

ADMIRALTY DISTRICT OF BRITISH COLUMBIA.

1893
 Jan. 24.

THE CANADIAN PACIFIC NAVI- } PLAINTIFFS ;
 GATION COMPANY. }

AGAINST

THE SHIP C. F. SARGENT.

Maritime law—Salvage—Essentials of—Difference between towage and salvage service—Professional and volunteer services—Rate of compensation.

Salvage means rescue from threatened loss or injury. No danger, no salvage. If the ship be in danger, then the rescuers earn a salvage reward, which, on the grounds of public policy, is to be liberal, but yet varies according to the imminence of the danger to the ship on the one hand, and the skill and enterprise and danger of the salvors on the other hand.

2. A small packet steamer, while performing one of her regular trips between certain points in thick weather, discovered a large steamship lying at anchor in such a position as to be in imminent danger of becoming a total loss. The latter signalled the former and asked to be towed into port. This the packet steamer refused to do, wishing to prosecute her voyage, but agreed to tow the ship out of her dangerous position into the open sea, and there give her captain directions to enable him to reach his port of destination. This offer was accepted and acted upon. In conducting the ship to the open sea the packet steamer performed the services both of a pilot and tug, and showed skill and enterprise, and incurred appreciable risk, while so engaged.

Held, to be a salvage, and not a mere towage service.

Seemle, while the court is disposed to confine the claims of professional pilots and tugs to the tariff scale for such professional services, a volunteer ought to be allowed a more liberal rate of compensation.

THIS was a claim for salvage services.

The facts of the case are fully stated in the judgment.

January 23rd and 24th, 1893.

The case was heard before Sir Matthew B. Begbie, C.J., Local Judge for the Admiralty District of British

Columbia,—Capt. May, R.N., C.B., and Lieut. Stileman, R.N., sitting as Nautical Assessors.

Bodwell, for the plaintiffs, cited *The Princess Alice* (1); *The Charlotte* (2); *Maclachlan on Shipping* (3); *The Ellora* (4); *The Reward* (5); *The Rialto* (6); *The Undaunted* (7); *The Silver Button* (8).

Eberts, Q.C. (with whom was *Taylor*), cited *The Strathnaver* (9); *Maclachlan on Shipping* (10); *The Reward, ubi supra*; *The Mulgrave* (11); *The True Blue* (12).

Bodwell replied.

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Sir MATTHEW B. BEGBIE, C.J., L.J., now (January 24th, 1893) delivered judgment.

On the morning of the 4th November last, the steamer "Maude," Captain Roberts, with a full cargo and forty or fifty passengers, was on her regular trip from Victoria to Clayoquot, calling, among other places, at Mr. Sutton's settlement in Uculet. She passed Cape Beale about 5 a.m., but, owing to the fog, could not see the light. Owing to the same cause, she abandoned her usual course in clear weather, viz., through the intricate but smooth inner-water channels of Barclay Sound, and stood across to Cape Flattery. As soon as she heard Flattery whistle, she made for the western entrance of Barclay Sound. The first thing she made out was Black Rock, at a distance of one-half mile. On closing up to Black Rock she saw a ship lying at anchor inside, being the "C. F. Sargent," Captain Snow (now libelled), on a voyage from San Francisco to Port Angeles. The ship hoisted a signal, but before paying any attention to it, the "Maude," wishing to

(1) 3 W. Rob. 138.

(2) 3 W. Rob. 71.

(3) P. 631.

(4) Lush. 550.

(5) 1 W. Rob. 174.

(6) (1891) Prob. 175.

(7) Lush. 90.

(8) L. R. 2, E. & A. 70.

(9) 1 App. Cas. 58.

(10) P. 633.

(11) 2 Hagg. Adm. 77.

(12) 2 W. Rob. 176.

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ascertain her exact position, and not being quite sure of Black Rock or any of the rocks, (owing to the fog) endeavoured to make Round Island, where there is a beacon, easily identifiable. Finding her first signal unnoticed, the ship began tooting on her horn, but the "Maude" continued her course till, recognizing the beacon, she knew that she had rightly judged Black Rock, and returned to the ship. After informing the captain, in answer to his inquiries, that he was off the entrance of Barclay Sound, and refusing (on account of his freight and passengers) to tow him to a port, Captain Roberts undertook to tow him out of his position into the open sea, whence he could give him directions to proceed on his voyage. It was also, after various offers and refusals, agreed that the amount payable for these services was to be left to the respective owners. But, a very few minutes after this had been agreed to by both parties, Captain Snow wished to add a stipulation that in no case was the amount to exceed \$500; and he says that Captain Roberts, from the deck of his steamer, gesticulated assent, and shouted "all right"; Captain Roberts insisting that his gesticulations meant dissent, and that he shouted back a refusal to add anything to what was already agreed upon. And this is confirmed by those on board the "Maude," who could, much better than Captain Snow, hear what it was that Captain Roberts really said. I am of opinion that the defendants fail to prove any assent to this further stipulation; and so the amount of remuneration was either by agreement left to the respective owners, who now cannot agree; or else, if the last stipulation were considered by Captain Snow to be a necessary term of the agreement, there was no concluded agreement at all.

