23rd. April, 1952.

Judge:

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

Vice-Admiral Geoffrey Alan Brooke Hawkins, C.B., M.V.O., D.S.O. ne.

versus

John Scott ne. et. (*)

Salvage — Reward — Danger — Voluntariness of Service.

Two things at least are essential for a salvage service: there must be, in the first place, the danger to the subject of the service; and in the second place, the undertaking of the service must be a voluntary act on the part of the salvor.

The danger, in this respect, is judicially interpreted in the sense that the danger need not necessarily be imminent or absolute, but must be such as to create a state of difficulty and of reasonable apprehension, in such a way that, as an effect of the service, the vessel is rescued from apprehended danger.

The person rendering the service is a volunteer if he is a stranger, that is, if he is not bound by any pre-existing covenant that connected him with the duty of employing himself in the preservation of that ship. And the relevant moment to be looked at in order to establish whether there was any such covenant is the moment when the misfortune happened which produced the apprehension of the danger.

The right to claim salvage reward normally arises out of an "implied" contract, by which the ship-owner undertakes to give a reward to the salvor. If an agreement is entered into by both parties, which does not touch in any way upon the nature of the service, but simply puts in writing the obligation already existing "impliedly",

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(*) Vide subsequent judgment delivered on the 17th. June, 1952 (published).

the salvage remains a salvage service, and is to be rewarded as such.

When a ship is in distress, there may be an express invitation and an express engagement, or the rendering of assistance may be unasked: but in both cases, if the service is a salvage service, a reward is due on salvage basis.

This is a claim for salvage;

Plaintiff nomine, after prefacing in the writ-of-summons that, on the 3rd. of April, 1952, at Malta, the cargo of S.S. *Siva Ranjita*, consisting of a shipment of coal, caught fire; that, at the request of defendant nomine, he lent the Dockyard Fire Brigade and the necessary fire-fighting equipment; that on the 12th. April, 1952, the fire was extinguished, and the cargo, as well as the steamer, were saved from the danger of fire; asked (1) that a declaration be made by the Court to the effect that plaintiff nomine is entitled to the payment of salvage in respect of the services so rendered, (2) that the salvage award in respect of such services be assessed by the Court, *due regard being had to the disbursements* made on defendant's behalf, and (3) that defendant nomine should be condemned to pay to plaintiff nomine the sum so assessed, inclusive of the expenses incurred. With interest thereon according to law from the date of service hereof, and with costs, including the costs of the warrant of impediment of departure sued out on the 18th. April, 1952;

In his statement of defence, at page 11, the defendant nomine submitted that plaintiff nomine did not act in the capacity of salvor, but merely carried out contractual services, and was not therefore entitled to a salvage award, but merely to a payment for services rendered. Defendant had at no time denied such payment, which he has not effected so far because plaintiff has not submitted the bill which was requested;

It is obvious that, before proceeding further in this case, it is necessary to dispose of the preliminary issue so raised, that is, whether the services, admittedly rendered by plaintiff nomine, fall to be treated on a salvage basis, or should be considered merely as contractual services to be paid for on the "quantum meruit" principle;

After hearing the submissions of Sir Philip Pullicino, Counsel for plaintiff nomine, and those of Professor Cremona, Counsel for the defendant nomine, this Court has considered as follows:—

The contention of defendant nomine is based on Exhibit "D" filed in the sitting of the 21st. April, 1952, at page 19 of the record, which is an undertaking, signed by the agents of the ship in question Messrs. Lambert Brothers Ltd., couched as follows:—

Superintendent of Police Office,
H.M. Dockyard, Malta.
3rd. April, 1952.

We hereby agree to pay for the services of the Dockyard Police Fire Brigade attending fire on board S.S. Siva Ranjita, berthed at no. 2 Buoy, Grand Harbour;

Professor Cremona, on the strength of that document, has pressed upon the Court the argument that plaintiff nomine should not be considered as a salvor, but merely as a person acting in pursuance of an ordinary contract of employment, and that consequently the remuneration should not be assessed on salvage principles, but on the Common Law "quantum meruit" principle "pro opere et labore". He further stressed that, even if the vessel had been in danger, and even if this danger had been averted by the services so rendered, still, this notwithstanding, the fact that plaintiff nomine was acting as contractor in virtue of the afore-mentioned document, excluded his being treated as a salvor. Counsel also made the point that, once plaintiff nomine was acting in the capacity of contractor, the services were not voluntary, and the absence of this ingredient of voluntariness precluded an award on the basis of salvage;

