1926
Dec. 16, 17.
1927
Jan. 15.

TORONTO ADMIRALTY DISTRICT

BETWEEN:—

JOHN E. RUSSELL.....PLAINTIFF;

AGAINST

THE SHIP GLORIA, HER CARGO AND FREIGHT ..... } DEFENDANT.

Shipping—Towage—Duty of tug—Damages—Division of damages

Held: That it was the duty of a tug when engaged in towing to stand by in case of accident and also to return to part of the tow which is disabled or adrift, after leaving the remainder in safety.

That when supervening circumstances, stress of weather or other emergency are such as to justify the towing vessel in abandoning her contract, it is still her duty to remain by the towed vessel and its

cargo, for the purpose of rendering assistance, but this duty is subject to the condition that the safety of the tug or its crew is not thereby endangered. The Court must be satisfied that the attendant circumstances warrant such a conclusion.

2. That the Admiralty rule as to division of loss applies to cases where two colliding vessels are damaged. In a case where an innocent ship is damaged by a collision through the fault of two other ships, the innocent ship (or in this case the cargo) can recover its whole damage from either of the delinquent ships.

This was an action for salvage against the cargo of sulphur in the barge *Gloria* and a counter-claim by the owners of the cargo for damages due to the alleged failure of the tug in performing its duty under the towage contract, and failing to stand by and save the barge and its cargo.

The action was tried before the Honourable Mr. Justice Hodgins, at Osgoode Hall, Toronto.

R. I. Towers, K.C., and *F. Wilkinson* for plaintiff.

G. M. Jarvis for the cargo.

The facts are stated in the reasons for judgment.

HODGINS L.J.A., now (15th January, 1927), delivered judgment (1).

In this action the barge *Gloria* is not before me. The plaintiff contracted with the Hedger Company, as shown by the two following telegrams, to tow four barges laden with sulphur from Oswego, N.Y., to Hamilton, Ont. These are the telegrams:

November 12, 1925.

W. E. HEDGER CO., INC.
25 Beaver St., New York City.

Re towing barges Oswego to Hamilton will send tug Russell with competent crew ready for twenty-four hour service American towing machine with twelve hundred feet one and quarter-inch towing wire. Will not accept any towers liability in connection with this tow. Please acknowledge this. Russell should be Oswego late Friday. Will advise you later.

JNO. E. RUSSELL.

(1) On appeal this judgment was affirmed by the Honourable Mr. Justice Maclean, the President of the Court, on May 9, 1927.

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JNO. E. RUSSELL,
Reford Bldg., Toronto, Ont.

Your wire received regarding towboat *Russell*. Your arrangements and conditions satisfactory. Would appreciate having tug in Oswego soon as possible so we can get at least a Monday morning start at Hamilton account barge canal closing shortly. Kindly do your utmost.

W. E. HEDGER CO. INC.

The tug *Russell* was sent to Oswego and left there on the 22nd November, 1925, in tow of two barges, the *Foster* and the *Gloria*. After encountering some weather they put into Sodus Bay, N.Y., and remained there till November 25, at 8.30 a.m. when they started again. The weather was fine until about 1 p.m. Then it changed, the wind shifting to northwest accompanied with snow. The sea got up so much that the tug Captain determined to go into Charlotte, N.Y., and at about 6 p.m., when he was about 3½ miles off the Charlotte breakwater, the lines holding the *Gloria* to the *Foster* parted and she went adrift. The tug and the *Foster* continued on and arrived inside Charlotte Harbour about 7.30 p.m. where they remained that night, and later.

The Master of the *Gloria*, Long, who was on her with his wife, failing to make the fact that he had gone adrift known to the tug, though he used a lantern, a fog horn and a shot gun, dropped his anchor. This held for 1½ hours when the cable parted at the anchor shank, and the *Gloria* drifted, and grounded on the rocks about 9 p.m. at 9 Mile Point, East of Charlotte, where she injured her bottom and took in water. This injured some of the cargo.

