ARTHUR SEWELL, *et al.*, (PLAINTIFFS)..APPELLANTS; 1883

AND *May 9, 10, 11.

THE BRITISH COLUMBIA TOWING AND TRANSPORTATION COMPANY (LIMITED), AND THE MOODYVILLE SAW MILL COMPANY (LIMITED), (DEFENDANTS)..... RESPONDENTS. 1884 *Jan. 16.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Contract of towage, liability under—Sea damage—Joinder of defendants—Right of a saw mill company to let to hire a steam tug—Liability limited—25 and 26 (Imp.) ch. 63—31 Vic. ch. 58, sec. 12—Motion for judgment—Findings of jury not against weight of evidence—Practice.

The *B. C. T. Co.* entered into contract of towage with *S.* to tow the ship *Thrasher* from *Royal Roads* to *Nanaimo*, there to load with coal, and when loaded to tow her back to sea. After the ship was towed to *Nanaimo*, under arrangement between the *B. C. T. Co.* and the *M. S. Co.*, the remainder of the engagement was undertaken between the two companies, and the *M. S. Co.'s* tug boat, *Etta White*, and the *B. C. T. Co.'s* tug, *Beaver*, proceeded to tow the *Thrasher* out of *Nanaimo* on her way to sea, the *Etta White* being the foremost tug. Whilst thus in tow the ship was dragged on a reef, and became a complete wreck. The night of the accident was light and clear, the tugs did not steer according to the course prescribed by the charts and sailing directions; and there was on the other side of the course they were steering upwards of ten miles open sea free from all dangers of navigation, and the ship was lost at a spot which was plainly indicated by the sailing directions, although there was evidence that the reef was unknown. The ship had no pilot, and those aboard were strangers to the coast.

In an action for damages for negligently towing the ship, and so causing her destruction,

Held,—(1.) That as the tugs had not observed those proper and

* PRESENT—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry and Taschereau JJ.

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reasonable precautions in adopting and keeping the courses to be steered, which a prudent navigator would have observed, and the accident was the result of their omission to do so, the owners of the tugs were jointly and severally liable, (*Taschereau*, J., dissenting as to the liability of the *M. S. Co.*, and holding that the *B. C. T. Co.* were alone liable).

2. That under the *British Columbia* Judicature Act the action was maintainable in its present form by joining both companies as defendants.

3. That as there was nothing in the *M. S. Co.'s* charter or act of incorporation to prevent their purchasing and owning a steam tug, and as the use of such a vessel was incidental to their business, they had a perfect right to let the tug to hire for such purposes as it was used for in the present case.

4. That as the tugs in question were not registered as British ships at the time of the accident their owners were not entitled to have their liability limited under 25 and 26 *Vic.* (Imp.) ch. 63.

5. That the limited liability under section 12 of 31 *Vic.* ch. 58 (D.) does not apply to cases other than those of collision.

6. This case coming before the Court below on motion for judgment under the order which governs the practices in such cases, and which is identical with English Order 40, Rule 10, of the orders of 1875, the Court could give judgment, finally determining all questions in dispute, although the jury may not have found on them all, but does not enable the Court to dispose of a case contrary to the finding of a jury. In case the Court consider particular findings to be against evidence, all that can be done is to award a new trial, either generally or partially under the powers conferred by the rule similar to the English Order 39, Rule 40. The Supreme Court of *Canada*, giving the judgment that the Court below ought to have given, was in this case in a position to give judgment upon the evidence at large, there being no findings by the jury interposing any obstacle to their so doing, and therefore a judgment should be entered against both defendants for $80,000 and costs.

APPEAL from the judgment of the Supreme Court of *Brtish Columbia*, sitting as an Appeal Court, rendered and pronounced on the 19th April, 1882, and by which the appeal of the present appellants from the judgment of the Supreme Court of *British Columbia* rendered in

this cause, in favor of the defendants, on the 11th July, 1882, was dismissed.

This was an action for recovery of damages ($80,000) for negligently towing the plaintiffs' ship on a reef, during the performance of a towage engagement, and so causing her destruction.

The following, as disclosed by the evidence and pleadings, are the material facts of the case.

The plaintiffs were strangers, owners of the ship *The Thrasher*, an American ship registered at *Bath*, *Maine*, *U. S.*, of which one R. *Bosworth* was the master. The defendants were towing companies, carrying on business for hire in the navigable waters of *British Columbia*.

On the 22nd day of May, 1880, a contract of tonnage was entered into between the plaintiffs and the defendants, the Towing Co., to tow the plaintiff's ship, *Thrasher*, from *Royal Roads* to *Nanaimo*, there to load with coal, and when loaded to tow her back to sea.

After the ship was towed to *Nanaimo*, the agent of the Towing Company sent the *Beaver*, belonging to the *Towing Company* to the captain of the *Thrasher*, to tow her to *Cape Flattery*. The *Beaver* not having sufficient power, the agent supplemented that power by sending another towing steamer, the *Etta White*, belonging to the *Moodyville Saw Mill Co.*

The *Thrasher's* captain, and those on board were strangers to the coast, and had no pilot, having paid the half forfeit required by law, as the tugs knew. The captain of the *Beaver* had been acting and was then holding a certificate as a licensed pilot in the navigable waters of *British Columbia*, though at the time and in the contract under consideration he was not acting or receiving remuneration as a pilot, but was solely the servant of the defendants, *The Towing and Transportation Co.*; and the master of the *Etta White*

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held a pilot's certificate for the district of *Nanaimo*, though then not acting or receiving remuneration as a pilot, but simply and solely as the servant of the said defendants.

