

NEW BRUNSWICK ADMIRALTY DISTRICT

1922
Nov. 10.

W. N. McDONALD, OWNER OF SHIP }
CURLEW } PLAINTIFF;

AGAINST

THE SHIP *SENECA*.

Shipping—Salvage services—Conditions required for volunteer or requested services.

The *S.*, a steamship, was caught in the ice off Louisburg, N.S., and the Government steamer *M.* went to her assistance. The *M.* was unable to tow the *S.* to a safe place owing to ice conditions, but with the approval of the *S.* wired the agent of the Marine Department at Sydney, N.S., for further aid. The tug *C.* was engaged for the purpose by such agent. Taking a heavy hawser the *C.* started to render assistance. She was unable to reach the *S.* on that day or the next day owing to ice and fog, but finally reached her. The *S.* sent the tug to the *M.* who told the *C.* to "stand by". On the morning following the day on which she got in touch with the *S.* and while using the hawser brought by the *C.*, the *M.* endeavoured to tow the *S.* After going a few hundred feet the hawser broke, but the *M.* was able to go ahead, clearing the way, and the *S.* was able to follow under her own steam. By this means the *S.* was brought into harbour. A wireless was sent by the *M.* to the marine agent, at Sydney, after the *C.* had left, saying it was useless for the *C.* to try and give assistance, ice being too heavy.

Held, that the *C.* had rendered salvage services to the *S.* and that she was entitled to the ordinary salvage award.

Semble: That a wireless message, contramanding an earlier one requesting the services of a tug, received after the tug had left to render assistance, whether the latter message was or was not communicated to its owners, cannot alter the nature of the services, and change them from requested services to that of volunteer services.

SUMMONS *in rem* issued by plaintiff claiming \$10,600.00 for salvage services rendered to the ship *Seneca*, her cargo and freight, between the 4th and 13th days of May, 1922, at Fourchu, and for damages sustained by the ship *Curlew* whilst performing said services.

October 10th and 11th, 1922.

Case now heard before the Honourable Sir J. Douglas Hazen at the City of St. John.

The facts are stated in the reasons for judgment.

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F. R. Taylor, K.C., for plaintiff: There is no dispute as to this being a salvage service, and the only thing to consider is the question of compensation. Cites *The Undaunted* (1); *The E.U.* (2); *The Santipore* (3); *The Melpomene* (4); *The De Bay* (5); *The August Korff* (6); *The Fairport* (7); *The Glengyle* (8); *The Manchester Brigade* (9).

M. G. Teed, K.C., for defendant: In a requested case, the man is entitled to recover even though he may not have succeeded in what he set out to do. In the case of volunteer service he is entitled to recover only for what services he actually rendered. Both these principles exist here. The vessel was more or less in danger, not imminent, but at risk. We admit we are liable for the first half day. We deny responsibility after that except in so far as the use of the hawser and whatever may flow from that, the value of which we admit responsibility for. After the hawser came, he went out as a volunteer, and he is entitled to only what benefit he conferred. Cites *The Undaunted* (1); *Kay on Shipmasters & Seamen 2nd ed. sec. 698*; *Maclachlan on Shipping 5th ed. 704*; *the Killeena* (10); *The Cheerful* (11); *The India* (12); *The Camellia* (13); *The Zephyrus* (14); *The Chetah* (15).

The evidence is clear that the hawser was used to the extent of hauling the boat from one hundred to three hundred yards or thereabouts, and that is all it was used for, and then it snapped. There is no evidence that that conveyed any material benefit upon the saving of the ship. There was no danger of the ship going on Guyan Island. *The City of Chester* (16).

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| (1) [1860] Lush. 90. | (9) [1921] 276 Fed. R. 410, referred to in 35 Harvard Law Review 887. |
| (2) [1853] 1 Spinks E. & A. 63. | (10) [1881] 6 P.D. 193. |
| (3) [1853] 1 Spinks E. & A. 231. | (11) [1885] 11 P.D. 3. |
| (4) [1873] L.R. 4 A. & E. 129. | (12) [1842] 1 W. Rob. 406 |
| (5) [1883] 8 A.C. 559. | (13) [1883] 9 P.D. 27. |
| (6) [1903] P. 166. | (14) [1842] 1 W. Rob. 330. |
| (7) [1912] P. 168. | (15) [1868] L.R. 2 P.C. 205 |
| (8) [1898] P. 97 and [1898] A.C. 519. | (16) [1894] 9 P.D. 182. |

HAZEN, L.J.A. now (November 10th, 1922) delivered judgment.

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This is an action for salvage brought by the steamship *Curlew* against the steamship *Seneca*, the alleged services having been rendered in the month of May last.

