NEW BRUNSWICK ADMIRALTY DISTRICT.

BETWEEN

1907
Mar. 2.

JOHN READ AND JOHN L. READ, OWNERS OF THE SCHOONER *MALABAR* ..... } PLAINTIFFS;

AND

THE TUG *LILLIE* ..... DEFENDANT.

Shipping — Towage — Contract — Negligence — Inevitable Accident — Damages.

Where a towage contract is made it implies an undertaking that each party will duly perform his share of it; that proper skill and diligence will be used on board both tug and tow; and that neither party by neglect or mismanagement will create unnecessary risks to the other, or increase any risk which might be incidental to the service undertaken.

2. If, in the course of the performance of the contract, any inevitable accident happens to the one, without any default on the part of the other, no cause of action will arise.

The *Julia* (14 Moo. P. C. 210 at p. 230) followed.

ACTION for damages for negligence in performing a contract of towage.

The facts are stated in the reasons for judgment.

October 5th and December 2nd, 1905;

August 14th, 1906.

The case was now heard.

H. H. McLean, K.C., and *F. R. Taylor* for plaintiffs;

C. J. Coster, K.C., for defendant.

MCLEOD, L. J. now (March 2nd, 1907,) delivered judgment.

This is an action brought by the owners of the schooner *Malabar*, a vessel of about 98 tons burthen, registered in

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Charlottetown, Prince Edward Island, against the tug *Lillie* of Saint John, N.B. The action is brought for damages sustained by the *Malabar* in consequence, as is alleged by the plaintiffs, of negligence on the part of the tug *Lillie*, or rather the captain in charge of her, while the *Malabar* was being towed by the tug. The accident occurred on Musquash River, at what is called "The Rapids" on that river, on the twenty-second day of August, 1905.

I will first refer to the law with reference to the liability of the vessel or tug in claims for damages of this kind. Where a tug engages to tow a vessel, it is her duty to use due diligence and care in regard to it; and if the vessel suffers or is damaged in consequence of negligence on the part of the tug, the tug will be liable. On the other hand, it is also the duty of the vessel being towed to use care and diligence and if the tug is injured in consequence of the negligence of the vessel, the vessel itself will be liable to the tug.

In the *Julia* (1) the law is stated as follows in reference to contracts of towage Their Lordships say:—

[When such a contract is made, it in law, implies] "an engagement that each party to the contract will perform his duty in completing it; that proper skill and diligence will be used on board both the vessel and tug; and that neither party, by neglect or mismanagement, will create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken. If, in the course of the performance of the contract, any inevitable accident happens to the one, without any default on the part of the other, no cause of action could arise. Such an accident will 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

(1) 14 Moo. P. C. 210, at page 230.

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occasion any damage to the other, such wrongful act will 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."

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That is the plain rule of law which governs in all cases of this kind. In this case the plaintiffs claim that the accident was caused by the negligence of those in charge of the tug. The defendants in the first place claim that there was no negligence on the part of the tug; in the second place, they say, that the contract under which the vessel was towed relieved the tug from any negligence that there might have been on the part of those in charge of the tug. In the third place that those on board the *Malabar* were guilty of conduct that contributed to the accident. This defence raises the following questions: First, was there such a contract as would relieve the owners of the tug from damage although the injury to the schooner may have been occasioned by negligence of those on board the tug; secondly, was there, in fact, negligence on the part of the tug that caused the accident; thirdly, was the accident contributed to by any misconduct or unskillfulness on the part of those on board the schooner?

As to the facts, it appears that the *Malabar* was chartered on the 1st of August, 1905, by Stetson, Cutler & Company, to proceed from St. Stephen, in Charlotte County, N.B., to what is known as Knight's Mills, on the Musquash River, and there load a cargo of laths for New York. Musquash River is a tidal river emptying into the Bay of Fundy. At low water in the channel where this accident happened, it is nearly dry. At high tide there is ample water for schooners and tugs, such as this, to go up and down. Knight's Mills is situated some miles up the river. The schooner left St. Stephen and arrived at what is called Five Fathom Hole, on the 18th of August, 1905. Five Fathom Hole is about a

