

the stipulation admitted the construction of the spinning frames, but did not admit that they had sold machines with bands, and that such a machine can be banded in different ways, and that there is no evidence that the complainants had banded their machines in any way. Without discussing the effect of the defendant's silence after the testimony of the complainants, which was based upon the supposed extent of the stipulation, I think that the respondent positively admitted the fact of making and selling machines with the Atwood mode of banding. Mr. W. G. Morrison, the defendant's vice president, in reply to cross question 96, "When did you first employ such a way of banding [in the 1877 frame] in the frames which your company sent out from its shop?" and to question 97, to give the date as nearly as he could recollect, said, "Between 1881 and 1884." In reply to cross question 127, which inquired whether the end of 1884 or the beginning of 1885 was the time when he first produced spinning frames with the method of banding shown in the exhibit, Mr. Morrison said: "Some time prior to this date, I made a trial frame containing a continuous tin cylinder. I had never made any frames, and sent out prior to this date." He certainly implied that after that date he had sent out frames with the method of banding shown in the model. This testimony leaves no room for reasonable uncertainty upon the question of infringement. Let there be an injunction against infringement of the 1st, 2d, and 3d claims, and for an accounting.

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THE CHATFIELD.

SHELDRAKE v. THE CHATFIELD.

OCEAN S. S. Co. v. SAME.

(District Court, E. D. Virginia. March 14, 1892.)

**SALVAGE—TOWAGE—STEAMSHIP WITH BROKEN SHAFT.**

On the night of the 26th of October, 1891, the steamship Chatfield, of 1,904 tons register, and loaded with 7,400 bales of cotton, when about 53 miles out from Cape Henry, broke her shaft and lost her propeller. A strong wind was blowing at the time, which increased during the next day to a gale. There is also a strong current in that part of the ocean, setting south, and the Chatfield was carried to a point some 70 miles from Cape Henry, and off soundings. On the following morning she set signals of distress, and about 11 o'clock was approached by the cargo steamship Brixham, of 400 tons net register, and loaded deep with iron, which with great difficulty got hawsers to her, and in 9 hours towage against the wind, her hawser parting 3 times, brought her within 43 miles of Cape Henry, and into 16 or 17 fathoms of water, where the Chatfield anchored. The Brixham remained with her all night, and in the morning, the gale increasing, the Chatfield signaled the Brixham to go to port for additional help, with which request the Brixham complied. Thereafter the passenger steamship City of Augusta came up, to which the Chatfield exhibited signals of distress; she at this time dragging her anchor and drifting towards the coast. The City of Augusta, with great difficulty, and danger of fouling her propeller and disabling herself, got hawsers to the Chatfield, and towed her into Hampton Roads; the service lasting about 12 hours. The Chatfield, with her cargo and freight, was worth about \$435,000, the Brixham

\$30,000, and the City of Augusta \$440,000. Each of the salving vessels was damaged to the extent of some \$5,000. *Held*, that the Brixham should recover \$12,500, and the City of Augusta \$15,000; the same to cover both salvage and damage claims.

### In Admiralty. Salvage.

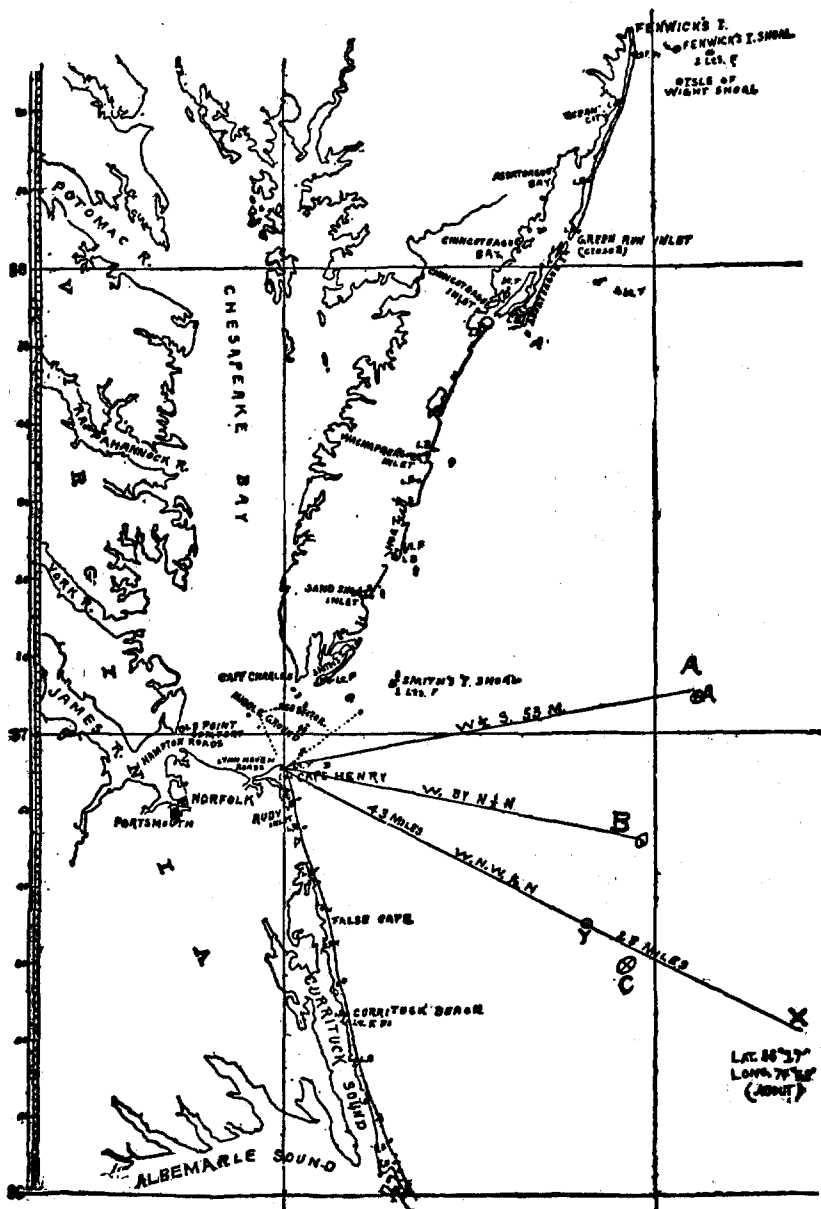
#### EPITOME OF THE EVIDENCE.

