DUNSMUIR *v.* BRADSHAW, Collector of Customs.

(Circuit Court of Appeals, Ninth Circuit. April 19, 1892.)

SHIPPING—PUBLIC REGULATIONS—TOWAGE BY FOREIGN TUGS.

Under Rev. St. U. S. § 4370, imposing a penalty against foreign tugs towing American vessels from one American port to another, except where the towing is partly in foreign waters, a British tug is not liable where the towing is done partly on the British side of the straits of San Juan de Fuca, even though it might have been done entirely on the American side, in the absence of any allegation that the British waters were entered collusively or for the purpose of evading the statute.

Appeal from the District Court of the United States for the District of Washington, Northern Division.

The Lorne, a British tug, was seized by the collector of the district of Puget sound, under the provisions of section 4370, Rev. St. U. S., for an alleged illegal towing of the ship Oriental, a documented vessel of the United States, from the high seas through the straits of San Juan de Fuca and the waters of Puget sound to Tacoma, in the state of Washington. The owner of the tug paid under protest a fine of $884, and brought this libel to recover the same as having been illegally exacted. The respondent answered, alleging that, although a portion of the towing was upon the British side of the boundary line between the United States and the British possessions, it was not necessarily so, and that it might all have been done upon the American waters. A demurrer to this defense was overruled, and a decree entered dismissing the libel, upon the ground that none of the waters are "foreign waters," within the meaning of the statute.

Burke, Shepard & Woods, (*Thomas R. Shepard*, of counsel,) for appellant.

Patrick H. Winston, U. S. Dist. Atty., for appellee.

Before GILBERT, Circuit Judge, and DEADY and HAWLEY, District Judges.

GILBERT, Circuit Judge. The principles decided by this court in the case of *The Pilot*, 50 Fed. Rep. 437, govern the decision of this case. The additional defense that the towing might all have been done upon the American side of the boundary line, and without entering foreign waters, can make no difference with the result. It is not alleged that the foreign waters were entered collusively, or for the purpose, on the part of the tug, of evading the statute. The decree is reversed, with instructions to sustain the demurrer to the answer and for further proceedings.

THE COLUMBIA.

UNITED STATES *v.* THE COLUMBIA.

(Circuit Court of Appeals, Second Circuit. February 16, 1892.)

PENALTIES—FORFEITURES—PASSENGER ACT—OVERLOADING—SECTION 4465, REV. ST.

On the evidence the court found that the steamboat Columbia, libeled by the government for carrying passengers in excess of the number stated in her certificate of inspection, and held in fault by the district court, did not, on the trip in question, carry more passengers than her certificate allowed, and that the decree of the district court should therefore be reversed, and the libel dismissed. 39 Fed. Rep. 617, reversed.

In Admiralty. Libel by the United States against the steamboat Columbia for violation of section 4465, Rev. St. The Columbia was allowed to carry 3,000 passengers, and no more. The libel alleged that on one trip she had carried 677 in excess of the number stated in her certificate of inspection. The district court decreed for the libelant, (39 Fed. Rep. 617;) and the claimant appealed to the circuit court for the eastern district of New York, which affirmed *pro forma* the decree of the district court, and claimant appealed to this court. Reversed.

Blair & Rudd, (*Benjamin F. Blair*, of counsel,) for appellant.

Jesse Johnson, U. S. Dist. Atty.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. The circumstances under which the count was made by the two passengers at Far Rockaway were such as to make absolute accuracy impossible. It did not need the testimony of the government inspectors, whom the claimant called as experts, to show that a count of a crowd moving rapidly in a mass over a wide gang plank, and moving away from the observer, could be but an approximation only. Besides errors likely to result from displacement of positions as some one turns back to return, there is the highly probable error that some will pass whom the observer does not count, and the error resulting from a consciousness of that fact on the part of the observer, and his effort, perhaps unconsciously, to correct it. Manifestly, it cannot be as accurate as a count of articles that can be handled and sorted, when that count is conducted under circumstances which admit of its being done deliberately. It appears from the evidence that the company running the Columbia had issued complimentary season tickets to the number of nearly 300. Holders of such might have been on the Columbia that day, and left no tangible evidence of their presence. But such tickets were issued almost entirely to persons in a similar line of business,—railroad men and others more or less closely affiliated in business with the company. Very few of such tickets would be shown on any one trip. It also appeared that the president or general agent of the company, the master, or purser might pass a friend on board without a ticket, and sometimes did so; but there would be very few such instan-