1873.
April 15.

[ORIGINAL CIVIL JURISDICTION.]

In Admiralty.

BARDOT AND ANOTHER.....*Plaintiffs.*

THE AMERICAN SHIP OR VESSEL "AUGUSTA" *Defendant.*

Jurisdiction—Admiralty—Collision—Foreign Ships—Discretion—Questions--communis juris—Consul's consent—3 & 4 Vic. c. 65—24 Vic. c. 1026 & 27 Vic. c. 24.

The Imperial Statutes 3 & 4 Vic. C. 65, 24 Vic. C. 10, and 26 & 27 Vic. C. 24, do not apply to the Admiralty or Vice-Admiralty jurisdiction of the High Court.

On that point, *The Asia* (5 Bom. H. C. Rep. O. C. J. 64) followed; *The Portugal* (5 Beng. L. Rep. 323, 330, 331) disapproved.

The High Court, as now existing, was continued, not created, by the Letters Patent of 1865.

The High Court has jurisdiction, under the common maritime law, to entertain a suit in respect of a collision, upon the high seas, between two foreign vessels, although that collision may not have occurred in British or Anglo-Indian waters, and notwithstanding the opposition of the Consul of the State to which the defendant belongs.

Whether the High Court has a discretion to decline to entertain such a suit—*Quœre.*

Even if there be such a discretion, the Court will ordinarily allow a suit of that nature to proceed.

THE pleadings and facts sufficiently appear in the judgment of the Court, upon a motion made, on the 7th day of April 1873, before WESTROPP, C. J., SARGENT and MELVILL, JJ., to discharge the warrant of arrest issued against the defendant vessel, the "Augusta."

Anstey and *Lang* in support of the motion to discharge the warrant of arrest of the Augusta.

Marriott and *Pigot,* for the plaintiffs, opposed the motion

In the course of the argument the following authorities were mentioned :—

The Asia (a) ; The Portugal, (b) ; The Christiana (c) ; The Courtney (d) ; The Nina (e) ; Wendt's Maritime Legislation 109; *The Johann Friederich (f) ;* Wheaton 110 *n*, 170, Pt. II., S. II., Chap. XII ; 18 Dalloz, Droit Maritime pl. 522, 2276, 2294, 2301, 2303, 2305, 2307, 2308; *Le Louis (g) ;* Bonfils 174 ; 1 Pritch. Adm. Dig. 283 ; 4 Phillimore International Law S. 815, p. 581 ; *The Zollverein (h) ; The Courier (i) ; The Golubchick (j) ; The Ida (k) ; Cope* v. *Doherty (l) ; The Two Friends (m) ; The North America (n) ; The Bold Buccleugh (o); The Mali Ivo (p); White* v. *Damon (q) ;* 1 Kent Com. 399 (p. 418 of 10th edn.) ; Treaties between France and America of 1788 and 1853 ; and the several Statutes subsequently mentioned in the judgment of the Court. *The Jerusalem (r).*

Cur. adv. vult.

WESTROPP, C.J. :—This suit has been brought, at the Admiralty side of this Court, by the owner and the master of the French barque "Antares" (the latter suing on behalf of himself and the rest of her crew) against the American ship "Augusta" (now lying in Bombay Harbour), the freight due for her cargo, and her owners. The cause of action alleged by the plaint is a collision between the two vessels, on the 11th December 1872 at 2-40 A M. in Latitude 20° south and Longitude 32° 35′ west, whereby the "Antares," her cargo, and the money, clothes, and private effects of her master and crew were sunk and totally lost. She was bound from Callao to the Havannah with a cargo of guano. The

(*a*) 5 Bom. H. C. Rep. O. C. J. 64. (*b*) 6 Beng. L. R. 323, 330, 331.
(*c*) 2 Hagg. Adm. Rep. 183. (*d*) Edw. Adm. Rep. 239
(*e*) L. R. 2. P. C. 38. (*f*) 1 W. Rob. 35. (*g*) 2 Dods. 238
(*h*) Swabey R. 99. (*i*) Lushington 541. (*j*) 1 Wm. Rob. 143
(*k*) Lushington 6. (*l*) 4 Kay & J. 367; S. C. on App. 2 DeGex & Jo. 614. (*m*) 1 C. Rob. 271. (*n*) 12 Moo. P. C. C. 331.
(*o*) 7 Moo. P. C. C. 284. (*p*) L. R. 2. Adm. & Ecc. 356.
(*q*) 7 Vesey 35. (*r*) 2 Gallison 198; and mentioned in *The Golubchick* 1 W. Rob. 145, 153.

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amount of damages claimed is Rs. 93,600. The plaint prayed an arrest of the "Augusta" and her freight in order to answer that claim. A warrant of arrest having, pursuant to the prayer, been issued and executed against her, counsel on behalf of the owners of the "Augusta" and of the Vice-Consul of the United States of America (to whom notice of the institution of the suit was given by the plaintiffs' solicitors on the day on which the plaint was filed—the 1st of the current month of April) have moved before Sir Charles Sargent, Mr. Justice Melvill, and myself, that the warrant of arrest be discharged.

That motion has been based upon three grounds, viz. :—1st, that the collision having taken place on the high seas, and not in British or Anglo-Indian waters, and the vessels both belonging to foreign owners, this Court has not jurisdiction ; 2nd, that, even if the Court have jurisdiction, its exercise is discretionary, and, under the circumstances of the case, the proper course will be to decline to entertain the suit. The third objection was that the warrant had been obtained by fraud, namely, the concealment of the fact that the "Antares" was a French ship. That objection might, we think, have been well spared. Although the nationality of the "Antares" was neither stated in the title nor in the body of the plaint, the names of the owner and master, as appearing in the title, are manifestly French, it being there also mentioned that the owner is a resident of Nantes, in France. And the 6th of our Admiralty Rules, which is, I believe, a transcript of one of the English Admiralty Rules, and is the only rule expressly relating to the nationality of vessels or to suits against foreign vessels, requires that in a suit of necessaries or of wages (suits of damage are not mentioned) the national character of *the vessel proceeded against* shall be stated. The national character of the vessel proceeded against in this case is mentioned in the plaint, and enough is stated as to the plaintiffs to lead us to the conclusion that there was not any disingenuous suppression of the nationality of their late vessel.

