8FED.CAS.—45

Case No. 4,480.

THE EMULOUS.

[1 Sumn. 207.]

Circuit Court, D. Massachusetts. Oct. Term, 1832.

SALVAGE—DERELICT—WHAT IS SALVAGE SERVICE—CONTRACTS—COMPENSATION—HOW DETERMINED—SUBSEQUENT STORMS—APPEALS.

[1. A case of derelict can arise only when there has been an abandonment by the master and crew, without any intention of returning to the wreck.]

[Distinguished in The Boston, Case No. 1,673. Cited in Mesner v. Suffolk Bank, Id. 9,493; The John Gilpin, Id. 7,345; The H. B. Foster, Id. 6,290; The John Perkins, Id. 7,360; Cromwell v. The Island City, Id. 3,410; Harley v. 467 Bars of Railroad Iron, Id. 6,068.]

[2. Wherever services have been rendered in saving property on the sea, or wrecked on the coast of the sea, there is a salvage service in the sense of the maritime law.]

[Cited in The Centurion, Case No. 2,554; The John Gilpin, Id. 7,345; The Narragansett, Id. 10,020; The A. D. Patchin, Id. 87; The Independence, Id. 7,014; The Cheeseman v. Two Ferry-Boats, Id. 2,633; Maltby v. Steam Derrick-Boat, Id. 9,000; McMullin v. Blackburn, 59 Fed. 178.]

[3. The fact that the parties have voluntarily entered into a contract for a fixed compensation, or upon the ordinary terms of a compensation for labor and services quantum meruerunt, does not alter the character of the service as a salvage service, but only fixes the rules by which the court is to be governed in awarding the compensation.]

[Cited in The Narragansett, Case No. 10,-017; The A. D. Patchin, Id. 87; The Independence,

Id. 7,014: Collins v. The Ft. Wayne, Id. 3,012; The Camanche v. Coast Wrecking Co., 8 Wall. (75 U. S.) 477; The Silver Spray, Case No. 12,857; The Williams, Id. 17,710; The Louisa Jane, Id. 8,532; The Roanoke, 50 Fed. 577.]

[4. It is impracticable to lay down rules to govern the courts in ascertaining the proper rate of compensation, farther than to assign some general limits to its discretion in certain cases approaching nearly to the same average merit, such as cases of derelict. And in general the amount of the reward must be left largely in the discretion of the court, upon a just estimate of all the circumstances of the particular case.]

[Cited in Bearse v. 340 Pigs of Copper, Case No. 1,193; The Connemara and The Joseph Cooper, Jr., 108 U. S. 359, 2 Sup. Ct. 758; The Dupuy De Lome, 55 Fed. 95.]

[5. The circumstances entitled to most consideration in all cases are the value of the property saved, the extent of the labor and services, and the degree of merit and gallantry in accomplishing the enterprise. The latter, in an especial manner, is looked to with uncommon favor.]

[Cited in The Fairfield, 30 Fed. 702.]

[6. Contracts for salvage services are not ordinarily held obligatory by the courts of admiralty, upon the persons whose property is saved, unless the court can clearly see that no advantage has been taken of their situation, and the rate of compensation is just and reasonable.]

[Cited in The A. D. Patchin, Case No. 87; Eads v. The H. D. Bacon, Id. 4,232; Williams v. The Jenny Lind, Id. 17,723; Post v. Jones, 19 How. (60 U. S.) 160; The J. G. Paint, Case No. 7,318; The W. D. B., Id. 17,306; Harley v. 467 Bars of Railroad Iron, Id. 6,068; The Clotilda, Id. 2,–903; Brooks v. The Adirondack, 2 Fed. 393; The C. & C. Brooks, 17 Fed. 550; Chapman v. Engines of The Greenpoint, 38 Fed. 672; The Alert, 56 Fed. 724.]

[7. Persons who, on the request of the master, merely render services in assisting to get out cargo from a wrecked vessel and set her afloat, with the understanding that they are to be compensated on a basis of daily wages, cannot afterwards elect to turn their services into a higher grade, without any supervening circumstances changing either the perils or the contract.]