mile from the mouth of the river. The charter stipulates that Stetson, Cutler & Company were to provide towage, or, to use the words of the charter itself: "Towage in and out of Musquash, free to vessels." From this I take it that as between the charterers and the plaintiffs, the charterers were to provide for towing the vessel up the Masquash River to Knight's Mills, and down from Knight's Mills. I think, also, it clearly appears from the evidence, that the tug *Lillie* was doing all the towage of Stetson, Cutler & Company, that is, that it towed their scows or rafts or any schooners required, up the river and down the river, charging the towage to Stetson, Cutler & Company. The charter-party itself would not be taken to make a contract between the tug *Lillie* or the owners of the tug *Lillie* and the plaintiffs to tow the schooner up Musquash River; but the facts are that the schooner was to be towed up and down the river at the expense of Stetson, Cutler & Company, and the tug *Lillie* did all that towing for Stetson, Cutler & Company, and charged such towage to Stetson, Cutler & Company.

When the *Malabar* arrived at Five Fathom Hole, on the 18th of August, the tug *Lillie* was there about to take up some rafts, and the captain of the *Malabar* called to the captain of the tug to tow him up. He, at first refused, saying he had load enough, and he said afterwards that if he took the schooner up he would not be responsible. The captain of the schooner replied that he must be responsible Leaving the conversation practically in this way, the tug took the *Malabar* and towed her up. I do not think that anything turns on what took place at Five Fathom Hole, as nothing arises out of that. The tug towed the schooner up the river, and arrived there safely with her. Correctly speaking, the schooner was towed up to the bridge, which was a short distance below Knight's Mills, and from there sailed up,

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went into the dock and loaded her cargo. On the 22nd of August she was loaded and ready to go down. The tug *Lillie* was there about to take some rafts down. The *Malabar* was in the dock and grounded. The captain attempted to kedge her out but he could not do it and called upon the tug *Lillie* to take him out of the dock. There appears to have been some danger in taking her out of the dock, because there was what is called a sand-bank in front of her. The difficulty appears to have been as to the safety of taking her out of the dock at the time. Without going fully over the evidence given by the captain of the schooner and the captain of the tug, it appears that the captain of the tug told the captain of the schooner to give him a line and he would give him a "jerk out," but he would take no responsibility. The captain of the schooner stated shortly as follows, at page 12 of the evidence: "The captain said, "I will put a line on your main-mast and give you a "jerk out, but I will take no responsibility." I said, "I will take the responsibility, for I will put a spring out "and spring around the head of the wharf." I ordered "the mate to put a spring on and ordered her to go "ahead and slack the spring until I got the vessel "floated." Captain Hazlett of the tug, after saying that he told the captain of the schooner that he had better stay there until the next day when the tide would be higher, and that he would not be responsible for anything that happened on his vessel, as he did not consider it safe, says further, on page 204, as follows: "So I came "back and he wanted me to give him a hold of the slip "and take him down, so I backed the boat up and "he wanted me to give him a line. I asked him for "his line, he said he hadn't any, so before the men "handed the hawser over I said I would give him the "hawser, but I would not be responsible for anything "that happened to him in hauling him off and down

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" the stream. So then he asked me for a line, I gave it " to him." There are other witnesses as to what took place then, and after hearing the witnesses, and after having again examined the evidence, I have come to the conclusion and find that what the captain of the schooner said he would take the responsibility of was the responsibility of taking him out of the dock. It was dangerous, or seemed to be dangerous, and the captain of the tug agreed that he would try to take him out, but would not be responsible for any accident that might happen. Mr. Knight, who was called on behalf of the defendants, in speaking of what took place at the time, says in answer to a question, on page 302: " Yes, I heard the captain of the *Lillie* tell the " captain of the *Malabar* that he would make a line fast " to his mast, he would give him a pull out but he would " not be responsible for any damage." He says he did not hear Captain Read's reply. It is on the contract or agreement there made, if a contract or agreement was there made, that the owners of the tug claim they would not be liable, even though the accident was caused by negligence on the part of the master of the tug. In support of that contention that defendants cited, *The United Service* (1), in which latter case the judgment of Sir Robert Phillimore was sustained. In that case there was negligence on the part of the tug in taking too many vessels in tow, but the owners of the tug were The Great Yarmouth Steam Tug Company, Limited, and they were owners of various steam tugs that were doing this class of work, and they gave notice distinctly that they would tow vessels, boats or crafts, on certain conditions, and the conditions were as follows:

" That they are not to be answerable or accountable for any loss or damage whatever which may happen to or be occasioned by any vessel, boat or craft, or any of

(1) 8 P. D. 58, and also 9 P. D. 3.

