[HIGH COURT OF AUSTRALIA.]

THE OWNERS, MASTER AND CREW OF THE STEAMSHIP *CARTELA* . } APPELLANTS ;

PLAINTIFFS,

AND

THE SHIP *INVERNESS SHIRE* . . . RESPONDENT.

DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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HOBART, *Feb.* 17, 18.

MELBOURNE, *March* 24.

Griffith C.J., Barton, Isaacs and Rich JJ.

Ship—Salvage—Towage—Services rendered by steamer to ship in distress—Contract with Government—Contract for specific services—Alteration of circumstances—Remuneration—Agreement with master of ship—Non-disclosure of material facts.

When after the making of a contract to render for an agreed sum service (expected to include towage) to a ship in distress the circumstances incident to the performance of the contract prove to be of a nature substantially different from those supposed to exist when the contract was made, being such that, if then known, they should have been disclosed, and it turns out that the services required to be rendered and actually rendered are of so much more onerous a nature than those expected that they cannot fairly be considered as within the contemplation of the parties when the contract was made, additional remuneration may be claimed under the maritime law as against the ship.

The owners of a steamer of about 77 tons, which was built and used for cargo and passenger service in the port of Hobart, and was not specially equipped for towing, but which could without difficulty tow a ship of 400 tons, and was then in port, agreed with an agent of the Tasmanian Government that in consideration of the sum of £25 the steamer would proceed to the assistance of a vessel which had been reported from a lighthouse as being a dismasted vessel of about 300 or 400 tons, distant about 15 miles in the offing and apparently abandoned, and that those on the steamer would do the best they could for the vessel and, if possible, tow her into port. As the certificate of the steamer's ordinary master was limited to the waters of the port the Government agent,

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with the consent of the owners, nominated an assistant pilot to act as master of the steamer, which he did. On reaching the locality where the vessel was supposed to be, it was found that the vessel reported was a four-masted barque of 2,307 tons which had lost three of her masts and, not being fully under control, would be in a position of considerable danger if the wind should change. The nominated master of the steamer, who was unaware of the contract made between her owners and the Government, agreed with the master of the ship to tow her into port for £500. The operation of towing then began and was carried out successfully, but the services actually and necessarily rendered by the steamer were much more onerous and involved much more risk than had been contemplated when the contract was made. In an action by the owners, master and crew of the steamer against the barque to recover £500 for towage, or alternatively for salvage,

Held, by *Griffith* C.J., and *Barton* and *Rich* JJ. (*Isaacs* J. dissenting), that so far as the claim was for salvage, properly so called, it was negatived by the fact that the services were rendered under a contractual obligation, and also by the fact that they were rendered in the course of official duty, that so far as the claim was for the agreed sum of £500 there was no valid contract because the fact that the steamer was engaged under a special contract with the Government to render assistance to the ship was not communicated to the master of the ship; but that, as the services actually rendered were much more onerous and involved much greater risk than those in contemplation when the contract with the Government was made, the owners of the steamer were entitled to recover against the ship remuneration additional to the £25 agreed to be paid by the Government, and that the master and crew of the steamer were also entitled to remuneration as for services in the nature of salvage.

In such a case it is not material whether the service rendered is called by the name of towage or salvage service.

By *Isaacs* J.—(1) Where shipowners contract with the Government to tow in to safety a vessel in danger in outer waters, the mere fact that the Government supply to the shipowners a person who is a pilot and who holds a certificate for outer waters to command the ship does not constitute the tug an official vessel; (2) if shipowners let their tug to the Government so as to constitute it an official vessel, the shipowners cannot claim from the tow any reward for the services so rendered; (3) where towage services are agreed upon at a specific sum, the fact that they turn out to be more onerous than was anticipated does not entitle the tug to an increased reward, except on a salvage basis: so long as the contract is adhered to as a simple towage contract, as distinguished from salvage, there is no rule that the Court can depart from the terms of the express contract by altering the agreed remuneration; (4) where the services found to be necessary are so different in character from ordinary towage services as to raise the duty of salving the tow from a position of danger, then the rule of law is that simple towage is converted into salvage and the Admiralty Court may allow

a corresponding reward but on a salvage basis, unless there is an express contract which otherwise provides; (5) where the *res* required to be towed is found to be essentially different from the *res* agreed to be towed the express contract is at an end, and the remuneration for towing it depends upon the actual nature of the services rendered or any new express agreement entered into.

The Minnehaha, 15 Moo. P.C.C., 133, discussed.

Decision of the Supreme Court of Tasmania: *The Inverness-shire*, 11 Tas. L.R., 119, reversed.

APPEAL from the Supreme Court of Tasmania.

An action was brought in the Supreme Court in its Admiralty Jurisdiction by the owners, master and crew of the steamship *Cartela* against the ship *Inverness-shire* claiming £500 as being the agreed remuneration under a contract of towage or, in the alternative, such an amount of salvage as, having regard to the agreement, the Court might think fit to award. The action was heard by the Full Court, and was dismissed with costs: *The Inverness-shire* (1).