In either case, the parties now failing to agree upon an amount, it falls upon the court to say what is a pro-

per remuneration. And the first thing to be determined is, whether such remuneration is to be made as for a salvage service, or simple towage; the plaintiffs claiming as for the first; the defendants alleging that it was nothing but ordinary towage.

Salvage means rescue from threatened loss or injury. If the ship were in no danger, there could be no salvage. If she were in danger, then the rescuers earn a salvage reward, which, on the grounds of public policy, is to be liberal; but which varies very much according to the imminence of the danger to the ship on the one hand, and the skill and enterprise and danger of the rescuers on the other hand. But the question of the ship's danger is the first thing to be considered. On a service of towing, for instance, the tug may display both skill and enterprise, and expose herself to risk, but if the ship be towed merely for the sake of expedition, and not to take her out of danger, actual or impending, it is towage merely, and not salvage. And the court is to judge whether the danger really existed, and not the parties themselves.

Now, what was the position of the ship out of which the "Maude" undertook to tow her? Captain Snow tells us, that having left San Francisco; a few days before, in his ship of nearly 1,700 tons, with crew of twelve men before the mast, bound for Port Angeles, he found on the early morning of the 4th November, that he had completely lost his way—was in utter ignorance whereabouts he had got to. He had been wandering and drifting about with light airs and a fog, which prevented any observations for two or three days previously. He had never been in Barclay Sound before, though he had been to Victoria and Nanaimo; he had no chart except one quite out of date, on a small scale, and almost, if not quite, useless for the purposes of navigation within the intricate channels of Barclay

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Sound, into which, without knowing it, he had drifted; sailing first north and then south, without knowing where he was or whither he was going. At 6.30 a.m., he was running north-east with a light wind from south-east, when he saw land right ahead. He immediately wore, and proceeded on a south-west course for an hour and a half or two hours, the wind dying out, when, on the fog lifting a little, he saw enough to make him immediately drop both his anchors, running out seventy-five fathoms on the one and sixty fathoms chain on the other. What induced him to do this? He could not have the least notion of the bottom under him; it might have been rock, and sixty fathoms deep; in fact there are fifty or sixty fathoms marked not very far from the place where he was. What was that place?

According to the evidence of the plaintiffs, the ship was lying near a point about equi-distant from Black Rock on the south, and Starlight Reef on the west, having Heddington Reef and Great Bear Rock on the north; and westward of a line drawn from Black Rock to Great Bear. A ship coming down from the north-east with a light dying air from south-east, as Captain Snow describes, with the westerly current mentioned by some of the witnesses, might easily find herself just about that spot; and the fog rising a little would show an almost uninterrupted semi-circle of broken water, completely embaying the ship, except on the quarter by which both the wind, such as it was, and the current forbade her escape. I am advised that under these circumstances, in order to save the ship from the visible breakers, it was prudent seamanship to cast anchor without wasting any time in examining the ground; but that imminent danger is the only apparent ground for such a manœuvre. And if the ship had been in any of the four positions alleged by Captain Snow (to be presently mentioned), inasmuch as there would in

that case have been clear open water ahead of him, and none of the rocks above mentioned would even have been sighted, (about half a mile was probably about the sight limit in the fog that morning, at that distance from the shore, though one or two of the Sargent's crew speak of two or three miles), there is no conceivable reason why he should have cast his anchor at all, or why he did not continue on his S.W. course.

