

TORONTO ADMIRALTY DISTRICT.

1892

Feb. 15.

THE GLENIFFER.

Maritime law—Salvage—Maritime lien—Possessory lien—Priority—Towage—Nature of services—Express agreement for reward—Successful result—Amount of salvage award—Costs.

A stranded vessel abandoned by the owners to the underwriters, and sold by them was saved, and was brought by the purchasers to a shipwright for repairs :

Held, that the towage of the vessel from the place where stranded to the dry dock was a salvage service.

2. Claim for use of anchor, chains, &c., used in saving vessel :

Held, a salvage service.

3. Claim for personal services not performed on vessel :

Held, not a salvage service.

4. Claim for services of tug in unsuccessful attempt to remove vessel.

Held, not a salvage service. Salvage is a reward for benefits actually conferred.

5. *Held*, maritime liens take priority of possessory liens to the extent of the value of the *res* at the time of delivery to the shipwright.

6. *Held*, following the usual rule, that not more than a moiety of the value of the *res* at the time when saved should be awarded to salvors, there being no exceptional feature except the small value of the *res*.

Costs of salvors awarded out of other moiety. Costs of arrest and sale and of bringing fund into court paid in priority to claims out of fund, in proportion to the value of the *res* at the time of delivery to the Dry Dock Company, and balance of the proceeds of sale which was not sufficient to pay claim of possessory lienholder.

THIS was an issue between Frank Jackman, Patrick McSherry, A. B. Morrison, and Joseph Jackson and the Toronto Dry Dock and Ship-Building Company (Limited), in which said Jackman, *et al.*, set up that they respectively had valid and subsisting claims for salvage services performed on the ship, *The Gleniffer*, and that their claims were entitled to rank on the proceeds of the sale of the said ship in priority to the claim of the company under a possessory lien for repairs and dockage charges.

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 of Facts.

The facts appear in the judgment.

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The issue was tried on affidavit.

Mulvey for the salvors:—

The questions to be decided are whether the services performed give maritime liens, and whether the maritime liens should rank on the proceeds of the ship in priority to the possessory lien of the shipwright.

The services performed by Jackman and Morrison give a maritime lien. (Cites *The Catherine* (1); *The London Merchant* (2); *The Princess Alice* (3); *The Reward* (4).)

The services of Morrison give a maritime lien notwithstanding the fact that they were performed under an express agreement. (Cites *The Catherine* (5); *The True Blue* (6); *The Mulgrave* (7).)

Jackson is entitled to a maritime lien for services rendered; although no immediate benefit accrued from his services, he was a party to the general successful result. (Cites *The Atlas* (8); *The Camellia* (9); *The E. U.* (10); *The Santipore* (11).)

When a ship is arrested by the marshal she is in the possession of the court, and the possessory lien is divested. (Cites *The Harmonie* (12); *Ladbroke v. Crickett* (13).)

Possession is not required to support a maritime lien. The lien travels with the *res* into the possession of whomsoever it may come. It is inchoate from the moment the claim attaches, and when carried into

(1) 12 Jur. 682.

(2) 3 Hagg. 394.

(3) 3 W. Rob. 138.

(4) 1 W. Rob. 174.

(5) 6 No. of Ca. Supp. 43.

(6) 2 W. Rob. 176.

(7) 2 Hagg. 77.

(8) Lush. 523.

(9) 9 P. D. 27.

(10) 1 Spks. 66.

(11) 1 Spks. 231.

(12) 1 W. Rob. 178.

(13) 2 T. R. 649.

effect by legal process relates to the period when it first attached. (Cites *The Bold Buccleugh*) (1).

A maritime lien is prior to a possessory lien. (Cites *The Gustaf* (2); *The Immacolata Concezione* (3); *The Acacia* (4).)

The work done by the shipwright was done on personal security. There is no maritime lien for such services. (Cites *The Heinrich Björn*) (5).

