Imperial Act of 1843, 6 and 7 Vic., c. 76; Canadian Acts of 1849, 12 Vic., c. 19; Acts of Congress of 1848, c. 167.

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ance with the treaty rights of her nation from one foreign port to another, could not, of itself, justify the attempted exercise of Canadian jurisdiction," and that she was therefore immune from arrest in such Canadian waters, and so was not subject to the jurisdiction of this Admiralty Court. But as there was no reversal of my finding on the doctrine of "inevitable accident," it is now binding on me. And as the evidence does not warrant a finding of "inevitable accident" as the cause of the damage to the plaintiff's barge in this case, I must overrule this contention of the defendants.

And here I might say that I had lately to dispose of a substantially similar case (1) to that of the *Whitney* case, of the arrest of an American ship while exercising her right of innocent and continuous passage through Canadian waters, from one American port to another; and in so disposing of it, I had to yield judicial obedience to the supreme authority of the Judicial Committee of the Privy Council, and to the Imperial Merchant Shipping Act of 1894, as to the jurisdiction conferred on British Courts over any ships "being on, or lying, or passing off," British coasts within Her Majesty's Dominions, under section 685, and to the Imperial Order-in-Council of 1897, reciting the consent of the Government of the United States that the British Regulations relating to collisions should apply to the ships of that country when beyond the limits of British jurisdiction, and declaring that "such ships for the purposes of such Regulations be treated as if they were British ships." (1)

As to the other defences which refer to the contract liability of towage of ships and the relative duties of tug and tow, I had to consider and review such defences in the case of the *Montreal Transportation Company* v. *The Ship Buckeye State* (2), and to disallow similar defences

(1) *Dunbar Dredging Company* v. *The Ship Milwaukee* 1907, 11 Ex. C. R. 179.

(2) Reported *post*.

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there. To the authorities there considered, the following may be added.

In the *Zouave and Rich*, (1) the Court said: "The tug is presumed in the undertaking she makes, to know the channel and all its perils; and undertakes to take her tow line safely through. It comprehends knowledge, caution, skill and attention."

In the *Wilhelm* (2) the tug brought the tow too near the shore; and by so doing parted the tow line, which caused the tow to drift ashore. Taft, J., held that this was negligence, and a grave fault; and showed want of reasonable care and skill, in the offender. And also in the *J. W. Paxon* (3) where the tug in towing the tow caused both to strike a sunken wreck, known to the captain of the tug, the tug was held guilty of negligence, and therefore liable.

In the evidence in this case, the captain of the tug admitted that he was very familar with the locality of the Pandora shoal; and that he knew by Sandford Island where he was, but supposed he was all right; and he also said that when he was about three hundred yards west of the shoal, he shifted the course of his tug half a point by the compass, and that he expected this half point change would take him about two hundred feet north and clear of the shoal. But as the actual result of the half point change brought the barge directly on the shoal, it is a reasonable presumption that had he kept straight on the course he was steering, and not changed by the half point, he would have passed about two hundred feet south of the shoal.

In addition to the duty of the tug towards her tow as above reviewed, there is evidence of the neglect of the captain of the tug to provide a proper lookout; and this neglect appears to have been intensified by the facts urged

(1) 1864. 1 Brown's Adm. 111. (2) 1893, 59 Fed. Rep. 169.
(3) 1885, 24 Fed. Rep. 302.

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by the counsel for the defence, which are: (a) that the night was smoky and hazy; (b) that the place of navigation was a dangerous locality; (c) that the tow was too heavily laden; (d) that the tow did not follow the course of the tug owing to her wide sheering, which the captain of the tug could not say was caused by any improper steering, or use of the helm, of the tug, but he attributed her bad sheering to shallow water, and her being too heavily laden; (e) and that the captain of the tug desired to delay starting until the next morning, which was declined by the captain of the tow. The rule applicable in such cases is, the more imminent the risk, the more imperative is the necessity for implicit obedience to the duty to have a vigilant lookout.

The captain of the tug admits that he did all the lookout and steering; but the British and Canadian Navigation Rules are explicit as to the duty of proper lookout. Art. 29. "Nothing in these Rules shall exonerate any ship, or the owner, or Master, or crew, thereof, from the consequences of any neglect to carry lights or signals; *or of any neglect to keep a proper lookout*; or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

This question of a proper lookout came before me in the *Whitney* case, (1), and in *Cadwell* v. *C. F. Bielman*, (2), and to the authorities there cited, may be added the following :—

In the *Genessee Chief* (3), the Court held that it was the duty of every steamboat navigating waters to have a trustworthy and constant lookout, besides the helmsman; and that whenever a collision occurred with another vessel, and there was no other lookout on board but the helmsman, it must be regarded as *primâ facie* evidence

(1) 10 Ex. C. R. 15. (2) 1906, 10 Ex. C. R. at p. 161.
(3) 1851, 12 How. U. S., 463.

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that the collision was occasioned by the fault of the offending vessel.

And in *Chamberlain* v. *Ward* (1), where the mate who was in charge of the deck, and in control and management of the ship, and was also the lookout, the Court said : " Steamers navigating in the thoroughfares of commerce, must have constant and vigilant lookouts stationed in proper places on the vessel, and charged with the duty for which lookouts are required ; and they must be actually and vigilantly employed in the performance of the duty to which they are assigned."

Equally emphatic was the judgment of Mr. Justice Swayne in the *John Trotter* case quoted in the *Armstrong* (2) :—" Where there is no lookout, the fault is of the grossest character, and every doubt relating to the consequences is to be resolved against the tug. It is impossible, in the nature of things, that the captain can properly perform his other duties, and also that of lookout, and he must not attempt it. A crew is not competent without a lookout either on tugs, or steamers. If there be none, the tug cannot avoid the responsibility by the oaths of the captain or crew, if there be the slightest doubt as to the spring-head of the catastrophe."

The evidence of Captain Cowles in this case shows that not very long before the accident there was a discussion, and a difference of opinion, between him and Captain Hamilton of the tug, as to the locality of Sanford Island, one of the special and admitted landmarks for guiding the course of the tug. Captain Cowles said : " He (Captain Hamilton) said to lookout ahead to see if I couldn't see Sanford Island on the starboard bow. Why, I said, I am looking for it on the other bow. Oh no, he says, it is on the starboard bow. I think the engineer came out on deck very shortly afterwards, and he asked the

(1) 1858, 21 How. U. S., at p. 570. (2) [1864] 1 Brown's Adm. at p. 135.

engineer to look to see if he couldn't pick up Sanford Island, and he could not see it; and pretty soon,—I dont know whether the engineer or me saw the light,—one of us saw Sanford Island on the port bow. One of us saw it first; I think it was the engineer. We saw it about the same time, Sanford Island on the port bow where I had figured it was; and the Captain said, "that is Sanford Island over there all right;" and he headed upand put the Island on the starboard bow. Further on Cowles said: "I asked him again if I shouldn't steer for him, and he said no, that he was used to steering and handling the tug, and could see just as well inside the pilot house as he could out."

On the evidence given in this case, and the law applicable to it, I must find that the defendants are responsible for the damage to the tow and her cargo, caused by the improper navigation of the tug in stranding the barge *James G. Blaine*, on the Pandora shoal.

But the defendants contend that, under the provisions of either the Imperial Merchant Shipping Acts, or the Canadian *Act respecting the Navigation of Canadian Waters*, (1) they are entitled to the limitation of their liability as owners of the tug to $38.92 per ton on the 41.33 tonnage of their tug *J. H. McDonald*, for the loss and damage to the plaintiff's barge complained ot; on the ground that the said loss and damage occured "without their actual fault and privity." The damages complained of by the plaintiff are $4.739.77.

When the *B.N.A. Act* of 1867 was passed by the Imperial Parliament, the Canadian statute then regulating the liability of owners for damages arising from a collision between two ships in Canadian waters was the 27th and 28th Victoria, (1864), c. 13, sections 11 to 14, under the heading *Duty of Masters; Liability of Owners as to collisions.* And by the *B.N.A. Act*, section 129, that

(1) R.S.C. (1886), c. 79, s. 12.