In support of the first objection—the alleged absence of jurisdiction—it has been, as we think, correctly argued that the Imperial Statutes 3 & 4 Vict., c. 65, 24 Vict., c. 10, and 26 & 27 Vict., c. 24, do not apply to the Admiralty or Vice-Admiralty jurisdiction of this Court. If we have jurisdiction to entertain this suit, it must be sought for in the general maritime law administered by Courts of Admiralty. For the reasons stated in *The Asia* (*a*), which it would be prolix here to repeat at length, the two first named Statutes (3 & 4 Vict., c. 65, and 24 Vict., c. 10) are inapplicable to the Admiralty Civil Jurisdiction of this Court, which is the same as that of the Supreme Court. Its jurisdiction was that of the High Court of Admiralty in England, as it stood on the 8th of December 1823, the date of the Letters Patent creating the Supreme Court. Section 53 of those Letters Patent empowered that Court to take cognizance of and determine all causes, civil and maritime, &c., "the cognizance whereof doth belong to the jurisdiction of the Admiralty, as the same is used and exercised in that part of Great Britain called England." The jurisdiction in Vice-Admiralty was created by commission from the High Court of Admiralty in England, dated the 21st August 1843, nominating Sir Henry Roper, then Chief Justice of the Supreme Court at Bombay, "and the Chief Justice of the said Court for the time being, or the person executing the duties of such office, to be our Commissary in the Vice-Admiralty Court of the Island of Bombay and territories thereunto belonging," and authorizing such Commissary "to take cognizance of and proceed in all causes civil and maritime, and in complaints, contracts, offences or suspected offences, crimes, pleas, debts, exchanges, policies of assurance, accounts, charterparties, agreements, bills of lading of ships, and all matters and contracts which in any manner whatsoever relate to freight due for ships hired and let out, transport money, or maritime usury, otherwise bottomry, or which do anyways concern suits, *tres-*

(*a*) 5 Bom. H. C. Rep. O. C. J 64, 66 68.

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passes, injuries, extortions, demands and affairs civil and maritime whatsoever, between merchants, or between owners and proprietors of ships or other vessels, and merchants or other persons whomsoever, with such owners and proprietors of ships and all other vessels whatsoever used or employed, or between any other persons howsoever had, made, begun, or contracted for any matter, cause, thing, business, or injury whatsoever done or to be done as well in, upon, or by the sea, or public streams, fresh waters, ports, rivers, creeks, and places overflowed whatsoever, within the ebbing and flowing of the sea, or high water mark, or upon any of the shores or banks adjoining to them or either of them, together with all and singular their incidents, &c., &c., and such causes, complaints, &c., and other the premises above said, or any of them, howsoever the same may happen to arise, be contracted, had or done, to hear and determine according to the civil and maritime laws and customs of our High Court of Admiralty of England, in our said Island of Bombay and territories thereunto belonging whatsoever;" (here follow many other provisions not material in the present case) "and to promulge and interpose all manner of sentences and decrees and to put the same in execution with cognizance and jurisdiction of whatsoever other causes civil and maritime which relate to the sea, or which any manner of ways respect or concern the sea or passages over the same, or naval or maritime voyages, performed or to be performed, or the maritime jurisdiction above said, with power also to proceed in the same according to the civil and maritime laws and customs of our aforesaid Court *anciently used,* as well those of mere office mixed, or promoted, as at the instance of any party, as the case shall require and seem convenient."

The Letters Patent of the 26th June 1862 ordained that the High Court at Bombay "shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said Supreme Court as a Court of Admiralty, or by any Judge of the said Court as Commissary to the Vice-Admiralty

Court, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions, arising in India, as is now vested in any Commissioner or Commissioner appointed by Us or Our Predecessors," under Stat. 39 & 40 Geo. III., c. 79, s. 25. The Letters Patent of the 28th December 1865 ordained that the High Court at Bombay "shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said High Court as a Court of Admiralty, or of Vice-Admiralty, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions, arising in India, as may now be exercised by the said High Court."

The Statute 3 & 4 Vict., c. 65, passed in 1840, "to improve the practice and extend the jurisdiction of the High Court of Admiralty *in England,*" by its 4th section gave, to that Court, "jurisdiction to decide all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof remaining in the Registry, arising in any cause of possession, salvage, *damage*, wages, or bottomry," and, by its 6th section, "jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to, or damage received by, any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any *foreign* ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered or *damage* received, or necessaries furnished, in respect of which such claim is made."

In *The Australia (b)*, which was an appeal in a cause of possession from the Vice-Admiralty Court at Hongkong heard in 1859, Dr. Lushington, in delivering the judgment of the Privy Council, said: "I ought to have said one word with respect to the jurisdiction in cases of this kind. Their Lordships have decided this case upon its merits, because

(*b*) Swabey R. 480, 488.

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it appeared to them that it would be more satisfactory on the whole so to do, but the state of the law must be taken to be this. A Vice-Admiralty Court has no more than the ordinary Admiralty jurisdiction. That jurisdiction is the jurisdiction which was possessed by Courts of Admiralty antecedent to the passing of the Statute (3 & 4 Vict., c. 65) which enlarged it. What is the nature of that jurisdiction in a cause of this description will be seen from the judgments of Lord Stowell upon that subject, which are collected in Mr. Pritchard's Digest. It would be a dangerous thing, after the hearing of this cause, to resort to a Vice-Admiralty Court for the purpose of trying the title to a ship in a case of this description." And in *The Rajah of Cochin (c)*, he said in the same year: "I am of opinion that by Statute, and for other reasons, the Vice-Admiralty Courts in our colonies, properly constituted, exercise the same jurisdiction as this Court, with one exception, and that is, where particular powers are conferred upon this Court by name, and not upon the Vice-Admiralty Courts; and there are instances to that effect." The Statute 3 & 4 Vict., c. 65, is such an instance. It is proper here to observe that the Commission of Vice-Admiralty for Bombay, though bearing date in the year 1843, and, therefore, subsequent to the passing of the Statute 3 & 4 Vict., c. 65, in 1840, contains no reference to the statutory powers of the High Court of Admiralty in England, but speaks only of "the civil and maritime laws and customs anciently used," and it is also important to note that the Vice-Admiralty Commission for Hongkong, with reference to which Dr. Lushington's above quoted remark in *The Australia* was made, must also have been issued subsequently to the passing of the Statute 3 & 4 Vict., c. 65, in 1840, inasmuch as the Treaty of Nankin whereby Her Majesty acquired the island of Hongkong was signed on the 30th August 1842, and it was not regularly constituted a British colony until the 26th

(c) Swabey R. 473, 475.

