

1919
June 23.

TORONTO ADMIRALTY DISTRICT.

THE OWNERS, MASTER AND CREW OF THE
STEAMER "KEYVIVE",

PLAINTIFFS;

v.

THE TUG "S. O. DIXON" AND THE BARGES
"LOUISA" AND "IDLEWILD" AND THEIR
CARGOES AND FREIGHT,

DEFENDANTS.

Salvage—Towage—Costs.

When about twenty miles out from Kingston the sole engineer on the tug "Dixon", towing two barges, fell overboard and was lost. He was the only one on board who knew anything about engines and the tug was, in consequence, without means of keeping up motive power. She was drifting and was in a position of actual or apprehended danger, and was signalling for help, when the "Keyvive", with some risks to herself, took them in tow and brought them to safety.

Held, 1, That the claim arising thereunder was one of salvage and not merely of towage.

2. That the act of plaintiff in claiming an excessive amount and having the ship arrested therefor was oppressive, and costs relative to the arrest and release on bail, and applications relative thereto, will not be allowed him.

THIS was an action for salvage by the plaintiffs against the ship "S. O. Dixon", and certain barges in tow, all of which were arrested with their cargoes and freight and afterwards released on bail.

The facts of the case are set out in the reasons for judgment below.

The hearing took place at the City Hall, Toronto, on April 28, 1919, and was partially proceeded with, and was concluded on June 23, 1919, when Mr. Justice Hodgins, L.J.A., delivered the following judg-

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ment, determining the nature of the claim made, and reserving judgment as to the amount.

Francis King, for plaintiffs.

H. W. Shapley, for defendants.

MR. JUSTICE HODGINS, L.J.A. (June 23, 1919) delivered judgment.

The claim in this case is for salvage, which, as originally stated, was estimated at \$50,000, but that amount, I am informed, was based upon erroneous information as to the value of the cargoes and was not asked after October 11, 1918. This date was before the statement of claim was filed. I presume however, that it had considerable bearing on the amount fixed for bail, but no argument has been addressed to me with regard to any unfair features in the fixing of the original amount of bail beyond the fact that it was based on a much larger sum than is now contended for.

This vessel "Keyvive" is a comparatively new steamer worth about one-half million dollars, possibly three-quarters of a million dollars, and was, during the year 1918, engaged in transporting coal from Lake Erie ports to Montreal; she is 1,044 tons registered tonnage, has triple expansion engines and was built in 1913. She carries a crew of twenty-one men, a first and second mate, a chief and assistant engineer. On September 15, 1918, when she was upbound from Montreal, light, her master observed on the starboard bow the tug "Dixon" and the two barges "Louisa" and "Idlewild", which were in the position shown on the chart, 1, something like 20 miles away from Kingston and north of a line drawn from the main Duck light to the false Duck light. The "Keyvive" answered the signals of distress and at the request of the captain of the tug,

took the three vessels in tow and towed them into Kingston.

The case was argued by the defendants on the basis that it involved only a simple towage claim, and on the part of the plaintiffs that it was really a salvage claim and should be allowed for as such. The evidence shows that the situation of the three vessels, the tug and the 2 barges, which were drifting in Lake Ontario in the position I have mentioned, was brought about by the fact that the engineer of the tug had fallen overboard, and being the only one among all those on the vessels who knew anything about engines they were without any means of keeping up their motive power. Mr. Kerr says they pulled fires and couldn't start again without obtaining a new engineer. The "Louisa's" gas engine was also disabled, or rather useless, because the line of the "Dixon" had got entangled in her propeller, and altogether they were at a stand-still, the statement being made that they couldn't cut the rope, which had wound around the wheel of the "Louisa", on account of the wind at that time.

Now, these three vessels, the tug and the two barges, were on a commercial enterprise, the two barges carrying molasses, but the tug itself was not such a valuable vessel, apparently not being a lake tug. On the evidence she is worth about eight thousand dollars. The "Louisa" was apparently quite an old barge, a wooden barge. The "Idlewild" was an A1 iron boat. They were both loaded with molasses, and the value of the cargoes, as stated, amounts, on the "Idlewild", plus freight to Belleville, to \$15,568.58, and on the "Louisa", including freight to Belleville, to \$7,317.48, in all, nearly \$23,000.

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The situation on the morning of September 15, 1918, was not very serious when the vessels were sighted, the velocity of the wind, as given by the meteorological office, based on Kingston, was estimated, for the vicinity of Duck Island, at 8.00 a.m., southwest five miles, and at 10.00 a.m., southeast eight miles. The wind, however, was from a southerly direction, which would be the dangerous wind in that locality, and it was increasing, and did increase, as a matter of fact, through that day, so that at the Ducks at 5.00 p.m., it was blowing 17 miles southeast, and at 6.00 p.m., 24 miles southeast, and, from the meteorological office records, this appears to be the same velocity as occurred at Kingston at the same hour. It was suggested that it would be blowing harder there than in Kingston, but this was not shown on the meteorological chart.

The vessels were making, at the time they were sighted, distress signals. The tug whistled four times, which indicates that assistance is wanted; the "Idlewild" had a United States flag hoisted upside down, which is a distress signal, and signals were being made from the "Louisa" with tablecloths or bed blankets, all these being explained to me as distress signals.

