*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ward and others* v. *Mc Corkill and others (the "*MINNEHAHA*"), from the High Court of Admiralty; delivered the 2nd day of August,* 1861.

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Present:

LORD KINGSDOWN.
SIR EDWARD RYAN.
SIR JOHN TAYLOR COLERIDGE.

THIS is an appeal from a decision of the Court of Admiralty respecting a claim of salvage brought by the owners of the steam-tugs "Storm King" and "United Kingdom" against the owners of the ship "Minnehaha," and of the cargo on board of her.

The steam-tugs both belong to the port of Liverpool.

The "Minnehaha" is a ship of 1,127 tons register, and belongs to the port of Londonderry. On the 11th March, 1861, she was bound from New Orleans to Liverpool, with a valuable cargo of cotton and other goods, and on entering the mouth of the River Mersey had brought up at anchor in Crosby Channel, being unable to continue her voyage to Liverpool by reason of the tide, which was ebbing, and the wind which was blowing strong south-west down the river.

It is not in doubt that at this time the ship was lying in safety; but she was anxious to get into dock at Liverpool, which was distant about seven miles, without waiting for a change of the tide, and about 9 o'clock in the morning she made an agreement with the master of the "United Kingdom" to tow her to Liverpool and dock her for

thirty guineas. The "Storm King," at the same time, offered her services for the same purpose. Her assistance was considered by the master of the "Minnehaha" as unnecessary, and he rejected it; but the "Storm King" still remained near for the purpose of rendering assistance if it should be required.

The hawser of the "Minnehaha" was made fast to the "United Kingdom," and the "Minnehaha" was towed up to her anchor, which was hove up, but soon afterwards the hawser broke. How this interval was employed, and what was the cause of the breaking of the hawser, are two important points in dispute in this case. After the hawser broke, the ship of course drifted: how far she drifted is another important question. She let go both her anchors, but it is said by the Appellants that they were unable to hold her. The "United Kingdom," on being relieved from the weight of the "Minnehaha," by the breaking of the hawser, of course started a-head, but she returned and got her own hawser on board the "Minnehaha," which was attached to the ship. The "Storm King" again came up and offered her services, which were accepted. Another steam-tug, called the "Enterprise," joined the other two, and finally the three boats, the tide having changed and the flood tide set in, towed the ship to Liverpool.

Claims for salvage were made by the three boats. Those of the first two boats, the "United Kingdom" and the "Storm King," are alone before us.

The cases of these two boats differ in some material points, and we will deal first with that of the "United Kingdom."

In her case it is admitted that a contract for towage was first entered into, but she alleges that by reason of the danger in which, as she insists, the "Minnehaha" was afterwards placed, and from which she was rescued by the exertions of the "United Kingdom," the original towage contract was superseded and she became entitled to claim salvage.

On the part of the "Minnehaha," it is contended that she never was in any danger at all, but that if she was, such danger was occasioned entirely by the fault of the "United Kingdom," and that the "United Kingdom" cannot therefore be entitled

to any reward for rescuing her from such danger; that, in fact, the "United Kingdom" performed none but towage services, and performed those services very ill.

So much discussion has taken place at the Bar on the rules of law by which this case is to be governed, and so much doubt has been supposed to exist with respect to principles which we had imagined to be entirely settled, that it may be advisable for us, before considering the evidence, to state our view of the law.

When a steam-boat engages to tow a vessel for a certain remuneration from one point to another, she does not warrant that she will be able to do so and will do so under all circumstances and at all hazards; but she does engage that she will use her best endeavours for that purpose, and will bring to the task competent skill, and such a crew, tackle, and equipments as are reasonably to be expected in a vessel of her class.

She may be prevented from fulfilling her contract by *vis major*, by accidents which were not contemplated and which may render the fulfilment of her contract impossible, and in such case, by the general rule of law, she is relieved from her obligations.

But she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task; because the performance of the task is interrupted, or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship's hawser. But if in the discharge of this task, by sudden violence of wind or waves, or other accidents, the ship in tow is placed in danger, and the towing-vessel incurs risks and performs duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services if the ship be saved, and may claim as a salvor, instead of being restricted to the sum stipulated to be paid for mere towage. Whether this larger remuneration is to be considered as in addition to, or in substitution for, the price of towage, is of little consequence practically. The measure of the sum to be allowed as salvage would, of course, be increased or diminished according as the price of towage was or was not included in it. In the cases on this subject. the

towage-contract is generally spoken of as superseded by the right to salvage.