[8. As different minds, exercising the most enlightened discretion, will not arrive at precisely the same results, it is the disposition of the appellate courts to discourage appeals in salvage cases as mischievous and expensive. They therefore adhere to the rate of salvage allowed below, unless the evidence clearly calls for a different proportion.]

[Cited in The Camanche v. Coast Wrecking Co., 8 Wall. (75 U. S.) 479; Lubker v. The A. H. Quinby, Case No. 8,586; The Baker, 25 Fed. 773; Scott v. The City of Worcester, 45 Fed. 122.]

[9. Salvage compensation should not be increased because of subsequent storms or other contingent events which might have increased the peril, or even occasioned a total loss; and they can only enter as ingredients in the case, when they were foreseen at the time, for the purpose of showing the promptitude of the assistance, and the activity and sound judgment with which the business was conducted.]

[Approved in The Saragossa, Case No. 12,–335. Cited in The Hesper, 18 Fed. 692; The Fannie Brown, 30 Fed. 221.]

[Appeal from the district court of the United States for the district of Massachusetts.]

Libel for salvage. The district court, upon the hearing [case unreported], decreed to the libellants the sum of twelve hundred dollars; the value of the schooner and cargo saved, was ascertained to be five thousand seven hundred and twenty-two dollars and

thirty-eight cents. From this decree the claimant {Michael H. Simpson} appealed to the circuit court.

The facts, as they appeared at the trial in the district court, (and they were not materially changed by the evidence on the appeal,) were as follows: The Emulous. laden with mahogany, logwood, coffee, and hides, on homeward voyage from—to Boston, struck on a reef at "Robinson's Hole," (so called,) on Nashaun island, in the Vineyard sound, early on Wednesday morning, the 8th of February, 1832, and was so much injured, that she very soon filled with water. Immediate assistance was obtained from the shore by the captain, and the coffee, hides, provisions, and clothing were landed on that day. Anchors were carried out, and the schooner left at night nearly full of water. The next day was a stormy day, (a snow storm.) The vessel, however, was on that day hove off from the reef by the captain and his assistants, and left at five o'clock in the afternoon at anchor. She capsized during the night; and on the next morning, (the 10th,) she was found in that situation by the captain. He had previously made a contract with the owner of the sloop Hero, to tow her into Wood Hole for fifty dollars or to Edgartown for seventy-five dollars, as the captain of the Emulous should choose. On finding, however, the vessel capsized, the parties considered that contract at an end. Soon afterwards the pilot boat Superior, commanded by Captain Daggett, (the principal libellant,) came to their assistance, and in her then perilous situation, with the consent of the master of the Emulous, she was committed to his charge and superintendence, and he, together with his associates, and the master and the crew of the Hero, undertook to tow the Emulous into the port of Edgartown, which was at the distance of from twenty to twenty-five miles. After sawing off the chain cable, and disengaging the Emulous from her anchor, and securing the latter by a buoy, they proceeded to tow her across the sound to Edgartown, without attempting to right her. There is a strong current in the Sound, from three to four and a half miles an hour; and, after having towed the schooner a considerable way, she was carried back again a considerable distance by the force of the current. In the course of her towage she struck on a shoal, (the middle shoal,) and there righted. With a good deal of exertion and perseverance, and some considerable risk, during that day and the following night and a part of the next day, they succeeded in bringing her safely into the harbour of Edgartown. The vessel was there repaired, and finally came to Boston, and completed her voyage.

The original libel was filed in behalf of the masters and crews of the Superior and Hero; but it was afterwards amended by adding the claims of fourteen other persons, who, it is alleged, were employed in getting the schooner off the rocks and anchoring her, before possession was taken by the Superior and Hero.

At this term the cause was argued by Dunlap, Dist. Atty., for the libellants, and by Peabody and Webster, for the claimants.

The former cited Harrison v. Sterry {Case No. 6,144}; {Peisch v. Ware} 4 Cranch {8 U. S.} 347; 4 C. Rob. Adm. 194; Tyson v. Prior {Case No. 14,319}; Rowe v. The Brig {Id. 12,093}; 1 Dod. 421; 2 Dod. 75; 4 C. Rob. Adm. 108; 5 C. Rob. Adm. 323; 2 Parl Deb. 1688, p. 191.