The Master of the tug *Russell* having telephoned the plaintiff, the latter, on the following day, sent a tug (not his own), the *Salvage Prince*, to salvage the *Gloria* and bring her back to Charlotte. This could not be done without taking out some of the cargo, but eventually she was got off and towed to Charlotte. When off the pier the pump being used to keep her afloat went wrong and she was beached till it was repaired. This done, she was pumped out and got into safety. The remainder of her cargo was transhipped and all of it was towed by the plaintiff in another barge to Hamilton. The tug *Russell* which meantime had proceeded to Hamilton with the *Foster* re-

turned to Charlotte and supplied an additional pump to the *Salvage Prince* and also steam for the pump, and in doing so and in getting close in, was somewhat injured by bumping against the pier where she was exposed to the waves.

The plaintiff claims in this action, not on his towage contract, the parties to which are not before the Court, but for the salvage of the cargo in the *Gloria*. The defendant counter-claim for the injury to the cargo by wetting. This, it is agreed, amounts to $2,300.

It will be observed that the plaintiff's contract with Hedger to tow the barges contains the words " will not accept any tower's liability in connection with this tow."

Hedger had chartered the *Gloria* and other barges to transport the sulphur, but what his arrangements with the owners of the cargo were has not been disclosed. So far as the cargo owners are concerned they have not been shown to have had knowledge of any limitation of liability between the plaintiff and Hedger, nor does it appear that Hedger had any authority to bind them by any such contract. He agreed to forward the cargo and chartered the barges for that purpose, being thus not their agent but a contractor with the cargo owners. They are not bound by that limitation in resisting the plaintiff's claim. The services rendered were not done in the course of the towing contract but after it had been suspended owing to the breaking away and stranding of the *Gloria*. And so the exception in the contract has no bearing on the question of liability for salvage services. Nor does it, I think, form any answer to their counter-claim as the cargo owners never became bound by it. See The *Leon Blum* (1).

I need not, therefore, consider the exact import of those words in the present case, though they would become important if the *Gloria* itself or its charterer were before me.

When the tug *Russell* set out from Oswego with the two barges in tow, the *Foster* was next to her with the *Gloria* behind the *Foster*. Both are square dumb barges, without rudder or power, the *Gloria* drawing about 10 feet, with 6 feet freeboard, and being laden with 714 tons of sulphur. The coupling of the *Gloria* and *Foster*, as stated by her

(1) [1915] P. 90; 290.

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Master, was by two seven-inch hemp lines from each corner of the *Gloria* to the corresponding corner of the stern of the *Foster,* as well as by two five-inch lines running from bitts on the *Gloria* crosswise to the *Foster.* Added to this was a steel bridle and to the apex of it was attached a heavy lake hawser, supplied by Hedger, which led again to the *Gloria.*

No objection is taken by any one to the way in which the barges and the tug were secured to one another. Long appears to have been familiar with the rule in the United States, of which he is a citizen, and where he was engaged, as laid down in The *Edwin Terry* (1). In that case the Circuit Court of Appeal said, at p. 310:—

> It is charged as a fault that the tug did not herself see to getting out and fastening these lines; but in *Myers* v. *The Lyndhurst,* 147 Fed. 110, 77 C.C.A. 336, we held that such is not the rule, where the tow has her own master aboard. It is the duty of the tug to make up the tow, that is, to select the positions to be occupied by its component vessels, to attend to the leading hawser on which they are towed, and to prescribe the distances apart of the different tiers. But the details, which are familiar to every boatman, of making fast the lines which attach his boat to those ahead, behind, or alongside of it naturally and usually are left to those on board the boat so attached.

