No. [illegible]

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

The British Ship "[illegible]", her tackle, apparel [illegible], master and claimant thereof,

Appellants,

vs.

[illegible] Company, Limited, (an [illegible] corporation), owner of the [illegible] "[illegible]," "[illegible]," "[illegible]," and "[illegible]," for itself, the officers and crews of said [illegible] and other servants of said [illegible],

Appellee,

The British Ship "[illegible]", her tackle, apparel [illegible], master and claimant thereof,

Appellants,

vs.

[illegible] Company, Limited, (a corporation),

Appellee,

and

The British Ship "[illegible]", her tackle, apparel [illegible], master and claimant thereof,

Appellants,

vs.

[illegible] Company of California, (a corporation), owner of the tug "Intrepid," for itself and the officers and crew of said tug,

Appellee.

APPELLANTS' REPLY BRIEF.

Filed

[illegible] 1914

[illegible],

[illegible],

Proctors for Appellants.

F. D. Monckton, Clerk

Filed this ______ day of November, 1914.

FRANK D. MONCKTON, Clerk.

By ______ Deputy Clerk.

No. 2426

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE BRITISH SHIP "CELTIC CHIEF", her tackle, etc., and JOHN HENRY, master and claimant thereof,

Appellants,

vs.

INTER ISLAND STEAM NAVIGATION COMPANY, LIMITED (an Hawaiian corporation), owner of the steamers "Helene," "Mikahala," "Likelike," and "Mauna Kea," for itself, the officers and crews of said steamers and other servants of said owners,

Appellee,

THE BRITISH SHIP "CELTIC CHIEF", her tackle, etc., and JOHN HENRY, master and claimant thereof,

Appellants,

vs.

MILLER SALVAGE COMPANY, LIMITED (a corporation),

Appellee,

and

THE BRITISH SHIP "CELTIC CHIEF", her tackle, etc., and JOHN HENRY, master and claimant thereof,

Appellants,

vs.

MATSON NAVIGATION COMPANY (a California corporation), owner of the tug "Intrepid," for itself and the officers and crew of said tug,

Appellee.

APPELLANTS' REPLY BRIEF.

Complaint is made in both briefs of the appellees that said briefs had to be written before the receipt of appellants' brief. Admitting this to be true, we call attention to the fact that our brief was served *in Honolulu* on October 31st, or 18 days before the argument, and considerably before this on the local proctors for the Inter Island and Matson companies. There was, therefore, *ample* opportunity to add to the briefs of appellees any reply that was deemed appropriate, and the Inter Island and Matson companies have taken advantage of this opportunity, though the Miller Salvage Co. has not. In order to be absolutely fair, however, we shall make no reply to the Miller brief and let that case stand as submitted on the original briefs.

The brief for the Inter Island and Matson companies, hereinafter called the appellees, does just the thing we endeavored to avoid—giving a detailed survey of the testimony on points wholly undisputed by us on this appeal, although accepting the lower court's findings. Counsel's industry is to be praised, but we submit that the court should not allow itself to be swamped by a consideration of details not in dispute. From reading his brief one would be apt to gather that, because so much testimony was taken on so many trivial points, the case was a very complicated one and called for a very high salvage award. We again reiterate, however, our contention that the case was a very simple one, and that a high award should not be given merely because the record contains 3419 pages of testimony (at least 2500 more than it ought to), and because counsel has seen fit to write a 236-page brief analyzing that testi-

mony. We shall not endeavor to follow counsel in his detailed analysis of the evidence, but will discuss very briefly a few of the points which he makes.

In opening we wish to correct a few unintentional misstatements of the facts by us. The testimony of appellants covered 385 pages and not 285 as stated by us. We were mistaken in saying that the "Mikahala" and not the "Mauna Kea" was the first Inter Island vessel to come out, but both came at about the same time, and the error was immaterial. We were also mistaken in saying that the "Mikahala" rather than the "Like-like" towed the steamer to an anchorage after she was cast off by the "Arcona". It is not fair, however, to insinuate that the "Arcona" would have cast the ship off if one of the Inter Island vessels had not agreed to take hold. She asked to be relieved and was relieved, and that is all there is to it (Henry, I, 199). We also may have been mistaken in leaving open the inference (justified by the court's decision) that the "Mauna Kea" left the ship before the "Helene" came out. It is true, as counsel says, that the "Helene" took the "Mauna Kea's" line, but the fact still remains that the "Helene" was not ready for pulling till 8 A. M. (brief of appellees, p. 79), or a considerable time after the "Mauna Kea" left. The two steamers were never pulling together, and it cannot fairly be said that they were both assisting in the operations at the same time, or that their values should be considered together while so doing.

