in consequence of a former voyage, or in need of necessaries, no bottomry bond can be given on cargo which is not shipped; and that for the obvious reason that the master has no control over the cargo till it is on board the ship The master is the agent of the ship for many purposes, but he is not the agent of the cargo, except so far as it is thrown upon him by direct contract or by necessity, and it is not till the cargo comes on board the ship, and under his control, that he has the slightest right to interfere or deal with it, directly or indirectly It appears to me that it would be contrary to principle, and most mischievous, if a valuable cargo lying in a port in this country, having been shipped from the East Indies, was held liable for damage done to the ship before it had been put on board or contracted to be so,—a liability which the owners could not have contemplated their property would be exposed to Dr. Twiss has said that this Court has no jurisdiction over goods pledged when on land, but I wish it to be understood that I do not decide this case on any point of jurisdiction, but because I am of opinion that the master had no authority in fact or in law to hypothecate the property. I am of opinion that this bond cannot be supported, so far as it affects the cargo, and therefore I must pronounce against that portion of it, with costs.

Bowdler and Bathurst, proctors for the bondholders.

Tebbs for the owners of the cargo.

[358] IN THE PRIVY COUNCIL

Present—The Right Hon. Lord Kingsdown
The Right Hon. Sir Edward Ryan
The Right Hon. Sir J T. Coleridge.

THE "NORTH AMERICAN" December 8, 1858.—Collision—Estoppel by pleading and evidence—Practice—Costs—The Court will proceed *secundum allegata et probata*, even though entertaining some doubt whether, in so doing, it will arrive at the real truth and justice of the case. In a cause of collision, therefore, the party suing cannot recover in full if he fails to prove the case set up in his pleading and evidence, although no fault be proved against his vessel, and fault is established against the other vessel. The libel and evidence of A, a foreign vessel, close hauled on the starboard tack, alleged B. to have had no look-out, to have starboarded just before the collision, and to have struck A with her starboard bow, B.'s want of look-out was proved, but it was proved that B. struck A with her port bow, B.'s starboarding was not proved. Held that A could not recover in full Where both parties appeal from a sentence of the Court below, pronouncing both to blame, and the sentence is affirmed, no costs of the appeal given.

On Appeal from the High Court of Admiralty

[S. C. 12 Moore, P. C 331, 14 E R. 937 Applied, *The* "*Ann*," 1860, Lush. 55; *The* "*Despatch*," *ibid* 98, *Kilgour* v. *Alexander*, *ibid* 241. Referred to, *North German Lloyd Steamship Co.* v *Royal Netherlands Steam Navigation Co*, 1879, 4 P. D. 157. For further proceedings see p 466, *post*, and Lush. 79.]

[362] IN THE HIGH COURT OF ADMIRALTY.

THE "MILFORD"—(Bennett Morgan, Master) March 29, 1858—Foreign ship—Master's wages—*Lex fori*—17 & 18 Vict c 104, ss., 109, 191.—In a suit by a foreign master against the freight for his wages, the question whether the freight is liable is a question of remedy and not of contract, and is therefore to be determined by the *lex fori* A statute general in terms and intended for the protection of navigation applies to foreign vessels within British waters The 191st section of the Merchant Shipping Act, 1854 (notwithstanding section 109), extends to the masters of foreign ships, and gives them a remedy against ship and freight for their wages

[S C. 31 L. T. (O. S.) 42, 4 Jur. (N. S.) 417, 6 W. R 554 Followed, *The* "*Jonathan Goodhue*," p. 524, *post* Questioned, *The* "*Halley*," 1867, L. R. 2 Ad. & Ecc. 12, reversed 1868, L. R. 2 P C 193. Followed *R* v *Stewart*, [1899] 1 Q B. 964. Explained. *Poll* v. *Danube*, [1901] 2 K B 579; *Davidsson* v. *Hill*, [1901] 2 K B. 606; *The* "*Tagus*," [1903] P. 44. Referred to, *The* "*Colorado*," [1923] P. 108.

This was a suit for wages, brought by Bennett Morgan, the master of the "Mil-

ford," against freight due on the voyage as under stated, and against William W. Wakman and Zalman [363] B. Wakman, both of South Port, Connecticut, in the United States of America, the owners of the ship "Milford" intervening for their interest in the said freight.

The owners appeared to the suit under protest. The act on protest stated that the "Milford" belonged to South Port, in Connecticut, U.S. North America; that Bennett Morgan was a native and subject of the United States; that in November 1856, Morgan shipped as second mate on board the "Milford," bound from San Francisco, in California, to the United Kingdom; that in consequence of a series of deaths Morgan, on the 10th of March 1857, assumed the command and acted as master, that he proceeded to Rio Janerio for repairs, where he remained from the 9th of April to the 14th of July, for the expenses connected therewith he, as master, granted a bottomry bond on the ship and freight for £3229, which had subsequently been paid by the owners' agents in this country; that Morgan arrived in command of the ship in the port of London in September 1857, that from the 11th of April 1857, one of the crew had been appointed first mate, and had received first mate's wages since that date, that by the law of America the master of an American ship has no lien upon, or right of action against, the freight for wages earned as master of such ship, and that such was well known to be the law by Judges, advocates and lawyers in the United States of America, that Morgan's wages as first and second mate had been tendered to him since the arrival of the ship in England, but that he had refused to receive the same, and prayed the Court to pronounce only for the wages due to Morgan as first and second mate, and to condemn him in the costs of the petition.

