

<p>1908 <u>May 14, 15.</u> 1909 <u>*Feb. 12.</u></p>	<p>THE SHIP "NANNA," HER CARGO AND FREIGHT (DEFENDANT)</p>	}	APPELLANT;
AND			
	<p>THE ENGLISH AND AMERICAN SHIPPING COMPANY, OWNER OF THE "MYSTIC" AND OTHERS (PLAINTIFFS)</p>	}	RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA,
NOVA SCOTIA ADMIRALTY DISTRICT.

Admiralty law—Salvage—Injury to salving ship—Necessities of service—Seamanship—Appeal on nautical question.

In an admiralty case the Supreme Court of Canada must weigh the evidence for itself unassisted by expert advice and will, if the evidence warrants it, reverse the judgment appealed against on a question of seamanship or navigation.

The ship "M." brought an action for the value of salvage services rendered to the "N." part of the damages claimed being for injury to the "M." in performing such services.

Held, Girouard and Maclellan, JJ., dissenting, that the evidence established that said injury was not caused by necessities of the service but by unskilful seamanship and improper navigation; the judgment appealed against should, consequently, be varied by a substantial reduction of the damages allowed by the local judge.

The dissenting judges were of opinion that sufficient ground was not shewn for disturbing the findings of the trial judge.

APPEAL from the judgment of the local judge for the Nova Scotia Admiralty District of the Exchequer Court of Canada in favour of the plaintiffs.

The action was for the value of salvage services performed by the "Mystic" in rescuing the "Nanna" from probable shipwreck off the southern coast of

*PRESENT:—Girouard, Davies, Idington, Maclellan and Duff JJ.

Nova Scotia, the latter, a steel ship of 1,125 tons gross tonnage being on her way from Halifax to New York with a cargo of deals, and the "Mystic," 2,342 tons bound for Halifax. The facts of the salvage are stated by the local judge as follows:

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There is nothing to especially distinguish this case from the ordinary cases of salvage towage services rendered to vessels in distress, until the "Mystic" and the "Nanna" arrived in the vicinity of the Sambro Ledges.

On Monday, February 4th, at about 7.30 in the morning the "Mystic" took the "Nanna" in tow off Seal Island near Cape Sable. Previous to that date the "Nanna" had been drifting about with her propeller shaft broken. That happened on the night of January 31st.

During the day before the "Mystic" came up a heavy westerly gale prevailed, which caused the "Nanna" to drift a long distance. She could not be steered, even with all her sails set, as way enough could not be made to enable her to answer her helm. Cargo was jettisoned in the hope that by lightening the vessel steerage way could be made but she would not obey her helm even then, nor could she be made to do so by any of the devices tried.

On Monday, 4th February, when picked up, she was about twenty miles off Seal Island. When the vessel was disabled signals of distress were put up.

On Sunday night there was a high sea, and as the captain of the "Nanna" says, her position on that night was not pleasant.

The vessel when picked up by the "Mystic" was, no doubt, not in a safe position, though she was in the vicinity of the usual route of vessels. After the

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"Mystic" made fast to the "Nanna" the towing proceeded without serious accident until Tuesday morning at about 7.45, when the line parted in a heavy wind, when the vessels were nearing Chebucto Head. At that time the captain of the "Mystic" appears to have been on his proper course to Halifax; but as he could not pick up a pilot, and as the weather was becoming bad, he decided to put to sea.

It was while he was bringing his ship slowly round, so as to avoid breaking the hawser, that the line parted, and the "Nanna" immediately commenced to drift towards the shoals at Morris Point. The captain of the "Mystic" at once proceeded to manœuvre his vessel in an attempt to again make fast to the "Nanna"; and this he succeeded in doing in a most creditable manner, considering the condition of the weather.

* * * * *

While he was thus endeavouring to get a line aboard the "Nanna" both vessels were drifting rapidly towards the dangerous reefs known as the Sambro Ledges. From the time when the line parted, until it was again put aboard the "Nanna" about half an hour elapsed, and three quarters of an hour passed more before the line was made fast aboard the "Nanna."

