BRITISH COLUMBIA ADMIRALTY DISTRICT.

1921
April 26.

THE OWNER, MASTER AND CREW OF GAS BOAT THE *FREIYA*..... PLAINTIFF;

v.

THE GAS BOAT, *R.S.*..... DEFENDANT.

Shipping—Fishing Industry—Custom—Proof of—Salvage

On the 29th July last, the *R.S.*, a fishing boat chartered by and engaged in fishing for the G.C. Cannery Company went adrift in Knight Inlet, B.C.

The *Freiya* was owned by one C. and was at the time engaged in buying fish from the same Company and others and taking it to market, and claims for alleged salvage services rendered the *R.S.* when adrift as aforesaid.

The *R.S.* alleged that there existed a long established custom in these waters that all vessels engaged in the fishing industry afford to each other in the common interest and for their joint benefit voluntary and gratuitous assistance to crews and vessels in distress in any of the frequent accidents which are incidental to vessels of various descriptions engaged in that industry, and that this mutual assistance is not confined to the vessels attached to or employed in connection with the various canneries, but accidents to those which carry on independently the fishing business in its various aspects.

Held: That the above custom has been sufficiently established with reasonable certainty as being so notorious and generally acquiesced in that it may be presumed to have been known to all persons engaged in that industry who sought to inform themselves on so important a matter as it was incumbent upon them to do in working under local conditions.

2. That such a custom was in the interest of humanity and industry, was not unreasonable and could be successfully invoked in favour of the *R.S.*; and that in consequence the present action should be dismissed.

ACTION by plaintiff against defendant to recover for salvage services rendered to defendant by the plaintiff ship.

1921

THE FREIYA v. THE R.S.

Reasons for Judgment.

Martin L.J.A.

April 9th and 11th, 1921.

Case was tried before the Honourable Mr. Justice Martin, at Vancouver.

D. M. Hossie, for plaintiff.

E. C. Mayers, for defendant.

The facts are stated in the reasons for judgment.

MARTIN L. J. A. now (April 26th, 1921) delivered judgment.

This is an action for salvage of the gas fishing boat *R.S.* in Knight Inlet on the 29th of July last. The boat was chartered by the Glendale Cove Cannery Company and engaged at the time in getting fish for the cannery. The power boat *Freiya* is owned by one Carson and she was engaged at the time in buying fish from the Glendale Cannery and others and taking it to market at Seattle, or as might be. She had been at the cannery in question for some days before and after the accident of the *R.S.*, buying and loading fish from the Company and she claims an award for alleged salvage service rendered to the *R.S.* when adrift in Knight Inlet as aforesaid.

The first defence set up is one of much importance to those engaged in the fishing industry on this Pacific Coast of British Columbia, and it is that there is a long-established custom in these waters that all vessels engaged in the fishing industry afford to each other in the common interest and for their joint benefit voluntary and gratuitous assistance to crews and vessels in distress in any of the frequent accidents which are incidental to vessels of various descriptions engaged in that industry, and that this mutual assist-

1921

THE FREIYA v. THE R.S.

Reasons for Judgment.

Martin L.J.A.

ance is not confined to the vessels attached to or employed in connection with the various canneries, but accidents to those which carry on independently the fishing business in its various aspects. Obviously there cannot be anything unreasonable in such a custom as it is both in the interests of humanity and industry, but on the contrary everything is in favour of it to one at all familiar with the waters of this Province and the conditions in general under which fishing operations are carried on and so the only other aspect of the question is has the custom been sufficiently established with reasonable certainty as being so notorious and generally acquiesced in that it may be presumed to have been known to all persons engaged in that industry who sought to inform themselves on so important a matter as it was incumbent upon them to do in working under local conditions.

After careful consideration of the evidence, I am satisfied that the defendant vessel has discharged the burden imposed upon it in that respect and, indeed, it is confirmed in its submission by the evidence of Carson, the owner of the plaintiff ship, whose cross-examination upon this point was unsatisfactory and he attempted to evade it by saying that he was not sufficiently interested to inquire into the existence of such a custom, though the evidence shews that there were special reasons why he should have done so.