*First. In the Case of the Brixham.* The British steamer Chatfield, bound from Galveston to Liverpool with cotton, put in at Newport News for coal in October last. On the night of the 26th of that month, she proceeded from the coaling port on her voyage, and had made about 53 miles out from Cape Henry, when, at 11 o'clock, she broke her shaft and lost her propeller. She was then at the place on the chart marked "A." She was under sails during the rest of that night, and in the morning hoisted signals of distress. McFee, master of the Chatham, fixes the position of the steamer that morning at the place on the chart marked "B." She was taken in tow by the steamer Brixham, bound from Philadelphia to Velasco, Tex., which had her in tow for 9 hours, and brought her within 48 miles of Cape Henry. She then cast anchor in 17 fathoms of water, and continued at anchor during the night of the 27th; the Brixham remaining near her. On the morning of the 28th, she gave signals to the Brixham to go into port for another tug, with which request the Brixham complied. McFee declares that the Chatfield was then at the place marked "C" on the chart. She again put out signals of distress, and between 10 and 11 o'clock on the morning of the 28th was taken in tow by the freight and passenger ocean line steamer City of Augusta, bound on schedule time from Savannah to New York, and towed into Hampton Roads. Two libels against the Chatfield for salvage have resulted from these occurrences, — one of them brought in behalf of the Brixham, and the other in behalf of the City of Augusta. The two cases have been heard together, as the libels are against the same ship for services, one of which was in immediate sequence of the other, and as the evidence taken is in part common to both cases.

*First, as to the libel of the Brixham.* The master and two mates were examined in behalf of the Chatfield. Her engineer also testified, but on points not controverted. In substance, the testimony was as follows: The Chatfield is a steel steamer, 1,904 tons in measurement, 314 feet long, 40 feet in beam, schooner rigged, with two masts, no topmasts, a foresail, a mainsail, and fore and main staysails, and with triple expansion engines. She had on board upwards of 7,400 bales of cotton, weighing 2,000 tons, and a supply of coal for her voyage; the ship and cargo probably weighing about 4,000 tons. The value of the ship was \$130,000; of the cargo, \$297,000; and she had earned one third of an aggregate freight of \$20,863. It does not appear how numerous her crew was, only three of whom testified on the disputed facts of the case.

McFee, master, says:

"After the accident at 11 P. M. on the night of the 26th of October, there being no wind, we let the sails lay, and waited till morning. Sighted the Brixham at half past 10 to 11 A. M., and the Brixham came up about noon. We were then about 48 miles from Cape Henry. There was a fresh N. N. W.



breeze and moderate sea. In the early part of the night before, the wind had been light from S. W.—very light—and the sea smooth. At noon, when the Brixham came up, the depth of sea was 17 fathoms. The mate says 21 fathoms. As to hawsers, the Chatfield had the full requirements of Lloyds. On the morning before the Brixham neared us, the wind came a fresh breeze, and continued that way, once a little stronger, throughout the towing; at no time more than a moderate sea. The place where our shaft broke was at 'A,' marked on the chart exhibited in this case. Upon the Brixham coming up, it was settled by signals that services were to be left to arbitration."

McFee gives no description of the preparations for towing, but his log says: "We got lines to him, and he commenced towing; also got his wire hawser fast to us, and we set sails." All three of the Chatfield's witnesses say that the towing began at 1 p. m. McFee says that at that time Cape Henry bore W. by N. half N.; that at 7:30 p. m. he let go all sails, and split a good many of them. He says the hawsers parted three times,—first about 3 p. m., then next about 4, and the last about 7:30, p. m. After this the Chatfield let down her anchor. At the parting of hawsers about 4 p. m., the Brixham came up on the lee of the Chatfield, when there was a collision, inflicting trifling damage upon the Chatfield. McFee ascribes the partings of the hawsers to the bad steering of the tug, in veering first to one side, and then to the other, which put undue strain alternately upon one and the other hawser. On the night of the 27th, after the Chatfield went to anchor, the Brixham remained, steaming around her all night. On the morning McFee signaled her to go to Norfolk for another tug, thinking the Brixham unable to bring her into port. McFee says: "My object in sending him was to have all means possible to get the ship in in case he would send a tug which would come. If I got anything to tow me in, I thought certainly I should meet him coming out." McFee considered himself safe when the Brixham was sent in for a tug. At that time the City of Augusta had come in sight. Cape Henry then bore N. W. by W., and was 48 miles distant.

Logan, the second mate of the Chatfield, testified very much in accordance with the master. He was the only one on the Chatfield who took soundings. Of the weather and sea, he says:

"The whole time from the morning of the 27th to the morning of the 28th the direction of the wind was N. N. W. It was a fresh breeze, blowing about the same the whole time, with the wind and sea nothing at all. The night of the 27th was a beautiful, clear, starlight night, with not the slightest appearance of a squall. When the Brixham came up on the morning of the 27th, the weather was fair, with a fresh breeze and clear, and with a moderate sea."

Burn, the first mate of the Chatfield, says:

"There was an ordinary breeze from N. N. W. The weather throughout the whole towing was just an ordinary fresh breeze. With the wind that way, the sea cannot rise, because the wind is off the land, so there cannot possibly be any sea. In our ship there was hardly a motion of her. The passing of hawsers could have been done easily, by lowering a boat,—very easily. The Brixham was very badly handled, for first she was down broad

on the port bow, and then up to starboard again. It was impossible for us to keep after her."

It is stated in evidence that the Chatfield's free board was 17 feet; that is to say, that she presented above the water that much surface to the wind. The Brixham had only 19 inches of free board.