The four positions just mentioned arise thus, Captain Snow does not admit that the ship's position is accurately alleged by the plaintiffs. He says that in the course of conversation between himself and the captain of the "Maude," while his own ship was getting ready to weigh her anchors, he learned for the first time that he was off the western entrance to Barclay Sound, and obtained the names of the different rocks in the neighbourhood—his own chart of Barclay Sound being on too small a scale to contain half their names. From these rocks he took many cross bearings, the result being to place his ship, he says, from a mile to a mile and a half to the eastward of the position described by the plaintiffs. Of course, if the ship had been where her captain alleges, she would have been in little or no danger; and so there could have been no salvage service performed. The only wonder is, why, if so far from the rocks, she should have repeatedly demanded the plaintiffs' services, or why she should have cast anchor at all, or wanted a tug at all. She might have wanted to know where she was. But when the assessors plotted out the cross bearings, of which Captain Snow took no less than four, it appears that no two of the points of intersection coincide. There are, therefore, no less than four positions of the ship, as thus shown, some of them three-quarters of a mile apart. This extraordinary discrepancy in a part of the case which was very strongly relied on, and announced with an air of

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great particularity, throws great doubt over the accuracy of Captain Snow's recollections and observations in other respects. And these alleged and uncorroborated observations by a complete stranger, scarcely deserve to be considered or weighed against the direct evidence of the captain and engineer of the "Maude" and of Mr. Sutton, a settler on Uculet Inlet, who knew Barclay Sound well, having traversed it in steamers, in canoes and in a steam launch, and who happened to be a passenger on board the "Maude." Besides which, the fact admitted by both parties that the "Maude" began to tow S.E., and afterwards edged away to S. and S.W., is entirely consistent with the ship's position as alleged by the plaintiffs; but from the position stated by the defendants there was nothing to prevent her steering south at once. There is no doubt that the service of getting the ship out of her difficulties, and placing her in the open sea, with sufficient directions as to her future course, was well and sufficiently performed by the "Maude."

It was, indeed, argued for the defendants that the ship, even if in the position assigned by the plaintiffs, was in no danger, for that if a westerly wind should arise (and the wind actually came strong from the westward early next morning near Port Angeles) she could have easily sailed out. In the first place, it is to be observed that the argument completely misconceives the meaning of the word "danger." The argument seems to admit that every other wind would have been fatal. And a position which leaves only one chance of escaping destruction, and that chance depending entirely upon one particular change of wind is, in the view of this court, dangerous in the extreme. The force and direction of the wind experienced by the ship one hundred miles away, off Port Angeles, is not at all decisive—is scarcely a guide for guessing the nature or direction

of the wind at the western entrance of Barclay Sound. Nothing is more common than to stand on Beacon Hill with a fairly strong west wind, and watch the smoke of a forest fire on the opposite side of the Strait, scarcely twenty miles away, rapidly carried towards the Pacific, exactly in a contrary direction to the wind on Vancouver Island, on the north side of the Strait. The evidence of witnesses who were in the neighbourhood that night, shows that the wind there was either S.E. or S.W. But this is very immaterial. I am not satisfied how the wind was that night at the point from whence the ship had been towed. What is more material is this, that with the most favourable wind I do not think she could have taken advantage of it. There is every ground for believing that Captain Snow used all possible expedition in raising his anchors on the 4th November, yet he was four hours getting them aboard, even with the assistance of the "Maude" towing the ship up to her anchors in order to get the last of them on board. How could the ship have raised them in time to sail out, even if the wind had changed to the west and freshened suddenly, as Captain Snow says it did? She might have slipped them, it is true; but she would have been in a sorry plight without an anchor, and the first vessel from whom she borrowed one might perhaps have claimed as for a salvage service. Nor would her troubles have been nearly over, nor would she have been nearly out of danger, even if she had got free from her immediate entanglement. The assessors are of opinion that with the fairest wind it would have required good seamanship, with a well found crew and a knowledge of her starting point, to have evaded the dangers, of which she knew absolutely nothing, which lay to the eastward and south-eastward. Assuming that her captain had the requisite seaman-

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ship, all the other requisites were absent. To describe such a position as quite safe, because she was not at the moment in instant danger of sinking or drifting, is to misuse language. She might, of course, have ultimately been wafted harmlessly and ignorantly out of that triangle, as she had been, in fact, wafted harmlessly and ignorantly into it. Perhaps the one event was not more unlikely than the other; and of course the second event might have happened as well as the first. But in the opinion of the assessors, in which I quite coincide, she was on the morning of the 4th November in imminent danger of becoming a total loss. And however Captain Snow may now make light of his position, as men are apt to do of a danger that is past, I am quite clear that he thought at the time he was in a most imminent danger, or he never would let go both his anchors; nor would he otherwise have repeatedly, by ensign and fog horn, called for assistance. And we all think that the "C. F. Sargent" was just in such a position as that a prudent owner or master would willingly have accepted the services of a tug and pilot (for it is to be remembered that the "Maude" rendered both services—the one might have been of little avail but for the other), knowing that he would have to requite such service with a salvor's reward.