The latter cited The Blaireau, 2 Cranch {6 U. S.} 240; Schutz v. The Nancy {Case No. 12,493}; Taylor v. Twenty-Five Thousand Dollars {Id. 13,807}; Abb. Shipp. (4th Am. Ed.) 433, note; St. 43, Geo. III.; Jac. Sea Laws, 530, 559, 560; 4 C. Rob. Adm. 217; 6 C. Rob. Adm. 272.

STORY, Circuit Justice. This is clearly, in my judgment a case of meritorious salvage, for which the salvors, and especially the masters and crews of the Superior and Hero are entitled to a fair recompense. It is not, as has been suggested, (rather than argued,) at the bar, a case of derelict; for that can arise only, when there has been an abandonment by the master and crew, without any intention to return to the wrecked property. Here was not only the animus revertendi, but the actual presence of the master, at the time when the salvage service was performed.

The court has been asked upon this occasion to lay down some clear and definite rule, as to what shall be deemed salvage service, and what shall be deemed a mere common contract for labor and services. I take it to be very clear, that wherever the service has been rendered in saving property on the sea, or wrecked on the coast of the sea, the service is, in the sense of the maritime law, a salvage service. If it has been rendered under circumstances, which establish, that the parties have voluntarily, and without any controlling necessity on the side of the proprietors of the property saved, or their agents, entered into a contract for a fixed compensation, or upon the ordinary terms of a compensation for labor and services quantum meruerunt; in either case, it does not alter the nature of the service, as a salvage service, but only fixes the rule by which the court is to be governed in awarding the compensation. It is still a salvage contract, and a salvage compensation. It is true, that contracts made for salvage services are not ordinarily held obligatory by the court of admiralty upon the persons, whose property is saved, unless the court can clearly see that no advantage is taken of the parties' situation, and that the rate of compensation is just and reasonable. The doctrine is founded upon principles of sound public policy, as well as upon just views of moral obligation. No system of jurisprudence, purporting to be founded upon moral, or religious, or even rational principles, could tolerate for a moment

the doctrine, that a salvor might avail himself of the calamities of others to force upon them a contract, unjust, oppressive and exorbitant; that he might turn the price of safety into the price of ruin; that he might turn an act, demanded by Christian and public duty, into a traffic of profit, which would outrage human feelings, and disgrace human justice. The salvors, who, at the request of the master of the Emulous, assisted in taking out her cargo and getting her afloat, are certainly entitled to a compensation. But their services are of a nature belonging to the lowest grade of salvage, such as may ordinarily be compensated by daily wages. They understood themselves, if we are to believe the testimony of the master of the Emulous, to enter upon the service for such a compensation; and if they did, they cannot afterwards elect to turn it into a higher grade of service, without any supervening circumstances, changing either the perils or the contract. My judgment is, that a much smaller sum will be an ample remuneration for their services.

In respect to the masters and crews of the Superior and Hero, their services commenced exactly where those of the other salvors terminated. The assistance given by them was prompt and cheerful; their labors arduous, and constant, and persevering; and, at times, not without considerable peril to life, and some hazard to their own vessels. The season of the year was that, in which the weather is usually boisterous and variable; and of course the chances of a successful termination of the enterprise, upon which alone they could entitle themselves to salvage, were proportionably more unfavorable. It has been suggested, that a different course of operations might have been better, and less hazardous. The attempt should have been made, (it is said,) to right the vessel, where she lay; and it is hinted, that perhaps a nearer port might have been reached. But it appears to me that, these suggestions ought not to have any weight in the cause. The parties appear to have acted with good faith, and reasonable skill, and sound discretion. The master himself made no complaint, and the enterprise was completely successful. Under such circumstances, it would be too much for the court to act upon mere afterthoughts and calculations, when the events are known, and other judgments at a distance from the scene of action have intervened. It is far from being certain, that any attempts to right the Emulous would have been successful. And it is certain that they must have occasioned delays, if they had been undertaken. Now, at such a season of the year, on such a coast,