All through the brief for appellees are numerous incorrect statements as to our contentions, as, for

instance, that we claim the "Arcona" did most of the salvage work, and that the "Celtic Chief" was not in danger, as well as other things too numerous to mention. It may be that these claims were made by other counsel in the lower court, but we do not make them here and, therefore, any arguments on such subjects should be largely disregarded.

Counsel discusses at great length in the opening part of appellees' brief the character of the reef on which the "Celtic Chief" grounded, the character of the swells during the operations, and the evidence as to how far and during what times the ship went further on the reef. Almost all of these matters are settled by the lower court's decision, and we decline to be drawn into a discussion of them. As regards the swells we still rest confidently on our brief statement in regard thereto in our opening brief. Despite the perils which the Inter Island witnesses were able to conjure up, the salient fact remains that not a single small boat was capsized and not a single man was injured. The wealth of detail accumulated on all these subjects in the trial court simply indicates how much useless testimony was taken as to trivial matters. If all salvage cases were tried as this one was our federal courts could hardly continue to do business. Having thus dealt, or declined to deal, with the opening observations in appellees' brief, we shall proceed to deal with their more specific contentions. Here again, however, we shall endeavor to avoid any detailed discussion and to take up only the broad salient features of the case.

THE CASE FOR THE "INTREPID".

We shall leave unanswered the argument as to the amount of strain on the "Intrepid's" line during the operations, accepting the findings of the court on this point. We cannot, however, pass over the expected reference to her alleged aid in changing the position of the "Celtic Chief" upon her arrival. Counsel says that Capt. Macauley's evidence on this subject is uncontradicted, wholly overlooking the fact that it is contradicted by both McAllister and Barret, the men who ought to know best, and we again say that probably the change from "position 2" to "position 3" was accomplished before the "Intrepid" took hold. Otherwise McAllister would hardly have said that the "Celtic Chief" was "right straight head on" to the reef when he arrived (I, 82). Counsel claims that this maneuver by the "Intrepid" "saved the day", yet McAllister and Barret clearly negative the idea that any such maneuver took place and claim no credit for it.

As to the action of the "Intrepid" in not making way for the "Arcona", the excuses are petty and invalid. Counsel asks *why* the "Arcona" had to have the position in question, and the answer is that it was because it was the best position and the "Arcona", being larger and more powerful than all the other vessels combined, was therefore entitled to the best position. The claim is also made that there was ample room for her elsewhere, yet on page 113 of appellees' brief it is argued that the Inter Island vessels would have been in grave danger if their lines broke, because the salving vessels were so close to each other, and

the danger of a collision between the "Mikahala" and "Arcona" is especially emphasized. Apart from this, however, it was the "Intrepid's" duty to make way when ordered to do so and not to undertake to weigh the pros and cons. The statement that Lowry was the only person to hail the "Intrepid", and only hailed her once, is met by our opening brief (p. 70) where the applicable evidence is referred to.

Counsel seems to object because Capt. Henry did not make good his offer to take the "Intrepid's" line from another position, but this was because the "Intrepid" *did not make way as requested.* Had she done so he certainly would have made good his offer. As it was, however, the "Intrepid's" disobedience forfeited her right to any further consideration.

In the supplement to appellees' brief (p. 234) it is claimed the "Intrepid" was *not* dismissed because McAllister's offer to lay within hailing distance was *accepted* by Capt. Henry. This is a most remarkable misconstruction of the testimony. Capt. Henry distinctly told McAllister that he did not require his further assistance (I, 86) and, on McAllister's further statement that he would lay there anyway within hailing distance, Henry replied, "All right" (I, 95-96) or, properly construed, "Do as you please, for all I care". Henry simply assented to what the "Intrepid" proposed to do; he could not have done anything else. The act of a salvor in "standing by" may be exceedingly meritorious in *some* cases (as in *The Amsterdam,* 7 Asp. 400, where the master let go when requested), but not,

we submit, where he has been dismissed for misconduct and told that his services are no longer required.

