

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Walter Turnbull and others v. the Owners
of the ship "Strathnaver," her cargo and
freight (The Strathnaver), from the Vice-
Admiralty Court of New Zealand; delivered
8th December 1875.*

Present:

SIR R. J. PHILLIMORE.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS is an appeal from a decree of the Deputy Judge of the Vice-Admiralty Court of New Zealand, in a case of salvage promoted by the Appellants, the owner, master, and crew of the steam-ship "Storm Bird," against the ship "Strathnaver," her cargo and freight, for recovery of salvage in respect of certain services rendered to the ship, her cargo and freight.

It is hardly necessary that their Lordships should repeat what they have often had occasion to say with regard to cases of this description, namely, that where facts have been established by oral testimony before the Court below, and the Court has maturely deliberated, and formed its opinion as to the credence due to the witnesses on the one side and the other, this Court rarely interferes with such a finding on the part of the Judge, and never unless there has been a manifest miscarriage of justice.

It appears that at about a quarter past eight p.m., on Monday the 31st August last year, the steam-ship "Storm Bird," of 68 tons register, manned by a crew of 12 hands, was coming

out of the harbour of Port Nicholson, New Zealand, on a voyage from Wellington to a place called Wanganui, with a cargo and 70 passengers. The "Strathnaver" was a wooden ship of 1,017 tons, a sailing vessel, with a cargo and 391 emigrants. She was entering the harbour at the time the other vessel was going out. The captain of the "Storm Bird" says: "When abreast of the Steeple Rock"—the exact position has been much considered in the course of this debate, and is some way up the entrance of the harbour,—“my attention was drawn by the chief officer to signals, blue lights and rockets, bearing from us S.S.W., coming as from the direction of Chaffer's Passage, and to the S. and W. of Barrett's Reef. I took my glasses and went on the bridge and saw the loom of a large vessel; I likewise saw a green light. Nearing the heads opposite Barrett's Reef, I made it out to be a ship. I was then about 100 yards N. of the Outer Rock. We were on a straight course. The green light of the ship was almost south, about two and a half points before our starboard beam to the S.W. of the Outer Rock. I considered the vessel was running into danger by going into Chaffer's Passage. I burned a blue light; my object was to indicate the position of the safe channel. At the same time I steamed with all haste towards the ship, about eight miles an hour. It was just as we were abreast the Outer Rock, about 150 feet off, that I put on steam and altered course to S. and W. I could not see the green light except when she rolled. I steamed towards her bows." Then he says:—"She was inside a line drawn from Pencarron Head to end of the West Ledge Reef, heading towards the old pilot station, about two cables length from the part of the West Ledge nearest to the Outer Rock of

“Barrett’s Reef.” He goes on to say, what is admitted, that the wind was very light from the south-east. He then says, when he came up to the bows of the vessel he thought it unsafe to go round her bows; that he steamed under her stern and came up again a second time, and then, when he got astern of the ship, he stopped his engine and called out “port your helm;” that he was barely 50 yards from her stern, and he repeated the words three or four times “port your helm; steer for the light; you are running on a reef.” There is no doubt that when the “Storm Bird” came up the pilot was on board.

Now it will be proper to refer to the evidence of the pilot of the “Strathnaver,” and to show what his account of the position of the vessel at this time is. The pilot first gives an account of where he was. He says:—“When I first got alongside, she was from half to three-quarters of a mile from the Outer Rock of Barrett’s Reef, nearly due south. The red light of Some’s Island was open all the time.” A little lower down he says:—“I said from the boat ‘port your helm,’ after that I had been a minute or two alongside. I did not see any reason at that time for being extremely expeditious. The proper course was to get the vessel into the white light. The steamer gained on us, but not much. We pulled our boat four and a half to five knots. We arrived at the ship before the steamer.” That is an undoubted fact in the case. “After I got on deck, I braced the yards up, and set the upper mizen topsail, and loosed the main top-gallant sail. It was sheeted home, but am not positive whether it was hoisted up. When the steamer came the first time she came from the direction of the lighthouse at right angles to us, and as she passed I heard Captain Doile

“ singing out ‘ port.’ I recognised his voice. I
“ said ‘ all right.’ ”

Now their Lordships are of opinion upon an examination of the evidence with regard to the situation of the “ Strathnaver ” that at this time it is clear that she was not heading up channel as she ought to have been, but, owing to the ignorance of the captain as to the chart, she was crossing the mouths of both the channels, so to speak, and she was to the south of the Outer Rock about three-quarters of a mile to the southward. There is no dispute as to the fact that the pilot gave these orders, or that he was on board the vessel before the steamer came up.