There is no doubt that two things, at least, are essential for a salvage service. As Kennedy states (Law of Civil Salvage. 1936 edition, page 20), there must, in the first place, be danger to the subject of the service. In the second place, the undertaking of the service must be a voluntary act on the part of the salvor;

It appears to be common ground between the parties (see declaration recorded at page 20) that there was "danger"

in the sense in which that word has been judicially interpreted, that is, not necessarily immediate and absolute, but such as to create a state of difficulty and of reasonable apprehension, in such a way that, as an effect of the services, the vessel is removed from apprehended danger (vide the judicial statement on this point contained in the judgment of Dr. Lushington in the Charlotte Case, 1848, 3 W. Rob. 68, 71, approved by the Privy Council in The Strathnaver Case (1875, 1. A.C. 58, 65). Vide also judgment given by this Court in "Clarke ne. vs. Gibbons ne.", 16th August, 1950;

Now the whole point is whether the document at page 19 *disentitles plaintiff nomine from claiming salvage;*

Professor Cremona contends that it does, because (a) as a result of that document the services were not voluntary, (b) a contractual obligation was created, and the capacity of contractor excludes that of salvor;

It is well settled that the person rendering the services is a volunteer if he is a stranger, that is, if he is not bound by any "pre-existing" covenant that connected him with the duty of employing himself in the preservation of that ship (vide judgment of *Lord Stowell in the Neptune Case*, 1824, 1 Hagg. 227, 236). If there was a pre-existing obligation, then there can be no claim for salvage; otherwise, as Lord Stowell pointed out in the Neptune Case afore-quoted, there might be a temptation to throw the ship into situations of danger. Thus, as a rule, the crew of a vessel, in rendering services to her in time of peril, do not thereby become entitled to salvage. Thus, too, a pilot, when on board a vessel, is not, as a rule, entitled to salvage". ".....the right to salvage", as *Carver states in his treatise "Carriage by* Sea", 1918 edit., p. 440, "is, generally speaking, confined to persons who are strangers to the vessel in distress, and thus the evil is avoided of holding up inducements which may lead men to produce disaster in order to reap gain from it";

Now, in this case, was plaintiff nomine under any "pre-existing" contractual obligation to employ himself in the preservation of the vessel? The relevant moment to be looked at in order to answer that question is the moment when the misfortune happened which produced the apprehension of

danger. It is obvious that at that moment, plaintiff was not under any pre-existing covenant bound to employ himself in the preservation of the ship, such as the members of the crew were, or the ship's agent, etc. At that moment plaintiff nomine was a stranger to the vessel, and his claim for salvage is therefore in order, as far as voluntariness of service is concerned;

The second point made by Professor Cremona is that a contractual capacity, excluding that of salvor, was created by the document afore mentioned;

In the Court's opinion, that document, on a proper construction of it, did not bring about any such consequence. It should be noted at once (because it appears that this point was missed in the course of the arguments) that the document in question is not an engagement to perform certain services entered into by plaintiff nomine, but is the other way about, that is an engagement, on the part of the ship's agents, to pay for the services. The question of the nature of the services was left absolutely untouched. Defendant nomine does not claim that there was any stipulation, even oral, before or concomitantly with that undertaking, to the effect that salvage was excluded. Salvage was simply not mentioned; that is all (see declaration at page 20);

It therefore comes to this. The right to claim salvage normally arises out of an "implied" contract, by which the shipowner undertakes to give a reward to the salvor (vide "Marine Law", Duckworth, p. 179). In this case, the ship's agents merely undertook "expressly in writing" what already existed as an "implied" obligation; nothing more. That document did not go any further than that, i.e. putting into writing the obligation to pay salvage which existed even without that written undertaking. It did not go beyond that. Particularly, it did not touch in any way the question of the nature of the services. It logically follows, therefore, that if those services were salvage services, the reward must be on a salvage basis. The fact that the agents of the vessel agreed to pay for the services cannot, in the absence of some other limiting expression, be construed as changing the nature of those services. Plaintiff nomine is entitled to say to

defendant nomine:— "You have engaged yourself through your agents to pay for my services; therefore, if my services are in the nature of salvage services, I am entitled to a salvage award". Had it been in any way stipulated that the services were not salvage services (and, as has been said, defendant nomine does not claim this), then, of course, plaintiff would have had no "persona standi" as salvor; but his capacity of salvor cannot be held to be excluded by the mere undertaking of defendant to pay what is due. The Court has merely to see whether it was in effect a salvage service; so much so that in the Halsey vs. Albertuszen case (1857) 11 Moo. P.C.C. 313, the claim of a pilot for salvage was upheld because, even though expressly engaged as a pilot for pilotage services, in effect these services turned out to be salvage services;