delay itself is often equivalent to loss. Speed and activity in reaching a port are the means, and the only means, of safety. In this very case, if the vessel had remained out another day, there is much reason to believe, that, from the succeeding storm, she would either have been totally lost, or have suffered far more damage. It might, therefore, be truly said, that, here, prompt action was the price of safety. But I put the case upon the common ground of a fair exercise of reasonable skill and discretion; and if another course would have been (as I am not satisfied it would have been) better, I do not think, under such circumstances, it could be permitted to vary the rights of the salvors. I think, then, the salvors are entitled to a liberal salvage, not upon the narrow ground of a mere compensation for labor and services, but upon the larger policy of the maritime law, looking to merit, and effort, and peril, and the duty of encouraging assistance in cases of distress. See The Sarah, 1 C. Rob. Adm. 313, note; The William Beckford, 3 C. Rob. Adm. 355; Rowe v. The Brig [Case No. 12,093].

The question is, what would be a proper salvage under all the circumstances of the case? And here, again, the court is asked to lay down some rules, by which to guide the parties in interest, underwriters as well as owners, in the ascertainment of the proper rate of salvage. That is asking the court to do, what it is utterly impracticable to do, to lay down rules, in cases admitting of an indefinite diversity of circumstances, and endless considerations of value, of perils, of services, and of merit. The subject is necessarily one, in which the reward must depend upon a just estimate of all the circumstances of each particular case. The court may, indeed, assign some general limits to its discretion in certain classes of cases approaching nearly to the same general average merit. For instance, it may say, and indeed it has said, that generally, in cases of derelict, it will not allow more than one half of the value as salvage. But extraordinary cases of great danger and gallantry may occur, in which the court would even desert this rule. On the other hand, it may say, that it will not generally award less than one eighth, (a sum fixed by statute, as a minimum in certain cases of recapture,—salvage act of 1800 [2 Stat. 17],) unless under very peculiar circumstances. Indeed, looking to the general current of decisions, it will be found, that the courts have not commonly allowed less than one third, unless where the services have been quite inconsiderable, or the amount of the property has been very great[1] Still, this must be subject to many qualifications; and it will be found very difficult in practice to lay down any rules which, would furnish a just guide to limit the discretion of the court. The court must endeavor to work its own way through every case, upon a comprehensive survey of all the circumstances.

The circumstances entitled to most consideration in all cases of salvage are, the value of the property saved; the extent of the labor and services; and the degree of merit and gallantry in accomplishing the enterprise. The latter, in an especial manner, is looked to by the court with uncommon favor. Lord Stowell has spoken on this subject with his ac-

customed force and elegance. "The principles," says he, "on which the court of admiralty proceeds, lead to a liberal remuneration in salvage cases; for they look, not merely to the exact quantum of service performed in the case itself, but to the general interests of the navigation and commerce of the country, which are greatly protected by exertions of this nature. The fatigue, the anxiety, the determination to encounter danger, if necessary, the spirit of adventure, the skill and dexterity, which are acquired by the exercise of that spirit, all require to be taken into consideration. What enhances the pretensions of salvors most, is the actual danger which they have incurred. The value of human life is that which is, and ought to be, principally considered in the preservation of other men's property; and, if this is shown to have been hazarded, it is most highly estimated." The William Beckford, 3 C. Rob. Adm. 355. On the other hand, the value of the property saved must always form a very important ingredient, since that proportion would be a very inadequate compensation in cases of small value, which would be truly liberal in others of great value.

As the allowance of salvage necessarily rests very much in the discretion of the court, it is hardly possible, in many cases, that different courts, exercising independent judgment, should arrive at precisely the same conclusion. Each may exercise the most enlightened discretion; and yet, from the necessary differences of the human mind, they may differently adjust the salvage to the circumstances. On this account it has always been the disposition of the appellate courts of the United States, in all salvage cases, to discourage appeals, as mischievous and expensive to all parties. And, therefore, they generally adhere to the rate of salvage allowed in the court, from which the appeal is taken, unless the evidence clearly calls for a different proportion. The Sibyl, 4 Wheat. [17 U. S.] 98; Tyson v. Prior [Case No. 14,319]; The Dos Hermanos, 10 Wheat. [23 U. S.] 306. No judge has been more inclined to adhere to this doctrine than myself. Still, when the question is made, it becomes my duty to examine the case with all the just deference belonging to the judgment of others; but at the same time with some regard to the rights of the

