John Welsh, to the defender, the said John Thomas North, was arrested in the hands of the pursuer by Robert Stewart;" "and on the following day, viz., on 27th May 1887, the sum of £5000 was arrested in the hands of the pursuer, in virtue of a precept of arrestment contained in a summons at the instance of the said Robert Stewart against the defender, the said John Thomas North." The question therefore appears to me to be relegated to this, Was there, on this 26th day of May, which as I say, is the date of this arrestment order, a debt due to John Thomas North by John Welsh? I am of opinion that there was not, in the sense in which, as I understand it, there would be a debt due by one person to another, namely, that it could be made capable of execution and of being realised. Colonel John Thomas North appears to have got a judgment in this country, in England, against Welsh for costs. He was the defendant in a suit brought by Welsh; therefore the only judgment which he could get, being a defendant, or did get, was for costs in an action brought against him, and it is so stated in the judgment that the judgment was for the costs of the suit, *prima facie* the property of the attorney, at all events popularly so, unless the defendant in the suit, Colonel North, paid them. That judgment is registered in Scotland, and upon the face of it, as I have already mentioned, it states that it is a judgment for costs.

Now, what is the position between Colonel North and Mr Welsh as regards that judgment which Colonel North had so obtained against him for the costs of the action which he had brought against Colonel North? As I understand it, it is admitted that if a trustee, at all events, obtained a judgment and registered it in Scotland, and if he was a bare trustee for some other person in this country, in England, it could not be contended (and I believe it was not contended) that it would not be a debt which could not be arrested for the purpose of founding jurisdiction, because it would be merely a nominal judgment on the record, and the amount ought to go to his *cestui que* trust. On the other hand, I am free to admit that if there was an ordinary debt between Colonel North and Mr Welsh, upon the authorities, according to this so-called contrivance for creating jurisdiction, there would be jurisdiction, and this arrestment notice would be good. But this is an intermediate case, in which, although Colonel North was plaintiff in a judgment which *prima facie* he would have been entitled to levy from Mr Welsh, and which I quite concede Mr Welsh was entitled to pay him if he did not receive notice, still it was a debt of this character, that there was an inchoate right in the solicitors at any moment to swoop down and say that the debt should be paid to them; and if they gave notice to Mr Welsh, and if after that notice he paid Colonel North, they could go to Mr Welsh and make him pay them over again if they had not been paid by Colonel North. Therefore, in my judgment, undoubtedly there never was at any time such a debt as that the relation of debtor and creditor existed unconditionally between Colonel North and Mr Welsh. I suppose I must be wrong, differing as I do from the view of my noble and learned friends who have preceded me; but I feel very strongly about it, and hopeless as the contention has shown itself to be, still I must say it appears to me very plain that there is no such debt existing between the parties. Upon that short ground I am of opinion that this arrestment order was never properly in existence so as to found this jurisdiction.

I should be quite content to base my judgment upon that simple ground; but if I had to resort to the statute I should also be of opinion that this was not an act which operated to defeat, but an act done to defeat the claim of Eldred & Bignold. It certainly was done with that object, because Welsh had contested in the multiplepoinding suit the right of Eldred & Bignold, and this was the very inception of the transaction which gave him a right to dispute all through that action the right of Eldred & Bignold to recover the amount. I am of opinion that it was an act done to defeat the right of Eldred & Bignold; but as I said before, I quite rest my own judgment upon being clearly of opinion, so far as my judgment can be clear upon any matter, that this was never a debt between the two parties such as was capable of being realised by execution at all—there was this inchoate right of Eldred & Bignold to swoop down upon it and claim it as theirs.

Upon these grounds I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

Their Lordships affirmed the judgment of the First Division, and dismissed the appeal with costs.

Counsel for the Appellant—D.-F. Balfour, Q.C.—Sir Horace Davey, Q.C.—Odgers—Kennedy. Agents—Eldred & Bignold, for Alex. Campbell, S.S.C.

Counsel for the Respondent—Asher, Q.C. —Wilson—Le Breton. Agent—A. Beveridge, for J. & A. Hastie, S.S.C.

COURT OF SESSION.

Thursday, December 18, 1890.

FIRST DIVISION

(WITH TWO ELDER BRETHREN OF TRINITY HOUSE).

[Sheriff-Substitute of Lanarkshire and Nautical Assessors.

BROWN *v.* BOARD OF TRADE.