From that decision the plaintiffs appealed to the High Court.

The material facts are stated in the judgments hereunder.

Lodge and *J. R. Macfarlan*, for the appellants. The services rendered by the *Cartela* were wholly salvage services from the start, and the appellants are entitled to remuneration on that basis. Taking the contract made between the Government and the owners of the *Cartela* to be a contract of towage, the services rendered were beyond what could reasonably be supposed to be in the minds of the parties to that contract, and were therefore salvage services. See *Ward* v. *McCorkill*; *The Minnehaha* (2); *Kennedy's Law of Civil Salvage*, p. 102; *Five Steel Barges* (3). It is not necessary that danger should be imminent to constitute salvage, but it is sufficient that there is a reasonable apprehension of danger: *The Charlotte* (4); *The Strathnaver* (5); *The Leon Blum* (6); *The Liverpool* (7). The original contract with the Government was gone, because the subject matter of it, namely, a vessel of about 300 or 400 tons, did not exist. The agreement for £500 was not

(1) 11 Tas. L.R., 119.
(2) 15 Moo. P.C.C., 133.
(3) 15 P.D., 142, at p. 144.
(4) 3 Wm. Rob., 71.
(5) 1 App. Cas., 58.
(6) (1915) P., 90, at p. 96.
(7) (1893) P., 154.

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rendered invalid by the non-disclosure of the agreement with the Government: *Flight* v. *Booth* (1); *In re Contract between Fawcett and Holmes* (2).

Alec Thomson (with him *Hodgman*), for the respondent. The contract between the owners of the *Cartela* and the Government was not void *ab initio* by reason of the innocent misrepresentation that the ship in respect of which the contract was made was of about 300 or 400 tons. At most it was voidable, and the appellants never exercised their option to disaffirm it. The representation was not such as to affect the validity of the contract, for the difference between the representation and the fact was not such as to render the undertaking a totally different one from that agreed upon. See *Addison on Contracts*, 11th ed., p. 126; *Seddon* v. *North-Eastern Salt Co. Ltd.* (3). There was no such alteration in the circumstances as to convert the services rendered from towage to salvage. The Supreme Court found that there was no salvage. The non-disclosure of the existence of the contract with the Government rendered the contract for £500 invalid. Under the former contract the *Cartela* was to all intents and purposes a Government ship which was hired for a particular purpose. That fact should have been disclosed. It may be that the captain of the *Cartela* had an implied permission, when the ship intended to be helped turned out to be much larger than was expected, to make on behalf of the owners a reasonable contract for towage with the captain of the *Inverness-shire*, and the respondent has always been willing to pay a reasonable sum.

Macfarlan, in reply. The Supreme Court refrained from finding that the services were not salvage services. The non-disclosure of the fact that the *Cartela* was sent out by the Government was immaterial. The services rendered were salvage services. They were outside the duty which the owners of the *Cartela* owed to the Government, and they were voluntary, for on finding out that

(1) 1 Bing. (N.C.), 370.
(2) 42 Ch. D., 150, at p. 156.
(3) (1905) 1 Ch., 326.

there was no ship corresponding with that described the *Cartela* might have returned. See *Kennedy's Law of Civil Salvage*, p. 112. The original contract was then at an end, and the *Cartela* was then at liberty to render salvage services. On the evidence the *Cartela* was not a Government ship. There was no demise of her to the Government. The temporary captain was a servant of the owners, and was to be paid by them. If the services were not salvage services there is no ground on which the Court should set aside or disregard the contract for £500. There was no fraud in regard to the non-disclosure such as would be a ground of an action for misrepresentation, and a Court of equity will not give relief in respect of innocent non-disclosure unless the fact which was not disclosed was material to be known, and was one which there was a duty to disclose. The Court will not set aside a contract on the ground of fraud unless the parties can be relegated to their original position, and that cannot be done here.

Cur. adv. vult.

The following judgments were read :—

March 24.

GRIFFITH C.J. and BARTON and RICH JJ. This case presents for consideration some points of interest, which, though not, perhaps, new in principle, are novel in form. The relevant facts are not in dispute. The *Cartela* was a wooden screw steamship of 77 tons net register with engines of 35 h.p. nominal, of the value of £10,000, and manned by a crew of 9 hands. She was built and is used for cargo and passenger service in the port of Hobart, and is not specially equipped for towing, but could without difficulty tow a ship of 400 tons. Her master at the time in question was one Mills, whose certificate did not extend beyond certain limits within the port of Hobart.

