

APPEAL FROM NOVA SCOTIA ADMIRALTY DISTRICT.

THE SHIP *MANHATTAN* AND HER } APPELLANT;
 CARGO (DEFENDANT)..... }

1907
 June 10.

AND

JAMES SULLIVAN AND OTHERS (PLAIN- } RESPONDENTS.
 TIFFS)..... }

*Shipping—Salvage—R.S.C. 1906, c. 113, sec. 814—Delivery of salvaged goods
 to receiver of wrecks—Penalty.*

Under the provisions of sec. 27 of the *Wrecks and Salvage Act*, R. S. C. 1886, c. 81 (now R. S. C. 1906, c. 13, sec. 814) a salvor who has delayed the delivery of salvaged goods to the receiver of wrecks for a short time, not with the intention of retaining the goods but merely for the purpose of having the amount payable to him for salvage determined before giving up possession, does not thereby forfeit his right to salvage, or incur the penalties mentioned in such section.

APPEAL from the following judgment of the Local Judge of the Nova Scotia Admiralty District:—

MACDONALD, L.J.:—The schooner *Manhattan*, of Lunenburg, while on a voyage from Carbonear, near Newfoundland, to Lunenburg with a cargo of dried fish, was cast away in a violent gale of wind at or near Glasgow Head, on the 17th of January last between 8 and 9 a.m. The master during the previous night had taken shelter in the harbour of Canso and on the morning of the 17th January put to sea to pursue the voyage, but was driven ashore as stated a few miles from the port in which he had sought shelter. When the vessel struck it appears from the master's evidence on the trial that he was so impressed with the danger of the situation to vessel and crew that he and the crew under his direction at once left the vessel in the schooner's boat, and made the shore, apparently with some difficulty and no little danger and risk

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on account of the heavy sea. Before leaving the vessel the master and crew lowered the jib and foresail, but left the heavy mainsail set, and exposed to the full force of the gale. After the master and crew had left the vessel, some young fishermen of the locality who had heard of the vessel being ashore went to the scene of the wreck and with great difficulty and very considerable risk to themselves succeeded in removing the sails and a quantity of rigging to the shore. This property was afterwards taken to the port of Canso, a few miles distant and there delivered to the agents of the owners under an agreement for compensation. When the cargo was ultimately got from the ship's hold at Canso, and sold at Canso, the plaintiffs claimed that they had rendered salvage services which entitled them to consideration in the proceeds of the cargo. They contended at the trial that their work in taking down and removing the sails from the ship, particularly the large mainsail contributed to the ultimate recovery of the cargo. That the then condition of the weather and the vessel rendered it doubtful if the latter could long survive the action of the sea in such a gale on an open and exposed coast, and that the action of the heavy mainsail if left in the condition in which they found it would materially increase the risk of a total loss of the cargo, as if the vessel should break up as was quite possible, a total loss of the fish would result. The following authorities were cited and relied on at the trial as sustaining the plaintiff's contention for salvage services out of the proceeds of the cargo: the *Sarah* (1); the *Melpomene* (2); the *Camellia* (3); the *Aeolus* (4); the *Pickwick* (5); Williams and Bruce's Admiralty Practice (6).

The latter says:—"When however the exertions are meritorious and the property is afterwards saved, the

(1) 3 P. D. 39.

(2) L. R. 4 A. & E. 129.

(3) 9 P. D. 27.

(4) 42 L. J. Adm. 14.

(5) 16 Jur. 669.

(6) 3 Ed. 132.

court will it seems on very slight evidence conclude that the services were in some degree instrumental towards the ultimate result."

The evidence in the case leads me to the conclusion that had the vessel been left to the mercy of the gale prevailing when boarded by the plaintiffs and in the position and under the conditions in which they found her, the cargo would have been totally destroyed or rendered worthless before any considerable portion could be saved, and that the services rendered by the plaintiffs were of a character to entitle them to be remunerated for their services and the risk they incurred in rendering their services. There will therefore be judgment for the plaintiffs with costs and I assess the amount of salvage to be paid plaintiffs at the sum of four hundred dollars to be equally divided between them. This to include all salvage claims of the plaintiffs rendered the ship and cargo including sails and rigging landed by them.

January 25th, 1907.

The appeal was argued at Halifax.

Mr. *J. B. Kenney* for appellants;

Mr. *W. K. A. Ritchie, K.C.*, for respondents.

THE JUDGE OF THE EXCHEQUER COURT now (June 10th, 1907, delivered judgment.

This is an appeal from a judgment or decree made on the 26th day of May, 1906, by the learned Judge of the Nova Scotia Admiralty District, whereby in an action for salvage he found for the plaintiffs and assessed the amount of salvage to be paid to them at the sum of four hundred dollars, to be equally divided between them. This amount included all claims for salvage for services rendered by the plaintiffs to the ship, including sails and rigging and to the cargo.