Ship—Court of Inquiry—Merchant Shipping Act 1854 (17 *and* 18 *Vict. c.* 104), *sec.* 242—"*Wrongful Act or Default*"—*Suspension of Master's Certificate—Process—Expenses where Appellant Unsucessful but Charge against him Withdrawn on Appeal.*

While a steamship was on a voyage from Cardiff to Tralee, without any apparent cause an inrush of water into the engine-room occurred, and in consequence the ship sank in about half-an-hour. The weather was calm, the ship was within ten miles of land, and the lives of the crew were in no immediate danger. Upon the first alarm being given, the master took no means to assure himself of the danger to the ship except by looking through a deck-grating into the engine-room where he saw water. He immediately ordered out the boats, and within a quarter of an hour left the ship with his crew, who were in a state of panic. There was some evidence that the master shared in the panic, and no means were taken by him to save the ship either by closing the door in the water-tight bulkhead, setting the pumps to work, or endeavouring to discover and stop the leak. The master's certificate was suspended by a court of inquiry, on the ground that the vessel was prematurely abandoned owing to the fault of the master, but much of the evidence had been adduced to support a charge of ship-scuttling against him. An appeal against this judgment was *dismissed*, but no expenses were given against the appellant in respect that the Board of Trade withdrew in the appeal from the charge of scuttling.

This was an appeal under the Shipping Casualties Investigations Act 1879 (42 and 43 Vict. c. 72), sec. 2, against a decision pronounced by a Court of Investigation into the circumstances attending the loss of the steamship "Ashdale," of Glasgow, which foundered about ten miles N.W. of Lundy Island, in the Bristol Channel, on the morning of 10th September 1890. The Court of Investigation had found "that the 'Ashdale' sank in consequence of an inrush of water into her engine-room, the cause of which is not apparent," and the present appeal was taken by the master, whose certificate had been suspended by that Court for a period of six months.

It appeared from the evidence that the "Ashdale" was chartered in August 1890 upon a time-charter by Messrs R. M'Cowen & Sons, of Tralee, for which port she sailed in the latter part of the month, after having landed a cargo of coal at Irvine. She duly arrived at Fenit, which is at the entrance of the Tralee Canal, and having there discharged 40 tons of cargo she proceeded up the canal towards Tralee in charge of a pilot. The ship had been aground for one tide while discharging at Fenit, and in her passage up the canal to discharge, and thereafter in her passage down to Fenit, she took the ground repeatedly. The bottom of the canal was soft mud unlikely to damage the ship's bottom. She lay at Fenit to take in 25 tons of ballast, and left upon 3rd September for Cardiff, but anchored for two nights in Brandon Bay awaiting favourable weather. Up to this time she made no water, and upon arrival at Cardiff the ship was found to be perfectly dry.

The ship left Cardiff again upon 9th September with a full cargo of coal, and proceeded down the Bristol Channel upon her return voyage to Tralee. The weather was fine, the wind light, and the sea smooth. At about 1·5 a.m. of the 10th September the master came on the bridge, took a bearing of Lundy Light, which was bearing S.E., and then went to the chart-house, and after a very short time returned to the bridge. Almost immediately on his reaching the bridge, and at a time fixed by the first mate as 1·10 a.m., they (the master and mate) heard what they described as a yell from the engineer Dearness, who had rushed on deck shouting the ship was sinking, upon which the master went aft and looked down into the engine-room, where he noticed water coming up under the platform of the engine-room in what appeared to him to be two large spouts. He then ordered the hands to be called, the boats to be lowered, and the engines to be stopped, which was done. The boats were lowered and manned in about fifteen minutes, and then the master again looked down the engine-room, and according to his own evidence then noticed the water some 2 feet higher than before, upon which he got into the lifeboat, and they pushed off and lay about 100 yards distant from the vessel, and in about some twenty minutes after this the "Ashdale" was seen to founder stern first. The account given by Dearness, the engineer, concerning the leak was that he suddenly heard a rush of water into the ship below the engine-room platform, which was 4 feet above the keel, that he then rushed on deck and informed the master, who was on the bridge, and that when he left the engine-room it was about 1½ feet high; that he again went down below, and in accordance with the master's orders stopped the engines; that he then went to the stoke-hole and told the firemen who were there to go on deck and get into the boat; that at this time the water was on a level with the engine-room platform, and that thereupon Dearness also got into the boat. The fireman, Jeremiah Moriarty, who was in the stoke-hole, stated that he saw no water there until he got on deck, and that he then looked down and saw a little water coming through a small hole into the stoke-hole. Other members of the crew confirmed to a great extent this witness. No attempt was made to discover the nature and position of the leak, to use the pumps, or to close the water-tight door.