Appellees' final contention is that the misconduct of the "Intrepid's" master was individual and personal and should not be visited on her owners. The cases cited, however, are not in point, as *The Rising Sun* and *The Boston* deal with embezzlement of cargo, and *The Mulhouse* deals with the failure to properly care for cargo so that it was embezzled by others. While it is fair to say that where a vessel performs meritorious services her reward should not be forfeited by acts wholly outside such services, it cannot be said that the same is true of misconduct directly bearing on what *the vessel* does to earn salvage. As said in the case of *The Rising Sun,* the owners are not responsible for the acts of the master "unless they are expressly authorized or fall within the usual course of his employment". In this case it is expressly alleged in the "Intrepid's" libel "that one of the *principal* purposes of said maintenance of said tug in said harbor is that of rendering assistance to and salving vessels in distress in and about the waters of and immediately surrounding the Territory of Hawaii" (I, 47). In rendering such services, therefore, McAllister was clearly acting within the direct scope of his employment, and it was incumbent upon him to decide *for his owners* whether he would give up his position. On ordinary and familiar principles of agency his owners are bound by his act. If the "Intrepid" was justly dismissed, as is clearly the case, it seems hopeless to contend that she is entitled to salvage. The court will note that in many

We shall not go into the detailed and intricate discussion as to the value of the "Helene's" anchors or the comparison between them and the Miller anchor. We are surprised, however, to be told that an anchor attached to a vessel moving to and fro in a seaway can have the same effect for holding purposes as a fixed anchor directly connected with the stranded ship. Licensed wreckers, who operate mainly by means of anchors and cables, will have to look to their laurels if this new principle of physics be adopted. We submit that it is but another exaggeration of the case for the Inter Island Co.

The argument on pages 111-114 of appellees' brief in regard to the dangers to the Inter Island steamers is half hearted and far from convincing. The alleged dangers are those incident to all salvage services. The lower court has found that there was no material danger, and we have no doubt as to that finding being accepted.

THE "ARCONA".

As the trial court, after hearing a mass of contradictory evidence, made its findings as to what services the "Arcona" performed, the hopelessness of attacking such findings should have been as clear to our opponents as to us. Yet it has become the principal subject of appellees' brief, and we are glad that the court is thus given the opportunity of reading the testimony of the officers of the "Arcona" and the "Celtic Chief" on this subject, and to judge for itself whether the attacks on

their credibility are justified and whether their "militarism" or "egotism" prevented their telling the truth as they saw it. As we do not claim, however, that the "Arcona" was the principal factor in the operations, we shall discuss only a few phases of the subject. We shall also ask the court to judge whether appellees were justified in taking the vast amount of evidence which they did on this subject. The lower court taxed the costs against them because of their excessive claims. It could have even more appropriately done so because of the manner in which they incumbered the record on this and other matters.

We cannot let pass unchallenged the claim of appellees that the record shows what is equivalent to an utter absence of the "Arcona" as a salving agency. The "Arcona" was a German warship, and she did not go out till she did solely because other salvors were on the spot and their success was expected. If there had been no one else there it cannot be doubted for a moment but that the "Arcona" would have assisted. It cannot be said by appellees, therefore, that no other assistance than their own was available, and this is a very material factor in determining the amount of their award. Counsel speaks of the "Arcona" as "the fearsome cruiser", and wholly forgets that a ship of war rarely acts as a salvor and is not justified in subjecting herself to danger to meet the private ends of others, if there is a reasonable hope that the work in hand can be accomplished otherwise.

The claim that the coming of the "Arcona" prevented the pulling off of the ship on Wednesday noon

is wholly unjustified by the record, and we refuse to be drawn into any such conjectural discussion. We also shall not go into the facts as to the initial pulling by the "Arcona". The court has found the facts in this regard and we stand on those findings. It is also unnecessary for the same reason to discuss the final position of the "Arcona's" anchor. The evidence of Capt. Piltz is much relied on by appellees on this point (brief, pp. 166-167), but this evidence was discredited by the court (VIII, 3360).

Counsel claims that the lines of the cruiser were too small for towing purposes. If the court will examine the wire offered in evidence, which was 1¼ inches in diameter, and will even further accept counsel's statement that the wire used was only 1 inch in diameter, it will be readily apparent how powerful the wire was. The fact that the "Arcona's" first line broke is not necessarily evidence of its weakness for ordinary salvage purposes, but is rather evidence of the "Arcona's" great power. Men of war with 8200 horsepower are not generally engaged in salvage operations. We shall go but little further into the evidence as to the size of the wires used or the strain on them. The findings of the court are conclusive on this issue. Counsel would have it that the evidence of Capt. Schroeder and Lieut. Conneman as to the tautness of their lines was hearsay, but we do not think this court will so hold even on an examination of the quoted statements in appellees' brief. Capt. Haglund testified to having made a special trip in which he noted the slackness of the "Arcona's" lines, but, when counsel for the "Celtic

Chief'' tried to check him up on this evidence, he could not remember the name of a single man in the boat with him at the time (VIII, 3037). Capt. Macauley's testimony, quoted on page 151 of appellees' brief, is to the effect that only the bight of the ''Arcona's'' line was in the water, and that it touched in the middle, just as Capt. Nelson testified as to the lines of the ''Helene'', and just as every seaman knows lines will touch no matter how taut. Macauley's later evidence as to meaning that the middle of the line was *practically the whole line* may, we think, be safely discounted.

