THE JOHN WURTS.

Case No. 7,434.

{Olc. 462;[1] 16 Hunt Mer. Mag. 383.}

District Court, S. D. New York. Feb., 1847.

SALVAGE—AMOUNT AND KIND OF SERVICE—COMPENSATION.

1. An indispensable ingredient of a salvage claim is that the service has contributed immediately to the rescue or preservation of property in peril at sea.

{Cited in The Tolomeo, 7 Fed. 500.}

{Cited in Eads v. Brazelton, 22 Ark. 499.}

2. How far a person must he directly employed aiding the recovery of a wreck to constitute him a salvor? quere.

3. But the title of salvor arises from actual possession of property in peril, with power to save it and the actual employment of means to that end.

4. The rate of compensation is governed by no determinate rules of law. The principle sought to be enforced is to make a fair division of the salved property between its owners and the salvors.

5. In case of absolute derelict the habit of maritime courts favors an equal partition of what is saved, one moiety to the salvor, the other to the owner, after deducting the costs of suit.

This was a cause of salvage. The action was brought in the name and favor of James Curtis, master of schooner Elizabeth, for himself, the owners and crew thereof, and also for the respective owners, masters and crews of the schooners David Cromwell and the Vineyard, and the sloop Hickory, and all others entitled. The libellant Curtis alleges that he was master and part owner of the schooner Elizabeth, of 65 tons burden, having a crew of three men and a boy; that she was employed in the coasting trade to and from New-York; that the schooner David Cromwell was a vessel of 30 tons burden, with a crew of two men, and the schooner Vineyard was of 45 tons burden, with a crew of two men, all three registered at Amboy, New-Jersey; that the sloop Hickory, a small fishing vessel, with a crew composed of her master and one boy, on or about the 9th of November last, discovered a large

schooner, the John Wurts, floating on the lower or Sandy Hook Bay, bottom up, dismantled and filled with water and deserted; that the sloop not being able to tow the wreck, came to where the above-named schooners were lying, and it was agreed that they and the crew of the sloop should proceed to the wreck and tow her into port. He further alleges that various articles necessary to this purpose were immediately procured at considerable expense. He further alleges that the captains and crews of the vessels applied themselves from the afternoon of Monday until Wednesday morning upon said wreck, and for some days more, when finding it impossible, on account of the bad weather, to get said wreck into port, they employed the steamboat Telegraph to assist them; that after working all one day they succeeded in bringing the wreck to the shore at Staten Island. He further alleges that the vessel was wrecked about the 10th of September in a storm, when all hands on board perished; that she had from that time until the 9th of November, been drifting about at the mercy of the winds, and would soon have been broken and gone to pieces. He further alleges that it was with the greatest difficulty and exposure that the wreck was finally saved by libellant. Thomas Bell, Joshua and Charles Jones, owners of the schooner Excelsior, also intervened and alleged that they were entitled to salvage in said wreck, alleging that having been informed of the wreck of the John Wurts by the wreckmaster, they proceeded about the 10th of November, and found her sunk in about ten fathom water, bottom upwards; that after attempting to raise her, they were obliged to leave on account of the very bad weather; that afterwards the steamer Jacob Bell, in the employment of the agent of the owners, came and assisted in towing her; that they towed her about ten miles towards Sandy Hook; that afterwards they were informed by the owners that the owners would employ one of their own vessels to save her. They further allege that the owners being unable to save her, agreed with libellants that they would allow the one-half of the proceeds of the said John Wurts and cargo, if they would renew their efforts and bring her into port. They further allege that, in pursuance of this arrangement, they prepared themselves with a heavy chain and a large wheel cast expressly for the occasion, and employed Captain Bennett, who was experienced and skilful in raising vessels, to go with them to the wreck; that they visited the wreck, but were prevented by the weather from continuing their work. That another trip was made by the Excelsior and the schooner Union and her crew, employed by libellants, and again without success, owing to adverse winds, which increasing to a gale, drove them away, and in which the bows of the John Wurts, striking violently against the bottom, she was opened, and her cargo chiefly or wholly discharged, and she was blown off to sea. They further allege that for three or four weeks they were in active pursuit of her, but could not find her, until they saw her in New-York Bay, in the possession of the libellant, to whom they gave notice of their claim for salvage. Jesse Richards, intervening as owner, admits in his answer the wreck of the John Wurts, as alleged, and that she was found by