What is contended by the defendants is that the tug Master failed to arrange with or to instruct the barge Masters as to what was to be done in rough weather, gave no signals indicating when to lengthen out the lake hawser, and kept on going at full speed though the wind and sea were increasing. This they assert made it practically impossible to let go the lines and pay out the hawser. They further say that having lost the *Gloria* the tug did not return to find and bring her in that night. The plaintiff denies these charges, and I will have to discuss his position in detail. This defence seems based on the rules laid down in the United States where towage as an occupation is well understood and is performed under many of the conditions arising in Canada as well as in that country. These rules are to be found authoritatively set out, so far as the United States is concerned in the case of *Transportation Line* v. *Hope* (2), at page 300:—

> When the Master of a tug undertakes to transport a barge, he must apply the means for that purpose. He must not only furnish motive

(1) [1908] 162 Fed. Rep. 309. (2) [1877] 95 U.S. 297.

power, but he must direct her location, whether on the port or the starboard side, whether she shall be the inside boat or the outside one, when and how she shall be lashed to other boats, with what fastenings she shall be secured as she is dragged through the water, whether she shall go fast or slow, when, if at all, she shall drop astern, when she shall go to harbour, how long remain there, and what shall be her course of navigation. These tows consist at times of thirty or forty boats, and they must all be under one head, and subject to one judgment, which is that of the transporter.

I find that the Master of the tug, Willard, did have some conversation, though not of a very definite character, with the Master of the *Gloria* before beginning the tow. His version is that Long was to use his own judgment if he got into bad weather, to ease the line out more (i.e., the lake hawser). Willard says he looked the lines over before leaving Oswego and Sodus Point, but once under way he had nothing whatever to do with lengthening the lines between the barges, and had no conversation about it.

Whether or not the denial of the barge Master that any instructions were given is believed, there can be no doubt, on his own testimony, that he fully understood his business so that instructions would have been superfluous. In such a case it might well be that the omission to give directions might not be negligence, as in the *Arctic Fire Ins. Co.* v. *Austin* (1). His own words discussing the part played by the hawser from the *Foster* are:—

That sketch (Exhibit 5) does not indicate the lake hawser which was coiled up. The lake hawser was made fast on the *Richard Foster* and passed through the bits and coiled on the hatches of the *Gloria*.

60. Q. But that was not being used at the time you left?—A. That was in case we did want to go on a long hawser we could take the others off and it would be in place and all I would have to do was to pay it out until it got to the proper distance and make it fast.

The length of the lines between the *Gloria* and *Foster* after leaving Sodus Point was 60 feet and this distance increased to about 100 feet before the hawser broke.

As to Long's knowledge of his duties the following occurs in the evidence:—

A. I superintended making fast the one on my boat. Each Captain superintends making fast the hawser on his own boat. He may have some particular way of his own.

159. Q. In this case you superintended the making fast to the plates on the *Foster* and carried it over the bitts of the *Gloria*?—A. I handed his end over and the Captain of the *Richard* made that end fast on his boat.

(1) [1869] 54 Barb. N.Y. 559.

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160. Q. When you say the *Richard* you mean the *Foster*?—A. Yes.

161. Q. Then you passed it over the bitts on the *Gloria* and coiled the slack upon the hatches?—A. Yes.

162. Q. The intention being that if it became necessary to put out more line in the lake for towing you would use that hawser?—A. Yes, if I had to go back farther than my short lines would reach we would simply disconnect them and take them in and pay out the big hawser until we got a safe distance.

163. Q. What would make it necessary for you to go back farther?—A. Heavier seas.

. . . . . .

186. Q. Then you cleared from the Sodus Point about eight o'clock in the morning, do you say, of the 25th?—A. At eight or eight-thirty, or somewhere along there.

187. Q. And all went well until about what time?—A. Approximately two o'clock in the afternoon.

188. Q. What crew were you carrying on the *Gloria*?—A. Myself and wife.

189. Q. And you were in the cabin?—A. We were in the cabin.

190. Q. Had you noticed the wind increasing?—A. As soon as it increased we did. As soon as the wind shifted and changed we noticed it immediately.

191. Q. Did you cast loose any of your short lines?—A. No.

192. Q. Did you communicate with Captain Barth (of the Foster)?—A. No, I may have passed a word or two back and forward with him that it was pretty rough, or something of the kind, but nothing to have any bearing on the case.