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statute, being then "a law in force in Canada" it was continued in Ontario and Quebec, "subject nevertheless to be repealed, abolished, or altered by the parliament of Canada." And after this confirmation of the Provincial Act of 1864, the Parliament of Canada during its first session in 1868, exercising its legislative power to make laws respecting "Navigation and Shipping," repealed the above, and other Provincial Acts, and enacted the *Act respecting the Navigation of Canandian Waters*, 21 Victoria, c. 58, containing the clauses which were subsequently construed by the Supreme Court, as hereinafter mentioned. This Act continued in force until 1880, when it was repealed by the *Act to make better provision respecting the Navigation of Canadian Waters*, 43 Victoria, c. 29, which came into force on the 1st September next after its passing. Both of these Acts in their preamble recitals; in the "Regulations for preventing collisions;" in the several clauses relating to "collisions"; and in the legislative heading over the clauses respecting the "Duty of Masters; Liability of owners as to Collisions", clearly indicated that they were to apply to the cases of damages caused by collisions between vessels navigating the Canadian waterways; for headings prefixed to the sections of a statute are regarded as preambles to those sections.

Such was the judgment of the Supreme Court in considering the prior Act of 1868, in the case of *Sewell* v. *British Columbia Towing and Transportation Company*, (1) where it was held that the damages caused by the improper navigation of the defendant's tugs, in towing a ship and stranding her on a reef, were not subject to be reduced, or limited, by the limitation clauses of the English Merchant Shipping Act of 1862 (2), nor by the limitation clauses of the *Act Respecting the Navigation of Canadian Waters*, of 1868, 31 Victoria, c. 58; because the legislative

(1) (1883), 9. S.C.R. at p. 530.

(2) See the *Andalusian*, 3 P.D. 182.

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purpose of such limitation clauses (11-14) was indicated by the preamble, and by the heading over such sections: "Duty of Masters. Liability of Owners as to Collision," which defined the limited application of the said sections. Strong, J., in giving judgment and construing these clauses, said: "I cannot see my way to holding that this restricted liability applies to cases other than those of collision. Further, the preamble to the statute itself, which sets forth its object to be to enact certain rules of navigation and regulations for "preventing collisions," shows that the scope of the Act itself was much more confined than the English Act, and was only intended to insure careful navigation, and prevent cases of collision."

In *Lang* v. *Kerr, Anderson & Co.* (1), Lord Cairns, L.C., held that "headings" to sections of an Act of Parliament are to be looked upon as marginal notes, for they show that Parliament had carefully and analytically divided the Act into those different parts. See further *Eastern Counties L. &c. R. Co.* v. *Marriage* (2), where the general heading over sections of an Act of Parliament was held to indicate the proper judicial construction they were to receive.

The judgment of the Supreme Court indicates, I think, the judicial construction which should be given to the latter Act, of 1880, 43 Victoria, c. 29, prefaced as it is by a substantially similar preamble to that in the Act of 1868, and also specially reciting the agreement of certain foreign Governments that the British regulations respecting collisions should apply to their ships "when beyond the limits of British jurisdiction"; and re-enacting the same legislative purpose in the heading over the owners' limitation clauses, (12–14), of that Act, which had been construed by the Supreme Court in the *Sewell* case, (*supra*).

(1) (1878), 3 A. C., at p. 536.

(2) (1860) 9 H. L. Cas. 32; s. c. 7 Jur. N. S. 53.

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This Act of 1880 remained in force until the revision of the statutes of Canada in 1886, when under the Act 49 Victoria, c. 4, it was authorized to be repealed by the Proclamation of the Governor General in Council, and the consolidated and revised *Act respecting the navigation of Canadian Waters* (1) was substituted for it. But in consolidating the substituted Act, the revisors appear to have assumed legislative authority to strike out the words "as to collisions" in the heading over the limitation clauses of the consolidated Act, while retaining the term "collision" in the corresponding sections to those in which it had appeared in the original Navigation Act of 1880.

The revisors of the statutes of 1886 had the opportunity of considering the applicability of the *Sewell* judgment of the Supreme Court of 1883, construing these limitation clauses of the prior Canadian Navigation Act of 1868, prescribing the tonnage liability of shipowners in collision cases, and which, if compared with the Act of 1880, then before them for consolidati n, they should have realized that such clauses were a re-enactment of the tonnage liability clauses of the prior Act under the same heading and wording; and therefore governed by the same judicial construction in the Courts of Canada as had been given to such clauses by the Supreme Court in in the *Sewell* case. It was therefore their duty to reproduce in the consolidated and revised Act the same controlling heading in the same words that Parliament had used in the prior Acts, so as to preserve as applicable to future cases the judicial construction given to such heading and limitation clauses in the case referred to.

To strike out, and so repeal, the headings over the clauses of a statute, which by the judgments of the House of Lords, our Supreme Court, and other courts, have been held to be parts of such statute, and indications of the legislative purposes of the clauses or parts of

(1) R. S. C., (1886), c. 79.

such statute, and as material in furnishing a key for their proper construction, is the prerogative of legislative power. And legislative power is defined to be the law-making authority in a State which makes, alters, or repeals, the laws thereof, or declares what the law shall be, the power to enact new rules for the regulation of future conduct, rights, and controversies.

Possibly the revisors of this Navigation Act of 1886 may not have had the intention of repealing the legislative words "as to collision," over these tonnage liability clauses, which had influenced the Supreme Court in the *Sewell* judgment, and had not intended to usurp the legislative prerogative of Parliament; or possibly their attention may not have been called to that judgment, and the judicial construction given to those clauses by the Supreme Court. But innocence of intention, or want ot knowledge of the Supreme Court judgment, cannof excuse a disregard, or usurpation, of the legislative prerogative of Parliament to repeal or alter headings of sections or words of statutes which have been judicially construed by the courts;—for by so doing they originate fresh forensic and judicial difficulties in considering how far previous judicial constructions apply to the consolidated Acts in the Revised Statutes of Canada. That similar difficulties may have to be considered in future shipping cases may be conceded, owing to the continuation of the altered wording of the heading over the same limitation clauses in the revised Act respecting Shipping in Canada (1). The succession-relation of the Revised Statutes of Canada to the original and repealed statutes, was thus explained by Wilson, C.J., in *Regina* v. *Durnion* (2). "The repealed Acts have not been absolutely repealed and abolished; nor do the Revised Statutes take effect as new and independent enactments. But all

(1) [1906] R.C. chapter 113, secs. 920-923.

(2) [1887] 14 Ont. R. at page 681.

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matters are to be carried on under the Revised Statutes as if no repeal had taken place; for the Revised Statutes are not new laws, but a consolidation, and declaratory of the law as contained in the former Acts.

And in *Frontenac License Commissioners* v. *County Frontenac* (1), Boyd C. indicated a similar view: "The purpose of the revision was to revise, classify, and consolidate, the Public General Statutes of the Dominion, and the repeal of the old statutes incorporated in the revision, was rather for convenience of citation and reference, by giving a new starting point, than with a view of abrogating the former law" * * * "The effect of the revision, though in form repealing the Acts consolidated, is really to preserve them in unbroken continuity." The point in hand was long ago passed upon by a jurist of the highest repute, Shaw, C. J., in *Wright* v. *Oakley* (2), from which I quote his words: "In terms the whole body of the statute law was repealed, but these repeals went into operation simultaneously with the Revised Statutes which were substituted for them, and were intended to replace them, with such modifications as were intended to be made by that revision. There was no moment in which the repealed Act stood in force without being replaced by the corresponding provisions of the Revised Statutes. In practical operation and effect therefore they are rather to be considered as a continuance and modification of old laws, than as an abrogation of those old, and re-enactment of new ones."

Further, I think that the doctrine governing the construction of statutes *in pari materia* may also be invoked in this case. As stated by Lord Mansfield, C. J., in *Rex* v. *Loxdale* (3), "Where there are different statutes *in pari materia*, though made at different times, or even expired, and not referring to each other, they shall be

(1) [1887] 14 Ont. R. at p. 745. (2) (1843) 5 Metc., at p. 406.
(3) (1758), 1 Burr. at p. 447.

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taken and *construed together*, as one system, and as explanatory of each other." Lord Justice Knight-Bruce approved of this in *ex parte Copeland* (1), by saying: "Although the Act has been repealed, still upon a question of construction arising upon a subsequent statute on the same branch of the law, it may be legitimate to refer to the former Act." And Lord Justice James in *Greaves* v. *Tofield*, (2), is equally clear: "If an Act of Parliament uses the same language which was used in a former Act of Parliament, referring to the same subject, and passed with the same purpose, and for the same object, the safe and well known rule of construction is, to assume that the legislature, when using well-known words upon which there have been well-known decisions, uses those words in the sense which the decisions have attached to them." And *Maxwell on Statutes* (3) says that a statute may be construed by such light as its legislative history may throw upon it.

