1922
January 7.

EXCHEQUER COURT OF CANADA IN ADMIRALTY
ON APPEAL FROM THE BRITISH COLUMBIA
ADMIRALTY DISTRICT.

BETWEEN

THE OWNER, MASTER AND CREW OF GAS BOAT *FREIYA* (PLAINTIFFS)..... } APPELLANTS;

AND

GAS BOAT *R.S.* (DEFENDANT)..... RESPONDENT.

Shipping—Salvage services—Custom and local usage—Ignorance of custom—Reasonableness, thereof.

In the defendant's plea to an action for salvage services, it was alleged that it is the custom amongst those engaged in the cannery and fishing business in certain parts of the British Columbia coast, to render reciprocal services to each other in times of need without thereby creating any obligation on the part of the party to whom such services are rendered either by way of salvage or as a contractual liability.

Held: (Reversing the judgment of the Local Judge in Admiralty for the British Columbia Admiralty District), that, even if the alleged usage or custom was valid and binding between cannery people and people engaged in fishing, it did not extend to persons who did not fish but limited their business and avocation to buying fish; nor could it operate to the detriment of the positive rights enjoyed by those outside the class of cannery people and people engaged in fishing.

2. A local usage or custom need not have existed from time immemorial, yet it must be notorious, certain and above all things reasonable, and it must not offend against the intention of any legislative enactment. *Nelson* v. *Dahl* (1879) 12 Ch. D. 568; and *Devonald* v. *Rosser & Sons* (1906) 2 K.B. 728 referred to.

3. That the plaintiff in this case having been ignorant of such usage, and not coming within its reasonable application, he could not be assumed to have acquiesced in it.

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APPEAL from the judgment of the Local Judge in Admiralty of the British Columbia Admiralty District (1).

October 27th, 1921.

Appeal heard before the Honourable Mr. Justice AUDETTE at Vancouver.

D. A. McDonald, K.C., E. A. Bennett, for appellants.

E. C. Mayers, for respondent.

The questions of law involved and the facts are stated in the reasons for judgment.

AUDETTE J. now (this 7th day of January, 1922) delivered judgment.

This is an appeal from the judgment of the Local Judge of the British Columbia Admiralty District, pronounced on the 26th April, 1921, dismissing the plaintiffs' action.

On the afternoon of the 28th July, 1920, while Mr. Matthews, the manager of the Anglo-British Columbia Packing Company, was travelling on board the *Fir Leaf*, on his way to the cannery at Glendale Cove, he "sighted the gas boat *R.S.*, sunk and submerged, with just simply a part of the pilot-house showing and the mast, with a big seine, floating around which prevented them from getting alongside of her. There was a very bad west wind blowing at the time and the sea was very choppy." He then decided to go to the cannery to get some gear and salve the boat, and on his way kept looking on the beach for the crew who had necessarily left this submerged craft. The *Fir*

(1) See page 87 ante.

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Leaf found part of the crew, took three of them on board, leaving two on the beach to watch the *R.S.*, which they did until it got dark. Three of them had already started for the cannery in a small skiff and she picked them up on her way.

The *R.S.* at the time was, as shewn by exhibit 2, under charter for a period of thirty-five days to the Glendale Cannery for fishing purposes.

When the *Fir Leaf* arrived at the Glendale Cove, and while proceeding to load the necessary gear, including the taking of a scow and winch, they related all about the mishap and condition of the *R.S.*, and Mr. Matthews sent the night boss for Matthew Wilson, the skipper of the *Freiya*, which was lying at the cannery wharf, having been there engaged for three or four days in loading fish purchased from the cannery. Wilson came to the wharf at Mr. Matthew's request, and becoming acquainted with all the circumstances of the mishap of the *R.S.* asked Mr. Matthew (who was much concerned about losing his seine, says witness Ford) if he wanted his services and Mr. Matthew answered "yes," and said he thought two boats were better than one and Wilson pulled off on board the *Freiya* at about 9.30 p.m., whilst the *Fir Leaf* followed about half an hour afterwards, both in search of the sunk and submerged *R.S.*

At the time they left the cannery it was blowing heavy from the west and it *fined away* at about 2 o'clock in the morning.

After steaming full speed all night, from 9.30 o'clock on the evening of the 28th, the *Freiya* between 5.30 and 6 o'clock a.m. of the 29th found the *R.S.* She was all under, submerged, only just about one foot of her pilot house and the mast out, with the seine net all the way around her, impossible to get alongisde

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of her with their boat on account of this 300 fathoms of seine around her. The *R.S.* was lying under water at an angle of about 45 degrees to the port side, with nobody on board.

