

13th. February, 1951

Judge :

The Hon. Mr. Justice W. Harding, B.Litt., LL.D.

Vice Admiral Godfrey Alan Brooke Hawkins, (C)

C.B., M.V.O., D.S.O. ne. et.

versus

Cecil Pace ne. et.

Salvage — Towage — Danger.

Mere towage service is confined to vessels that have received no injury or damage; and mere towage reward is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any damage or accident which may affect her safety, if left without assistance.

A towage service may be described as the employment of one vessel to expedite the voyage of another, when nothing more is required. If something more is required than acceleration of progress, then, although the service may not be attended with any danger of the towing vessel, the service may be deemed of a salvage character. The danger need not be imminent. It will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage

or misfortune which might possibly expose her to destruction if the service were not rendered.

The extent of the damage is one of the factors usually taken into consideration in fixing the amount of the salvage reward.

If by the towing of a vessel the vessel towed was taken out of a state of reasonable apprehension of danger, then the towing vessel is entitled to salvage reward.

Plaintiffs proprio et nomine, after prefacing, in the aforesaid writ-of-summous, that the vessel S.S. Mediterranean, a passenger boat, 292 tons, belonging to the "Medimar Navigation Co. Ltd.", was lying about twelve (12) miles off the Malta breakwater, with her engine damaged, with 32 passengers on board, bound for Syracuse; that H.M.'s Tug "Robust", at 2.25 a.m., had proceeded to the assistance of the vessel and towed her to harbour; that consequently they are entitled to a reward for salvage service, which defendant Pace nomine is contesting; prayed that (1) it be declared by the Honourable Court that plaintiffs proprio et nomine are entitled to salvage; (2) that such salvage reward be liquidated by this Court; and (3) that defendant Pace nomine be condemned to pay to plaintiffs proprio et nomine such sum as shall be liquidated, saying its apportionment amongst plaintiffs themselves, either by arrangement between themselves, or on separate proceedings. With interest at six per cent (6%) per annum from the date of liquidation, and with costs;

In his statement of defence at page 26, defendant Cecil Pace nomine submitted that, although it was true that the S.S. Mediterranean was damaged, it was in no danger when plaintiffs rendered a simple towage service; consequently plaintiffs are not entitled to any salvage award, but possibly to a compensation for towage, which, however, is not included in the summons;

Omissis;

The first and main point to be settled is obviously whether the service was a salvage or a towage service:

The facts do not appear to be in dispute. The S.S. Me-

(*) Vide subsequent judgment re assessment of award delivered on May 8th., 1951 (published in this volume).

diterranean was proceeding to Syracuse from Malta. At about 11.30 p.m., when about five miles off the Grand Harbour breakwater, the main engines and auxiliary machinery became completely immobilised in consequence of the boiler tubes having caught fire owing to the boiler having been left short of water. Two red lights were hoisted to indicate that the vessel was "not under command". The Master instructed the wireless operator to communicate with Malta and asked for the assistance of a tug-boat; but, owing to the breakdown of the machinery, the operator was unable to get in touch. At about midnight, the Master observed a ship to the North East, and he burned red hand flares to attract her attention, and at 00.03 a.m. the vessel approached the S.S. Mediterranean. The Master then lowered a life-boat and sent a verbal message to the Master of the approaching ship, asking him to signal the Palace Tower requesting that a tug might be sent to the S.S. Mediterranean. By this time the fire had gone out of its own accord. The Master of the other vessel, that is, the American steamer "Cape Race", suggested giving the S.S. Mediterranean a tow into harbour; he also promised lowering his motor life-boats to take the passengers into harbour. The Master of the "Mediterranean" replied that the only thing he required was tug assistance; to which the Master of the American steamer replied that he would remain in attendance until he saw the tug-boat approaching. Then H.M. Tug "Robust" arrived, passed a towing line from her stern to the bow of the "Mediterranean", at approximately 4.15 a.m., and took her in tow, arriving at the Grand Harbour at approximately 6.15 a.m., when "Robust" slipped the tow and secured the "Mediterranean" alongside and berthed her at the Fish Market. The "Mediterranean" dropped anchor at 6.40 a.m., and was secured at approximately 7 a.m., when the Tug cast off;