In the *Wild Ranger* (4) Dr. Lushington held that the ancient law of unlimited liability of ship-owners for damage done by one ship to another was still binding on the Court of Admiralty, except in so far as that law had been modified by Acts of Parliament. The earliest modification of that law was made in 1734 by 7 George 2, c. 15, amended in 1786 by 26 George 3, c. 86, and further amended in 1813 by 53 George 3, c. 159. These were repealed by the Merchant Shipping Act, of 1854, c. 104 and s. 504 substituted therefor, which was amended by the Merchant Shipping Amendment Act of 1862, c. 63. By the Merchant Shipping Act of 1894, c. 60, the prior Acts were consolidated, and the limited liability of British and foreign ship owners was defined in sections 502-509. These sections were amended in 1898 by 61 and 62 Victoria c. 14; in 1900 by 63 and 64 Victoria c.

(1) (1852,) 2 DeGex M. & G. at p. 920.

(2) L. R. 14 Ch. D. at p. 571.

(3) 4th ed. p. 76.

(4) 1863, Lush. 562, s. c. 7 L. T., N. S. 725.

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32; and in 1906, by 6 Edward 7 c. 48, s. 70. The American law on this subject will be found in *Marsden on Collisions* (1).

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For the reasons given above I prefer to follow the judicial decision of the Supreme Court in the *Sewell* case, rather than the unauthorized attempt at legislation by the Revisors of the Statutes of 1886, and hold that the limitation in the Canadian Shipping Act, R.S.C. (1886), c. 79, sec. 12, prescribing the liability of shipowners, not having been regularly repealed by Parliamentary legislation, applies only to cases of damages caused by collisions between vessels navigating the Canadian waterways; and that it is not invocable to limit the liability of defendants for the damages caused by the improper navigation of the defendants' tug, which caused the shoaling of the plaintiff's barge on the Pandora shoal.

There will be a decree for the plaintiff, with a reference to the Registrar to take the accounts and tax to the plaintiffs the costs of the action and reference.

March 22nd, 1909.

The appeal was now argued at Toronto.

*A. H. Marsh, K.C.*, for appellants;

*F. E. Hodgins, K.C.* and *W. D. McPherson, K.C.* for respondents.

Mr. *Marsh*: The facts shortly stated with regard to the accident are these: That the tug went to some place near Blind River, that is up in the Georgian Bay district, where the barge was lying waiting for a tug; the tug came alongside, hailed her, and they arranged to have the tow taken into the Algoma Mills by the tug. It was then dark, the night was hazy and smoky, and the tug undertook the duty and carried the tow around all right for about five miles. Then, under circumstances I will have to detail more fully, the tow was stranded upon a

(1) 5th ed. p. 179.

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sunken rock called the Pandora Rock, a rock that is wholly under water, at the highest point being six feet under water and shelving off, varying in depth. It is entirely under water. That is a matter of importance. The tow was stranded on this sunken rock and damaged. It took seven weeks to get her off. The cargo was largely jettisoned. It is a question of the amount of loss and who has got to bear it.

The plaintiffs say this loss was owing to the negligence of the defendants or the master of the tug. We say no, it was not owing to their negligence at all. It was, in the first place, owing wholly to the negligence of the plaintiffs themselves in the bad steering of their tow, which allowed what is called sheering back and forth and produced the damage; and we say, even if the whole damage is not imputable to the plaintiffs, at least the plaintiffs were guilty of negligence, and the Admiralty rule would apply as to a division of the damages.

[THE COURT: The question is whether the tug or the tow was liable?]

Yes. Then, preceding that, however, we rely on the appeal not only on the facts, but also on a couple of questions of law. The first question I wish to deal with is purely a question of law.

The defendants claim here that even though they were, and should be found guilty of negligence so as to make them liable, still they are entitled to the protection of the limitation of liability clauses contained both in the Imperial Merchant Shipping Act and in the Dominion Act. The Dominion Act is not an exact copy, that is not *verbatim* but it is practically the same as the Imperial Merchant Shipping Act. There is scarcely any difference except in mere phraseology.

The provisions of the Imperial Merchant Shipping Act will be found set out in the 11th paragraph of the statement of defence. That this, it leaves out all the immaterial

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matter, and everything that is material is set out *verbatim* in the 11th paragraph of the defence. The provisions of the Merchant Shipping Act are there referred to, namely section 503 of the Imperial Act of 1894, chapter 60. Those are the provisions which I say we are entitled to the protection of as contained in the Imperial Act, and then I simply refer to the Canadian Act, which is practically the same thing. Now, the provisions are:

"The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity."

Now, my learned friend will make a point of that, and I shall refer to authority as to the meaning of that term.

Section 503 of the Imperial Merchant Shipping Act of 1894 says: "Where any loss or damage is caused to any other vessel or to any goods, merchandise, or other things whatsoever on board of any other vessel by reason of the improper navigation of the ship, [the owner of the ship shall not] be liable to damages beyond the following amounts, that is to say in respect of loss of or damage to vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal property or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage."

This is, of course, when the loss is not the result of the owners' actual fault or privity. So we say that gives us protection in any event, we shall not be bound for damages beyond eight pounds for each ton of the tonnage of our tug. Then sub-section 2 of the Act says: "For the purposes of this section the tonnage of a steamship shall be her gross tonnage without deduction on account of engine room."

Now, the Dominion Act which was in force at the time of the happening of the accident is practically in the same words, although not *verbatim* the same. The Act which was in force at the time of the accident is not the

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present revised statute of 1906, but is contained in the Revised Statutes of 1886, chapter 79, section 12, now contained in the Revised Statutes of 1906, chapter 113, sections 921, 922 and 923, where the phraseology is still changed slightly, but practically the language is the same as in the statutes of 1886.

I will next refer to the legal construction that has been put upon the provisions of the Imperial Act.

[THE COURT: Is the judgment of the trial judge founded on the Imperial Act?]

He says he does not find any reason whatever why we are not entitled to the protection of the Imperial Act, and I shall show your lordship he would have done a great deal better if he had not given any reasons why we are not entitled to the protection of the Canadian Act, because the reasons given are directly opposed to the statute.

[THE COURT:—Does he hold the statute would apply but for the fact of default on the part of the defendants?]

No. My learned friend argued as to that question of fault. He has not found anything whatever in regard to the application of the Imperial Act. He does find the Dominion Act does not apply because of the decision of the Supreme Court in the case of *Sewell* v. *The British Columbia Towing Co.*, which was decided under a different statute, and which case doubtless led to the amendment of our statute, and that British Columbia case has no application to the statute of 1886, because it had been amended. But he founded his whole judgment in regard to that matter upon what he calls the illegal and unauthorized attempt of the revisors of the statutes of 1886 to amend the law as it formerly stood in the previous statute not revised. He says that their attempt to amend was illegal and unauthorized, beyond their powers, and all that, overlooking entirely the fact that it was all confirmed by statute.

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[THE COURT:—There was a general Act passed confirming it ?]

That is what we have here. But page after page of this judgment is devoted to showing how the revisors went beyond their powers.

[THE COURT:—I suppose *primâ facie* the tow was liable for its navigation].

There are some authorities that hold to the contrary, and very high authority too, the Judicial Committee, but I must confess there are conflicting cases.

Now, counsel for respondent contend we are not entitled, or did contend below that we are not entitled, to protection here because of our actual fault or privity in the negligence. I will refer to authoritics showing that those terms as used in the statute do not cut us out from protection, for, in the first place, we are entitled *primâ facie* to the protection of these limitations of the statute where the damage is caused through improper navigation.

I will refer your lordship, then, to what has been said about that term "improper navigation." It is said:—

"This includes faulty navigation arising from the negligence not only of the master and crew of the ship, but also ot any person who has been employed by the shipowner in connection with the construction, overlooking or management of the ship."

That was held in England in the case of *The Warkworth*," (1).

Then again as to the meaning ot "actual fault or privity," of course we are not to be protected if the negligence was with our actual fault or privity. Now, it has been held in England that the fact the master of the ship in default was on board the ship when the negligence in question occurred, is no reason for charging the other owners with responsibility. That is, we had our master

1) L.R. 9 P.D. 20.

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on board here, and if any body was guility of negligence it was our master, the master of our tug. But this case I am referring to now shows that the fact the master of the boat was on board does not deprive the owners of the protection of this statute. That is so laid down in the case of The *Obey* (1). And then in that same case I have already referred to, *The Warkworth* (*supra*) the Master of the Rolls deals with the two phrases "improper navigation" and "actual fault or privity." He says, "The owner's liability is limited for all damage wrongfully done by a ship to another whilst it is being navigated, where the wrongful action of the ship by which damage is done is due to the negligence of any person for whom the owner is responsible." That clearly covers our case here. If anybody on our side was negligent at all it was the captain of our tug, and he is the person for whose negligence we are responsible, if he was negligent at all, as it is held in the case of *The Warkworth* (*supra*). It is shown there in a case of such as this we are entitled to the protection of the statute.