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the cargoes on board of the same while such vessel, boat or craft is in tow of either of the steam-tugs on the river or at sea, and whether arising from or occasioned by any supposed negligence or default of them or their servants, or defects or imperfections in the said steam-tugs or either of them, or the machinery or any part of the same; or any delay, stoppage, or slackness of the speed of the same, however occasioned, or for what purpose whatsoever taking place, and that the owner or persons interested in the vessels, boats or craft, or of the cargoes on board the same so towing, undertake, bear, satisfy and indemnify the said tug owners against the same."

In that case, it was clear that when a contract was entered into with any of the defendants' tugs for the towage of vessels, that specified notice became part of the contract itself, and it was held that, as it was a part of the contract of towage, there would be no liability, although the accident was caused by negligence of the master of the tug itself. I have already said that I not think the contract referred to the towing of the tug down the river, but that it was confined to simply taking her out of the dock. It seems to me there was no necessity to make a special contract with the tug for towage down the river, for by the terms of the charter-party the schooner was to be towed down free; and as I have said, the towage for Stetson, Cutler & Company was done by the *Lillie*, and it is in evidence that the towing in this case, as in other cases, was to be charged to Stetson, Cutler & Company. I therefore think there was no special contract made for towing down the river, and certainly none that would relieve the tug from liability for the negligence of the captain himself. If, however, I am wrong in that finding, as a matter of fact, I think the contract as stated by the defendant himself, and set up by the defence, would not relieve the owners of the tug for an accident

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happening through negligence of the master himself. The fact that the master of the tug simply said that he would not be responsible, could not be construed and would not be construed to say that he would not be responsible for his own negligence. The most that could be said is that he would not be responsible for any accident happening which would not be attributable to his negligence. I therefore think that the claim put forward by the defendants that they are not liable, if the accident happened in consequence of the negligence of the tug, cannot be sustained. After the schooner was taken out of the dock the tug took the schooner in tow in the ordinary way. He took her in tow first behind the tug and then some rafts behind that again, and towed her down below the bridge. The tug was then backed up and the schooner lashed on the port side of the tug, and they proceeded down stream in this way. About four miles below Knight's Mills is what is called "The Rapids." It is a place where there are certain rough rocks, on a high rocky place, practically in the middle of the river. There is a channel on both the western and eastern side of these rocks. The eastern channel is never used; the channel on the western side is used. The western side of this western channel would be on the right hand or starboard side of the schooner as she came down the river, and at the western or starboard side there was sufficient water, at that time of tide, for both the schooner and tug to pass down safely. It was then about half an hour before high water. In going down, therefore, with the schooner lashed as she was, to the port side of the tug, it was important and absolutely necessary, for the safety of the schooner, that the tug should be kept to the right hand or starboard side of the channel. A short distance above the rapids, where the accident occurred, there is a shoal place in the river, or rather a bar, extending some distance out into the river,

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but, as it goes out, it drops off quickly. There was some dispute as to just where that was; but I take it from the evidence that the bar spoken of was where what is called the "clump of bushes" are—that is bushes on the bank—the branches of one of the trees extending ont some distance over the river. The bushes are marked on Plan No. 12, put in evidence by the plaintiffs, and the different depths of water given for some distance out in the river. These bushes are also marked on Plan "B." No. 2, put in evidence by the defendant, but the bar is there marked as being some distance above where the bushes are. However, after hearing the witnesses and after having examined the evidence, I think the bar, where it was necessary to keep a little further from the western bank or the starboard side, is where the bushes are as stated and claimed by the plaintiffs. In going over that bar (shoal place), it is alleged by the defendants, that the keel of the schooner touched the ground, and that in consequence of that she took a sheer to the port side and the tug was unable to control her, and she went on the rocks in consequence. The captain of the schooner and the men on board of her say that she did not touch the ground; and having heard the evidence and read it, I think that I must find, that as a matter of fact, she did not touch the ground at that place. Some statements are made, in the evidence, by the defendants that the captain of the schooner gave some orders to the man at the helm, whilst coming down the river, as to changing his helm. I think the weight of evidence shows that he did not give instructions. The helm was put amidships, and being put in that way the schooner would follow the tug as she might go. When, however, they came down close to these rapids the captain of the schooner, in the first instance, called the attention of the mate of the tug and subsequently the attention of the captain himself, to the fact that they were keeping too