The assistance, therefore, consisted in proceeding to sea, taking the S.S. Mediterranean in tow, and bringing her to anchorage in the Grand Harbour. The towing operation was, as such, a simple one, with no danger to craft or crew. The weather conditions were favourable. The fire on board the S.S. Mediterranean had already burned itself out. The whole operation from the time the Tug prepared for sea at 2.15 a.m.

to her securing the S.S. Mediterranean in the Grand Harbour, at 7 a.m., took four hours and forty-five minutes:

With regard to the element of danger to the S.S. Mediterranean, the nautical expert appointed by the Court has expressed these views. The fire was out long before the arrival of the Tug. As a result of the fire, however, the dynamo of the S.S. Mediterranean was put out of action and all current failed, and the wireless was put out of use. The vessel's engines were completely immobilised, and she was helpless, not being able to use her power. In order to become seaworthy, the vessel had to be put in dock, and new boiler tubes got out from England. At the time the vessel became immobilised, and throughout the operation, the weather was fine. Owing to the favourable weather conditions, there was no immediate danger to the vessel; but as she was not under control, her engines being immobilised, she was at the mercy of the elements; and, had the weather deteriorated, the consequences to the vessel might have been serious. From the time the vessel was not under control to the time of the arrival of the tug, she drifted about five or six miles in an easterly direction away from Malta. At the time the vessel was immobilised, she was about five miles from the breakwater, at a depth of about 70 fathoms, where it would not have been practicable to anchor. Properly speaking, there was no distress signal, as the hoisting of the two red lights is not in itself a distress signal, or one asking for assistance, but merely a warning to other vessels to keep clear. Later on the nautical expert, on being examined on his report, added that the American steamer would, in the ordinary course of things, have the necessary equipment to take the "Mediterranean" in tow into harbour. However, the fact that the "Cape Race" was in attendance did not entirely remove the danger set out in his report, but would have lessened the danger. The danger would not be entirely removed, as it would be difficult for the "Cape Race", which is not a tug-boat, to manoeuvre properly in towing a vessel which is not under control. If the "Cape Race" had towed the "Mediterranean" into harbour, the danger would not have been a serious danger, but there would have been some difficulty. Probably, had the vessel been towed by the

"Cape Race", she would have been towed not in the Grand Harbour, but in Marsascirocco;

The whole question hinges on the possibility of danger;

Kennedy, in his text-book "A Treatise on the Law of Civil Salvage", 1891 edition, page 22, remarks that there is no doubt that in one class of salvage claims, viz. that which is made for towing a ship which has received damage, the Court of Admiralty has always taken, in respect of the possibility of danger, a very liberal view in favour of the claim;

The rule "in subjecta materia" is that to be gathered from the judgment of Dr. Lushington in *The Reward* (1 W. Rob 171 at p. 177) and *The Princess Alice* (3 W. Rob 138 pp. 139, 140); that is:—

1. Mere towage service is confined to vessels that have received no injury or damage. Mere towage reward is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any damage or accident which may affect her safety, if left without assistance;

2. A towage service may be described as the employment of one vessel to expedite the voyage of another, when nothing more is required than the accelerating of progress (Kennedy, pp. 22, 23);

In Roscoe's "Admiralty Practice" (1903 edition, page 156) it is thus stated:— "If something more is required than expedition, and something more than acceleration of progress, then, although the service may not be attended with any danger of the towing vessel, the service may be deemed of a salvage character. That is to say, the question for the consideration of the Court will be whether it is a case of ordinary towage, or whether there are any other ingredients which would justify the Court in considering it rather in the nature of a salvage service". It may be, of course, a salvage service "of a very inferior character" (vide note "Q" *ibidem*);

In the present instance, it was not a case of ordinary towage service rendered to a vessel not disabled or in distress. The vessel was disabled;

The point is: was there such a danger as might have af-

fectured the safety of the S.S. Mediterranean, if left without assistance?