Then I come to the *Sewell* case, upon which the trial judge bases his whole finding with reference to our being entitled or not entitled to the protection of the statute. (*Sewell* v. *British Columbia Towing Co.*, (2). It has no application here because of the change in the statute. There the defendants were held not to be entitled to the protection of the Imperial Act—it would be implied otherwise they would be entitled—because they had not proved British registry. We have proved British registry here, we have put in the register of the ship in question as part of our evidence. So then all reasons which prevented the defendants in the *Sewell* case from relying on the Imperial Act has no application here, because we have proved British registry.

Now, in the Revised Statutes, in the heading "Liability of Owners as to Collisions" the revisors have left out

(1) L.R. 1 Ad. & Ec. 102. (2) 9 S.C.R. 527.

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all reference to collision, so then it leaves the wording of section 12 to operate without any restriction upon it at all, to operate with regard to all cases of negligent navigation just the same as the Imperial Act was and always has been. That is, the revisors have brought our statute into conformity with the Imperial Act, and our present revision of 1906 does the same thing. The result of that, then, was to make the *Sewell* case wholly inapplicable to this case and to entitle us to the protection of the Imperial statute.

Now, 49 Vict. chap. 4, recites that there had been a revision made under direction of Parliament, that is speaking of the revision of 1886, and reciting that the original roll had been certified to be the roll referred to in future, and then it goes on with a number of provisions, among others, that the certified roll, including amendments and so on, shall be deposited and shall be deemed the original. I refer to section 4 of that statute:—

"The Governor in Council after such deposit of the said last mentioned roll may by proclamation declare a day from and after which the same shall come into force and shall have effect as law by the designation of the Revised Statutes of Canada."

Section 5: "On, from and after such day the same shall accordingly come into force and effect as and by the designation of the Revised Statutes of Canada to all intents as if the same were expressly embodied in and enacted by this Act to come into force and have effect on, from and after such day."

And then express provision is made for the very sort of thing that occurred here, that is alterations being made, section 8, sub-section 2:—

"But if upon any point the provisions of the said Revised Statutes are not in effect the same as these repealed Acts and parts of Acts for which they are substituted, then as respects all transactions, matters and things subsequent to the time when the Revised Statutes

take effect"—so it does not cover the past at all—"the provisions contained in them shall prevail, but as respects all transactions, matters and things anterior to the said time, the provisions of the said repealed Acts and parts of Acts shall prevail."

I do not see how anything could be more clear than that.

The present Revised Statutes of 1906, chap. 113, were not in force at the time of the happening of the accident, but it is immaterial; it is the same thing there as was in force by the previous revision.

Defendants rely on section 951, because it repeals so much of the Imperial Merchant Shipping Act as is inconsistent with this part of the Canadian Act. Your Lordship must remember that the Canadian Act is divided into parts. This particular part happens to be part 15, where this provision of section 951 is contained. Section 951 comprising a portion of part 15 of the Canadian Act says that it repeals "so much of the Imperial Merchant Shipping Act as is inconsistent with this part"; that is, part 15 of the Canadian Act. But when we look to see what part 15 deals with, it deals wholly and solely with deck and load-lines, what they call the Plimsoll Act in England.

If you examine it to see what is dealt with by this part, you find it deals with nothing but deck and load-lines. Now then, if anything more is required it is made more plain if we look back of this section 951 of the present Act and find where it came from. What we find is this, that it came from the statute which was in force at the time when the accident happened namely, chapter 40 of 54 and 55 Victoria, which was a statute that stood all by itself apart from the Shipping Act and dealt with nothing but deck and load-lines. Section 20 of that statute, that is chapter 40 of 54 and 55 Victoria, repealed so much of the Imperial Act as was inconsistent with the

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said Canadian Act. So then what my learned friend now relies upon as contained in the Revised Statutes of 1906 is simply copied from this statute which I am now referring to, which was a statute standing all alone by itself, altogether apart from the Shipping Act and dealing distinctly with deck and load-lines.

[Mr. *Hodgins*: In substance the same. The Canadian Parliament has chosen to enact provisions which cannot stand with and are substituted for the English Act. I do not rely wholly upon Section 951.]

Well, my contention on that point will be the differences between the Dominion Act and the Imperial Act touching limitation of liability are simply verbal changes so immaterial in difference that one cannot be said to repeal the other at all, so that we are entitled here to have the protection, I submit, of both the Imperial provision and the Canadian provision.

With regard to the Imperial Statute being in force here, I suppose there is no question about that at all. It is stated so to be in the third volume of our Revised Statutes of Ontario, page 45, and then the Imperial Merchant Shipping Act is reprinted in the Dominion Statutes of 1895 at page 3.

Now in that is my whole argument upon this first ground of appeal, namely, that we are entitled to the protection of these statutes, one or both.

Then the next ground of appeal is that the judgment should have made the provision which is usually made under this statutory limitation of liability. Where there are outstanding claims of persons not before the Court, the defendants are entitled to be protected against those outstanding claims, if they have reason only to apprehend there are outstanding claims they are entitled to be protected against them in the way provided for by the practice of the Admiralty Court. There are two ways in which this can be done. The common way is, where a

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claim is made against defendants for negligence, and they admit their liability, admit their negligence, and say, "Well, in addition to the claim made by you, a plaintiff, we have reason to apprehend that other people will have claims growing out of this same alleged negligence or the same negligence we admit", and so one way which the persons against whom the negligence is alleged can get relief against apprehended outstanding claims—the apprehended outstanding claim is that of the cargo-owners—they can bring an action themselves, an action for limitation of liability. They can bring that as a cross action, or they can bring it either before or after the original plaintiff brings his action, they can bring it before by way of counter-claim, or bring it afterwards as a cross-action, asking for leave to pay the money into Court and have the Court distribute the money to all persons proved to be entitled, whether vessels-owners, cargo-owners, persons whose lives have been lost, or whatever the case may be.

Now, we have not pursued that course, because we do not admit liability. If we had admitted liability we could have pursued that course. What we have done is to adopt the other course of pleading in our defence, and then also setting the defence up by way of counter-claim that we have reason to apprehend outstanding claims and asking in our defence that relief should be given to us of the same nature as if we had brought an action for limitation of liability. Originally we did not plead that in our defence for this reason: The statement of claim was made by Walter K. Fullum alone, and in his statement he alleged he was the owner of the barge, and that the damage that was caused to the barge and cargo was damage which he suffered, the whole loss. There was no need then for any pleading. We did not know of anybody else having any rights in the matter at that time. It subsequently developed, however, that the

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plaintiff Fullum did not own the cargo, did not own any interest in it, and that he was only a two-third owner of the barge. So at the trial the judge ordered Miss Fitzgerald, the owner of the other third of the barge, to be made a party plaintiff. That, of course, absolves us from liability as to her, we have no need for fear of her having any outstanding claim, but it leaves us unprotected as to claims of cargo-owners whose cargo was jettisoned. Accordingly we obtained leave to set up this in addition to our defence as originally pleaded, and this is in the latter part of section 14 of our defence:—

"No action other than this action has been brought against defendants or against said tug in respect of said accident, but the defendants apprehend other claims in respect of damages to the said tow and to goods, merchandise and other things on board the said tow at the time of the said accident.

"15. If it should be determined by the Court that the defendants are liable to pay any damages in respect of the matters complained of in the plaintiff's statement of claim, then the defendants desire by way of counterclaim to repeat, and they do repeat, all the allegations made in the plaintiff's statement of defence as amended, and they claim judgment for limitation of liability such as they would have been entitled to in a separate action for limitation of liability."

We were allowed to plead that, but no relief was given to us in respect of that, that is, there is just the ordinary reference made to the Registrar.

Now, as showing we are entitled to plead in that way I refer your lordship to *Wahlberg* v. *Young* (1). I would also refer your lordship to *The Clutha* (2) Williams & Bruce's Admiralty Practice (3).

Then it was contended by my learned friend that we could not take advantage of any such practice as that

(1) 45 L. J. C. P. 783. (2) 35 L. T. N. S, 36.
(3) 3rd edition, page 347,

without admitting liability on our part, without admitting that the defendants were negligent, that they were liable. But the practice is held to be the contrary, that is, it is held that admission of liability on the part of the defendants is not necessary in order to enable the ship at fault to take advantage of the statuory limitation of liability. That was held in the case of *The Sisters* (1) and *The Amalia* (2).

Then the third ground for appeal is either that the accident was an inevitable accident and not due to the negligence of the defendants, or that it was due to the negligence of the plaintiffs, and that brings us then to the questions of fact.