Shortly after noon on 19th June 1915, while the *Cartela* was lying at a wharf in that port, her owners were requested by the Government of Tasmania to proceed to the assistance of a vessel in distress which had been reported from the lighthouse at South Bruni as a dismasted vessel of about three or four hundred tons, distant about fifteen miles from the light, and apparently abandoned. The weather was thick and misty. The owners of the *Cartela* there-

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upon agreed with an agent of the Tasmanian Government to proceed to the assistance of the vessel, do the best they could for her, and, if possible, tow her into port, for which service the sum of £25 was agreed to be paid. The description of the ship as of about three or four hundred tons was obviously conjectural. It did not affect the identity of the vessel intended to be designated.

As Mills' certificate did not extend to the waters in which the vessel was supposed to be lying, it was necessary to appoint another person as master for the purpose of the enterprise. The Harbour Master accordingly, with the consent of the owners, nominated Captain James Davis, who was an assistant pilot for the port of Hobart, to take charge of the *Cartela*, which he did. He was informed of the services to be rendered, but not of the terms of the contract between the owners and the Government. The owners put on board an extra towage rope and an extra boat, and the *Cartela* left Hobart about 1.15 p.m. and proceeded to the locality where the ship in distress had been reported to be. At about 6.45 p.m., when it was dark, a light was sighted close on the starboard bow, which proved to be on board the *Inverness-shire*, a four-masted barque of 2,307 tons gross register on a voyage from Fremantle in Western Australia to Portland in Oregon in ballast, which had lost her fore, main and mizzen masts, and had only her jigger mast and bowsprit standing. She had been drifting before the prevailing westerly wind, and was not fully under control. She had on board a crew of thirty-one, all told, including the master and two mates. Her position would have been one of considerable danger if the wind had changed and set towards the land.

It may be said at once that, if the *Cartela* had been a vessel on an independent voyage and had fallen in with the *Inverness-shire* in that place, all the necessary conditions to render the service of towing her into port a salvage service would have existed.

When the *Cartela* came near the *Inverness-shire* Davis hailed her and asked her master if he wanted a tow, to which the master replied, "Yes, what will you charge"? Davis replied, "£500," to which the master of the *Inverness-shire* agreed. The necessary operations were then begun, and the *Cartela* with some difficulty succeeded in towing the *Inverness-shire* to Hobart. Nothing

occurred during the tow to change the character of the services from towage to salvage, and it was so found by the Supreme Court on the evidence.

The suit was originally instituted as a suit to recover the sum of £500 for towage. An alternative claim for salvage was afterwards added by amendment. It was not disputed that the sum of £25 was an inadequate remuneration for the services actually rendered by the *Cartela*, but it was contended that the plaintiffs could not recover under either head of their claim—not for towage because the service rendered was the towage of a specific vessel, none the less specific because her size was unknown, which service the owners of the *Cartela* had agreed to render for a specific sum ; not for salvage because under the circumstances it was not a case of salvage. The plaintiffs refused to put their case on any other basis, and the Supreme Court accepted the contentions of the defendants and gave judgment for them.

So far as regards the claim for salvage, properly so called, it is negatived both by the fact that the service was rendered under a contractual obligation and by the fact that it was rendered in the course of official duty. For the *Cartela*, although only engaged for the occasion, was as much an official ship as if she had been owned by and been in the regular service of the Government. So far as regards the claim for the agreed sum of £500, whether for salvage or towage, the contract is vitiated by the fact that the promise to pay that sum was made by the master of the *Inverness-shire* under the belief that the *Cartela* was an ordinary vessel falling in with him when in distress and offering its services under circumstances which would make them salvage services. If he had been informed that the ship was a Government vessel engaged under special contract to search for him and if possible tow him to safety, it is not likely that he would have agreed to pay £500 without further inquiry. The fact omitted to be stated was one which it is natural to infer would have led the master to abstain from making the contract. Such an omission, if unjustifiable, is sufficient to avoid the contract. (See *Akerblom* v. *Price* (1), to which we shall have to refer on another point.) This is not a rule peculiar to the English law of contracts, but is common

(1) 7 Q.B.D., 129.

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to all jurisprudence. It is true that Davis is free from moral blame for not disclosing the fact, since he was not aware of it. But the owners, who claim to take advantage of the contract, are not in the same position, and cannot in our opinion rely on the express agreement which was obtained under such circumstances, whether it is regarded as a contract for salvage or for towage services.

But, as we have already said, it is admitted on all hands that the sum of £25 is an inadequate remuneration for the services actually rendered.

During the argument before us a rule was suggested from the Bench which may be stated thus :—When after the making of a contract to render for an agreed sum assistance to a ship in distress, including towage if practicable, the circumstances incident to the performance of the contract prove to be of a nature substantially different from those supposed to exist when it was made, being such that, if then known, they should have been disclosed, and it turns out that, either from change of weather or any other circumstance, the services required to be rendered and actually rendered are of so much more onerous a nature than those expected to be required that they cannot fairly be considered as within the contemplation of the parties when the contract was made, additional remuneration may be claimed as against the ship. The rule is part of the maritime law, and it is not necessary to call in aid the common law doctrine of implied contract. The proposition is supported by high authority, and we adopt it.