It is important to note that the danger need not be imminent. In Lowndes' "Law of General Average", 1912 edition, p. 177, it is stated that the ship must be, to found a salvage claim, actually or prospectively in danger..... Nor it is necessary that the danger be imminent..... In the Charlotte case (1848) 3 W. Rob. 66, 71, Judge Lushington said:— "It will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered". This Court, then, presided over by Judge Ganado, in the case "Fayden vs. Boyer", 23rd. October, 1928, Malta Law Reports, Vol. XXVII Part III, p. 397, quoted with approval from Smith's Mercantile Law the passage wherein it was stated that the possibility of destruction is sufficient;

Now, in the case before the Court, the S.S. Mediterranean had suffered damage (which need not be a damage resulting from the perils of the seas—vide Lowndes, *ibidem* p. 177), and was disabled and immobilised. She was at the mercy of the elements, and there was the possibility of destruction, if the weather had deteriorated—the possibility of her safety being affected:

It is true that the American steamer was standing by till the arrival of the Tug, but, in the opinion of the nautical expert, the danger was not removed thereby, albeit lessened. Even in the fair weather conditions prevailing, it would have been difficult for the "Cape Race" (not being a tug-boat) to manoeuvre properly in towing a vessel which was not under command. Had the weather deteriorated, this difficulty would have increased considerably;

The extent of the danger is one of the factors usually taken into consideration in fixing the amount of the salvage award. The presence of the "Cape Race" would presumably have a bearing on the amount, but it does not make the service rendered by plaintiffs *proprio et nomine* a mere towage service; because, notwithstanding the attendance of the "Cape Race", the possibility of danger, particularly had the wea-

ther deteriorated, still persisted. The possibility of the weather deteriorating must be considered;

In the *Ellora* case (1862) the vessel, which was carrying mails and passengers, lost her propeller during the voyage from Alexandria to Malta; but, being fully equipped as a sailing ship, made sail, the weather being fine. She was then towed into Malta by another steamer without difficulty, and in moderate weather. It was held that the towing, even though clearly there was no immediate or imminent danger, deserved substantial salvage remuneration, on the ground simply that she might be unmanageable in the event of a storm coming on (Kennedy, p. 19; Lowndes, p. 177);

Again, in the *Ella Constance* case, 33 L. J. Adm. 191, p. 193, salvage was awarded to the S.S. *Isis* for towing a vessel which was in distress for want of fuel, and the degree of danger was thus described by the Court:— "It is a case in which there was no immediate risk, but there was a possible contingency that serious consequences might have ensued";

In the case of the *White Star* (L.R., 1 Q. & E. 68, p. 71), a sailing ship, otherwise undamaged, which had slipped both her anchors off Folkestone, but still had on board a powerful Trotman anchor and chain, was taken in tow in moderate weather. The *Trinity* Masters remarked, in awarding salvage, that even though the salvaged vessel was not exposed to immediate peril, contingencies might arise, in which, having a single anchor, whatever its size or strength, she would be exposed to risk and peril";

As text-writers say, the danger must be "a reasonable cause of apprehension". That this was the state of the vessel, appears to be also borne out by the fact that the Master had instructed the passengers to assemble aft in the saloon, and the life-boats were got ready for lowering. Another recent case, which may be quoted, is that of the *St. Melante*, Dec. 9-11, 1946 (Lloyd's Calendar, 1950, p. 379). This was a steam-trawler which had its propeller fouled by trawl. It was towed in moderate weather. There was no immediate danger, and other trawlers were in the vicinity. A salvage reward was allowed;

Counsel for defendant, in the course of his oral submissions to this Court, pressed the point that in the reports made by plaintiffs, and filed in the record, it is stated (p. 7) that "the operation was neither difficult nor dangerous", and, at page 8, "if assistance had not been rendered, the vessel would not have been exposed to any dangers, due to an unidentified man-of-war standing by". These statements do not alter the legal stand-point. In this case the salvage award is not being based on the danger to the tug. Moreover, whoever drew up the report, was referring to immediate danger, and was not considering the legal aspect founded on the possibility of danger;

This Court, therefore, finds that the service was not mere towage service requiring mere expedition or acceleration of progress rendered to an undamaged vessel, but was a service rendered to a vessel which was disabled and not under control, with the prospective danger of her safety being possibly affected in the event of the weather deteriorating — which danger was lessened, but not removed, by the fact that the American steamer was in attendance; in as much as, for the reasons stated by the expert at page 69, towing by that steamer would have been difficult, and the difficulty would have increased had the weather deteriorated. By the towage for which plaintiffs are claiming, the vessel was taken out of a state of reasonable apprehension of danger;

The Court, therefore, adjudges on the first demand by declaring that plaintiffs *proprio et nomine* are entitled to salvage award:

Costs are reserved to the final judgment;

The case is adjourned to the 28th, February, 1951, for further bearing on the rest of the merit.
