[HIGH COURT OF AUSTRALIA.]

RUSSELL . . . . . APPELLANT;
DEFENDANT,

AND

WILSON . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1923.

SYDNEY, *Nov.* 27, 28; *Dec.* 13.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Rich and Starke JJ.

Gaming and Betting—Seizure of money in gaming house—Conviction of person keeping house—Appeal to Court of Quarter Sessions from conviction dismissed—Right of police to keep money—Recovery of money seized — Action of detinue—Limitation of action—Evidence of title—Possession—Gaming and Betting Act 1912 (*N.S.W.*) (*No.* 25 *of* 1912), *secs.* 40, 42, 44, 45, 48, 58.*

The appellant, a police officer, purporting to act under authority conferred on him by a search warrant issued under sec. 40 of the *Gaming and Betting Act* 1912 (N.S.W.), entered the premises of the respondent and seized certain money and valuable securities which had been received by the respondent in connection with a business of promoting sweeps on horse-racing carried on by him upon those premises. The respondent was subsequently prosecuted and convicted, on a charge under sec. 42 of the Act, of using his premises for the

* Sec. 40 of the *Gaming and Betting Act* 1912 (N.S.W.) provides that "(1) Any justice upon complaint made on oath that there is reason to suspect any house, office, room, or place to be kept or used as a betting-house or office contrary to this Part of this Act may, by special warrant under his hand, authorize any constable to enter into such house, office, room, or place and arrest, search, and bring before any two justices all persons found therein, and seize all moneys, coin, notes, cheques, IOU's, or other writings for securing the payment of money, and all lists, cards, or other documents relating to racing or betting found in such house, room, office, or place. . . . (3) Every special warrant shall be in the form contained in the Second Schedule hereto, or to the like effect." Sec. 42 (2) provides that "No house, office, room, or other place shall be opened, kept, or used at any time for the purpose of any money or valuable thing being received by or on behalf of the owner, occupier, or keeper, or any other person whatsoever, as or for the consideration for (*a*) any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event

purpose of money or valuable thing being received by him as a consideration for a promise to pay or give money or valuable thing on an event or contingency of or relating to a horse-race. An appeal to the Court of Quarter Sessions by the respondent against that conviction was dismissed. No order for forfeiture of the money or valuable securities was made under sec. 44 of the Act. After the dismissal of the appeal a demand was made by the respondent for the return of the money and valuable securities, but was refused. In an action by the respondent against the appellant for detinue,

Held, that assuming the seizure to have been lawful, the respondent was entitled to recover the money and valuable securities.

Held, also, that the action, having been brought within three months after the refusal of the demand for the return of the money and valuable securities, was brought within the time prescribed by sec. 58 of the Act.

Per Isaacs and Rich JJ. :—Possession is not merely evidence of title : it confers title which yields to a superior title but only to the extent of that title.

Decision of the Supreme Court of New South Wales : *Wilson* v. *Russell*, (1923) 23 S.R. (N.S.W.), 441, affirmed.

APPEAL from the Supreme Court of New South Wales.

On 6th May 1921 Alexander Russell, a sergeant of police, purporting to act under a special warrant issued under sec. 40 of the *Gaming and Betting Act* 1912 (N.S.W.), entered upon the premises of

or contingency of or relating to any horse-race" &c. Sec. 44 provides that "(1) Whosoever opens, keeps, or uses any house, office, room, or other place for any of the purposes mentioned in section forty-two . . . shall be liable to a penalty" &c. "(3) All moneys, coins, notes, cheques, IOU's, or other writings for securing the payment of money . . . found in such house, room, office, or place, may, on conviction of any offender under the provisions of this section, be adjudged to be forfeited or destroyed." Sec. 45 provides that "Whosoever being the owner or occupier of any house, office, room, or place opened, kept, or used for any of the purposes mentioned in section forty-two . . . (*a*) receives, directly or indirectly, any money or valuable thing . . . (ii.) as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any such event or contingency" (event or contingency of or relating to horse-racing, &c.) "shall be liable to a penalty" &c. Sec. 48 provides that "(1) Any money or valuable thing received by any person mentioned in section forty-five . . . as or for the consideration for any such assurance, undertaking, promise, or agreement as is in the said section referred to, shall be deemed to have been received to the use of the person from whom it was received. (2) Such money or valuable thing, or the value thereof, may be recovered accordingly with costs in any Court of competent jurisdiction." Sec. 58 provides that "No action, suit, information, or other proceeding shall be brought against any person for anything done or omitted to be done in pursuance of this Act, or in the execution of the authorities thereunder, unless . . . (*b*) the action, suit, information, or other proceeding is brought or commenced within three months next after the act or omission complained of, or if there be a continuation of damage, then within three months next after the doing such damage has ceased."

H. C. OF A. 1923.

RUSSELL v. WILSON.

John Palmer Wilson and seized, among other things, certain money, bank-notes, cheques and postal orders. On those premises Wilson had conducted the business of promoting sweeps upon horse-races. On 8th June 1921 Wilson was convicted on a charge under sec. 42 of the Act of having used his premises for the purpose of any money or valuable thing being received by him as consideration for any promise to pay or give money or valuable thing on an event or contingency of or relating to a horse-race. Wilson appealed from that conviction, and on 25th August 1921 the appeal was dismissed. No order was made under sec. 44 of the Act for the forfeiture of the money, &c., which had been seized. A demand was on 1st September 1921 made by Wilson for the return of the money, &c., but the demand was refused. By a writ issued on 16th November 1921 Wilson brought an action in the Supreme Court against Russell for detinue of the money, &c., which had been seized. The action came on for trial before *Gordon* J. and a jury. By consent the jury was discharged, and it was agreed that the learned Judge should have power to draw inferences of fact in deciding the questions of law. The learned judge found a verdict for the plaintiff for £375 14s. 1d., or the return of the goods, together with one shilling for detention. A motion to the Full Court for a new trial was dismissed: *Wilson* v. *Russell* (1).

From that decision the defendant now appealed to the High Court.

Other material facts are stated in the judgments hereunder.

Piddington K.C. (with him *Delohery*), for the appellant. The property was lawfully seized by the police. The warrant which was issued was the only one which is authorized to be issued for the purposes of sec. 40 of the *Gaming and Betting Act* 1912 (N.S.W.). Being on the premises under the authority of the warrant, the appellant had authority to do what sec. 40 prescribes, that is, seize the property. The prior possession of the respondent having been lawfully divested, the respondent in order to succeed in his action is not entitled to rely on his prior possession but must prove his title (*Buckley* v. *Gross* (2); *Butler* v. *Hobson* (3)). The receipt of the money by the respondent from subscribers to sweeps was made

(1) (1923) 23 S.R. (N.S.W.), 441.
(2) (1863) 3 B. & S., 566.
(3) (1838) 4 Bing. N.C., 290, at p. 298.

unlawful by sec. 45 of the Act, and the respondent had no title to it. The respondent cannot sue in respect of money which was the fruit of his unlawful act (*Wilkinson* v. *King* (1); *Helps* v. *Glenister* (2); *Sykes* v. *Beadon* (3)). The effect of sec. 48 of the Act is that the moneys of subscribers to a sweep cannot become the property of the sweep promoter. The transactions under which the respondent received the moneys being prohibited and it being necessary for him to disclose that transaction in order to prove his title, he cannot recover (*Moses* v. *Macferlan* (4); *Holman* v. *Johnson* (5); *Zeeb* v. *Bank of New South Wales* (6); *Cannan* v. *Bryce* (7); *Scott* v. *Brown, Doering, McNab & Co.* (8); *Begbie* v. *Phosphate Sewage Co.* (9); *Dillon* v. *O'Brien* (10)).

[STARKE J. referred to *The Winkfield* (11); *Glenwood Lumber Co.* v. *Phillips* (12).]

Under sec. 48, although a subscriber to a sweep intends to part with the property in the money which he pays for his chance in the sweep, the money is deemed to remain his property and he can recover it in an action for detinue even against the police who have seized it. The appellant holds the money as custodian for the true owners. (See *Gordon* v. *Chief Commissioner of Metropolitan Police* (13); *Brightman & Co.* v. *Tate* (14).)

[KNOX C.J. referred to *In re Arbitration between Mahmoud* v. *Ispahani* (15).]

There was no such refusal by the appellant to return the money to the respondent as would support an action for detinue. The refusal must be unreasonable (*Green* v. *Dunn* (16); *Clayton* v. *Le Roy* (17)), and there is no evidence of an unreasonable refusal. There was a refusal to return the property on 8th June 1921 and the cause of action, if the respondent had any, arose then. As the action was not brought until more than three months after that date, it is barred by sec. 58 of the Act.

(1) (1809) 2 Camp., 335.
(2) (1828) 8 B. & C., 553.
(3) (1879) 11 Ch. D., 170, at p. 196.
(4) (1760) 2 Burr., 1005.
(5) (1775) 1 Cowp., 341.
(6) (1901) 1 S.R. (N.S.W.) (L.), 167.
(7) (1819) 3 B. & Ald., 179, at p. 183.
(8) (1892) 2 Q.B., 724.
(9) (1875) L.R. 10 Q.B., 491.
(10) (1887) 20 L.R. Ir. (C.L.), 300.
(11) (1902) P., 42.
(12) (1904) A.C., 405.
(13) (1910) 2 K.B., 1080.
(14) (1919) 1 K.B., 463, at p. 467.
(15) (1921) 2 K.B., 716.
(16) (1811) 3 Camp., 215 (n.).
(17) (1911) 2 K.B., 1031.

H. C. OF A. 1923.

RUSSELL v. WILSON.

Windeyer K.C. (with him *Edwards*), for the respondent. The only refusal to deliver up the property which was so treated by the parties was after the dismissal of the appeal. Sec. 58 has no application to such a case as this: it only applies so as to protect the police in doing some act which they believe they are doing under the authority of the Act. Until the respondent's appeal was disposed of and a demand for its return was thereafter made, the appellant was entitled to hold the property. [Counsel was stopped.]

Cur. adv. vult.

Dec. 13.

The following written judgments were delivered :—

KNOX C.J. On 6th May 1921 the appellant, who is a police officer, purporting to act under authority conferred on him by a search warrant issued under sec. 40 of the *Gaming and Betting Act* 1912 (N.S.W.) (No. 25 of 1912) entered the premises of the respondent and seized certain property including money and valuable securities. On 8th June 1921 the respondent was convicted of an offence under sec. 42 of the Act. He appealed to Quarter Sessions against this conviction, and on 25th August 1921 his appeal was dismissed and the conviction affirmed. Part of the money and valuable securities seized by the appellant had been received by the respondent in connection with the sweep business for carrying on which he was convicted. No order for forfeiture was made under sec. 44 of the Act. Upon the conviction of the respondent the property which had been seized was returned to the police and remained thereafter in the possession of the appellant. After the appeal had been dismissed the respondent on 1st September 1921 demanded the return of the money and documents, and, this demand not having been complied with, on 16th November he commenced an action in the Supreme Court for detinue. At the trial of the action the jury was dispensed with and *Gordon* J. gave judgment for the respondent for £375 14s. 1d. or the return of the goods with one shilling for the detention. The Supreme Court in Full Court dismissed a motion for a new trial; and this appeal is against that order. Both in the Supreme Court and in this Court it was assumed that the seizure by the appellant was lawful, and I shall deal with the case on that footing.

Mr. *Piddington* for the appellant argued that as the goods were lawfully taken out of the possession of the respondent he must establish his title as owner in order to succeed in the action. In my opinion, the respondent has shown title as owner. Apart from the provisions of the *Gaming and Betting Act* it could not be denied that the property in the money, cheques, &c., sent to the respondent in connection with the sweep passed to him, and in my opinion there is nothing in the Act which prevents the property from passing. On the contrary, sec. 48 seems to assume that the property would pass to the recipient of the money or valuable thing.

An alternative argument was founded on sec. 58 of the Act, which provides that no action shall be brought for anything done or omitted to be done in pursuance of the Act unless commenced within three months next after the act or omission complained of. Assuming the seizure by the appellant to have been lawful, it is clear that the respondent had no right to recover the goods seized until 25th August 1921, when his appeal was dismissed, and the action was brought within three months next after that date.

In my opinion the appeal should be dismissed.