The Minnehaha (1) was a case of an express contract for towage, in the course of the performance of which, by reason of sudden change in the weather, the towing vessel was placed in danger and obliged to incur risks and perform duties which were not within the scope of her original engagement, and it was held that she was entitled, the ship having been saved, to additional remuneration. Lord *Kingsdown*, who delivered the opinion of the Board, said (2) :— " The tug is relieved from the performance of her contract by the impossibility of performing it, but if the performance of it be possible, but in the course of it the ship in her charge is exposed, by unavoidable accident, to dangers which require from the tug services

(1) 15 Moo. P.C.C., 133.

(2) 15 Moo. P.C.C., at p. 154.

of a different class and bearing" (? "deserving") "a higher rate of payment, it is held to be implied in the contract that she shall be paid at such higher rate."

We apprehend that this was not intended as an exhaustive statement of the maritime law applicable to such cases, but as an application of a general rule to that particular case.

In the case of *Akerblom* v. *Price* (1), which was a case depending on admiralty law, *Brett* M.R., delivering the judgment of the Court of Appeal, said (2) :—"The fundamental rule of administration of maritime law in all Courts of maritime jurisdiction is that, whenever the Court is called upon to decide between contending parties, upon claims arising with regard to the infinite number of marine casualties, which are generally of so urgent a character that the parties cannot be truly said to be on equal terms as to any agreement they may make with regard to them, the Court will try to discover what in the widest sense of the terms is under the particular circumstances of the particular case fair and just between the parties. If the parties have made no agreement, the Court will decide primarily what is fair and just. The rule cannot be laid down in less large terms because of the endless variety of circumstances which constitute maritime casualties. They do not, as it were, arrange themselves into classes, of which *à priori* rules can be predicated. If the parties have made an agreement, the Court will enforce it, unless it is manifestly unfair and unjust; but if it be manifestly unfair and unjust, the Court will disregard it and decree what is fair and just. This is the great fundamental rule. In order to apply it to particular instances, the Court will consider what fair and reasonable persons in the position of the parties respectively would do or ought to have done under the circumstances." *The Westbourne* (3) is to the same effect.

In the present case the services rendered were of the same character as those contracted for, and, in one sense, towage services throughout. But the towage of a ship of 2,300 tons in rough water was much more onerous, and involved much more stress upon the structure of the towing vessel, which was not equipped for such a

(1) 7 Q.B.D., 129.

(2) 7 Q.B.D., at p. 132.

(3) 14 P.D., 132 (C.A.).

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service, than the towage of a ship of 400 tons under the same circumstances. As pointed out by Lord *Kingsdown* in *The Minnehaha* (1), it is immaterial whether the larger remuneration is regarded as towage or as salvage.

The present case falls within the rule we have stated. The extra services rendered are analogous to salvage in this respect—that they do not depend on express contract but upon a liability imposed by maritime law; they are unlike it in this—that in estimating the quantum of remuneration there are no extraordinary perils of the sea to be taken into consideration.

It follows that the plaintiffs are entitled to additional remuneration from the Ship, which we assess at £175. And, at the request of the parties, we direct that sum to be distributed as follows:—£100 to the owners, £20 to Davis, £10 to Mills, and £5 to each of the crew.

The defendants must pay the costs of the action. There will be no order as to the costs of appeal.

ISAACS J. This is a case involving principles of vast importance, not only to the shipping industry and general public of this country, but also to all maritime commerce that visits our shores.

I agree that the decision of the Supreme Court of Tasmania cannot stand; but as to the proper order to be made, and as to substantially all the fundamental rules of admiralty law applicable to the case, I regret to have the misfortune to differ entirely from the view taken by my learned brothers.

As this will, of course, be henceforth the ruling authority in Australia on this branch of the law, I think it very desirable to state explicitly the opinion I have been led to form upon the various points of law dealt with, so far as my mind has been guided by the relevant cases decided up to the present by the English Admiralty Courts, nearly all of which were either cited during the argument or are quoted in the cited cases. I shall therefore, in the circumstances, be relieved in most instances from doing more than formulating the propositions which I deduce from them.

It is necessary first to ascertain the facts.

