BRITISH COLUMBIA ADMIRALTY DISTRICT.

1894

Oct. 10.

WILLIAM CURTIS WARD AND FREDERICK PEMBERTON..... } PLAINTIFFS;

AGAINST

THE SHIP *YOSEMITE*.

Maritime law—Collision—Burden of proof—Mutual negligence, effect of—Mortgagee's right of action.

Where a collision occurs between a moving vessel and one lying at anchor, the burden of proof is upon the moving vessel to show that such collision was not attributable to her negligence.

The *Annot Lyle* (11 P.D. 114) referred to.

2. Where a collision is attributable to negligence on the part of both vessels, the loss must be equally apportioned between them notwithstanding the fact that the negligence of one contributed to the accident in a greater degree than that of the other.

3. The mortgagee in possession may maintain an action for damages arising out of a collision.

THIS was an action for damages by collision.

The facts of the case are stated in the reasons for judgment.

July 10th, 1894.

The case came on for trial at Victoria, B.C., before the Honourable Mr. Justice Crease, Deputy Local Judge for the Admiralty District of British Columbia; Commander Blair, R.N., and Lieutenant Moggridge, R.N., sat with him as Nautical Assessors.

A. L. Belyea, for the plaintiffs.

P. Æ. Irving, for the *Yosemite*.

CREASE, D.L.J. now (October 10th, 1894) delivered judgment.

This was an action for damages by collision of the steamer *Yosemite* with the tug-boat *Vancouver*, a little

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after two o'clock in the morning of the 15th of May 1893, in Miner's Bay, Mayne Island, Plumper's (or Active) Pass.

The *Vancouver* was lying at anchor with a scow laden with iron moored to her, about a hundred yards from the shore, and I am disposed to think, some three hundred yards from the wharf.

The *Yosemite*, a very long, fast paddle wheel steamer, when she ran into the *Vancouver*, was swinging round E. by N. to S., for the purpose of landing at the wharf.

A very dangerous thing to do at night in a narrow pass, full of tide rips, and varying currents at the best of times, and especially so with an unaccustomed captain and an unaccustomed ship.

The night was clear overhead, but dark from the reflection of the trees along the shore, especially under the high ground inshore; in the shadow of which, both ships were at the time of the accident.

The tide was about three quarter flood, and the evidence on both sides showed that the *Yosemite* struck the *Vancouver* on the port quarter, a few feet from the stern, nearly immediately over the propeller, cut through her guard, and considerably damaged her.

The defence was, that the *Vancouver* was anchored in the fairway and carried a dim light, not a proper shipping light, at her masthead—kept no look out either on the steamer or on the schooner *Bonanza* which was fastened to her.

On the opening of the case, a contention arose between the parties to determine upon whom the *onus* of commencing should fall.

The court decided that from the facts disclosed in the Preliminary Acts, assuming the plaintiffs' right to sue, the burden was on the defendant to show that it was no fault of his, and upon the following authorities:

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Marsden on Collisions (1) lays it down that as soon as plaintiff has made out a *primâ facie* case of negligence on the part of the defendant, the *onus* is shifted, and the defendant will be liable unless he proves that his negligence in no way contributed to the loss.

It is notably the case in collision actions where certain inferences of fact have been established by numerous cases, they become to a great extent of the same authority as if they were propositions of law. In support of this position the following authorities were cited:—In the *Batavia* (2) Dr. Lushington, in his judgment, declared it to be a presumption of law, that the *onus* was on a vessel underweigh to show that the collision occurred by no negligence of hers. A vessel at anchor cannot get out of the way. The *onus* is on the vessel doing the damage, whether the injured vessel is well or ill anchored. The same in *The Victoria* (3), although the vessel was lying in a track frequented by other ships. In all cases, the *onus probandi* is on the vessel which comes into contact with another vessel which is stationary and helpless.

Lord Chancellor Herschell in *The Annot Lyle* (1) (Esher and Frye, L. JJ., concurring) placed the *onus* on the vessel in motion.