The *Seneca* was caught in the ice not far from Louisburg. She needed aid, and the Canadian Government steamer *Montcalm* was sent to her assistance. The *Montcalm* finding it impossible in consequence of the ice to take the *Seneca* to a safe place, communicated with the agent of the Marine Department at Sydney, Nova Scotia, the message which was sent being as follows:

RADIO, MONTCALM. May 4, 1922.

V. Mullins, Sydney, N.S.—

Trying to tow *Seneca* to Louisburg stop Hawser broken stop Impossible to take her in tow tug needed urgently If get tug can make the way and tug will tow her behind if tug on hand kindly advise will meet off Louisburg Harbor.

This message was sent by the captain of the *Montcalm* after communicating with the *Seneca* and getting its approval. On receipt of this message Mr. Mullins got in communication with the owner of the *Curlew* which was at Louisburg and as I think the evidence shows the only tug available, and she was engaged to go to the *Seneca's* assistance. It appears that Mr. McDonald the owner of the *Curlew* said that he would not send the tug to the assistance of the *Seneca* unless he had some assurance of being paid for his services, as the conditions were such that it was very dangerous for a tug to proceed from Louisburg, and Mr. McDonald in his evidence stated that he was informed by Mr. Mullins that the latter was satisfied that the *Montcalm* would not ask for a tug unless asked to do so by the *Seneca* but she had to wireless herself and that if he, McDonald, sent the *Curlew* he would be paid for it, in consequence of which the Captain of the *Curlew* was instructed to proceed with the *Curlew* taking a hawser with him, which he did.

The *Curlew* which had originally been a Dominion Government cruiser and been converted into a wrecking ship by her owners, left Louisburg at two o'clock on the afternoon of May 4th. She was unable to reach the *Seneca* and

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 returned again that night to Louisburg. She went out again early Friday morning, the 5th of May, and again was not able to reach the *Seneca* owing to the ice, and returned to Louisburg the same evening. She left again on Saturday morning at half past five o'clock; in the meantime having got the position of the *Seneca* by latitude and longitude, and finally reached the *Seneca* on the following Tuesday afternoon, that is to say, after she had been trying from the previous Thursday. The delay was caused by the fact that they were interrupted seriously by both ice and fog, and the *Seneca's* position had, during the period, been changing. When they finally spoke the *Seneca* on Tuesday afternoon, the captain of the *Seneca* sent them to the *Montcalm*, and the *Curlew* told the captain of the vessel that the tug has been sent out by the agent of the Marine Department with a hawser, and the reply he received was "Stand by, and when daylight comes they will take the hawser." On Tuesday, the ships were close together and the ice was heavily packed around them. The *Curlew* had brought out a sixty-five fathom hawser of 11½ inch circumference, which had been used once before, but which was, it appears, in good condition. The captain of the *Montcalm* under the instructions of the captain of the *Seneca* used the hawser which had been brought out by the *Curlew* to take the *Seneca* in tow, instead of carrying out the plan suggested in the wireless message that the *Montcalm* would go ahead of the *Curlew* breaking the ice, the *Curlew* towing the *Seneca* behind. The hawser was taken on board the *Montcalm* and attached to the *Seneca*. The ice, however, was very thick and the hawser broke after the *Seneca* had been towed a distance of a few hundred feet, but after a time, the *Montcalm* was able to go ahead and the *Seneca* to follow under her own steam. It does not appear from the evidence definitely as to whether the *Seneca* was greatly benefited by the distance she was towed by the *Curlew's* hawser or whether or not the *Montcalm* by being able to tow her for this distance, was able to put her in a place of safety.

Dominique LeBlanc, master of the *Curlew*, testified that at the time the *Montcalm* started to tow the

Seneca with the hawser which the *Curlew* had taken out, the *Seneca* was drifting towards Guyan Island, which he described as one of the worst places on the coast, and I am asked to conclude that the result of the vessel being towed by the hawser was to prevent its drifting, on to this coast, and becoming a wreck.

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Such may have been the case, but I do not find the evidence is sufficient to justify me in absolutely coming to that conclusion. The *Seneca* eventually got into Louisburg, and the *Curlew* got out of the ice and back to Sydney, which is her home port. The claim is that the case is clearly one of salvage, that the *Curlew* rendered important service by taking out the hawser under instructions from the *Seneca* through the captain of the *Montcalm*, that in the services she rendered, she was engaged continuously for ten days from the fourth to the thirteenth of May, and that she sustained considerable damage, having destroyed her propeller, and being generally injured, and that she had to be hauled up on the blocks and repaired in Sydney, and that those repairs were not completed until the twelfth of June, and that further, the *Curlew* was engaged in actual work for the *Seneca* from the fourth of May until the twelfth of June, and that during that time the repairs were made with the exception of the propeller shaft tube which was injured, and a certain amount of wear and tear which had not yet been repaired, and that the fabric of the ship generally was damaged to an extent which had not been ascertained.