The Court thinks that defendant in his contention failed to draw a distinction between the case of a person who, at the time of the misadventure, was already employed to do all such acts as would preserve the vessel, and the case of a person who is engaged to perform these services after the misadventure and because of the misadventure. In fact, it is well settled that, when a ship is in distress, there may be an express invitation and an express engagement, or the rendering of assistance may be unasked; but in both cases, if the service is a salvage service, a reward on a salvage basis is due. "Although", as Lowndes remarks in his textbook "Law of General Average", 5th. edition, p. 177, "in general salvors derive their title to remuneration from their being expressly engaged by the master to assist, ... yet such an express hiring is not always requisite. There may be cases of emergency, in which the rendering of unasked assistance will give a title to reward";

In this case, there was a request for assistance, and, further, there was an engagement to pay, but by such request and by such engagement the nature of the services, and therefore of the award, was not prejudiced. Carver mentions this point. He refers to what he calls "volunteer salvors" and to "employed salvors", evidently using this latter term not in the sense of persons under a "pre-existing" con-

tractual obligation, but to persons who have given their services "on request", as distinct from those who gave their services unasked, for whom he reserves the term "volunteers". And quoting the judgment in the Purissima Conceptio case, 1849, 3 W. Rob. 181, he goes on to say :— "If the service has been rendered in saving from danger, it is a salvage service, whether it was employed or done by a volunteer, and the scale of reward, and the lien for it, will be those of salvage";

The same expressions, that is "volunteer salvors" and "employed salvors", are used by Dr. Lushington, in the sense as aforesaid, in The Undaunted Case, 1860, 29 L.J. Adm. 176, wherein the learned Admiralty Judge, after referring to those who volunteer to go out to a ship in distress and to those who are employed by her, and stressing that the former go out at their risk, goes on to say that "the engagement to render assistance to a vessel in distress, and the performance of that engagement, establishes a title to salvage award";

Counsel for defendant drew the Court's attention to The Solway Prince Case mentioned in Kennedy, at page 31, and in the English and Empire Digest, Vol. 41, para. 8227. Now, in that case there was an undertaking by certain persons vis-a-vis the underwriters to do certain specified services on the terms of receiving a specified reward. On failure to obtain payment from the underwriters, they proceeded to claim for salvage against the ship. It was held that they could not claim salvage, the reason, as this Court assumes, being (and properly so) that, once they had bound themselves to a specified reward, they could not press for the more liberal award of salvage. The present case must be distinguished from the one quoted, because the only undertaking before this Court is merely an undertaking on the part of the ship's agents to pay for services; no reward is specified, and the nature of the services is a point left untouched;

Professor Cremona also drew the Court's attention to the note in Kennedy at the foot of page 31, where the Goulandris Case is mentioned in connexion with the Solway Prince Case. As is obvious from the letters "Cf" preceding the

quotation, this other case was quoted merely for purposes of comparison. The sitting Judge has examined the fairly comprehensive summary of this other case in the English and Empire Digest, Vol. 41, para. 8228, and it is obvious that it bears no analogy to the present case;

As this Court sees it, the position in this case is simply that of a person, not bound under any pre-existing covenant to labour in preserving the "res", giving, on request and against a written undertaking to pay, services constituting salvage;

This Court, therefore, disposes of the preliminary issue in the sense of declaring that plaintiff nomine is entitled to payment on the basis of salvage, with costs against defendant; and consequently appoints Captain Arthur Messenger to report on the following points, so that the Court may have before it, in due course, all the factors which are to be taken into consideration in assessing the salvage award:—

1. What was the nature and extent of the danger to the ship and/or her crew, and/or the cargo;

2. What was the extent of the assistance given, the nature and degree of the risk run by the salvors and/or their property in the salvage service, the length of time occupied in and about the service, and the degree of labour and skill incurred and displayed by the salvors;

3. What would be a fair and reasonable amount to be awarded in respect of the salvage services;

4. What expenses were properly incurred and what damages, if any, were sustained by the salvors in the course of the salvage services;

Doctor of Laws Victor Sammut is hereby appointed to assist Captain Messenger in so far as legal formalities are concerned;

This reference is being ordered provisionally at the expense of plaintiff nomine;

Captain Messenger and Dr. Sammut are hereby empowered to hear witnesses and receive exhibits, the oath to witnesses being administered by Dr. Sammut;

The report to be verified on oath in the Registry;

This order is to be notified to Captain Messenger and Dr. Sammut, unless they accept notification otherwise;

The report is to be filed as soon as may be;

The case is put off "sine die", but may be put again on the list on a verbal request as soon as the report is filed, or for any other good reason;

The costs of this order for a reference are hereby reserved.