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Counsel for the Pursuer and Respondent—W. Campbell, K.C.—Lyon Mackenzie. Agent—David Milne, S.S.C.

Counsel for the Defenders and Appellants—Salvesen, K.C.—Chree. Agents—Adamson, Gulland, & Stuart, S.S.C.

Friday, February 15.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.]

NORTH BRITISH STEAM FISHING COMPANY, LIMITED *v.* NORTH EASTERN SHIPPING COMPANY, LIMITED ("THE ACACIA").

Shipping Law—Salvage—Remuneration for Services—Measure of Award.

A steamship of the value with her cargo and freight of about £4000, which had suffered so badly in a heavy gale that her fires had been drowned out, was rescued by a steam trawler from a position of grave but not of imminent danger off the rocky coast near Aberdeen Harbour. In an action for salvage it was admitted that salvage services had been rendered, but it was maintained that the sum claimed was excessive. It was proved that the master of the steamship showed a signal of distress, and when the trawler in response to his signal bore down to his assistance, requested to be towed to Fraserburgh, which the master of the trawler agreed to do; that the towing lines broke twice before they were made fast, and that in passing the lines the trawler ran a risk of fouling her propeller; that after they had proceeded part of the way to Fraserburgh it was thought advisable to turn back to Aberdeen on account of the heaviness of the sea; and that the time occupied in rendering the services was twenty-four hours, but that the trawler lost no time, as during that period she could not have entered the port of Aberdeen, to which she was bound, owing to the state of the sea. It was also proved that no damage had been done to the steam trawler except that her hawsers had been strained.

The Lord Ordinary (Stormonth Darling) assessed the value of the services rendered at £300.

On a reclaiming-note the Court refused to interfere with the Lord Ordinary's award.

The North British Steam Fishing Company, Limited, the registered owners of the screw steam trawler "Ben Alder," Aberdeen, for themselves, and as representing the master and crew of the vessel, brought an action against (1) the North Eastern Shipping Company,

Limited, the registered owners of the screw steamship "Acacia," of Aberdeen, and also (2) against Macdonald & Morrison, coal merchants, Inverness, the owners of the cargo on board the "Acacia" on 17th February 1900, in which they concluded for decree ordaining the first-named defenders to make payment of £1500, and for decree ordaining the second-named defenders to make payment of £150, to the pursuers as compensation for salvage services rendered by the "Ben Alder" to the "Acacia" on 16th and 17th February 1900.

The defenders admitted that salvage services had been rendered, but pleaded that the sum sued for was excessive. Parties were agreed that at the time of the salvage the value of the "Acacia" and her freight and cargo was about £4000, and the value of the "Ben Alder," with her fishing gear and catch of fish, a little over £5000.

Proof was led, which disclosed the following facts:—The "Acacia" left Sunderland for Inverness at 2:45 p.m. on Thursday 15th February 1900, with a cargo of coal and a crew of 11. The wind increased and blew a gale about 3:30 p.m. In the course of the evening the vessel's boats were stove in or carried away, and damage was done to the deck. The gale reached its height about midnight. Thereafter the wind commenced to fall, but the sea continued rough. The pumps began to get choked, and the "Acacia" made for Aberdeen in order to get them cleared. She reached Aberdeen Bay about 11 a.m. on Friday the 16th, but the sea was too heavy for her to get over the bar. About a dozen vessels were moving about the bay waiting for the sea to go down, and the "Acacia" joined them. About 2 p.m. the engineer of the "Acacia" reported that the fires were being drowned out, and that he could not keep the vessel going much longer. The master asked two of the vessels which were waiting in the bay to tow the "Acacia" to Fraserburgh, but they declined. The wind was then S.S.E. to S.E., and the vessel was lying a mile or so off Girdleness. The master of the "Acacia" then ran up a flag as a signal of distress, and the "Ben Alder" bore down to his assistance. He asked the "Ben Alder" to tow him to Fraserburgh, which the master of the "Ben Alder" agreed to do. The tow lines broke twice before they were made fast. In passing the lines on board the "Acacia" the "Ben Alder" had to come within 3 or 4 feet of the "Acacia," and she ran a risk of fouling her propeller. After the hawsers had been made fast, the "Ben Alder" at first attempted to tow the "Acacia" northwards towards Fraserburgh, but desisted on account of the heavy seas, and took her back to Aberdeen Bay, and kept attached to her all night. At 2 a.m. the "Acacia" heeled over, and all her boats being useless she sent up rockets for a boat. The trawler "North Coast" sent a boat alongside with two men, who got on board the "Acacia." This boat was kept astern in case the "Acacia" should sink, and was towed behind till it was swamped at the entrance of Aberdeen Harbour. The sea gradually went