About seven o'clock on the evening of the 14th July the *Thrasher* passed her hawser to the *Beaver*, and the *Etta White*, leading, passed her hawser to the *Beaver*. The *Thrasher's* hawser was made fast to her port-bow and the hawser from the *Beaver* to the *Etta White*, was made fast to the starboard bow of the *Beaver*, these arrangements being made by the tugs. The two tugs and ship being thus attached, the Captain of the *Thasher* gave orders for the tugs to start.

The weather was calm and clear and a bright sky overhead.

No direction of any kind, except a general one to tow to the point of destination, was given from the tow to the tugs.

A safe course is laid down on the chart and the "*Vancouver Island* Pilot," or Sailing Directions.

Whilst thus in tow, the ship (which was laden with coal and drew some twenty-five feet of water) was dragged on a rock some distance outside of the limits of what was known at the time and laid down on the charts as *Gabriola* reef, and became a complete wreck.

The respondents severed in their defence.

By their plea, the *Towing Co.*, respondents, in effect, contended that the loss of the ship was not attributable to any negligence, carelessness, or unskilfulness of the tugs, that, on the contrary, the loss was caused by the carelessness and want of skill of the master of the ship, for whom the company are in no way responsible; that, moreover, the master of the *Thrasher* was responsible for the course, direction and navigation of the said tugs; that the rock in question was, an unknown rock, not laid down on any authorized chart, and

that the accident was inevitable; and that, under any circumstances, the appellants' claim must be limited to $38.92 per ton of the gross tonnage of the *Beaver*, which, without making any deduction for engine room was 159.12 tons.

The respondents, *The Moodyville Saw Mill Co.* by their defence, contended that the tow in sailing without a pilot had contributed to the negligence, and that the master of the *Thrasher* had been guilty of great negligence and carelessness in consequence of the *Thrasher* not following the course steered by the tug next to her, to wit—the *Beaver*, and that the course taken by the *Etta White* was in accordance with the sailing directions of the *Vancouver Island* pilot, and that they were not to blame for the unknown dangers of the seas and navigation. By way of alternative defence they, also, pleaded that by the law of *Canada*, which regulates and governs the law of ships and shipping navigating Canadian waters, the owners of any ship (where any loss or damage is by reason of the improper navigation of such ships, caused to any other ship or boat) shall not be answerable in respect of loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding $38.92 for each ton of the ship's registered tonnage, where such loss or damage occurs without their actual fault or privity, and without in any way admitting that they are responsible for the alleged loss of the *Thrasher*, the respondents claim that the said loss alleged occurred without their actual fault or privity, and that the amount of damages, if any, recoverable against the respondents must be limited to $38.92 per ton of the registered tonnage of the said tug; that the gross registered tonnage of the said tug is 97.35 tons without any deduction for engine room.

The trial was had before the Hon. Chief Justice *Beg-*

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bie, assisted by a special jury. The Judge charged the jury and left to them the following questions:—

Q.—Did the defendants, or either, and which of them, at any time contract to tow the *Thrasher* from *Nanaimo* to *Fuca Straits* without a pilot engaged as such by the *Thrasher*? A.—There was no contract made by either of the defendants to tow the *Thrasher* from *Nanaimo* to the *Straits of Fuca* without a pilot, neither was there any direct stipulation in the contract which was made between Captain *Bosworth* and (the agent) Mr. *Saunders*, of the *British Columbia Towing and Transportation Co.*, that the vessel should take a pilot.

Q.—What was the magnetic compass course taken by the tugs from *Entrance Island*? A.—The magnetic compass course taken by the tugs was about due east from *Entrance Island*, which course was changed by the *Etta White* some ten minutes before the *Thrasher* struck.

Q.—Was any specific compass course (or any other course) given by the tow to the tugs, either by the captain or other officer? A.—No course of any kind was given by the tow to either of the tugs by Captain *Bosworth* or any of his officers.

Q.—At what time did the captain of the *Thrasher* go to bed? A.—We are of opinion that Captain *Bosworth* left the deck about a quarter to nine o'clock.

Q.—Did the captain of the *Thrasher* direct his steersman to neglect the *Beaver's* course? A.—Captain *Bosworth* did instruct his steersman not to follow the course of the *Beaver* but that of the *Etta White*.

Q.—Was there any current and in what direction? Would it have been probably noticed and allowed for by a competent pilot on board the tow or either of the tugs? A.—There was some current setting in shore and we are of opinion that same would have been noticed and allowed for by a competent pilot either on board the tow or either of the tugs.

Q.—Was the *Thrasher Rock* a generally well-known rock previous to the accident? A.—We are of opinion that the *Thrasher Rock* was not generally well-known prior to the accident.

Q.—Did the captain of the *Thrasher* follow a reasonably direct course after the tugs? A.—We are of opinion that the captain of the *Thrasher* did follow a reasonably direct course after the *Etta White* but not after the *Beaver*.

Q.—Did the accident take place with the actual privity of either of the defendants? A.—The accident did not take place with the actual privity of either of the defendants.

Q.—Did Captain *Bosworth* take proper and what precautions as captain of a tow should, such as to take notice of the rate and real direction of the progress? A.—We are of opinion that Captain *Bosworth*, as captain of a tow, did not take proper precautions as to noticing rates of speed and real direction of his vessel's progress.

Q.—At the time of the stranding what was the value of the *Thrasher*, of the cargo of freight; if no evidence, say so? A.—There is no evidence to show the value of either ship, cargo or freight at the time of stranding.

The following were the additional questions submitted by counsel at the trial as questions to be put by the judge, but rejected:—

"Was there any negligence or want of common care and caution on the part of the ship without which the accident would not have happened, and if so, what was such negligence, or want of common care or caution?

"Notwithstanding any such negligenceor want of care and caution on the part of the tow, could the tugs by the exercise of skill on their part, have avoided the neglect or carelessness of the ship?