The claim that the ''Arcona'' did not use her propellers was admitted in the lower court and it is here again admitted, so counsel's elaborate citations on this point seem somewhat unnecessary. The claim that she did not heave on her anchor chain is met by the court's findings. The court credited the evidence of the ''Arcona's'' officers on this point as against the biased evidence of the Inter Island witnesses. As to the argument that, if she had heaved, she would have changed her position, this largely depends on where her anchor was placed. The lower court after ''repeated reviews'' of the evidence found that the ''Arcona'' did heave on her anchor chain (VIII, 3360, 3363).

Comment is made on the slacking of the ''Arcona's'' lines when the ship came off the reef, and the same comment is later made as to the Miller anchor. Both these agencies, however, might well have found it difficult to take in their slack fast enough to meet the ship's movement, especially as the ''Arcona'' was not using her propellers. The vital fact remains that the ship *came*

off in their direction. Counsel says that this was natural because the Inter Island steamers *balanced each other.* It would seem, however, that, if the "Helene" was doing the powerful work she claimed to be doing, she and the "Likelike" on one side of the ship would have far over-balanced the "Mikahala" on the other side. We believe that the lightering put the ship afloat or so nearly afloat that her moving was comparatively easy, just as the lower court said it did. We also believe that, with that result accomplished, it was either the "Arcona" or the Miller anchor that started the ship off. We do not believe that the Inter Island vessels assisted much except after she first started and the real work had been done.

There are many other animadversions against the "Arcona" besides those already noted. That most of them are unjust we firmly believe. We do not, however, intend to go at any more length into this highly immaterial matter, and we will let the further comments pass even at the risk of injustice being done to this German cruiser. If foreign salvors are attacked in the future as the "Arcona" has been attacked in this case there will be little likelihood of their contributing aid to other vessels similarly situated.

OPERATIONS OF THE MILLER SALVAGE CO.

Many apt comments are made on Miller's operations in this part of appellees' brief. The refusal of the Inter Island witnesses, however, to give any real tan-

gible credit to the Miller anchor, and their biased testimony to the effect that the wire was slack most of the time is another instance of how each salvor discredited all aid but his own. Their testimony as to the slackness of the Miller line, which even the "Celtic Chief" men and Capt. Macauley gave credit to, goes far to show that their evidence as to the "Arcona's" lines is also not to be credited.

NO ASSISTANCE FROM THE SHIP.

Appellees would have the court believe not only that Miller and the "Arcona" did nothing, but that the "Celtic Chief's" men also failed to assist. The court, however, found that "When the men and the ship's engines and appliances did work, they worked with energy and efficiency" (VIII, 3370). That the court was referring to the men on the "Celtic Chief" as distinguished from the men employed by the other salvors is made clear by the remainder of the paragraph from which the matter in question is taken (Id.). Counsel loses no opportunity to criticize Capt. Henry, and says that he "leaned pretty well on Capt. Macauley's advice" (brief, p. 200). If Capt. Macauley is to be placed in the gilded frame designed for him by the appellees, Capt. Henry did exactly right in deferring to his judgment. Let us here again remark that the lower court erred gravely in not making a deduction from its award to the other salvors on account of Capt. Macauley's services.

CREDIBILITY OF WITNESSES.

We shall simply deal here with the unfair comments on the evidence of Capt. Schroeder and Lieut. Conneman of the "Arcona". The evidence of these men, taken about two years after the operations took place, is contrasted unfavorably with that of the Inter Island witnesses, because they could not give the wealth of detail treasured in the memory of the latter witnesses. We submit that the testimony of the "Arcona's" officers would have easily passed muster in an ordinary salvage suit, and is as full and clear as could well be expected after the lapse of time. Of course, however, they did not know they were to testify into a 3419-page record, and that every detail of their actions was to be looked at through the eye of a needle. That they may have testified incorrectly as to small details is of little importance, if they testified to the main facts as they saw them, which we submit they did. Equally unfair is the attack on the testimony of Capt. Henry, who also failed to realize the magnitude of the case. We will let the court judge for itself whether the attacks made are merited, or are not rather petty quibbling over small details.

AMOUNT OF AWARD.