ISAACS AND RICH JJ. The material facts are succinctly stated in the judgment of the learned primary Judge, *Gordon* J., as follows :— " On 6th May 1921 a search warrant was issued under the provisions of sec. 40 of the Act No. 25 of 1912 in respect of premises occupied by the plaintiff. That section gives power, after the issue of that search warrant, to the person entrusted with the execution of the warrant, to enter into the premises described, to bring before any two justices of the peace all persons found there, and to seize all moneys, coin, notes, cheques, IOU's, or other writings for securing the payment of money, and all lists, cards or other documents relating to racing or betting found in such house, room, office or place. Under the authority conferred on him by that warrant and section of the Act the defendant, who is a police officer and was entrusted with the execution of that warrant, entered the premises. He then under that authority arrested the plaintiff and took possession of certain property including the property in question. The plaintiff was afterwards brought up before the Police Court, charged with an

H. C. OF A. 1923.

RUSSELL v. WILSON.

Isaacs J. Rich J.

offence under sec. 42 of the Act and convicted, the date of that conviction being 8th June 1921. The plaintiff appealed from that conviction; and the appeal came on for hearing on 25th August 1921 before the Quarter Sessions, and was dismissed. The conviction, therefore, was then affirmed. It is admitted that no other charge was pending against him beyond the one on which the plaintiff was charged and convicted. When the Magistrate convicted the plaintiff, as he did, he might have made an order under sec. 44 that all that money and property found in the plaintiff's possession on those premises should be forfeited or destroyed. He made no such order. . . . I am satisfied as a fact that after the dismissal of the appeal to Quarter Sessions there was a demand for and a refusal by the defendant to return those goods so found on the plaintiff's premises. . . . The property taken possession of under the provisions of the Act to which I have referred and held by the defendant at the present time consisted of certain bank-notes, certain cash, certain cheques and certain postal notes. Certain of the bank-notes, amounting to £240, were in a small kit-bag together with other articles to which it is unnecessary to refer. As far as the £240 in that kit-bag were concerned, it is not—and could not—be disputed that it was money derived from a legitimate source; that is, that it is the proceeds of the sale by the plaintiff of property of his to Mr. Gardiner and was the money paid to him by the purchaser for that property. . . . In another kit-bag there were cash, bank-notes, cheques, postal notes and other documents. With regard to £10 of that, that also represented the purchase-money paid for this property, and, with regard to one cheque for £8 10s., that was proved affirmatively to be moneys which had been obtained by the plaintiff altogether independent of the sweep business which he was promoting. It was money which he earned in carrying on his legitimate business. Consequently, as far as the £250 and the cheque for £8 10s. are concerned, the plaintiff has proved affirmatively a perfectly good, legitimate title. Supposing there was a demand and refusal prior to action brought, as I have held there was, it is not denied that the plaintiff is entitled to a verdict for the £250 and the £8 10s. cheque. As far as the balance of the property sued for in this action is concerned—cheques, cash and securities—it is admitted by the plaintiff that he cannot

say whether any or what portion of that balance belongs to his legitimate business; he cannot say whether any or what portion belongs to his wrongful business, that is, the sweep he was promoting. He says he mixed everything up together, and therefore it is impossible for him to say whether those securities and the cash were obtained by him in the course of carrying on the sweep business, or whether they were obtained by him in carrying on his legitimate business; and I will assume that the whole of them were obtained by him in carrying on the illegitimate business, that is, the promotion of the sweep." The date of the demand and refusal referred to by *Gordon* J. was a few days before 13th October 1921. The writ in this action was issued on 16th November 1921.

It is unnecessary to say anything as to the property seized except as to the portion obtained in carrying on the sweep business. The contention put forward for the appellant as to that was that the respondent must fail, because (1) the property having been in fact received by him in contravention of secs. 42, 44 and 45 of the *Gaming and Betting Act* 1912, the law, both by virtue of the common law and by force of secs. 48 of the Act, refuses to recognize him as the true and absolute owner of the property; (2) inasmuch as his actual possession was lawfully terminated on 6th May and never in fact renewed, he could not succeed by reason of possession only. In other words, the appellant, having once obtained possession rightfully, can never be considered a wrongdoer. We must confess we should feel greatly pressed by the first point if it were essential. The cases of *Cope* v. *Rowlands* (1), *Whiteman* v. *Sadler* (2), *Bridger* v. *Savage* (3) and *Gordon* v. *Chief Commissioner of Metropolitan Police* (4) are, we think, formidable authorities in support of the appellant's contention. Nor do we feel convinced that sub-sec. 3 of sec. 44—the forfeiture provision—settles the matter. The jurisdiction to forfeit extends to all moneys, &c., "found in such house, room, office, or place," and therefore to such property as admittedly belonged to him, as for instance, the £250 and £8 10s. cheque in this case; and even to the property of other persons. Sec. 48, so far as it goes, assists the contention. However, it is not in

(1) (1836) 2 M. & W., 149.
(2) (1910) A.C., 514, at pp. 525-526.
(3) (1885) 15 Q.B.D., 363, at pp. 367-368.
(4) (1910) 2 K.B., 1080.

H. C. OF A. 1923.

RUSSELL v. WILSON.

Isaacs J. Rich J.

our view necessary to express any definite opinion on the first point, as we are clearly of opinion that the second point cannot be sustained. Immediately before the seizure on 6th May 1921, Wilson was in actual possession of all the property seized, which comprised the proceeds of the forbidden transactions. But he was possessed of that property as for himself by the actual consent of the original, and, we shall for this purpose assume, the continuing, absolute owners of the property. That is to say, he had possession of the property, not as servant or agent of another, but as in his own right subject to any right of the absolute owners to recover it whenever they so desired. Had there been no intervention of the police, his possession would have continued unless the absolute owners had recovered the property from him, either upon simple demand or by action. They have not intervened, and the matter is left to a contest between Wilson and the police. We interpose one observation: that the contest does not involve any reliance by him on any illegal transaction. He starts with actual possession as being the owner of the property. It is true his possession was broken. But it is of the essence of the matter to inquire first what right his possession in the circumstances conferred, and next what the breaking of it involved with regard to that right. Possession, in the relevant sense, is not merely evidence of absolute title: it confers a title of its own, which is sometimes called a "possessory title." This possessory title is as good as the absolute title as against, it is usually said, every person except the absolute owner. As to real property, *Cockburn* C.J. said in *Asher* v. *Whitlock* (1):—"All the old law on the doctrine of disseisin was founded on the principle that the disseisor's *title* was good against all but the disseisee. It is too clear to admit of doubt, that if the devisor had been turned out of possession he could have maintained ejectment. What is the position of the devisee? There can be no doubt that a man has a right to devise that *estate*, which the law gives him against all the world but the true owner." This is affirmed by the Privy Council in *Perry* v. *Clissold* (2). So as to chattels. In *Glenwood Lumber Co.* v. *Phillips* (3) Lord *Davey* quoted from *Jeffries* v. *Great Western Railway Co.* (4) the words of

(1) (1865) L.R. 1 Q.B., 1, at pp. 5-6.
(2) (1907) A.C., 73, at p. 79.
(3) (1904) A.C., at p. 410.
(4) (1856) 5 E. & B., 802, at p. 805.

Lord *Campbell*, who said: "I am of opinion that the law is that a person possessed of goods *as his property* has a good *title* as against every stranger, and that one who takes them from him *having no title in himself* is a *wrongdoer*, and cannot defend himself by showing that there was title in some third person, for against a wrongdoer possession is *title*." Lord *Davey* added some words of the Master of the Rolls in *The Winkfield* (1), namely: "Therefore it is not open to the defendant, being a wrongdoer, to inquire into the nature or limitation of the possessor's right, and unless it is competent for him to do so the question of his relation to, or liability towards, the true owner cannot come into the discussion at all, and therefore, *as between those two parties*, full damages have to be paid without any further inquiry." In the later case of *Eastern Construction Co.* v. *National Trust Co.* (2) Lord *Atkinson*, delivering the judgment of the Privy Council (Lords *Atkinson*, *Moulton* and *Parker*), also referred to the question. He quoted Lord *Campbell's* observation that as "against a wrongdoer possession is *title*." He quoted *Armory* v. *Delamirie* (3) as deciding the finder has "such a *property* as will enable him to keep it against all but the rightful owner," and reaffirmed *Glenwood Lumber Co.* v. *Phillips* (4). It is therefore clear that Wilson had by that possession a real "title" to the property, just as lawful and just as powerful as if it were the absolute title, except as against the absolute owner, or any person claiming to hold by virtue of the absolute owner's authority. And it is also clear that a wrongdoer is, according to Lord *Campbell*, "one who takes them" (the goods) "from him" (the possessor), "*having no title in himself*." The expression "having no title in himself" must, we think, mean no legal right superior to the title of possessor. If the person taking the goods has a superior right, then *to the extent of that superior right, and to that extent only*, must the possessory title yield. The absolute owner, his rights being unqualified by any circumstance, would of course be justified in taking and keeping or demanding the goods, because his title is superior. The defendant in *Buckley* v. *Gross* (5) had a superior title, because, as *Blackburn* J. said (*Crompton*

(1) (1902) P., at p. 55.
(2) (1914) A.C., 197, at pp. 209-211.
(3) (1722) 1 Str., 505.
(4) (1904) A.C., 405.
(5) (1863) 3 B. & S., 566.

H. C. OF A. 1923.

RUSSELL v. WILSON.

Isaacs J. Rich J.

J. being of the same opinion), the plaintiff's possession was such that it became the duty of the constable at common law to deprive him of it permanently and to hold the property for the true owners, the possession of the police henceforth being that of the true owners. The constable's right and duty being to terminate the plaintiff's actual possession finally, when that was done the plaintiff's possessory title vanished, and he necessarily failed. Apply those principles here. What was the superior right of the police? It was created, and therefore limited, by the statute, and did not, as in *Buckley's Case* (1), exist at common law.

Again, under the statute, the powers of the police are limited by the Act and cannot be extended beyond those limits. Sec. 40 permits the issue of the warrant and authorizes its form and the action under it. Sec. 44 empowers the Court on conviction of the offender to adjudge the forfeiture or destruction of the property found. But what if the offender is acquitted, or if, although he is convicted, the Court refuses to adjudge forfeiture or destruction? Is the property derelict or outlaw? Suppose the original owner declines or fails to take advantage of sec. 48? There is nothing in the Act which introduces the groundwork of *Buckley* v. *Gross* (1), namely, that it is the duty of the police to deprive the betting-house keeper permanently of the property—which, unlike the finder in *Buckley* v. *Gross*, he has received from, and with the actual knowledge and consent of, the original owners—and to hold that property henceforth for those owners. Whatever protection the Legislature has intended for those owners, it has expressed. They may exercise, or decline to exercise it: *Quilibet potest renunciare juri pro se introducto.* But their abstinence is not equivalent to an authority to the police to set up their absolute rights and hold on their behalf. The result is that the instant the proceedings authorized by the Act are terminated—that is, finally terminated—the power of seizure and retention by the police are exhausted. That is admitted as to the £250 and the £8 10s. cheque; why not as to the remainder? The police statutory right having expired when the demand was made in October, their superior right no longer existed, and the refusal was that of a person who was

(1) (1863) 3 B. & S., 566.

depriving the respondent of the property and having, in Lord *Campbell's* words, "no title in himself," that is, a wrongdoer. The respondent's position reverted to that immediately before the seizure as to both classes of the property seized, and he had an instant right as against the appellant to possession.

The point as to the limitation of action under sec. 58 of the Act obviously cannot arise in view of the date of the demand.

The appeal should be dismissed.

HIGGINS J. This appeal is from a judgment—a verdict as it is here called—in detinue, for the return to the plaintiff of the things seized or their value, and one shilling for damages.

The police seized the money, cheques, &c., of a sweep promoter, Wilson, on 6th May 1921, as under sec. 40 of the *Gaming and Betting Act* 1912; on 8th June following Wilson was convicted and fined, but no order was made for forfeiture or destruction of the goods; on 29th June Wilson lodged an appeal to Quarter Sessions from the conviction; the conviction was confirmed by Quarter Sessions on 25th August; the writ in this action was issued on 16th November. So that if the defendant to this action, a sergeant of police, did not wrongfully withhold the goods from the plaintiff during the time between 8th June and 25th August, the action was brought within the three months prescribed by sec. 58.

Now the goods—money, documents and all—were actually put in evidence at the trial. It appears also that except when they were in Court they were kept in a safe at the police station. It is admitted by the sergeant that at some time between the conviction (8th June) and 11th June, the solicitor for Wilson asked the sergeant to return the goods and that the sergeant refused—saying that he would have to hold them for twenty-one days pending appeal. In my opinion this refusal was right—for this reason (if not others) that the goods as exhibits were under the control of the Court, and he was not justified in handing them over without the Court's order until the day for notice of appeal should have passed, and, on notice being given, until the appeal should be determined. After the conviction was confirmed, Wilson's solicitor made application to the Inspector-General of Police to inform him in whose possession the goods were, and the

H. C. OF A. 1923.

RUSSELL v. WILSON.

Higgins J.

