

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Snow and others v. Aylan and others (ship "Atlas"), from the High Court of Admiralty of England; delivered 16th July, 1862.*

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Present :

LORD CHELMSFORD.

LORD KINGSDOWN.

SIR JOHN TAYLOR COLERIDGE.

THIS was an appeal from the Judgment of the High Court of Admiralty in a cause of salvage, which the owners, masters, and crew respectively of the smacks "Prosperous" and "Alert" had instituted against the owners of the schooner "Atlas" and of her cargo, the claim for compensation having been rejected by the learned Judge of that Court. The allegations of the petition were admitted by the Defendants with a single exception, which will be stated hereafter; and the facts appear to be these: The "Prosperous" and "Alert" are two fishing-smacks, and on the 4th March last were employed in fishing in the North Sea about seventy miles from the English coast, when at a distance of some miles a vessel was discovered, which turned out to be the "Atlas," apparently under no command. They proceeded towards her, and found her lying hove-to under her topsail only, rolling in the trough of the sea, which was running heavily and breaking over her fore and aft. The two masters and three men from each smack, with difficulty and at considerable risk, succeeded in boarding her. They found her derelict, her compasses, charts, and some other articles washing about her decks, and about three feet of water or more in her hold. She was laden with iron. With great exertion the pumps were set in motion, the fore-staysail set, and her head veered round. Hawsers were got ready in the smacks, and about 1 P.M. they began to tow her; this continued through that night, during which it was

found necessary to keep the pumps constantly going, as she continued to make a considerable quantity of water. On the following day a breeze sprang up, and the wind blew heavily; the sea made a complete breach over her, and it was difficult to stand to the pumps. The gale continued for some hours, but at 2 A.M. of the 6th they made the Newcap light-ship; and about noon of that day reached up with the land a little below Winterton.

When the "Atlas" had been brought thus far, the steam-tug "Emperor," of Yarmouth, came up and offered her services, which were accepted, and an agreement made that she should tow the schooner and the two smacks up the Cockle into Yarmouth roads, and thence into and up Yarmouth harbour, in safety, for the sum of 7*l*. Accordingly the schooner and the "Alert" were attached to her; the "Prosperous," however, in breach of the agreement, the master of the tug refused to take, and she proceeded under canvass, and reached Yarmouth. The "Emperor" towed the "Atlas" and "Alert" in safety until between 6 and 7 P.M., when they were approaching the piers to enter Yarmouth harbour. The tide was at this time falling; the master of the "Alert" and the crew on board her doubted whether there were water sufficient to float the "Atlas" over the bar, and shouted to the master of the tug not to attempt to enter at that time; it does not appear whether he heard them, but, whether he did or not, he persevered in the attempt, and the schooner came to the ground; the tow-rope attached to the smack broke, and both she and the "Atlas" struck the ground, and drove upon the beach; on which the tug turned round and left them.

The sailors, six in number, who were on board the "Atlas," took boat to consult with the master of the smack, who was on board of her, as to the measures to be adopted for getting the vessels off at the flood; a violent squall, however, drove them out to sea; the squall increased to a hurricane, and their lives were in great peril, but they were providentially picked up by a Ramsgate fishing-smack, and landed at Lowestoft on the following day.

Phillips, the master, when the weather had become calm went ashore in his boat, and while he was trying to find out his owner's agent for the purpose of procuring assistance for completing the salvage, some

strangers without authority boarded the "Atlas," and brought her into the harbour at the flood early in the morning, the vessel of course requiring repairs, but the cargo uninjured.

It has been stated that the Defendants admit all the allegations of the Petition but the thirteenth, which is as follows: "That the Plaintiffs were the means of saving the vessel and cargo from total loss, and at the risk of their lives." They plead also 1st, that the Plaintiffs did not bring the "Atlas" into safety; that the negligence of those on board the tug having occasioned the "Atlas" and "Alert" to go ashore, occasioned all the subsequent expenses; and 3rd, the pendency of another salvage suit by the ultimate salvors.

On these pleadings, and under these circumstances, the learned Judge has rejected the claim of the Plaintiffs *in toto*; in his Judgment, which he appears to have arrived at with great regret, he makes no question of the great and meritorious exertions of the Plaintiffs, and he expressly decides that those exertions were not abandoned when the vessel drove on the beach; but he says they must be entirely responsible for the misconduct of those on board the "Emperor," and that owing to that misconduct those exertions were "in no degree successful;" and that, however great the efforts of salvors may be to save a ship, yet if they are not successful there is no salvage.

In a certain sense the general propositions here laid down are undoubtedly true; if the ship or cargo be not saved there can be no salvage, and if this result follow from the miscarriage or the misconduct of an agent employed by those who claim as salvors, however great or meritorious their exertions may have been, they are identified with their agent for this purpose, and their claim entirely fails. But their Lordships are compelled respectfully to differ from the learned Judge in his application of these principles to the facts of the present case. Here the ship and cargo have been saved, and it is not denied that this result is in a great measure attributable to the very meritorious exertions of the Plaintiffs; in the course of these exertions, and when the safety of the ship was near its accomplishment, it may be taken, for the sake of argument, that, by their agent's misconduct or mismanagement, an untoward

interruption was occasioned ; and that the danger of the vessel and cargo to a certain extent temporarily revived, but they never abandoned their endeavours to save her ; that which without their authority and against their will was done by others, might and would have been done by themselves, and if it had been, it cannot be conceived that their claim for compensation could have been resisted in its entirety on the ground of the misconduct which has now been held fatal to it.