While they were thus drifting no soundings were taken. After again getting under way with the tow, and while steering a S. by E. course, the "Mystic" saw breakers ahead on the starboard bow, which were probably the Sisters; thereupon his helm was starboarded and he kept away from them, changing his course to north.

He then went slow, and was taking soundings. Not long after this the soundings shewing 15 fathoms,

then again 15 again, and after that 17 fathoms, speed was increased, and breakers were seen a point or two on the port bow. These breakers were what is known as the Stapleton Rock breakers.

The captain of the "Mystic" signalled to the "Nanna" to anchor, and this was done by both vessels; the "Nanna" being in a position where she weathered the gale that blew all day Tuesday and on Tuesday night, without incurring any mishap whatever. The "Mystic" bumped several times on Stapleton Rock and incurred considerable damage. She made water in some of her compartments, but does not seem to have been rendered unseaworthy. After coming to anchor the weather continued to be very bad; a gale blew and the sea became extremely rough. Nevertheless, the vessels rode out the gale without further mishap until taken in charge by the tow boats from Halifax on Wednesday morning.

Judgment was given against the owners of the "Nanna" and damages were assessed at \$27,000, which included a sum for the injury sustained by the "Mystic" at Stapleton Rock, the local judge holding that such injury was caused by necessities of the service. The defendants appealed mainly against the allowance of damages under this head.

Mellish K.C. for the appellants.

W. B. A. Ritchie K.C. for the respondents.

GIROUARD J. (dissenting).—I think the judgment of the trial judge should not be disturbed. The appeal involves only a question of fact and his finding is not so clearly wrong as to justify an appellate court

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in reversing, much less to simply reduce the amount awarded. All the points seem to have been fairly weighed by the trial judge. This court agrees with him that without the services of the "Mystic" the "Nanna" would probably have been a total loss. This admission is sufficient for me to accept the amount of the judgment which is fully and properly detailed, to my satisfaction at least. Twenty-five thousand dollars for salvage seems to be a large amount, but, when we consider that more than \$15,000 go for repairs rendered necessary by the salvage services performed, I do not think it excessive. I am, finally, of opinion that \$10,000, outside of these repairs, is not an unreasonable remuneration for saving a vessel of the value of \$65,000, without propeller, at the mercy of a raging gale, close to a dangerous coast, amidst a blinding snow storm and after great exertions and risks to the salvors whom the pilot and salvage tugs would not even venture to assist at first.

Upon the whole, I think the appeal should be dismissed with costs and, in reaching this conclusion, I keep within the well-settled jurisprudence of this country. I do not propose to review all the cases for they are too numerous. I will merely quote three or four, two of our own court, *The "Picton"* (1), in 1879, at page 653, and *The "Santanderino"* v. *Vanvert* (2), in 1893, and two of the highest courts in England.

In *The "Baku Standard"* (3), at page 551, Sir Ford North, speaking for the Privy Council, said:

Their Lordships are of opinion that, considering the evidence, and that the compensation for damage is dealt with separately, full

(1) 4 Can. S.C.R. 648.

(2) 23 Can. S.C.R. 145.

(3) [1901] A.C. 549.

justice would have been done by an award of less than £1,000 for salvage. But this is a question of amount only, and it is not the custom of this committee to vary the decision of a court below on a question of amount merely because they are of opinion that, if the case had come before them in the first instance, they might have awarded a smaller sum. It has been laid down in the "*DeBay*" (1), and other cases that they will only do so if the amount awarded appears to them to be grossly in excess of what is right; which is not the case here.

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In another case, *The "Glengyle"* (2), at page 521, where a salvage of £19,000 was awarded, Lord Herschell, speaking for the House of Lords, said:

At the best, in cases of this description, all that can be done is what may be called rough justice. It is impossible nicely and accurately to measure in relation to the risks run and the services rendered the sum which ought to be awarded by the court. My lords in the present case the amount is large, and it may be that it is larger than each of the members of this house, who have heard the appeal, would have given if it had been left to his individual judgment. I do not say that it is so; all I say is that, in my opinion, it is not so exorbitant or so manifestly excessive that we ought to interfere with the conclusion which has been arrived at.

I am, therefore, of opinion that the appeal should be dismissed with costs.

DAVIES J.—I concur with the judgment of Mr. Justice Duff.