Previous to the "Keyvive" coming up, and according to Daniel Ludwig, who was in charge of the entire fleet of the Sugar Products Company, which owns and controls the three vessels, another vessel had passed but had declined to answer their signals and tow them. This was between eight and half-past eight in the morning. I am rather impressed with the fact that under the conditions which then existed and in view of their previous request which had been declined, the persistence of the men on these three vessels in signalling for assistance is a very import-

ant fact in determining whether there was or was not any danger either present or impending.

It must be remembered that the barges had had a collision in Lake Ontario, and the cargo in one of the vessels was said to be fermenting. The cargoes were valuable, they were near their place of destination and being undoubtedly off shore, might, if allowed to drift on, and the weather became worse and the wind increased, be in a very considerable difficulty. It is quite true that the vessels could have anchored, but that in itself is not safety, and I cannot help thinking that those three vessels, which were completely helpless, with valuable cargoes and with a number of men on board, were in a position of danger at that time, an impending danger, and that their desire to be rescued was genuine. I think some importance should be attached to the fact that this vessel, the "Keyvive", was under a time contract, was earning a large amount of money, that it was up-bound for the purpose of getting its cargo and was not likely to turn aside to undertake the towing of these three vessels into harbor unless there had been in the mind of the captain an apprehension that these vessels were in danger. The fact that the vessels were where they were stated to be, and were anxious for help, notwithstanding the evidence given by the men on the defendants' side that they had a fine chance of drifting into excellent ground to anchor, would indicate that they were not at that time quite so sure about their being in safety as they now appear in the witness box to be. The "Louisa" had been damaged through the collision; some of the planks at the stem had started and it is not unreasonable to conclude that this was an element in making them prefer to be towed into the dock instead of having to spend the day and possibly the night at

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anchor, with the wind increasing. There must be some weight given to the evidence that there was a danger of it growing worse, although I cannot accept the ideas of those who suggest that at that time it had become nearly a hurricane. However, I think that there was a chance of danger. There was no motive power at all; the anchoring which they say would have made them safe was not resorted to; they didn't wait to drift in to a position safe to anchor but preferred to call for assistance and if they had gone ashore one of the barges might have gone to pieces. Under all the circumstances this should be considered upon the basis of a salvage claim in the sense that there was danger, apprehended danger at all events which might be very real apprehended danger of these vessels and their crews and that the "Keyvive" undertook the work under the belief that they were in danger and at some risk to herself.

I agree with the argument that has been made that a vessel, of this size, 260 feet long, and with the engines at the stern, a steel vessel, having to undertake to gather up and tow in waters that were somewhat confined a tug and 2 barges, all of them unable to help themselves would mean fairly good seamanship and might very easily have resulted in an injury to the salving vessel.

I therefore, pronounce in favour of the plaintiffs that the claim is a proper salvage claim and they are entitled to recover upon that basis. As to the amount, I have heard argument upon that now and I shall have to consider it a little further and work it out more in detail before stating the exact amount, and I will in a day or two, I hope, be able to hand out the result to the litigants.

HODGINS, L.J.A. (June 25, 1919) delivered further judgment.

The amount of salvage remains to be fixed. The value of the vessels and cargoes involved are large while the actual services rendered proved comparatively easy of accomplishment and were carried out without accident. The danger to which the salvaged vessels and cargoes were exposed, though real, was largely an apprehended one and fortunately did not develop any evil consequences. The services were skilfully and smartly rendered without causing any damage to the salvors.

A claim is made that by reason of the operation the "Keyvive" was delayed, and being under contract to carry coal from Lake Erie ports, lost her turn into Cleveland and under the spout at Toledo. This delay, though not long, is carried into the account as showing why further delay caused by a break in the Soulanges Canal on October 14 should be charged up to the defendants. I am unable to follow out this chain of causation. It takes apparently only 4 or 5 days to make the trip and there are lay days in Montreal and Toledo to be explained before it is possible to prove that this deviation was the sole cause of the vessel being at the Soulanges Canal so as to be held up on October 14 by the break.

Mr. Waller, the defendants' marine superintendent admits that unless the trips planned, which were interrupted by the salvage operation had occurred exactly as intended and without incident or accident, their claim for delay cannot be sustained although he is very positive that nothing would or could have prevented the ship completing the trips on schedule time. To my mind the margin is too close to allow damages upon, as claimed, even if they were not too

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remote, as I think they are. All I can allow is the value of the salvage, including the actual delay which it caused, coupled with a reasonable allowance for the actual dislocation of the schedule at a busy time of the year.

The plaintiff vessel was earning, net, about \$200 per day under the five year contract. She could earn, it was said, much more if free from that. The fair value of the tug and of the two barges is, I think, \$55,000, and the cargoes and freight \$22,985. The value of the "Keyvive" is over half a million dollars.

The allowance which I think can fairly be made in this matter should not exceed \$2,500. \$200 should be apportioned to the master and \$300 to the crew according to their ratings and the balance to the owners of the "Keyvive". The claim originally made was for \$50,000 and vessels were arrested for that sum.

The demand was not modified until October 11, 1918, nearly a month afterwards.

I think the making of this claim and the arrest therefor, were oppressive, and while I give the plaintiffs the general costs of the action, these will not include therein any costs relative to the arrest and release on bail or any applications relative thereto.

Judgment will therefore be entered for the plaintiff for \$2,500, off which \$200 will be apportioned to the master and \$300 to the crew, with costs of action except as above mentioned.

Judgment accordingly.

Solicitors for plaintiff: *King & Smythe.*

Solicitors for defendants: *Osler, Hoskin & Harcourt.*