On the part of the Brixham, the master, the two mates, the engineer, the fireman, two seamen or deck hands, and the cook,—eight in number,—constituting, I suppose, the entire crew, were examined. This ship was of 628 gross and 400 net tons; in measurement was 193 feet long and 27 feet beam. She was worth \$60,000, had on a cargo of iron valued at \$20,000, and was under charter for a freight from Philadelphia to Velasco, Tex., of \$3,200. She left Philadelphia shortly after 10 o'clock on the morning of the 26th October, passed out of the capes of Delaware after nightfall, and passed Fenwick Island light on her starboard beam at 9:45 P. M. Sheldrake, master, testifies that his course from there was about due south, that his steamer's speed was 9 miles, and that he went along with a current and the wind in his favor, making 10 to 10½ knots an hour. The wind was 30 to 38 miles an hour from sundown on the 26th to 10 at night, and afterwards increased to 40 to 42 miles, becoming, on the morning of the 27th, a stiff gale, causing a high sea, which overflowed his decks. He sighted the Chatfield at 9:30 A. M., about 6 miles to eastward, and got to her a few minutes after 10. Chatfield asked by signals what he expected, and he answered "Arbitration." He then came close to the ship, and was told to take her hawser. He backed up under her lee side, heaving her a line from his steel hawser, and she heaving him a line from her Manilla hawser. Both were fortunately caught. One was run from her starboard bow to his starboard quarter, and the other, in like manner, from port bow to port quarter. He passed them through his stern chocks to big iron bits in the bow, but could not place them just as he would have liked, because of the sea breaking over his deck. He had taken soundings with a 30-fathom line at 4 A. M., and again at 8 A. M., and found no bottom. He started ahead for Norfolk, towing on the two hawsers, at probably about 20 minutes to 11. As he was moving, while towing about N. N. W., moving up towards N., which put him within about three points of the wind, he took in his sails, and the Chatfield took in hers also, following suit. The Chatfield sheered so much from her bad steering that it caused his steamer to veer, and put too great a strain upon the hawsers,—first upon one, and then upon the other. His steel hawser parted about 1:30 P. M., and he went ahead on the Manilla hawser, which also parted about 4 P. M. When this happened, he went up on the lee side of the Chatfield, and was in collision with her, by her coming down against him, causing very considerable damage to his steamer. Having again succeeded in making fast the Manilla hawser, he again went ahead, and continued the towing until 7:30 at night, when this hawser again parted, in consequence of the sheering of the Chatfield. The Chatfield then went to anchor in 16 or 17 fathoms water, and the Brixham steamed around her all night. In towing he moved from 3 to

3½ miles an hour, and made a distance in all of about 28 miles, bringing the Chatfield to within 43 miles of Cape Henry. The towing lasted nine hours, less one hour consumed in the trouble with the parted hawsers. This witness marks "Y" on the chart exhibited with this opinion as the place where he left the Chatfield. He had and has no doubt that he could have taken her into port on the 28th.

Henze, the cook, besides giving other testimony corroborating that of the master, says:

"The Brixham had the Chatfield under tow by 11:20 A. M. on the 27th. The sea was pretty rough that morning. The main deck was full of water all the time. It was a very high sea, and continued so until next day about 10. While the towing was going on, the sea was very high, and, by coming down with sea on, parted the hawsers. The Chatfield was high up above the water, and we low, and deep loaded. When the collision happened, she smashed right down upon our stern; smashed the cabin in. Her starboard stern smashed the side in," etc.

Thompson, seaman, says, among other things:

"We got a hawser out about between 10 and 11 o'clock of the 27th. We got her in tow about 11. We towed her till about 25 minutes past 7 at night, when the rope broke. The wind was northerly and northwesterly on our starboard quarter,—pretty heavy wind, and pretty heavy sea on. The wire hawser parted first, after dinner some time, and then the Manilla hawser parted. When we first met the Chatfield in the morning, she had fore and aft sails on. She took them down when the captain spoke to her, and did not put them up again while we had her in tow. It was a heavy sea on, and, through the night of the 27th, snowy and squally. The speed of the Brixham during the towing was three and a half to four knots, after my own way of judging."

Olsen, seaman, says, among other things:

"I went on at 12 M. on the 27th. We were towing the Chatfield when I went to the wheel. The wind was to north and west, and there was a pretty heavy sea in the morning. The decks were full of water, which was going into cabins and everywhere. The Brixham had much difficulty in towing the Chatfield, on account of the weather and heavy sea on. The wire hawser parted after dinner, and we were called out on deck. Some time in the afternoon the Manilla hawser parted. We passed ropes again, and towed her until between 7 and 8 o'clock, when the hawser parted again. The wind was blowing pretty hard, and a heavy sea on; raining in the afternoon. We laid around the Chatfield all the night of the 27th, and left about 8 in the morning for port."

Tibland, fireman, says:

"After we got our dinner that morning [27th] at half past eleven, I went on deck. We then had the Chatfield in tow. There was a heavy sea and a gale of wind."

Currie, engineer, says, among other things:

"When we stopped the engines on nearing the Chatfield, it was half past 10 in the morning of 27th. We proceeded ahead at 11 o'clock. We stopped again about 4 in the evening, and was in tow again at 4:30, and towed till a quarter to 8 that night. We were running around the Chatfield all that night, working the engines, as ordered from deck. Next morning at about 8 went

ahead, with engines at full speed. From Philadelphia down to where we stopped, near the Chatfield, our speed had been  $8\frac{1}{2}$  to 9 knots. While towing the Chatfield we were going through water at a speed of about  $3\frac{1}{2}$  knots. The wind was pretty bad. The sea was washing right over us. The Chatfield had her sails up when she was flying signals in the morning. She took her sails down when she was in tow. The average speed of Brixham through the water in ordinary weather is  $9\frac{1}{2}$  to 10 knots."