It is not disputed that these are the rules which are acted upon in the Court of Admiralty, and they appear to their Lordships to be founded in reason and in public policy, and to be not inconsistent with legal principles.

The tug is relieved from the performance of her contract by the impossibility of performing it, but if the performance of it be possible, but in the course of it the ship in her charge is exposed, by unavoidable accident, to dangers which require from the tug services of a different class and bearing a higher rate of payment, it is held to be implied in the contract that she shall be paid at such higher rate.

To hold, on the one hand, that a tug, having contracted to tow, is bound, whatever happens after the contract, though not in the contemplation of the parties, and at all hazards to herself, to take the ship to her destination; or, on the other, that the moment the performance of the contract is interrupted, or its completion in the mode originally intended becomes impossible, the tug is relieved from all further duty, and at liberty to abandon the ship in her charge to her fate;—would be alike inconsistent with the public interests.

The rule as it is established guards against both inconveniences, and provides at the same time for the safety of the ship and the just remuneration of the tug. The rule has been long settled; parties enter into towage-contracts on the faith of it; and we should be extremely sorry that any doubt should be supposed to exist upon it.

It is said that it has never been brought before us for decision. If so, considering how often the rule has been acted upon, the necessary inference is, that it has never been made the subject of appeal because it has been universally acquiesced in.

Whether the circumstances in each particular case are sufficient to turn towage into salvage must often be a subject of great doubt, as it is in the present case; but there is one point upon which their Lordships can entertain no doubt, and upon which they are surprised that any doubt should have been thrown at the Bar. If the danger from which the ship has been rescued is attributable to the fault of the tug; if the tug, whether by wilful miscon-

duct, or by negligence, or by the want of that reasonable skill or equipments which are implied in the towage-contract, has occasioned or materially contributed to the danger, we can have no hesitation in stating our opinion that she can have no claim to salvage. She never can be permitted to profit by her own wrong or default.

When it is remembered how much in all cases—how entirely in many cases—a ship in tow is at the mercy of the tug; how easily, with the knowledge which the crews of such boats usually have of the waters on which they ply, they may place a ship in their charge in great real or apparent peril; how difficult of detection such a crime must be, and how strong the temptation to commit it, their Lordships are of opinion that such cases require to be watched with the closest attention, and not without some degree of jealousy.

In applying these principles to the claim of the "United Kingdom," the first point for consideration is whether the "Minnehaha" was ever in danger, and if she were, whether the Court below was warranted in finding, as it has found, that the danger was owing to the misconduct of the tug.

There seems to be no reason for thinking that there was any danger till the hawser broke; but when it broke, and the ship drifted, the question is whether she did not then drift into a position in which she was in very serious danger.

She was originally at anchor, in the fair way of the Crosby Channel. It appears by the charts that this fair way is bordered on the north-north-east by a long ridge or shoal, beyond which lie two sand-banks called "Taylor's Bank" and "Formby Bank," and between these banks there is a narrow channel. The two banks shelve down towards each other, but in the midway there is a space of comparatively deep water called "Formby Hole." This channel is stated to be about a mile and a-half long, but not more than from twenty to thirty fathoms across, from shallow to shallow. That a large ship, in rough weather, getting into Formby Hole must be in great danger appears to their Lordships to be clear from circumstances of which even landsmen can form an opinion; that the fact is so, is proved by many witnesses in this case; and the nautical gentlemen who assist

their Lordships entertain no doubt whatever that, in the then state of the wind and tide, the "Minnehaha," which drew nineteen feet of water, if she got into Formby Hole, was in imminent danger of wreck.

If, on the other hand, she did not drift across the ridge to which we have referred, but only, as is alleged by the Respondents, touched the ridge with her stern, there was no such danger as would justify a demand by the "United Kingdom" for anything beyond her stipulated hire.

The question then is one of evidence. The pilot who ought to be well acquainted with the facts, no doubt, swears that the ship never was in Formby Hole.

