

THE OWNERS OF THE STEAM-
SHIP "DRACONA" AND HER } APPELLANTS ;
CARGO (DEFENDANTS)..... }

1896
Oct. 27.

AND

N. K. CONNOLLY, AND OTHERS, } RESPONDENTS.
(PLAINTIFFS)

Maritime law—Salvage—Contract for service rendered—Validity.

If an agreement for salvage services was just and reasonable when entered into it will not be disregarded because something has happened subsequently, or some contingency, of which one party or the other has taken the risk, has occurred to make it more onerous on one or the other than was anticipated when it was entered into.

The *Strathgarry* ([1895] Prob. 264) referred to.

APPEAL from a judgment of the Local Judge of the Quebec Admiralty District (1).

The appeal was argued at Quebec on Friday, the 29th May, 1896.

A. H. Cook, for the appellants :

The agreement was an unfair one; it was entered into by the master of the ship because of his distressed circumstances, and after a threat by the agent of the respondents that the tug would leave the ship unless his offer was acceded to. The circumstances show that it was clearly not a salvage service. The amount the respondents stood out for is greatly in excess of the ordinary rates of remuneration for services of this character. The tug ran no risk in the performance of the services. Under such circumstances the authorities show that the agreement will not be enforced. (*The Mark Lane* (2).)

(1) Reported *ante*, p. 146.

(2) L. P. 15 Prob. 135.

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C. A. Pentland, Q.C. :

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There was nothing present at the time of entering into the agreement to induce the master of the ship to enter into it rashly or improvidently. There was no menace to the lives of those on board the ship, and the means of communication with the ship's agent were abundant. Indeed, the captain had communicated with other parties in Quebec to come to his rescue before this tug had appeared upon the scene at all. Moreover, on his cross-examination, the captain admits that he thought the price agreed upon reasonable. Then the agreement was not signed until some days after it was entered into, and at the time of signing the captain did not protest against it in any way. If there is any doubt it must be resolved in favour of the validity of the agreement. (*The Victory* (1); *Couette v. The Queen* (2); *The Palmerin* (3); *The Canadian Pacific Navigation Co. v. The C. F. Sargent* (4); *The Firefly* (5); *The Elm* (6); *The James Armstrong* (7); *The Medina* (8); *Carge Ex Woosung* (9).)

Mr. Cook replied.

THE JUDGE OF THE EXCHEQUER COURT now (October 27th, 1896) delivered judgment.

This is an appeal from the judgment of the Judge in Admiralty of the Exchequer Court for the Admiralty District of Quebec, by which the learned judge pronounced the tender of fourteen hundred and fifty dollars, made in this action, to be insufficient, and awarded to the plaintiffs the sum of two thousand three hundred and eighty-seven dollars and fifty cents, which they claimed to be due to them in respect of

(1) Cook's Adm. Rep. 335.

(5) Swab. 241.

(2) 3 Ex. C. R. 82.

(6) Swab. 168.

(3) Cook's Adm. Rep. 358.

(7) L. R. 4 Ad. & Ec. 380.

(4) 3 Ex. C. R. p. 332.

(8) L. R. 2 Prob. Div. 7.

(9) L. R. 1 Prob. 260..

two agreements entered into between the master of the steamship *Dracona* and the agent of their steam-tug, the *Eureka*. One agreement bears date of the 15th of August, 1895, and the other of the 21st of the same month. By the latter the master of the *Dracona* agreed to pay two hundred dollars to the owners of the *Eureka* for taking the crew, and the gear of the *Dracona*, and also a boat, from Pointe Jaune, near Fame Point in the River St. Lawrence, to Quebec. This service was performed, and the amount agreed upon is not in dispute. The controversy between the parties arises upon the agreement of the 15th of August, whereby the master of the *Dracona*, for the use of the tug *Eureka* to stand by the *Dracona* and to render all assistance to save the vessel and, if possible, to tow her off the reef on which she then was, agreed to pay the sum of three hundred and fifty dollars per day until the vessel came off, or was condemned. No attempt was made to tow the *Dracona* off, and after six and one quarter days from the time when the agreement was entered into, she was condemned. During that time the *Eureka* stood by the *Dracona* and rendered all the assistance demanded of her. For that service the plaintiffs seek to recover, at the rate agreed upon, the sum of two thousand one hundred and eighty-seven dollars and fifty cents. The defendants say that they are not bound by the agreement, that the agent of the *Eureka* took advantage of the position that the master of the *Dracona* was in to exact the agreement from him, and that the rate agreed upon is inequitable and exorbitant, and they tender in respect of such service a sum of twelve hundred and fifty dollars, that is two hundred dollars per day for the time during which the *Eureka* was standing by and assisting the *Dracona*.