June 1843. The Vice-Admiralty Commission for Bombay seems to be in the usual form, of which Sir Christopher Robinson, in an opinion given by him in 1821 (*d*), says: "The commission of the Judges of the Vice-Admiralty Courts agrees in substance with that of the High Court of Admiralty, and is an instrument of ancient date, and comprehends many subjects, which have been formerly under jurisdiction, but have been withdrawn, or restrained, by usage or the authority of superior courts. The commission still retains its ancient form, and is acted upon under those limitations in the High Court of Admiralty, according to the principles which have been applied to it, and are as well known as any other general principles on which it proceeds; and I think the same restrictions ought to be applied to the exercise of that jurisdiction in the Vice-Admiralty Courts, *except on points on which special jurisdiction may have been given by statute*;" and he accordingly advised that, notwithstanding the form of the Commission, the Vice-Admiralty Court at the Mauritius had not then "a jurisdiction over transactions of policies of assurance, charter parties, and other civil contracts, which have been withdrawn from the general jurisdiction" of the Court of Admiralty in England. As to the non-applicability of the Statute 3 & 4 Vict., c. 65, to the Courts of Admiralty in British India, we may refer, without here repeating them, to the remarks made in *The Asia* (*e*), upon *Murray* v. *Langford* (*f*), decided in the Supreme Court at Calcutta in 1842-43.

The Merchant Shipping Act (1854) 17 & 18 Vict., c. 104, Sec. 527, relates to *injuries* done in any part of the world *to property belonging to Her Majesty or to any of Her Majesty's subjects*, by any foreign ship, and empowers Courts in the United Kingdom only to arrest such foreign ship when "found in any port or river of the United Kingdom, or within three miles of the coast thereof." That section, therefore, cannot affect the present suit brought here in

(*d*) Forsyth Cas. & Opin. 94, 95.

(*e*) 5 Bom. H. C Rep. O. C. J. 68, 69. (*f*) Fulton R. 95 130.

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Bombay, and to which the parties are French and American. As to this enactment, see *The Griefswald (g)* and *The Ticonderoga (h)*.

The Statute 24 Vict., c. 10 (passed in 1861), reciting that "it is expedient to extend the jurisdiction and improve the practice of the High Court of Admiralty *in England*," enacts by its 7th section that "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship."

The Statute 26 & 27 Vict., c. 24, was passed, in 1863, "to facilitate the appointment of Vice-Admirals and of officers in Vice-Admiralty Courts in Her Majesty's possessions abroad, and to confirm the past proceedings, to extend the jurisdiction, and to amend the practice of those Courts." Its 10th section declared that those Courts shall have jurisdiction in respect (amongst other matters) of "claims for damage done by any ship." As to this statute, the remarks of the late and deservedly lamented Mr. Justice Norman made as Officiating Chief Justice at Calcutta in the case of *The Portugal (i)*, have been mentioned. He said: "I am certainly disposed to think that the High Court, as constituted by the Charter of 1862, had not, by virtue of the Admiralty Court Act, 1861 (24 Vict. c. 10), or otherwise, any jurisdiction over claims for disbursements by the master. But when the present High Court was constituted by the Charter of 1865, I am inclined to think that the Vice-Admiralty Courts Act, 1863 (26 & 27 Vict. c. 24) applied to such Court as a Vice-Admiralty Court established after the passing of that Act in a British possession, and consequently that I have jurisdiction to entertain the claim of the master for disbursements, and to treat the same as a maritime lien." In the concluding portion of that opinion, viz., that the Charter of the High Court of 1865 rendered the Vice-Admiralty Courts Act of 1863 applicable to the High

(*g*) Swabey R. 430. (*h*) Ibid. 215.
(*i*) 6 Beng. L. R. 323, 330, 331.

Court, we are wholly unable to concur. In the first place the High Court was not a court "established after the passing of the Vice-Admiralty Courts Act 1863." We shall refer to the Bombay High Court Charters of 1862 and 1865 in discussing this point. They are in this respect similar to those of the High Court at Calcutta. The Charters of 1862 and of 1865 were granted under the authority of the Statute 24 & 25 Vict., c. 104, the 17th section of which empowered Her Majesty, at any time within three years after the establishment of the High Court, by her Letters Patent, to revoke the Letters Patent by which the Court was so established, in whole or in part, "and to grant and make such other powers and provisions as Her Majesty might think fit, and as might have been granted or made by such first Letters Patent—" a power extended by Statute 28 & 29 Vict. c. 15 to the 1st January 1866. Her Majesty did revoke the Charter of 1862 by the Charter of 1865, but by the 2nd section of the latter ordained that, "notwithstanding" such revocation, the High Court of Judicature at Bombay "shall be and *continue* as from the time of the original erection and establishment thereof, the High Court of Judicature at Bombay for the Presidency of Bombay aforesaid, and that the said Court shall be and continue a Court of Record," &c., &c. It is from this provision quite clear that it was the Court of 1862 continued with, however, such variations in its constitution as were made by the Charter of 1865. Moreover it was a Court constituted under a Statute (*j*), enabling Her Majesty to declare what its jurisdiction should be in Admiralty and Vice-Admiralty, as well as in other matters; and, in the Charter of 1862, Her Majesty did not confer upon it the statutory powers given to the Court of Admiralty in England by the Statute 3 & 4 Vict. or the Admiralty Act of 1861, nor did she, by the Charter of 1865, make any allusion to those Statutes, or to the Vice-Admiralty Courts Act of 1863, but merely gave to the High Court of 1865 the same jurisdiction in Admiralty

(*j*) Stat. 24 & 25 Vict. Sec. 9.

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and Vice-Admiralty as the High Court of 1862. If, then, the argument rested there, we should have great difficulty in holding that the Vice-Admiralty Courts Act of 1863 had any application here. The argument, however, against any such application is rendered quite conclusive by the language of the Vice-Admiralty Courts Act of 1863 itself. In the interpretation clause (Sec. 2) it is stated that the term "Vice-Admiralty Court" shall mean any of the existing Vice-Admiralty Courts enumerated in the schedule marked A hereto annexed, or any Vice-Admiralty Court which shall hereafter be established in any British Possession." The Vice-Admiralty Courts of Calcutta, Bombay, and Madras are not included in the schedule. And the term "British Possession" is, in the interpretation clause, defined as "any colony, plantation, settlement, island or territory, being a part of Her Majesty's dominions, *but not being within the limits* of the United Kingdom of Great Britain and Ireland or *of Her Majesty's Possessions in India*."