193. Q. You didn't ask him for any instructions or discuss that matter?—A. No, neither of us needed any instructions or assistance or anything of that kind.

In dealing with the crisis which arose he said:—

196. Q. Was the towing hawser fast to your bitts or just passed over them?—A. No, simply a turn taken so it wouldn't pay out too fast.

197. Q. So that you could snub it up?—A. When I wanted to. It generally takes two or three turns and I had taken one preliminary turn so it would pay out slow, so that I could check it up.

198. Q. When the gale parted one line and you went forward?—A. Yes.

199. Q. And then it parted the second line?—A. It parted all of them by the time I got up there. Well, I had only practically arrived there when they all parted.

200. Q. Then your towing hawser would be paying out over your bitts?—A. Yes.

201. Q. Did you snub it?—A. I jumped up to snub it and had just got hold of it. It was paying out and had the turn on it, of course, and some strain, and it parted.

202. Q. You must have snubbed it before it would part, don't you think, or did it jam?—A. Only what I had—the way I had drawn it in, I had drawn it along in under the cavel and taken the turn up through the bitts and around in under the cavel again.

203. Q. So there were two turns?—A. No, one complete turn, you might say. It laid from forward under from the back over and back in under again and back onto the hatches.

204. Q. It would be about what you would call about one and one half turns?—A. Yes.

205. Q. Enough at all events to put sufficient strain on it to part it?—A. To part it.

I should think it likely that whatever instructions (or whatever they may be called) were given they probably were given in such a way as to be regarded not as a command, but as intended to elicit information as to the knowledge of the barge Masters of the usages of towing. As to the contention that no signals were given and no check of speed was made, the case is not so clear. But if the Master of the *Gloria* understood as much as he says he did as to the necessity of lengthening her cable when it got rough and if he asked for no signals and gave none himself (until after the hawser parted) it is difficult to conclude that he was otherwise than entirely confident, owing to the careful arrangement of his lines, that he could easily detach one line after the other before bringing strain on the lake hawser which he always intended to let out. The fact that he stayed inside the cabin as late as 6 p.m. and made no attempt during the afternoon in a rising sea and wind to do anything renders it probable that he either did not realize the strength of the elements or thought his lines would bring him through as far as Charlotte. Willard on the tug was evidently of the latter opinion for he says that when towing barges close together "we do that a mile and a half or two miles faster, so we keep them together if at all possible." I observe that the log states that at 4 p.m. they were only a mile from land. The mate of the tug testified that he could see the light on the *Gloria* until 6 p.m. so that if Long had been waving his lantern there is every chance that it would have been seen and noted.

If he had deposed to any attempt to lengthen out or had tried to signal I would have felt inclined to hold the Master of the tug negligent if he had made no attempt to check, but in face of complete inaction on the barge such a conclusion would be, I think, unwarranted. If there was confidence in the barge in things as they were, there is some excuse for a like condition on the tug. The real *causa causans* in fact was the neglect to ease off the lake hawser and although the speed and the absence of signalling may have been contributing causes, and while in that case, the

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tug would be equally to blame, they are not shown, on the present evidence, to stand out as reasons which prevented or disabled the barge Captain from doing what he admits to be the usual and proper practice in a rising wind and heavy sea; nor does he so assert. I refrain from a definite finding as between the tug and the barge *Gloria* on this point, as the latter is not before me and the tug may be entitled to rely on the terms of the contract as an answer to any claim by the owners of the barge. The fact that the barge had, according to its Master, an anchor quite insufficient to hold it when loaded, is an additional fact which may be important as between the tug and the barge.

The last objection is to my mind the most formidable. It seems agreed that the hawser parted at between 5 and 6 p.m. or about 6 p.m. when opposite (or nearly so) 3 Mile Point. At 7.30 the tug and the *Foster* were safe in Charlotte Harbour. The *Gloria* after breaking away had anchored and the anchor held for about an hour and a half, bringing the time to somewhere around 7.30 p.m. When the anchor line parted the *Gloria* drifted until about 9 p.m. and then grounded.