A. C. Galt, for the Toronto Dry Dock Company, after setting out the condition of the vessel when brought to the Dry Dock Company and the work which was subsequently done on her:—

When an agreement is entered into for the performance of service salvage remuneration will be refused. (Cites *Abbott on Shipping*) (6).

Salvage is a compensation allowed for services performed in rescuing a ship, and must involve skill, enterprise, and risk. (Cites *Sweet's Law Dictionary*). There was no risk or enterprise in this case, the vessel being an abandoned hulk.

A salvor is a person who performs useful services as a volunteer. When these alleged salvors entered into an agreement to perform the services, they were under a legal duty.

The services of Jackman were merely towage services, which give no maritime lien. (Cites *The Heinrich Björn*) (7).

Jackson's services gave no maritime lien. No benefit was obtained therefrom.

A maritime lien travels with the *res*, but is subsequent to any lien through which the value of the *res* is increased. (Cites *The Bold Buccleugh*) (1).

(1) 7 Moore P.C. 267.

(2) Lush. 506.

(3) 9 P.D. 37.

(4) 4 Asp. M.L. C. 254 (n).

(5) 11 App. Cas. 270.

(6) 12 ed. 547, 548, 569.

(7) 11 App. Cas. 270.

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It is the general rule of maritime law that not more than a moiety of the *res* will be awarded to salvors. (*Jones on Salvage* (1), *International Wrecking Co. v. Lobb* (2).

Mulvey in reply: The full value of the *res* was awarded in the following cases: *The William Hamilton* (3), *The Castletown* (4), *The Rutland* (5).

The amount of the salvage award is in the discretion of the court. (Cites *The Aquila*) (6).

MCDUGALL, L.J.—This is a motion before me, in the several suits brought against the above ship, to determine the priorities of the various claims. Four actions have been instituted for salvage, and one by the Toronto Dry Dock Co. for repairs. In two of the salvage cases the plaintiffs claim under an express agreement as to amount; in the other two salvage cases, the plaintiffs demand a *quantum meruit* by virtue of their alleged salvage services under the maritime lien thereby created. The ship was arrested in the salvage actions while in the possession of the plaintiffs, in action No. 10, the Toronto Dry Dock Company, who claim they are entitled to a possessory lien for the amount of their account for repairs and dock charges. The owners do not appear to the actions in this court. The Dry Dock Company, before any one had commenced an action in the Admiralty Court, had taken proceedings in the High Court of Justice, *in personam*, against the alleged owners, and have secured a judgment by default against two of the defendants in the action, named Baker, for the amount of their claim. The other defendant, Patrick McSherry, disputes their right to recover against him, on the ground that he was not an

(1) P. 88.

(2) 11 O. R. 408.

(3) 3 Hagg. 168.

(4) 5 Irish Jur. 379.

(5) 3 Irish Jur. 283.

(6) 1 C. Rob. 37.

owner of the vessel at the time she came into the hands of the Dry Dock Company for repairs. McSherry is plaintiff in action No. 6 in this court, claiming a considerable sum for alleged salvage services. All the alleged salvage services were performed before the ship came in possession of the Dry Dock Company.

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A brief history of the ship will be of value as showing the relative position of the parties. The *Gleniffer* was stranded on the shore of Lake Ontario, near Toronto, several years ago. She became a total wreck, and was abandoned by her then owners to the underwriters. These latter sold the wreck to McSherry; McSherry stripped her of her sails, rigging, chains, anchors, and practically all movable articles, leaving the hull partially under water, where she lay for a year or two. In the autumn of 1891 McSherry sold the hull and outfit removed by him to the present owners, two brothers named Baker, for the price or sum of \$400, retaining, however, possession of the outfit until the purchase money was paid. The Bakers proceeded at once to recover the hull, employing the plaintiffs in actions No. 6, 7 and 8 to aid them in their endeavours to get the vessel afloat. Their efforts were ultimately successful, and the vessel was taken by the salvors, under the direction of the owners, the Bakers, to the yard of the Dry Dock Company, where the vessel had been docked immediately on her arrival, and she was kept afloat only by the constant working of a steam-pump.