In his evidence the master in answer to the question, "Do you think that anything that could have been done then could have kept that vessel afloat from what you saw?" replied—"No, the panic of the crew was too great. The rush of water appeared to be so strong, and the panic of the crew was so great rushing for the boats, that it was impossible for anyone to do anything." In point of fact no step to save the ship was taken either by the master or by the crew; and the master, in speaking of the means taken by himself to ascertain the extent of the danger, said—"I merely went to the deck-grating and looked down into the

engine-room. . . . I simply looked at one side, and ran again as quick as possible." The pumps of the vessel—which were not set to work at all—had pumping capabilities to the extent of 72 tons per hour.

In answer to the questions submitted by the Board of Trade, the Court, *inter alia*, replied as follows—"The Court is unable to state the cause of the water found in the engine-room at 1·10 a.m. on the 10th September. No effort was made to ascertain the locality of the leak, to endeavour to stop it, or to keep the water under by means of the pumps. The Court considers that the 'Ashdale' was prematurely abandoned, as the steps mentioned in the foregoing answer should have been taken, and could have been taken, had the engines not been stopped, and the pumps thus put out of use."

The Court at the close of the inquiry suspended the master's certificate as before mentioned for six months from 23rd October 1890, upon the special ground that the master was "in fault as regards the premature abandonment of the vessel;" and the present appeal was taken.

Argued for the appellant—The evidence all went to show that the water was coming into the ship in such quantity as would immediately sink her. The crew was panic stricken, and rushed for the boats, and the master could take no effective measures to save the ship. Besides, the master's first duty was the safety of the crew, and if in presence of imminent peril he committed an error of judgment while seeking the safety of the crew, that was not sufficient. The Merchant Shipping Act 1854 (17 and 18 Vict. c. 104), sec. 242, made suspension of certificate conditional upon the master's "wrongful act or default." The master here was of sixteen years' standing, and unlikely to be moved by unreasonable fear, and "wrongful act or default" must be proved conclusively. The evidence in the Court below was mainly directed to a charge of scuttling of the ship; the charge of premature abandonment was now sprung upon the master without an opportunity of disproving it. The cases of *Watson* v. *Board of Trade*, 22 S.L.R. 22, and *Famenoth*, 7 Prob. Div., showed what amounted to "wrongful act or default," and the facts here did not amount to that.

Argued for the respondents—It was conceded that error of judgment was not enough to warrant suspension of certificate. Here there was culpable neglect to use any judgment at all. The master allowed himself to be made the victim of panic, instead of using efforts to allay it. He made no effort to discover the leak, much less to stop it. He gave no orders to close the water-tight compartment, or to use the pumps, and the ship was allowed to sink without any endeavour to save her at a time when from weather conditions and proximity to land her crew were in no danger whatever. The master's actings showed unreasonable fear, and both his acts and defaults were wrongful.

At advising—

LORD PRESIDENT—The steamship "Ashdale," of which the appellant was master, was in the months of August and September last sailing under a time charter, and in obedience to instructions by the charterers she loaded a cargo of coal at Cardiff to be carried to Tralee. At 3 p.m. of 9th September she left Cardiff. About 1·5 a.m. of the 10th it was found that the vessel had sprung a leak. The fact was made known to the master, who was then on the bridge, by the chief engineer, Dearness, who rushed on deck shouting that the ship was sinking. The master looked down into the engine-room, where he noticed water coming up under the platform, in what appeared to him to be two large spouts. Thereafter the master and whole crew betook themselves to the boats, saved their lives, and left the ship to sink, without any effort to keep her afloat.

We have carefully considered the evidence laid before the Court below, and have received valuable advice and assistance from the two Elder Brethren of the Trinity House who sat with us as assessors in the hearing of the arguments of counsel, and in accordance with their advice, and with our own view of the evidence, we have come to the conclusion that there is no valid ground for impeaching the judgment of the Court below.

In the circumstances in which the master was placed he had a double duty to discharge—to take all possible and necessary measures to save life, and also to save the ship. These duties may come into conflict, but they are not incompatible, and the master was not entitled to devote himself entirely to the one without giving any consideration to the other. He failed to give orders to close the sliding door in the water-tight bulkhead, or to use the pumping gear with which the ship was well supplied. In short, he did nothing towards stopping or abating the leak, and at last, on the suggestion of one of the crew, he gave orders to stop the engines, which put an end to all chance of saving the ship.

It is impossible to resist the conclusion that in so acting the master was under the influence of a panic, originated no doubt by the chief engineer, but which it was the duty of the master to resist and quell. It is precisely in such an event that the master is bound not only to exercise self-control and to apply his own judgment calmly to the emergency, but also by every means in his power to influence the crew by giving distinct and peremptory orders, and so to dispel the panic.