Mr. *Irving*, for defendant, contended, on the authority of *The Telegraph*, (5) that as the collision took place at night, and the *Vancouver* was not well lighted, the vessel at anchor should prove she was properly lighted and anchored. She ought not to have been moored at the entrance of the port, except from necessity, and from the long delay in bringing the action on a collision which occurred fourteen months ago, the *onus* ought to be on the *Vancouver*. It was the com-

(1) 3rd Ed. p. 31.
(2) 2 Wm. Rob. 407.
(3) 3 Wm. Rob. 49.
(4) 11 Prob. Div. 114.
(5) 1 Spks. 427; and Pritch. Ad. D. 290.

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plainant's delay (*vide* the *John Brotheric*) (1) and he should therefore have the *onus* thrust upon him.

The court decided that the plaintiffs should first prove property, that is, prove their right to sue, and then the *onus probandi* would be shifted upon the *Yosemite* to discharge the presumption of her negligence being the cause of the injury.

To prove property and the right to sue, one of the plaintiffs, Frederick Pemberton, testified that he and William Curtis Ward, his co-plaintiff, are the executors of the will of the late Joseph Despard Pemberton, the mortgagee of the *Vancouver*, probate of which was granted to them on 27th December, 1893.

The *Vancouver* was registered at New Westminster in the name of Robert Couth, as owner.

The register of course is not evidence of title.

On the 10th September, 1889, the *Vancouver* was mortgaged by the owner to the late Joseph Despard Pemberton, before the present action was brought. It was intended that the action should have been brought before, but on the 11th November, 1893, the said mortgagee suddenly died, and probate was not granted until the 27th December, 1893, the requirements of the new Act respecting succession duties requiring time for their fulfilment.

The mortgage was produced, and it was shown that money was still due to the mortgagees on that mortgage.

The mortgagees took possession of the *Vancouver* on the 1st July, 1892, and she has been in their possession ever since.

The mortgagees had agreed to insure the vessel for $2,600, but had originally insured for more. They had the bill of sale from Henderson to Cook.

The certificate of registration from the Custom House, at New Westminster, was produced, dated the

(1) 8 Jur. 276.

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2nd March, 1893. On it was an endorsement of Greenleaf, as Master, dated the 18th March, 1893, by Peter Grant, the then acting registrar. This endorsement was afterwards cancelled, as he turned out to be an American citizen—*but that took place after the collision*—and that charge consequently has no bearing on the present case.

The appointment of Greenleaf as Master was made through the instrumentality of the mortgagees.

The plaintiffs do not sue as registered owners; the registered owner (Couth) cannot be found.

They sue as mortgagees in possession under an unsatisfied mortgage. The plaintiff Pemberton, besides being executor, was partner with his father, the late Joseph Despard Pemberton, when this business and mortgage were transacted, and it was all done as part of the firm business.

The authorities which support this proposition are as follows:

Dicey on Parties to Actions (1) lays down the rule that any person entitled to a reversionary interest in goods is entitled to bring an action for their possession.

There are other authorities:

Dickenson v. *Kitchen.* (2)

Keith v. *Burrows* (3), where the mortgagor remains in possession until the mortgagee takes possession, then, in right of that, the latter becomes the owner. (4)

In *Mears* v. *London & South Western Railway Co.* (5), where a barge let out for hire was damaged, the owner was held to have the right to maintain an action for permanent damage.

European and Australian R'way Mail Co. v. *Royal Mail Steam Packet Co.* (6). This was a very full case, and

(1) Am. Ed. 388.
(2) 8 El. and B. 789.
(3) 2 App. Cas. 646.
(4) *Ibid.* see Lord Cairn's judgment.
(5) 11 C. B. N. S. 850.
(6) 30 L. J. C. P. 247.

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established that mortgagees in possession are equivalent to owners.

On the other side, Mr. *Irving* quoted section 70 of *The Merchant Shipping Act* 1854. The corresponding section to which in the Canadian Statute is section 36, Cap. 72, Revised Statutes of Canada, as expressly declaring that the mortgagee shall not, by reason of his mortgage, be deemed to be the owner of the ship, and cited *Simpson* v. *Thompson* (1) in support.