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The following is the master's account of the wreck of the *Manhattan* :

"I belong to Lunenburg. I was master of the *Manhattan*. She would be four years old this spring. She was built and owned in Lunenburg. She was on a voyage from Carbonear, Newfoundland, to Lunenburg, loaded with a cargo of dry codfish. We went into Canso for a harbour. Coming out we got under way about one o'clock Monday night, or Tuesday morning, January 16th. We caught a nice breeze and got out as far as Black Rock at Canso, and there the wind suddenly died out. We thought we might get out clear and kept on for some minutes, but the sea was heavy and we tried to tack the ship and go back, but she would not come round. Then we tried to wear her, and she would not wear. The wind was light and the sea heavy. We made a second attempt to tack ship, and after some time we got her around and headed in and got inside Black Rock, abreast of Glasgow Head, and there we got becalmed altogether. I saw that we could not get up and said to the crew that we would let go the anchor. We let go the anchor and lowered the jibs, and lowered away the foresail. The mainsail we did not lower. The sea then was boarding her. I gave the crew orders to put out the boat and get her ready alongside. While taking out the boat a heavy sea boarded us and nearly took two or three of the crew over. We had to take to the boat and get off as fast as we could. We came up to Canso, knowing that there was a tow boat there, to try and get her to go down and get the schooner towed up to the harbour. After we had left her three or four minutes we saw she had parted the chain or taken the anchor with her and gone head on the land. I knew then that there was no chance for us and that there was no use taking the tow boat. We went up and got two dories instead of our boat, and went down to Glasgow

Head. There was no chance of getting on board and I landed and came up to Canso. This was before daylight."

About nine or ten o'clock of the same day the plaintiffs went to the place of the wreck. At that time the *Manhattan* was on the beach with her bow to the shore. There was a heavy sea running, but the wind had gone down. She was on the rocks, the end of her jibboom being ten or fifteen yards from the shore. The tide was high. After several attempts, and at some considerable risk and peril, the plaintiffs got on board the vessel and proceeded to strip her. This work lasted until evening. During the day the master and crew of the *Manhattan* returned to the wreck, removed what belonged to them, and assisted, it appears, in saving the sails and rigging. The master does not, however, appear to have gone on board the vessel, and when he was asked about the mainsail he answered that they had all off then and they might as well take the mainsail. And then the mainsail was taken down. This was done to save the sail, not with any view at the time of preventing the vessel from breaking up. That, however, was the result of the plaintiffs' action in taking down the mainsail, for in the afternoon and evening a breeze sprang up, and during the following night the wind blew heavily. With the mainsail set she might have pounded to pieces, and the cargo, which was afterwards salvaged by others, might have been lost.

Now, apart from the defence set up in pursuance of *The Wrecks and Salvage Act* (1), to which reference will be made, it is not denied that the plaintiffs are entitled to salvage for their services in saving the sails and rigging of the defendant vessel. It is contended, however, that they are not entitled to any salvage in respect of the cargo. The learned Judge who heard the case found

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(1) [1886] R. S. C. c. 81.

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against that contention, and I think he was right. The vessel was not, it is true, stripped and the mainsail taken down with a view to saving the cargo ; and, standing by itself, what was done would not have had that result, yet it contributed to it, and as the service rendered was in itself meritorious, I think the learned Judge was justified in taking the matter into consideration in assessing the amount of salvage to be paid to the plaintiffs. To entitle a person to salvage it is not necessary, it seems to me, that he should foresee or intend all the benefit that may result from the salvage service that he renders. I am also of the opinion that the amount allowed was a reasonable and moderate amount.

By the 26th section of *The Wrecks and Salvage Act* in force at the time the salvage services in question was rendered (R. S. C. c. 81, s. 26), it was, among other things, provided that whenever any person took possession of a wreck within the limits of Canada, he should as soon as possible deliver the same to the receiver of wrecks.

By the 27th section of the Act mentioned it was among other things further provided that any person who failed to deliver possession of a wreck to the receiver in pursuance of the provision referred to should forfeit any claim to salvage and should be liable to pay as a penalty double the value of such wreck, and a further sum not exceeding four hundred dollars. There was in this case some delay by the plaintiffs in delivering up a part of the sails and rigging saved. There was no intention on their part to retain the goods, but they wanted to have the question of the amount to be paid to them determined before they gave up possession. And on the whole it does not appear to me that their action is unreasonable. The receiver of wrecks at Canso was brought into the matter, but not as receiver of wrecks. He acted as auctioneer for the sale of the goods at the instance of the master and of his own brother who was the ship's

agent at that place. The delay in delivering up possession of the sails and rigging was not in fact a delay in delivering them to the receiver of wrecks, but a delay in delivering them to the auctioneer engaged by the master of the vessel. The only use the receiver made of his office was to get possession of the goods as auctioneer. After some negotiation it was arranged that the plaintiffs should be paid for their services in saving the things that were taken from the vessel on the day mentioned one half of what they realized at auction. So far as there was delay in delivering to the owner's agent possession of the things salvaged the parties themselves settled the matter, and there really was no question at any time of delivering them to the receiver of wrecks at Canso in his quality and office as receiver. In my opinion the defence sought to be set up under the statute referred to fails.

The appeal will be dismissed with costs to the respondents.

Judgment accordingly.

Solicitors for appellant: *Drysdale & McInnis.*

Solicitors for respondents: *Ritchie & Robertson.*

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