But upon this point their Lordships think that the evidence of the Appellant is quite conclusive. Not only is there the evidence of the claimants themselves, but there is the testimony of two wholly independent witnesses, the masters of the two lightships; and the evidence of the master of the ship rather confirms their statement. In addition to this evidence, there is a fact proved which is decisive. The ship when she drifted let go both her anchors. The ship would of course drift beyond the anchors. If therefore the anchors were beyond the ridge, the ship would be still further beyond the ridge. When she was towed away by the three tugs she slipped her anchors, and after she got to Liverpool sent an anchor-boat to get them up and bring them to her. Now it is proved by Rodriguez the master, and Hudson the mate of the anchor-boat, that these anchors were found beyond the ridge inside of Taylor's bank, or, in other words, on the bank forming one side of Formby Hole.

Their Lordships being satisfied that the ship was in danger, the next question is whether she was brought into such danger by the misconduct, wilful or otherwise, of the "United Kingdom."

The first charge brought against her by the Respondent is one which if properly alleged and proved would make it fit that those who were guilty of it, instead of appearing in the Court of Admiralty as claimants should stand in the dock at Liverpool as criminals. It is nothing less than this: that the persons in charge of the steam-tug with a view to their own advantage purposely put in peril this valuable ship and cargo, and the lives of those

on board of her. It is contended that after the tug was attached to the ships he purposely forbore to exert her full power for the performance of her contract, and that when she was compelled to go a-head she did so with a sudden jerk with the intention of breaking the ship's hawser, and succeeded in doing so.

No such charge is contained in the Answer of the Respondent, and their Lordships agree with the learned Judge below that if it were intended to be made it should have been brought forward in the pleadings. There does not appear to be anything in the evidence to warrant such an accusation, and it is unnecessary to consider it further.

It is then contended by the Appellant that as to negligence or error in judgment, there is no case brought forward by the Answer, and that the Court is precluded from inquiry into that matter. We are not prepared to go that length. The claimants must prove their own case; they must show that the ship being in danger from no fault of theirs, they performed services which were not covered by their towage contract, and did all they could to prevent the danger. If entitled to salvage at all, the amount must in a great degree depend on the promptness and efficiency of the services rendered.

If the Court below was right in holding that after the hawser broke the "United Kingdom" did not come up as soon as she might reasonably have done, and ought to have done, in order to repair the mischief, then we think it was properly decided that she could make no claim to salvage.

It has been found by the Trinity Masters in the Court below that the hawser was broken by the erroneous conduct of the alleged salvors, and that the "United Kingdom" and "Storm King" might have rescued the ship from her position at an earlier period without risk to their own safety.

If these findings are warranted by the evidence, the judgment is right. But we have great difficulty in arriving at these conclusions. As to the first, and much the most important point, the breaking of the hawser. It is found to have been done "by the erroneous conduct of the alleged salvors." But the alleged salvors were the "United Kingdom" and the "Storm King;" and what could the "Storm King" possibly have to do with it?

Again, we have looked in vain for any sufficient evidence to justify the finding with respect to the "United Kingdom." Our Nautical Assessors are of opinion that the accident was caused by the failure of the hawser, which was unequal to bear the heavy strain to which it was exposed between a large ship drawing nineteen feet of water and a powerful tug pulling her against a strong tide and squalls of wind in a rough sea.

The other complaint made against the "United Kingdom" is that she ought to have come up sooner after the hawser broke, and that she might have done so by backing under the bows of the "Minnehaha."

Upon this point there is no distinct finding in the Court below. It is sworn by the witnesses for the "United Kingdom" that by reason of the hawser of the "Minnehaha" having broken close to the ship and dragging in the water, it was impossible for the tug, in the position in which the ship was, to have backed under the bows of the ship. Our Nautical Assistants are of that opinion; they think that the course which the tug actually adopted was that which in the circumstances of the case was proper; and that considering what was to be done in getting out their own large hawser to supply the place of that which was broken, there was no want of promptitude or nautical skill on the part of the crew of the "United Kingdom."