On the 4th and 7th days of July, 1881, the plaintiffs,

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pursuant to notice, duly applied to the Chief Justice to enter judgment for the plaintiffs for $80,000, but on the 11th day of July, 1881, the Chief Justice, upon such motion, directed judgment to be entered for the defendants, and the following is such judgment:

"The action having on the 26th, 27th and 28th days of June, A. D. 1881, been tried before the Honorable Sir *Matthew Baillie Begbie*, Knight, Chief Justice of the Supreme Court of *British Columbia*, and a special jury of *Victoria*, and the jury having been discharged without finding a verdict expressly either for the plaintiffs or defendants, but having answered certain questions put to them by the judge as appears by the certificate of the registrar, and now upon this day motion is made to His Lordship the Chief Justice, on behalf of the plaintiffs (pursuant to notice duly given in that behalf) to enter final judgment in favor of the plaintiffs for the sum of seventy-five thousand dollars and cost of suit,, and the said motion having been debated by the council on both sides, his lordship did adjudge that judgment should be entered for the defendants with cost of suit. Therefore it is adjudged that final judgment be entered for the defendants, and that the plaintiffs do pay the defendants their cost of suit, to be taxed by the registrar."

From this judgment the appellants appealed to the full court, which confirmed the judgment unanimously so far as it concerned the *Moodyville Saw Mill Co.*, but the hon. Mr. Justice *Gray* dissenting so far as it freed from liability the *British Columbia Towing Co.*

Mr. *Davie* for appellants:

We submit this court can direct judgment to be entered according to the merits of the case, as it has before it all materials necessary for finally determining the questions in dispute. See Rules 294 and 298 of the Supreme

Court of *British Columbia*, under Judicature Act—the same as English Order 40, Rule 101, and *Hamilton* v. *Johnson* (1). The Chief Justice and the majority of the court below, although there is abundant evidence of negligence on the part of the tugs, have laid down the rule of law to be that in all cases of towage, the tow must direct the course, and that the tugs are not responsible. If this is admitted, then it would be useless to have a new trial, but, we think, the true proposition is that where no express orders, other than a general direction, are given from the tow, the tug has the general direction of the course, and is bound to tow the ship in a safe and prudent course. *Smith* v. *St. Lawrence Tow Boat Co.* (2); *The Robert Dixon* (3); *McLachlan* on Shipping (4); and cases there cited.

We ask the court to do here what the Court below should have done. We do not ask for a new trial. Mr. Justice *Gray*, in his judgment sums up what we contend for (5).

We ask the court to supplement the findings of the jury. There are sufficient materials before the court to enter a judgment according to the merits of the case. There is uncontradicted evidence of the value of the ship at the time of stranding.

The employment of a tug is a contract which implies the exercise of diligence, care, and reasonable skill in the fulfilment of the engagement. Although there is no implied warranty to bring the tow to the point of

(1) 5 Q. B. D. 263.
(2) L. R. 5, P. C. 308.
(3) 42 L., T., N. S. 344; S. C., L. R., 5, P. D. 54.
(4) 3d. Ed. 286 *et seq.*
(5) Page 67 of the case:—
"Before referring to the law on "the question of negligence in "such a case, it is important to ex- "amine the ground on which the "Chief Justice claims that he may "supplement the finding of the "jury and by drawing his own con- "clusions from the evidence as- "sumed as a fact proved that "which the jury have not found, "and thus render complete that "which the jury left incomplete. "It is to be borne in mind that on "this trial the jury gave no ver-

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destination at all hazards and under all circumstances, she engages to use her best endeavors for that purpose, and should only be prevented by *vis major* or by accidents not contemplated, which render the performance of the contract impossible. The *Minnehaha* (1) ; the *Julia* (2) ; the *Galatea* (3) ; *Spraight* v. *Tedcastle* (4) ; *McLachlan* on Merchant Shipping (5) ; the *Margaret* (6).

The tug is bound to have local knowledge of the place where she is towing : she is bound to know the proper channel : the state of the tides : all recognized impediments and dangers of the way, and not voluntarily to deviate from a recognized and safe channel, much less to proceed in a course where there may be, and, as the results proves, is danger ; or when there is a well known course which she may pursue of unquestionable safety. The *Energy* (7) ; the *Lady Pike* (8) ; the *Express* (9) ; the *Trojan* (10) ; the *Niagara* (11) ; the

"dict. When a distinct verdict is "given the law presumes much in "itsfavor and the court will sup- "port it unless and until it be ma- "nifestly shown that it was errone- "ous, but when no verdict has "been given such presumptions "do not exist. The reason is "obvious. The jury are supposed "to be intelligent men, practically "acquainted with subjects of the "enquiry before them, and to "bring to the consideration of "such subjects practical business "intelligence and experience.The "judge's duty is to guide them as "to the law. The jury's duty "under that guidance to find the "fact. The new rules, however, "seem intended to provide for an "omission of the kind that took "place on this occasion, when the "court having all the materials "before it, can supplement the "finding of the jury on points es- "sential to the case (on which "points the jury have expressed "no opinion) by conclusions not "inconsistent with their findings "on points on which they have "expressed opinion. In no case, "however, it seems to me should "the conclusions of the court on "facts not pronounced upon by "the jury,be inconsistent with the "conclusions of the jury on the "facts on which they have pro- "nounced. Such inconsistency "would be a conflict of finding as "to facts and form ground for a "new trial, whereas when consis- "tent they afford ground for judg- "ment.

(1) 30 L., J. Ad. N.S. 211.
(2) Lush, Ad. 224.
(3) Swab. Ad. 349.
(4) L. R., 6 App. Cases 217.
(5) 3rd ed., 286, and seq.
(6) 4 Otto (U. S. Sup. C.) 494.
(7) 3 L. R. 2 Ad. 48.
(8) 21 Wall. 1.
(9) 3 Cliff. 462.
(10) 8 Ben. 498.
(11) 6 Ben. 469.

steamer *Webb* (1); the *Brazos* (2); the *C. F. Ackerman* (3); the *Favorite* (4).