It is suggested by counsel, *inter alia,* in discussing this subject, that the "Mauna Kea" and perhaps other vessels of the Inter Island Co. lost opportunities to take on freight by their delay at the "Celtic Chief". There is not one word of evidence in the record to establish

any such contention. Counsel suggests, however, that it can be inferred without specific proof, which we vigorously dispute. It was a part of the Inter Island case to make such proof if it had it. Judging from the way the case was tried, it is safe to say that the evidence would have been used if available. Moreover, specific proof *was* put on as to replacing the "Mikahala" with the "Ke Au Hou", showing that these specific details were in mind. We submit that this claim should be totally disregarded.

Appellees suggest that the award should be sustained in order to *encourage* salvage services and avoid the delay and expense of future litigation—in other words, property salved must be taught to settle on the terms of the salvors. We venture to express the opinion (borne out by cases in this court) that salvage claims are never settled in Honolulu without a lawsuit, because the claims of the local salvors there are *always excessive.* Each new ship that goes ashore there is treated as in the nature of a prize, excessive and petty details as to the service are gathered together and the delays, harassments and expense of legal proceedings, so feelingly alluded to, are largely due to complications caused by the salvors; while a salved ship on a foreign shore, largely friendless and with little evidence at her disposal except that of her own officers and crew, is placed at a great disadvantage. It is true that salvage should be encouraged, but the salved ship deserves *some* consideration. We venture to predict that the Inter Island Co. will, so long as its corporate life lasts, eagerly undertake salvage ventures and accept the

handsome profit which those ventures afford. That company must, however, mend its ways and be taught fairness or other records like the present will result.

To the salvage awards referred to in our main brief appellees have added three new cases—one of them dealing with the salvage of a derelict and another with a quasi derelict. In each case the salved value was too small to be of much assistance here as a criterion, and it is unnecessary to go into the same in detail.

We shall not deal further with appellees' treatment of the case of *The Hesper,* nor with the ingenious method by which the award in that case is made to lead to an award of over $40,000 in the case at bar for the Inter Island Co. alone. We also shall not deal with the labored analysis of the *Loch Garve* case, except to correct counsel in his statement that the award was reduced because the lower court did not give enough credit to the "Manning". The award was reduced because of the error of the court in including the value of the "Mauna Loa" as a basis for fixing the salvage (182 Fed. at p. 525), just as the court erred in this case in including the value of the "Mauna Kea". It should also be remembered that no interest was allowed in that case either from the date of the salvage operations or even after the decree. The discrepancy between the two awards is, therefore, very much greater even than we thought, for in this case interest was provided for for both periods.

Counsel is in error in referring to the additional expense allowance as being $3,561.77 (brief, p. 232). This allowance was $2,011.77 (VIII, 3377).

Counsel on oral argument tried to impress upon the court the extreme danger attendant upon strandings in the Hawaiian Islands and tried to liken the situation to strandings off the Florida coast. We presume that the members of the court, like the writer, are somewhat familiar with these islands and their topography. The serenity of the climate, its mild weather and balmy breezes are well known and Honolulu has been well designated as "The Paradise of the Pacific". To attempt to assimilate the beautiful coral reefs, where vessels often grind safe beds for themselves, to the hard and perilous shores of Florida is to venture upon the absurd. Of course, counsel *must* find some such analogy in order to sustain an award which is even larger than those made in Florida, yet we submit that there is no such analogy, but that, on the contrary, Hawaii is an ideal spot for a stranding, if such stranding must take place.

The lower court allowed costs against appellees because of their excessive claims, and all (including the Miller Salvage Co.) now claim that this was unjust, *not* because the total claims of $70,000 were not excessive, but because each appellee contends that it was the *other* that exaggerated its claim. The fact is, however, that each and every claim was grossly excessive and the court, properly using its discretion as to costs, discountenanced the making of such claims in the future—a salutary precedent as far as it went. As already suggested the court could even more justly have penalized the appellees in costs for unduly incumbering the record. The costs of appellants, before they were

forced to take this appeal, were very small indeed, because they tried their cases in the way salvage cases are usually tried. Reference is made to the division of costs in the *Manchuria* case, where the claim was far more excessive. In that case, however, the salvor accepted the bond of the claimant without any surety. Ever since the stranding, however, the appellants have been forced to make very heavy payments on the excessive surety bonds demanded by appellees (I, 23).

Finally we meet the claim that the awards to the Inter Island and Matson companies should be *increased* by giving them part of the award to the Miller Salvage Co. The latter company makes a similar claim, wanting a part of the Inter Island and Matson awards. We cannot more fitly close this brief than to leave the various appellees struggling to fatten themselves on something from the other.

Dated, San Francisco,
November 25, 1914.

Respectfully submitted,

E. B. McClanahan,
S. H. Derby,
Proctors for Appellants.