The answer on behalf of the master took issue on the law of the United States, and asserted that the master of an American ship has a lien on, and a right of action against freight earned in such ship whilst under his command, and prayed the Court to pronounce for the right of Morgan to proceed in this Court against the freight earned whilst he was master.

As to the American law the parties agreed to use as evidence certain opinions of American lawyers on a case submitted to them in *The "Jonathan Goodhue,"* a New York vessel, lately sold under authority of the High Court of Admiralty of England, at the suit of a bottomry bondholder One question there raised was as to the master's lien for wages on the freight

[364] Addams, Q.C., for the master, contended that on the balance of evidence as to the law in the United States, before the Court, it must be taken to have been ruled in the case of *The "Spartan"* (1 Ware's R. 162), that a master has a lien on the freight for his wages as well as for liabilities or disbursements on behalf of the ship

Phillimore, Q.C., and Robinson, *contra*, in support of the protest:—This is an American ship, and the master is an American subject. What law is the Court to look to in deciding the question? It must be either the *lex loci contractus* or the *lex fori*: if the former, the burden of proof is on the claimant to establish clearly the foreign law under which he claims, and that burden is very far from being discharged by shewing that the American law is in a contradictory and conflicting state on the point, which is the utmost the opinions before the Court can shew, and even then the case in the Court of last resort in the State of New York, *Van Bokkelin* v *Ingersoll* (5 Wendell's R. 315), is in our favour On the question of the *lex fori*, we contend that it is not applicable at all to this case *Don* v. *Lippmann* (5 Cl & Finn. 1) determined that the remedy must be taken according to the law of the country in which it was sought, but that the meaning of a contract must be determined according to the *lex loci contractus* In this case the original contract entered into in America was limited by the United States law, which we take to be, that the master has no lien on ship or freight for his wages, and that is part of the contract which the Court has to act upon. If, however, the Court should be of opinion that the *lex loci* is not applicable, then comes the question whether it is to be the general maritime law as administered by the Court before the statutes which modify it, or whether the law as laid down by the Merchant Shipping Act. The 17 & 18 Vict. c. 104, s. 191, gives the master the same remedies for wages in the Court of Admiralty as seamen; but the 109th section limits the application of the third part of that statute to sea-going ships registered in the United Kingdom and

to ships registered in any British possession under certain circumstances. In *The "Golubchick"* (1 W. Rob. 143), the Court held that questions of wages were to be decided by the general maritime law

Dr. Lushington: This is a question of great importance and of some difficulty, but as the subject has been discussed in another case some time since, and I have taken the matter into full consideration, I shall not delay pronouncing the opinion at which I have arrived. The main question is, whether the Court **[365]** ought to apply the *lex loci contractus* or the *lex fori*; and if the latter, whether the law maritime as administered previous to the changes made therein by statute law, or the law as it now stands under the Merchant Shipping Act It is impossible not to be struck with the inconveniences which might ensue if the Court is to be governed by the *lex loci contractus*; in every case in which a foreign seaman or master sued, the Court would have to enquire into the contract and into the law of the country under which it was made, and the difficulties with respect to the United States of America is very great, for, though the decisions of their Supreme Court may, generally speaking, be binding, yet the laws of their different states vary in their application of maritime law as well as in their municipal regulations, and the cases cited shew that this is so as to proceedings against ship and freight on account of wages and advances We know quite well that this Court had no jurisdiction as to masters' wages, but it is by no means so clear what were the rights which a master might have had in a Court of Equity against ship, cargo and freight The facts of the case, as stated in the pleadings, are few and simple Morgan is a subject of the United States. He shipped on board an American ship at San Francisco as second mate. By the successive deaths of the first mate and master he became in possession of the ship as master. As first and second mate, and also as master, he now proceeds against the freight, wages have been tendered up to the time when he became master, and issue is taken as to the right of lien on freight I have very serious doubts whether the question as to the law of the United States is the true question, and whether I am called upon to give any opinion upon that law