down, and with the next tide the "Ben Alder" took the "Acacia" safely into Aberdeen Harbour. No actual damage was done to the "Ben Alder," except that her hawsers were strained and new hawsers had to be got a few months sooner than would otherwise have been the case. The time occupied in rendering the services was twenty-four hours, but the "Ben Alder" lost no time, as during that period she could not have entered the port of Aberdeen, to which she was bound, on account of the state of the sea.

William Crombie, harbour-master at Aberdeen, examined for the pursuers, deponed as follows:—"I recollect seeing the steamship 'Acacia' flying signals of distress early in the afternoon of the Friday. I was then at the flaghouse at the north pier. The 'Acacia' was to the southward from where I was standing. She was in a very dangerous position. She was off a very rough part of the coast. There was no good anchorage there. At that time there was a heavy sea coming in from the south-east, and the current was then flowing southward. It was full tide that afternoon at half-past two. (Q) And does the current flow south after high-water off Girdleness?—(A) Forfully two hours, and it sets off there as well. (Q) So that the effect of the wind and sea from the S.E. and the current flowing south would be to take the 'Acacia' in on the rocks?—(A) It is my opinion that she would have cleared the Girdleness, and would have gone to the Cove, three or four miles south of Girdleness. That would have been owing to the strength and the offset of the tide. . . . (Q) I saw the 'Ben Alder' going to pick up the 'Acacia,' and then I saw her get the 'Acacia' in tow. . . . At first the 'Ben Alder' towed the 'Acacia' out to sea and then northwards. There was still a very heavy sea running. (Q) In your judgment, was it a difficult and dangerous operation?—(A) It is always a difficult operation to take a vessel with a screw in tow, and with a sea running like that. (Q) It was on account of the heavy sea, and the fact that they were screws and not paddle steamers?—(A) Yes. There was a danger of fouling the propeller. It was not till about half-past eleven on the Saturday forenoon that I first put up signals intimating that it was safe to come into the harbour. There was still a good bit of sea on, but nothing to what it was on the Friday. I saw the 'Ben Alder' bringing the 'Acacia' in. (Q) Was it a difficult operation?—(A) It was difficult the way he came in with her. (Q) And dangerous?—(A) Yes, dangerous for the 'Acacia.' (Q) Was that because of the sea that was running, and the fact that the 'Ben Alder' was a smaller vessel than the 'Acacia,' and a screw?—(A) No. It was because they did not allow for the flood tide running across the harbour; and with the great length of rope they had out they had enough to do to keep clear of the breakwater. One of the 'Ben Alder's' ropes parted when the vessels were in between the pier and the breakwater. After getting inside the pier end she came up pretty well. There was