It appears to their Lordships that the evidence upon which the learned Judge of the Court below relied was perfectly credible, that these orders were those which enabled the ship to be rescued from a situation of danger,—or perhaps, to speak more accurately, of running into great danger,—because had she continued her course with the wind as it then was blowing lightly from the south-east, there is no doubt that she would have run upon the West Ledge; and the first question which is really to be determined in this case, when we are considering whether salvage remuneration is due or whether the service was simply one of towage, is, whose advice or whose order it was that prevented this large ship from running upon the West Ledge Rock? There is no reason to doubt that the captain of the “ Storm Bird ” did what he says he did, namely, that he shouted out “ port,” and that he burned a light by way of a signal. At the same time there is equally no doubt that the pilot when he came up,—the exact time is difficult to ascertain, the learned judge thinks it was a short time, but it was an appreciable time before the arrival of the “ Storm Bird,”—he gave the order from his boat,

being anxious no doubt that no time should be lost in order to port the helm, and to brace the yards on the starboard tack. It was the execution of that order which in the opinion of the Court below, —and their Lordships on the whole see no reason to differ from it, and it is also the opinion of the nautical assessor by whom their Lordships are assisted to-day,—it was the execution of that order which rescued the ship from running into the danger which she otherwise would have incurred. Their Lordships therefore cannot ascribe the character of a salvor to the steamer, on the ground that he also gave the advice which has been mentioned.

Now there is no doubt of this fact, that when the steamer did come up again, having crossed the stern of the other ship, and come up again on her port bows, she was engaged to take the vessel in tow, and the question then arises, which has been so much contested in the Court below and before their Lordships to-day, whether he may be considered, in a construction of law, to have been engaged as salvor, or to have been engaged merely to tow.

Upon this point it may be well to refer to a very clear and precise statement of the law by Dr. Lushington, in the case of the "Princess Alice" (3 W. Rob. 138), in which he says, "without attempting any definition which may be universally applied, towage services may be described as the employment of one vessel to expedite the voyage of another when nothing more is required than the accelerating her progress." It is contended on behalf of the Appellants that something more was required than the acceleration of her progress, and that she was still in danger after the pilot had given the order to port the helm, and to brace the yards on the starboard tack, and to put the head of the vessel exactly in the opposite direction from

what it had been, and to direct the course of the vessel eastward instead of north-westward upon the rock.

Now this is a question upon which the learned Judge had a variety of conflicting testimony before him, and after most maturely and carefully deliberating upon it—and, it may be observed, in passing, it would be difficult to conceive a more accurate and careful note than the learned Judge seems to have been at the pains of taking—after mature deliberation on the subject, he came to the conclusion that the “Storm Bird” was not engaged as a salvor, but merely to tow the vessel. The facts stand in this way; they are thus described in the evidence of the pilot. He says:—“After the steamer passed she stopped. I thought she was going on her course. I had no thought of taking a steamer then. I then had a conversation with the captain”—that is, his own captain—“on the propriety of getting a steamer to tow us, not on account of danger, but on account of expedition.” It may be observed, in passing, that this large vessel had a number of emigrants on board, who were naturally extremely anxious to arrive at the port. “I think the master of the steamer might have been deceived as to the position of our ship, because he came out on the bright light and saw the vessel under the red.” In the lighthouse at Somes Island there are three lights, a green light, a white light, and a red light. The white light is the one which should be followed; it is the safe light leading to the central passage up the main entrance, and which ought to be followed. He goes on to say:—“It might have appeared to him she was more to the west than she was. I know the position exactly from pulling from the Outer Rock to the ship. The captain hesitated about taking the steamer. I told

“ the captain she belonged to a respectable firm.
 “ He asked the name and I told him. He said
 “ they corresponded with his owners or con-
 “ signees. Something to that effect. I then
 “ hailed the steamboat.” Now it is important
 to observe what he says passed. “ I said ‘ Storm
 “ Bird ahoy!’ He said, ‘ What is it?’ I said,
 “ ‘ Will you give us a tow?’ He said, ‘ Yes.’
 “ I said, ‘ What will you give us a tow for?’
 “ He said ‘ Leave that to the agent,’ or to that
 “ effect. That did not satisfy the captain till
 “ I told him about Mr. Turnbull. I then said,
 “ ‘ All right, I will give you a tow line.’ I said,
 “ ‘ If you will only tow me inside the Steeple
 “ ‘ Rock that will do.’ I do not know whether
 “ he heard or not.”