There, the underwriters contended they had a right to maintain an action for damages in their own name, in respect of goods insured in the ship. But there was no possession before she was lost—no possessory right. The cases are not parallel, and the difference makes a very wide distinction. He cited also the *Ilos* (2) a case of collision. There, George Tanner, up to a late period of the case, appeared as registered owner. The ship was condemned, and reference for the amount of damages after decree was ordered.

The real owner, one Redway, afterwards turned up. Dr. Lushington refused to substitute the beneficial owner as he had already decreed in favour of the registered owner, but directed the amount to be paid into the registry, and threw on the party claiming it the *onus* of establishing his ownership.

To this argument, rather implied than direct, of defendants' counsel, plaintiff gave a complete reply drawn from *Dickerson* v. *Kitchen*, followed in *The Feronia* (3). There the limited construction and true meaning to be placed on section 70, of *The Merchant Shipping Act*, repeated in our own statute, section 36, was clearly brought out.

(1) 3 App. Cas. 279. (2) Swab. 100.
(3) 2 L. R. A. & E. 65.

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The latter was a suit, by a master who was also part owner, against ship and freight for wages and disbursements.

The master's maritime lien on these was deemed to be in priority to the claims of the mortgagees in possession, and not affected by his being part owner.

And the reason why the master's maritime lien was preferred to the mortgage, was that the maritime lien does not require possession to make it good. The rights of the mortgagee must be made good, or better, by possession. Those two cases established that rule.

And the endorsement of the mortgage is not on the certificate of registry, for the simple reason that when the mortgagee has once taken possession, registration becomes immaterial.

Keith v. *Burrows* (1) establishes the point that an unregistered mortgage passes the ownership on the mortgagee taking possession (subject of course to the equity).

Non constat, but that there may be another registered mortgagee in existence. The register itself has not been produced, but that consideration does not affect the plaintiffs' right to sue as they are first mortgagees and in possession.

The proof of the registration of their mortgage is certified on the mortgage itself, and it is in evidence that it was registered on the 19th September, 1889, as avouched by the signature of George C. Clute, the registrar of shipping.

Influenced by these considerations, the court determined that the plaintiffs had clearly established their right to sue for the damage occasioned to the *Vancouver*, and that the *onus* was thereby cast on the *Yosemite* to satisfy the court that she was not at fault in the collision which took place between them.

(1) 1 C. P. D. 722.

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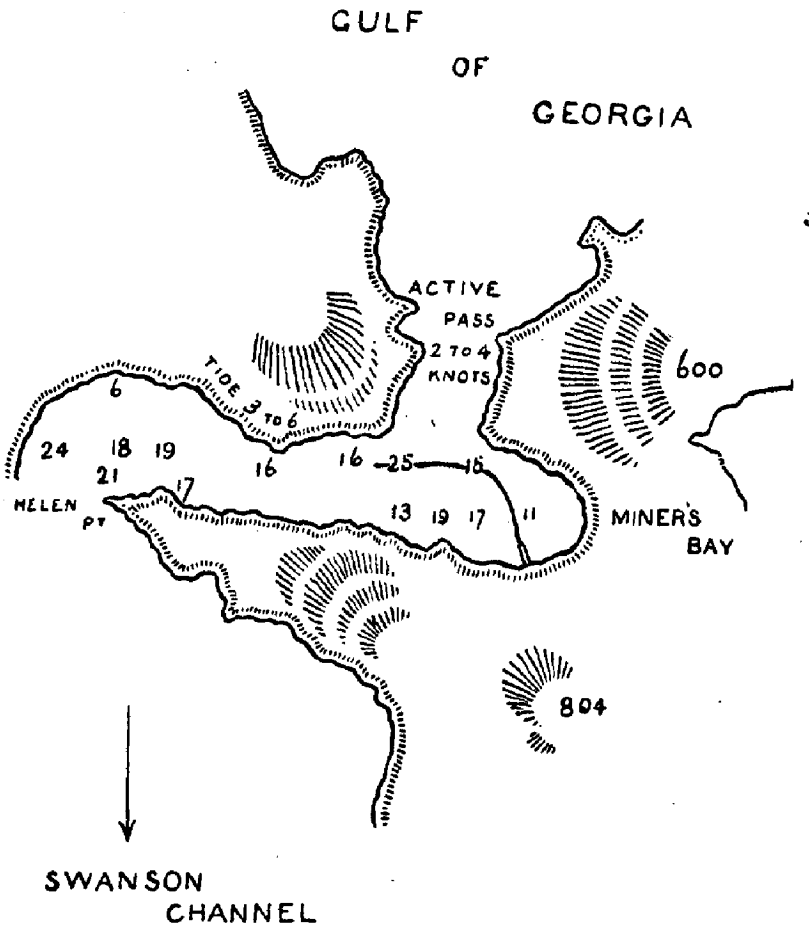
Thereupon numerous witnesses were examined on both sides; and, as usual, in collision and running down cases, there was a considerable conflict of testimony.