The *Freiya* lowered a small boat and the captain, accompanied by one of his crew, made a line fast on her and proceeded to tow and after towing for some little time, the seine strung out straight behind the *R.S.* That was the state of things when the *Fir Leaf* came to them at between 6.30 to 6.45 or 7 o'clock on the morning of the 29th.

Witness Matthews testified that, at 6 o'clock in the morning Captain Jackson came to him and said he thought the *R.S.* "*had gone,*" was lost; but on his advice they went to look for her in Hoeya Sound and when coming out, rounding Boulder Point, they sighted the *Freiya* at a distance of 2½ to 3 miles.

They proceeded towards them and after circling around they succeeded in picking up the seine and hauling it on board the scow. They then moved the scow alongside of the *R.S.* and stretched the derrick wire to the step of the mast, but it parted. Then both with the scow and their boat they placed the *R.S.* in what they called crutches, and the *Fir Leaf*, after that tried her power, but she had to stop it as she was thereby driving the *R.S.* under water.

From that time on the *Freiya* towed the whole gathering, that is the *R.S.*, the scow and the *Fir Leaf* to Glendale Cove, arriving there at about one o'clock, p.m. For such services the *Freiya* claimed the sum of $6,000.

To this claim the defendant sets up, *inter alia*, a denial of any salvage services and in the alternative says that "it is the custom amongst *those engaged in*

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the cannery and fishing business of the coast, and in the inlets of British Columbia for the various *fishing boats, cannery tenders*, etc., and their masters and crews to render reciprocal services to each other in times of need without thereby creating or intending to create any obligation on the part of the party to whom such services are rendered either by way of salvage or as a contractual liability." And in further alternative, the defendant paid into court and tendered to the plaintiffs for their services the sum of $250, reserving the question of costs and submitting that such tender was sufficient.

The evidence spread upon the record by the defendant upon this alleged custom is composed of the testimony of one John MacMillan, a perfectly disinterested witness, and that of witnesses Walker and Matthews, two managers of the Anglo-British Columbia Packing Company in question and which held the *R.S.* under charter, at the time of the accident.

Witness MacMillan limits that custom to cannery tenders and cannery boats, and adds that it does not mean the salvors would not be entitled to claim, but that it is not the custom to claim. He further says that (p. 83) the custom does not apply to outside people who have nothing to do with the cannery people, strangers, owners of separate boats, and who (p. 84) have nothing to do with fishing business. And by "outside people" (p. 84) he says he understands people who are not interested with the canneries, that is those who are not chartered—whose boats are not chartered to the canneries and which are not owned by the canneries, but are independent of the cannery people. The custom is confined to cannery owners and those engaged in *fishing* business—it is restricted to the *fishing* business.

Witness Walker states it has been the custom of all canneries and any one interested in the fishing business, and *"interested"* means *engaged* in the fishing business, to abide by this custom. There is no difference between vessels owned *by the cannery companies or chartered by them,* or in their employ by *fishermen attached* to them. Adding: (p. 92) that is: fishing vessels which are attached to one cannery during the season will give mutual assistance to all other vessels gratuitously. In the course of his examination by counsel for the plaintiffs, he is asked:—

"Q. Suppose he was not a neighbour, but travelling up the *coast buying fish,* and he drops into a cannery which suits him best, would you consider him bound by that custom? A. *Well no.* I wouldn't consider any one bound, it is just—I am simply *giving the feeling of the cannery*—of the fishing people as a rule.

"Q. But you don't know of any instance where a man such as I have described, who wasn't under any contract with the cannery. A. We have been blessed with fish buyers *in the last year or so,* but that hasn't come under my ruling.

"Q. Yes—but would you say they were within this custom or not? A. I wouldn't say at all. I couldn't say."

Yet, when this witness ceases to be examined on behalf of the plaintiffs and falls into the able hands of counsel for the defence, he answers the following *leading question,* in direct contradiction of what precedes, viz.:—"Q. So that the man who did travel in that way from cannery to cannery buying fish is—in substance, would be within the area of the custom that you have mentioned? A. Yes, he would."

In the result this witness swears black and white. He has, however, laid the premises for the answer he first gave and not for the second answer.