The appellants, the owners, master and crew of the *Cartela* by

(1) 15 Moo. P.C.C., 133.

their amended pleadings sued in Admiralty substantially for salvage remuneration and, failing that, for towage simply. They sued not the Government of Tasmania, but the Ship *Inverness-shire*, that is, the owners of that ship. The facts divide themselves into two periods, and two sets of circumstances, which must be regarded separately. The first relates to the engagement of the *Cartela* by the Government, with which the owners of the *Inverness-shire* had nothing to do, and the second to the engagement of the *Cartela* by the *Inverness-shire*, with which the Government had nothing to do, and the services actually rendered to the latter vessel. As to the first—the Government contract—the Harbour Master at Hobart, (Captain McArthur) received some weather reports on the 17th, 18th and 19th of June 1915, that a vessel was discerned through the mist and looked, as the report said, "like a huge blur." The vessel was reported, says Captain Davis, as being *a vessel of about 300 or 400 tons, and apparently abandoned.* The Harbour Master, on this information as to the nature and situation of the vessel, then made a bargain with Mr. Piesse, the managing director of the company owning the *Cartela*, with reference to a ship, and possibly that ship, endeavouring to bring in the distant vessel. It may be mentioned that Mr. Piesse is acting Master Warden of the Marine Board when the Master Warden is away, but on June 19th was not so acting. He was in law an absolute stranger to the Government. His account, which gives with precision the terms of the agreement as expressed between the parties and is not contradicted, is as follows :— "At 12.25 that day the Harbour Master came along to me, and told me there was a *derelict vessel of about 300 or 400 tons*, and said they wanted a steamer to go out and tow *her* in. I said I have a steamer which could go, but that I have not a master who was qualified to go outside the limit. We discussed the matter, and the Harbour Master then sent for Captain Davis. Captain Davis came down, and I was with the Harbour Master when he arrived. Captain McArthur passed Captain Davis a slip of paper referring to the fact that *a vessel of about 300 or 400 tons apparently abandoned* had been reported from Bruni Island. I told the master of the *Cartela* to give over the charge of the vessel to Captain Davis, who would take charge whilst she was outside the limit. The understanding was that I was to

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tow in *a 300 or 400 ton barque*, and I agreed *to do it for £25* . . . I told Captain McArthur I would have to get a tow rope . . . The arrangement made was a verbal one with Captain McArthur." He added that it was made prior to Captain Davis coming on the scene. They expected, said Mr. Piesse, to pick up an abandoned vessel. Mr. Piesse also said, in direct answer to the Chief Justice, " I agreed to pick up a *derelict*," and went on, in answer to counsel, to add that it was he who put Captain Davis in charge, and it is he who has to pay him, and that he heard nothing whatever about the Government paying him.

Captain McArthur's account is that he believed it was a *small vessel in distress and in danger*, that he agreed the *Cartela* should go down and tow the vessel in for £25, that she was to go down and *render any assistance she possibly could*. He says that when the Government take on a job of that kind they always engage a responsible officer, and that he arranged that Captain Davis should take charge in this case. Those last words, by themselves, apply equally to the two views that the Government was getting work done by contract and that it was being done by the Government itself. But what preceded is only consistent with the first view. And what follows is equally inconsistent with the second. He says: " *I told Mr. Piesse that Captain Davis was there and that they could make what use of him they desired.*" That necessarily means they need not have used him at all. If they could have found anyone else competent and willing to go out, they need not have taken Davis. And the agreement that the *Cartela* should go down and render any assistance she possibly could points to the owners controlling her.

I have italicized the words describing the vessel to be brought in, and the subsequent words as to the use of Captain Davis. It will be observed that nowhere does the evidence describe the vessel as " apparently of 300 or 400 tons " but as *being* (that is, in fact) " of about 300 or 400 tons." In either case the vessel is specific, but the two descriptions are of specifically different vessels.

The judgment appealed from begins by referring to " a ship apparently to be of 200 or 300 tons." Passing by the inadvertent figures, I called the attention of learned counsel to the word

"apparently" in that connection. It was practically agreed that it should not have been there, that the evidence did not support it, and that its proper place was in connection with "abandoned." In any event that is the true situation. The error is corrected by the Supreme Court further on where it is expressly found that "The agreement was that she" (that is, the *Cartela*) "should go out and do what could be done for the distressed vessel which was described *as being of from 200 to 300 tons and apparently abandoned*" &c. The italics are mine. The figures are obviously inadvertently repeated.

The parties obviously selected the word "about" to allow or the manifest impracticability of fixing the size of the vessel precisely.

Not a word was said about a demise of the ship to the Government, or the payment of Davis by the Government, or the payment of the crew by the Government. Even Captain McArthur in his evidence did not assert it was a Government ship or under Government control. As to Davis's appointment all the Harbour Master did besides handing him the memo. was to say "Go out and tow her in." He did not mention the name of the *Cartela*; he did not say she was a Government ship; he did not say anything as to payment for his services. He was simply placed at the disposal of Piesse's company for the service already arranged between the Government and the company. Even if the Government were to pay Davis, it would not, n view of the other facts, affect the position of the owners of the *Cartela*, and its ordinary crew, but would be a mere supplementary transaction as between the Government and Davis.

Now, in my opinion the legal result of the arrangement is this :—

(1) It was a mere contract of services by the appellants for the Government, they retaining control of the *Cartela*, and it was not a demise of the ship. It is not, in my opinion, open to any tribunal on the evidence given to find the tug was a Government ship, and its crew Government officials.