parties in respect to my own. The allowance of the district judge in this the present case, exceeded, in a small degree, one fifth of the whole property saved. It cannot certainly be pronounced an extravagant proportion; at the same time, with reference to the value of the property, and the duration and peril of the service, it must be admitted to be large. The time employed was less than two days; the weather was not boisterous; the peril to life, if it existed in any considerable degree, was not long, nor exceedingly critical; the season of the year was unfavorable, but the voyage was in a Sound full of ports or anchorages, where assistance might, in case of necessity, be procured, or a harbour made; the vessel was upset, but the principal cargo (logwood and mahogany) was buoyant; so that there was little danger of the wreck and loss of both, unless by some severe storm. And it may be added, that numerous vessels are perpetually passing through the same Sound; so that extraordinary hazards would have been, under common circumstances, accompanied by extraordinary means of assistance. A suggestion has been made, that the storm of the succeeding day, after the arrival at Edgartown, would have very probably occasioned a total loss of the vessel and cargo, if they had not then been in port. Admitting that to be true, still it cannot constitute a material ground, in a case like the present, for enhancing the salvage. Salvage is a compensation for the rescue of the property from present, pressing, impending perils; and not for the rescue of it from possible future perils. It is a compensation for labor and services, for activity and enterprise, for courage and gallantry actually exerted, and not for the possible exercise of them, which under other circumstances might have been requisite. It is allowed, because the property is saved; not, because it might have been otherwise lost upon future contingencies. Subsequent perils and storms may enter, as an ingredient, into the case, when they were foreseen, to show the promptitude of the assistance, and the activity and sound judgment with which the business was conducted; but they can scarcely avail for any other purpose. Ought the salvage to be diminished by a favorable state of the weather after the arrival in port? If not, why should it be increased by an unfavorable state of the weather? To introduce such ingredients into the estimate of salvage, which were neither foreseen, nor acted upon, would compel the court to deliver itself over to conjectures, resting on loose probabilities, the nature and extent of which could never be measured. It would be to go off of soundings; to desert the facts; and to be guided by speculations, always questionable, and sometimes deceptive.

After weighing all the circumstances, I have with great reluctance come to the conclusion, that the decree assigns too high a rate of salvage. No person can entertain a higher respect for the sound judgment and ability of my learned brother, the district judge, than myself. Nor should I incline upon slight differences of opinion to vary his decree. But a full review of all the facts has not enabled me to arrive at the conclusion, that, consistently with my duty, I ought to affirm the decree. In the case of The William Beckford, 3 C.

Rob. Adm. 355, where the property was in great distress, and the circumstances more perilous than those of the present case, though somewhat resembling them, Lord Stowell deemed a salvage of £1,000, out of a property worth more than £17,000, to be an ample remuneration. I am not sure, that I should have arrived at a result so moderated and measured. But the decree of the district court, in the present case, has more than trebled the proportion, under circumstances, however, of greatly diminished value.

My opinion is, that eight hundred and fifty dollars, which is a little more than one seventh of the property saved, will be a liberal compensation, looking to the value of the property at hazard, and the nature of the services performed. Of this sum, I shall decree one hundred dollars to be paid to Bartemus Luce and the thirteen other persons, whose claims were brought forward by the supplemental libel, instead of the sum allowed them by the decree of the district court. The remaining sum is to be paid to the original libellants, belonging to the pilot boat Superior, and the sloop Hero; and these sums are to be apportioned and distributed among the salvors respectively, according to the distribution made by the decree of the district court. The costs of the district court are to be paid by the claimants; and the costs of this court are to be borne by the respective parties, who have incurred them. Decree altered accordingly.

[1] See the cases referred to in Abb. Shipp. (4th Am. Ed. 1829, by Story) p. 3. c. 10, pp. 397, 398, note 1; Id. p. 400, note 1; Rowe v. The Brig [supra].