The above authorities show that for any breach of duty on the part of the tug, she is responsible in damages to the tow, should damage ensue.

The tug is bound to keep a look-out for tow and tug. The *Jane Bacon* (5).

The mere fact of an accident happening throws the onus upon the tugs of showing that the accident was not caused by their negligence, or that the tow contributed to the disaster, and *a fortiori* is this so when the tug is admittedly towing out of the usual course, has no look-out, and has not recognized the tides. Little short of *vis major*, or inevitable accident, could excuse the tugs, even if no actual negligence could be proved against them, but when ignorance and unskilfulness is once proved against the tugs, the defence of inevitable accident, or *vis major* is set up in vain.

The *Lady Pyke* (6); The steamboat *Deer* (7).

And every doubt as to the performance of the duty and the effect of non-performance should be resolved against the vessel sought to be inculpated, until she vindicates herself by testimony conclusive to the contrary. The *Ariadne* (8).

The allegation and finding that the rock on which the ship struck was unknown does not help the respondents. They were admittedly out of the course, in a locality stigmatized in the sailing directions as dangerous ground, and the question is, not whether or not the rock was known, but is whether they could have exercised ordinary care and have been where they were. Not observing the force of the current, which the jury

(1) 14 Wall. 406.
(2) 14 Blatchford 446.
(3) 8 Benedict, 496.
(4) 5 Sawyer 226.
(5) 27 W. R. 35.
(6) 21 Wall. 1.
(7) 4 Benedict, 352.
(8) 13 Wall. 475.

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find would have been observed and allowed for by a competent pilot, is conclusive evidence of negligence.

The defence set up in paragraph fourteen of the statement of defence of the *Towing Co.*, and in paragraph five of the statement of defence of the *Sawmill Co.*, alleging a sudden change of course on the part of the ship, and of her improperly following the foremost tug at a particular moment, instead of the tug next her, is unsupported by the evidence.

Now as to *Moodyville Saw Mill Co.'s* liability.

The *Moodyville Saw Mill Co.*, although not parties to the contract, had a duty imposed upon them, the same as that which resulted from the contract, and are liable in damages for the breach of such duty, and under the Judicature Act, sub-sec. 7 of sec. 2, rules 17 & 16, and sub-sec. 7 of sec. 2, both parties can be joined in the action.

See *MacLennan's* work on Judicature (1); See, also, *Martin* v. *Great Indian Peninsular Ry. Co.* (2); *Foulkes* v. *Met. Ry. Co.* (3).

Then, as the defence of limited liability, I contend it cannot be maintained.

The loss of the ship occurred before the statute 43 *Vic.*, ch. 29, *D*, came into operation. The accident did not happen within the body of the county. There is no proof that the tugs were registered.

The defendants, if they had wished to limit their liability, should have pleaded the Imperial Statute 25 and 26 *Vic.*, ch. 63, sec. 54.

Liability must be admitted and money paid into court before the relief given by the statute can be invoked.

Hill v. *Andus* (4); *James* v. *London, S. & W. Ry. Co.*

(1) Pp. 140, 142.
(2) L. R. 3 Ex. 9.
(3) 5 C. P. D. 157.
(4) 1 K. & J. 263.

(1); *The Amalia* (2); *The Normandy* (3); *Georgian Bay Transportation Co.* v. *Fisher* (4); *Prehn* v. *Bailey* (5).

It is also objected that the defence does not show the tugs to have been registered.

Mr. *Robinson*, Q.C., follows for appellants:

The law as to the relative duties of tug and tow as applicable to the facts of this case, is well laid down in *Spaight* v. *Tedcastle* (6), and the decision of this case must depend upon the answer to the question, who was responsible for the course taken in this case? And if, as the evidence clearly establishes, respondents choose to contract to tow this vessel and, without orders being given by the tow, and none being asked by the tugs, take a wrong course they are responsible.

[The learned counsel then reviewed the evidence, contending that these tugs were guilty of negligence, and that the tow had not been guilty of any contributory negligence.

The following cases were also referred to the tug *Ackerman*, "The *Robert Dixon*" (7).]

As to the liability of the *Moodyville S. M. Co.*, I do not think the question can present any difficulty under the recent decisions. The question is, if sued alone would they be liable? If so, because they are sued with another company, are they less liable? As to their liability I refer to the steamboat *Deer* (8); *Heaven* v. *Pender* (9); and *Hooper* v. *L. & N. W. Ry. Co.* (10). See also *Leslie* v. *Can. Cen. Ry. Co.* (11). The liability of both is identical, and we are claiming for the same sum, and we ask for one payment. There is no objection taken here except as to misjoinder, and under the new Judi-

(1) L. R. 7 Ex. 187.
(2) 1 Moore, P. C. N. S. 471.
(3) L. R. 3 A. & E. 152, 157.
(4) 5 Ont. App. 383.
(5) L. R. 6 P. D. 127.
(6) L. R. 6 App. Cases 217.
(7) 8 Benn. 496; 42 L. T. N. S. 344.
(8) 4 Benn. 352.
(9) 9 Q. B. D. 302. S. C. in Appeal, 11 Q. B. D. 503.
(10) 43 L. T. N. S. 570.
(11) 44 U. C. Q. B. 21.

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cature Act this objection can no longer be entertained if both are liable. Separate trials can be granted by a judge when it is found more convenient, but here there is no pretence that it was inconvenient.

As regards the limited liability under the Dominion statute, it is sufficient to say it is confined to cases of collision.