The relative position and distances of the vessels from each other, from the shore, and from the wharf, before, and at the collision, were carefully gone into. The state of the tide, and the existence or non existence (for, two witnesses, a father and daughter, residing near, attempted to prove a negative) at the critical time, of the lights which vessels are required by law to exhibit at night, the pilotage regulations, and all the other incidents which might be naturally expected to accompany collisions at night, close in shore, in a locality where the currents are strong and variable, were detailed at great length by the numerous witnesses who were examined on both sides.

In the discussions on these subjects, and the elucidation of the several points as they arose, and the nautical deductions to be drawn from them, I have to acknowledge the great assistance I have derived from the Nautical Assessors, who aided the court during the trial with their ready and valuable experience and suggestions.

All the maps, pilotage regulations and authorities on the various points which arose during a lengthened trial were carefully examined and applied: and it is satisfactory to add that the final conclusions at which the court arrived, after the different views of the Nautical Assessors had been fairly heard and weighed, met with their concurrence.

To understand these conclusions, it is necessary to have some idea of the locality of Plumper's or Active Pass and its waters generally, and then of Miner's Bay—the part of it in which the collision occurred—as shown by the following sketch:



Active Pass is a narrow and tortuous passage through which, on the flood, the waters of the East Coast of Vancouver Island rush and whirl, as one witness expressed it, to join the waters of the Gulf of Georgia.

Captain, afterwards Admiral, Richards, the Admiralty Hydrographer, who, with his officers, spent many years here, from 1858 onward, in surveying the coast of the Island, and the Main, embodied the results of these in the *British Columbia Pilot*, 1888.

This work, which is now before me, on page 284 says :

> Active Pass takes an E. N. E. direction for 1½ miles, and then turns N. for the same distance fairly into the Straits of Georgia.

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The average breadth of the channel is about ⅛ of a mile, and its general depth about 20 fathoms. There are no hidden dangers with the exception of a small rock off Laurel point, &c.

The great strength of the tides, together with the absence of steady winds, renders it unfit for sailing vessels, unless indeed, they be small coasters.

MINER'S BAY, on the south side of Active Pass, where it takes the sharp turn to the northward, affords anchorage, if necessary : but a vessel must go close in to get 12 fathoms ; and then it is barely out of the whirl of the tide.

The *Vancouver* was anchored in from ten to twelve fathoms, and was therefore "close in shore" and certainly not in the "fairway" or ordinary passage-way of ships to the wharf, as suggested by the defendants.

If she had been, it would have been the *Yosemite's* duty, if practicable, to have steered clear of her.

The flood tide in Active Pass sets from west to east : or from the Swanson Channel to the Straits of Georgia.

Velocity, &c., sometimes 7 knots, at ordinary tides from 3 to 5, &c. It is recommended to pass *through in mid channel ; no favourable eddy or less strength of tide will be found on either side, unless inside the kelp which lines the shore.*

[This is full notice to the *Yosemite* of the strength of the tide at all times and throughout the Pass, except inside the kelp.]

It is high water full to change at 4 h. a.m. which is one hour later than at Port Townsend Admiralty Inlet (1886.)