Inspector-General having replied (8th October) that they were in charge of Sergeant Russell, the sergeant was asked to return them, and he refused. Therefore, whether the wrongful act began on 25th August or after 8th October is immaterial: the action was commenced within the three months from the first wrongful act of detention. Up to 8th June, the goods were, as both parties assume, under the control of the police by virtue of the warrant; from 8th June they were under the control of the Court, until 25th August at all events.

If, therefore, the limitation of three months prescribed by sec. 58 applies as from the first wrongful act, the action was brought within the three months; but the words of sec. 58 are peculiar. I am going to assume that the section applies to detention of goods such as in this case; but the point is doubtful. I am strongly inclined to think, however, that under the final words of the section the three months do not begin to run, in a case of "continuation of damage," until "the doing such damage has ceased." Under the ordinary Statute of Limitations the time begins to run in detinue from the moment when the possession of the defendant becomes unlawful (*Darby & Bosanquet*, 2nd ed., p. 43); but under sec. 58 it would appear to run from the time that the damage has ceased. It would, indeed, be extraordinary that a man should be deprived of his wrongfully detained property if he do not bring his action within three months. But the point has not been argued. It is argued, however, by counsel for the appellant, that the plaintiff cannot by action at law recover the money, &c., which are the fruits of his own offence. This point seems to be answered sufficiently by the case of *Gordon* v. *Chief Commissioner of Metropolitan Police* (1). No doubt the mere receipt of the money for the unlawful purpose referred to in sec. 45 is made an offence by that section; but the act of receiving was over when the police seized. The money received belonged to the offender; it was given to him by subscribers to the gaming transaction; and the offender merely asks the Court to order it to be restored. He does not ask the Court to aid him in the receipt, or to treat the receipt itself as being legal or as not involving the liability to punishment. The right to possession as against outsiders having no

(1) (1910) 2 K.B., 1080.

title remained in Wilson subject to the temporary right to possession given to the police until conviction, and to the Court until the conviction was affirmed. The position of Wilson in this case is quite different from that of the plaintiff in *Buckley* v. *Gross* (1), for in that case an Act of Parliament, operating through an order of a justice, terminated absolutely the possession of the wrongdoer and gave the whole right of property and possession to the purchaser from the police.

Perhaps I ought to say here that the conviction, confirmed as it has been on appeal, is binding, and that this Court cannot, even if invited by any of the parties, question its validity. But it is not to be taken for granted that the receipt of purchase-money for tickets in an ordinary sweepstake is necessarily an offence within sec. 42 (see *R.* v. *Hobbs* (2), decided under sec. 1 of the English Act of 1853, from which sec. 42 is copied).

But it is argued for the appellant that, by virtue of sec. 48, the property in these goods, so far as received by Wilson as a deposit, is not in Wilson but in the depositor or subscriber. But the action allowed by sec. 48 does not alter the relations between the betting promoter and others who have withheld the goods from him without title; it deals only with relations between the betting promoter and the person depositing the money or valuable thing. The section is copied from sec. 5 of the English *Betting Act* 1853; and, as explained by the Court of Appeal in *Lennox* v. *Stoddart* (3), it is a purely statutory action, like an action given by a statute for the recovery of a penalty. The person who deposits the money or the valuable thing is, under this purely statutory action, enabled to recover what he has deposited even if the money, &c., have been applied in payment in pursuance of his authority. This position was not even contested in the argument in *Vogt* v. *Mortimer* (4).

It is but right to point out that the case has been argued by both parties on the assumption that the warrant authorized the seizure of the money, cheques, &c. The warrant does not give such authority by its actual words—the warrant is, in its actual words, confined to entering into the premises and searching for all instruments of unlawful gaming, and arresting, searching and bringing before a stipendary

(1) (1863) 3 B. & S., 566.
(2) (1898) 2 Q.B., 647.
(3) (1902) 2 K.B., 21.
(4) (1906) 22 T.L.R., 763.

H. C. OF A. 1923.

RUSSELL v. WILSON.

Higgins J.

magistrate the keepers of the premises and the persons there haunting resorting and playing; " and *for so doing* this shall be your warrant." Sec. 40 (3) provides that " every special warrant shall be in the form contained in the Second Schedule hereto, or to the like effect "; and this warrant contains the words used in the Second Schedule. But it may hereafter, in some other case, be argued that the Second Schedule merely gives a typical form of warrant, not limiting the words that may be contained in it, and that if the authority to seize money, cheques, &c., is to be given, that authority should be expressed in the warrant. As the point has not been argued and as the conviction has been confirmed, I think that we must give our judgment on that basis.

In my opinion the appeal must be dismissed.

GAVAN DUFFY J. In this case it is admitted that the defendant in fact deprived the plaintiff of the possession of the money and goods the subject matter of the action, and retained possession of them, and refused to deliver them to the plaintiff. But it is said that at all material times the defendant was entitled to possession as against the plaintiff. Immediately before the seizure of the money and goods by the defendant they were, in my opinion, the property of the plaintiff and in his possession. It was assumed by the learned Judge who tried the case and by the parties to the action that the seizure by the defendant under the special warrant was good in law, and in the circumstances I shall make the same assumption. On that assumption I agree that the plaintiff, who had never lost his property in the money and goods, became again entitled to possession of them only when his appeal to the Quarter Sessions was dismissed on 25th August 1921, and that his cause of action arose when the demand for the delivery was made after that date. From what I have said, it follows that even if sec. 58 of the *Gaming and Betting Act* 1912 in other respects applies to this action it does not bar the plaintiff's claim, because the action was brought within three months next after the act complained of.

In my opinion the appeal should be dismissed.

STARKE J. The appellant did not contest, in this Court, the right of the respondent to recover the sum of £258 10s., and limited his

arguments on this appeal to the sum of £117, or thereabouts. This sum represented the value of certain cheques, cash and securities which the appellant had seized on the respondent's premises under a warrant issued pursuant to sec. 40 of the *Gaming and Betting Act* 1912. The case was conducted in the Courts below on the footing that the warrant authorized the seizure, and any other view of the effect of the warrant ought not, at this late stage of the case, to be considered, and indeed no other view was presented by the appellant. The respondent was convicted of an offence under sec. 42, and his conviction was affirmed on appeal, but no order was made for forfeiture of the cheque, cash or securities pursuant to the provisions of sec. 44 (3). The proceedings against the respondent being now ended, he brought his action against the appellant for the recovery of the cheque, cash and securities which the appellant held and refused to deliver to him. Judgment for the value of the goods or their return and payment of a nominal sum for their detention was recovered by the respondent in the Supreme Court. The appeal brought to this Court against the judgment is based on the contention that the respondent had neither the possession of nor the property in the goods. Possession of the goods was lawfully divested, so it was said, by the seizure under the warrant, while the property in the goods—the right to possess them—never vested in the respondent because the physical act of handing over the goods to the respondent by the former owners was in contravention of the *Gaming and Betting Act*, and therefore had no effect in point of law, or, in other words, the transaction by which the respondent acquired the physical possession of the goods had no legal consequence. The validity of the argument depends upon the proper construction of the *Gaming and Betting Act*. Sec. 42 prohibits the keeping of betting-houses and sec. 45 the receiving of any money or valuable things as deposits on bets or as a consideration for certain assurances, undertakings, promises or agreements. Sec. 48 enacts that any money or thing so received should be deemed to have been received to the use of the person from whom it was received, and might be recovered in any Court of competent jurisdiction. "It may be," as *Buckley* L.J. said in *Gordon* v. *Chief Commissioner of Metropolitan Police* (1), "that the plaintiff never ought to have

(1) (1910) 2 K.B., at p. 1098.

H. C. OF A. 1923.

RUSSELL v. WILSON.

Starke J.

acquired that property." Apart, however, from the Gaming Act, the transaction whereby the respondent obtained possession of the goods from the former owners would have vested the property in the goods in him. And the Act, in my opinion, recognizes the transaction and the acquisition of the property in the goods by the respondent, and then creates a statutory right in the former owners to recover them. Otherwise sec. 48 is meaningless.

If this be so, then the appellant "seeks to say, 'True, it is your property, but it ought not to have been your property; you ought not to have got it by or in betting transactions.' . . . If the property is taken from the plaintiff on that ground, it is taken by confiscation. There is no ground of public policy upon which the defendant should keep that which under no circumstances is his" (*Gordon* v. *Chief Commissioner of Metropolitan Police* (1)).

The provisions of sec. 58 of the *Gaming and Betting Act* did not bar this action, but the question whether that section covers actions brought to establish proprietary rights remains open so far as I am (concerned (cf. *Sharpington* v. *Fulham Guardians* (2)).

The appeal ought to be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor for the respondent, *E. R. Abigail.*

B. L.

(1) (1910) 2 K.B., per *Buckley* L.J., at p. 1098.
(2) (1904) 2 Ch., 449.

[HIGH COURT OF AUSTRALIA.]

SPAIN . . . . . APPELLANT;
PLAINTIFF,

AND

THE UNION STEAMSHIP COMPANY OF NEW ZEALAND LIMITED . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM A DISTRICT COURT OF NEW SOUTH WALES.

H. C. OF A. 1923.

SYDNEY, *Nov.* 29, 30, *Dec.* 3, 20.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Rich and Starke JJ.

Industrial Arbitration—Award —Construction—Expenses incurred by master of ship in service of owner—Inquiry as to shipping casualty—Whether inquiry due to negligence of master—Recovery of expenses—Evidence of negligence—Finding by Court of Marine Inquiry (N.S.W.)—Estoppel—Navigation Act 1901 (*N.S.W.*) (*No.* 60 *of* 1901), *secs.* 24, 26, 27, 28—*Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *secs.* 478, 483—*Court of Marine Inquiry Rules* 1900 (*N.S.W.*), *rr.* 7, 8.

A clause in an award of the Commonwealth Court of Conciliation and Arbitration made in a dispute in which the Merchant Service Guild was claimant and a number of owners of ships were respondents, provided that "the employer shall pay any reasonable expenses of an employee incurred in the service or in the interests of the employer. (a) This provision shall apply to (amongst other matters) inquiries as to casualties . . . unless the inquiry . . . be due to the personal misconduct or negligence of the employee."

An action was brought in a District Court of New South Wales by the master of a ship, who was a member of the Guild, against the owner, a company, which was one of the respondents to the award, to recover, pursuant to the clause of the award, the reasonable expenses incurred by him upon an inquiry by the Court of Marine Inquiry under Part III. of the *Navigation Act* 1901 (N.S.W.) into the circumstances attending the stranding and subsequent beaching of the ship. Notice of the inquiry was given to the captain and the owner, and both were present at it.

H. C. OF A. 1923.

SPAIN v. UNION STEAMSHIP CO. OF NEW ZEALAND LTD.

Held, by *Knox* C.J., *Higgins*, *Gavan Duffy* and *Starke* JJ. (*Isaacs* and *Rich* JJ. dissenting), (1) that the question whether the casualty, and therefore the inquiry, was due to the personal misconduct or negligence of the master was not concluded, either upon the construction of the clause of the award or by way of estoppel, by a finding in the master's favour by the Court of Marine Inquiry, but that the District Court was entitled to determine that question for itself on the evidence before it; and (2) that, even if a finding by the Court of Marine Inquiry that the casualty was not due to the negligence of the master was prima facie evidence upon that question, upon the evidence the finding of the District Court that the casualty, and therefore the inquiry, was due to the master's negligence should not be disturbed.

Per Isaacs and *Rich* JJ.: The master of a ship is not responsible as for negligence causing a casualty, either (1) because he did not take precautions against a current then and previously unknown and not to be reasonably anticipated, and the effect of which in taking the ship out of its course could not be detected; or (2) because he did not stop or slow down in a fog where there was no reason to expect danger ahead, and where stopping or slowing down would have resulted in the casualty by reason of an unknown and undiscoverable cause operating to deceive him whatever course he took.

APPEAL from a District Court of New South Wales.

An action was brought in the District Court of the Metropolitan District, Sydney, by Bayer Spain against the Union Steamship Co. of New Zealand Ltd., in which by his plaint (as amended at the hearing) the plaintiff alleged that he was employed by the defendant in the capacity of master of the British ship *Karitane* on the terms that the defendant should pay any reasonable expenses incurred by the plaintiff in the service and in the interests of the defendant and in relation to inquiries as to casualties to the said steamship or as to the conduct of the plaintiff; that the said steamship while on a voyage to a port within the State of New South Wales became a total wreck; that the plaintiff incurred expenses in the inquiry before the Court of Marine Inquiry and at a preliminary inquiry before the Superintendent of Navigation; and that the defendant had not paid such expenses, and declined to pay the same or any portion thereof. The plaintiff claimed £63 18s., being the amount of costs paid by him to his solicitors. The basis of the claim was an award made by the Commonwealth Court of Conciliation and Arbitration on a plaint in which the Merchant Service Guild of Australasia, of which the plaintiff was a member, was the claimant and the defendant was one of the respondents. Clause 8 of the

award was as follows:—"The employer shall pay any reasonable expenses of an employee incurred in the service or in the interests of the employer. (a) This provision shall apply to (amongst other matters) inquiries as to casualties or as to the conduct of employees and to proceedings for any alleged breach of any maritime or port or other regulations unless the inquiry or the proceeding be due to the personal misconduct or negligence of the employee."