Now, the grounds on which I put it that the plaintiffs are liable for negligence are as follows : First, that they had no lookout. I will have to refer to law on that point presently. They rely largely on our liability because we had no lookout. We say, if that is so you are equally liable ; you had no lookout. Secondly, the barge was overladen. That was negligence, not on our part, but on the part of the plaintiffs. Then the third ground is, the accident was caused by the sheering of the barge.

So if any of those grounds of negligence exist on the part of the plaintiffs, then, even though we have been negligent, we are entitled to the application of this special Admiralty rule.

Then here is the way in which the rule of contributory negligence is dealt with in the case of *Tough* v. *Warman*, where the trial judge charged the jury on the fact of negligence on the part of the plaintiff and on the part of the defendant and so on, and that was confirmed by the full Court of Exchequer. The charge to the jury was in this way :—

(1) 1 P. D. 281. (2) Brown & Lush. 151.

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"That if there was no negligence on the part of the defendants, or if the plaintiff directly contributed to the collision"—which happened to be the matter in question there—"they (that is, the jury) should find for the defendants, that if the defendants directly caused it they should find for the plaintiff." That was held to be the proper direction. A more convenient place to refer to this case than in the original report is in the *Ruling Cases*, because all the cases are brought together. It will be found in 19 *Ruling Cases* 194.

Then I come to the law referred to by your lordship some time ago. What is the law regarding the respective duties of the tow and the tug as to managing things so as to keep away from harm? The first case I refer to on that point is the case of the tug *Stranger* (1), which shows that it is the duty of the tow to closely follow the wake of the tug. It is said there that it is the duty of a tow to follow directly in the course of the tug, and the tug therefore is not liable for damages sustained by a tow which sheered out of the course and struck a rock, but if the sheering of the tow is caused by some manœuver of the tug, then the tug will be liable.

Then I come to the point that has been controverted to a considerable extent. The cases are not all in the same direction. The point which was referred to by your lordship, that is, which controls, does the tug control the tow, or the tow control the tug, that is the point. Now, what I submit is that the tow controls the tug and should give it proper directions. (Cites the *Altair* (2), *Smith* v. *The St. Lawrence Tow Boat Co.* (3), *The Niobe* 4).

A vessel in tow of a tug proceeded in a thick fog and grounded in consequence in the River St. Lawrence, and it was held that the weather was so bad that the vessels

(1) 24 L. T., 364.
(2) [1897], P. 105.
(3) L. R. 5 P. C. 308.
(4) 13 P. D. 55.

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ought not to have been under way, and that as they continued under way without any attempt on the part of those on board the tow to stop the tug, those persons must be taken to have assented to the tug proceeding; that there was negligence on the part both of those on board the ship and tug in proceeding in the way in which they did during the fog; and that as those on the ship contributed to the accident which occurred the owners of the ship could not recover from the owners of the tug for the loss which they had sustained (1).

Now, my learned friends depended strongly on our alleged negligence by reason of not having a lookout, and they contend that would saddle us with liability at any rate. Well, I have already pointed out there was the same necessity for a lookout on the tow as on the tug, so they were equally at fault if there was any fault.

Then my learned friends rely on a provision in the Statute which they say, by reason of our not having a lookout puts the onus upon us, so that *primâ facie* we were responsible for the accident. I want to point out that is not the case.

Now, the navigation rules are contained in section 2 of the Canadian Act, chap 79 of the Revised Statutes of Canada 1886. I may say our present Revised Statutes of 1906 do not contain the navigation rules, but the Revised Statutes 1886, chap. 79, had at the very beginning, the navigation rules.

Then Article 24, as contained in the revision of 1886, contains the only thing that is said about lookout. It is this:—

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

(1) See *Smith* v. *St. Lawrence Tow Boat Co.*, L. R. 5 P. C. 308.

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Now, here is the section of the Act my learned friends rely upon as showing, according to their contention, that by reason of not having a lookout that saddles us with all responsibility in this case.

[THE COURT—This accident did not arise through default of a look-out.]

They argue to the contrary.

What I want to point out is that section 6 does not apply in this case. Section 6 reads in this way:—

"If any damage to person or property arises from the non-observance by any vessel or raft of any of the rules prescribed by this Act" (Lookout is not prescribed by the Act. Article 24 only says that the provisions shall not exonerate a ship from the consequences of not having a lookout; it does not prescribe a lookout.) "such damage shall be deemed to have been occasioned by the wilful default of the person in charge of such raft or the deck of such vessel at the time, unless the contrary is proved, &c."

I need not read it further. This section does not apply, because there is no lookout prescribed in the article. Even if there had been a rule requiring a lookout, then the section would not have been applicable, the damage here was not one that arose from the non-observance of any such rule. The lookout would have been useless.

Then just one word more on the Imperial Merchant Shipping Act. I want to refer to this because my learned friend relies so strongly on it. Under the Merchant Shipping Act, in a case of collision a ship proved to have infringed any of the regulations for preventing collision contained in or made under the Act is to be deemed to be in fault. That is similar to this section my learned friend relies upon, he says we have not had a lookout, we are deemed to be in default.

Just one more point; and that is this Admiralty rule as to apportionment where both parties are in default.

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We have, as far as I have been able to find, only one case in our reports here dealing with that, namely, the *Heather Belle* (1). It is shown there that the course to adopt is this. First, if you have a case of negligence where the defendant is entitled to protection of the statute limiting liability, apply your statute limiting the liability and so find out what is the maximum amount for which the defendant would be responsible. Having then arrived at the maximum amount of liability in that way, you next, if it is found that both sides are guilty of negligence, apportion that maximum amount equally between the plaintiff and the defendant.

So here, then, the first thing to do, if these defendants are liable at all, is to find the maximum limit of their liability with reference to the statute protecting them; and then, having found that maximum liability, if it is found that the plaintiffs were also guilty of negligence, you divide that maximum liability between the plaintiffs and the defendants.

Mr. *Hodgins*, for the respondents:

I would like to deal somewhat with the facts before going into the law.

The case came before the learned local judge, and his findings are in favour of the plaintiffs on the evidence of the three witnesses called by the plaintiffs as against the explanations given by the witness Hamilton, the sole witness for the defendants. And I take the point with some confidence that the court will not, unless it is absolutely demonstrated that the learned judge is wrong, reverse him after he has seen the witnesses where the question he decided is, which of them are telling the correct story of the course followed that night?

The Privy Council practically laid down that rule in Admiralty in the *Kitty D.* (2), where the Supreme Court

(1) 3 Ex. C. R. 40, at p. 56. (2) 22 T.L.R. 191.

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had reversed the trial judge, assuming that he had erroneously found on the facts. The Privy Council decided that having seen and heard the witnesses it was to be presumed he was right, and unless it was clearly demonstrated he was wrong, the court would uphold him.

I make these observations because of my learned friend's suggestion of what he called the animadversions upon the witnesses being unjustified. They may be in his view certainly they were not in mine, because Captain Hamilton began his examination in-chief by asserting that in this short distance he had to go he followed a straight course and the compass course, that he got exactly to the spot where he was to change, that is within two or three hundred feet of the shoal, that he then changed half a point, which brought him into the true course for Algoma Mills, that he was proceeding upon that course when the sheer took place and the barge stranded. That was his examination-in-chief. In his cross-examination it developed that he was not prepared to say that he steered a straight course, that he was then prepared to say that the barge threw him off, that he was all the same confident that he got to the proper place and changed his course, and it was not until re-examination that his counsel saw it was necessary that questions should be put to him to bring those two theories into line. The questions were put, and he then admitted that his original theory as to having followed the straight course for that length of time and arrived at that exact spot known to him by the locality was not quite correct, but was a pure matter of judgment and a matter of guess, and he thought he was all right and would do the same again. He did not, I think, show up in the way indicated that he was a man who would not be governed by a good deal of biased interest. His reputation was certainly at stake in the matter.

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There were two distinct theories; ours being that, in, following this course the tug kept to the south by error the captain expecting that he was going in the more northerly course, and that he would find Sandford Island on his starboard bow. That when it was picked up it turned out to be on the port bow, showing he followed a more southerly course. That then realizing it, he immediately turned and kept a quarter of a mile on the north-east course, which, if he had followed the proper distance, would have carried him a quarter of a mile past that shoal to the north.

Now, what we say is this, our theory is that he intended to take this course to the north, but knowing he was heavily laden he took a course down south owing to these shallow grounds. There is no evidence one way or the other upon that. His contention is he took a more southerly course, and when he ran just about as far as he ought to run if he was on the proper course, he discovered Sandford Island. It loomed up on the port bow instead of as, it ought to have, looming up on the starboard bow if they were keeping on that course.