danger of the 'Acacia' not clearing the south breakwater. She was scarcely clear of it at one time. (Q) It was necessary to have a long stretch of rope out in order to make quite sure that the rope would not break?—(A) They are bound to have a long stretch out when it is wild weather. (Q) Did the 'Ben Alder,' in your judgment, run a serious risk in carrying out the salvage?—(A) Her greatest risk would have been at the time of taking the 'Acacia' in tow. The 'Acacia' seemed to us to be helpless. . . . *Cross.* . . . If no boat had taken the 'Acacia' in tow at all, the remains of the flood tide would have swept her to the southward and off the land, but the sea would have taken her in as well. (Q) If no assistance had come to her, do you think she had a fair chance of reaching good anchorage to the south of the harbour?—(A) Yes, I think she would have cleared Greig's Ness, and could have let go her anchors at the Cove. The set of the tide would have taken her round there, and she would have found holding-ground at that place. (Q) So far as there was danger to the 'Ben Alder,' you say that that was confined to the danger of fouling her propeller when she was passing a line to the other vessel?—(A) Yes. (Q) Do you see any other possible danger that she incurred except that?—(A) No, I cannot say I do. (Q) So far as the difficulty of bringing the 'Acacia' in was concerned, you say that that was caused by the way in which the 'Ben Alder' brought her in?—(A) Yes. (Q) She did not allow for the flood tide and her long hawser, and the consequence was that the 'Acacia' was swept down near the pier-head?—(A) Yes. (Q) And that was danger to the 'Acacia' and not danger to the 'Ben Alder'?—(A) I did not see any danger to the 'Ben Alder.'"

On 5th December 1900 the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor:—"Decerns against the defenders the North-Eastern Shipping Company, Limited, for payment to the pursuers of the sum of £279, 5s. 6d. sterling, with interest thereon at the rate concluded for, from this date till payment: Decerns against the defenders Macdonald & Morrison for payment to the pursuers of the sum of £20, 14s. 6d. sterling, with interest thereon at the said rate, from this date till payment," &c.

Note.—"The services rendered by the 'Ben Alder' to the 'Acacia' on 16th and 17th February 1900 are admitted to have been salvage services, and therefore the question which I have to decide is simply one of amount. The 'Acacia' when picked up shortly after 2 p.m. on the 16th was undoubtedly in a position of danger, not, I think, of extreme or imminent, but certainly of grave danger. She had been knocked about so badly in the heavy gale of the night before that her fires were drowned out and her motive power gone. She was lying a mile or so off Girdleness, near Aberdeen, and had hoisted signals of distress. The wind had by that time gone down, but a heavy sea was running in, and

though the tide might possibly have carried her southward and clear of the rocky coast which stretches from Aberdeen to Stonehaven, it is also quite possible that she might have drifted on the rocks. It was high time, therefore, that some vessel should come to her assistance, as the 'Ben Alder' did. There were a good many others about waiting to get over the bar at Aberdeen, but one of them refused to take her in tow on the ground that she had no lights. Probably that was a sufficient reason, but there certainly seems to have been no competition for the work of salvage.

"Next, I think it is impossible to say that there was no risk to the 'Ben Alder.' The work of picking up a disabled vessel in a heavy sea must always involve a certain amount of risk. The tow-line broke twice, and this required the 'Ben Alder' to come within a few feet of the 'Acacia.' There was no fouling of the propeller when the ropes broke, but there might have been; and the two vessels might have collided.

"The services occupied about twenty-four hours. At first there was an attempt to tow the 'Acacia' towards Fraserburgh, in accordance with her master's desire, but the force of the sea was found to be too strong, and ultimately she was taken into Aberdeen. During the night the crew of the 'Acacia' became afraid that she might go down, and their own boats having been rendered useless, they sent up rockets, in answer to which a boat came from the trawler 'North Coast,' and was towed in their wake, ready for any emergency till they reached Aberdeen. An attempt was made by the pursuers to show that the 'Ben Alder' ran some risk in taking the 'Acacia' into port. But the risk, I think, was to the 'Acacia' and not to the 'Ben Alder.' No actual damage was sustained by the 'Ben Alder' except that her hawsers were strained, and new hawsers had to be got a few months sooner than would otherwise have been the case.

"As regards the 'Acacia,' the parties are agreed in stating the value of the ship, freight, and cargo at £4000, and the value of the 'Ben Alder' at a little over £5000. Taking all the circumstances into account, I come to the conclusion that £300 is a reasonable award."