The District Court Judge before whom the action was tried gave a verdict for the defendant upon which judgment was given for the defendant. The plaintiff having appealed to the High Court, that Court allowed the appeal and remitted the case to the District Court for rehearing (*Spain* v. *Union Steamship Co. of New Zealand Ltd.* (1)). The rehearing took place before *Scholes* D.C.J., who found that the plaintiff had been guilty of negligence and that the casualty was due to that negligence. In his judgment the District Court Judge set out the following statements of fact, which he said were undisputed: —(1) The *Karitane* was on a voyage from Devonport to Sydney. (2) The vessel was abreast of the Pyramid Rock on the morning of 24th December 1921. (3) The first mate took a bearing and found the position of the vessel to be three miles off; the plaintiff who was present did not check the mate, but judged from vision that the vessel was three miles off, having the Pyramid Rock to the starboard. (4) At 8 p.m. on 23rd December the plaintiff left this "night order"—"Let me know when you see the Pyramid Rock and the distance off when abeam. The course will then be N. by E$\frac{3}{4}$E. to pass Deal Island Lighthouse five miles off and when it is abeam reset log and steer N34°E." (5) The plaintiff left the bridge at about a quarter to six a.m. on 24th December and lay in his bunk fully dressed. (6) Three minutes before receiving the message in the next finding set out the plaintiff heard the fog signal and remained where he was. (7) The plaintiff got the following written message from the first mate, who was on watch: "24/12/21—7.15 a.m. 7.25 a.m.—I have run 18 miles by the log and Deal Island should be abeam. I have not seen it yet on account of very heavy fog. Engines at stand-by." To this message the plaintiff returned the order "O.K. Carry on." (8) The plaintiff did not

(1) (1923) 32 C.L.R., 138.

H. C. OF A. 1923.

SPAIN v. UNION STEAMSHIP CO. OF NEW ZEALAND LTD.

go on deck for ten minutes afterwards; on his way he went to the lavatory. (9) Two minutes before reaching the deck he heard and felt the engines reversed. (10) Just before reaching the deck the vessel grounded slightly to the East of Squally Cove on Deal Island; he beached the vessel in Squally Cove. (11) He abandoned the vessel, all hands being safe. (12) The speed of the vessel was ten knots. (13) Round all material parts, and practically up to the cliffs of Deal Island, there were 24 to 30 fathoms of water. His Honor ordered judgment to be entered for the defendant with costs.

From that decision the plaintiff now appealed to the High Court.

The other material facts are stated in the judgments hereunder.

Piddington K.C. (with him *Collins*), for the appellant. The finding of the Court of Marine Inquiry was that the wreck was not due to any negligence of the appellant, and the award means that, where a determination of the question of negligence has been made by the tribunal which inquires into the cause of the casualty, that determination is to be conclusive. The District Court should therefore have treated the finding of the Court of Marine Inquiry as being conclusive, or at any rate should not have deprived the appellant of the advantage of that finding unless it was established that the finding was one which could not reasonably have been arrived at. Even apart from the finding of the Court of Marine Inquiry the evidence before the District Court did not establish that the wreck was due to the negligence of the appellant. The District Court Judge has found that the wreck was due to a cause that could not have been anticipated, and the conduct of the appellant under such circumstances cannot be said to be negligent (*The Beryl* (1)). There is nothing suggested which, if done, would have prevented the wreck. It is not sufficient to show that the appellant was negligent: it must also be shown that that negligence caused the wreck. The onus of establishing negligence was upon the respondent and that onus has not been discharged. The appellant, and the respondent having appeared before the Court of Marine Inquiry, the finding by that Court that the appellant was not guilty of negligence was an estoppel which prevented the respondent from setting up in the District

(1) (1884) 9 P.D., 137, at p. 138.

Court that the appellant was guilty of negligence (*In re May* (1); *Hutton* v. *Ras Steam Shipping Co.* (2)). The finding of the Court of Marine Inquiry was prima facie evidence, and if uncontradicted was sufficient evidence, that the appellant was not guilty of negligence causing the wreck (*Harvey* v. *The King* (3); *Sturla* v. *Freccia* (4)).

[STARKE J. referred to *McAllum* v. *Reid* (5)].

Rogers, for the respondent. It was negligence on the part of the appellant, when he received the message from the mate, to act on the assumption that the ship was where he expected her to be and to order full speed ahead in a thick fog and in the neighbourhood of land. On the proper interpretation of the award the question of negligence is to be determined by the Court which has to decide whether the claim for expenses should be allowed. The decision of the Court of Marine Inquiry is not evidence on that question (*Bird* v. *Keep* (6)).

[HIGGINS J. referred to *Hill* v. *Clifford* (7).

[RICH J. referred to *Barnett* v. *Cohen* (8); *Calmenson* v. *Merchants' Warehousing Co.* (9).]

On the particular proceedings before the Court of Marine Inquiry that Court could not have dealt with the certificate of the appellant; for, under sec. 470 (4) of the *Merchant Shipping Act* 1894, it was necessary that the charge and the report as to the cause of the wreck should have been served on the appellant before his certificate could be dealt with. If the finding of the Court of Marine Inquiry was admissible in evidence as being the result of a public inquiry, it could not be used as either an estoppel or as *res judicata*. It was not a judgment *in rem*, nor was the respondent a party to the proceedings before the Court of Marine Inquiry. (See *The Chelston* (10).) The determination was limited by the notice which was given, namely, to inquire into the "circumstances attending" the wreck. There is no case which establishes that the finding was conclusive between the appellant and the respondent. *Hutton* v. *Ras Steam Shipping*

(1) (1885) 28 Ch. D., 516, at p. 518.
(2) (1907) 1 K.B., 834, at p. 838.
(3) (1901) A.C., 601, at p. 611.
(4) (1880) 5 App. Cas., 623.
(5) (1869) L.R. 3 A. & E, 57, n. 3.
(6) (1918) 2 K.B., 692.
(7) (1907) 2 Ch., 236.
(8) (1921) 2 K.B., 461, at p. 467.
(9) (1921) 90 L.J. P.C., 134; (1921) W.N., 59.
(10) (1920) P., 400.

H. C. OF A. 1923.

SPAIN v. UNION STEAMSHIP CO. OF NEW ZEALAND LTD.

Co. (1) was a decision on the special provisions of sec. 483 of the *Merchant Shipping Act* 1894.

Piddington K.C. in reply.

[ISAACS J. referred to *The Kestrel* (2).]

Cur. adv. vult.

Dec. 20.

The following written judgments were delivered :—

KNOX C.J. AND STARKE J. This case, which was before us in April and in May 1923 (3), has again come on appeal from the District Court, to which it had been remitted by this Court for rehearing. We have had the benefit of another lengthy argument, which, in substance, was that the appellant was entitled, upon a true construction of an award of the Commonwealth Court of Conciliation and Arbitration, to his reasonable expenses of an inquiry into a shipping casualty, unless the Court of Marine Inquiry found that the inquiry or the casualty which led to the inquiry was due to the personal misconduct or negligence of the appellant. But we have heard nothing to shake our former opinion that the District Court was entitled to determine for itself the question whether the inquiry or the casualty was due to the appellant's misconduct or negligence. A number of other arguments were addressed to us, but they are all contained in the proposition that the District Court should have acquitted the appellant of personal misconduct or negligence in connection with the wreck of the s.s. *Karitane* on Deal Island in Bass Straits. We agree, however, with the conclusion of the learned Judge of the District Court. The matter was, in some of its aspects, merely a question of fact, and depended largely upon the credibility of the witnesses called before the District Court. In such circumstances, the usual practice of this Court is to accept the finding of the Court below, and we should have been content to do so on this occasion. But in deference to the contrary opinion of our brother *Isaacs*, and to the argument, we shall shortly state the reasons which lead us to think that the finding of the Judge of the District Court was reasonable and proper.

(1) (1907) 1 K.B., 834. (2) (1881) 6 P.D., 182.
(3) (1923) 32 C.L.R., 138.

According to the evidence, the appellant, who was the master of the s.s. *Karitane*, fixed his position off Pyramid Rock in Bass Straits at about 5.30 o'clock in the morning, and then set a course which, if all went well, would take his ship past Deal Island, which was about eighteen miles away, with an offing of five or six miles. Deal Island, it should be observed, is a small island in Bass Straits about two miles long, and 1,000 or 1,100 feet high, with a lighthouse upon it. When, however, the ship had run eighteen miles by the log, the officer on the bridge reported in writing to the appellant that Deal Island should be abeam but that he had not seen it on account of a very heavy fog. As a matter of fact, the appellant, before he received this report, heard, while resting in his cabin, the ship's "siren going," which indicated fog. He minuted the report O.K., which means "all right," but he also sent a verbal message to the officer on the bridge to carry on. At the time this order was given, the ship was at her full speed, some ten knots an hour, and she continued on her course at that speed. The appellant himself proceeded to the bridge within ten minutes after the receipt of his officer's report, but, before he reached it, the ship's engines were suddenly reversed, and, apparently before he gained the bridge, the ship had struck the island with great force, and she was totally lost. The learned Judge found that the ship was set on to the island by a westerly set, which could not reasonably have been anticipated by the appellant. But, even if he could not have anticipated the set, ought a prudent seaman, in the circumstances of the case, to have acted as if his position were definitely fixed and secure at the time of the officer's report? The Admiralty Chart, which is in evidence, shows that the ship was in the vicinity of islands and in a locality affected by currents. A dense fog had come on, and land, which should have been in sight, could not be seen. A seaman could not, in these circumstances, be sure of his position; for involved were the possibilities of error in the course set, and in the steering, and, in fact, all the grave risks attendant upon fog at sea. And it is not unimportant to observe that in earlier orders the appellant directed his officers, when Deal Island was abeam, to reset the log and steer another course. Under these conditions, no prudent seaman would, in our opinion, have driven

H. C. OF A. 1923.

SPAIN v. UNION STEAMSHIP CO. OF NEW ZEALAND LTD.

Knox C.J. Starke J.

his ship at full speed: on the contrary, he would have moderated his speed, or perhaps stopped.

The decision given by the Court of Marine Inquiry in its investigation into the loss of the s.s. *Karitane*, was relied upon as prima facie evidence of the facts and opinions therein set forth. And it was claimed that the finding of that Court exonerated the appellant from all blame in connection with the loss of the ship. Assuming that the decision is receivable in evidence upon the principle referred to in *Sturla* v. *Freccia* (1)—which must be read with *Bird* v. *Keep* (2); *Barnett* v. *Cohen* (3); *McAllum* v. *Reid* (4)—and is favourable to the appellant, still it is only put for the purpose of this argument as an evidentiary fact, and we prefer the finding of the District Court to that contained in the decision of the Marine Court. Moreover, we are by no means satisfied that the finding of the Court of Marine Inquiry goes the length suggested by the appellant. The statement that the Court does not consider that the master or the first mate was guilty of negligence relates, grammatically, in our opinion, to the omission to take a check bearing at Pyramid Rock. So the effect of the decision turns upon the finding that the stranding of the ship was caused by her " being taken out of her course by an unusual westerly set which could not have been anticipated by the master." This does not explicitly exonerate the master from blame in relation to his order to carry on when he was abreast of Deal Island, on the distance run according to the log, and in a dense fog. But in any case we do not rely upon the point, for we are satisfied that the finding of the District Court was right and proper in the circumstances of the case.

But we are told that the loss of the ship was not the consequence of the appellant's negligent conduct—that she might have gone ashore in any case. The argument is best answered in the words of Tindal C.J., in *Davis* v. *Garrett* (5), " that no wrongdoer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the

(1) (1880) 5 App. Cas., 623.
(2) (1918) 2 K.B., 692.
(3) (1921) 2 K.B., 461.
(4) (1869) L.R., 3 A. & E., 57, n. 3.
(5) (1830) 6 Bing., 716, at p. 724.

action the bare possibility of a loss, if his wrongful act had never been done." "It might admit," as *Tindal* C.J. added, "of a different construction if he could show, not only that the same loss *might* have happened, but that it *must* have happened if the act complained of had not been done; but there is no evidence to that extent in the present case."