Such were the waters into which, on that Sunday night, the *Yosemite*, emerging from the Swanson Channel, steamed from Victoria intending to land at the Miner's Bay wharf, a not very pretending wooden structure, down at the bottom of Miner's Bay.

Captain Roberts was totally unaccustomed to the *Yosemite*, whose usual pace is fourteen knots, but of her exact speed at such a conjuncture, none but an experienced master, like her regular master Captain Rudlin, or one equally accustomed to her, could be sure. It

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appears that, when under weigh, she slips through the water like a knife.

The evidence of the then master, Captain Roberts, shows she is very long, some 280 feet—draws very little water—is 39 feet broad—her side lights were 40 to 50 feet apart—she takes 300 yards at least to swing—he could not say at what distance from the wharf the *Yosemite* was when he began to swing. As an instance of unconscious speed, and how he overshot the mark in swinging round to the wharf the captain says, "I had to *go back to get into the line of the wharf.*" If the *Yosemite* had swung a few feet further round, she would have been clear of the *Vancouver* he thought; could not say how far the *Vancouver* was from the land when he struck her, as he had never anchored there. It was his first trip in the *Yosemite*. He made another collision, the same day, at the entrance of the Fraser River. At the time of the collision, now under inquiry, there was little wind, and a slack flood tide (the general evidence, made it about ¾ flood)—he saw the light of the *Vancouver*—it was a dim light, and not what he called a light, at all—a small lantern, all smoked up—small lantern of some sort, "when I backed off, it seemed like a light in the trees—as high as a man's head."

The lantern in its existing state was produced and examined by the court and Assessors, and compared with one which Captain Roberts considered a proper light, under the rules. Did not report the accident on Sunday evening; not until Tuesday.

When asked for entries in the log, the captain said he had done so; but there was no official log kept in the steamer. The entries he made, on that day, were on paper. These original papers were destroyed. The entries that he did make were copies from slips of paper, into a small book, after he got down to his office.

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This small book was produced but, under the circumstances, is of no authority here.

The mate did not notice any light on the steamer at the time of striking. Asked why—replied "his" attention was drawn "otherwise." At the wharf he says he did not notice the light on the *Vancouver*, and, "could not say whether he looked for it or not."

To the Assessors. Q. "After the engines stopped, how long did she run?

"A. Half a mile."

She was going about 2½ miles an hour, when she struck. The mate adds, "the engines were backed and stopped, and she was going astern when we struck the *Vancouver*." [The engineer's evidence differs from this, and he had charge of the handles.] "As to the wharf—it is a very hard wharf to make."

"Under any circumstances, that night, I would not have gone inside the *Vancouver*," and that shows how close she was anchored to the shore.

The quarter master of the *Yosemite*, Charles Douglass Clarke, who appeared to be a straight-forward witness, and gave his evidence carefully, but without any appearance of undue restraint—was in the wheel house—which is 20 to 25 feet above the level of the water (the windows being open)—up to the time of the collision,—stated:—

I saw two lights on the wharf, and a light I supposed to be on shore, I could not say if the same was the *Vancouver*'s light, but the *Vancouver*'s light loomed up a little later.

When we saw the light we ported the helm (which was already ported) still more. * *

We were 300 or 400 yards away then, (speaking of the time of the collision) from the wharf.

The *Vancouver* was lying in the gloom of the land.

Captain Greenleaf of the *Vancouver* described her position as from 450 to 500 yards from the wharf, and 100 yards from the shore.

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Mr. Robson's house (which was about in a line with the position of the *Vancouver* and the *Bonanza* as seen from the western entrance of the Pass) was three hundred and fifty yards off and on the land.

Clarke, in one part of his evidence, says that "on making the entrance of the Pass we saw the light, and mistook it for Robson's, a light, which was kept burning all that Sunday night, in a window in his boarding-house, as a guide to the lodgers, the window being screened only by lace curtains.

The damage caused by the *Yosemite* was not made the subject of much inquiry; as that was acknowledged by both sides as a suitable object for subsequent reference and inquiry before the Registrar, as a matter of detail.