Mr. *Bethune*, Q.C., for respondents, *British Columbia Towing Co.*:

As to the relative duty of tug and tow:—

In a case of towage the tug is the moving power, but it is under the control of the master or pilot of the vessel in tow. The *Duke of Sussex* (1); The *Christina* (2); The *Energy* (3); The *Sinquasi* (4); *Smith* v. *The St. Lawrence Tow Boat Co.* (5); The *Cleadon* (6); The *Aracan* (7).

Where no directions are given by the vessel in tow, the rule is, that the tug shall direct the course, and, under such circumstances, it is the duty of the tow to follow directly in the course of the tug. *Smith* v. *The St. Lawrence Tow Boat Co.* (8); The *Stranger* (9), a case somewhat similar to this; The *Jane Beacon* (10).

Even if the tug be to blame for the course taken by it, the tow cannot recover when any misconduct or unskilfulness on her part contributed to the accident. The *Julia* (11); *Smith* v. *The St. Lawrence Tow Boat Co.* (12).

[The learned counsel then referred to the cases cited by counsel for appellant, and argued they were distinguishable on the facts of the present case.]

Then, as to negligence, I contend that we followed

(1) 1 W. Robinson, 270.
(2) 3 W. Robinson, 27.
(3) 3 A. & E. 48.
(4) 5 P. D. 241.
(5) L. R. 5 P. C. Cases, 313.
(6) 14 Moore, P. C., 97.
(7) L. R. 6 P. C. Cases, 127, 132.
(8) L. R. 5 P. C. Cases, 313.
(9) 24 L. T., 364.
(10) 27 W. R. 35.
(11) 14 Moore P. C. 210.
(12) L. R. 5 P. C. Cases, 313 & 314.

the proper course, and it has been so found by the jury.

The steamers steered a proper course from the outset and far beyond or outside the limits of danger shown by the chart, and they were unaware of the sagging of the vessels.

The rock in question, also, is about a mile beyond the danger limit shown on the chart, and was at the time not generally known and was certainly wholly unknown to any one on board the steamers.

In the present instance, the tow was guilty of gross negligence,—by sailing without a pilot, by the master leaving the deck and going to bed, at least an hour before the ship struck; by the failure of the tow to steer directly after the tug (the *Beaver*,) and unskilfully steering after the *Etta White*, which was towing the *Beaver*, thereby causing the three vessels to sag towards the shore, by the failure of those on board the tow, who noticed the sagging at least an hour before the accident, but failed to warn the tugs or direct them in any way to alter their course, by persisting in steering on the *Etta White*, even after she had altered her course from E. to E.S.E. (the *Beaver* still running due east), and thereby placing the tow about fifty feet nearer shore than the *Beaver*, her tug, and thereby, in fact, bringing about the accident which occurred; there being deep water between the sunken rock (then covered by eleven feet of water) on which she struck and her tug.

As to question of procedure, the learned counsel argued that if the court were of opinion that certain facts ought to have been found by the jury, then there should be a new trial.

The clause in the Act cannot be interpreted so as to give to a court the power of a re-trial before a judge.

Mr. *L. N. Benjamin*, for respondents, *The Moodyville Saw Mill Company*:

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The statement of claim alleges a contract with *Saunders'* as agents for the *Tow Boat Company* to tow safely. The appellants elect to sue the *Tow Boat Company* as principals, and not the agent. The *Saw Mill Company* was only the servant of the *Tow Boat Company*; in order to make the *Saw Mill Company* liable on these pleadings, as no contract is alleged with them, it is necessary to show expressly the creation of a duty, and the breach of it which appellants fail to do. *Dutton* v. *Powley* (1); *Winterbottom* v. *Wright* (2).

Moreover, the Company were not authorized to tow vessels for hire, and their doing so was *ultra vires* of their corporation. *Morawetz* on Corporations (3).

The liability of owners of ships or steamers, for damages occasioned without their actual fault or privity is limited to the sum of $38.92 per ton of gross tonnage of steamers. 31 *Vic.* (*Canada*), ch. 58, sec. 12, and extended to *British Columbia* by 35 *Vic.*, ch. 38, sec. 1. The *Obey* (4); *Spirit of Ocean* (5). See also 25 and 26 *Vic.* (Imperial), ch. 63, sec. 54, sub-sec. 4, Merchants' Shipping Act of 1862.

That the limitation applies to tugs. See *Beta* (6); *Franconia* (7); *Clara Killam* (8); *Wahlberg et al* v. *Young et al* (9); *MacLachlan* on Shipping (10).

As to the course, the evidence shows that the steamers steered a proper course from the outset and one far beyond and outside the limits of danger shown by the chart, and were unaware of the sagging above referred to.

The rock in question also is about a mile beyond the danger limit shown on the chart, and was at the time

(1) 30 L. J. Q. B. 169.
(2) 10 M. & W. 109.
(3) See 189, 209.
(4) 1 L. R. A. & E. 102.
(5) 34 L. J. A. D. 74.
(6) L. R. 2 P. C. 447.
(7) 2 P. D. 160.
(8) 3 L. R. A. & E. 161.
(9) 45 L. J. C. P. D. 783.
(10) 3 ed. N. 304.

not generally known, and was certainly wholly unknown to any one on board the steamers.

Mr. *Robinson*, Q. C., in reply.

RITCHIE, C.J.:—

I have given this case very careful consideration, and I entirely agree with Mr. Justice *Gray* in the conclusion at which he has arrived in, if I may be permitted to say, his very able and exhaustive analysis of the facts of this case, and as my views are in precise accordance with the judgment which will be delivered by my brother *Strong*, I shall therefore content myself with simply saying that I entirely concur in every word that he has written, both with reference to the facts and the law in this case.