libellants about the 9th of November, but he is informed that she was found within the bar at Sandy Hook, and there was but little difficulty and no danger in towing her to the shore at Staten Island. He admits that she was found dismantled, bottom up and totally deserted. In answer to the claim of Joshua T. Jones, owner of the schooner Excelsior, he denies that he is entitled to salvage; that his agents entered into the following agreement with the said Jones for his services: "It is hereby agreed between Joshua T. Jones, and Warrington & Richards, that the said Jones will take the schooner John Wurts, and what cargo is on board of her, at a salvage of fifty per cent, (and to deliver her in the vicinity of Jersey City,) for saving the same, and all that has been saved by the schooner Excelsior at the same rate; and Warrington & Richards shall not be at any charge for what Captain Bell has done with the schooner Excelsior previous to this contract for the schooner nor for any materials. Warrington & Richards', Joshua T. Jones." The claimant alleges, that though frequently urged to go on with their work, and bring in the schooner, that they delayed it for other employment, for several weeks, being engaged in raising other vessels. He denies that they are entitled as co-salvors to compensation as claimed.

The original libel in this case was filed by James Curtis, for himself and others, to recover salvage compensation for saving the schooner John Wurts, and contains appropriate allegations to that end, and is substantially supported by the evidence. After the action was instituted, Joshua T. Jones and others, owners of the schooner Excelsior, by leave of the court, intervened in the suit and claimed a share of such salvage as should be awarded by the court for saving the schooner. The material facts in proof are these: The John Wurts, owned by the claimant, in New-Jersey, was wrecked in a gale on the 8th or 9th of September, a few miles below Sandy Hook, on a voyage from the North river and New-York to her home port, and all on board perished. The claimant was also owner of most of the cargo, and shortly after her loss employed the schooner Excelsior and other vessels, with a steamboat, to endeavor to save the wreck and cargo. They succeeded in raising her and towed her several miles, when she escaped from them and again sunk in ten fathoms water, her bows in the sand and her stern just out of water. All the expenses of

these proceedings were paid by the claimant, except those of the schooner Excelsior. On the 24th of September an agreement in writing was entered into between the claimant and Joshua T. Jones, managing owner of the Excelsior, that he would undertake the salvage of the vessel and cargo, and deliver them near Jersey City, for fifty per cent. on the amount saved, and that allowance should also be in full compensation of services already rendered by his vessel and crew under the employment of the claimant. About the 6th or 7th of October the Excelsior proceeded to the wreck, with apparatus prepared to raise it, and passed a large chain under its stern, but she had not force enough to move it; the chain was secured around the wreck and the Excelsior and her crew went back to the city for further assistance. They had been engaged about twelve hours in this service. On the 13th of October the Excelsior and another vessel started to go to the wreck again, but were driven off by a heavy gale of wind. The schooner is supposed to have been moved by the same gale, as a day or two after she was seen drifting to the eastward, past Fire Island, and was subsequently reported off the east end of Long Island. After a heavy blow from the eastward she was again seen drifting to the westward, past Fire Island, towards the New-Jersey shore. When information was received of this last movement of the wreck, the Excelsior was sent to Fire Island to search for it, but could discover nothing of it. The Excelsior was then engaged by her owners in another wrecking adventure near Fire Island. The Excelsior was after that further dispatched to New-York Bay in search of the schooner, but without success. The agent of the claimant, after the agreement of September 24th, repeatedly urged Jones to pursue with promptitude the undertaking to raise the wreck. Jones, at the time of the agreement, declared he should be able to complete the salvage in two days, and ten days or more after this agreement he excused himself when pressed on the subject—the weather being particularly fine and favorable—by saying he was engaged in other business, or had arrangements to make before going to the wreck. On the 9th of November, the libellants, Curtis and others, fell in with the schooner, grounded on the Great Kill shoals in Sandy Hook Bay, bottom upwards, filled with water, her bows bilged, her rigging and masts all gone, the principal part of her cargo out, and her bulwarks and stanchions mostly carried away. Immediate and active exertions were applied to saving her; and by aid of several small vessels, with chains and other appropriate apparatus, and a steamboat to tow her, she was got off the shore and moved towards Amboy, but grounded several times before she could be got to Staten Island. A good deal of difficulty and some danger was incurred in keeping her afloat. The weather was thick, cold and severe, and nearly a fortnight was occupied constantly by all the libellants and their vessels before the salvage was accomplished—at times the crews being kept at work all night. They were compelled to float her bottom upwards and stern foremost, at great disadvantage and risk, and to the hazard of her turning over on the small vessels supporting her and crushing them. The ordinary incidents of breaking