Allen, first mate, says, among other things:

"We had Fenwick Island light abeam at 9:45 on night of 26th. Course south all night, till 8 o'clock in the morning, when it was S. quarter W. She made an average of 9 knots during the night. Called captain's attention to Chatfield about 9:30 A. M., on the 27th. She was about 6 knots from us, southward and westward, four or five miles west from our course. She had up three balls, as signals of distress, calling for help. She had her sails up before we took her in tow. She hauled them down afterwards, and did not hoist them again during the towing. We had her in tow about half past 10 to quarter to 11. The weather was nasty, blowing a northwest gale of wind; sea running very heavy, filling us with water fore and aft, all through the towing. I took soundings that morning close to 8. Didn't find any bottom with 30 fathoms of line. Soundings were again made about the time the Chatfield was taken in tow, and got no bottom. About noon, made soundings myself, and yet no bottom. I took an observation then, and found latitude  $36^{\circ} 23'$  N. During the towing the Brixham made two and a half to three miles an hour. I attribute the bad towing to the bad steering of the Chatfield. The hawsers were nearly parallel, and she ought to have steered straight after us; otherwise, the strain would be all on one hawser or the other, which made it more liable to part than if the strain was kept on both. The effect was, from the Chatfield being five times larger and heavier than the Brixham, that the ship towed took the tug in charge. If she had followed the tug, I have no doubt that the Brixham would have taken her right in out of the storm. The failure to do so was owing to the bad steering of the Chatfield, and the bad state of the weather, wind, and sea. The weather and sea were both very violent, with heavy squalls of wind, and rain, snow, and sleet during the night of the 27th. The Chatfield did not have sails hoisted at any time during the towing. She let go her anchor at the end of towing, in soundings varying from 16 to 17 fathoms. During the towing our progress was  $2\frac{1}{2}$  to 3 miles an hour, to the N. N. W. There was no drifting during the towing. During the whole of the 26th, we were running to the southward in a northwest gale of wind. There was also a northwest gale of wind on the 27th. Statements in our engineer's log to the contrary are not true. Engineers' logs are not authority in regard to weather. The Brixham is considered a fast boat for a small one, and very strong and staunch, which is proved by her breaking the hawsers on the occasion of the towing without tearing her bits out or straining herself. The wind moderated on the morning of the 28th, but, as it had blown a gale all during the night, with very heavy sea, and continued to do so up to daylight, the sea had not gone down, and was still very rough. There is never any trouble in passing hawsers in a light breeze and moderate sea. It was the gale and the high sea on the 27th that made the difficulty with us. It was out of the question to think of lowering a boat. I have been in a boat a good deal myself, and in a good many kinds of seas,—I have been whaling for three years,—and I would not have taken one of those whale boats, which are better than almost any ship carries out of New York,—I wouldn't have done that on that day for the Chatfield nor the Brixham combined, and their cargoes chucked in. When we parted the Manilla hawser, our only chance was to go to leeward of the Chatfield to get to her;

she being a larger ship than we, showing more side out of the water, and the wind blowing very strong. At that time it was blowing her two miles to our one. If we had gone to windward of her, we wouldn't have got anywhere near her. The leeward was the proper side for our small tug."

The signal service report of the weather at Cape Henry on the 27th and 28th October last shows the wind to have been as follows:

Oct. 27th, 12 M.	to 6 A. M.,	average of 24 miles an hour.			
" 7	to 8 A. M.	" " 19	"	"	"
" 8	to 9 A. M.	" " 33	"	"	"
" 9	to 10 A. M.	" " 34	"	"	"
" 10	to 11 A. M.	" " 40	"	"	"
" 11 A. M.	to 12 M.	" " 38	"	"	"
" 12 M.	to 1 P. M.	" " 37	"	"	"
" 1	to 2 P. M.	" " 37	"	"	"
" 2	to 3 P. M.	" " 38	"	"	"
" 3	to 4 P. M.	" " 41	"	"	"
" 4	to 5 P. M.	" " 46	"	"	"
" 5	to 6 P. M.	" " 45	"	"	"
" 6	to 7 P. M.	" " 46	"	"	"
" 7	to 8 P. M.	" " 42	"	"	"
" 8	to 9 P. M.	" " 47	"	"	"
" 9	to 10 P. M.	" " 42	"	"	"
" 10	to 11 P. M.	" " 39	"	"	"
" 11 P. M.	to 12 M.	" " 40	"	"	"
Oct. 28th, 12 M.	to 1 A. M.	" " 36	"	"	"
" 1	to 2 A. M.	" " 35	"	"	"
" 2	to 3 A. M.	" " 35	"	"	"
" 3	to 4 A. M.	" " 34	"	"	"
" 4	to 5 A. M.	" " 31	"	"	"
" 5	to 6 A. M.	" " 31	"	"	"
" 6	to 7 A. M.	" " 31	"	"	"
" 7	to 8 A. M.	" " 31	"	"	"
" 8	to 9 A. M.	" " 30	"	"	"
" 9	to 10 A. M.	" " 27	"	"	"
" 10	to 11 A. M.	" " 27	"	"	"
" 11 A. M.	to 12 M.	" " 25	"	"	"
" 12 M.	to 1 P. M.	" " 22	"	"	"

The signal service classification of winds is as follows:

Light wind,	- - - - -	1 to 2 miles an hour.
Gentle wind,	- - - - -	3 to 5 " " "
Fresh,	- - - - -	6 to 14 " " "
Brisk,	- - - - -	15 to 24 " " "
High or strong,	- - - - -	25 to 39 " " "
Gale,	- - - - -	40 to 59 " " "
Storm,	- - - - -	60 to 79 " " "
Hurricane,	- - - - -	80 to 150 " " "

Sheldrake's judgment was, on hearing the signal service report of the velocity of the wind at Cape Henry read to him, as above, that the wind was stronger out to sea than at the cape. This report, reinforced by the testimony of Sheldrake, shows that all through the night of the 26th a high or strong wind prevailed; that it increased to a gale about 11 o'clock A. M. on the 27th; that it blew a gale throughout the towing



of the Brixham, and through the night of the 27th, and abated only by slight degrees, and very gradually, between 1 A. M. and noon on the 28th, at which last hour it was still 25 miles an hour. The Brixham files bills for repairs, damages, and outlays resulting from her service, amounting to \$5,000.