IDINGTON J.—I also concur in the opinion of Mr. Justice Duff.

MACLENNAN J. (dissenting).—I am of opinion that this appeal should be dismissed.

The appeal is from a judgment of the local judge in Admiralty, at Halifax, in a case of salvage, and the only serious question is whether the sum

(1) 8 App. Cas. 559.

(2) [1898] A.C. 519.

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awarded to the "Mystic" for the salvage of the "Nanna" is excessive.

The witnesses in the case were all examined in the presence of the learned judge, and I think his conclusions from the evidence were well founded, and it was for him to judge between conflicting statements.

Both vessels are of steel and propelled by steam, the "Mystic," without cargo, valued at \$219,000, and the "Nanna," with cargo, at \$65,437.

The "Nanna," loaded with lumber, and on her way from Halifax to New York, became disabled, on the night of the 31st of January, 1907, by the breaking of her propeller.

This happened off the southwest coast of Nova Scotia, and she then drifted about helplessly, at the mercy of the wind, and tides, and currents, for three days and four nights, until picked up and taken in tow for Halifax, about 10.40 a.m., on the 4th of February, by the "Mystic," which was on a voyage from Boston to Louisburg, in Cape Breton.

All went well for about two hundred miles, except for some delay caused by the parting and re-hitching of the tow-line, until about 5 a.m., on the 5th of February, when it began to snow so heavily that they could see nothing, the thermometer, at the same time, indicating a zero temperature.

Under these circumstances they soon began to take soundings, and, at 7.45, they heard the whistle at Chebucto Head, the entrance to Halifax Harbour, the same being supposed to be about a mile and a half distant.

And here is where trouble and confusion began. In addition to the heavy snow and the zero temperature, a heavy gale sprung up from the E.N.E. and the tide was flowing in the same direction.

About this time the tow line parted again, while making a change of course, and, for more than an hour, except for the manœuvres necessary to get the hawser on board the tow and made fast, the ships could do nothing but drift.

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The circumstances were such that to re-hitch the tow-line the ships had to get alongside; if a boat had been launched, it could not have lived. No pilots were out, although they were on pilot ground, and the evidence is that the pilots refrained from going out on account of the violence of the weather.

It was nine o'clock before the tow-line was made fast on the "Nanna," and a further quarter of an hour, or twenty minutes, passed before movement could be made.

At this time the captain could not tell in what direction they had drifted, or where they were, and for another hour afterwards he endeavoured to make his way out to sea, but, seeing breakers whichever way he turned, he failed to get out, and, at last, determined to anchor.

This both ships did, but, before the "Mystic" was able to do so, she struck a shoal, and received injuries, repairs of which amounted to \$13,850.

The "Nanna" suffered no injury, and both ships rode out the gale at anchor all that day and the following night. The "Nanna" was towed into harbour next morning by tugs, and the "Mystic" went in with her own steam; and the learned judge is of opinion that, while the "Mystic" was quite capable of taking the "Nanna" in, it was more prudent to accept the offer of the tugs.

The result was that, by the exertions of the "Mystic," the "Nanna," valued at \$65,437, was

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rescued from a position of great danger on a rocky coast in which she had been for three days and nights, and was brought into port without appreciable damage, while the "Mystic," while so employed, suffered very serious injury and incurred very serious risk of total destruction.

Now, I do not understand that, in order to earn substantial reward, the master of a salving ship must be found to have done everything in the best possible manner. All men have not equal skill and capacity in difficult circumstances. No want of attention or effort is charged against the master of the "Mystic." He was at his post of duty during the whole period of danger, using his best skill and judgment in the difficult situation and circumstances in which he was placed, and I do not think that, because he did not succeed in finding a way out to sea from among the shoals and breakers into which he had drifted, after the cable had parted, his owners are to be deprived of the just reward which the "Nanna" ought to pay for complete rescue from very great peril.

The learned judge has awarded a sum of \$27,000 altogether, or about forty per cent. of the saved ship's value. Of this sum, \$25,000 is awarded to the "Mystic," and its officers, and, after deducting the expense of repairs, and other damages, the sum of \$8,022 is all that goes to the owners of the "Mystic" as compensation for the services rendered by their ship and crew, and for the loss of forty-five days' use of their ship and wages of crew while undergoing repairs.