For those reasons, we must hold it to be quite clear that the Statutes 3 & 4 Vict. c. 65 (1840), 24 Vict. c. 10 (1861), and 26 & 27 Vict. c. 24 (1863), do not increase or in any wise affect our jurisdiction either in Admiralty or Vice-Admiralty, and that if we have jurisdiction to entertain this cause, that jurisdiction must be sought for outside those Statutes.

We must, then, endeavour to ascertain whether the High Court of Admiralty in England would, before the passing of the Statute 3 & 4 Vict. c. 65 and the subsequent Statutes, have taken cognizance of a suit founded upon a collision between two foreign vessels upon the high seas. We find that it has done so. In the year 1839, in *The Johann Friederich* (*k*), Dr. Lushington overruled a protest against the jurisdiction of the Court in a cause of collision, which protest was rested upon the ground that both vessels were the property of foreign owners, and the collision occurred whilst they

(*k*) 1 Wm. Rob. 35.

were in the prosecution of their respective voyages upon the high seas. He said: "Now no doubt could be entertained of this Court's jurisdiction, if the vessel that has been lost had been the property of British subjects. The question, therefore, arises; whether a foreigner should be deprived of the same privilege and protection. It is, I apprehend, a general rule that, save as to real estate, an alien friend is entitled to sue on the same footing as a British-born subject, and if the foreigner in this case had been resident here, and the cause of action had originated *infra corpus comitatûs*, no objection could have been taken. It is said, however, that the proceedings in this Court are *in rem*, a mode of proceeding peculiar to this Court, and not the usual course adopted by the Courts in this country in the first instance. But admitting this to be true, analogous cases exist, as in that of foreign attachment, in which the property of foreigners may be attached in order to compel an appearance, or to secure bail to the action; and if such a process is open to the foreigner in that case, it is difficult to understand the grounds of disputing the jurisdiction of this Court in the present instance. It has also been said in the course of the argument, that this Court is not desirous of exercising its jurisdiction between foreigners; and, in support of this doctrine, some observations of Lord Stowell in cases of seamen's wages have been cited. But it appears to me that the cases cited are distinguishable from the present for the following reason:—that all questions of collision are questions *communis juris*, but in cases of mariners' wages, whoever engages voluntarily to serve on board a foreign ship, necessarily undertakes to be bound by the law of the country to which such ship belongs, and the legality of his claim must be tried by such law. One of the most important distinctions, therefore, respecting cases where both parties are foreigners, is whether the case be *communis juris* or not. In the case of *The Two Friends (l)*,

(*l*) 1 C. Rob. 271.

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which has been cited in argument, Lord Stowell takes the distinction between salvage on recapture and wages, and the distinction he takes is this, "that a salvage on recapture is a question *juris gentium*; so, I apprehend, is civil salvage; in which the *quantum meruit* is the only rule that exists for the guidance of the Court's discretion in apportioning the remuneration. But in cases of wages, the Court is called upon to take notice of the law of commerce, and the question must in most cases be decided by the municipal law of that country in which the seamen's contract is made." *(m)*

We have not overlooked the fact that Dr. Lushington rested his decision in *The Johann Friederich* on three grounds, viz.: 1st, that all causes of collision are causes *communis juris*; 2ndly, that the vessel, at the time of her arrest, was within the Admiralty jurisdiction; 3rdly, that the collision took place on the high seas close upon the English coast; and that the two first grounds only exist in the present case, the collision not having taken place either near the coast of India or of England. We, however, think the two first grounds sufficient, and that the decision would have been the same in *The Johann Friederich*, even if the third ground had not existed in that case. It may be observed too that Trinidad, near which, upon the high seas, the collision, the subject of this suit, did take place, is a British colony—a fact perhapes not of much importance.

In April 1857 a collision took place in the Irish Channel on the high seas between Tuskar and Bardsey of two American ships, the "Tuscarora" and the "Andrew Foster," shortly after which the latter foundered and was lost with her cargo. Certain of the owners or consignees of cargo (of

(*m*) In *The Benares* (7 Notes of Cas. Supp. lii;) decided in 1850, Dr. Lushington further illustrates the distinction between a cause of damage and a cause of wages or of bottomry, or any other arising purely *ex contractor*.

whom some would appear to have been British and some American) on board the "Andrew Foster" had obtained judgment in the Court of Admiralty in England (affirmed, on appeal, by the Judicial Committee of the Privy Council) whereby the owners of the "Tuscarora," who were Americans, were condemned in the damages consequent on the collision and in costs. The "Tuscarora" had been arrested by process of the Court of Admiralty and was liable to be sold. Similar actions had been commenced in respect of the collision by the remaining owners of cargo on board the "Andrew Foster" and by other persons as part owners of her. Under these circumstances the bill in *Cope* v. *Doherty (n)* was filed in Chancery by the owners of the "Tuscarora" who did not thereby deny their liability to be sued in England by the owners of the "Andrew Foster" and her cargo, but only endeavoured to limit that liability by seeking for the application of Secs. 504 and 514 of the Merchant Shipping Act of 1854 (17 & 18 Vict., c. 104, Pt. IX.) to their case. But it was held by V. C. Wood to be inapplicable to a case of collision *on the high seas* between two foreign ships ; and he refused to take judicial cognizance that the law of America is, in respect of limitation of liability in such cases, the same as in those sections of the British Merchant Shipping Act, but was of opinion that if that identity were averred and proved, the Court could administer the American law between Americans. That decision was affirmed, on appeal, by Lords Justices Knight-Bruce and Turner (*o*).

The following cases have not been overlooked by us :— *The Carl Johan (p)* between a British and a Swedish vessel ; *The General Iron Screw Company* v. *Schurmanns (q)* between a British and a Dutch ship ; *The Wild Ranger* (*r*) between a British and an American ship ; *The Zollverein* (*s*) between a British and a Prussian vessel ; *The Griefswald* (*t*)

(*n*) 4 Kay & J. 367. (*o*) 2 DeGex. & Jo. 614.
(*p*) Cited in 1 Hagg. Adm. R. 113. (*q*) 1 Johns. & Hem. 180.
(*r*) 9 Jur. N. S. 134. (*s*) Swabey R. 96 (*t*) Ibid. 430

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between a British and a Prussian vessel; and *The Amalia* (*u*) between a British and a Belgian ship; but, as they relate mainly to the question of limited liability, rather than to the question of jurisdiction, it is unnecessary to refer to them at length. The last mentioned of those cases was decided upon the recent Statute 25 & 26 Vict., c. 63, s. 54, whereby the law of limited liability, in cases of collision, has been put on a new footing, the propriety of which has been questioned. See De Wendt's Maritime Legislation p. 109.