(2) Whatever services were to be rendered to the tow were to be rendered, not directly by the Government through its agents, but by the appellants and their servants.

(3) The intended tow was "a vessel of about 300 or 400 tons," and did not include any vessel of any possible magnitude.

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(4) The intended services were of course towage services, but in view of the description of the tow as "derelict" and "apparently abandoned," salvage services were also in contemplation of the parties.

As to the last point, I find it impossible either in fact or law to suppose otherwise. The mere circumstance that the vessel to be brought in was described as "derelict" and "apparently abandoned" connotes in law, according to the decisions, that salvage services were contemplated (*The Strathnaver* (1)). Indeed, as a matter of hard sense, it was salvage that was thought to be necessary. The Government are not concerned with the ordinary towage of private vessels not in danger regarding life or property. That is the concern of the owners. To spend public funds to tow private ships for the benefit of private shipowners is not a justifiable public function or one likely to be undertaken by the Government, and I decline to attribute it to the Government of Tasmania. But it was because property was believed to be in jeopardy, and because the ship was supposed to be abandoned, and at all events in distress with possible lives at stake, that the Government entered into the bargain to save the ship and anyone who happened to be on board. That was "the job," as Captain McArthur described it, that the Government took on. I must confess that I do not understand how it is said that ordinary towage only was contemplated, which, according to high authority, means substantially the mere acceleration of progress when nothing more is required, the vessel not being injured or damaged in a way to imperil her, or render her more hazardous or difficult to tow than she otherwise would be.

From every standpoint I regard the *Cartela* £25 contract as a salvage contract. The low price is explained by the fact that the vessel to be salved was described as "about 300 or 400 tons." That description was "a substantive part of the contract" (*Behn* v. *Burness* (2)). It hardly needed the sworn testimony of Mr. Piesse that "A 400-ton vessel could have been towed in quite easily by the *Cartela*, but there was a great difference between that and towing a 2,000-ton ship."

Having regard to the terms of the contract, some measure of

(1) 1 App. Cas., 58, at p. 65. (2) 3 B. & S., 751, at p. 759.

approximation must be implied, but I think it is clear that so great a difference as was found to exist in this case between the vessel described in the contract and the vessel found to be drifting makes the latter an essentially different *res*. The *Inverness-shire*, a ship of 2,307 tons register, or, allowing 100 cubic feet to every ton, of 230,700 cubic feet available content, was not the ship which the owners of the *Cartela* undertook to bring in if reasonably possible for the fixed price of £25 as a vessel of about 300 or 400 tons, or 30,000 to 40,000 cubic feet available space—" a small vessel," as Captain McArthur says.

Besides the difference in the vessel herself, the cargo actually on board the *Inverness-shire* was 1,500 tons, though this does not really affect the legal position.

The basis of the contract was absent when the *Cartela* arrived on the spot, because no ship even approximating the ship she came for was on the water. I would apply the observations of *Vaughan Williams* L.J. in *Scott* v. *Coulson* (1), where it is said :—" It is true that both parties entered into this contract upon the basis of a common affirmative belief " (here that the vessel was one of about 300 to 400 tons) " but as it turned out that this was a common mistake, the contract was one which cannot be enforced. This is so at law ; and the plaintiffs do not require to have recourse to equity to rescind the contract, if the basis which both parties recognized as the basis is not true." If, for instance, the *Cartela* on discovering the *Inverness-shire* had returned without assisting her, I do not think any action for breach of contract could have been sustained by the Government against the owners of the *Cartela*. The answer would have been : " We did not contract for £25 to tow *that ship* in fair weather or foul, or under any circumstances whatever ; our bargain had no relation whatever to such a vessel " (*Cf. The Glenmorven* (2)).

But in my opinion the position is that the Government contract for £25, if it ever subsisted in law, seeing that there never was the *res* contemplated, ended when, by reason of the ascertained absence of the subject matter, there was actually found to be nothing to which it could apply. If so much had been known before the *Cartela*

(1) (1903) 2 Ch., 249, at p. 252. (2) (1913) P.D., 141, at p. 145.

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started, she would not have been bound to start; and when she discovered the fact she might have returned, so far as any legal liability under the contract was concerned. No one would dispute that, if not bound to fulfil the contract because its root assumption was absent, the return of the *Cartela* and notification of intention would be effectual. But if the contract is not merely voidable, but void, no such action is necessary. Still less can it be said to be reasonable to require that course in such circumstances of distress as those in which the *Inverness-shire* was found to be. She had lost her three principal masts, had signalled her distress, and was still sending up rockets; was in danger, as the Harbour Master proved, of being set away to the South, and probably the crew would have left her, because she would be in danger of drifting away into the Antarctic. The barometer was exceedingly low, about 29.30, indicating danger to ship. She was practically unmanageable. The *Cartela*, finding a ship essentially different from the one she had been sent to look for, was free to act in relation to the *Inverness-shire* as if she had been a passing ship, and had never made any bargain for any other ship. To return to port first to notify her freedom would have been absurd, and even wicked. Though under no legal obligation to assist the *Inverness-shire* she had a moral duty, described by Lord *Stowell* in *The Waterloo* (1) in the oft-quoted words :—"It is the duty of all ships to give succour to others in distress; none but a freebooter would withhold it."