The defendants urge that the ship might have lain there in perfect safety till she could summon a tug, and that Captain Snow could have taken a boat to Carmanah or Cape Beale, only twelve or thirteen miles distance, and telegraphed thence to Victoria. The suggestion seems absurd. The captain had not the least idea where he himself was, or where or in what direction either Cape Beale or Carmanah lay. For all he knew, they might have been fifty miles off. How could he have gone on so mad an errand? Then it

was suggested that tugs were often in that vicinity. But the contrary is the notorious fact; tugs seeking employment go, it is true, beyond Cape Flattery, but they always expect their customers from the southward. Scarcely once in a year would a chance sailing ship wanting a tug be met coming from the north, and the very perilous position of the ship did not admit of delay. One of the defendants' own witnesses, who said he had once approached Barclay Sound, admitted that he had not been nearer than seven or eight miles off and thought that quite near enough. Fortunately for Captain Snow, the same fog which had driven him out of his course, had compelled the "Maude" deliberately to alter hers, and, by the merest chance in the world, brought her right down on the ship, so close as to be seen. A quarter of a mile farther off, and neither of them probably would ever have known of the other's vicinity.

The service then being a salvage, we have to consider the amount of remuneration, there being no concluded agreement between the parties. The defendants have paid \$500 into court; and they urge that as \$50 per diem would be sufficient charter money for the "Maude," \$500 are fully ample for a service which only detained her eight or nine hours. But the mere expense out of pocket of a salvor is never much considered in estimating the value of the service rendered. The most important services may be rendered without the expenditure of a shilling or the loss of a quarter of an hour's time by the salvor; e. g., by giving a course, or information of locality by word of mouth, or giving a lead by sailing ahead of one or more ships; all of which would be lost, in an intricate channel, but for the lead; that is a salvage service; and it was performed by the "Maude" in addition to the mere physical motive power which she lent to the

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ship to enable her to reach the line of safety. The "Maude" was not there seeking such service; she was crowded with freight and passengers, on her fortnightly trip to the West Coast. The court leans against the large claims sometimes made by professional tugs and pilots; they are generally confined to the tariff scale for their professional services. But the case is different with respect to pure volunteers who cannot be expected to work for mere tariff allowance. Nor is it at all clear on the evidence produced that the "Sargent" could have procured a tug from Victoria or Port Townsend, without aid from the "Maude." Without information from the "Maude," the captain could not have reached any telegraph station. He neither knew where he was, nor where the telegraph was. The "Maude" could have taken a letter engaging a tug from Victoria; but that tug could not have reached the ship without information derived from the "Maude." And if a regular tug charges \$700 for going from Cape Flattery to Nanaimo and back, (which is what the defendants and their witnesses proved) and \$650 from Port Angeles to Nanaimo and back to Cape Flattery, it may well be doubted whether such a tug would have gone from Victoria or Port Angeles to the Black Rock just opposite Cape Flattery and back for so small a sum as \$500. I look upon the \$500 paid into court as barely sufficient for a towage service. The "Maude" was of small size, 95 tons; the ship was 1,704 tons gross. The "Maude" consequently had to put on all her power against the current and wind in the heavy swell, so that though her engines were racing, yet she could not relieve them. Then the delay in the ship in getting her anchor up, also caused risk. If anything had given way in the "Maude's" engine she would have been in some risk, as she was not fitted to pass the night at sea if disabled, nor was she rigged so as to enable her to seek shelter

under sail. Fortunately her engines stood the strain, and she did reach shelter; but she did not reach her destination until next day, losing a whole twenty-four hours; though the actual towage only lasted an hour and a half. The "Maude," therefore, showed both skill and enterprise, and incurred some appreciable risk, and the ship derived great benefit from her service and did not lose a rope yarn. I do not think that any insurance company would, in the absence of a tug, have underwritten a policy on her for less than 10 per cent premium; and there were the lives of all on board at stake. The ship being valued for the purposes of this action at \$20,000, I do not think less than \$2,000 would be sufficient acknowledgment of the advantage to the ship's owners from the local knowledge and steam power furnished by the "Maude." There will be judgment for that sum, with costs. If there is any difficulty about the disposal of the salvage money, application can be made to me in Chambers.

I am alone, of course, responsible for this judgment; but it is founded on the advice, upon nautical matters, of the two gentlemen I have been fortunate enough to have as assessors, with whom, I am happy to say, I have agreed throughout.

Judgment accordingly.

Solicitors for plaintiffs: *Bodwell & Irving.*

Solicitors for ship: *Eberts & Taylor.*

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