The North American (*v*) was a case of collision between a Spanish barque and an American ship. It is reported on appeal to the Privy Council from the Court of Admiralty in England in 1858. The Lords of the Judicial Committee who took part in that case, were Lord Kingsdown, Sir Edward Ryan, and Sir John T. Coleridge. The collision occurred in St. George's Channel. There was not any attempt made in that case to rest the jurisdiction on Statute Law. Nor was there any attempt to deny the jurisdiction. The law applied to the case was the maritime law common to all nations, as in *The Dumfries* (*w*) a collision between a Danish schooner and a British barque; and in *The Saxonia* (*x*) a collision between a Hamburgh and a British vessel. With respect to the case of *The North American*, it is important to remember that it occurred in 1858, *i.e.*, previously to the passing of the Admiralty Courts Act of 1861, and that, until that Act was passed, we have not met with any case in which the jurisdiction to entertain suits as to collisions between foreign vessels was rested, by the Court, or in the arguments of counsel, upon Statute Law.

The Diana (*y*), which occurred in 1862, was a case of collision between two British vessels in foreign inland waters. The jurisdiction was rested on the Admiralty Courts Act of 1861 (24 Vict. c. 10).

(*u*) 1 Moo. P. C. C. N. S. 471. (*v*) 12 Moo. P. C. C. 331.
(*w*) Swabey R. 63. (*x*) 15 Moo. P. C. C. 262.
(*y*) Lushington Rep. 539.

The Courier (*z*) was a case of collision in 1862, the owners of both vessels being foreigners. The collision happened in the port of Rio Grande. Dr. Lushington is reported as saying: "It is immaterial that the owners of both ships are foreigners: the Court has jurisdiction." He is not in the text represented as relying on the Admiralty Courts Act of 1861, but the head note of the case grounds the decision on the 7th section of that Act.

The Ida (*a*), much relied upon for the defendants, was a case in which the Admiralty Court, in the year 1860, declined to entertain a suit brought by the foreign owners of cargo lately laden on board the English barque "Barbara Innes" against the schooner, "Ida," and her owners, and is not in point in the present case. It was not a case of collision proper, but of a personal tort committed by the master of the Danish schooner, whereby a portion of the cargo, which had been placed in a boat alongside the English barque, was lost at Ibraila in the river Danube, at a distance of about 99 miles from its mouth. Both the tort itself and the locality in which it was committed deprive the case of *The Ida* of any bearing upon a case of collision between two vessels upon the high seas.

The Mali Ivo (*b*) was a case of collision which occurred in the Bosphorus, on the 12th December 1866, between a Norwegian brig and an Austrian brig. The former sued the latter in the English Court of Admiralty in 1866, and in 1869 obtained a decree. Sir R. Phillimore, in giving judgment, said: "It has been said by the counsel for the defendant, that this Court would not be anxious to entertain such a suit, but it has not been said, and could not with propriety have been said, that the Court had not jurisdiction over the subject. It is well known that the jurisdiction of the High

(*z*) Lushington Rep. 541.
(*a*) Ibid 6.
(*b*) L. R. 2 Adm. & Eccl. 356.

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Court of Admiralty extends to all cases of collision happening upon the seas, that is within the ebb and flow of the tide." So far as we can perceive, the learned Judge was there speaking of the ancient law of the Admiralty and not of the Admiralty Court Act of 1861 ; and in the 4th Volume of his work on International Law, p. 581, plac. DCCCXV., written apparently before the passing of the Admiralty Court Act of 1861, or the more recent Statute 26 & 27 Vict., c. 24 (1863), he treats the Court of Admiralty as having jurisdiction to entertain a suit in respect of collision between two foreign vessels. He says : " In all cases of collision upon the high sea, or in foreign waters, between a foreign and English vessel, or *between two foreign vessels,* the wrongdoer, whether he be a foreigner or English subject, is ascertained by a reference to the old rule of the sea, founded on the principle of general maritime law, and not to the rule prescribed by the English statute. Cases of *collision,* like cases of *salvage,* are considered as belonging to the *jus gentium.*"

In *The Halley* (*c*) Lord Justice Selwyn, in giving the judgment of the Privy Council in a suit promoted by a Norwegian against a British vessel in respect of a collision in 1867 off Flushing Roads, says : " The right of all persons, whether British subjects or aliens, to sue in the English Courts for damages in respect of torts committed in foreign countries, has long since been established ; and as is observed in the note to *Mostyn* v. *Fabrigas* in Smith's Leading Cases, Vol. I., p. 656, there seems to be no reason why aliens should not sue in England for personal injuries done to them by other aliens abroad, when such injuries are actionable both by the law of England and also by that of the country where they are committed, and the impression which had prevailed to the contrary seems to be erroneous." *A fortiori* should they be at liberty so to bring civil suits against each other for injuries committed upon the high seas.

(*c*) L. R. 2 P. C. 193., 202.

It is well settled in the Admiralty Courts, both of England and America, that the jurisdiction to entertain a suit between foreigners does not depend on the assent of the Consul or minister of either nation, although in certain suits, more especially suits for wages or otherwise upon contracts, the assent or dissent of the consul or minister may influence the Court on the question whether or not it will exercise the discretion, which in such suits is vested in it, as to entertaining the suit or not.