The duty of the Master of a tug is to stand by in case of accident, or in this case, to return after leaving the *Foster* in safety. This is stated clearly in *The I. C. Potter* (1), (dealt with in Kennedy on Salvage 95), and in the *Maréchal Suchet* (2), where the necessity for observing the burden of proof is emphasized. In the *Potter,* Sir Robert Phillemore, p. 297, says:

> It was not disputed that circumstances may supervene which engraft upon an original towage agreement the character of a salvage service; and to this proposition of law I must add another, which has an important bearing on my decision, namely, that when the supervening circumstances from stress of weather or otherwise, are such as to justify the towing vessel in abandoning her contract, it is still her duty to remain by the towed vessel for the purpose of rendering her assistance, but that for such assistance she is entitled to salvage reward.

In the *Suchet* it is stated that (p. 12 and 13):

> The Court is, and ought to be, careful to scrutinize a claim for salvage by a tug engaged to tow. It is essential in the public interest, for obvious reasons, that the towage contract should not be easily set aside, and a salvage service substituted for it. A tug ought to make a clear

(1) [1870] L.R. 3 A. & E. 292. (2) [1911] P. 1.

case before she can convert herself into a salvor . . . The burden of proof is upon the plaintiffs. It is a two-fold burden. They must shew that they were not wanting in the performance of the obligations resting upon them under the towage contract; and they must also account for the stranding of the vessel by shewing something like *vis major,* or an inevitable accident. In the words of Brett L.J., in the *Robert Dixon* [(1879) 5 P. 54]: "The plaintiffs, being under a towage contract, bring this action, in which they assert that the towage service was altered into salvage; and it seems to me that the plaintiffs are in this position; that it lies on them to shew that the change occurred without any want of skill on their part, but by mere accident over which they had no control. The burden of proof on both the affirmative and the negative issues is on the plaintiffs, that is, both that there was an inevitable accident beyond their control and that they shewed no want of skill."

See also the *Clematis* (1), Brown's Admiralty, 499; and the *Cahill* (2), where it was held that a tug which cut loose from a dredge and two scows which she had in tow, in the night, and deserted them, in disregard of her duty to use all reasonable efforts for their preservation is liable for their consequent loss or damage, in the absence of clear proof that her efforts to save them would have been ineffectual.

In the *Thalatta* (3), cited in Bucknill on Tug and Tow, 29, Gorrell Barnes J., said:

> A tug is entitled to salvage if the services are outside the scope of the contract, but at the same time the fact that there is a contract cannot be left out of consideration altogether, because the vessel is entitled to have the assistance of the tug. In other words the tug cannot desert the vessel.

The tug, had she fulfilled the duty laid down in these cases, would have had the wind and sea in her favour and quite probably might have caught up with the *Gloria,* which so far as distance goes, traversed, before she grounded, only some 6 or 7 miles and took 1½ hours to do it. The speed of the *Russell* is 12 miles an hour and the drift of the *Gloria* was known, so that it is easy to surmise that a search would have been successful, or at all events, would, whether successful or not, have discharged the duty which the law casts on the tug master. He himself says the tug had plenty of power, notwithstanding the 40-mile gale. He had a search light, though he did not use it when he thought the *Gloria* had gone adrift although according

(1) [1874] 5 Fed. Cases 1009 (No. 2876).
(2) [1903] 124 Fed. Rep. 63.
(3) Bucknill, Tug & Tow 29.

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to his wheelsman's statement (Ex. 9) the snow ceased about 4.30 and thereafter only came on in flurries.

The first mate of the tug had made a statement on December 3, 1925, (put in as Exhibit 6) that the wind was blowing a gale all the afternoon and the wheelsman on the tug estimated it at 40 to 50 miles an hour (Ex. 8). In this the Master of the *Foster* agrees.