STRONG, J. (1):—

The first question which is presented for decision in this case requires us to determine what was the duty of the defendants implied in the engagement which they entered into to tow the plaintiff's ship. I am of opinion that the answer to this question may be given in a very few words, by saying that the authorities establish tha the defendants were bound to use reasonable care and skill in the performance of their undertaking - and that this applies to both the defendants—as well to the company who were the owners of the *Etta White*, as to the *British Columbia Towing & Transportation Co.*, who were the parties with whom Captain *Bosworth* made the contract for towage. The reasons for applying this rule to the owners of the *Etta White* I will state hereafter.

In the face of the decisions in the cases of the *Julia*

(1) This judgment is not preceded with any statement of the facts for the reason that it was intended to follow a judgment of the Chief Justice, in which the facts were stated.

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(1), and in that of *Spaight* v. *Tedcastle* (2), it is difficult to see how there can be any doubt as to the duties of a tug under circumstances like those in evidence here. In the former case Lord *Kingsdown* lays it down that:

> The law implies an engagement that each vessel would perform its duty in completing the contract, that proper skill and diligence would be used on board of each, and that neither vessel by neglect or misconduct would create unnecessary risk to the other, or increase any risk which would be incidental to the service undertaken.

In *Spaight* v. *Tedcastle*, Lord *Blackburn* refers to this case of the *Julia* with approval, saying that "it accurately and clearly states the law."

The judgment of the Supreme Court of the *United States* in the case of the steamer *Webb* (3) states the law as applicable to American waters in the same terms; it says:

> The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services.

Having thus ascertained the duty which was incumbent on the defendants, and for the present assuming that it applies equally to both tugs, as well to the *Etta White*, whose owners made no contract with the plaintiffs, as to the *Beaver*, we have next to consider if this duty was sufficiently performed. It is said on behalf of the defendants that there was contributory negligence on the part of the plaintiffs, which, according to well understood principles, disentitles them to maintain the action. The negligence thus attributed to the plaintiffs consists, it is said, in their omission to take a pilot, and in the officers in charge of the plaintiffs' ship not having themselves been sufficiently vigilant in seeing that the tugs steered the proper course. These objections are directly answered by what was

(1) 14 Moo. P. C. 210. (2) 6 App. Cases 217.
(3) 14 Wall. 406.

said by Lord *Blackburn* in the case of *Spaight* v. *Tedcastle*, and by the principle of the well known case of *Davies* v. *Mann* (1). If the proximate cause of the loss of the ship was the negligent steering of the tugs, it is no defence to the action within the rule as to contributory negligence, that if the plaintiffs had done something which they might, and, perhaps, ought to have done, but omitted to do, the accident would have been avoided. In *Davies* v. *Mann*, if the donkey had not been negligently left by its owners on the highway, it would not have been killed, but this was considered not to be decisive, the question being if the killing of the animal would have been avoided if the defendants had used reasonable care, which the law made it incumbent on them to use. Applying that doctrine here, the question must be, would the loss of the vessel have been altogether avoided, if the tugs had observed those proper and reasonable precautions in adopting and keeping the courses to be steered which a prudent navigator would have observed. If it could be shown that those in charge of the vessel were in any way responsible for the course taken by the tugs, that would have taken this case out of the principle of the cases cited, but it does not suffice to show that, apart altogether from any concurrence in the neglect of duty by the tugs, the captain of the ship might, if he had not omitted to take a pilot, have been able to guard himself from the consequences of the defendants' negligence. In order to constitute con-contributory negligence, there must be a neglect on the part of the person suffering the injury contributing to that which is the proximate cause of the accident. In *Spaight* v. *Tedcastle*, Mr. Justice *Blackburn* says:

> Be it that there was negligence in the ship, and those for whom the ship was responsible, in letting her get so dangerously near the

(1) 10 M. & W. 546.

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bank before the helm was ported, as complete as the negligence of those who in *Davies* v. *Mann* left the fettered donkey dangerously rolling in the road, it forms no defence to an action against the persons who, by want of proper care, have injured the ship.

This is, I conceive, exactly applicable to the present case, and reduces the enquiries to these: Did the defendants exercise due care and take all reasonable precautions in ascertaining the proper course to steer and in adhering to it? And if they did not, was the accident the result of their omissions so to do? This is a question of fact on the evidence, to which, as it appears to me, there can be only one answer.

The tugs did not steer according to the course prescribed by the charts and sailing directions, and the accident immediately resulted from their omissions in these respects. After what has been said by the Chief Justice and by Mr. Justice *Gray* in his judgment in the court below, where the evidence bearing on this point has been most ably examined and analyzed, I do not purpose to take up time by further reviewing it. An observation is made in the judgment in the case of the *Webb* already referred to, that—

> There may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it.

And in the present case, when we consider the condition of the weather, the fact that the night was light and clear; that there was on the other side upwards of ten miles of open sea free from all dangers of navigation; that the line of danger within which tugs should not have steered was clearly marked in the charts and pointed out by the sailing directions, the mere fact that the ship was lost at a spot which was plainly indicated by the sailing directions as a place where it was not safe to take her, by itself and without any inquiry into the course actually steered, demonstrates,

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at least *primâ facie*, that the accident was the result of negligence.

The burden thus being shifted on to the defendants to show some excuse for this, can it be said that they have exonerated themselves? Have they shown anything like *vis major*, or any other causes for such a result except such as could not easily have been met with proper management? Do they show that any conduct or neglect of the ship's officers contributed to their neglect to steer the proper course? Granting that they originally laid out the proper course to be steered, but that the effect of the steering of the ship or the currents, or both together, was such as to carry them off the course, how can this make any difference, if these were causes which with reasonable care would have been observed, and being observed could easily have been neutralized. If there had been a narrow channel, with dangerous ground on both sides, the case might have been different, but here the tugs had on one side many miles of safe water, open sea. They could easily have avoided all danger if they had seen it, and but for very gross neglect of the ordinary precautions of a prudent navigator, they must have seen it. With these general observations on the evidence, and adopting what has just been said by the Chief Justice here, and by Mr. Justice *Gray* in the court below, I come to the conclusion that the immediate and sole cause of the accident was the negligence of the defendants.