The salvage claim may be described briefly as follows :

Action No. 5—Frank Jackman, plaintiff : 67 hours' work of steam tug, at \$6 per hour.....	\$402.00
Towing scows.....	5.00
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	\$407.00
Action No. 6—Patrick McSherry, plaintiff : For use of boat, tow lines, anchors and chains, and 21 days' personal services.....	\$267.00

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	Half cost of fuel, also per express contract.....	24.00
	Ten days' use and work of steam scow and crew (not covered by any agreement as to price), at \$20.....	200.00
		\$684.00
	Less cash paid on account.....	167.00
	Leaving a balance due of.....	\$517.00
	Action No. 8—Joseph Jackson, plaintiff: Trying to pull <i>Gleniffer</i> off ground, 2½ hours with steamer <i>Eurydice</i> , under express agreement, \$50 for the first hour, and \$10 for each additional hour.....	\$65.00

These efforts were unsuccessful.

The value of the hull when delivered to the Dry Dock Company was about \$300; after the repairs made to her by the Dry Dock Company the vessel was sold by the marshal, without any outfit or sails, for \$850.

In the first place, it must be determined whether all or any of the foregoing claims are properly salvage claims or not.

McSherry's claim, in action No. 6, is for the use of the boat tackle, anchors, chains, tow-lines, tackle lines, &c., and twenty-one days' personal service, of which only three days were spent on the wreck, the remaining eighteen days being occupied in going about town, it is said, procuring and forwarding supplies. I think the services rendered were salvage services, except the eighteen days' personal services in town, which I disallow as salvage.

The claims of the plaintiff in No. 5, Frank Jackman, and of the plaintiff in No. 7, A. B. Morrison, are also clearly for salvage services. It is argued that the claim of the plaintiff Morrison, for the use of the steam pump, being under express agreement, cannot rank as a maritime lien for salvage; the express agreement either ousts the court of jurisdiction, or, if it is found to be an express agreement, it ceases to be a lien,

which is a right or privilege seldom arising, it is contended, except in the absence of an express agreement, I cannot concur in this view. The agreement does not alter the nature of the service as a salvage service, and the court will give effect to its provisions in awarding remuneration according to its terms. An agreement fixing an amount to be paid for the services, whether in writing or verbal, is legally conclusive on both parties as to the amount of the reward (1). Such an agreement must, however, be free from fraud or any taint of dishonesty or corruption, and made with a competent knowledge of all the facts (2). The proof of the alleged agreement rests with the party who sets it up, and satisfactory evidence must be given of its existence (3).

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Jackson's claim for attempting to pull the boat off, which effort was entirely unsuccessful, I do not consider a salvage service. There is no agreement shown that he was to be paid in any event. Salvage is a reward for benefits actually conferred, not for services attempted, and resulting in nothing. The exertions must in some way contribute to the successful result (4). Here there is no evidence or allegation that the service resulted in the slightest benefit whatever.

The claims made for services which I hold to be salvage, with the amounts claimed, will be as follows :—

Patrick McSherry.....	\$213
A. B. Morrison, contract.....	\$484
Less cash paid.....	167
Leaving a balance of.....	\$317
Services not under contract.....	200
Total.....	517
Jackman's claim.....	407
Total.....	<u>\$1,137</u>

(1) *The Fire Fly*, Swa. 240 ; *The True Blue*, 2 W. Robb. 177.

(2) *The Betsy*, 2 W. Robb. 170 ; *The Kingalock*, 1 Spk. 263.

(3) *The Graces*, 2 W. Robb 297 ; *The Salacia*, 2 Hagg. 265.

(4) *The Edward Hawkins*, Lush. 515.