The questions to be decided are:—

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1. Should the agreement of August 15th be upheld?  
 and if not,

2. What amount should be allowed to the plaintiffs  
 for the services rendered? Is the amount tendered  
 sufficient?

Now, apart from the agreement and what was contemplated by the parties when they made it, and having regard only to the services actually rendered, it seems to be clear from the evidence that the amount tendered would be sufficient to compensate the plaintiffs for such services. But because that may be so, it does not follow that the agreement may be disregarded. In coming to the conclusion that two hundred dollars per day would have compensated the *Eureka* for what she did, one judges after the event, and naturally looks at the service actually performed, and at the length of it. But in determining the question as to whether such an agreement is to be upheld or not one must look at the service contemplated by the parties at the time, and the circumstances under which the agreement was entered into. If the agreement was just and reasonable when entered into, it will be enforced and will not be disregarded or set aside because something has happened subsequently, or some contingency of which one party or the other has taken the risk has occurred, to make it more onerous on one or the other than was anticipated when it was entered into (1). Where the parties have made an agreement the court will enforce it, unless it is manifestly unfair and unjust; but if it be manifestly unfair and unjust the court will disregard it and decree what is fair and just. That, it was said by Brett, L.J., delivering the judgment of the Court of

(1) *The True Blue*, 2 Wm. Rob. *Cato*, 35 L. J. N. S. Ad. 116; *The* 176; *The Resultatet*, 17 Jurist, 353; *Waverly*, L.R. 3 Ad. & E. 369; and *The Jonge Andries*, Swa. 226; *The Strathgarry*, [1895] Prob. 264.

Appeal in *Akerblom v. Price* (1), is the great fundamental rule, and in order to apply it to particular instances, the court will consider what fair and reasonable persons in the position of the parties would do, or ought to have done under the circumstances. The rule is of course applicable to both parties to such agreements. Where salvors, or persons claiming salvage compensation, have sought to disregard agreements which they had made, and to recover as salvage larger sums than they had bargained for, they have been told that such agreements ought to be respected if they have been fairly entered into and are not clearly unjust or inequitable (2). In the same way and on like grounds agreements made by the masters of vessels in distress have been upheld against the contentions of the owners that they should be relieved from such agreements (3). The instances in which agreements have been set aside in favour of salvors or persons claiming salvage compensation, are not numerous. That has been done, however, where some material fact has been concealed by the master of the vessel (4), or where the service has been rendered by one who was ignorant of its value, and the amount agreed upon has manifestly been inadequate (5), or where the agreement was clearly inequitable (6). In general, however, the cases in which such agreements have

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

(2) *The Mulgrave*, 2 Hagg. 77; *The British Empire*, 6 Jur. 608; *The Betsey*, 2 Wm. Rob. 167; *The True Blue*, 2 Wm. Rob. 176; *The Repulse*, 2 Wm. Rob. 396; *The Henry*, 15 Jur. 183; *The Resultatet*, 17 Jur. 353; *The Jonge Andries*, Swa. 226; *The Firefly*, Swa. 240; *Bondies v. Sherwood*, 22 Howard, 214; *The Cato*, 35 L.J.N.S. Ad. 116; *The Canova*, L.R. 1 Ad. & E. 54; *The Waverley*, L.R. 3 Ad.

& E. 369; *The Solway Prince*, [1896] Prob. 120.

(3) *The Helen and George*, Swa. 368; *The Arthur*, 6 L.T.N.S. 556; *The Prinz Heinrich*, L.R. 13 P.D. 31; and *the Strathgarry*, [1895] Prob. 264.

(4) *The Kingalock*, 1 Spinks, 213.

(5) *Silver Bullion*, 2 Spinks, 70; *The Phantom*, L.R. 1 Ad. & E. 58.

(6) *The Enchantress*, 1 Lush. 93; 30 L.J.N.S. Ad. 15.

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been disregarded are cases in which some advantage has been taken of the master to extort from him terms that are not fair and just. It rarely happens that the master of a vessel in distress and need of assistance is on equal terms with those offering to aid him. Sometimes in such cases he is compelled to accede to unreasonable demands by threats openly made to leave him unless he agrees to the terms offered to him. At other times although no such threat is openly made he is subject to a like and equally effective compulsion to agree to terms that are unfair and unjust, because of the circumstances in which he finds himself. Again, he may recklessly, or through ungrounded fears, accede to demands manifestly exorbitant. In all such cases the agreement will be disregarded (1). The same rules are followed in the courts of the United States. Where such agreements are fairly made, no advantage being taken of ignorance or distress, they are to be upheld (2). But while Courts of Admiralty will enforce contracts made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain, they will not tolerate the doctrine that a salvor can take advantage of his situation and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit (3).