I think that is a very fair sum to charge against the "Nanna" for her complete rescue from a position of very great danger, and the learned trial judge, having thought that sum a proper one to allow, I do not think we ought to reduce it.

In *The "Chetah"* (1), it was declared that the first and most important question in such cases is the danger of the vessel salvaged, and that the most important element in a claim for high salvage is the imminent danger of destruction of the salvaged vessel. That there was such imminent danger in this case from first to last cannot be denied.

It is evident that it is only in very plain cases of excess that an appellate court interferes with the salvage allowed by the trial judge, for, in the "*Chetah*" Case (1), in 1868, it is stated that was the first case in which the sum awarded was reduced.

In *The "City of Chester"* (2), Lindley L.J. enumerates the matters proper to be considered in salvage cases, and, at page 203, says:

Another circumstance to be considered is the importance of so remunerating salvors as to make it worth their while to succour ships in distress. This consideration renders it necessary to be liberal, not only to captains and crews who perform the salvage services, but also to owners of vessels engaged in those services where such vessels have been injured or exposed to danger. The salving vessel is often herself exposed to imminent peril; the risk of loss or damage to her is often very great; and the damage actually done to her, and the loss actually sustained by her owner from delay in her voyage and otherwise, may be, and often is, very considerable. Hence, one element in determining the amount to be awarded for salvage services is the value of the salving ship and cargo which have been exposed to risk; and the nature and extent of the risk are other elements for consideration. Where the salving vessel is, as in the present case, a large and valuable steamer, exposed to great risk, the claims of her owner deserve very favourable attention.

In the present case the value of the "*Mystic*" was more than three times that of the "*Nanna*," and, having regard to the risk to which she was exposed, and the damage sustained, I think the award not excessive, and that a substantial value, over sixty per cent., is not an unfair surplus left to the salvaged vessel.

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(1) L.R. 2 P.C. 205.

(2) 9 P.D. 182.

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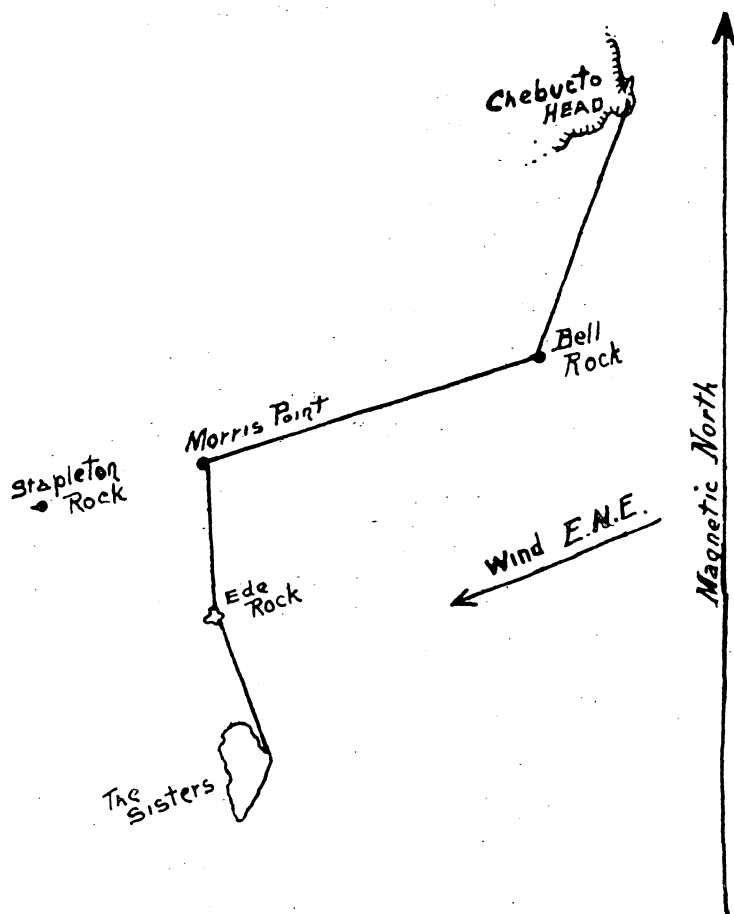
DUFF J.—This is an appeal from a salvage award; and the question principally argued—which is the question of substance to be decided—is whether the learned trial judge erred, in finding that certain injuries suffered by the "Mystic" (the salving ship), were caused by the necessities of the service, and so clearly erred as to justify a reversal of that finding; the damages attributable directly to these injuries as well as damages for the delay and loss of earnings consequent upon them having been reckoned as elements in the computation of the amount awarded (\$25,000).