There are pines on that island 50 feet high. It is a well-known landmark. That is about as far as he would come if on a straight course, only he would have landed here instead of there (indicating on chart). He made a turn and ran right on the rock. That is our theory in a nutshell.

[THE COURT :—Intending to go north of the rock ?]

Yes. It is reasonable to suppose he had gone on this southerly course, and had he proceeded he would have cleared this if he had gone straight on.

There is a channel 400 or 500 feet wide, so he could have kept well up here (indicating on chart) if he wanted to avoid that and go down, then he could have turned here and kept to the north side. Then, instead of finding himself 100 feet to the north of that, he would have

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found himself with the tow following along behind in that way. He must have turned here in order to be able to substantiate the fact that he went for about a quarter of a mile up along that course before the vessel's course was turned. That is the whole thing in a nutshell as far as the contention of the plaintiffs goes.

[THE COURT: Are you at issue at all as to the fact that the means of navigation were being obscured by darkness?]

We are to this extent. This night is said by the witness Hamilton on his examination-in-chief, to be smoky and hazy, slightly smoky. As a matter of fact it was in the month of July, the 20th. Now, the evidence is that at 9 o'clock that night when the tug arrived out to where the *Blaine* was anchored, Sandford Island was plainly in sight. It must have been within something like a mile and three-quarters to two miles away, because Captain Hamilton, the captain of the tug, says that he picked it up again—I am just going to explain why that was so, —that he picked it up again when he got within a mile. He says at one place a mile and three-quarters, and two miles on another occasion. The fact was this, that at 9 o'clock at night it was visible when he commenced to tow, and he says "I lost sight of it for a time." Perhaps the night grew darker, but he picked it up again as he went on. He says, "I picked it up a mile and a half." That is in one part of the evidence. In another part he said a mile and three-quarters or two miles away. So it became visible. And that is one reason why we charge him with negligence, that he picked up this island, according to his own admission clearly in sight long before he came in dangerous ground, and that he picked up the small island a mile or a mile and a half away. I think your lordship will find some island close to Sandford Island called O'Dwyer. And Captain Hamilton's story is that as he got closer and closer he saw Sandford

Island, he saw O'Dwyer Island, and corrected his position, and he knew exactly where he was. Now, that is his version, and that all of course proves the night, which he originally said was slightly smoky, was not in any way a drawback to him; and that when he got, let us say, within a mile, to be perfectly fair to him, of those two islands he knew where that charted shoal was.

I am taking it upon its own showing. He says, "there is only one course, I have got to take it and I did take it, that is the compass course bringing me three and a half miles from Pandora shoal exactly in line with it where I turn north." Now, taking it upon his own evidence, we say they have started upon that course and deviated from it and kept on deviating, and that he was guilty of negligence. But I think the negligence is that having been able to pick up these lights, as he swears, in plenty of time, that he kept on so far that when he turned he kept right over the shoal.

[THE COURT: As I understand it, from the time they sighted the island you say they ought to have sheered north sooner or else kept south?]

Yes.

[THE COURT: But having sighted the island and being off his course he ran too long before checking the ship. That is your contention?]

Yes.

[THE COURT: A lookout would not have obviated that?]

A lookout would have settled the point.

Let me put it in the strongest way I can If the lookout had been at the bow of that boat and had picked up Sandford Island and reported its position to the captain, and the captain and he checked over one with the other the position of Sandford Island, this accident would not have happened. That is my contention.

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[THE COURT: What do you say to this proposition? Supposing it is admitted the captain is duly qualified, that the defendants had every reason to believe in his competence, and that through error of judgment he caused this accident. Would you contend there is liability on that set of facts?]

Yes. In Admiralty practice the rule does not apply we are all so familiar with, because the man who makes a mistake is generally a man of absolutely no substance at all, a poor mariner of some kind, and therefore the Admiralty laws make the owners responsible, even although a competent captain is employed and he has done his best.

It is obvious it would be almost ridiculous if the defence was that a man used his best judgment at the moment, and that he had a certificate. In England they are held liable every day for infringing the rules and going out of their course. Here, of course, is a man who, we say, took the wrong course. We prove it out of his own mouth.

Now, as to the question of sheering. My learned friend says that the sheering is what is responsible for the whole difficulty. Just let me point this out as an answer. The sheering, if it existed at all, must have existed during the whole transaction. This man admits that it went on during the whole two hours and that it made it hard, he says, to follow the compass course, but he did follow the compass course; that is his statement. Now, it seems to me that he is in this position; that if the sheering was affecting the course of his tug, and he was conscious of it, as my learned friend says, during the whole of that period of time while he was running the four miles, he was bound to allow for it; and that it is not enough for him to say now, "she was sheering bad and notwithstanding that I went on the course I was accustomed to take with a barge that steered well, and after I had reached the

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right spot, I turned to the north." He is bound, if the sheering does affect the course of his tug, to make due allowance for it.

Then if he turned at the right spot it is perfectly evident that the sheering had not affected the course of his tug. He must take one position or the other, either it did not affect his course, or it did affect his course and he was bound to right it. But he was responsible for that, and was bound to make due allowance for that. He does not appear to have done so.

Then as to the law. Now, the contention, is that there is no appeal here, that this is a final judgment and it must go to the Supreme Court direct. The fact is that this action does finally settle the question, and the very important question so far as my learned friend is concerned, as to the limitation of liability. It is absolutely held by this judgment that he is liable for all the damages. There seems to be a difference between the English mode of looking at the matter and ours, but here under the rules the judgment appears to be final. All that is done is to refer the damages to the Referee who then, if he makes a report, files it, and the report becomes absolute. It is by force of this judgment that the money is then paid out.

The *Duke of Buccleugh* case (1), which my learned friend referred to as settling the fact that this is not a final judgment, proceeds, as far as two of the judges are concerned, on a different wording altogether, that they have power to add and substitute plaintiffs at any time, which they think means after final judgment. Then in Lord Esher's judgment he held that this was not a final judgment because it had to go to the Referee and another order made.

[THE COURT: I do not understand that is the ground taken. Any appeal from any final judgment, decree or

(1) [1892] P. 201.

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order of any local judge in Admiralty may be made to the Exchequer Court.]

The *Admiralty Act*, 1890, section 20, provides that in cases of appeal we can go to the Supreme Court if against a final judgment, but if against an interlocutory judgment we have to go to the Court of Exchequer.

Now as to the question of responsibility. I have got some cases for your lordship on that. Before I deal with them I should like to submit the references in *Marsden on Collisions* (1) as showing that negligence of the master and crew make the ship-owner liable by maritime law. That is the rule that applies in a great many cases, where a competent man is employed to do a certain thing the owner is not directly responsible, but I should have imagined the statute—if the case comes under that statute—would settle it beyond question, that is the limitation of liability. If that statute applies, then, and limits the liability, it shows the circumstances of the liability which it limits, and it can only take place where there is no privity of the owner.

Upon the question of responsibility of the tow, I point out to your lordship the barge had no motive power. The barge was taken up by the tug and was, according to the evidence, wholly under the control and subject to the direction of the tug, and the tug-master himself took entire control, and, as I say, in making the turn he gave no direction or anything else to the vessel. He says it is their duty to follow in his wake, they have nothing to say about it, he sets the course. That appears to have given rise to a state of affairs where liability has always been held to attach. *Marsden on Collisions* (2) and *Abbot on Shipping* (3) point out that in the first place where there is on motive power in the barge, and the tug is therefore in charge, the tug is responsible; and secondly, that where

(1) 5th ed. at pp. 70, 71.
(2) 5th ed. p. 193.
(3) 14th ed. at pp. 305, 306.

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no orders are given by the tow that the tug is responsible for negligence. These are the two principles which appear to be laid down. Where no directions are given by the vessel in tow or by the pilot it has been laid down by the Privy Council that the rule is for the tug to direct the course. That is *Smith* v. *The St. Lawrence Tow-Boat Co.* (1). And it is pointed out in *Abbot* that if the service is performed at night and the weather foggy or bad, or if at sea or in a river or harbour which is crowded, the pilot's ability, that is on the tow, to direct the tug's movement is diminished, while with several of these difficulties combined his control may become very slight, and in consequence they point out if the tow gives no directions the tug is liable. Now *Smith* v. *The St. Lawrence Tow-Boat Co.* is a very short judgment, and is to this effect:—

"It appears to be clear that when no directions are given by the vessel in tow, the rule in the case of tug-steamers is that the tug shall direct the course. The tug is the moving power, but it is under the control of the master or pilot on board the ship in tow." (2)

Now here it is a clear question of the tug directing the course. I further refer your lordship to the *Quickstep* (3), a later case than the one in 13 P. D., cited by my learned friend, the *Niobe*. There are other cases referred to in the master's judgment which I call your attention to, as they all seem to be in the same direction.