The pursuers reclaimed, and argued—The Lord Ordinary's award was much too small, and should be at least doubled. When the "Acacia" was salvaged there was no doubt she was in a position of very great danger, and the "Ben Alder" in getting attached to her in such a heavy sea incurred great risk. All the cases in which the risks involved, the time taken up in salvaging, and the value of the vessel and cargo salvaged were similar to the present, showed that a much larger sum should have been awarded. In "*The Albion*," 1837, 3 Haggart's Reports, 254, the value of the ship salvaged was £4000, and the award £1000. In "*The Lord Grey*," 1837, 3 Haggart's Reports, 363, the value of the ship salvaged was £4000, and the award £900. In "*The Paris*," 1854, 1 Spink 289, the value of the ship salvaged was £4000, and

the award £800. In "*The M'Morran Castle*," December 16, 1898, reported in the *Shipping Gazette*, the value of the ship, which, as in the present case, was salvaged by a trawler off Aberdeen, was £4500, and the award was £1500. In "*The Sea Eagle*," August 8, 1900, High Court of Justice, Admiralty Division (not reported), the value of the ship salvaged was £4500 and the award £1500. The case of "*The Pathfinder*," *infra*, was not applicable, as the salvage services in that case were of the lowest order, and the risk incurred was not great.

Argued for the defenders—There was no ground for interfering with the judgment of the Lord Ordinary. The Lord Ordinary had put the pursuer's case in the most favourable manner when he said that the danger was grave but not imminent. The evidence showed that although salvage services had been rendered they were not of a higher class than those rendered in "*The Pathfinder*" (*Liverpool Steam Tug Company, Limited v. Cornfoot*), June 19, 1900, 2 F. 1060, and in the present case in proportion to the value of the salvaged vessel a large award had been given. The "*Ben Alder*" lost no time while performing the salvage services; she took the "*Acacia*" into the port to which she herself was going. As Lord Trayner had said in the case of "*The Pathfinder*," the Court would not interfere with the Lord Ordinary's award unless it was unreasonably inadequate or unreasonably extravagant. In the present case the award was neither the one nor the other. Besides, if the "Ben Alder" had declined to undertake the salvage services there were other vessels about at the time whose assistance could have been got. That fact tended to lessen the salvage award—"*The Werra*," 1886, 12 P.D. 52. The following unreported decisions in the Outer House showed that the award in the present case was ample. In *The Cargill Steam Trawling Company, Limited v. The Fraserburgh and North of Scotland Trawling Company, Limited*, May 26, 1900 (Lord Stormonth Darling), a steam trawler which had salvaged a disabled trawler of the value of over £6000 was awarded £250, although the former had lost two days' fishing in carrying out the rescue. In *The Peterhead Steam Fishery Company, Limited v. George M'Gowan*, November 17, 1900 (Lord Low), a lifeboat and a steam trawler, which, three miles to the north of Peterhead, had rescued a ship of the value of between £14,000 and £15,000, which was being towed to Sunderland to be fitted up with boilers, and had become unmanageable in a heavy storm, were awarded £600. And in *Scott v. Wighton*, February 4, 1898 (Lord M'Laren), one steamship which had rescued another of the value of £1800, whose engines had broken down, and which was in imminent peril of drifting on the coast of Fife, was awarded £180.

LORD JUSTICE-CLERK—We have had an able debate in this case, and having given it the best consideration I can, I do not think it is a case in which the Court should

interfere with the discretion which the Lord Ordinary has exercised. It is certainly a small award which the Lord Ordinary has given, and it is quite possible that if we had been considering it for the first time we might have been inclined to think that something a little more liberal might be given, but I feel myself unable to say that he is wrong in what he has done, or that it would be justifiable to hold that this is a case in which a much larger amount ought to be given than the Lord Ordinary has awarded. The case is in some respects peculiar, because when the services were first offered to this vessel, which was in a broken-down state, the services which were asked for and which were accepted were towage services simply, not as regards towing out of immediate and imminent danger, but towing to another port altogether, namely, Fraserburgh, the damaged vessel being on her voyage to Inverness. It turned out after the trouble they had with the hawsers, and so on, that it was thought more advisable, as the wind had abated and the sea was gradually falling, and the signal was taken down at Aberdeen Harbour, that the vessel should be taken in there. Now, I am not satisfied that at any time she was in what may be called imminent danger. The harbour-master, who was probably a very good judge on such matters, was of opinion that the wind having fallen, even if she had not received assistance, she might have cleared the head and got into what would be good anchoring ground in the diminishing sea within the Cove behind. But whether that is so or not, I am satisfied that at the time she was taken up she was taken up for towage service in the ordinary way, and it only was thought advisable later on owing to some difficulties they had owing to the heaviness of the sea to take her to Aberdeen.