The appellant, "Nanna" (the salved ship), is a Norwegian steel ship of 1,125 tons gross tonnage; the SS. "Mystic," which is owned by the respondent company, is a steel vessel of 2,342 tons.

The "Nanna" had her propeller shaft broken on the 31st January, 1907, in a voyage from Halifax to New York—laden with deals. She was taken in tow, on Monday, the 4th February, at 10.40 o'clock a.m., by the "Mystic," then bound for Louisburg. When picked up the "Nanna" was about 20 miles S.W. of Seal Island, which lies fifteen or twenty miles off the extreme southwest coast of Nova Scotia. Nothing material to the question at issue happened until the following morning—Tuesday, 5th February—when the whistle at Chebucto Head, which marks the outer entrance to Halifax Harbour, was heard by the "Mystic." According to the bearings and soundings then taken, Chebucto Head would appear to have been about a mile and a half away.

The account of what followed will be more readily comprehended by referring to the accompanying sketch, which shews approximately the relative situ-

ations of the different localities that it will be necessary to mention as we proceed.



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About the time Chebucto whistle was heard, the "Mystic" sighted Bell Rock buoy close at hand, and, as the wind from the E.N.E. was rising and snow was falling, she decided to put to sea in order to avoid risk of stranding. About this time the tow line broke and the "Nanna" was allowed to drift until a line was again passed to her. Shortly after this, breakers, which proved to be on Morris Point, were seen, and a

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course was then set S.E. by E. for the open sea. Breakers were again seen on the starboard bow, on Ede Rock or the Sisters, at 9.15. The "Mystic" then turned around with her tow under a starboard helm and, at 10.18 struck the shoal at Stapleton Rock, receiving the injuries referred to. Both ships then came to anchor at that place and safely rode out the gale which afterwards came on, the "Nanna" receiving hardly any damage. On the following morning, the weather having moderated, tugs came to their assistance and towed the "Nanna" to Halifax—the "Mystic" entering the harbour under her own steam.

There is, on the evidence, some conflict respecting the course steered by the "Mystic" after clearing the breakers seen at 9.15. The master of the "Nanna" says the course was north-west. Owen, the first officer of the "Mystic," and Schlieman, the third officer, say that the course was north and that this was maintained until Stapleton Rock was reached. The captain of the "Mystic" when first called, on both cross-examination and re-examination, agreed with this; being re-called, in rebuttal, he said that the course first taken was north, but that, after the tow had cleared the breakers this course was changed to a course north-east by north. The learned trial judge seems to have accepted the statement given by the first and third officers of the "Mystic" and by the captain when first called, and I think the weight of evidence is in favour of this view.

The contention on behalf of the appellant is that, in steering this course and maintaining it as he did for nearly an hour, the captain of the "Mystic" was guilty of a want of ordinary care or skill and that to his failure in this regard the injuries suffered by that ship are attributable. It is not suggested that the

captain of the "Mystic" committed a fault in turning to the north when he first saw the breakers referred to; this course was prudent to take in order to make sure that the "Nanna" could clear the dangerous place. But the captain admits that the "Nanna" was clear in ten minutes from the time the breakers were seen; and the question is—whether or not the "Mystic's" course from that time can be justified.