*Second. As to the City of Augusta.* The Chatfield was taken in tow by the City of Augusta about 10:40 A. M. on the 28th. The latter ship was of 2,870 tons measurement, was worth \$300,000, had on a cargo worth \$134,000, and had aboard 19 passengers. Her speed is 14 miles an hour. Her master, Catharine, says that in passing Hatteras, early on the morning of the 28th October, 1891, he encountered a northerly gale of 40 to 45 miles an hour, with a strong sea; so much so that it was necessary to put a governor on the engine. As he came north, the sea increased, and he could make only seven miles an hour. About breakfast time he discovered a vessel four points on his star-board bow, and on using his glasses found that she was giving out no smoke or steam, and was flying signals saying she wanted a tow, and showing three balls saying they had no command of the steamer. On nearing the Chatfield, he found she was lying at anchor, and sheering heavily from one side to the other. Though he used a great deal of caution, yet, in getting her heaving lines aboard, she took a heavy sheer, striking him abaft the main rigging, port side, doing him considerable damage, although the blow was lessened by his giving the jingle bell, and going ahead at full speed. He had great difficulty, attended by much danger to his ship, in getting a hawser properly adjusted. Tried heaving lines twice without success, and succeeded finally by using a buoy, and having it caught from the Chatfield by grappling hooks; the wind and sea being such during the time as to put him in risk of fouling his propeller with the hawser, which would have been fatal to both ships in the condition in which they were. During the time of getting out the hawser, the wind was blowing 35 miles an hour, with quite a high sea,—so high that the Chatfield, riding at anchor, was pitching her shaft hole entirely out of the water, so that we could see it. It took two hours to get the line on board. The wind was N. by E.; and, after getting the hawser, he had to tow a considerable distance around by a long circle to get on his course. After towing into within a mile of Cape Henry, and after the Chatfield had taken on a pilot, the hawser parted, subjecting him again to the risk of fouling his propeller. He again had a good deal of difficulty in getting his hawser to the Chatfield, owing to the strong tide, but succeeded, and brought her into Hampton Roads. When he picked up the Chatfield in the morning, she bore N. W., a little W. from Cape Henry, and was distant about 53 miles. She must have been drifting, from the way she was sheering about; it being evident the anchor was not holding the ship. The anchor was of a kind he had never seen before,—a long shank, with a little claw on the end of it, not more than two feet long; and it was evident to his mind that in a sandy bottom it was impossible for that anchor to keep that ship from running ashore. She was drift-

ing, and, if she had received no help, would have gone upon the beach anywhere between Nags' head and Hatteras. She was then 40 miles from Nags' head and 47 from Wimble shoals. With the wind blowing as strong as it did that morning, the current there being two miles an hour, she would have drifted with that anchor down at least a mile or two an hour, and five miles if the anchor had not held. She would have gone upon the beach in eight hours. The depth of water where he took the Chatfield in tow was scant 18 fathoms. The manner in which she sheered, first on one side, and then on the other, when he first neared her, proved that she was dragging her anchor. When he first came up to the Chatfield the wind was blowing 30 to 35 miles an hour; so hard that he could not keep his ship in position ahead of her. No attempt was made to pass hawsers by lowering a boat; it would have been too dangerous to be attempted, and was not thought of. To the same effect was the testimony of other members of the crew of the Augusta who were examined. The bills of lading and insurance policies of the Augusta at the time of this service gave her the right to assist ships in distress.

The three officers of the Chatfield, heretofore mentioned, testify in substance as follows: McFee, master, says, as of the time on the morning of the 28th when the City of Augusta neared the Chatfield, that there was not a heavy northerly gale, nor anything approaching it, but only a strong to fresh wind and a moderate sea. The Augusta came up to him about 9 A. M., on his weather side. They missed getting the line the first time, and also the second time, but the third time she came up under the bow, and he got his hawser aboard of her, and, as soon as the hawser was fast, he tripped his anchor, and she slewed around and towed away. He could have passed his hawser by a small boat, but there was no necessity for it. The Augusta was handled in a most seamanlike manner, and there was no trouble in getting the hawser on board. The towing commenced at 11:30, and they made about 8 knots an hour, and came into the capes, arriving at half past 5, the towing having lasted about 6 hours. The hawser appliances which he gave to the Augusta was a large wire hawser, attached to his chain cable, which veered out about 45 fathoms of cable with the wire. The Augusta started ahead, after he got the pilot on board off Cape Henry, with a little too much speed, and carried away his wire hawser at the point where it was fast to her stern. He thereupon let go his anchor, and gave out 15 fathoms of cable, to hold the ship in position. He then hauled in his hawser, put another bend on it, to make fast with, whereupon the Augusta came around again, and steamed up and passed her line, and took his hawser again, and, after some trouble with his chain cable and anchor, proceeded on and went into Hampton Roads. Half an hour after first taking him in tow, the Augusta signaled him to put up his sails, and, the wind being N. N. W., allowing the sails to draw well, he did so. The service of the Augusta lasted between 9 A. M. and 8:30 P. M. of the 28th. The towing commenced at 11:30. There was no peril or danger to her in the service over the ordinary peril of taking a ship in tow at

sea. There was no extra risk. The danger was very small. If there had been extra danger, the *Augusta* would have lowered a boat to run the lines. The mates of the *Chatfield* testify substantially in accordance with the testimony of McFee, the master. The City of *Augusta* files claims for costs, losses, and damages resulting from her service, amounting to about \$5,000.

*Whitehurst & Hughes*, (*William W. Goodrich*, of counsel,) for the *Brixham*.

*Sharp & Hughes*, for the City of *Augusta*.

*Richard Walker*, for the *Chatfield*.