Though we think that the Appellants must make out their own case, and that the objections to which we have referred are open to the Respondent, still in judging of the effects of evidence we must have regard to the degree of notice which was given by the Respondent to the Appellants of the nature of the objections on which it was intended to rely. Certainly the defence here is so framed that although it puts in issue all the facts alleged by the Appellants, it does not give them notice of any particular point to which their evidence should be especially directed. Notwithstanding the strong impression which we entertain as to the result of the evidence, yet if it depended in any material degree upon the demeanour of the witnesses and the mode in which their evidence was given, and if it appeared to us that the finding of the Trinity Masters was consistent with what we

hold to be certain facts, we should, probably, yield to the authority of the Court below, however it might differ from the advice given to us. But there are in the finding below conclusions which we are satisfied are mistaken. It is found amongst other things that the ship never was in danger, a fact with respect to which we can entertain no doubt.

Thus much as to the case of the "United Kingdom."

The case of the "Storm King" is different. After her services had been rejected she came up again after the "Minnehaha" was in Formby Hole, and when the danger had occurred. If in this state of things she made a towage contract she can claim nothing more; for nothing supervened afterwards to change the character of the services. And with respect to her, the main question is whether she entered into any engagement or not.

Upon this point we do not observe any finding in the Court below. It seems to have been assumed that whether there was a contract or not, yet if the ship was rescued from danger without any default of the tug she would be entitled to claim salvage, notwithstanding the contract. We cannot, for the reasons already assigned, agree in this view, for the danger, whatever it was, had been incurred before the contract had been entered into.

The evidence as to the contract is quite contradictory; it is for the Respondents to prove such an agreement, and we think they have failed to establish it. There appears to be, as it was likely there should be in the confusion which prevailed, some misunderstanding. The utmost extent to which the evidence could be carried (and we do not think it goes even to that length) appears to us to be that the "Storm King" insisted on being placed on the same terms as the "United Kingdom," *i.e.*, not receiving 30 guineas, but being on the same footing as the "United Kingdom," whatever that might be.

Then, were any services rendered by these vessels which could be properly termed salvage? On the assumption that the ship was in the position in which we have no doubt that she was, we think such services were rendered. The attempt to tow the ship across the shoal at first failed. It became necessary so to manœuvre that, till the tide turned, the ship should be kept from getting on the bank, and this, we are

advised, required considerable skill, and we think it is made out that, in endeavouring to tug the ship out of the shoal, the "United Kingdom" suffered some injury by straining. With respect to the alleged disobedience by the "Storm King" of the orders of the pilot as to the mode in which he should attach himself to the ship, the general rule is not disputed, that the directions of the pilot are to be obeyed. But in such cases there may well be a difference of opinion as to the most advisable mode of proceeding, and we think, upon the result of the evidence, that the pilot acquiesced in the course taken by the tug.

Upon the whole, notwithstanding the extreme reluctance which we always feel, for the reasons assigned in the "Julia," to disturb judgments in the Admiralty Court upon grounds such as those upon which we must proceed in this case, we feel ourselves compelled to advise Her Majesty to reverse the present sentence as to both vessels.

We are satisfied that the breaking of the ship's hawser placed the ship in danger; that when she drifted over the shoal into Formby Hole, and as long as she lay there, such danger continued; that she was rescued from such danger by the exertions of the steam-tugs; that as to the "United Kingdom," the towage contract was so far suspended as to entitle her to a larger remuneration under the head of salvage; and that as to the "Storm King," no towage contract at a fixed price is established. We think the evidence does not warrant a finding that as to both or either of the steam-tugs, there was any default in the performance of their duty.

With respect to the amount of remuneration, we are in considerable difficulty.

The "United Kingdom" was by no means relieved from the performance of her towage contract by the accident of the rope breaking. She was bound to do what she could to repair the mischief by throwing on board her own hawser, and, when circumstances made it possible, to tow the ship to Liverpool. And in estimating the amount to be awarded, we think this must be taken into account. We shall advise Her Majesty to award a sum of 300*l.* to the "United Kingdom," to cover all her claims. As to the "Storm King," the services which she rendered were little more than towage,

and we think they will be amply remunerated by a sum of 50*l*. Both vessels must have their costs, both in the Court below and in this Court. We think that the circumstances of this case made it fit to be tried in a Superior Court.