Now, a number of the cases quoted to us indicate very plainly that without forming a very close and accurate estimate of the circumstances—which can always be best done by the judge who hears the case—it is not easy to fix the compensation in such cases, because if we take the cases which have been decided, we find in some of them what appears to be a very large salvage given, and in others what appears to be a small salvage given, although on the general view of the services rendered, it is difficult to see that there is much difference between them. But there have been cases quoted to us where it has been fixed upon a percentage of the value of the property, the subject of the salvage, and the proportion given by the Lord Ordinary is quite reasonable in view of these cases. In the circumstances I do not think that it would be advisable for us to interfere with the judgment at which the Lord Ordinary has arrived.

LORD TRAYNER—I am of the same opinion. In this case, as in every case of a claim for salvage, one must deal with the special circumstances which the case presents, because you cannot find, or almost never can find, any one case precisely on

all fours with others where the very same considerations come into force and with the same weight. But there are one or two general considerations always observed in dealing with cases of the present kind. We must consider what was the risk the salvaged vessel was in; we must consider what was her value; we must consider what was the risk, if any, that the salvor undertook and underwent; and we must consider also the risk, if any, to the salvor's property. In dealing with this case in these views, I am of opinion that it would be contrary to the principles already laid down in this Court to interfere with the judgment reclaimed against. I agree with the Lord Ordinary in thinking that there was here salvage service. I am not prepared to say that there was salvage service of a highly meritorious order. I do not think the salvors' risk was very great, and while the "Acacia" was, as the Lord Ordinary says, in grave danger, I cannot say that she was in imminent peril of loss. There was a grave risk of loss and peril, but not so imminent as the pursuer has suggested. Looking to the amount of peril in which the "Acacia" was, and taking a liberal view of the service rendered to her by the "Ben Alder," I am not prepared to say that the Lord Ordinary's award is unreasonably inadequate. Now, I am of opinion that we should not interfere with the judgment fixing the amount of award or remuneration for salvage services—the award given by the judge of first instance—unless we are prepared to affirm that the amount is either unreasonably inadequate or unreasonably extravagant. I do not think that this is a case in which I can come to the conclusion that a really substantial difference ought to be made on what the Lord Ordinary has done, and though I might—I do not say that I would—if I had been judge of first instance, have pronounced an award in excess of what the Lord Ordinary has given, I am not disposed to interfere with what the Lord Ordinary has done. I am therefore for affirming the interlocutor of the Lord Ordinary.

LORD KINCAIRNEY—I am of the same opinion. No question of law has been raised, and the view which the Lord Ordinary has taken about the facts has not been challenged except in one particular. Mr Ure maintained that his Lordship had underrated the danger in which the salvaged vessel was placed, and I was much impressed with his argument on that point. But on considering the passages in the proof quoted by Mr Aitken I have come to think that the Lord Ordinary has taken the right view on that matter also, and that he has justly characterised the danger as grave, but not more than that. The question therefore is reduced to this, whether the Lord Ordinary, being right in fact and in law, has gone wrong on the assessment of the damage—on that point I am not without the impression that the defenders have been let off somewhat easily. Still, having regard to the recent judgment

cited as the "*Pathfinder*," I cannot suggest that this judgment should be altered. I am by no means prepared to characterise this assessment as unreasonable, although I should have been ready to agree had it been somewhat greater. It is supported by the cases decided in the Outer House, which were quoted, and also by the important case of "*The Werra*," in which the principles of assessment in such cases are discussed more fully than in the other cases cited. I think the cases of the "*Sea Eagle*" and "*M. Morran*" must be regarded as exceptional.

