

as there was any miscalculation, or even honest mistake as to which vessel had the right of way, as is alleged in this case.

Rule 21 declares: "In narrow channels, every steam-ship shall, when it is safe and practicable, keep to the side of the fairway or mid channel, which lies to the starboard side of such ship." The *Aurania* did not keep to the starboard side of the channel by any certain or reasonable margin, as the place of collision shows. If she was not to the northward of the middle line of the channel at the time of the collision, she was very nearly, if not fully, up to that line. The one whistle which she had previously given also indicated, under the nineteenth rule, that she was directing her course to starboard. Without expressing any opinion as to the applicability, in this situation and on pilotage ground, of the inspector's rules, which are clearly incompatible with the new regulations, I think both vessels meant and understood the whistles to be indicative of their intentions; and this confirmed also her obligation, under rule 21, to keep to the starboard side of mid channel, or to the southward of the buoy.

"The special circumstances of the case" also, under rule 24, which is a substitute for the former rule as to departures, in view of the Republic's neglect of duty, and the close approach of the two vessels, required the *Aurania* to go to starboard; because that course would have been away from danger and from risk of collision; and because, in the situation of the two vessels, porting could not possibly have tended to thwart any movement of the Republic to avoid her. The *Aurania*, therefore, could have done something to avoid this collision, by porting enough to keep southward of the mid channel by a reasonable distance, and to go south of the buoy; and this, in my judgment, would have avoided the disaster. Notwithstanding the fact that it was the primary duty of the Republic to keep out of the way, I am constrained to hold, though not without much hesitation, that the *Aurania* is also to blame. The reason of the rules and the policy of the law, which, for the safety of life and property, demand that no reasonable effort to avoid collision shall be neglected by either vessel, compel me to hold both in fault, and that the damages be divided.

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THE J. L. PENDERGAST.<sup>1</sup>

CHISHOLM *v.* THE J. L. PENDERGAST, etc.

(*District Court, S. D. New York.* November 15, 1886.)

SEAMEN—WAGES—MASTER'S LIEN—BRITISH VESSEL—LAW OF THE FLAG—MORTGAGEE IN POSSESSION, BUT OSTENSIBLY AGENT ONLY FOR FOREIGN OWNER—BRITISH MERCHANTS' SHIPPING ACT.

Libelant shipped in New York, as master of the bark *P.*, knowing that she had a British registry, and supposing that she was owned by a British subject re-

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

siding in Quebec. In fact, one P. was mortgagee in possession, and running the vessel for his own account, though acting ostensibly as "agent for owners." *Held*, that libelant was entitled to the benefit of the British merchants' shipping act, as the law of the flag that governed the ship, and upon which he relied in joining her, and which was presumably the law contemplated by both parties, and that, under that act, libelant had a lien on the vessel for his wages.

*Hill, Wing & Shoudy*, for libelants.

*Whitehead, Parker & Dexter*, for claimants.

BROWN, J. The libelant, as master of the bark J. L. Pendergast, claims a lien upon the vessel for his wages, under the British merchants' shipping act, on the ground that she was run as a British vessel, and owned by a British subject, residing in Quebec, where the bark was registered. James F. Pendergast held a mortgage upon the vessel, and was in reality in possession, and running her for his own account, but acted ostensibly as "agent for the owners." The libelant knew her British registry; engaged as captain with Mr. Pendergast, in New York, supposing her, as he testified, to be in fact owned by her registered owner, who lived in Quebec; and he had no knowledge of Mr. Pendergast's interest, other than as agent of the vessel, and who signed as such in his dealings. Had the master known that Mr. Pendergast was a mortgagee in possession, and managing the ship for his own benefit, I think he could not have invoked the benefits of the English Merchants' Shipping Act. But Mr. Pendergast's act in dealing ostensibly as agent only, in effect concealed his true relation to the vessel. Mr. Pendergast was not, however, the actual holder of the mortgage. It had been assigned by him to E. D. Morgan & Co., as collateral security. I think that the libelant is therefore entitled to the benefits of the merchants' shipping act, as the law of the flag that governed the relations of those on board the ship, and upon which he relied on joining her, and which was presumably the law contemplated by both parties. *The J. Friederich*, 1 Wm. Rob. 35; *Covert v. The British Brig Wexford*, 3 Fed. Rep. 577. The mortgagee, therefore, has no equity to withhold from the master out of the proceeds of the ship the payment of the master's services, by which he has profited. *The Geo. T. Kemp*, 2 Low. 477; *The Walkyrien*, 11 Blatchf. 241; *Pritchard v. Norton*, 106 U. S. 124; S. C. 1 Sup. Ct. Rep. 102; *The Gaetano*, 7 Prob. Div. 1, 137; *Chartered Mercantile, etc., v. Netherlands*, 10 Q. B. Div. 521. I do not think that there is any such account in the case as should preclude the master from recovering the amount due to him.

Decree for the libelant for amount claimed, with costs, but without extra pay.

GARRETT and others v. NEW YORK TRANSIT & TERMINAL Co., Limited, and others.

(Circuit Court, S. D. New York. November 27, 1886.)

1. COURTS—JURISDICTION—UNITED STATES CIRCUIT COURT—COLLUSION IN JOINDER OF PARTIES.

The statute which requires a suit to be dismissed when it appears that a party has been collusively made or joined for the purpose of creating a case cognizable by the United States circuit court is not intended to restrict those who contemplate bringing a suit, from selecting as adversaries all those against whom any substantial relief may be sought.

2. EQUITY—PLEADING—PROPERT—JUDGMENT RECORD—FORMER SUIT.

Where the judgment record, made a profert in a plea, showed that the decree in the former suit was without prejudice to the right of the plaintiffs to bring a new action against all but one of the several defendants who joined in the plea, *held*, that the plea was bad.

3. SAME—SETTING UP IN PLEA FACTS REQUIRED TO BE IN BILL—RULE 94 IN EQUITY.

A plea is bad which sets up matters of fact appearing on the face of the bill, and which sets up affirmatively, by way of defense, a fact which a plaintiff is required to allege in his bill by rule 94 in equity.

In Equity.

*Edward W. Sheldon*, (*William W. MacFarland*, of counsel,) for complainants.

*C. A. Seward*, for defendants.

WALLACE, J. None of the pleas which have been set down for argument are good. The first plea is to the jurisdiction of the court, and is an attempt to allege that three persons specified, who are made parties defendant, with others, should have been made parties plaintiff, but have been made defendants collusively, in order that the necessary diversity of citizenship between the parties may appear. The bill calls for relief against certain fraudulent acts of one Barnes and the corporation he dominates, as to which the three defendants have similar interests to the plaintiffs; but it also calls for an account to ascertain and establish the claims and liens of the plaintiffs, of the three defendants, and of Barnes, as between each other, growing out of the joint adventure which culminated in the frauds of Barnes. These three defendants are adversary parties to the plaintiffs upon the issues to which the second and third prayers for relief in the bill are addressed. No facts are alleged in the plea to show that these are not genuine issues; but the plea states merely legal conclusions. The statute which requires a suit to be dismissed when it appears that a party has been collusively made or joined for the purpose of creating a case cognizable by the circuit court is not intended to restrict those who contemplate bringing a suit from selecting as adversaries all those against whom any substantial relief may be sought.