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The value of the vessel when saved, in the hands of the salvors, and at the date of delivery to the plaintiffs, the Dry Dock Company, was \$300. This amount is the fund to be distributed unless the salvors are entitled to claim up to the added value resulting from the work done by the Dry Dock Company. Singularly enough, I can find no express decision on the point. In the cases of *The Gustaf* (1), and *Immacolata Concezione* (2), the question was not raised, it may be because the maritime liens which were in priority in these cases were small in amount, compared with the amount realized from the sale of the *res*; probably in each case below the actual value of the *res* at the time it came into the hands of the shipwright. In the case of *The Gustaf*, the vessel sold for £810, and the liens preferred to the claim of the shipwright came only to £390. In the case of *The Immacolata Concezione*, the proceeds of the sale paid into court were £2,328; wages were paid to the amount of about £500. Though that amount was not then settled, priority was given to such wages as had been earned up to the date of the ship's coming into the possession of the shipwright.

The principle laid down in the case of *The Gustaf*, and followed in the case of *The Immacolata Concezione*, was that the shipwright takes the vessel into his possession *cum onere*; i.e., with the existing obligations, then completed and done; and it would appear to me that the equitable and just meaning of taking the vessel *cum onere* would only extend to the value of the *res* at the time of its coming into the shipwright's hands. If the *res* at that time was of less value than the aggregated amount of the maritime liens attaching to the vessel, then the holders of such liens must abate their claims to the extent that their security failed them. I do not mean to say that it is always a simple

(1) Lush. 506.

(2) 9 P.D. 37.

thing to determine the value of the *res* at the time of its entering the shipwright's yard ; but it can be very closely approximated. Especially should this rule be applied to claims for salvage. In the case of such claims the court rarely allots for salvage more than a moiety of the property saved. Surely a vessel worth \$1,000 when saved, and worth \$5,000 after the shipwright has got through his work on her, though his, the shipwright's, individual claim may exceed, and usually would exceed, the selling value of the patched-up vessel, could not fairly be valued at \$5,000 for the purpose of estimating the amount to be awarded for salvage. If this rule were to prevail the salvors need only postpone suing for their claims till the shipwright has expended a large sum on the vessel, and then make a large claim for salvage, and for an award therefor far in excess of the actual value of the property so saved. I think the value of the *res* must be taken at the time she is salvaged and handed over by the salvors, and it is in reference to this value that the amount to be allotted for salvage is to be computed.

In this case I find the value of the *Gleniffer*, when handed over to the Dry Dock Company, to have been \$300, and I fix the amount of salvage at the sum of \$150, being a moiety of the value of the property saved. I do not think there were any special circumstances of danger or risk involved in the services rendered in this case which would warrant my making an award exceeding what appears to be the usual limit in cases of salvage. The only exceptional feature in the present case is the small value of the property saved ; but that, standing by itself, I do not consider as sufficiently exceptional or extraordinary to take the case out of the usual rule.

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1892 I also allow the salvors their costs, but these (in-
 THE cluding their share of the costs of arrest and sale) are
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 court are concerned. The \$150 for costs and the \$150
 Reasons allowed for salvage exhaust the full value of the *res*
 for for the full value of the *res* in the hands of the salvors at the time they delivered
 Judgment. it over to the Dry Dock Company for repairs.

The owners in this case not appearing, the salvors are awarded the full value of the property saved, because I assume that the sum which will be taxed for costs will equal, if not exceed the sum of \$150, the other moiety of the value of the *res* saved. This view protects to a just extent the possessory lien of the Dry Dock Company. They will have to pay their proportion of the costs of arrest and sale; these will be in the same proportion to the salvor's share of these costs as \$150 bear to \$300. After the payment of these costs and the money awarded to the salvors, the Dry Dock Company will be entitled to the balance of their fund in court to be applied on their claim and costs.

Judgment accordingly.