We are not called on to determine whether if the master had done his duty the ship would, or would probably, have been saved. The question is, whether he did his duty, and gave the ship a chance of remaining afloat till she could be rescued, or whether he failed therein, and we cannot resist the conclusion that there was such failure.

Two cases were cited on behalf of the appellant, one which occurred in this Court —*Watson* v. *Board of Trade*, 22 S.L.R. 22 —and another, which is reported in L.R.,

7 Prob. Div. 207. But these cases exhibit a contrast to the present. In each the master, in a position of great peril and embarrassment, exercised his judgment calmly and to the best of his ability in deciding between two courses. In each he committed an error of judgment, as was proved by the result. But he was absolved from all blame, because he adopted what in a case of great difficulty his experience and judgment dictated to him as the better course of two.

But here the fault is no error of judgment, but a failure by the master to exercise his judgment at all—a surrender of his judgment to the influence of an unreasonable panic. This is a fault utterly unworthy of and inconsistent with the character of a British seaman. We therefore refuse the appeal.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The appeal was accordingly dismissed.

The Board of Trade moved for expenses, quoting the "*Famenoth*," *supra*, and the "*Arizona*," 5 Prov. Div. 123, but the Court refused the motion, on the ground that the expenses had been mainly incurred in investigating the charge of ship-scuttling which the Board of Trade had now departed from.

Counsel for the Appellant—Dickson—Aitken. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Respondent—H. Johnston. Agent—David Turnbull, W.S.

Wednesday, February 18, 1891.

SECOND DIVISION.

[Sheriff of Dumbarton.

M'DONALD (INSPECTOR OF POOR OF DUMBARTON) *v.* MACKENZIE (INSPECTOR OF POOR OF OLD KILPATRICK).

Poor—Birth Settlement—Irregular Marriage—Desertion.

A woman acquired a derivative settlement in the parish of D by marriage with a man whose settlement was in that parish. They left the parish, and soon after the man died without having lost his settlement in D. The widow went through an irregular marriage with an Englishman who had no settlement in Scotland. After a few months she left him on account of his bad treatment, and returned to D within two years from the time she left it. After two years more she became a pauper and was relieved by D.

The second husband denied the validity of the irregular marriage, and refused to do anything for her.

Held, in a question between D and K, the parish of her birth, (1) that the irregular marriage was proved; (2) that the facts above stated constituted desertion by the second husband; and (3) that the settlement in D having been lost by the irregular marriage, K, as the birth parish, was liable for her support.

Proof—Proof of Marriage in Sheriff Court Incidentally.

In an action between parishes as to a pauper's settlement, proof of an irregular marriage of the pauper may be led incidentally in the course of ascertaining the settlement.

On 10th September 1889 Elizabeth M'Phedran or Jenkins or White, a person of no fixed residence, and a proper subject of parochial relief, was found by the police in Dumbuck Wood in the parish of Old Kilpatrick in an extremely exhausted condition, and suffering from the effects of poison which she had taken with the intention to commit suicide. She was removed to Dumbarton Combination Poorhouse, as that was the nearest refuge. On 10th September Dumbarton parish claimed relief from Old Kilpatrick parish for the amount they had expended upon the pauper's maintenance. Old Kilpatrick denied liability, and the Inspector of Poor of Dumbarton brought an action in Sheriff Court at Dumbarton to enforce the claim, on the grounds (1) that the pauper was found destitute in Old Kilpatrick, and (2) that that parish was the parish of her birth. The birth settlement was admitted. From proof it appeared that the pauper was married first to Joseph Jenkins, sometime Chief-Constable of Dumbartonshire, and resided in Dumbarton with him for some years. He resigned his office in 1885, and went to live at Coldingham, Berwickshire. He died there the same year. The widow continued to live at Coldingham in a house of her own, but she fell into very dissipated habits, and went through an irregular marriage *per verba de præsenti* with William White, a travelling basket-maker.

The pursuer set forth the irregular marriage, and alleged that White, the pauper's husband, had deserted her, and that she had therefore become chargeable to the parish of her birth, being the defender's parish.

The defender denied that there was ever any real marriage with White, and stated that the pauper still retained her derivative settlement in Dumbarton which she obtained through her marriage with Jenkins.

The defender pleaded—"*Preliminary*—The present action being in effect a declarator of marriage, is outwith the jurisdiction of the Sheriff Court. *Merits*—(2) The pauper having a derivative residential settlement in pursuer's parish, the pursuer has no recourse against defender. (3) The pursuer's statements of the pauper contracting an irregular marriage with William White, and of habit and repute marriage and cohabitation being unfounded in fact, the