chains in securing and saving her, and injuries to the vessels employed, were experienced. The wreck sold for about $1,300, and the fragments of her cargo remaining with her for about $50.

J. C. Hart, for libellants, Curtis and others. Burr & Benedict, for Jones and his associates.

J. M. Mason, for claimants.

BETTS, District Judge. Upon the facts in this case the claim of Jones and owners of the Excelsior to salvage cannot be allowed. It lacks the indispensable ingredient of a salvage service: that of having contributed immediately to the preservation or rescue of the property in peril at sea. The circumstances in proof do not demand of the court a decision upon the point, how far a person must be directly employed aiding the recovery of a wreck to constitute him a salvor. Nor am I disposed to lay down the rule that he must make it certain the property was saved by his assistance; but I am not aware of any principle which invests him with the rights and privileges of a salvor, until it is rendered reasonably probable upon the evidence that his labor or skill have contributed towards protecting property exposed to instant peril at sea from ultimate loss or further damage. An impression seems to have obtained, that one who finds derelict property under water or afloat, acquires a right to it by discovery, which can be maintained by a kind of continued claim, without keeping it in possession or applying constant exertions for its preservation and rescue. There is no foundation for such notion.

The right of a salvor results from the fact that he has held in actual possession or has kept near what was lost or abandoned by the owner or placed in dangerous exposure to destruction, with the means at command to preserve and save it, and that he is actually employing those means to that end. The finder thus becomes the legal possessor, and acquires a privilege against the property for his salvage services which takes precedence of all other title. Lewis v. The Elizabeth & Jane {Case No. 8,321}; The Bee {Id. 1,219}; Wilkie v. Two Hundred and Five Boxes of Sugar {Id. 17,662}. The law will protect him against all interference by others, even the true owners, until he is adequately rewarded or opportunity is allowed to bring the property to a place of safety, and have his compensation secured him by the judgment

of the proper tribunals. The fact that property is found at sea or on the coast in peril, without the presence of any one to protect it, gives the finder a right to take it in his possession; and the law connects with such right the obligation to use the means he has at control, and with all reasonable promptitude, to save it for the owner. He can therefore be no otherwise clothed with the character of salvor than whilst he is in the occupancy of the property, and employing the necessary means for saving it. Notorious possession, with the avowal of the object of such possession, are cardinal requisites to the creation or maintenance of the privileges of a salvor; where they do not exist, any other person may take the property with all the advantages of the first finder.