Turning then to the law ordinarily administered in this Court.—Morgan is before the Court as a foreigner and as master of a vessel We all know that as master he could not by the old maritime law have sued for wages in the Admiralty Court at all; a master had no *locus standi* here till the Legislature gave him, first, a remedy in the case of insolvent or bankrupt owners; and secondly, by the Merchant Shipping Act, put him in the same position as any seaman If a foreign master can now sue in this Court, he is entitled to proceed against the freight like other seamen How, then, stood the case as to foreign seamen previously to the statute? In *The "Golubchick"* (1 W. Rob. 143) the question was fully considered, and I there laid down a rule that notice should be given to the consul of the state to which the vessel belonged—not binding myself, however, to act in accordance with the views the consul might entertain, but I was anxious that the Court might **[366]** know what objections were taken to the exercise of its jurisdiction, and be placed in a position to act according to the justice of the case I adopted that course of proceeding on very mature consideration, and I will state why I did not in such cases so precisely follow Lord Stowell's practice as I have made a point of doing in others. With regard to applying the powers of the Court of Admiralty to foreigners at all, Lord Stowell always stood in awe of a prohibition, and therefore, as I think, was too abstinent in taking any step which might, by possibility, expose him to such interference. As I have said, I do not consider the representation of the foreign consul absolutely binding Cases of great hardship might occur where a vessel was sold under decree of the Court, and neither master nor mariners left with any means of subsistence. Upon the present occasion I know that notice to the American consul has been given, and, as he has not interfered, I consider that I have his indirect sanction. If any representation had been made that the administration of the law of this Court would interfere with the particular law of the country to which the vessel and master belong, it might be another matter.

Morgan's character as foreigner being then no hindrance to his suit, the next question is, whether the law of the United States is applicable? It may be, for if I am to construe a contract, its meaning and extent must doubtless be governed by the *lex loci contractus*; but does this question turn on the meaning of a contract? The Court has no contract before it; I have no means of knowing whether the con-

tract contained any special agreement or any stipulation intended to protect the owners against the jurisdiction of foreign tribunals. I am bound to take it as an ordinary maritime contract, Morgan succeeding as *hæres necessarius* to the original master It was very ingeniously contended that the law of the United States formed part of the contract; but I cannot think so. the proceeding originated in this country; it is a question of remedy, not of contract at all. Now the law as to contract and remedy was settled by *Don* v. *Lippmann*, to the effect that the remedy must be according to the law of the *forum* in which it is sought. I need not say that I should be bound by a rule so laid down by the House of Lords, even if I doubted its soundness; but I entirely concur in the principle there laid down. It would be pedantry to refer now to the authorities there quoted; Lord Brougham's judgment contains them all Now in this case the legality of the arrest of the freight is the whole matter in dispute. Then comes the important question, whether the *lex fori* in the **[367]** present case is to be the general maritime law as formerly used in this Court, or that law as modified and extended by statute? If the old law is to govern, it entirely puts an end to the master's case. But what is there to prevent the application of the Merchant Shipping Act, 1854, the 191st section of which gives the master the same rights and remedies for the recovery of his wages as seamen have? The construction put upon the 296th section of the Act in cases of collision, where foreign vessels on the high seas are concerned, cannot bind it in the present case (*a*) In cases of collision the Court has held that a British statute could not regulate the conduct of foreigners on the high seas. No doubt similar questions may arise in the application of the statute as have occurred with regard to pilotage under former Acts. The general rule, however, has been, that where vessels are within British waters, a statute, general in terms and intended for the protection of navigation, would apply to foreigners, as in the case of statutory obligations to take pilots on board under certain circumstances As to Dr Phillimore's remarks on the 191st section, the words of that section are undoubtedly broad enough to cover the case of foreign masters "Every master of a ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages which by this Act or, by any law or custom, any seaman not being a master, has for the recovery of his wages" But it is said, that the 109th section of the Act restrains the application of section 191 to certain classes of vessels there named The language there used, however, is affirmative, stating the cases to which the third part of the Act shall extend, there are no negative words which tend to shew that the Court should not apply section 191 to foreign masters and seamen. As there are no such words, is it consistent with justice that the Court should hold its hand in all these matters, and say, that as to foreign masters it will impose a restriction not found in the statute? I think I am bound to apply the remedy given by the statute. If I thought it my duty to go into the *lex loci contractus*, I certainly could come to no conclusion one way or the other about it on the evidence now before me; but I think I am bound to apply the general law of this Court as it at present exists, to overrule this protest with costs and allow the case to proceed.

Bathurst, proctor for the owners.

Clarkson for the master.

[368] THE "HELEN AND GEORGE"—(Connell, Master) May 19, 1858.—Salvage —Agreement—*Onus probandi*.—A salvage agreement will be upheld, unless proved to be very exorbitant, or to have been obtained by compulsion or fraud.

[Referred to, *Cargo ex Woosung*, 1876. 1 P D 270.]

This was an action of salvage brought by the master, owners and crew of the lugger "Argo," against the schooner "Helen and George," her cargo and freight.

The service rendered was assisting the schooner into Bridlington Harbour, on the 1st of February 1858. A gale was blowing from the N.N.E., with snow squalls and a heavy sea running, several vessels were driving with both anchors down, and others slipping from their anchors The schooner was anchored on the edge of the Smethwick Sand, with one anchor down and thirty-five fathoms of chain, about three miles distant from the harbour The salvors, nine in number, put out in their lugger or coble to assist vessels in distress, and observing the schooner in a

(*a*) See "*Zollverein*," *ante*, p. 96, *Cope* v. *Doherty*, 4 K. & J. 367