(1) *The Theodore*, Swa. 351; *The America*, 2 Stu. Ad. R. 214; *The Medina*, L. R. 1 P. D. 272, and on appeal 2 P. D. 5; *The Silesia*, L. R. 5 P. D. 177; *The Ismir*, 14 Q. L. R. 353; *The Mark Lane*, L. R. 15 P. D. 135; and the *Rialto*, [1891] Prob. 175.

(2) *The Independence*, 2 Curtis, 350; *The J. G. Paint*, 1 Benedict, 545.

(3) *Post v. Jones*, 19 How. 160; *The Emulous*, 1 Sum. 207;

See also *The Brothers*, Bee's Ad. R. 136; *The Nancy*, Bee's Ad. R. 139; *The Jenny Lind*, 1 Newberry, 443; *The Westford*, 6 Benedict, 119; *Two hundred and two tons of Coal*, 7 Benedict, 343; *The Homely*, 8 Benedict, 495; *The C. & C. Brooks*, 17 Fed. R. 548; *The Young American*, 20 Fed. R. 926; *The Tennasserim*, 47 Fed. R. 119; *The Don Carlos*, 47 Fed. R. 746; *The Jessomene*, 47 Fed. R. 903; *The Sirius*, 15 U. S. App. R. 181.

United States courts have perhaps been more ready than English courts are to disregard such agreements, and that tendency finds expression occasionally in the terms in which the rules applicable to such cases are laid down. English courts do not lightly encroach upon the old rule of the Admiralty Court, that where there is an agreement made by competent persons, and there is no misrepresentation of facts, the agreement ought to be upheld unless there is something very strong to show that it is inequitable. (Per Brett J.A., in *The Medina* (1).)

The *Dracona* went ashore on a reef near Pointe Jaune, on the 14th of August, 1895. On the morning of the 15th when the *Eureka* came to her aid, Captain Baxter, of the *Dracona*, was expecting that on the day following the *Lord Stanley*, a powerful tug, with a schooner and pumps, would arrive from Quebec to assist in getting the vessel off the rocks. He had the day previous sent one of his officers to Fox River in a fisherman's boat, and had been able to communicate by telegraph with his owners' agent at Montreal, and had received an answer from them to that effect. When Mr. Weir, the agent of the *Eureka* came on board the *Dracona*, Captain Baxter stated to him that he was expecting the arrival the next day of a tug and pumps, and the negotiation upon which they then entered had reference to the amount to be paid to the *Eureka* for standing by until the arrival of the *Lord Stanley*. Weir demanded one thousand dollars to stand by until four o'clock of the next day. Captain Baxter refused to accede to the demand; and at this time Weir did, I think, according to his own evidence, put some pressure upon Baxter, by intimating that unless the *Eureka* could get something to do she could not remain, as there were sailing vessels outside upon which

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(1) L. R. 2 P. D. 7.

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she depended a great deal for her business. But while this negotiation was proceeding the *Avalona*, a steamship belonging to the owners of the *Dracona*, came in sight and the masters of the two ships interchanged signals. At Baxter's request the *Eureka* took him on board the *Avalona*, where he had a consultation with Captain King of that vessel. Weir says that after they had consulted together in the chart room of the *Avalona* they came out and asked him how much he would charge per day, and that he answered five hundred dollars; that they went in again and on coming out the captain of the *Avalona* said: "Don't be too hard, you can come down a little"; that he, Weir, said: "No; it is kind of a bad place here. We might be here only for a day or two and we must get something for it"; and that Captain King finally said: "I will figure on it" and they came down to three hundred and fifty dollars, and he, Weir, accepted that. Baxter's account of what took place differs materially from Weir's. He says that no sum other than the thousand dollars was mentioned on board the *Avalona*; that after they went back to the *Dracona* he and Weir had another interview when the latter offered to stand by for five hundred dollars per day, if he, Baxter, would make an agreement that the *Eureka* should tow the ship to Quebec, and take the crew and their effects there; that Weir threatened to leave and go after a sailing ship that was coming up if he, Baxter, did not accept that offer; and that eventually he agreed to pay him three hundred and fifty dollars per day to stand by and to tow the *Dracona* off, if possible, the service to continue until the vessel was towed off or condemned. The captain admits that when he agreed to pay three hundred and fifty dollars per day he thought the amount to be reasonable, but he says that at the time he was afraid the *Eureka* would leave him.