Now, if that be so, that entirely shifts the onus in this case, and even if we were guilty of what may be termed contributory negligence, that is if our sheering were found as a fact affecting it, that is no answer to the liability which arises from the tug taking the wrong course and bringing us into a position of danger.

(1) L. R. 5 P. C. 308.

(2) L. R. 5 P. C. at p. 313.

(3) 15 P. D. 196.

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The *Sewell* case which has been referred to, and with which I have to deal on the question of law, is a most interesting and instructive case on the facts upon that very point, both on contributory negligence and as to the duties of tugs in a case very similar to this. I point out it is exactly applicable when your lordship notices that the channel to the north gives a stretch of open water into which he could have gone. The *Sewell* case was exactly this case. It says the course was dangerous and rocky in a certain direction, there was a stretch of open water the tug could have gone into, and not doing that the tug was responsible.

I would refer your lordship to *Spaight* v. *Tedcastle* (1), where it is laid down :—

" It must be shown that the injured party, or those with whom he is identified, might with proper care subsequently exerted have avoided the consequences of defendant's proper want of care."

The proposition I put to your lordship is this, you find in the section in the old Act exactly the same words that are in the Canadian Act to day. I say those words have been construed to mean certain things limited to cases of collision. I say that undoubtedly the fact that there was a heading weighed very largely with the Court.

I say irrespective of the heading in the clause in which there had been a change, the identical section in words is before your lordship today that was before the Supreme Court in the *Sewell* case, where, rightly or wrongly, that was decided by the Supreme Court to mean a certain thing.

There is a decision of the Supreme Court that those words mean certain things, they do not include anything but cases of collision. (Refers to the *Sewell* case.)

Now, I deal with the point that is taken in the judgment. The original statute said :—" Duties of masters

(1) L. R. 6 App. Cas. 226.

in cases of collision." Now, it is said that was the whole reason for the judgment, but what is the effect of the deletion of those words in the subsequent revisions? Confessedly, although my learned friend read Statute 49 Victoria, confessedly those were not new Acts, those were intended to be a consolidation of the old Acts. The omission of that was, if it has any effect at all, clearly beyond the powers of the revisors, and my submission is that the Act, notwithstanding what we say was the wrongful omission of it by the revisors and not the legislative omission, that this Act must be construed exactly as if those words were there; and that the case is not such that your lordship can treat it as a deliberate act of the legislature. If Parliament had amended the Act by striking those words out, there would not be any doubt about the fact that there was some reason to be attached to it; but in this case where the act is that of revisors, and where the statute is not amended, but is merely consolidated, and that was stated, I will show your lordship then the rule applies that the act of the revisors cannot prejudice and does not affect the statute. There are a number of cases upon that. They are *Nicholls* v. *Cumming* (1); *License Commissioners* v. *Frontenac* (2); *Crane* v. *Ottawa* (3); *Whalen* v. *The Queen* (4); *Lamb* v. *Cleveland* (5); and *Brock* v. *Toronto* (6).

I want to call your lordship's attention, because the point is of considerable importance to us, to the fact that that statute which was supposed to be amended, 43 Victoria Chapter 29, was in the schedule of the Acts not repealed, but is referred to in this way; "consolidate subsection 1 which is recommended for repeal." So that the omission of those words by reason of what appears in the schedule and what was being done, was merely a consol-

(1) 1 S. C. R. pp. 420, 425.
(2) 14 O. R. 741.
(3) 43 U. C. Q. B. 498.
(4) 28 U. C. Q. B. 108.
(5) 19 S. C. R. 78.
(6) 45 U. C. Q. B. at p. 53.

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idation at that time, and not a repeal and not an alteration. Then the entire preamble of the Acts are referred to in Chapter 1 of the Statutes of 1886, Section 4, Sub-section 56, which shows what the entire preamble of the Act is. The rest are similar sections. There is no authority at all for those grouped sections.

I argue upon the authority of those cases, and in view of the fact that is merely a consolidation, that when that Act was passed after the *Sewell* case, making that amendment, it was evidently not intended to be changed; and that your lordship would be bound to construe that, if the case had come up immediately after this, exactly as was done in the *Sewell* case, because there was no intention to repeal. And I say that the form of words having been carried down through subsequent re-enactments makes no difference in that respect.

With regard to the English Act, our contention is that under section 735 there was a right given to the Colonial Legislatures to repeal or abrogate any portion of the Act; that it is not necessary it should be repealed in words; that the same principle applies as has been applied in the Privy Council in constitutional cases in Canada; that where a Provincial Legislature has legislated within its rights and that field is properly invaded by the Dominion Government, this practically follows, though not in so many words. The two cannot stand together; if there is any repugnance the Dominion statute governs.

I say here the enactment by our Parliament of almost the same sections, taken as a group, which deal with both ships of British registry and Canadian registry, is a clear indication that the Colonial Government was legislating in the direction of a provision inconsistent with, and which cannot stand with, the English Act.

Section 9 of the Act of 1886 says :—

"The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a

consolidation and as declaratory of the law as contained in the said Acts or parts of Acts, so repealed, and for which the said Revised Statutes are substituted."

"That if upon any point the provisions of the said Revised Statutes are not in effect the same"—it does not say, "not in words the same;" it is "not in effect the same"—"as those of the repealed Acts and parts of Acts for which they are substituted, then as respects all transactions * * * subsequent to the time that they take effect the provisions contained in them shall prevail, but as respects all transactions, &c., anterior, the provisions of the repealed Acts and parts of Acts shall prevail."

I contend, first, that is limited to repealed Acts; secondly, that it only deals with statutes which are not in effect the same. There is nothing to suggest that the words used in the section are not capable of the meaning given to them in the *Sewell* case. The omission of the heading is not conclusive, because the other sections in the same group are confined to cases of collision, and this is the marginal note, which apparently is the work of some of the revisors.

If in this schedule it had been repealed and the other substituted I would not have a word to say; but they merely consolidated it, and we can imagine it dropped out by a printer's error or anything you like, but it was the same thing being consolidated and re-enacted.

There is one other point I want to make, that is with regard to the rules—perhaps it is not of much importance now if your lordship takes the view the look-out is not of much consequence. I refer to Section 917 of our present statute and to the case of *Tucker* v. *Tecumseh*, referred to in the judgment, (1), and *Stoomvaart* v. *Peninsula, etc. Co.* (2), as showing that the necessity to follow these regulations is absolute and can only be departed from in case of actual necessity. That is to the

(1) 10 Ex. C.R., 44, (2) 5 A.C. 876.

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same effect as in *Marsden* at page 496. Although my learned friend says it is not a regulation that they should have a lookout, no one can read the regulations as published without feeling that they are impliedly binding upon the defendants.

Mr. *McPherson*, *K.C.*, followed for the respondents. I will only take your lordship's time for a moment on the question of having a lookout upon the tug. Take the circumstances of the night out in Georgian Bay, coming in an easterly direction with no light direct on the course to steer by, but a light in the rear, the Missisauga light, that was the only one he had and it was over his stern. He could look about in his pilot-house and keep that light, he could get the range by taking that light in conjunction with his bow, but he had nothing forward at that time. The only thing he had to steer by was what he called in the witness-box the loom of Sandford Island. Your lordship has seen the chart we brought over. It is a lithographed copy of the one marked. If there had been a lookout stationed there for the express purpose, one he knew was a competent lookout—it cannot be said that Cowles who was there as a passenger can be regarded as a competent lookout, he was not sailing in those waters—if a seaman had been there familiar with these land-marks, and had made out these landmarks it would have aided the captain in making that turn and changing his course at the right time.

In *Marsden on Collisions* (1) it is said that the lookout must be vigilant and efficient according to the exigencies of the case. The denser the fog and the worse the weather, the greater the cause for vigilance to avoid collision.

I do not think he did make out Sandford in time to clear it. He had gone too far south and east when he made his swing. His tug was drawing 7 feet 6 inches

(1) 5th ed. p. 464.

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of water and he cleared the rock himself, but we, drawing 9 feet, when we came up we stranded. Fullum personally is quite clear about that, page 8 question 60 :—

Q. How long before you struck did he put his wheel over to starboard! A. Oh, I can't say; possibly three minutes."

According to Captain Fullum, the minute they discovered the island they changed their course. The other captain says they were all anxious; Cowles the passenger was on deck; they brought up the engineer and were trying to get out of the loom of Sandford Island.

Consequently, not having a lookout and not complying with the regulations, they must be liable for all negligence. I do not think I need take up your lordship's time any longer on that. There is the case of the *Jane Bacon* (1) showing the necessity of a tug having a lookout.