Upon a careful review and consideration of the whole evidence, I have come to the following conclusions:—

The collision was almost entirely due to the *Yosemite*, a long paddle-wheel vessel, being handled at night in close waters, and with strong and variable tides running at the time of the collision.

The "Pacific Coast Tide Tables" show that, on the 15th of May, 1893, the date of the collision, the tide was still flowing and running to the North-eastward. All this, the *Yosemite* was bound to have considered.

This is not the only misapprehension of Captain Roberts. He gives the speed, at the time of the collision, at two and one half knots. Several considerations, from the facts, show that it must have been much more than that.

The engineer says that the engines were practically never stopped, that the "backing" bell was rung immediately after the "stopping" bell; and the captain in his conclusions must have overlooked two well-known peculiarities of paddle-wheel ships.

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1. That on stopping the engines, the vessel very soon loses all her way, and that then :—

2. The helm has little or no effect on her when stopped.

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Now, no captain would allow his ship to become unmanageable in such a place as the Active Pass, therefore, with her own speed, for she is a fast vessel, and the flood tide under her, she must have approached the *Vancouver* very rapidly, and, though it may have been necessary, and I can easily conceive it was so, to keep that speed for the proper handling of the ship, still, a steamer coming into an anchorage, fast, does so with the *onus* on her of keeping clear of every vessel in that anchorage.

And, until they came upon the *Vancouver*, they do not seem to have thought that the Robson light (seen on entering the Pass) might have been the light of a vessel at anchor. If so, the Robson light was certainly not an aid to mariners.

Much was said about the light of the *Vancouver* not being of the regulation size, and capable of throwing a light the full regulation distance, and that, not fulfilling that requirement, it was legally, "no light at all." Probably that was what Captain Roberts meant when he used the expression.

But the *Vancouver's* light, though not of the regulation size, would, from its construction (Dioptrical), more than make up in brilliancy what it lacked in diameter, and, even, if indifferently trimmed would meet the requirements of the Board of Trade, as regards visibility.

Considerable stress was laid by counsel for the defendants on the *Vancouver* being in the fairway; but I am satisfied and find that the *Vancouver* was not anchored in the fairway, but in a proper and suitable

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anchorage, and in a position where a ship entering the Pass might expect to find a vessel berthed.

I consider, too, that the *Vancouver* was also in a measure to blame; for, the weight of evidence goes to show that her light was burning dimly, and no proper look out was being kept. This was negligence on her part. But it was far and away overbalanced by the negligence, in which I include want of nautical skill, exhibited by the temporary captain of the *Yosemite*.

A question was raised as to whether there should not have been an anchor light on the tow *Bonanza* as well as on the *Vancouver*; but I have not thought it expedient to extract the evidence on that point, because the court is of opinion that not only was it not necessary for the tow to have an anchor light but that it would have been decidedly wrong if she had borne an anchor light, as well as the *Vancouver*.

Captain Greenleaf also thought that the *Yosemite* should have stood by the *Vancouver* after the collision; but I consider that under all the circumstances of danger around her, the *Yosemite* was quite right in going on to the wharf. Indeed, the captain of the *Vancouver* could hardly expect to be sent back at once to his ship when he had deserted her with such prompt alacrity upon the collision taking place.

These considerations may be condensed into the following conclusions:—

I consider that the *Yosemite* is principally to blame for the collision and damage which occurred.

But I also find that the *Vancouver* is also to blame in a smaller but yet distinct proportion for the collision and loss.

But the law, in such a case, where both vessels are at fault, as in this instance, is quite settled and undisputed, and the rule of Admiralty—is that if there is blame on

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both sides causing the loss, they are to divide the loss equally.

I pronounce, therefore, the collision to have been caused by both ships, and decree that the damages from such collision to the *Vancouver*, together with the costs of suit on both sides, be equally borne by both parties.

And that the amount of such damages be referred to the Registrar to ascertain the same, for the above purpose.

Solicitor for plaintiffs : *A. L. Belyea.*

Solicitor for the ship *Yosemite* : *P. Æ. Irving.*