In *The Nina* (*d*), which was a suit, by a British seaman employed on board a foreign ship, for wages, it was admitted by the Privy Council that the Consul of the nation to which the foreign vessel belonged was entitled to notice of the suit, and Lord Romilly, in giving judgment on behalf of their Lordships, further said: "With respect to the third question, their Lordships are of opinion that the protest of the Foreign Consul does not 'ipso facto' operate as a bar to the prosecution of the suit. The Foreign Consul has not the power to put a veto on the exercise of its jurisdiction by the Court of Admiralty. It is well observed by Dr. Lushington, in the case of *The Golubchick* (*e*), that the jurisdiction of the Court of Admiralty cannot depend upon the will of a Foreign Consul; that as he cannot confer the jurisdiction, so he cannot take it away. If the Consul protests, but advances no reasons, the suit will proceed. If he advances reasons for staying the suit, the plaintiff must be at liberty to dispute the facts and answer the reasons put forward by the Consul; and, then, the Judge of the Court of Admiralty is to exercise his discretion and determine whether, having regard to those reasons, with the answers thereto, it is fit and proper that the suit should proceed or be stayed. By discretion is meant, to use the words of Lord Eldon in *White* v. *Damon* (*f*), not an arbitrary, capricious discretion, but one that is regulated upon grounds that will

(*d*) L. R. 2 P. C. 47 and S. C. in L. R. 2 Adm. & Eccl. 44.
(*e*) 1 Wm. Rob. 143. (*f*) 7. Ves. 35.

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make it judicial. That the exercise of this jurisdiction by the Court of Admiralty lies in the discretion of the Court in the sense before stated, is established by al ong line of authorities, from the time of Lord Stowell down to the present. They are all one way, and they are, in the opinion of their Lordships, conclusive on this subject. And their Lordships concur in the decision of the late learned Judge of the Court of Admiralty in the case of *The Octavia*, that this discretion is not taken away by the 10th section of the Admiralty Jurisdiction Act, already referred to." That, in America, neither does the assent of the Consul or minister confer, nor does his dissent take away, jurisdiction, will be seen in the American author's work to which we shall presently refer on the question of discretion.

For these reasons, we have not any doubt that, by common maritime law, this Court has jurisdiction to entertain this suit.

The 2nd question remains for consideration. Assuming that the Court has jurisdiction, is the exercise of it discretionary, and, if so, is this a proper case for its exercise? We must commence by saying that we have not discovered any instance of collision on the high seas, between foreign vessels, in which the Admiralty Courts have laid it down that the entertainment of a suit in that respect is discretionary. The question was raised in *The Mali Ivo* (*g*), but Sir R. Phillimore declined to pronounce any opinion upon it. He admitted that in suits for wages, instituted by foreign seamen against foreign masters, the Court had a discretion to entertain or refuse them, but that discretion, he said, "is certainly distinguishable in principle from a discretion to be exercised, as in the case before him, for the purpose of preventing the subject of one foreign nation from suing the subject of another foreign nation in a cause of damage done to the vessel of the former upon the sea." He then proceeded thus: "It is another and different question whether, if there be, as is contended in this case, a *lis alibi*

(*g*) L. R. 2 Adm. and Eccl. 356.

pendens, the Court has not a discretion, or, perhaps, even a duty, to refuse the exercise of its jurisdiction, upon the same subject matter between the same parties, unless that litigation be discontinued. I am aware that it has been decided by the Court of Common Pleas, in the case of a foreigner against whom an action of contract was pending in his own country, at the suit of the plaintiff, and who came over to this country, and was sued here by the plaintiff for the same demand, that the pendency of the action in the foreign country was not a sufficient ground for staying proceedings in the action here: *Cox* v. *Mitchell* (*h*): and I have considered that part of the case of *The Bold Buccleugh*(*i*) which refers to this subject. I have referred also to the cases of *The Griefswald* (*j*), *The Lanarkshire* (*k*), *The Bengal* (*l*), and *The John & Mary* (*m*); and I have come to the conclusion that it would be my duty either to suspend proceedings in this Court, or to put the parties to their election as to which Court they would have recourse to, if, indeed, the evidence before me established that there was a *lis alibi pendens* before a tribunal which could afford the plaintiff a complete remedy, whether the proceedings were technically instituted *in rem* or *in personam*. I am also of opinion that the Austrian Consular Court of Constantinople would come within this category of a competent tribunal, inasmuch as, by the well-known capitulations by treaty, sufferance, and usage, the Austrian Empire, like other Christian States, has acquired from the Ottoman Porte an exclusive right of jurisdiction, to be exercised over its own subjects in suits of this kind within the limits of the Ottoman territory." * * * "As a matter of fact, however, I am satisfied that there is no suit pending between the litigants now before me on the same subject as that upon which I am now called to adjudicate."

In the present case, it is not pretended that there is any *lis alibi pendens* in respect of the collision, the subject of this suit.

(*h*) 7 C. B. N. S. 55
(*i*) 7 Moo. P. C. 283.
(*j*) Swabey 430.
(*k*) 2 Spinks. 189.
(*l*) Swabey 468.
(*m*) Ibid 471.

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In the Law of Shipping published in 1869 at Boston in the United States by Dr. Parsons, Dane Professor of Law in Harvard University, after referring to the English authorities, he says (Vol. 2, p. 226): "In this country (the United States) it seems to be settled, after some controversy, that our Admiralty Courts have full jurisdiction over suits between foreigners, if the subject matter of the controversy is of a maritime nature. It is, however, a question of discretion in every case, and the Court will not take cognizance of the cause, if justice would be as well done by remitting the parties to their own forum. In one of the most elaborately considered cases on this subject, *The Jerusalem* (*n*), jurisdiction was exercised in the case of a bottomry bond, although the contract was made between subjects of the Sublime Porte, and it did not appear that it was intended that the vessel should come to the United States. Claims for salvage, which depend for their determination upon the law of nations, will generally be considered by our courts. It is, however, in cases of seamen's wages that the power of the courts is most frequently invoked, and it is well settled that cognizance of a suit will be taken whenever justice demands that it should be done, as where the voyage is broken up at a port of this country, or the seaman is compelled to desert on account of cruel treatment, or is entitled to be discharged on account of a deviation." In note 5, 226, Dr. Parsons mentions the case of *One Hundred and Ninety-four Shawls* (*o*), which was a suit in respect of salvage of English goods by an English ship, in which, for very special reasons, an American Court of Admiralty, although holding that it had jurisdiction, declined to entertain the suit, and he mentions (p. 228 and notes) several suits for wages by foreign seamen against foreign captains, in which, for special reasons, the Admiralty Courts took the same course, but he does not mention any case of collision between foreign vessels in

(*n*) 2 Gallis on 198, before Mr. Justice Story. (*o*) Abbott Adm. 317.

which those Courts refused to entertain the suit. In speaking of wages suits (p. 229) he admits that American Courts seem to "go somewhat farther than the English Courts in requiring the assent of the minister or consul of the foreign country to which the parties belong; and some recognition on his part of the court is usually required; but he adds that his assent is not indispensable to the jurisdiction. He mentions (p. 230) *Patch* v. *Marshall* (*p*) where "the libellant, an American citizen, had been hired in Boston for a voyage in an *English registered vessel with an English master*, from Boston to St. Jago and back to a port in the United States. The voyage was performed, and the crew discharged in Boston. An action was commenced in a cause of *personal damage*, and the English Consul filed a protest to the jurisdiction of the Court, setting forth that the vessel was a British vessel and the Commander a British subject. 'Also that 'an investigation of some of the alleged causes of damage must call in question official acts and conduct of a British functionary in regard to British subjects, for which he is responsible only to his own government.' Mr. Justice Curtis overruled the protest and, on the merits, made a decree in favour of the libellant."