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far out in the stream, that the helm should be put to port, and the vessel turned more towards the starboard side of the stream; and he says the captain at that time said there was water enough there at any time. The captain of the schooner then gave the word to port the helm, but it was too late and the vessel went on the rocks and the damage was done. The evidence shows that there was almost water enough where the schooner struck for her to pass over the rocks. Even in that position, the tug drawing much less than the schooner and being on the schooner's starboard side, was not injured. If the schooner had been but a short distance further to the westward, that is to the starboard side of the stream, no damage would have been done; and by porting the helms of the tug and schooner earlier both the tug and schooner could easily have been kept to the starboard side of the stream and escaped damage entirely. The captain of the tug, and I think some other witnesses on behalf of the defendants, say that the captain of the schooner, as they were crossing this sandbank, gave the order to starboard the helm, which, of course, would send her further to port. The captain of the schooner denies that, and having examined the evidence carefully, I think no such order was given. As I have already said, I think the schooner did not strike the sandbank or bar that has been spoken of. The plaintiff's witnesses say she did not, and the witnesses for the defendants do not seem to me to satisfactorily show that she did. They say that shortly after crossing this bar she went on the rocks. I think that even if she had touched on the sandbank there was sufficient distance, if the helm had been ported, to avert the disaster. My opinion from the evidence is that where the schooner first touched was on the rock on the bank just as she stopped. She appears to have just glided over the first rock and then struck the rocks following. There was almost water

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enough where she was to keep her afloat. The tug did keep afloat. There is the further evidence of different parties who made measurements on the bar referred to that the tug, drawing eight feet of water, and the *Malabar* drawing eleven feet, at a proper distance from the bank it was impossible that the *Malabar* should strike on this bar and the tug go free, as the bank settled so quickly that if the *Malabar* struck the tug would also strike, the tug being nearer the shore than the *Malabar;* and it is admitted that the tug did not strike on this bar. I therefore think the schooner did not touch the bar but first struck on the rocks where the accident occurred. There is no doubt that just before the schooner went on the rocks the captain of the *Malabar* did call out to port the helm, but it was not ported. If the helm of the tug even then had been ported, I do not think the accident would have occurred. I have concluded from the evidence, if the captain of the tug had displayed due diligence, that diligence required of him when he took this vessel in tow—proper, ordinary diligence—that the collision could have been avoided, that he could have easily kept closer to the bank. He required to be but a very little distance closer to the bank, and if so both the tug and the schooner could have gone safely down the river. The trouble seems to me to have been that the captain, possibly thinking there was water enough where he was, but without a proper right to think there was water enough, and knowing, as he should have known, that there was ample water on the western or starboard side to take both vessels down with safety, kept too far out and did not port his helm as he should have done.

I, therefore, come to the conclusion that the damage was occasioned in consequence of negligence on the part of the tug in not taking what may be called ordinary care in bringing the vessel down, that she was guilty of negli-

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gence in not taking sufficient care in passing what are called "The Rapids"—not keeping sufficiently close to the starboard side. If he had done that, and there was ample room for him to do it, and no reason shown why he could not and did not do it, the vessel could have been taken down safely.

As to the claim of contributory negligence on the part of the schooner, the alleged contributory negligence, so far as I can gather, is that the master interfered coming down the river with reference to the steerage of the schooner, and gave orders himself as to how the helm of the schooner should be put. As I have already said, I do not think the evidence bears that out. The evidence shows that the helm of the schooner was simply put amidships and this could have no effect, as the schooner would go in any direction taken by the tug. Indeed, I think it was what should have been done. I think the only order the captain of the schooner gave and the first order, was when he gave the order to port the helm, that is when he saw there was danger of going on the rocks, and after he had called the attention of the master and engineer to the fact that they were not keeping close enough to the shore. This order did not and could not contribute to the accident. Indeed, if the order had been obeyed and carried out at the time it was given, the accident would not have occurred.

I think, therefore, that there was no negligence on the part of the schooner. The decree will therefore be, that the tug be condemned in damages and costs; and as there is no evidence as to the damage if the parties do not agree, I will order a reference.

*Judgment accordingly.**

Solicitor for plaintiffs: *F. R. Taylor.*

Solicitor for defendants: *C. J. Coster.*

* REPORTER'S NOTE.—On appeal to the JUDGE OF THE EXCHEQUER COURT OF CANADA this judgment was affirmed. January 7th, 1908.