LORD YOUNG and LORD MONCREIFF were absent.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Sol. Gen. Dickson, K.C.—Ure, K.C.—W. Brown. Agents—Alexander Morison & Co., W.S.

Counsel for the Defenders and Respondents—Salvesen, K.C.—Aitken. Agents—Boyd, Jameson, & Kelly, W.S.

Tuesday, February 19.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

JOHNSTONE v. THORBURN.

(See *ante*, vol. 36, p. 453.)

Agent and Client—Responsibility of Agent—Trust Investment—Liability of Law-Agent for Sufficiency of Investment—Trust.

Losses were sustained by a trust-estate owing to part of the funds having been lent to a harbour trust upon an assignment of their revenues and property. By Act of Parliament passed shortly before this investment was made it was provided that assignments for money borrowed before the passing of the Act and in force at that date should have priority over assignments for money borrowed after the passing of the Act. The investment had been submitted by the law-agent of the trust along with another for the consideration of the trustees, and while expressing his preference for the other he stated his opinion that the harbour trust investment was "perfectly safe." One of the trustees was found liable to make good the loss, upon the ground that although the investment was one of a class in which the trustees under the trust-deed were entitled to invest the funds of the trust, it was not in the circumstances sufficient in point of value to make it a reasonably prudent investment for trust funds. He brought an action of relief against the law-agent of the trust. The Court found in fact that the investment had been made, not upon the recommendation or advice

of the law-agent, but as the result of independent inquiries made by one of the trustees. Held that the law-agent was entitled to absolver.

Opinion (per the Lord President) that while the law-agent of a trust by submitting an investment to the trustees in effect represents that the investment is of a kind or class upon which they have power to place the trust-funds, and will be liable if loss results from the trustees having acted upon this implied representation, it is not the duty of the law-agent in respect of his appointment as law-agent to the trust, and without any express employment or instructions, to make inquiries as to the sufficiency in point of value of a proposed investment, and that consequently, even if it is not proved that the trustees proceeded upon their own inquiries in making an investment, the law-agent will not be liable unless it is proved that he was employed to advise the trustees as to the sufficiency of the security, and that the trustees acted upon his advice.

Dicta of Lord Mure and Lord Shand in *Raes v. Meek*, July 19, 1888, 15 R., at pp. 1049 and 1051, *approved*.

(This case is a sequel to the case of *Alexander v. Johnstone*, March 3, 1899, 1 F. 639, *ante*, vol. 36, p. 453.)

By his trust-disposition and settlement the late Mr Charles Alexander, who died on 3rd September 1879, conveyed his whole estate, heritable and moveable, to James Johnstone, Hunterheck, Moffat, and Peter Inglis, farmer, East Pilton, as trustees for the purpose, *inter alia*, of paying to his widow such sums as they should think proper for her maintenance and for bringing up her children. The trustees were appointed executors. They were authorised to invest the trust-estate "upon good heritable property in Scotland, . . . or upon any of the Government stocks of Great Britain or the United Kingdom, or on debenture bonds of any municipal or parliamentary trust in Scotland."

At a meeting held on September 8, 1879, the trustees and executors accepted office.

From the minute of this meeting it appeared that there were present thereat the two trustees and "also Robert Thorburn, writer, Peebles, agent for the deceased;" that the documents of value found in the repositories of the deceased were placed in the hands of Mr Thorburn; that "Mr Thorburn was instructed to have the deceased's personal effects valued forthwith for Government duty by Mr Cairns, licensed appraiser, Peebles; to advertise for claims against the deceased in the *Scotsman* and *Courant* newspapers and the *Peeblesshire Herald and Advertiser*; to have the trust-disposition and settlement by deceased placed on record; and to have a title made up to the deceased's estate forthwith;" and that "Mr James Johnstone was appointed factor and manager to the trust, with power to open an account with the Bank of Scotland, Peebles, and to