A further argument was that the decision of the Court of Marine Inquiry estopped the appellant from contending contrary to its findings, and conclusively established, in all Courts, and before all tribunals, the cause of the loss of the s.s. *Karitane*. The decision was compared to judgments *in rem* and as to status, and to judgments *inter partes*. We cannot adopt this view. The Court of Marine Inquiry is mainly, as its name suggests, one of investigation and inquiry, though it has also powers of cancelling and suspending certificates of masters and other officers, and also of detaining unsafe ships. Its decisions, apart from its orders cancelling or suspending certificates, or detaining ships, &c., are really reports upon shipping casualities. They are not judgments, either *in rem* or *in personam*. And so far as the decision was compared to a judgment *inter partes*, we need only say that there was no issue whatever between the appellant and the respondent in the proceedings before the Court of Marine Inquiry: there was no controversy between them. All that can be truly said is that both were present at a public inquiry as to the wreck of the s.s. *Karitane*. Moreover, as already stated, we are not satisfied that the finding of the Court of Marine Inquiry does wholly exonerate the appellant in connection with the loss of the ship.

The appeal ought to be dismissed.

ISAACS AND RICH JJ. Several questions of first-rate importance emerge from the attempt by an employee to put into force a provision for definitely settling and simplifying industrial relations between him and his employer as to expenses he has incurred. Those questions extend to some fundamental principles of the law of negligence, and the duty of masters of ships at sea, and they include the interpretation and application of a Federal award affecting large bodies of important officers and the interest of the great body of Commonwealth ship-owners. In logical order the first matter to be considered is the interpretation and effect of the arbitral provision immediately in

H. C. OF A. 1923.

SPAIN v. UNION STEAMSHIP CO. OF NEW ZEALAND LTD.

Isaacs J. Rich J.

point. As to this the real question this Court is for the second time asked to determine, is whether par. 8 (a) of the award between the Merchant Service Guild and the Commonwealth Steamship Owners' Association is intended to be a substantial workable provision for expenses, or whether it is intended to be merely a provision so hedged round with litigious barriers as to be, either from a public or a private standpoint, worse than useless. The present case is appalling, whoever is right and whoever is wrong. But for the painful evidence to the contrary, it might be said to be incredible. The officer's whole claim for expenses was originally £63 18s. and is now £57 15s., an amount which it is agreed is reasonable. But, besides the Marine Court inquiry at which these expenses were incurred, the officer, in order to ascertain what was meant by a provision in an award intended definitely to clear up all disputes between him and his employers, has had to fight two hearings in the District Court and two appeals in this Court. Even if the appellant succeeded, it would be but a Pyrrhic victory for him, and only now, it seems, is he to be definitely informed what advantages at best par. 8 (a) of the award confers on any officer in his position. Probably this decision means that for all practical purposes the provision, so fair on its face, is essentially a dead letter. It stands to reason that no officer can afford, besides running the gauntlet of a Marine Court inquiry, even though he succeeds before that expert tribunal in preserving his means of livelihood and reputation, again to face the risk of an adverse judgment by another tribunal or series of tribunals, less competent for the purpose of nautical problems, together with the attendant loss of time and expenditure of money, the probable disappearance of evidence, and always pitted against a powerful antagonist.

In our opinion the appellant should succeed. We think so on two grounds: first, because the Marine Court in its formal inquiry expressly found him free from negligence, and that the casualty happened from a cause inconsistent with any negligence on his part; and, next, because, on the material now before this Court, he is entitled to a similar decision. We deal with each of these grounds separately:—

(1) *Marine Court Decision.*—Under Imperial authority (sec. 478 of the *Merchant Shipping Act* 1894) and under the New South Wales *Navigation Act* 1901, a Court was specially constituted in January

1922, nearly two years ago, to hold a statutory formal inquiry into "the circumstances attending the stranding and subsequent beaching of the British ship *Karitane*." Such an inquiry necessarily involves the consideration of the conduct of the captain. We are altogether at a loss to understand the view which, it is astonishing to state, occupied hours to discuss, that such an inquiry is independent of the conduct of the officer in charge of the vessel, and that whether the captain's negligence was the cause of the disaster is a separate and independent subject of investigation. The Court, which by statute is a Court of Record, consisted of Judge *Cohen* (a District Court Judge) assisted by two master mariners, Captains Reid and Wood. The presence of these captains was necessary, because sec. 24 (2) provides that "where an inquiry involves or appears likely to involve any question as to the cancelling or suspension of the certificate of a master, mate, or engineer, the Court shall hold the inquiry with the assistance of not less than two assessors having experience in the merchant service." That is to say, as we understand it, although the captain's conduct is always and necessarily a matter for consideration, his punishment by cancelling or suspending his certificate may not be; but where that also is, or appears likely to be, involved the Court must be constituted in a particular way. Complete exoneration of the officers may take place without assessors; deprivation or suspension of certificate cannot. Whether any procedural formalities are necessary or not we do not stop to discuss, because the Court is the same, the inquiry is the same, the decision to cancel or not to cancel or suspend or not to suspend is all in the same proceeding (see *The Kestrel* (1)). It seems like burning daylight to demonstrate so plain a matter, notwithstanding the argumentative efforts to convince us to the contrary. We therefore leave the matter to its own simplicity.

By sec. 26 of the *Navigation Act*, rules may be made to regulate the practice and procedure of the Marine Court, and "such rules shall have the same force and effect as if they had formed a part of this Act." Rule 8, relating to parties, is as follows: "Any other person" (that is, other than the persons mentioned in rule 7) "upon whom a notice of inquiry has been served, and any person who shows that he has an interest in the inquiry shall have a right to appear,

(1) (1881) 6 P.D., 182.

H. C. OF A. 1923.

SPAIN v. UNION STEAMSHIP CO. OF NEW ZEALAND LTD.

Isaacs J. Rich J.

and any other person may, by leave of the Court, appear; and any person who appears under this rule shall thereupon become a party to the proceedings." The Court has the same power, by its "decision," of cancelling and suspending as an English Court has in Great Britain (sec. 27 (4)). The respondent Company appeared, and was therefore a party. The inquiry occupied three days, and included an inquiry into the conduct of the appellant. Among other findings of the Court were these:—"The Court finds that such stranding was caused by *the Karitane being taken out of her course by an unusual westerly set which could not have been anticipated by the master*. The Court is of the opinion that a check should have been made of the distance of the ship off Pyramid Rock; *but does not consider that either the master or the first mate was guilty of negligence*." One would suppose these words plain enough. On their face they amount to the ordinary mind to a finding that the *cause* of the stranding was a westerly set which the master could not have anticipated, and, as the exclusive reference of the casualty to that cause carries a necessary implication that the master was not responsible in any way, because he could not be supposed to do anything to counteract it, it appears hardly possible to imagine that the Marine Court meant to leave untouched the central question of his responsibility by reason of negligence.

To show, however, that the Court left absolutely nothing unconsidered, they proceeded to add the final sentence which definitely shows that, even where the master could possibly have acted, namely, in checking the mate's bearings, the Court exonerated Captain Spain from any negligence. Again, we have to express our surprise that public time should have been so long occupied in discussing whether the Court's findings did or did not amount to a complete exoneration of the captain. Unless we are to attribute to that tribunal either the incapacity to understand its obvious duty or the most marvellous facility for concealing its conclusions, the plain English words in which it clothes its findings admit, in our opinion, of no doubt whatever. The express finding, adapting the words of Lord *Chelmsford* in the case of *Dryden* v. *Allix*; *The Moderation* (1), "serves to dispose of the objection of" the Marine Court "not having decided the

(1) (1863) 1 Moo. P.C.C. (N.S.), 528, at p. 536.

question of " the master's negligence, " because it necessarily involves an opinion upon the point."

It was said that what the *Navigation Act* calls the " decision " of the Court is only a " report," and has no finality. But that is an error. For the purposes of the statute, operating either by its own force or by the force of the Imperial *Merchant Shipping Act* 1894 (see sec. 478, sub-sec. 3), the report is final as a " decision " except, so far as it is superseded; as, for instance, under sec. 29, where a rehearing is ordered, or under sec. 478, sub-sec. 6, of the Imperial Act. The report, whatever it is, whether a simple exoneration of the officers, or a censure of the officers without more or an adverse finding followed by punishment, must be and is of the same statutory effect. In other words, whether the Court thinks an officer's conduct so obviously right as not to be fairly susceptible of blame and says so at once, or whether it thinks his conduct may or may not be deserving of punishment and calls on him to show cause—if he has not already had that opportunity—it cannot make any difference to the legal value of the decision. It may be conceded, so far as this case is concerned, that the purposes of the statute do not relate to entirely outside proceedings, such as actions by third persons for damages.

But, even conceding that for present purposes it is *nihil ad rem*, the present question is entirely within the purposes of the Act. The arbitral provision links the officer's " misconduct or negligence " with the statutory " inquiry " and not with any outside proceeding. It looks to the statute—which in every State in Australia operates in that connection. Therefore, where, as here, the conduct of the master is expressly made a special subject of consideration by the Marine Court (sec. 24 (2) and sec. 27 (1), (4)), it does not seem to us open to serious doubt that " misconduct " or " negligence," so far as it is relevant to and linked with an inquiry as to a " casualty " or a " charge of misconduct," is determined statutorily once and for all by the decision of the Marine Court. The finding must expressly or impliedly include a decision on that matter, and, if the Court has not proceeded so far as to suspend or cancel the certificate, it must be either because the inquiry neither " involves or appears likely to involve " such a course or, if at first it " appears likely," it turns out not to involve so severe a step. We may, therefore, put aside as irrelevant

H. C. OF A. 1923.

SPAIN v. UNION STEAMSHIP CO. OF NEW ZEALAND LTD.

Isaacs J. Rich J.

all such outside cases as those advanced in argument (such as coroners' inquests, actions for loss of cargo, and so on), and confine ourselves to the true import of the arbitral provision looking directly and expressly to the Navigation Statutes of Australia. So far therefore as clause 8 (a) of the award is concerned, where an inquiry into a casualty takes place all that is material in the way of relevancy is the relevancy of the " misconduct or negligence " to the " inquiry." We therefore adhere to the opinion we expressed on the former argument (1). This means that, in our opinion, without going further, the disentitling condition in clause 8 (a) beginning " unless " &c. has not been established, and cannot be established by the respondent, because the very contrary has been established by production of the finding of the Marine Court, and consequently the appeal should be allowed and judgment entered for the appellant for the amount of £57 15s.

We are strongly supported in the view we have taken by the judgment of our brother *Higgins* on the last occasion—about seven months ago—when this case occupied our attention. Our learned brother there said (2): " it was probably within the competency of the Court of Marine Inquiry to include a finding as to conduct." If that be right (and we admit it is right), it appears to us decisive as to the intention of clause 8 (a) of the award. That clause does not *expressly* require unlimited litigation; and, if not, why should that be implied as being the intention of the framer of the clause when the Court of Marine Inquiry includes, as here, a finding as to the officer's conduct? This, we think, is sufficient to dispose of the case; and personally we would not pursue the matter further. The majority of the Court, however, being of the opposite opinion, it becomes necessary to consider the facts for ourselves, including whatever scientific aid is afforded by the experts called by the parties to support their respective contentions.

(2) *Misconduct or Negligence.*—Whether Captain Spain was guilty of misconduct or negligence causing the loss of the ship, and so leading to the inquiry, depends on considerations both of law and fact. What has to be assiduously guarded against is that *ex post facto* wisdom which renders the task of condemnation so simple. To show how easily the actual result might have been avoided, if only some

(1) (1923) 32 C.L.R., at pp. 152-154. (2) (1923) 32 C.L.R., at p. 157.

different course—it may be one among many possibilities—had been adopted, is a familiar method of criticism. Judge *Scholes* felt the necessity of adverting to the strain of this dangerous tendency. He says: "I have endeavoured to so regulate my mind as to prevent myself from reasoning that there was negligence because there was a casualty, rather than that there was a casualty because there was negligence." There cannot be any doubt that his Honor did so endeavour, and believed he had succeeded; but there is the strongest evidence in his judgment, when applied to the evidence, that in this he failed. The matter requires the clearest analysis, because on this branch of the case the task is to reconstruct the position as it existed during ten minutes or less beginning at about 7.25 a.m. on 24th December 1921, on board the *Karitane*, and then to determine whether Captain Spain, in that period of time, by any negligence, that is, by any neglect of duty which the law required of him, caused the stranding of the vessel. As a matter of law, "the liability for an omission to do something depends entirely on *the extent to which a duty is imposed to cause that thing to be done*" (per *Blackburn* J. in *Mersey Docks Trustees* v. *Gibbs* (1)). In *Butler* v. *Fife Coal Co.* (2) Lord *Kinnnear* says:—"Negligence is not a ground of liability, unless the person whose conduct is impeached is under a duty of taking care; *and whether there is such a duty* in particular circumstances, *and how far it goes*, are questions of law. . . . But a finding as to negligence, which implies the existence of a duty without explicitly defining it, is a proposition of mixed fact and law." We may add that a finding of negligence for not doing a certain thing implies, therefore, that in the circumstances that is a thing which *the law required to be done*. What did the law require of the appellant in the circumstances; in other words, what is the legal standard of his duty? The legal standard of the captain's duty was that he should take whatever precautions a hypothetical prudent and skilled navigator would reasonably be expected to take in the actual circumstances.