This is the clear policy of the law. It rewards with liberal generosity a meritorious salvor, but counts first in the order of his meritorious acts a prompt use of sufficient means, both in getting at property needing relief and abiding with it until its salvage is completed. The value of his services is enhanced and their compensation augmented proportionally to the danger and loss to the salvor accompanying such exertions and their benefit to the owner. No one of these cardinal qualities appears in support of this claim. The most that is proved in favor of the owners of the Excelsior is, that being in port after having left the wreck, they directed apparatus to be prepared here to aid in raising it. A fortnight or three weeks were consumed awaiting such preparations, the wreck in the mean time being left deserted, with the exception that the Excelsior and crew were once alongside of it for about twelve hours. Under those circumstances, any other persons going to the wreck and effecting its saving would have been entitled to the rights of sole salvors. The claim becomes infinitely weaker, when set up after the wreck had been forced from the place where it grounded, and was driven by the winds and waves for nearly a month to and fro out at sea, and along the coasts. I accordingly pronounce against the claim of the owners of the Excelsior, and only refrain imposing costs on them because of the loss and expense incurred by them in making their preparations and efforts, amounting to $120 or $130, independent of the time employed by the Excelsior and her crew in their fruitless efforts. If they have any right to compensation for services rendered prior to the written agreement, it cannot be enforced in this action. They must look to the owner personally on his contract with them. The right of the other libellants to a reasonable reward is not denied by the owner; but he seeks by his defense to prove that one or two hundred dollars would be a full compensation for the time occupied and assistance given by the libellants on the occasion.

It is unnecessary to repeat the principles entering into the determination of a salvage reward; they have been too often discussed and stated in the decisions of maritime courts to leave any important illustration of the doctrines unexplained. There can be no doubt of the rightful authority of the court to regulate the award of compensation very much at discretion; but all judicial tribunals find fixed rules of adjudication, when at all applicable to

the subject, more useful and satisfactory in operation than mere discretionary allowances, however discreetly they may be allotted. Tyson v. Prior [Case No. 14,319]. Accordingly, maritime courts, when not governed by positive law in this respect, have, by a kind of common concurrence, favored an allowance, if in cases of derelict, of from one-third to three-quarters of the salved property to the salvors, varying the amount between these points by regard to the special nature of the services, the peril and toil incurred and value of property saved, and hazard to property employed in making the salvage. The Jubilee, 3 Hagg. Adm. 43, note; Abb. Shipp. (Story's Ed. 1829) p. 398. The growing preference, however, to determinate rules of compensation in salvage cases, has so far settled upon a moiety as the proper rate of division in cases of absolute derelict, that it may almost be termed the habit of courts to give that proportion when no imperative consideration induces them to deviate from it. The Henry Ewbank [Case No. 6,376]; Bond v. The Cora [Id. 1,620]. The extraordinary merit of the services may augment the share awarded, or the large value of the property saved diminish the allowance. No sagacity could hope to select a fixed amount, which would in every instance be an appropriate compensation. A moiety, however, approximates sufficiently near to accomplish most of the important benefits which salvage rewards were designed to subserve, comprehending the general interest of maritime commerce and a reasonable partition of the imperiled property between the owner and the party instrumental in recovering and restoring it. Courts accordingly are inclined to countenance that method of fixing the reward, unless special circumstances call for a discriminating valuation. The Waterloo [Id. 17,257]; The Galaxy [Id. 5,186]. I think none such exists in this case, nor on a careful estimate of the services rendered, with a view to the small value of the property saved, and the probability that little or nothing could be realized from the adventure and the actual benefit to the owner, do I regard six or seven hundred dollars a disproportionate compensation to be specifically awarded the libellants for what was performed by them.

I therefore decree in their favor the costs of suit, first to be paid out of the proceeds in court, and then, that they receive the moiety of the residue for the salvage services rendered in this case. Unless the mode of distribution between the libellants is adjusted

amongst themselves, it must be referred to a commissioner to ascertain and report the proportion payable to each, and to each vessel employed in rendering the salvage service.

[1] {Reported by Edward R. Olcott, Esq.}