The damages which are claimed are as follows:—

New cast steel propeller.....	\$ 600 00
Amount paid the Sydney Foundry & Machine Co....	581 35
11½-inch hawser	600 00
Damages to the stern tube and damage by general strain going through ice, which was not included in the general repairs made by the Foundry & Machine Works, but would be a very definite depreciation on her general overhauling.....	1,000 00
Making a total actual damage claimed as sustained by the <i>Curlew</i> of.....	\$2,781 35

It appeared in the evidence that the cost of a new hawser would not be more than \$400.00. I think that undoubtedly the item for a new cast steel propeller \$600.00 and the

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account of the Sydney Foundry & Machine Company are correct, but the damage to the hawser should be reduced by \$200.00.

So far as the general damages are concerned, the evidence is very uncertain. Mr. McDonald, the owner, estimated the depreciation in the value of the *Curlew* which had not been repaired at \$1,000.00, but admitted it was just more or less a guess, he stated that there was damage that had been done to the machinery caused by the heavy ice work, and by proceeding with a broken propeller. He also testified the propeller being wounded wouldn't run smoothly, and this would cause excessive vibration to the engine and shaft, and that there was also damage done to the lignum vitae bearings, and that these bearings would be very much damaged, during the time the vessel would be working in the ice.

I think no doubt that the fabric of the vessel and parts of her machinery would undoubtedly be damaged, and that amount of the damage could not be ascertained with accuracy until a general overhauling took place, even if then, but in view of the captain's statement, that his estimate of \$1,000.00 is more or less of a guess, and as no other witnesses so far as I have ascertained gave any estimate of such damage, I do not think I would be justified in allowing this amount, and would reduce it by the sum of \$500.00.

Although a case was cited to me wherein under somewhat similar circumstances 5% of the value of the vessel had been allowed, I have concluded therefore that the amount of damages actually sustained by the *Curlew* should be reduced from \$2,781.35, the amount claimed, to \$2,081.35.

It was claimed on behalf of the *Seneca* that the service which was rendered by the *Curlew* was partly an engaged service and partly a volunteer service, and that this would affect the question of damages, as in a requested case, the vessel is entitled to recover even though it might not have succeeded in what it set out to do, while in the case of a volunteer service, it is entitled to recover only for what services it actually rendered, and it was admitted that the *Seneca* is liable for the first half day and for the value of the hawser, and that is all.

The contention that the service was a volunteer service and not an engaged service, after the first day, is based on a telegram that was sent by the master of the *Montcalm* to Mr. Mullins at Sydney on May 4th. It was not received until after the *Curlew* had started out to sea. This wireless message gave the position of the *Montcalm* and said:

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Impossible proceed Louisburg, ice too heavy stop Two hawsers broken stop No use *Curlew* try to give assistance believe ice too heavy for her will return now to stand by.

This was received after the *Curlew* had sailed. Mr. Mullins is of the opinion that he communicated the contents or substance of this message by telephone to the owner of the *Curlew* or to somebody on his behalf. His evidence, however, on this point, is not very satisfactory, and Mr. McDonald has no recollection of having received it. Had he done so, I do not understand why the *Curlew* would have proceeded to sea again on the following day with the hawser, especially in view of the fact that before he undertook to go out on the fourth of May, Mr. McDonald was very careful to assure himself that the services of the vessel would be paid for.

The *Curlew* was valued by its owner at \$18,000 and he stated that he had refused an offer of \$15,000 for it a little over a month ago. The *Seneca* at the trial was valued by Mr. Donald, the managing owner, at somewhere between \$18,000 and \$20,000 at the time she was in the ice, but it appears that she was insured with Lloyds in November, 1921, for £9,000, and valued at that time at £12,000, so I think that the valuation placed upon it by Mr. Donald is somewhat low, although he states that while he has asked \$40,000 for the vessel, he would be willing to accept \$20,000.

There was no evidence of the *Curlew* having lost any business during the time it was laid up, waiting for and receiving repairs at Sydney. In my opinion, the *Curlew* is entitled to a reasonable compensation for the services rendered.

Taking all the different facts into consideration, the fact that the *Curlew* had definite instructions to go out and did go out and rendered service, that in doing so, it undertook considerable risk, and that the hawser which it took out,

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Judgment accordingly.