The £500 towage contract then entered into between the *Cartela* and the *Inverness-shire* was a separate independent bargain, not only distinct from the £25 contract, but with a different party, and under circumstances quite different, because it related to a different vessel. And it was a clear manifestation that the *Cartela* was not willing to further act under the first contract.

The Supreme Court held that Davis made this contract on behalf of the Government, because the Government were then using the *Cartela* as a public vessel. The Court said he had no authority to speak on behalf of anyone else. So far as actual instructions are concerned, whatever might have been the right to give them, that is contrary to the evidence. Both Davis and Piesse say Piesse

(1) 2 Dods., 437.

put Davis in charge, and Davis says in cross-examination: "It was understood that I was to go out and do the best I could for the owners." Both for that reason and apart from it, I feel no doubt Davis's bargain must be taken to have been made for the owners of the *Cartela*.

The Supreme Court further held, as an independent ground of objection to the suit, that the non-disclosure of the £25 contract was fraud. My learned colleagues think it was not fraud, and I agree with them. But they do think it was non-disclosure, vitiating the £500 contract. With great respect, I am unable to follow that view. It seems to me, on my view as to the basis of the bargain, the £25 contract was *nihil ad rem.*

In any case, the question of non-disclosure is immaterial to the main question here, namely, whether the tug is entitled to the £500 agreed upon or to other salvage remuneration.

If the contract be regarded as towage only, the circumstances are not such as to make admittedly innocent non-disclosure a ground for affecting it.

The agreed amount should stand. If the non-disclosure vitiates the express contract, no contract can be implied, and the Court cannot annul one part of a contract and substitute a different part and then attach it to the rest. That is, if the bargain be regarded purely as towage, which depends altogether on principles of contract.

If, however, the services be regarded as salvage, then either the £500 as agreed to must stand, or if on admiralty doctrine exclusively applicable to salvage the fixation of the amount of £500 be regarded as "inequitable" or "unreasonable," the Court should proceed to assess compensation for itself on the salvage basis.

That is, if the services were salvage services; and the next question is: Were they so?

Both the Supreme Court and my learned brethren agree on two points with respect to this, namely, (1) that the services actually rendered were such that, if the *Cartela* were an independent ship, they would be salvage services. With this I quite agree, and would add that they were salvage services of a very meritorious nature. But they further hold (2) that in law the services must be nevertheless

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regarded as ordinary towage services by reason of the existence of the £25 contract, and of the Government nature of the tug, and of the further fact that all conditions were known when the £500 contract was entered into, and nothing subsequently occurred to create greater danger. With great respect, I hold that such a doctrine is contrary to law, and that the question whether salvage services have been contracted for or rendered depends on whether there is actual or imminent probable danger to the tow when the services are contracted for or rendered, and on nothing else.

The salvors, by reason of want of voluntariness or by reason of having definitely contracted with the owners or with their assent to do the known work on a non-salvage basis, or for a specific sum, may disentitle themselves to sue for compensation based on the ordinary maritime law, though the services are salvage. Salvage services and salvage remuneration are entirely distinct conceptions (*The Liverpool* (1)). The utmost that can be said here is that the salvors limited themselves to £500. The principles laid down in *Akerblom* v. *Price* (2) and *The Solway Prince* (3), so far from militating against the appellants, materially support them. In my opinion the services, whether called " extraordinary towage " or not, were inherently and remained salvage services (*The Westbourne* (4) and *Halsbury* vol. I., p. 68)), and must either be paid for at the agreed sum or at a sum which the Court finds fair on a salvage basis.

But assuming as the basis of consideration the position held by my learned brothers, what is the result in point of law?

They hold the tug was a Government vessel, and the crew Government officials performing a public duty in towing the *Inverness-shire*, and doing nothing but towage as distinguished from salvage. If that be so, I cannot see that the appellants have any case whatever against the ship. The hypothesis is they did nothing, they only let their ship for £25 to the Government, and the Government did everything—but did not salve the ship. Salvage is, of course, on this hypothesis out of the question; and on what principle towage can be claimed by a person who did not do it, from a person

(1) (1893) P., 154, at p. 160.
(2) 7 Q.B.D., 129.
(3) (1896) P., 120, at p. 127.
(4) 14 P.D., 132, at p. 134.

who by the hypothesis did not request it (for the £500 contract is eliminated), I am at a loss to discover.