HUGHES, District Judge. *First. As to the Brixham.* It seems plain that the evidence of witnesses of the *Chatfield* taken in this case is disproved on all contested points. The direction of the wind when she was approached and taken in tow by the *Brixham* was N. N. W., and remained so, or nearly so, all through the day and night of the 27th. That is conceded. But the wind was not a mere fresh breeze of 6 to 14 miles an hour, as stated, and iterated by master and mates. All the other witnesses say otherwise, and the signal service record of the wind at Cape Henry contradicts their testimony, and corroborates, with singular completeness, the testimony of Sheldrake, master of the *Brixham*. In fact, from 11 o'clock, the time the towing began, till midnight of the 27th, the wind was blowing a gale. All the witnesses of the *Brixham* concur substantially in saying so, and all the circumstances of the occasion corroborate their statements. If the sea and wind were "nothing at all," as one of the *Chatfield's* witnesses testifies, when the two ships came first into proximity, why did not the *Chatfield* lower a boat, and enter quietly into a settlement of the terms of the towing? Why did the two vessels stand off at cautious distances, and communicate solely by means of dumb signals? The weight of evidence proves that, after being taken in tow by the *Brixham*, the *Chatfield* took in her sails; but if, as McFee states, they were spread, how could a mere fresh breeze split the new sails of a new ship in pieces? And of what avail could sails have been at all to a ship moving within three points of the wind? The *Chatfield*, showing a surface 17 feet above water, was indeed a great mark for the wind, but would have been easily steadied by her own rudder and by the two hawsers of the *Brixham*, moving 3 miles an hour over the water, if the wind had been only a 6 to 14 mile breeze. The fact that she sheered beyond control of so stout a tug as the *Brixham* is conclusive of the fact that she was breasting a gale; otherwise, why did the strong hawsers by which she was drawn part, and continue to part, while she was under tow? And, as to soundings before the *Chatfield* was taken in tow, no one took or reported them but Logan, the second mate,—the man who testified that the night of the 27th was a bright, starlight night, and that there was no sea, and only a fresh breeze, during a period when the official report shows that the wind was blowing a gale. It is hard to believe that a witness who is discredited on every other point on which he testifies spoke truly as to the soundings. Burn, the other *Chatfield* mate, says, *arguendo*, that there could have been no sea, because the wind was off

shore,—a reason which would probably have been conclusive if his ship had been a small distance off shore, but is of no validity as to a ship 50 to 75 miles out to sea.

No one of the three witnesses of the *Chatfield* pretends that she let go her anchors in the interim between losing her propeller, at 11 on the night of the 26th, and sighting the *Brixham*, in the forenoon of the 27th. McFee, her master, says, there being no wind, he let his sails lie, and waited till next morning. Certainly, without sails and without wind, it would have been necessary for the ship to let go her anchors if the bottom could be reached. That they were not let down is proof that the ship was out at sea, beyond reach of the line of 30 fathoms. McFee's statement, however, that there was no wind, and that he let his sails lie, is not credible. The weight of testimony is conclusive that there was a high wind all the night of the 26th, and the signal service record of the velocity at Cape Henry confirms the preponderant testimony. It is impossible to believe but that there was a strong wind on the night of the 26th, and that the *Chatfield's* sails were all set. McFee subjects rational belief to too great a strain when he affirms that during all the night of the 26th, after 11 o'clock, he made no use of his sails; and yet that when he was in tow of the *Brixham* next day, moving within three points of the wind, he had them set before a wind that split them. It is just as incredible that, when sighted on the 27th by the *Brixham*, the *Chatfield* was at the point "B" which he marks on the chart. The mathematics of the case renders this statement very wide of the fact. The *Brixham* set out from Philadelphia at 10:30 A. M. on the 26th, moving at her usual speed of about 9 miles an hour. The distance to the capes is 96 statute or 81 nautical miles, and the distance on to Fenwick Island light 25 nautical miles further,—or about 106 miles from Philadelphia. If we allow that the favorable wind on her stern helped her engines a quarter to half a mile an hour, she was abreast of Fenwick Island light in 11½ hours from the time of leaving Philadelphia, or at 9:45 P. M., as stated by her log. From this light she took and continued on a course due south till about 9:45 next day, a period of about 12 hours; the longitude of her course being about 74° 42'. The speed of her engines was 9 knots an hour; some of her crew stating it to be 8½ to 9, and some 9 to 10. The current of the ocean was more than a mile in her favor, and there was a strong wind behind her, helping her engines. It is therefore just to infer that she made 10 miles an hour, which, by 9:45 o'clock on the morning of the 27th, would have brought her a distance of 120 miles, or 2 degrees of latitude, from Fenwick Island light, which is in latitude 38° 27', and placed her at that hour in latitude 36° 27', longitude 74° 42'; that is to say, would have placed her at the letter "X" on the chart, marked by Shel-drake. If the *Chatfield* was then at McFee's point "B," marked by him on the chart, she would have been 30 miles away from the *Brixham*, and out of sight. McFee and his mates say that they first sighted the *Brixham* at about 11 o'clock, or after, and were not under tow till 1 o'clock. The first of these statements cannot be true, and the second must fall with

it. If the Brixham had gone on her course for an hour and a quarter longer than her own crew testifies, and as the Chatfield's officers insist, before she sighted the Chatfield, then she had got 132 miles south from Fenwick Island light, or to latitude  $36^{\circ} 15'$ , and would have been 42 miles from point "B," where McFee claims that the Chatfield was. To insist that the Brixham was not sighted till 11 o'clock on the 27th is to present a case mathematically impossible. The point "B" cannot be accepted as the position of the Chatfield at either 9:45 or 11 o'clock on the 27th. At the earlier hour, she was within a few miles of the point marked "X,"—say five miles west; and it was from that point that she was towed by the Brixham. The wind was within about three points of being dead ahead during the towing, and the sails of the Chatfield, even if hoisted, could have been of no avail. The great weight of the Chatfield, and the large surface which she presented to the wind during the towing, caused the sheering of which both crews complain—each of the other—so much in the testimony. The steering was not at fault. The sheering was the result of the *vis major* of the gale. Against a gale of wind on her starboard quarter, the Chatfield's own rudder and the taut hawsers of the Brixham were unable to steady the great ship. She sheered continually, and put so great a strain upon the hawsers that, under the vigorous towing of the Brixham, they parted, one after the other. In face of the gale, the larger ship seriously interfered with the steady course of the tug, veering it from side to side, and presenting the spectacle, described by the Brixham's first mate, of the towed vessel taking charge of the tug; or, in other words, realizing the idea expressed by the popular paradox of the tail wagging the dog.