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The onus is, at the outset, on the appellant, and was so in the court below; "*Baku Standard*" (1); but I think that when the admitted facts are considered, they are, in themselves, of such cogency as to require an explanation of the conduct of the captain of the "Mystic." His own statement is that, having sighted a spar buoy at Morris Point, he believed it to be the Bell Rock buoy; and that, when he saw breakers the second time, he was at a loss to know where he was; and that the only thing he could do was to "take soundings and keep in good water." I do not think this can be accepted as a satisfactory explanation. He knew he was on the southeast coast of Nova Scotia, near the outer entrance to Halifax Harbour, that an hour and a half before he had been within a short distance, a mile and a half, he says, of Chebucto Head; the wind was east northeast; for nearly an hour he had been drifting; he could hardly suppose he had been drifting in an easterly direction, and, on any conceivable assumption as to his position, it must have been plain that north of him and west of him was the shore and that a northerly course maintained for even a short time must take him into exactly the kind of danger he was trying to avoid.

The skilled seamen who were called as experts all

(1) [1901] A.C. 549.

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say that in the circumstances his only prudent course after clearing the breakers was to proceed to sea, that is to say, on an easterly course. I cannot find in the evidence given on behalf of the respondents anything that appears to amount to a good reason why this course, seemingly so obvious, should have been looked upon as involving any special risk; or any plausible excuse for not taking it. I do not think it is sufficient or, indeed, any explanation to say the "Mystic" was "always keeping in good water"; to the eastward there was not only good water, but sea-room as well.

The standard which ought to be applied to the conduct of navigators engaged in a salvage operation is stated in the following passage quoted from the judgment of Dr. Lushington, in *The "Magdalen"* (1) at page 142:

If it be such an error that men of skill and ability would say, from what had been done in attempting to render the salvage service, that, if they had had to undertake the operation, they would have considered it so doubtful as to the method of proceeding that either of two methods of proceeding might have been adopted, and that they would have tried one way, and that, if that had been unsuccessful, they would have adopted another, the court would not look upon that error in a severe light. But if there were measures pursued which were so grossly unskilful as to make it evident that ordinary skill and ability were wanting, that would be taken into consideration by the court.

I think the captain of the "Mystic" fell below this standard; and that the appellants have succeeded in making out that the injuries in question were due, not to the necessities of the service, but to the default of the "Mystic."

I am not overlooking the counsel that upon a doubtful question of navigation the court should, in trying a claim for salvage, incline to the lenient view;

(1) 31 L.J. Adm. 22.

nor am I leaving out of mind the danger that, in passing judgment after the event, one may not make full allowance for all the difficulties and embarrassments of a navigator in an emergency at sea. Giving her the full benefit of these considerations, I cannot escape the view that the course of the "Mystic" is not to be explained upon any hypothesis consistent with reasonably competent seamanship.

The learned trial judge has, as I have said, found the injuries suffered by the "Mystic" were due to the necessities of the service; and this finding was strongly pressed upon us as decisive. The particular question I have discussed is not touched upon by the learned trial judge; and it is, after all, a simple question of fact which, as with any other question of fact not involving the credit attributable to particular witnesses, we must examine for ourselves; and, if satisfied that the court below is wrong, we are bound to give effect to our own view. It being a question of seamanship, one is disposed once again to repeat what has been said so often—it is unfortunate that, while exercising the functions of a court of appeal in respect of such questions, we have not (unlike other courts the world over exercising the like functions), the benefit of skilled advice.

The respondents are, however, entitled to a substantial reward for their exertions. I do not accept Mr. Mellish's contention that the "Nanna" was left by the "Mystic" in a position more dangerous than that from which she was taken. The learned trial judge found that the "Mystic," notwithstanding her injuries, was still able and ready to tow the "Nanna" into Halifax on the morning of the sixth. The acceptance of the assistance of the tugs with the consent of all parties is not sufficient, I think, in these circum-

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stances, to disentitle the "Mystic" to be rewarded as for a successful and completed service, though the sums allotted to the tugs must be taken into consideration in determining the amount which should be paid to her.

The learned judge has found that the operation of getting a line aboard the "Nanna" after the parting of the hawser, through no fault of the "Mystic," was a difficult operation, was performed very creditably, and saved the "Nanna" from the probability of a total loss. I do not see any reason for disagreeing with this. On the whole, I think the award should be reduced to \$12,500. The master's share should abate proportionately; but there should be no abatement of the sums allotted to the other officers and members of the crew.

Appeal allowed in part with costs.

Solicitor for the appellants: *W. H. Fulton.*

Solicitor for the respondents: *H. C. Borden.*