My learned brothers, however, have formulated a rule which they think is sanctioned, if not embraced, by the Privy Council in the judgment in *The Minnehaha* (1), and by which the owners of the tow are held liable for towage by reason of a stranger's contract. I have naturally read and re-read that judgment, and the cases on which *The Minnehaha* is founded (as the *Saratoga* (2)) and the later cases (as *The Waverley* (3) and *The Liverpool* (4)) in which it is expounded and applied. With the greatest deference, I am quite unable to see any sanction given by the Privy Council or any other tribunal to the rule now for the first time propounded.

The Minnehaha doctrine, so clearly stated in that case, and adopted in the later cases, as I understand it, simply inserts in or annexes to an ordinary towage contract, and by virtue of maritime law, the duty of salving the tow if occasion of danger should arise, and with that duty the right to corresponding reward, thus converting towage into salvage ; it further applies only between the contracting parties, and, as Lord *Kingsdown* observed (5), " the rule has been long settled ; parties enter into towage contracts on the faith of it " ; and it also assumes a given *res*, which the learned Lord calls " the ship in her charge," in respect of which the obligation of ordinary towage in the first place attaches, and to which the implied reciprocal obligations of the parties to the contract also attach when the circumstances call them into operation. This last assumption of a specific *res* is in line with the expression of Dr. *Lushington* in *The Galatea* (6), " the ship she has engaged to tow."

Assuming the bargain between the tug and the Government to be one of contractual service, and one of ordinary towage only, the reasons why I hold " additional " towage remuneration cannot be granted here on the authority of *The Minnehaha Case* (1) are : (1) the *res* is different ; (2) the parties are different ; (3) the matter claimed for is assumed to be towage and not salvage ; and (4) the

(1) 15 Moo. P.C.C., 133.
(2) Lush., 318.
(3) L.R. 3 A. & E., 369.
(4) (1893) P., 154.
(5) 15 Moo. P.C.C., at p. 154.
(6) Sw. Ad., 349, at p. 350.

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Court of Admiralty has no jurisdiction to increase a sum fixed in a towage contract—the contract not being impeached: *The Hjemmett* (1); *Halsbury*, vol. 1, p. 68.

The history of salvage, which is entirely within the common law control of the Court of Admiralty, and does not depend on contract, but "is a mixed question of private right and public policy" (*The Albion* (2) and *The Atlas* (3)), makes the jurisdiction in salvage essentially different from the recent statutory jurisdiction in towage, which is always contractual, and a matter of private right only, and subject to the ordinary rules of contract.

But assuming the £25 bargain not to be a contract of service by the owners of the *Cartela*, but to make that ship a Government ship *pro hac vice* whereby the Government had practically the ownership for the adventure and the full control, then it seems to me altogether impossible to apply the new rule at all. The assumption in that case is that the Government itself voluntarily undertook to tow the vessel in, and simply hired the *Cartela* for the purpose: this brought the *Cartela* owners into no privity whatever with the *Inverness-shire*, and, as the Government made no contract with that vessel, it might have abandoned its quest at any moment. How is it possible to apply the rule? Who was bound to salve? Who was bound to tow? Who could sue if neither was done?

For the primary reasons I have given, I think the appeal should be allowed, and compensation allowed on a salvage basis.

I ought to state that Mr. *Lodge*, when questioned by me as to the attitude he adopted before the Supreme Court on the question of towage, stated that he had refused to accept the suggestion of the Supreme Court to consent to the remuneration being based on a *quantum meruit*, unless the Court did so on a salvage basis. If that basis were taken, he stated that he was willing to assent to the Court fixing the remuneration free from the stipulation as to £500; but, if not, he gave no consent, but would argue his right to the £500 agreed to without, of course, rejecting any lesser sum which the Court fixed on him, but preserving his right to object to the reduction

(1) 5 P.D., 227.

(2) Lush., 282, at p. 284.

(3) Lush., 518, at p. 529.

and to claim the full amount. This I regard as being in strict accordance with the law.

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Appeal allowed. Order appealed from discharged. Judgment for plaintiffs for £175 with costs of action.

Solicitors for the appellants, *Perkins & Dear.*

Solicitors for the respondent, *Ewing, Hodgman & Seagar.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE MAYOR, COUNCILLORS AND CITIZENS OF THE CITY OF BRUNSWICK . COMPLAINANTS, } APPELLANTS;

AND

BAKER . . . . . DEFENDANT, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *June* 6, 7, 8, 9.

Barton, Isaacs and Rich JJ.

Local Government—Streets, formation of—Contribution to cost—Street set out on private property—Dedication to public—Public highway—Setting out of street—Distribution of cost, scheme of—Local Government Act 1915 (*Vict.*) (*No.* 2686), *secs.* 526, 527, 532, 537.

Sec. 526 (1) of the *Local Government Act* 1915 (Vict.) provides that "In case—(*a*) Any street road lane yard or passage or other premises formed or set out on private property, or (*b*) Any street road lane or passage formed or set out on land of the Crown or of any public body in such manner as to form means of back access to or drainage from property adjacent to such