It was held by Mr. Justice *Gray* in the court below, and was argued here by the learned counsel who appeared for the owners of the *Etta White*, that as there was no contract with their company, the plaintiffs had no right of action against them. I am unable to agree to this. True it is that there was no privity of contract; but the law, as I understand it, implies a

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duty, in cases like the present, on the part of those who undertake to perform services which involve the persons or property of others being placed in their power and control, that they will execute their employment with due and reasonable care. The case of a railway traveller who having purchased a ticket from company A., entitling him to be carried to a point beyond the line of company A, on that of company B., is entitled to make the latter company, with whom he has no contract, responsible to him for not exercising reasonable care is, as it seems to me, a sufficient analogy to show the liability of the owners of the *Etta White*, in the present case; and the late case of *Heaven* v. *Pender* (1), in the English court of appeal, also establishes this doctrine to its fullest extent.

That the action can be maintained under the *British Columbia* judicature act in its present form, by joining both the companies as defendants, is beyond doubt. The English supreme court rules of 1875, order 16, rule 3, of which the *British Columbia* rule is a transcript, provides that:

> All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative.

The only remedy for a mis-joinder, if, indeed, such a term is now applicable, is by an application to strike out one of the defendants. It suffices to say that the case has proceeded to trial without any such order being made. It would seem, moreover that the present case is an eminently proper one for the application of the rule, since the evidence is common to the case of both the defendants, and, therefore, that the present is just such a joinder of defendants as the rule was intended to authorize.

It was contended at the bar on the argument here

(1) 11 Q. B. D. 503.

that the *Moodyville* Saw Mill Co., the owners of the *Etta White*, were not liable, because the contract which they entered into with the *British Columbia* Towing & Transportation Co. to tow the *Thrasher*, was *ultra vires* of the first mentioned company. I cannot assent to this proposition. It is not shown the *Saw Mill Co.* had not under their charter or act of incorporation power to purchase and own a steam tug; in the absence of anything appearing to the contrary, it is to be presumed that they had the power, and the nature of the business which they were incorporated to carry on, as is well known, warrants the inference that the possession of such a vessel was, if not necessary, useful and usual in towing logs and rafts and thus incidental to their business. And if there was nothing *ultra vires* in the acquiring and holding the property in such a steamer, surely it could not be *ultra vires* that the company should, when they had no occasion for its use themselves, make it profitable by letting it to hire for such purposes as it was used for in the present case. If this question had arisen in an action by the *Saw Mill Co.* against the Towing Co. to recover the compensation agreed to be paid by the latter to the former company for the services rendered by the *Etta White*, the question would have been precisely the same as that which arose in the Queen's Bench Div., *England*, in the case of *The London & North Western Ry. Co.* v. *Price* (1), where it was held that a contract to pay a railway company a specific charge for using the plaintiffs' weighing machine for weighing the defendants coals was not *ultra vires*, upon the principle that the weighing machine being incidental to the business of the railway company as carriers, they had a perfect right to allow not only the persons from whom they carried coals, but also the public at large, to have the occasional

(1) 11 Q. B. Div. 485.

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use of the machine, and were entitled to make a fair charge for the use of it.

And if the saw mill company could have recovered the amount agreed upon for the hire of the vessel, the vessel must have been lawfully employed in the service in the course of which this accident happened, and if lawfully employed, the law will imply the usual obligations, already observed upon, as to the duty arising towards third persons, for whose benefit the service was to be performed, though not actually parties to the contract, to use due diligence and reasonable care in the performance of the undertaking.

The defendants also insist upon the benefit of the statutory defence of limited liability which they have pleaded in their statement of defence. The English Act, 25 & 26 *Vic.*, ch. 63 (The Merchant Shipping Act Amendment, 1862) cannot apply, for the tugs were not foreign ships, neither were they as British ships within the condition which is indispensable to entitle the owners to the benefit of the provisions of the Act uniting responsibility, for they were not registered as British ships (1). Indeed, it is evident from the terms in which the defence is pleaded, the claim being that the liability should be limited to $38.92, the amount to which the recovery is restricted by the Canadian Act, that the latter, and not the Imperial, statute was meant to be set up by the defendants. The Canadian Act is the 31st *Vic.*, ch. 58, the 12th section of which provides for the limitation of liability in the same terms as those employed in section 54 of the English Act, but the 11th and 12th clauses of the Canadian Act are prefaced with a heading in these words: "Duty of Masters—Liability of owners as to collision." The 11th section does not relate to the liability of owners, but prescribes the duties of masters of ships in case of collision, and the

(1) See The Andalusia, 3 Prob. Div. 182.

words "liability of owners as to collision" must therefore have been intended to relate to the 12th section only, which we must read as if it had the heading or preamble "liability of owners in case of collision," and the plaintiffs therefore contend that it confines the operation of this 12th section to cases of collision. The provisions of the 12th section are none of them such that any repugnancy would be caused if the words by "collision with another ship," or equivalent expressions were to be interpolated in each of them; and this being so, and having regard to the decisions as to the effect of headings of this kind in the cases of *Bryan* v. *Child* (1); *Hammersmith Rwy. Co.* v. *Brand* (2); *Lang* v. *Kerr* (3), and other cases which are collected in the note in *Maxwell* on Statutes (4), I cannot see my way to holding that this restricted liability applies to cases other than those of collision. Further, the preamble to the statute itself, which sets forth its object to be to enact certain rules of navigation and regulations for "preventing collisions," shows that the scope of the act itself was much more confined than the English Act and was only intended to ensure careful navigation and to prevent cases of collision. I do not see that we can apply the restricted liability in the present case, and the plaintiffs must, therefore, be entitled to the full amount of damages which they have proved, and which I think have been properly estimated by Mr. Justice *Gray* at the sum of $80,000.