The text of that is:—

"It is the duty of a ship with another in tow to keep a sharp vigilant lookout, because the tow cannot always see ahead."

That is *Marsden's* note. The text of the case bears out that.

CASSELS, J., now (June 2nd, 1909), delivered judgment.

This is an appeal on behalf of the defendants from the judgment pronounced by the Local Judge in Admiralty for the Admiralty District of Toronto on the 4th January, 1909.

I will deal with the third and fourth grounds of appeal before discussing the first and second grounds.

The third and fourth grounds of appeal are as follows:

"3. The learned trial Judge should have found that the stranding of the barges in question was due to inevitable accident, and was not due to the negligence of the

(1) 27 W. R., 35.

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defendants, or he should have found that it was due to the negligence of the plaintiffs.

4. If the learned trial Judge was justified in finding that the defendants were guilty of any negligence in connection with the said stranding, he should have found that the plaintiffs also were guilty of negligence which contributed to the said stranding, and he should have applied the Admiralty Rule that, where both parties are in default, the defendants should not be found liable for any amount exceeding one-half of the amount of the damages growing out of the said accident, as limited by the statutes aforesaid."

The appeal was very fully and ably argued in Toronto on the 22nd March, 1909, by counsel for appellants and respondents, and I have had the benefit of a transcription of the arguments.

Since the hearing of the appeal I have perused the evidence carefully, as well as the arguments.

I do not think I should interfere with the findings of fact of the learned trial Judge.

The question turns upon fact. The trial Judge was in a better position to weigh the conflicting evidence of the witnesses than I can be. He has done so, and I cannot say his conclusion is incorrect.

The tug was out of her course. She was westerly and southerly of Sandford Island. The captain of the tug, Fullum, if the evidence of Cowles is accepted, believed that when Sandford Island was seen it would be on the starboard side of the tug. Cowles was of opinion it would appear on the port side, and so informed Fullum. It turned out that Cowles' opinion was correct. The captain (Fullum) knew the location of Pandora reef and its position in relation to Sandford Island, and on sighting Sandford Island put the wheel to starboard, turning the course of the tug to the north so as to reach the channel

north of Pandora reef and Sandford Island. The result was the stranding of the barge.

Fullum states he was in the proper channel and that he navigated the tug in a proper manner. It is difficult to understand if he was in the proper channel why he should have believed Sandford Island would appear on the starboard.

The tug had no lookout as required by the rules. The question as to whether the absence of a lookout is conclusive depends on the circumstances of each case. The trial judge places great stress on this point. Cowles in his evidence gives as his reason for concluding that Sandford Island would appear on the port bow that the Mississauga light and the lights from Blind River were visible, and he judged from the location of these lights. The lights at Algoma Mills were also visible. It may well be that had there been a lookout, it would have been ascertained that the tug was not on the course the captain assumed her to be. In any event when the difference arose between Fullum and Cowles as to the location of Sandford Island, the captain of the tug should have accepted the suggestion of Cowles and allowed him to steer while he, Fullum, went forward and took observations.

The captain of the tug attributes the accident to the barge to the bad steering of the barge causing it to sheer. There is no evidence of bad steering. It is only an inference by reason of it sheering. If Fullum's story is correct he knew from the commencement of the towage that the barge sheered. If so, he must have known that if he turned the wheel to starboard so as to turn the tug to the north the barge would be very likely to sheer.

The evidence as to the sheering is contradictory, and it is not proved if the evidence on behalf of plaintiffs is accepted. The tow line was from fifteen to eighteen fathoms in length, and if Fullum's evidence were accepted

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no sheering could have caused the barge to run on the shoal unless she hauled the tug eastward.

The learned trial judge has dealt fully with the relative duties of tug and tow.

The case of *Sewell* v. *The B. C. Towing and Transportation Co.* (1) contains a concise statement of the law. The barge had no motive power. The tug had assumed the complete control of the navigation. There is no evidence of contributory negligence on the part of the barge.

I think these two grounds of appeal should be dismissed.

The first ground of appeal is as follows :—

"1. The learned trial judge should have found that the defendants are entitled to the benefit and protection of the provisions limiting liability as contained in the Imperial Merchants' Shipping Act, 1894, Chapter 60, Section 503, and as contained in the Revised Statutes of Canada, 1886, Chapter 79, Section 12, now contained in Revised Statutes of Canada, 1906, Chapter 113, Sections 921, 922 and 923."

The learned trial judge followed the judgment in *Sewell* v. *British Columbia Towing and Transportation Co.* (2) in which it was held that the defence of limited liability only applied to cases of collision and not to the facts in question in that case—a case very similar in its facts to the present case. That case turned on the fact that the 11th and 12th clauses of the Canadian Act in force at that time are prefaced with a heading in these words :—"Duty of Masters—Liability of Owners as to Collision." The reasoning is set out on pages 550, 551 of the report of the *Sewell* case.

In revising the statutes (see R. S. C. 1886, Cap. 79, Sec. 12) this heading is omitted. It is true that in the margin is written : "Liability of owners limited in case

(1) 9 S.C.R. 527. (2) 9 S. C. R. 527.

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of collision without their fault"; but this marginal note cannot control. The learned trial judge evidently was of opinion that the omission of the heading changed the construction as decided in the *Sewell* case. He has reasoned at length that this change in the statutes was on the part of those revising the statutes, and that their action in omitting the heading was *ultra vires*. Assume that the omission of the heading was legislating so as to make the law in Canada harmonize with the English law, then the trial judge has omitted from consideration the effect of Cap. 4, 49 Vict., respecting the Revised Statutes. Section 8 of this statute is as follows:—

"8. The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts or parts of Acts so repealed, and for which the said Revised Statutes are substituted:

2. But if upon any point the provisions of the said Revised Statutes are not in effect the same as those of the repealed Acts and parts of Acts for which they are substituted, then as respects all transactions, matters and things subsequent to the time when the said Revised Statutes take effect, the provisions contained in them shall prevail, but as respects all transactions, matters and things anterior to the said time, the provisions of the said repealed Acts and parts of Acts shall prevail."

In the revision of the statutes in 1906, Cap. 113, Section 924, there is a heading: "Duty of Masters—"Liability of Owners of Ships." The stranding in question in this case was prior to the Revised Statutes of Canada, 1906, coming into force.

The sub-sections (*a*) and (*b*) of the Revised Statutes of 1886, Cap. 79, Sec. 12, would apply to cases that might not happen owing to a collision—(*c*) and (*d*) to cases of collision. The statute to my mind has to be construed as if the *Sewell* case were being decided under the

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statute as consolidated in 1886, in which case the decision on this point would have been in my opinion the same as the decision under the English Act. The law in England is clear that under a similar statute the limitation clauses would apply (*Wahlberg* v. *Young* (1) "without their actual fault or privity." See also the *Warkworth* (2), and, in appeal, same volume, page 147. The *Obey* (3).

In the present case there was a British registry distinguishing it in that respect from the *Sewell* case. Mr. Marsh contends he is entitled to rely on the British statutes. I do not find it necessary to consider this question.

This ground of appeal is allowed and the judgment below should be varied. There is no disagreement as to the towage.

The second ground of appeal is as follows:—

"1. The learned trial Judge should have granted to the defendants the relief sought in paragraphs 14 and 15 of the defendants' amended Statement of Defence."

The 14th and 15th paragraphs of the amended Statement of Defence are as follows:—

"14. No action, other than this action, has been brought against the defendants, or against the said tug in respect of the said accident, but the defendants apprehend other claims in respect of damages to the said tow, and to goods, merchandise and other things on board the said tow at the time of the said accident.

15. If it should be determined by the Court that the defendants are liable to pay any damages in respect of the matters complained of in the plaintiffs' statement of claim, then the defendants desire, by way of counterclaim, to repeat, and they do repeat, all of the allegations contained in the defendants' Statement of Defence, as

(1) 24 W. R. 847.
(2) L. R. 9 P. D. 20.
(3) L. R. 1 Ad. & Ecc. 102.

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amended, and they claim a judgment for limitation of liability, such as they would have been entitled to in a separate action of limitation of liability".

These paragraphs were allowed as amendments by the learned Judge. There does not seem to be any strong objection on the part of the plaintiffs to the claim of the defendants.

The judgment should be varied by giving the defendants the relief asked for, and all proper provisions and directions should be inserted therein.

As both plaintiffs and defendants have succeeded in part and failed in part, I give no costs of this appeal.

*Judgment accordingly.*

Solicitors for appellants: *Marsh & Cameron.*

Solicitors for respondents: *McPherson & Co.*