Now the evidence establishes both these facts, first, that the pilot proposed to engage him merely to tow the vessel; and secondly, that the captain of the “ Storm Bird ” never accepted the proposal as a mere service of towage. Therefore the question must be determined with reference to the necessity of the ship at this time, because the captain not having accepted the offer to tow, if the vessel was in a state of danger at that time, and he had towed her, he would be entitled to be considered as salvor; but it has been already stated that the Court below was satisfied that at this time there was no danger to the vessel. Their Lordships think they ought not to disturb this decision, but, inasmuch as the learned Judge has used the words “ actual danger ” very often, although probably it received a restriction in his own mind which was not stated, it may be useful to state what is really the law with respect to services rendered to a vessel in danger or apparent danger, the law is laid down in the case of the “ Charlotte ” (3 W. Rob. 71) by Dr. Lushington. He says, “ It
 “ is not necessary, I conceive, that the distress

“ should be actual or immediate, or that the “ danger should be imminent and absolute.” Their Lordships are of opinion there was neither actual nor imminent probable danger at the time these services were rendered. The finding of the Judge to this effect, no doubt, depended upon his giving preference to the witnesses who were produced on behalf of the Respondents over those who were produced on behalf of the Appellants. If indeed the Judge had been satisfied that what the Appellants witnesses asserted was true, namely, that the pilot said to them, “ Will you tow her off this reef?” the case would have assumed a very different aspect, and it might have been fairly urged in that case that what the “ Storm Bird ” did was an act of salvage and not an act of towage. But in the circumstances which have been stated, the learned Judge came to a different conclusion upon the facts before him, and their Lordships, on the whole, decline to set aside that decision. Therefore, upon that part of the case, their Lordships will humbly recommend Her Majesty to affirm the judgment.

There is another portion of the judgment, by no means immaterial, to which I must now advert. It appears that the learned Judge of the Court below was of opinion that he could entertain in this case a claim for demurrage. The property was valuable, and worth in all about 40,000*l*. The action I think had been entered for 12,000*l*. The learned Judge upon the whole thought he was justified in decreeing to the Respondents damage to the amount of 600*l*. in the shape of demurrage. Now it is to be observed that the learned Judge himself more than once in the course of his judgment expressed his opinion that those on board the “ Storm Bird,” and especially the captain of the “ Storm Bird,” conducted them-

selves *bond fide* throughout, and he ascribes no misconduct to him of any sort or kind, but simply an error in judgment in bringing the suit. Now their Lordships think that the learned Judge was well founded in that opinion. In this state of things their Lordships are at a loss to understand why any damages at all should have been granted against the Appellants. The law upon this was very carefully considered in the decision in the case of the "Evangelismos" (12 Moore 352), by the very eminent Judge who delivered their Lordships' opinion, Mr. Pemberton Leigh. In that case "the collision took place at sea. The vessel causing the damage got away. From the appearance of a vessel in port the owners of the damaged vessel caused her to be arrested to answer an action for damages. The vessel seized was a foreign vessel, and in consequence of the owner having no funds in this country, she was detained for some months before she was released on bail. The Plaintiffs failed to indentify the vesssl seized as being the one causing the damage, and the Admiralty Court dismissed the action with costs, refusing to award damages." Then there was an appeal to their Lordships, and Mr. Pemberton Leigh in delivering the judgment of their Lordships said,—“It is also said that it is the established rule of the Admiralty Court where a party brings an action and succeeds in upholding it, that he is entitled, unless there are circumstances to take it out of the ordinary rule, to have compensation for the loss he has suffered, which in some cases is very inadequate, but it is the only compensation the Court can award. Their Lordships think there is no reason for distinguishing this case or giving damages. Undoubtedly there may be cases in which there is either *mala fides* or that *crassa negligentia* which implies malice, which would

“ justify a Court of Admiralty giving damages, as
“ in an action brought at common law damages
“ may be obtained. In the Court of Admiralty
“ the proceedings are however more convenient,
“ because in the action in which the main question
“ is disposed of, damages may be awarded.”
Their Lordships came to the conclusion, though
the case was certainly a very strong one, inasmuch
as the wrong vessel had been seized, that in the
absence of proof of *mala fides* or malicious negli-
gence, they ought not to give damages against
the parties arresting the ship. It appears to
their Lordships that the general principles of law
are correctly laid down in that judgment, and it
is their intention to adhere to them. They will
therefore humbly advise Her Majesty that that
part of the learned Judges sentence be reversed.

Their Lordships think that inasmuch as the
Appellants have succeeded in part of their case,
and as they have appealed from the whole
judgment, they will follow the rule which they
have usually adopted on these occasions, and
leave both parties to pay their own costs of the
Appeal. But their Lordships think the Appel-
lants are entitled to have their costs in the Court
below, strictly confined to the costs incident to
the decree as to demurrage, and that they must
pay the costs of the salvage suit in the Court
below.