In *Wright* v. *Western Can. Accident Co.* (1), I decided there was a custom in Victoria in the building trade to make allowance for the extra cost occasioned by the discovery of unexpected rock encountered in excavation work, and there is a note-worth case in connection with the fishing industry which supports my view. I refer to *Noble* v. *Kennoway* (2) a decision of Lord

(1) (1914), 20 B.C.R., 321 at 328. (2) (1782), 2 Doug. 510.

1921

THE FREIYA v. THE R.S.

Reasons for Judgment.

Martin L.J.A

Mansfield relating to the Labrador Fishery, wherein it was decided that if a policy on fishing vessels in terms expressed only twenty-four hours after their arrival for the discharge of cargo, yet by the custom of Labrador Fishery the liability of the underwriters was extended to cover a period of several months, within which the cargo or part thereof was kept on board, which custom was alleged to be in accordance with the trade on that coast. The custom there was proved by witness who had never been in Labrador and it was supported by evidence given as to the similar custom in Newfoundland, where the fishing trade had long been established, though the new trade of Labrador had only been opened up since the Treaty of Paris for a period of three years. Lord Mansfield said, p. 513:

"Every underwriter is presumed to be acquainted with the practice of the trade he insures and that whether it is established or not. If he does not know it he ought to inform himself. It is no matter if the usage had only been for a year. This trade has existed and has been conducted in the same manner for three years. It is well known that the fishery is the object of the voyage and the same sort of a fishery is carried on the same way at Newfoundland. I still think the evidence on that subject was properly admitted to show the nature of the trade. The point is not analogous to a question concerning a common law custom."

The other justices concurred with Lord Mansfield, Mr. Justice Buller adding that there was sufficient evidence to support the custom "without" calling in aid the usage in the Newfoundland trade, and that he was of the opinion that such evidence was admissable in order to prove the reasonableness of the custom in Labrador.

1921

THE FREIYA v. THE R.S.

Reasons for Judgment.

Martin L.J.A.

In the case at bar, I have before me the evidence of reputable persons on the ground, who speak with reasonable certainty from their personal experience, and knowledge of these waters for many years, and I have no doubt that if it had been the *Freiya* which had the misfortune to be the victim of an accident at the time in question, she would have invoked (and successfully) in her own favour the benefit of the custom which I now decide exists in favour of the *R.S.*

Such being the view I have taken of the case, it is not strictly speaking necessary to go into the question of the alleged salvage service, or decide the nice point as to whether it should in the most favourable light be regarded as nothing more than towage, and I think it now desirable to say that if the services can be regarded as salvage, it would only be so in a technical sense, and the amount awarded would be so small that it would be difficult in the stress and in the absence of necessary evidence as to the set of the tide, to distinguish it in practice from what would be allowed as towage, in which service the *Freiya* was of the greater assistance. Upon evidence I would not find that the loss of the fish on the *Freiya* was due to the services rendered, whatever they were.

I make observations because of the objection that has been taken to the extravagant amount of the claim, viz., $6,000.00, for which the ship was arrested, and though the plaintiff's solicitor subsequently agreed to bail being given for half that amount, yet it was so extravagant and oppressive that I call attention to my observations in *Vermont S.S. Co.* v. *The Abbey Palmer* (1), and *Grand Trunk Pacific Coast SS.*

(1) [1904] 8 Ex. C.R. 462.

1921

THE FREIYA v. THE R.S.

Reasons for Judgment.

Martin L.J.A.

Co. v. *B.B.* (1), on the impropriety of that course, i.e., forcing upon owners the always onerous and sometimes impossible burden of furnishing large bail. See also *The Freedom* (2), wherein it was said: "The Court has always discouraged the instituting of suit for an excessive amount."

It follows that the action should be dismissed with costs.

Judgnemt accordingly.

(1) [1914], Mayers Admiralty Practice 544. (2) [1871] L.R. 3 A. & E. 499.