This case came before the court below on a motion for judgment according to the new practice under the English Judicature Act lately introduced in *British Columbia*. The *British Columbia* order which governs the practice in such cases is identical with the original

(1) 5 Exch. 368.
(2) L. R. 4 H. L. 171.
(3) 3 App. Cases 529.
(4) 2nd Edition 65.

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English Order 40, Rule 108, of the orders of 1875. This enables the court to give judgment finally determining all questions in dispute, although the jury may not have found on them all. I take it, however, that it does not enable the court to dispose of a case contrary to the finding of the jury, but that in case the court consider a particular finding to be against evidence, all that can be done is to award a new trial, either generally or partially under the powers conferred by the rule similar to the English Order 39, Rule 40. There has, however, here been no finding by the jury which interposes an obstacle of this kind. The finding that the *Thrasher Rock* "was not generally well known prior to the accident," is not inconsistent with a decision by the court that on the whole evidence the defendants are proved to have been guilty of negligence in not steering a proper course, and adhering to the sailing rules and otherwise taking proper precautions.

The finding that there was no evidence of damages, when the value of the ship is distinctly stated in the evidence of Captain *Bosworth*, is something difficult to understand. By this I do not understand that the jury found that there was actually no damage, or that they discredit the evidence of *Bosworth*, but that no evidence of damage had been offered, which was incorrect and must have been an oversight. It was not, however, as I understood the counsel, insisted that there should be a new trial merely for the purpose of ascertaining the damages which may, therefore, be fixed at Mr. Justice *Gray's* estimation. This court, giving the judgment that the court below ought to have given, is, therefore, in a position to give judgment upon the evidence at large; and the result, in my opinion, must be that a judgment be entered for the plaintiffs against both defendants for $80,000 and costs, and that the plaintiffs also have the costs of this appeal.

FOURNIER, J.:—

I am of opinion that this appeal should be allowed with costs against both companies.

HENRY, J.:

I had very little difficulty at the argument of this case in coming to the conclusion that the plaintiff is entitled to recover in this action, not only against the company with whom he made the contract, but also against the company who came in to assist the other one in its performance. It is a clear proposition that when a party undertakes to aid in the performance of a contract entered into by another, he assumes the responsibility of performing his part of it, either singly or jointly with the original contractor; and if he fails in the proper performance of that duty, and the contract is not properly carried out through the negligence or improper performance of either or both the parties, the other party is entitled to recover against both. Now, the facts here are very clear, and there is no difficulty in ascertaining what they are. The party who undertook to convey this vessel by a tug from one place to another, says: "Although the vessel was lost, you should have put on board a pilot, and as none was put on board we are not answerable." Now, in order to sustain that proposition, it was necessary that the party so asserting should show that it was a part of the contract, either expressed or necessarily implied, that a pilot was to be put on board by the owners of the ship. There is no such express contract shown, and it is not necessarily implied, as I take it, that the party letting his ship to be towed from one place to another is required to have a pilot on board, or is required to put a pilot on board the leading tug, or the other tug, as the case may be, in order that the contracting party shall perform his contract properly.

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There are a great many cases where pilots are necessary, especially in going through very difficult channels and places where the owners of the tug are not supposed to be acquainted. There it might be implied as part of the contract that the owner of the ship shall provide a pilot, but it must be implied from the nature of the case.

In this case it is not expressed in the contract, and I see nothing here to warrant the implication that there was any such contract on the part of the plaintiffs. The defence on that ground, I think, entirely fails. Then, the question of negligence, on the part of the two towing tugs: they had undertaken to tow the vessel in a proper way and without negligence, and without deviation from the proper and ordinary course. I think that whether the rocks upon which this vessel was put were actually known to the parties or not, they were guilty of negligence in keeping so close to the shore. It was a turning point in the course on which they were proceeding that the ship struck, and they had eight or ten miles of sea room on the other side, where there was no danger, but they ran too close to the turning point. They could not justify such a course as that. They had no right to shorten their voyage by taking the turn too abruptly. It was their duty to take all reasonable care to avoid any possible sunken rocks near the shore. They did not do so, and therefore I think they are answerable for the damages that have been sustained.

Now, as to the amount of these damages. I think they were, under the evidence, properly assessed by the learned judge *Gray* in the court below. I think that under the circumstances, and under the law and the practice, we have the right to sustain the finding of the judge as to the amount of the damages. The evidence was clear as to the value of the ship and the cargo that

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were lost, and I think that what the jury in their answer referred to was not the amount and value of the ship and cargo, but the extra amount of damages actually sustained; but whether that was so or not, it is not necessary to be considered here, if we do not go beyond the amount of the actual value proved. I think there can be no doubt from the evidence what that amount was, and I consider it would be doing an injustice to the plaintiff, and adding more costs to the defendants, if we were to send it back for a new trial. The defendants could not expect to reduce the verdict below the actual value of the property, and it would be entailing not only additional delay but additional costs.

Under the whole circumstances, I think the appeal should be allowed, and we are entitled to give the judgment which the court below ought to have given, viz: judgment against both defendant companies for $80,000 and costs.

TASCHEREAU, J.:

I am of opinion to allow this appeal, and that judgment should be for the plaintiffs against the *British Columbia Towing and Transportation Co.* for $80,000 with costs, the said plaintiffs' action to be dismissed as against the *Moodyville Saw Mill Co.*, without costs.

Appeal allowed with costs.

Solicitor for appellants: *Théodore Davie.*

Solicitors for respondents *The British Columbia Towing Transportation Co.*: *Bethune & Bethune.*

Solicitors for respondents *The Moodyville Saw Mill Co.*: *L. N. Benjamin.*