But at this point it is essential to observe, because this is the crux of the whole case, that the law, apart from some specific absolute command, does not expect any person to take precautions against events which no one would reasonably anticipate. We may say, in

(1) (1866) L.R. 1 H.L., 93, at p. 115.

(2) (1912) A.C., 149, at. p 159.

H. C. OF A. 1923.

SPAIN v. UNION STEAMSHIP CO. OF NEW ZEALAND LTD.

Isaacs J. Rich J.

view of some part of the discussion, that we use the word "anticipate" in that one of its many significations which indicates taking into consideration before evidence of actual existence is presented. It is as if a man were to say "I do not anticipate any difficulty in getting through safely." The difficulty may have long existed; but the question is whether he ought reasonably to "anticipate" it before acting. That is manifestly the sense in which the Marine Board used the word.

The absence of a finding—express or implied—that the effective cause of injury was one which should reasonably have been anticipated, or, in other words, taken into consideration, as a factor to be guarded against, is fatal to any case founded upon negligence causing damage (*Rickards* v. *Lothian* (1) and the cases there cited, notably *Nichols* v. *Marsland* (2) as interpreted by the Judicial Committee). Even as to the express collision regulations, Lord *Herschell* in *Baker* v. *The Theodore H. Rand* (3), in quoting approvingly from *The Beryl* (4), expressed the same principle when he said:—"*You cannot regulate the conduct of people as to unknown circumstances.* When you instruct people, you instruct them as to what they ought to do under *circumstances which are, or ought to be, before them.*"

The relevant substantial law of this case, then, is as stated; and it remains to ascertain how the facts respond to the test. At the crucial moment just after 7.25 a.m. on the morning of 24th December 1921, the *Karitane* was in fact conjecturally somewhere about a mile or a mile and a half east of the southern portion of Deal Island, in or near the usual channel traversed by steam vessels going from Devonport in Tasmania to Sydney in New South Wales. A heavy fog concealed Deal Island from those on board the vessel, which was then under charge of the first officer, travelling at what we shall assume to be her full speed, namely, ten knots an hour. The learned District Court Judge has held that in the circumstances it was the captain's duty at that moment "to proceed at once to the bridge and take charge and thereupon to have eased his ship or slowed down to the limit of speed at which he could keep command of his vessel and turned his ship round." That conclusion, which, as Lord *Kinnear* says, is a mixed question of law and fact, is based on

(1) (1913) A.C., 263, at p. 274; 16 C.L.R., 387, at p. 395.
(2) (1876) 2 Ex. D., 1.
(3) (1887) 12 App. Cas., 247, at p. 250.
(4) (1884) 9 P.D., at p. 138.

certain inferences of the learned Judge, the accuracy of which is of course necessary to support it. If those inferences are shown to be unsound, the conclusion as to negligence necessarily fails. The learned District Court Judge, having found the negligence, proceeded to find the other essential to the appellant's liability, namely, the causal connection between the negligence and the injury that happened. As to this he very candidly says :—" Now, if the vessel had been going as slow as allowable when land was sighted, and the engines had then been reversed, *would the casualty have been prevented?* This depends so entirely on the distance between the vessel and the land, which is unascertainable, that I am unable to say with any degree of *satisfaction or certainty. I can only surmise*—I do not know." So that his Honor, first perceiving that the causality depended entirely on distance, and then feeling unsatisfied about the distance, which remains mere *surmise* in his mind—in other terms, mere conjecture,—proceeds to erect on it a very solid structure of culpability. This in itself seems opposed to the ordinary rule that the party having the burden of proof must discharge it to the satisfaction of the tribunal. The learned Judge gives reasons, which will be examined later; but the broad result of them is that there was one " obviously safe and careful thing " which if done would have rendered the stranding impossible, namely, slowing the vessel and turning her round so as to retrace her steps. That not having been done, says the learned Judge, causality is established, and the appellant fails.

Our first duty is, of course, to see whether, on recognized principles applicable to appeals, this judgment can stand. The two distinct findings of (a) negligence and (b) causality, must be separately considered. Before doing so, we desire to point out that there have been several sources of error in arriving at the result. (1) Witnesses were asked to state, not the circumstances and considerations which a prudent captain would take into account, but their own opinion of the captain's " duty "—which was a matter not for them but for the Court. They spoke as judges not as witnesses. Captain Spain's " duty " must be declared entirely according to the Court's view of the circumstances which were either known to or ought to have been anticipated, and therefore guarded against as sources of danger. (2) Among the group of facts narrated by learned counsel for the

H. C. OF A. 1923.

SPAIN v. UNION STEAMSHIP CO. OF NEW ZEALAND LTD.

Isaacs J. Rich J.

Company as the complete set of circumstances upon which the witnesses were to pronounce their opinion of the captain's "duty," no mention was made of the new order given at 5.25 a.m. on the 24th *to reset the log on sighting Deal Island abeam.* This is a feature of prime importance when weighing the testimony or the finding as to the message being an "emergency" message. (3) The Court gave no consideration to the effect of the inability of the captain to anticipate a westerly set, which is established as being then a *constantly operating* and *the dominating factor* of the situation. That is to say, the Court found (a) that the "westerly set" had been the efficient cause of taking the vessel out of her intended course, and also found (so as to produce no inconsistency) (b) that "the compass would tell him which way his vessel had come" and "which course his ship had come"—there being therefore no fault in compass or steering—and also (c) that no evil had resulted from not checking the bearing at Pyramid Rock. Nevertheless, the Court left out of, at all events, visible consideration, the effect on the absolute direction the vessel was forced into notwithstanding what we may call internal indications, and therefore the effect on the captain's duty of the utterly unexpected and incalculable natural phenomenon to which the disaster was owing. (4) The Court in generalizing as to "turning round" omitted to observe the complexities of the operation, the natural features of the surrounding sea, and the inconsistencies of the assumption on which such a generalization is based. These observations will be more clearly apprehended when each branch is separately considered.

As to misconduct and negligence, the key of the position in the mind of the learned Judge, and as presented by the respondent, is that just after 7.25 a.m. on the 24th, when the captain received the mate's message, he must have known this was an emergency message, and should have immediately hastened to the bridge to take command. Says his Honor:—"He had on the previous night given the mate an instruction in statement 4 how to proceed on reaching Deal Island. If all was right, the mate need not have reported to him. The message in statement 7 must have indicated to the master that he (the mate) was in doubt that all was not well. I feel here the plaintiff showed personal carelessness and inattention to his duty. . . . The plaintiff's conduct *at that time* and under the circumstances, in

directing the first mate to proceed at full speed ahead and remaining below for ten minutes without pressing necessity (so far as he showed) was altogether too casual and careless in my opinion, and he was, I think, guilty of personal misconduct or negligence, or both." *The whole of the "misconduct or negligence or both" is concentrated into those ten minutes.* When the defendant's evidence is examined the time is still less. But the whole of the learned Judge's *reason* for concluding that the captain's conduct during those ten minutes was of that blameworthy character, is that the mate's message indicated a sense of some previously unexpected danger. We say "previously unexpected" because up to that moment the learned Judge, in unison with the Marine Court, finds that the effective cause of the vessel's actual deviation from the projected course was "*a westerly set which could not have been anticipated by the master*," and that "*up to* 7.25 *there was no misconduct or negligence on his part.*" So that the whole case, in the opinion of *Scholes* D.C.J., primarily hinges on the indication of some previously unexpected danger, conveyed by the mate's message to the captain, leaving nothing but causality of injury to be considered. And the foundation on which that supposed indication is built is the supposed interrelation of the message with statement 4. This was not a momentary slip. His Honor formed and expressed that opinion on that basis during the progress of the case. Now, it is just at this point that, with great respect, the learned Judge has radically erred. He overlooked the connection and effect of an all-important circumstance. *The mate's message had nothing whatever to do with the instruction in statement* 4 *with respect to Deal Island.* Statement 4 refers to a paragraph in his Honor's summary of facts, and consists of the night order given at 8 p.m. on the 23rd. This instruction had been exhausted and superseded at 5.25 in the morning of the 24th. The captain, the night being foggy, had come up, had taken charge, had himself seen Pyramid Rock, had watched the mate take one bearing, and having gone to the chart-room had been told by the mate that he had taken another bearing from Pyramid Rock towards Deal Island. He had also roughly verified the bearing by his observation, but had not mechanically checked it. His mate held a master's certificate, and the captain had full confidence in him. In any event, so far from there being any evidence throwing doubt on the bearing, neither the Marine Court nor Judge

H. C. OF A. 1923.

SPAIN v. UNION STEAMSHIP CO. OF NEW ZEALAND LTD.

Isaacs J. Rich J.

Scholes could find any fault with it. Both Courts treated it as correct, and Judge *Scholes* considers that, in view of his own finding as to the westerly set, the bearing taken at Pyramid Rock was too remote to enter into any consideration of the cause of the casualty. In addition, his Honor expressly finds that up to 7.25 there is "no evidence of wilful misconduct or negligence on his part." But the point for the moment is that after the bearing had been taken a new steering course was given by the captain. The course in the night order referred to by Judge *Scholes* was N. by E.¾E. from Pyramid Rock to pass Deal Island five miles off. Before leaving the bridge at 5.45 where he had been from about three in the morning, Captain Spain set a new steering course, namely, NE. by N.½N. This was more easterly and would pass to the east of Deal Island about six miles. The full order was:—"*Steer NE. by N.½N.* If you see Deal Island Lighthouse *reset the log when it is abeam*; and steer N34°E." From 5.45 to 7.25 this morning order, and not the previous night order, was the source of the mate's instructions. It is not a little singular that there should have been omitted all notice of this important fact. It places an entirely different complexion on the whole situation. The simple explanation is that the mate, being under orders to reset the log and take a new steering course, namely, "N34°E." after sighting Deal Island abeam, could not, when he had run *his* eighteen *miles*—that is, the distance from Pyramid Rock to Deal Island *on the intended course*—carry out his actual instructions nor could he after finishing the eighteen miles proceed without getting fresh instructions. And all that his message could reasonably convey to the captain was that he, not being able to see Deal Island on account of fog, desired instructions as to the course to be thenceforth taken. Not a word about urgency or confusion or fear or anxiety or any sense of unexpected peril. It was just such a message as a mate feeling no doubt as to his being on the true course, and believing himself to have reached the right point in that course, but unable to say he could, as directed, "see Deal Island," would have sent as an application for fresh and for explicit instructions. This is confirmed negatively by the fact that the mate, on receiving the captain's reply "O.K. Carry on," gave no sign of apprehended danger or of any misunderstanding. There being nothing in the message to spell alarm or indicate any suggestion of doubt as to

course, why should the captain's reply and his delay during the fateful ten minutes (or rather for such part of it as he was responsible for) be regarded as misconduct or negligence ?

The collision regulations do not apply here (see *The Normandy* (1), *The Upcerne* (2), *Reischer* v. *Borwick* (3) and *Chandler* v. *Blogg* (4)). But even where they do apply, there is no absolute rule to stop in fog. It is well established that the duty depends on circumstances including the nature of the locality and the probability of meeting other vessels, and, again, the ability to keep command of the vessel. It may even be negligence to stand still in the way. There had been fog during the night and for hours. The *Karitane* had passed another vessel, doing probably eight or nine knots, going in the same direction. She was behind the *Karitane*—how far behind it is not known, but, as her speed was not far short of that of the *Karitane*, she probably was not far behind, at all events not so far behind as to be negligible in the retrograde movement suggested by the defendant's witnesses. They appear to have given no consideration to this possibility. Captain Spink's evidence may be thus summarized for what it is worth :—The captain on getting the message, which did not indicate that the mate felt in danger, should have gone dead slow for five or six minutes and used the leadline ; and, if he got no indication, should have turned back. But if he found, as he would have found, a depth of thirty fathoms, he would have felt perfectly safe, and if he believed himself clear, he would be justified in going full speed ahead. But Captain Spinks drew attention to a very important feature that seems to have escaped the attention of the learned District Court Judge. Its only importance is to test the value of the suggestion as to turning round. That feature is just that eastward—and about ten or eleven miles eastward of the point in the projected course, where the eighteen mile run ended—is *Wright's Rock*. Captain Spink at first thought a course allowing six miles distance from Deal Island would be as he said " mighty close to Wright's Rock." On measurement he allowed it to be about or a little over ten miles, and that the course was safe if the departure was right. The importance of Wright's Rock will be more apparent presently when the diagram is looked at. The evidence of Captain

(1) (1904) P., 187, at p. 201.
(2) (1912) P., 160.
(3) (1894) 2 Q.B., 548, at p. 552.
(4) (1898) 1 Q.B., 32.