Weir denies that he threatened to leave the *Dracona* and proceed to a sailing ship if Baxter did not enter into an agreement; but he admits that before he took Baxter on board of the *Avalona* he had said that if he could not get something to do he would not stop there. The agreement although dated of the 15th of August, the day on which its terms were agreed to, was not drawn up until four days afterwards, when, without any protest or objection on the part of Captain Baxter, it was executed at Fox River. Now, if Weir's account of what took place is the true account there is no ground, it seems to me, for holding that the agreement was entered into under any compulsion, or that any advantage was taken of the master of the *Dracona*. The terms of the agreement were settled on board of the *Avalona*. That vessel belonged to the company that owned the *Dracona*, and while the *Avalona* was present the *Dracona* was not dependent upon the services of the *Eureka* for assistance. The offer to give the three hundred and fifty dollars per day was made by the masters of the two ships after ample time for consultation and deliberation, and Captain Baxter admits that at the time he thought the amount reasonable.

If, on the other hand, Captain Baxter's account of the circumstances under which the agreement was made, is correct, it would appear that it was concluded on board of the *Dracona* after the *Eureka* had returned from the *Avalona*. We are not told whether that was before or after the *Avalona* had left for Montreal. If before, her presence would relieve the master of the *Dracona* from any pressure or compulsion to which he otherwise might have been subjected. If afterwards, we are forced to believe that while he was yet in negotiation with Weir, who was demanding, as he thought, an exorbitant amount for the use of the

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*Eureka*, and before anything was concluded the *Avalona* was allowed to depart. That, it seems to me, is not at all probable; and even if it were true it would go to show that in the opinion of the two masters the services of the *Eureka* were not so urgently necessary as to permit of Weir subjecting Baxter to any pressure or compulsion as to the terms of the proposed agreement.

Then as to the amount agreed upon. Captain Baxter admits, as we have seen, that he thought it reasonable. His view at the time was that if the service should continue for two or three days, as was anticipated, three hundred and fifty dollars per day would be a fair and reasonable amount to pay. In that view he was, it seems to me, in the right. Neither party at the time the agreement was made expected that the services of the *Eureka* would be required for more than two or three days. They might in fact not have been needed beyond one day, and in the meantime the *Eureka* might have lost a much more profitable engagement. If the *Lord Stanley* had arrived as expected and the *Eureka* had been able to render important services as she might have done in assisting to get the *Dracona* off the reef, it would not, I am sure, have occurred to any one to consider the rate agreed upon unreasonable or exorbitant. On the contrary it would, I have no doubt, have appeared to constitute a moderate and reasonable compensation for such services. It turned out, however, that the *Lord Stanley* did not arrive for six days. But that was not the fault of the *Eureka*. Captain Baxter had, by the agreement, taken the risk of that contingency; Mr. Weir, the chance that the service might have come to an end the next day, and that in the meantime he might lose a more remunerative engagement. Looking at the agreement from the standpoint of the parties to it, at the time they entered into it, and having regard to the services

that they had in contemplation then, the agreement cannot, it seems to me, be said to be unjust or unreasonable. The rate agreed upon was, it is true, considerably higher than that usually charged for a suitable tug sent from Quebec to the assistance of vessels in like situations of peril, but in such cases the tug is paid for the service from the time she leaves Quebec until she returns, and that makes a great difference. A tug plying on the lower St. Lawrence would not, it seems, be justified in charging upon a vessel which she takes under her care the full expenses incurred while she was so plying (1). Yet the fact that she has incurred such expenses, and is on hand ready to lend assistance, and that extra expense would necessarily be incurred in procuring a tug to render a like service, ought, it seems to us, to be taken into account in such cases as this. If, on the one hand, the tug ought not to take an undue advantage of the fact that she is at hand ready to perform the required service, she ought not, on the other hand, to be deprived of all the benefit resulting from that circumstance. Where the actual service may not continue for more than three or four days, a rate of three hundred and fifty dollars per day may, in reality, be quite as reasonable as one of two hundred dollars for that time and three or four days additional occupied in going to and coming from the place where the service is to be performed.

I agree with the learned Judge of the Quebec Admiralty District that the agreement in question in this case ought to be upheld, and I dismiss the appeal, with costs.

*Judgment accordingly.*

Solicitors for the appellants : *W. & A. H. Cook.*

Solicitors for the respondents : *Caron, Pentland & Stuart.*

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(1) *The Graces*, 2 Wm. Rob. 294.