The course which their Lordships will have to recommend to Her Majesty in this case will rest on two propositions. The first is this: that where a salvage is finally effected, those who meritoriously contribute to that result are entitled to a share in the reward, although the part they took, standing by itself, would not in fact have produced it. There is a case not cited in the argument which is a strong and clear illustration of this proposition, and an authority for it if any were needed—the “*Jonge Bastrian*,” 5 Ch. Robinson 323. There the vessel was found by the salvors stuck fast on a rock, her bottom beaten in, and her rudder lost in a heavy sea ; her case was so hopeless that the efforts which they made to save her were made in opposition to the master’s opinion ; however, they succeeded in warping her off and keeping her afloat long enough to enable him to take out some of her cargo, which was bullion ; then she sunk, and the salvors left her for a time ; but returned, and in their sight, she was weighed up by others who had intervened, and her whole cargo rescued. Sir William Scott determined that the claimants had not abandoned her, and must be taken to have abstained from interfering in the last stage because they saw the work was being well done by others, and their interference would have been useless. They had, he said, been the immediate instruments of saving her from the original danger, and of bringing her to the place where the other parties were enabled to complete the recovery. That learned Judge made them equal with those other parties in the salvage. This case, which, it may be observed, is mentioned with approbation by Mr. Justice Story in “*The Ship Henry Ewbank and Co.*” (1 Sumner’s R., 422), would have been on all fours with the present but for the alleged misconduct of the agent, assumed to be that of the Plaintiffs them-

selves, which difference for the present purpose is immaterial.

This introduces the second proposition—that where success is finally obtained, no mere mistake or error of judgment in the manner of procuring it, no misconduct short of that which is wilful and may be considered criminal, and that proved beyond a reasonable doubt by the owners resisting the claim, will work an entire forfeiture of the salvage. Mistake or misconduct other than criminal, which diminishes the value of the property salvaged, or occasions expense to the owners, are properly considered in the amount of compensation to be awarded. Wilful or criminal misconduct may work an entire forfeiture of it; but that must be proved by those who impute it. The presumption, of course, is in favour of innocence, and this rule applies so strongly in favour of salvors that the learned Judge of the Admiralty, in the case of the “Charles Adolphe” (Swabey’s R., 153), has laid it down that the evidence must be “conclusive” before they are found guilty; by which he must be understood to mean that it must be such as leaves no reasonable doubt in the mind of the Judge.

It is not disputed that this case falls within the first of these two propositions. The salvage has been effected, and the Plaintiffs have meritoriously contributed to producing it. What, then, are the circumstances which are to bring it within the latter part of the second, so as to justify the entire denial of compensation? Assuming for the present that they are to be responsible for the acts of the master of the “Emperor,” what is the evidence of any wilful misconduct in him? There is no proof that he heard the voices of those who requested him to anchor for the night, or that he knew or believed there was too little water to float the “Atlas” over the bar, or that he might not, in the exercise of an honest judgment, have believed that there was. There can be no doubt that it would have been very beneficial to the owners if he could have placed the vessel in perfect safety that night, and he may have been misled by an honest desire to do so. It is not enough to say that there are circumstances which may favour an opposite presumption; the conclusion is still left in reasonable doubt; and on evidence of this character a verdict of guilty could not, according

to the decision of the learned Judge in the case last mentioned, be properly pronounced.

It is, therefore, unnecessary to consider that which their Lordships have hitherto assumed, whether namely, the learned Judge correctly held the salvors to be entirely responsible in this case for the misconduct of their agent, nor do their Lordships intend to pronounce any opinion upon that point. There can be no doubt that if by the imprudence or unskilfulness of the agent the value of the property be diminished, the principal, however innocent, or however meritorious as to his own acts, must suffer for it in the diminished amount of his compensation. But when the moral considerations and the considerations of policy, which enter largely into the law of salvage, are taken into account; when also it is remembered in how many instances the salvor cannot select his agent, but is bound to accept on the spur of the moment such offers of service as tend apparently to expedite or secure the completion of the salvage; and also in how many instances the agent's conduct is entirely beyond the control or direction of the principal,—it may perhaps be found that even the limited amount of responsibility just stated may almost exceed the extent warranted by sound policy or strict justice. Their Lordships, however, throw this out merely to guard against the supposition of their having considerately assented to the doctrine of the learned Judge in this case; and they entirely reserve any decision upon it until some case shall make it necessary to pronounce one.

Their Lordships will, therefore, recommend to Her Majesty that the Judgment be reversed, with the costs below and the costs of this Appeal. They will also recommend that the salvage shall be allowed on the most liberal scale, agreeing as they do entirely with the learned Judge below that the services of the Plaintiffs were most meritorious, and they regret that the share of each individual will necessarily be small. The fund appears to have been of the value of 620*l.*, from the half of this (310*l.*) he has already given to the beachmen, who completed the saving, 120*l.* and their costs. Their Lordships will recommend that 190*l.*, the residue of this moiety, be divided equally between the two smacks.

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