H. C. OF A. 1923.

SPAIN v. UNION STEAMSHIP CO. OF NEW ZEALAND LTD.

Isaacs J. Rich J.

Hay, who has not been to sea for twenty-two years, similarly summarized is, to begin with, that the captain should have gone on deck at once, and either slowed down *or* gone back slow in the other direction (*note the alternative*); that the mate's message, because the engines were at "stand by," showed he was "anxious," but admits that that is merely usual in fog; that if the ship had been ten miles from land instead of six—which means necessarily if it had been *thought* to be ten miles instead of six—full speed ahead would not have been improper. He says: "Captain Spain should have used a Thompson sounding machine," and he declines to withdraw when he learns there was no such instrument on board. He admits that the mate's message was a routine message, and, most of all, he admits that *the fog alone was a sufficient reason for inability to sight Deal Island.* He sees no indication in the message that the mate thought he was safe; but he does not say, and could not consistently with his other evidence have said, that there were any indications to the contrary—except the "stand by" of the engines. "Stand by" is not, as explained, an indication of present danger, but a preparation in case danger should present itself. He admits also that there was no occasion for the master to interfere unless the mate sent for him or informed him of unusual circumstances. Captain Howell, who has never been through the channel between Pyramid Rock and Deal Island, says, primarily it was the captain's duty *to stop the ship.* There he differs from the other two witnesses. Then he says soundings should have been taken, and, "if they gave *no indications*," he continues, "it *seems to me* I should turn back." But what if the soundings indicated thirty fathoms, that is, safety? He admits the danger of slowing down where there is a current, and that the ship would be set twice as far going five knots as she would if going ten. There can be no doubt that without turning back, slowing down or stopping would have been the most dangerous thing to do. These are the witnesses on whose testimony the learned Judge founded his conclusions. It is not unimportant to notice that not merely none of the nautical assessors, but not one of the witnesses, even after nearly two years' opportunity for reflection and examination, suggests anything with respects to currents in the neighbourhood.

We do not think the burden has been sustained of indicating any

such clear line of conduct as can be accepted as the duty of the captain in the circumstances the omission to follow which was legally a breach of duty. The superstructure of "negligence or misconduct or both," starting with 7.25 on 24th December, must necessarily disappear with the foundation on which it was built. It is consequently incumbent on us to consider those matters afresh, starting from the point decisively established that the westerly set, a phenomenon which the typical prudent mariner would not anticipate, had been *the* cause of the actual position of the vessel out of the intended course, *and was still operating.* Before indicating what we conceive to be not merely the balance of probability but the overwhelming weight of probability, it is as well to resume the remaining verbal testimony. Captain Hayman's evidence, when read as a whole, is in effect that he would not have regarded the mate's message as an indication of danger, and, notwithstanding some answers not altogether easy to reconcile if read separately, he says in substance that, if he believed himself (which we understand to mean if he reasonably believed himself) to be six miles off Deal Island, he would have carried on at full speed until he got out of narrow waters. His views are tersely summed up by the learned Judge, referring to the suggestions of the three previous witnesses, in these words:—"He says: 'I would have carried on and would not have done these things.'" The appellant himself, who had held a master's certificate for twelve or thirteen years, had always been in charge in Australian waters. He proves that he had no doubt, from his previous experience and from the operations of this voyage, that he was still on the course he had set, that it was a safe course, and that at the moment of the message he was six miles east of Deal Island. He had, besides ten years' knowledge of the channel off and on as first and second officer, been in command five or six years travelling that channel once a fortnight—that is, he had passed through (say) 140 times, and had no reason to apprehend any westerly set or anything else to cause a deviation from his course. He says that he did not understand the mate's message as conveying any sense of danger or urgency, and that he believed it to be perfectly safe to go ahead at full speed until he came up, which he at once prepared to do. He intended to stay a long time on the bridge, and his visit to the lavatory was to enable him to do so. He also says that the westerly set was only

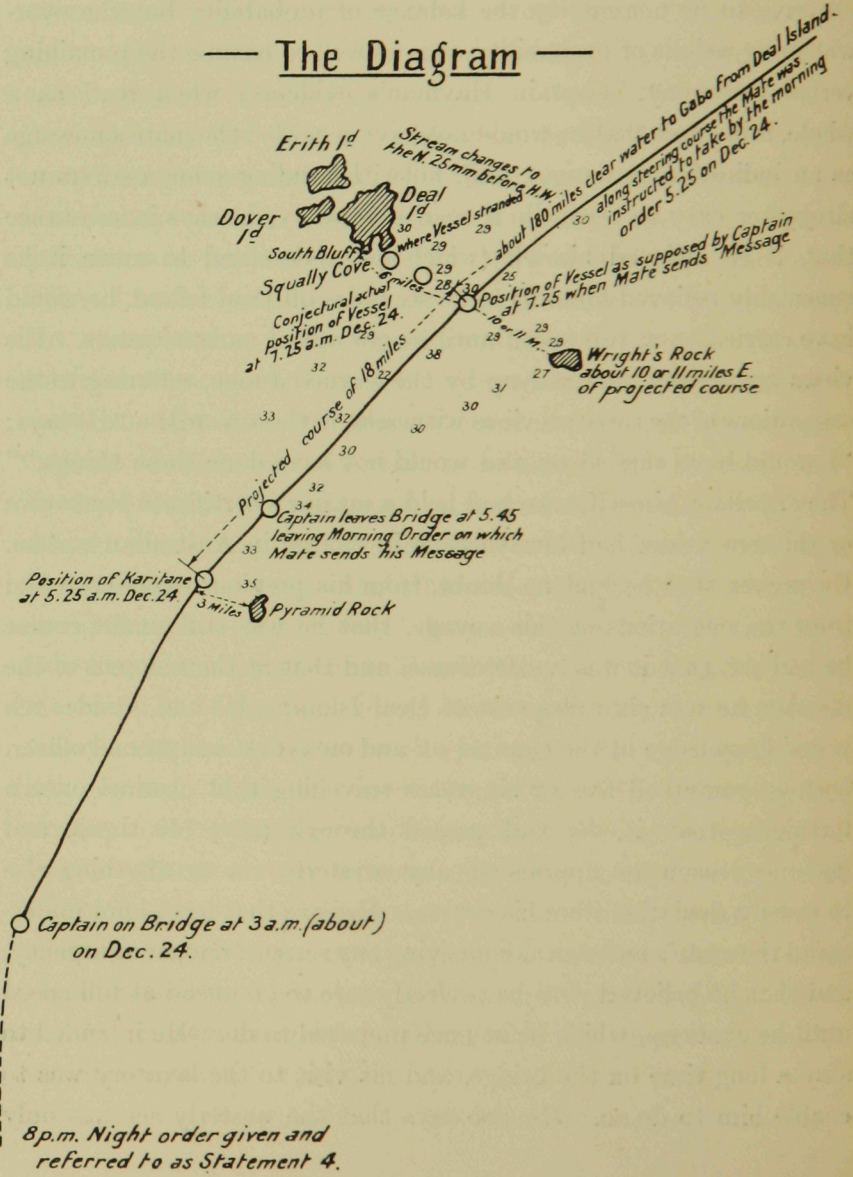
H. C. OF A. 1923.

SPAIN v. UNION STEAMSHIP CO. OF NEW ZEALAND LTD.

Isaacs J. Rich J.

discovered by him when in the ship's boat as he went away from the vessel. There was about 180 miles clear water from Deal Island to Gabo. He says, admitting the suggestion put to him in cross-examination, that he could steer as easily in fog as in clear weather, relying on the compass. He states that fog often hangs round Deal Island. He adds that the *Karitane*, a vessel of 847 tons register and 1376 gross tonnage, struck end on slightly on the port bow.

That is the evidence. Its true effect cannot be properly measured without a diagram showing the position of the ship at the critical moment.



Placing oneself in the position of the captain, one of two things must be predicated: either (1) he was justified in believing, however erroneously, that he was in the correct course and, therefore, in no danger whatever of striking either Deal Island on the one side or Wright's Rock on the other, or (2) he was bound, for some unimaginable cause, to contemplate the *possibility* of being off the course, either East or West, and perhaps in another latitude as well as longitude and for an indefinite distance. On the first hypothesis, which is the one he actually assumed, full speed ahead, where no ships could be reasonably anticipated, was not either necessarily or naturally attended with any injurious consequences to the vessel or any other vessel, because Deal Island, about two miles long, could be passed in about twelve minutes, with a radius of visibility which Judge *Scholes* thinks was about 600 yards and the Marine Court thought was about one mile, and there were 180 miles of open water to Gabo from the Island. Certainly the course adopted could not, on the hypothesis mentioned, be rationally considered as subject to any risks from Deal Island. But on the second hypothesis what course of conduct by the captain is suggested by the evidence to omit which was misconduct or negligence? On this hypothesis, he would have had to remember he might be close up to Deal Island on the one side, perhaps East, perhaps South, of that Island, for he could not accurately measure the range of visibility; or he might be close up to Wright's Rock, either West or South of it; or he might be anywhere within a circle of considerable circumference. He would have to bear in mind, on this hypothesis, that *the unknown and unimaginable cause that had occasioned the deviation was operating to deceive him as to any course he took*. His compass and his steering could no longer *ex hypothesi* be depended on, and this unknown cause might, and probably would, vitiate any attempt to go in whatever compass direction he chose. He had previously thought he was going NE. Well, if that was wrong; if (say) he had been going—as he must have been in fact—towards the W. or NW. when his bow was pointed NE., what reliance could he place on any course he determined on? Suppose he adopted Captain Spink's notion and went dead slow for five or six minutes (laying aside the further suggestion that while moving he used a lead-line that he did not have), what would have been the inevitable

H. C. OF A. 1923.

SPAIN v. UNION STEAMSHIP CO. OF NEW ZEALAND LTD.

Isaacs J. Rich J.

result ? It is admitted by Captain Howell that the current would have had more effect upon the vessel, twice as much when going five knots as at ten knots, and presumably much more when going dead slow. In the suggested five or six minutes, the ship would have drifted at least as far as she actually reached, which was within two minutes of grounding. But suppose he tried to turn back on the course he had come or thought he had come, the assumption of an unknown cause operating in an unascertainable manner would have left the captain in utter inability to rely on any attempt to retrace his steps. Which way should he turn with safety—to port or to starboard—to avoid Wright's Rock or Deal Island, or some indeterminate portion of either ? How could he tell he was going South-West ? In fact he would not have been. But if he had been, he would have been much more likely to have encountered the ship he had passed in the night than to occasion danger by going forward. Suppose we consider Captain Howell's suggestion to stop the ship and take soundings. He would have found thirty fathoms, and presumably safety. But he would have set westward rapidly and *not have known it*. Turning round—another suggestion of Captain Howell's—also overlooks, as we have said, the assumption of ignorance of position, and even direction of movement. Captain Hay's suggestions go no further. And yet, the learned Judge considers the operation of slowing and reversing the one obvious safe course, because of the utter ignorance of the captain as to where he was or how he came there or where he was going. We are of opinion that, as a matter of principle and as a matter of law, Captain Spain, having no reason to doubt his compass, his steering, his log, his officers or his course, and having a considerable, though not measurable, visibility, was not bound to imagine an unsuspected and phenomenal cause which perturbed his course, but *left no trace of that perturbation*. That is the ultimately crucial point. His inability to see Deal Island was sufficiently accounted for by the fog. That is expressly admitted by Captain Hay. We are driven to the conclusion that, despite his resolute endeavour to avoid making the casualty his real starting-point, the learned Judge has done what anyone attempting to depart from the first hypothesis must do, as it seems to us (unless

some hitherto unformulated rule is to be enunciated for fog conditions irrespective of general circumstances), namely, he has started unconsciously with the casualty, seen how with the wisdom of actual knowledge the result might have been averted, passed by the obscurities of the then present situation and the inconsistencies and dangers of the contrary hypothesis, and then found misconduct and negligence.

In the circumstances we entirely agree with the skilled nautical assessors who originally considered the matter, and hold that in law and in fact the respondent has failed, and the appeal should be allowed.