Damage by collision gives to the owners of the injured vessel a lien on the other vessel if she be in fault: *The Bold Buccleugh* (*q*). A maritime lien, as Sir. J. Jervis, in giving the judgment in that case, explains, is distinguished from a lien at common law by not requiring possession. He says: "This was well understood in the Civil Law, by which there might be a pledge with possession, and a hypothecation without possession, and by which in either case the right travelled with the thing into whosesoever possession it came. Having its origin in this rule of the civil law, a maritime lien is well defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process; and

(*p*), Curtis C. C. 432. (*q*) 7 Moo P. C. 267.

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Mr. Justice Story (1 Sumner 78,) explains that process to be a proceeding *in rem*, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding *in rem*, and, indeed, is the only court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process. This claim or privilege travels with the thing, into whosesoever possession it may come." And it would seem that the party, entitled to the lien, acts prudently in enforcing it as soon as may be, for Sir J. Jervis adds: "It is not necessary to say that the lien is indelible, and may not be lost by negligence or delay where the rights of third parties may be compromised; but where reasonable diligence is used, and the proceedings are had in good faith, the lien may be enforced, into whosesoever possession the thing may come."

The case before Mr. Justice Story, above referred to, was *The Brig Nestor* (*r*) where he lays it down as unquestionable that whenever a lien is given by maritime law, the Admiralty Court will enforce it by a proceeding *in rem*.

In *The Johann Friederich* (*s*) Dr. Lushington said: "But again; to this inconvenience it may be proper to set off the inconvenience that would arise, if no remedy here was open to the injured parties. If these parties must wait until the vessel that has done the injury returned to its own country, their remedy might be altogether lost, for she might never return at all; and if she did return, there is no part of the world so distant to which they might not be sent for their redress. In the case of a British vessel proceeded against

(*r*) 1 Sumner 78.
(*s*) 1 Wm. Rob. 38.

by a foreigner, (and why a foreigner should have a preference as against British vessels I do not see) the foreigner might be sent to Australia, the East Indies, to Newfoundland, or Canada, and in case the vessel was a foreign vessel, to any part of the globe. From these considerations it is perfectly clear, that a refusal to exercise the jurisdiction of the court in these cases, would in effect amount to a total denial of justice."

In *The Ticonderoga* (*t*) Dr. Lushington observed: "I am not aware, where there has been any proceedings *in rem*, and the vessel so proceeded against has been clearly guilty of damage, that any attempt has been made in this Court to deprive the party complaining of the right he has, *by the maritime law of the world*, of proceeding against the property itself." And in *The Linda Flor* (*u*) he said: "In the case of a foreign ship doing damage and proceeded against in a foreign country, the injured party has no means of obtaining redress save by proceeding against the ship herself, which, I apprehend, is one of the most cogent reasons for all our proceedings *in rem*." And in *The Griefswald* (*v*) the same learned Judge says: "In cases of collision it has been the practice of this country, and, so far as I know, of the European States and of the United States of America, to allow a party alleging grievance by a collision to proceed *in rem* against the ship wherever found; and this practice, it is manifest, is most conducive to justice, because in very many cases a remedy *in personam* would be impracticable. The remedy *in personam* may also exist, and we know that in this country it is frequently resorted to where the parties are resident in England."

On behalf of the American Consul and of the Augusta, it has been said that, under existing arrangements between France and the United States, if the Consuls have not power to decide such a dispute as the present, evidence at least may be taken by the respective Consuls here for the purpose

(*t*) Swabey R. 215, 217, (*u*) Ibid 309, (*v*) Swabey R. 435,

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of proceedings, which may hereafter be had in either of those countries with respect to the collision; and Treaties * of 1788 and 1853 between France and the United States

* NOTE:—The passages in the Convention, signed at Versailles on the 14th November 1788, between France and the United States, which were mentioned, were:—

"Article VI.—The Consuls and Vice-Consuls" (of the respective countries) "respectively shall receive the declarations, protests, and reports of all captains and masters of their respective nation, on account of average losses sustained at sea; and these captains and masters shall lodge, in the Chancery of the said Consuls and Vice-Consuls, the acts which they may have made in other ports on account of the accidents which may have happened to them on their voyage. If a subject of the Most Christian King and a citizen of the United States, or a foreigner, are interested in the said cargo, the average shall be settled by the tribunals of the country, and not by the Consuls or Vice-Consuls; but when only the subjects or citizens of their own nation shall be interested, the respective Consuls or Vice-Consuls shall appoint skilful persons to settle the damage and average."

"Article XII.—All differences and suits between the subjects of the Most Christian King in the United States or between the citizens of the United States within the dominions of the Most Christian King, and particularly all disputes relative to the wages and terms of engagement of the crews of the respective vessels, and all differences of whatever nature they be, which may arise between the privates of the said crews, or between any of them and their captains, or between the captains of different vessels of their nation, shall be determined by the respective Consuls and Vice-Consuls, either by a reference to arbitrators, or by a summary judgment, and without costs. No officer of the country, civil or military, shall interfere therein, or take any part whatever in the matter; and the appeals from the said Consular sentences shall be carried before the tribunals of France, or of the United States, to whom it may appertain to take cognizance thereof."

"Article XIII.—The general utility of commerce having caused to be established within the dominions of the Most Christian King, particular tribunals and forms for expediting the decision of commercial affairs, the merchants of the United States shall enjoy the benefit of these establishments; and the Congress of the United States will provide, in the manner most conformable to its laws, for the establishment of equivalent advantages in favour of the French merchants, for the prompt despatch and decision of affairs of the same nature."

have been referred to on both points. It has been further said that the Master of the "Augusta" has furnished to the Master of the "Antares" the names and addresses of the owners of the "Augusta," so that they may be sued in America. We find nothing whatever in the Treaties to debar the "Antares" from proceeding in a British Court of Admiralty. The first

"Article XVI.—The present Convention shall be in full force during the term of twelve years, to be counted from the day of the exchange of ratifications, which shall be given in proper form, and exchanged on both sides within the space of one year, or sooner if possible."—*Traites de la France par De Clercq*, Vol. I., pp. 197, 200.