Despite of this embarrassing state of things, the Brixham persisted stoutly in her work, moving 3 miles an hour, making a distance of 28 miles, on a course about W. N. W., between 10:45 in the morning and 7:45 in the evening; towing the Chatfield from a point a few miles west of point "X" to one marked "Y" by Shel Drake on the chart. At that time the wind had nearly reached its highest velocity, and, the hawsers having broken three times, it was a proper determination of the Chatfield, acquiesced in by the Brixham, to come to anchor. When the Chatfield let go her anchors, the wind was blowing a gale of 47 miles an hour, which was too strong to admit the towing of a large ship 17 feet out of water, weighing 4,000 tons, by a tug low in the water, and of only a fifth her size and avoirdupois, especially by night. The chart shows the movements of the two ships before and during the towing. The Chatfield had moved—whether by drifting or under sail was not definitely shown—from a point, "A," 53 miles E. half N. from Cape Henry, between 11 o'clock on the night of the 26th to 10 o'clock on the morning of the 27th, to a point a few miles from the place marked "X," which is 72 miles E. S. E. from Cape Henry, where there were no soundings. There she was taken in tow by the Brixham. She was thence towed, in the face of a gale of wind, and against a current of the ocean setting south, with great labor and difficulty, but with considerable courage and resolution, by the Brixham, on a course W. N. W.,

to the point "Y," where there were soundings of 17 fathoms, and where, in the height of the gale, she anchored for the night. She was attended there all the boisterous night of the 27th by the smaller vessel, and was still safe in the morning, but had probably dragged her anchor for six or seven miles southeasterly, to a point marked "C" on the chart. At 8 o'clock, the City of Augusta having been sighted in the offing, the Chatfield directed the Brixham to proceed into port, to obtain the assistance of another tug; her master's object being, in sending her on this mission, to get the Brixham out of the way, in order that the approaching vessel might not be deterred from answering his signals of distress, soon afterwards hoisted, by the presence of the first salving vessel. This proceeding of her master would seem to show that he felt himself so much in danger as to desire to provide two chances of rescue, at the expense of resorting to a subterfuge in dealing with a salvor who had saved him from the dangers of the gale of the preceding day and night, during which he had moved or drifted some 40 miles from the place where he had lost his propeller. The danger of the Chatfield, from which she was rescued by the Brixham, consisted in her being far out at sea, beyond 30 fathoms soundings, without power of locomotion except four small sails, wholly inadequate for so large a vessel, so heavily loaded, and drifting upon a very strong current, setting southward, and before a wind blowing, for the 10 hours anterior to her being sighted by the Brixham, at the rate of 20 to 40 miles an hour, on a coast proverbially dangerous in the pendency of heavy winds. That a strong current does set to the south on this coast is abundantly known to all mariners, and is in the judicial cognizance of the court. While this case is under consideration, the three-masted schooner Freddie Heniken broke from her anchors off Lynnhaven bay, was borne by the current out to sea through the capes of Virginia, in the face of a northeastern storm of wind, and carried south by the current, until she went ashore at Gull Shoal light station, 18 miles short of Hatteras. It was on this current and on this coast that the Chatfield drifted on the night of the 26th of October, from point "A," marked on the chart, for about 40 miles, to a place a few miles westward of point "X," marked on the chart. If the three officers of the Chatfield were sincere in their testimony, then their vessel was in the additional danger of being in control of mariners who were in unconscious ignorance of the situation of their vessel, believing her safe when she was in circumstances of extreme danger. The service rendered by the Brixham consisted in suspending her voyage when moving before a favorable wind and current, and coming to the assistance of the vessel in distress in a wind and sea which rendered the attempt very difficult and dangerous; in taking hold of that vessel, thus drifting, in a gale on a heavy sea, and not only holding her safe during the worst of the gale for 9 hours, but in towing her some 28 miles towards port, from a position 70 miles out at sea, where there were no soundings, to within 43 miles of Cape Henry, to a place where there were only 17 fathoms of water, and where she was able to anchor safely, watching her there during the night. The probabilities are great that

on the next morning the Brixham could have taken the disabled ship into harbor under a wind diminishing all day gradually from 35 miles an hour in the morning; and it is certain she was desirous to undertake the enterprise, and would have done so, but for being sent by the Chatfield's master for another tug. Obedience to this instruction does not impair the Brixham's right to salvage in this case, as there was no intention on her part to abandon the enterprise,—a fact which was shown by her prompt return, in company with another tug, to resume the towing of the Chatfield at the place where she was left in the morning.

*Second. As to the City of Augusta.* Coming now to the claims of the City of Augusta, it is to be remembered that her service was none the less meritorious from the fact that the Chatfield had still a chance of being taken safely into port by the vessel which had first had her in tow. The flying of signals of distress on sighting the Augusta estops the Chatfield from such a pretension. What, then, was the danger of the Chatfield at 9 o'clock on the morning of the 28th, when the Augusta, responding to urgent signals, came to her relief? She was drifting, with dragging anchor, from the point marked "Y" on the chart, where she had been at 8 o'clock on the night before, and had made seven or eight miles southeasterly, to point "C," when she was taken in tow by the Augusta. The state of the wind and sea made the attempt of the Augusta to get lines from her very hazardous. The unmanageable condition of the Chatfield, pitching and sheering heavily upon a dragging anchor, made it dangerous for the other vessel to approach near enough to pass lines for the hawsers. In this attempt there was an actual collision. But the great risk to the Augusta after getting hold of a hawser was in fouling her propeller with it,—a danger which would in all likelihood have been disastrous to both ships.