HIGGINS J. It now appears from the decision of the Court of Marine Inquiry put in evidence (subject to objection), that that Court "does not consider that either the master or the first mate was guilty of negligence." But if this finding did not bind the learned Judge of the District Court on the trial of this action, I should concur, without hesitation, in his finding that the casualty was due to the negligence of the master.

The truth is that the master took the risk—pushing on the vessel at full speed although there was such a heavy fog that the high Deal Island and its lighthouse could not be seen. The regulations of the company were not allowed in evidence, and I shall not refer to them; but in the regulations made under the *Merchant Shipping Act* and under the *Navigation Act* there is a provision that "every vessel shall in a fog . . . go at a moderate speed having careful regard to the existing circumstances and conditions." The master admits that his speed of nine or ten knots was not "moderate" for the ship. He disobeyed these regulations. The learned Judge said—rightly I, think—that the onus of proving negligence lay on the Company; but the onus of proof may be shifted; and, in my opinion, it is shifted to the master when he has pushed on at full speed in a dense fog—especially when he is in the neighbourhood of land.

A great deal of stress has been laid on the fact that the master believed he was five or six miles off Deal Island. But he was not entitled to act on such a belief in the fog and under the circumstances without taking every precaution. For aught that he knew the vessel

H. C. OF A. 1923.

SPAIN v. UNION STEAMSHIP CO. OF NEW ZEALAND LTD.

Higgins J.

might have been going on a wrong course; there *might* have been bad steering; or there *might* have been something wrong with the compass; or there *might* be a deviation from some unexpected current: and these possibilities should have deterred the master from recklessly pushing on at full speed in the dense fog. In cross-examination, the master admitted that if the mate's calculation of the distance off Pyramid Rock was wrong, the course of the vessel would be wrong; and yet he accepted the mate's calculation of three miles without checking it, without even making sure by inquiry that the mate had taken the two bearings which were necessary.

I need not restate the series of facts leading up to the casualty; they appear in the judgment of the District Court. But the message of the mate from the bridge has to be considered closely in its relation to the written directions left by the master in the bridge book at 5.25 a.m. The fog had lifted considerably; the engines were no longer at stand by; the master went down from the bridge having written "steer NE. by N½N. If you see Deal Island Lighthouse reset the log when it is abeam, and steer N34°E." This latter course would have been somewhat more easterly. At 7.22 (about) the master heard the fog siren. At 7.25 a.m. the mate wrote this message for the master: "7.15 a.m. 7.25 a.m.—I have run 18 miles by the the log and Deal Island should be abeam. I have not seen it yet on account of *very heavy fog. Engines at stand by.*" The master wrote on this message "O.K.", and told the man who brought the message to tell the mate to "carry on." I suggested to counsel for the master that possibly this meant to carry on in the course N34°E., on the assumption that Deal Island was abeam; but he disclaimed such a suggestion, although it would involve a course somewhat more easterly. Counsel says that the master meant the mate to carry on the course NE. by N½N. and that he kept on that course although he was supposed to be abeam of the island. I quite accept the argument for the master that the question of negligence must be judged by the master's knowledge of facts at the time. I take it that he thought the vessel to be five or six miles to the east of Deal Island. But in giving the order "O.K. Carry on," the master had those dominating facts before his mind, that the fog was again very heavy, so heavy that the lighthouse could not be seen,

and that the mate was so far in perplexity that he had put the engine men to " stand by " their engines. According to Captain Hayman, a witness called for the master, the master should have reasonably inferred from the message that the mate was in doubt. The vessel was driven on at full speed for ten minutes; the engines were reversed when the mate saw the island; but it was too late—the vessel having such way on struck the cliff, end on, within two minutes; and it was afterwards beached.

In my opinion, too much stress has been laid on the length of time —thirteen minutes—between the master's hearing the fog siren and his coming on deck. He attributes the delay to a call of nature. But, even if he had come on deck at once, he would not have known anything which he did not know after receiving the mate's message. The vessel was lost by the fatal reply " O.K. Carry on."

But the effect of the decision of the Court of Marine Inquiry has now to be considered. No case has been cited to us which supports in any degree the argument that the decision can be treated as being conclusive as between the Company and the master, on the question of negligence on the part of the master. The case of *Hutton* v. *Ras Steam Shipping Co.* (1) rests on the special provision contained in sec. 483 (2) of the *Merchant Shipping Act* 1894. This section expressly made the decision of the Naval Court " conclusive as to the rights of the parties " in any subsequent proceedings. There is no such provision in this *Navigation Act* 1901. Moreover, the conditions under which a decision on the inquiry can be treated as effecting an estoppel by way of *res judicata* are clearly wanting. Passing by other objections, it is sufficient to say that there was no direct issue between the owners and the master as to negligence of the master; there was no affirming of negligence on the one side, and denial of negligence on the other; indeed, usually the interest of the owner as well as of the master is to support a finding that there was no negligence. The finding of the Court of Marine Inquiry that there was no negligence was not essential to the decision. The summons issued by the Court merely stated that the Court would " make inquiry into the circumstances attending the stranding and subsequent beaching of the British ship *Karitane* "; and it was perfectly within the powers of the Court to state the circumstances without any finding on the question of

(1) (1907) 1 K.B., 834.

H. C. OF A. 1923.

SPAIN v. UNION STEAMSHIP CO. OF NEW ZEALAND LTD.

Higgins J.

negligence. It is true that under sec. 27 (4) of the *Navigation Act* the Court holding the inquiry has the same power of cancelling and suspending certificates as a Court holding a similar investigation or inquiry in the United Kingdom; but it has to exercise those powers "in the same manner" as the British Court; and a British Court would not cancel or suspend a certificate without a distinct notice to the master of any charge of negligence that is to be made against him (The *Chelston* (1)). In that case, the notice was even more pointed than in this case; for it was to "inquire into the *causes* which led to the casualty and into *all the facts* connected therewith." See also the special provision made in sec. 24 (2) of the *Navigation Act*. If the finding of no negligence is to be conclusive, so would be a finding of negligence; and it would be intolerable injustice if a master's certificate were to be taken from him without any notice being given to him that he is charged with negligence, and what negligence. If the finding of no negligence is to be conclusive it would be conclusive also on passengers who happened to be summoned as parties to the trial, and who attend to learn what they can of the circumstances under which they were wrecked.

The question whether the decision of the Court of Marine Inquiry was even admissible in evidence is more debatable. The decision was admitted in evidence subject to the defendant's objection, It is wrongly assumed by the appellant's counsel that on the former appeal in this case (2) I expressed the view that the decision was admissible. The position then was that great reliance was placed on a statement made voluntarily by the master, not in answer to any question, that the Court of Marine Inquiry had "exonerated" him; and my view was that if we were to be affected by such a statement, we should know precisely what the finding or decision was. If that decision could not be put in evidence, the statement as to its effect should not be regarded, unless fairly elicited by a question on cross-examination. It seems now to be settled that the verdict of a coroner's jury is not admissible evidence as to the cause of death (*Bird* v. *Keep* (3); *Barnett* v. *Cohen* (4)). Yet an order made by a Master in Lunacy in England under sec. 116 of the *Lunacy Act* 1890, reciting that it had been established to his satisfaction that A

(1) (1920) P., 400.
(2) (1923) 32 C.L.R., 138.
(3) (1918) 2 K.B., 692.
(4) (1921) 2 K.B., 461.

is of unsound mind, was treated as evidence of unsound mind, though not conclusive (*Harvey* v. *The King* (1)); and an order made under the *Dentists Act* 1878, by the General Medical Council, striking a dentist off the register on the ground that he had been guilty of disgraceful conduct in a professional respect has been held prima facie evidence of such conduct, in an action between the dentist and his partners (*Hill* v. *Clifford* (2)). In that case, *Gorell Barnes* P. made some striking observations as to the effect of a finding as to a shipping casualty (3). As the law does not seem to have been as yet satisfactorily defined on the subject, I propose to assume, in favour of the master, that the decision of the Court of Marine Inquiry is admissible as evidence; but the facts here are too strong against the master. There is, indeed, great force in the view taken by the learned Judge in the District Court, that the Court of Marine Inquiry does not seem to have addressed its mind to the conduct of the master after receiving the message from the mate. For the Court of Marine Inquiry said :—" The Court finds that such stranding was caused by the *Karitane* being taken out of her course by an unusual westerly set, which could not have been anticipated by the master. The Court is of opinion that a check should have been made of the distance of the ship off Pyramid Rock; but does not consider that either the master or the first mate was guilty of negligence." To say the least, these words are consistent with the view that the Court of Marine Inquiry thought there could be no negligence unless the westerly set could have been anticipated, or unless the failure of the master to check the distance from Pyramid Rock were shown to have conduced to the casualty. There is nothing to indicate that that Court applied its mind to any other aspect of the facts.

I do not rely on the fact that neither the mate nor the man at the wheel was called as a witness. It may be that they could not be found; although there is no proof to that effect.

Under these circumstances, I am of opinion that the plaintiff is not entitled under the award to any of his expenses of the inquiry. Clause 8 of the award provides for payment of his expenses " unless the inquiry . . . be due to the personal misconduct or negligence of the employee." These words point, of course, to misconduct or

(1) (1901) A.C., 601. (2) (1907) 2 Ch., 236.
(3) (1907) 2 Ch., at p. 251.

H. C. OF A. 1923.

SPAIN v. UNION STEAMSHIP CO. OF NEW ZEALAND LTD.

negligence *in fact*—not to the finding of misconduct or negligence by any Court. The obligation to pay the expenses does not depend necessarily on any curial proceeding whatever, as the parties may be agreed as to the fact of negligence or absence of negligence; and it is only when they cannot agree that resort to the appropriate Court may have to be made.

The appeal should be dismissed.

Gavan Duffy J.

GAVAN DUFFY J. In this case two questions arise for decision:— (1) Was the District Court Judge right in determining for himself the question whether the inquiry in respect of which expenses are claimed by the appellant was due to his personal misconduct or negligence, or should he have accepted an alleged finding of the Court of Marine Inquiry? (2) If he was right in so determining, should he on the evidence before him have found in favour of the plaintiff or of the defendant?

(1) As to the first question, the appellant says that the words of clause 8 of the award mean that the employee is entitled to his reasonable expenses unless the tribunal conducting the inquiry or proceedings finds that it or they are due to his personal misconduct or negligence. In my opinion that is not their meaning. The obligation to pay does not arise from the absence or presence of any finding of a Court, but by reason of the existence of certain facts and the non-existence of other facts mentioned in the clause. Though the existence of the obligation does not depend on any curial act, it may become necessary to enforce the obligation by means of such an act. The parties may be agreed as to all the facts and therefore may be agreed as to the liability or non-liability to pay the expenses claimed, and in such a case there may be no need to resort to any Court for the purpose of enforcing payment; but if they are not so agreed resource must be had to a Court, and that Court must decide all questions necessary for the ascertainment of the liability of the employer to pay the expenses claimed by the employee. As an alternative argument with respect to the first question the appellant says that, even if the District Court Judge was entitled to determine the issue himself, the respondent was estopped from asserting the existence of personal misconduct or negligence in the appellant

because that question had already been investigated by the Court of Marine Inquiry and determined in favour of the appellant. The District Court Judge thought that it was his duty to investigate and determine for himself the question as to whether the plaintiff had been guilty of personal misconduct or negligence after he received the message entered in the bridge book; and I think he was right. The finding of the Court of Marine Inquiry so far as it is relevant is as follows:—"The weather was fine, and the sea smooth, when the vessel left Devonport, but shortly before the stranding a heavy fog came up over the sea reducing the visibility to about one mile. The Court finds that such stranding was caused by the *Karitane* being taken out of her course by an unusual westerly set, which could not have been anticipated by the master. The Court is of opinion that a check should have been made of the distance of the ship off Pyramid Rock; but does not consider that either the master or the first mate was guilty of negligence." This finding is consistent with the existence of personal misconduct and negligence on the part of the master after he received the message entered in the bridge book. The Court of Marine Inquiry made no finding with respect to such negligence and, as far as appears, made no inquiry as to whether it existed. As the District Court Judge did not determine against the appellant any question already determined in his favour by the Court of Marine Inquiry, it is unnecessary to enter into a discussion as to the effect by way of estoppel of a finding of that Court on persons who have been summoned to attend at the inquiry.

(2) As to the second question, I think that the learned District Court Judge was not only at liberty but was bound to come to the conclusion at which he arrived if he believed certain witnesses who gave evidence before him. He appears to have believed them, and, as he was in a better position to judge of their credibility than we are, I think we should accept his finding as fact.

In my opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Sullivan Brothers.*

Solicitors for the respondent, *Creagh & Creagh.*

B. L.