The passages in the Convention, concluded between France and the United States on the 23rd February 1853, which were mentioned, were :—

"Article VI.—The Consuls-General, Consuls, Vice-Consuls or Consular Agents, shall have the right of taking at their offices or bureaux, at the domicile of the parties concerned or on board ship, the declarations of captain, crews, passengers, merchants or citizens of their country, and of executing there all requisite papers. The respective Consuls-General, Consuls, Vice-Consuls or Consular Agents shall have also the right to receive at their offices or bureaux, conformably to the laws and regulations of their country, all acts of agreement executed between the citizens of their own country, and the citizens and inhabitants of the country in which they reside, and even all such acts between the latter; provided that these acts relate to property situated, or to business to be transacted in the territory of the nation to which the Consul or the Agent before whom they are executed belong. Copies of such papers, duly authenticated by the Consuls-General, Consuls, Vice-Consuls, or Consular Agents, and sealed with the official seal of their Consulate or Consular Agency, shall be admitted in courts of justice throughout the United States and France in like manner as the originals."

"Article X.—The respective Consuls-General, Vice-Consuls, or Consular Agents, shall receive the declarations, protests, and reports of all captains of vessels of their nation in reference to injuries experienced at sea; they shall examine and take note of the stowage; and when there are no stipulations to the contrary between the owners, freighters, or insurers, they shall be charged with the repairs. If any inhabitant of the country in which the Consuls reside, or citizens of a third nation, are interested in the matter, and the parties cannot agree, the competent local authority shall decide."—*Traites de la France par De Clercq*, Vol. VI., pp. 292, 294.

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and obvious remark to be made as to the treaty of 1788; is that it would appear to have expired many years ago. It was, as shown by the 16th article, made for twelve years only from the exchange of ratifications, which, it was stipulated, should take place within a year from the time of signature of the treaty. Even if this treaty were still in force, it would not affect the sustainability of the present suit. The 6th article would rather seem to apply to average losses and the damage connected therewith only. The 12th article applies only to differences, suits, &c., arising in France or in the United States, which French Consuls are to decide between Frenchmen, and American Consuls between Americans; but that article does not appear to make any provision for the settlement of differences between a Frenchman on one side and an American on the other. The 13th article has manifestly no bearing on a suit in any country other than France or the United States. The 6th article of the Treaty of 1853 enables French and American Consuls to receive declarations made by captains, crews, and other citizens of their respective countries, and provides that copies thereof shall be admitted in Courts of Justice throughout the United States and France in like manner as the originals, but is silent as to the extent to which the latter shall be admissible, and as to their efficacy, if admitted. The 10th article of the same treaty authorizes American and French Consuls, respectively, to receive declarations, protests, and reports of captains of vessels of their nation in reference to injuries experienced at sea, and, in the event of there not being any stipulation to the contrary, to take charge of the repairs, but provides that if any inhabitant of the country in which the Consuls reside, or citizens of a third nation, are interested in the matter, and the parties cannot agree, the competent local authority shall decide. That article does not purport to give such Consuls power to award damages for collision between American and French ships, or enable them to enforce in any country other than France or America their decisions as to repairs,

either *in rem* or *in personam*; and it would seem very questionable whether it means more than that, in the absence of any stipulation to the contrary, an American Consul may interfere as to repairs in disputes between Americans, and a French Consul may do so between Frenchmen. It makes no express provision as to the interference of either French or American Consuls in a dispute as to repairs between French subjects on the one side and Americans on the other, or for the very probable case of a difference of opinion between those Consuls. It is most vaguely penned and its scope doubtful. Assuming, however, that the French and American Consuls here might, jointly or severally, have taken the depositions of the witnesses of the collision in the present instance, and that those depositions or copies of them might have been used in a suit brought in France or America either *in personam* or *in rem*, we do not see any reason in such an authority on the part of the Consuls for preventing the "Antares" from suing in a British Court of Admiralty, or why she should not be permitted to seize the first and most favourable opportunity of enforcing her lien for damage against the "Augusta," if the latter were in fault. So far from the practicability of taking evidence here for actions to be brought elsewhere being sufficient to induce the Court to exercise its option if it have any, to refuse to entertain this suit *in rem*, it is clear that even the actual pendency elsewhere of a suit, against the owners only, would not be sufficient. In *The Bold Buccleugh (w)* the Privy Council held that the pendency of a suit *in personam* in Scotland was no bar to the right of the owners of the injured vessel to proceed *in rem* in England. How, too, can this Court, or the Master of the "Antares," tell whether the owners of the "Augusta" are solvent. Could he justify himself to his owners if, while endeavouring to ascertain how that may be, he were to allow the substantial security, the vessel alleged to be in fault, to elude his grasp? Were

(*w*) 7 Moo. P. C. C. 267, 286.

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he to do so, he might find it a matter of extreme difficulty and expense, if not an impossibility, again to fasten upon her either in France or America.

It is unnecessary for us to express, and we refrain from expressing, any opinion on the question whether this Court has a discretion as to the entertainment of a suit, such as the present, in respect of a collision on the high seas between two foreign vessels. We have already stated that we have not any doubt as to our jurisdiction by maritime law to adjudicate in such a suit, and we are quite satisfied that even if it be discretionary and not compulsory upon us to entertain it, we ought to exercise that discretion in favour of the plaintiffs by permitting them to proceed with the suit. Accordingly, we refuse the motion to discharge the warrant of arrest, and direct the costs of that motion to be costs in the cause.

Subsequently, the cause was heard on the merits by Sir Charles Sargent, J., and Green, J. The hearing lasted seven days; and on the 3rd day of May 1873 the Court, being of opinion that the "Augusta" was in the wrong, made a decree for the plaintiffs for Rs. 78,400 and all costs.

This decree was subsequently reviewed on the 8th of September 1873, and the amount of the decree reduced to Rs. 73,088.

Attorneys for the plaintiffs: *Dallas and Lynch.*
Attorneys for the defendant: *Jefferson and Payne.*