It is useless here to go into the details of the evidence on these points. The signal service report of the velocity of the wind at Cape Henry on the morning of the 28th is in singular coincidence with the testimony of Catharine, master of the Augusta, and discredits that of the three Chatfield officers. Contrary to the statement of these latter, the wind and sea were so bad that it was impracticable to pass lines between the two ships by casting them with the hand; several attempts to do so having failed. A line was not successfully passed until a buoy was used to float it from the Augusta, when it was taken up by the Chatfield with grappling hooks. An ordinary ship's boat could not have been used for the purpose, and could not have lived in such a wind and sea. The Chatfield officers' asseverations to the contrary are not credible. The Chatfield was dragging her anchor slowly and surely, by force of a current which would have landed her in time on that graveyard of so many ships,—the coast stretching from out where she was to Hatteras. It was not shown that any other steamer passed in the usual track of steamers off that coast on that day, and the only chance of the Chatfield for rescue from her peril, except from the Augusta, was in the return of the Brixham, upon which she had practiced a ruse. The service of the Augusta consisted in her having rescued the Chatfield from a sim-

ilar, though not so great, danger as that from which she had been rescued by the Brixham the day before.

*As to the amount to be awarded.* In determining the amount of salvage which ought to be awarded to the Brixham and to the Augusta in these cases, I cannot consent to be restricted by the awards of the admiralty courts of New York city in salvage cases. The dry-land court rule of *quantum meruit*, so long controlling in those decisions, under the powerful influence of great and wealthy insurance companies located in that city, who are the real litigants in salvage cases, has proved to be inadequate to the requirements of the salvage service. The New York decisions discourage, rather than encourage, salvage daring and enterprise. To give, besides what is earned, an award for successful risk and daring, is of the essence of salvage service. The great ocean steamers, which are the most efficient salvors of vessels in distress, are unwilling to deviate from their scheduled courses, and to encounter the risks of difficult and hazardous salvage enterprises, for the lean compensation so generally awarded by the New York courts; often after dilatory litigation, further protracted by the delay of appeals. On the coast between Cape Henry and Charleston the difficulty and danger of salvage services are exceptionally great, requiring more liberal awards for those which prove successful than services rendered in other and safer waters, on other and safer coasts. I feel doubly warranted, therefore, in pursuing a more liberal policy in awards for salvage than the New York precedents are held to justify. Still it must be conceded that the cases now under consideration cannot be classed as of the highest grade of merit. It is shown in the evidence that the actual cost to each of the vessels filing the libels under consideration, due chiefly to collisions which they had with the saved ship in the act of rescuing her, has been in the neighborhood of \$5,000. It is with a general reference to this fact that I will estimate the amounts awarded in these cases. The whole value saved was about \$435,000. The whole put at hazard in the case of the Brixham was about \$80,000, and in that of the City of Augusta about \$440,000. I will sign a decree in favor of the Brixham for \$12,500, and in favor of the City of Augusta for the sum of \$15,000. These amounts are intended to cover and include all claims of the respective vessels for the amounts reported by the commissioner as actual damages and expenses.

NOTE. There was no appeal from the foregoing decision, and the amounts awarded were paid as decreed by the court.

Against part of the award in favor of the Brixham, a petition was filed by the Merritt Wrecking Company, and elaborate evidence taken in respect to the claim set up by the petition. The decision of the district court on the case presented by the petition follows.



## SHELDRAKE v. THE CHATFIELD.

*In re* Petition of THE MERRITS.

(District Court, E. D. Virginia. July 18, 1892.)

## 1. SALVAGE—PROCEDURE—CONTRIBUTION BETWEEN SALVORS—JURISDICTION.

Under the admiralty rules, a salvage suit must be brought against the thing saved, or the person at whose request and for whose benefit the service was performed. Hence a proceeding by a salvor against a fund in court already decreed to another salvor, to secure contribution thereof under an alleged contract, cannot be maintained in admiralty.

## 2. SAME—SUITS BETWEEN SALVORS—CONTRACT.

The ship B. had rendered salvage services to the ship C., and employed petitioner's vessel to assist her in completing the work. The master of the B., in engaging petitioner's vessel, acted as agent for the C., and the terms of the contract of employment were disputed. Petitioner's vessel rendered no assistance, the service having been completed by a third vessel. This court having granted salvage to the B. for the work performed by her, petitioner commenced this proceeding, claiming a share of the sum awarded the B. on the alleged contract. *Held*, both on the evidence as to the alleged contract, and also on the fact that a salvage proceeding must be brought against the vessel saved or the person requesting the service, that the petition should be dismissed.

In Admiralty. Salvage. *Ex parte* the Merritt Wrecking Organization, on a petition claiming half of a salvage bounty, which had been sued for as a chose in action by the libellant.

T. S. Garnett, for petitioner.

Whitehurst & Hughes, for the Brixham.

HUGHES, District Judge. The case in chief was decided by this court on the 14th of March last.<sup>1</sup> This petition had been filed on the 25th of February preceding. Upon the facts shown by the record, this court awarded the sum of \$12,500 to the Brixham for salvage services rendered to the steamship Chatfield, of which \$5,500 was intended in remuneration for expenses and damages incurred by the Brixham, and \$7,000 as bounty for a meritorious salvage service. This sum of \$7,000 is now in the registry of the court. The service was rendered by the Brixham to the Chatfield on the 27th of October, 1891, in taking hold of her when well out to sea, with a broken propeller, in a heavy gale, towing her the greater part of the day to an anchorage 40 miles southeastwardly from Cape Henry, and lying by her all night of the 27th, until the next morning, when the wind had abated, but the sea was still running high. The service of the Brixham to the Chatfield was completed on the morning of the 28th, and was never resumed. For this service the award of salvage which has been described was made by this court. On the morning of the 28th, Capt. McFee, master of the Chatfield, deputed Sheldrake, master of the Brixham, to come into Norfolk for the purpose of engaging a strong tug to go out for the Chatfield, and to give aid in towing her into port. Capt. Sheldrake came to Norfolk with the Brixham, in pursuance of these instructions of Capt. McFee, and engaged the Rescue, a strong

<sup>1</sup> 53 Fed. Rep. 479.