The Master of the *Gloria* puts it much higher, but admits his ideas were drawn from newspaper accounts the day after. No independent or scientific evidence as to the force of the wind on that night was given and the tug master himself puts the extreme velocity at 40 miles and admits that he did not anticipate danger. There is, however, a qualification grafted on the statement of the duty of a tug master to stand by or to search for a lost tow which is mentioned by Duff J. in the case of *Point Anne Quarries* v. *SS. Whelan* (1), that the safety of the tug must not be endangered in the performance of his duty of standing by and of that the Master is generally the best judge. This, I think, is a rule recognized though often not stated. It underlies the decision in the *Potter* (*ante*) and is definitely stated in the United States case of *The Czarina* (2).

There is, however, no evidence from the Master of the tug nor from any of his crew pointing in the direction of any danger or real apprehension of it, and the onus is on the plaintiff to establish it. The tug Master, it is true, says that nothing could be done when the *Gloria* broke away, and repeats this as applying after his arrival at Charlotte. But this is too general and vague to carry any conviction. It is in the interest of the safety of navigation that there should be no relaxation of the rule laid down for maintaining a high degree of care and skill in the performance of the duty of standing by and seeking to aid a derelict vessel by those at sea in circumstances of peril to life or property. I do not feel inclined to relax it under the circumstances existing in this case.

The fact that the tug master sent off the life-savers to rescue the man and wife on the barge indicates that he realized that responsibility rested on him to endeavour to

(1) [1921] 63 S.C.R. 109, at p. 135.

(2) [1901] 112 Fed. Rep. 541.

secure their safety, and it may be that he apprehended danger to the tug if he ventured out, or that he thought his contract protected him as to the barge, but in the absence of any opinion on the point given by those who were competent to speak on the subject, the circumstances do not convince me that fear for the safety of the tug, which the plaintiff had offered as one fit to tow in the month of November on the lakes was in the mind of the tug captain.

Under these circumstances the case seems to be brought within the words of Dr. Lushington in *The Minnehaha* (1), where he says:—

> When a steamboat 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 a vis major, by accidents which were not contemplated, and which may render the fulfillment 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.

In *The Julia* (2), in speaking of a towage contract, during the performance of which the tug was in collision owing to the negligence of the tow and its master and crew, who controlled the actions of the tug, Lord Kingsdown said:—

> If, in the course of the performance of this contract, any inevitable accident happened to the one without any default on the part of the other, no cause of action could arise. Such an accident would be one of the necessary risks of the engagement to which each party was subject, and could create no liability on the part of the other. If, on the other hand, the wrongful act of either occasioned any damage to the other, such a wrongful act would create a responsibility on the party committing it, if the sufferer had not by any misconduct or unskilfulness on her part contributed to the accident.

In *The Robert Dixon* (3), it was held that a tug under contract to tow a ship was held not to be entitled to salvage remuneration for rescuing the ship from danger brought about by the tug's negligent performance of her

(1) [1861] 4 L.T.R. 810 at p. 811, see also Lush. 335; 15 Moore, P.C. 133; 30 L.J. Adm. 211.

(2) [1860] 14 Moore P.C. 210, at p. 230.

(3) [1879] L.R. 5 P. 54.

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towage contract. See also *Schloss* v. *Heriot* (1); *The Ettrick* (2); *The Duc d'Aumale* (3).

The result is the plaintiff's claim for salvage services rendered to this cargo falls to the ground because the master failed to show that he did his full duty to prevent it being lost or damaged, in that he made no effort after the hawser broke to neutralize that accident and retrieve the barge with its cargo on board before it stranded. The towage contract was afterwards fully performed but is not before me for enforcement. But is this finding sufficient to sustain judgment on the counter-claim in the absence of the owners of the barge, who, if negligent through the inaction of their servant or on account of the insufficiency of the anchor they provided for the barge, might also become liable to the cargo owner for the consequences of the neglect of the Master of the barge. The question which was very fully fought out in the cases of the *Seacombe* and the *Devonshire* (4), was finally determined in the latter case by the House of Lords. It was there held that the Admiralty rule as to division of loss only applied to cases of collision and not to a case where an innocent ship was damaged by a collision through the fault of two other ships, but that the innocent ship could recover the whole damage from either of the delinquent ships. That was a case where the master and mate of the innocent ship were co-plaintiffs with the ship itself, claiming for the loss of their effects thereon, and their argument was that "there is a close analogy between an innocent tow in charge of a faulty tug, innocent cargo on board a faulty ship and an innocent ship damaged by two faulty ships." That put forward by the owners of the ship at fault was that the case of *The Avon and Thomas Joliffe* (5), was wrong and should be overruled. In that case Butt J., said:

> It is the right of every one who has sustained damage by the joint negligence of two individuals, and who sues them in tort and obtains judgment against them, to enforce it by execution against one or the other of the defendants, or both of them. That is the right of a plaintiff in a common law action. I see no reason why there should be a different one in an Admiralty action; nor do I think that in this case I have anything to do with the Admiralty rule as to the apportionment of damages where both vessels, that of the plaintiffs and of the defendant, are to blame.

(1) [1863] 14 C.B., N.S. 59.
(2) [1881] 6 P. 127.
(3) [1904] P. 60.
(4) [1912] P. 21; 1912 A.C. 634.
(5) [1891] P. 7.

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In giving judgment in the *Devonshire* (1), Lord Atkinson said in reference to that case that the principle there laid down had been acted upon in several cases after 1891 and no instance had been found where it was departed from in England.

Lord Moulton (then L.J.), said in *The Devonshire* (2), at P. 49:

> The tug is in the position of an independent contractor who performs the service of towing the barge to its destination, and who chooses for himself how he shall perform that service. I can see no reason why the misconduct of such an independent contractor should be imputed to the innocent tow, who is, in fact, no party to the wrongful act. So to impute it would be inconsistent with the general principles of our common law, and I should decline to do so unless I found a well-settled principle of admiralty jurisprudence evidenced by a course of consistent decisions which required me to do so.

In *The Seacombe,* in the same volume, and in which judgment was given at the same time he said (p. 59):

> No one suggests that the barge did anything which contributed to the collision, or was herself to blame in any way. Hence the case is one in which a barge which is being towed by a tug which has complete control of the navigation suffers damage by collision from a third vessel by the joint negligence of the tug and the third vessel. It is thus identical in all respects with the case of the *Devonshire,* on which we have just given our decision.

That case was one in which the owners of the cargo on the barge damaged by the *Seacombe* were co-plaintiffs. See also the *Devonshire* and *The St. Winifred* (3); the *Ettrick* (*ante*); *Strang, Steel & Co.* v. *Scott & Co.* (4), and the observations on p. 608, and *Canadian Dredging Co.* v. *Northern Navigation Co. et al* (5).

These decisions dealt not merely with the tow itself but with the personal effects of the master and mate and with the cargo on board. The cargo here was innocent, and while it may be that the barge was guilty of negligence, causing the parting of the hawser, yet after that had occurred the tug had a duty, not to desert it, but to stand by and assist it to safety and as well its cargo whose delivery was part of the responsibility of the tug.

I think I am justified in applying the principle to be gathered from the foregoing authorities to the circumstances of this case. No objection is taken to the jurisdic-

(1) [1912] A.C. 634.
(2) [1912] P. 21.
(3) [1912] P. 68.
(4) [1889] 14 A.C. 601.
(5) [1923] Ex. C.R. 189.

1927

RUSSELL v. THE SHIP *Gloria.*

Hodgins, J.J.A.

tion of this Court to give effect to the counter-claim of the cargo owners against the plaintiff for having by his neglect or that of his servants occasioned or permitted the stranding of and injury to the barge *Gloria,* thereby negligently damaging its cargo. If either party desires to be heard on that point I will hear them before judgment is taken out. If no application is made within one week the defendants will recover on their counter-claim against the plaintiff their full damages, which it is agreed are $2,300, with costs, and the plaintiff's action for salvage will be dismissed with costs.

Judgment accordingly.