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Passing now to the evidence, upon this subject of custom, of witness Matthews, another manager of the same company interested as having the *R.S.* under charter, again answering briefly another leading question—which always has a tendency to impair the value of the answer given by the witness, viz.:—

"Q. You agree, do you, that the custom as far as you have known of it during your 12 years experience includes all those who are in any way connected with the industry, the fishing industry of the province. A. I do, yes."

And that is all the evidence adduced in support of such alleged custom.

The place and function of "Custom" are elementary matters in the law and need not be discussed at any length here. But it will serve the interests of clarity in arriving at the grounds of my judgment, to state the distinction between "custom" proper and "local usage." Coke, C. J. in *Rowles* v. *Mason* (1), quaintly says:—

"Prescription and custom are brothers and ought to have the same age, and reason ought to be the father and congruence the mother, and use the nurse, and time out of memory to fortify them both." That observation is of course confined to "Customs" proper. However, there is no pretention in the case before the court that the usage or understanding in question here amounts to a custom that has existed from time immemorial, or that it has been built into the common law by judicial decision. At best it is only a local usage, but taking it at that, while the alleged usage need not have existed from time immemorial, yet it must be *notorious, certain,* and above all things *reason-*

(1) [1612] 2 Brownl. 192.

able, and it must not offend against the intention of any legislative enactment. See per Jessel, M. R. in *Nelson* v. *Dahl* (1), and per Farwell, L. J. in *Devonald* v. *Rosser & Sons* (2).

In *Dashwood* v. *Magniac* (3) Kay, L. J. speaks of custom and usage as follows:—"A great deal has been said in argument for the defendants about 'custom;' but, in my opinion, the word has been strangely misused. A custom which controls the law of waste must be a custom to do that which would be waste but for the custom. Waste in law is destruction of a part of the inheritance by a limited owner, such as a tenant for life or years. The custom which would exonerate him from the consequences must be a custom for a limited owner to do the act in question without being subject to any legal liability.

Littleton, in sect. 169, states that "a custome, used upon a certaine reasonable cause, depriveth the common law," and in sect. 170, "and note that no custome is to be allowed, but such custome as hath been used by title of prescription, that is to say, from time out of minde." Coke's Commentary confirms this statement of the law, quoting *Consuetudo praescripta et legitima vincit legem:* Co. Litt. (Page 113 a.).

"But this must not be confounded with such customs or rather usages as are imported into commercial contracts, or into contracts between landlord and tenant, as in *Wigglesworth* v. *Dallison* (4). In that case an immemorial or prescriptive custom was pleaded; but other authorities have recognized that evidence of immemorial usage in such cases is not required; (see per Mr. Justice Blackburn in *Crouch*

(1) [1879] 12 Ch.D. 568 at p. 575.
(2) [1906] 2 K.B. 728 at 743.
(3) [1891] 3 Ch.D. 306 at 370.
(4) [1779] I-II Doug. 201.

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v. *Crédit Foncier of England* (1), and *Tucker* v. *Linger* (2). But such usage, however extensive, would not prevail against positive law, whether by statute or decision; per Chief Justice Cockburn, in *Goodwin* v. *Robarts* (3)."

Every usage must have acquired, such notoriety in the business or amongst the class of persons affected by it that any person in that business, or amongst that class, who enters into a contract affected by the usage, must be assumed to have intended that the usage should form part of the contract. See *R.* v. *Stoke-upon-Trent* (4); and re *Goetz, Jonas & Co., ex parte the Trustee* (5); *Holderness* v. *Collinson* (6).

No one who is ignorant of an alleged usage can be bound by it if it appears to be unreasonable, and he can only be assumed to have acquiesced in a reasonable usage. *Neilson* v. *James* (7); *Scott* v. *Irving* (8).

In the case before the Court, the party against whom the alleged custom is asserted cannot be bound by any assumption or inference that he acquiesced in it when entering upon the salvage service. On the contrary, Captain Carson, the owner of the *Freiya*, swears positively that he had never heard of any custom of waiving salvage.

No usage can prevail if it be directly opposed to statute law. To give effect to a usage which involves a defiance of positive law would be to subvert fundamental principle. *Goodwin* v. *Robarts* (9); *Neilson* v. *James, ubi supra,* at p. 551.

(1) [1873] L.R.8 Q.B.374 at p. 386.
(2) [1882] 21 Ch.D.18; 8 App. Cas. 508.
(3) [1875] L.R. 10 Ex. 337.
(4) [1843] 5 Q.B. 303.
(5) [1898] 1 Q.B.D. 787.
(6) [1827] 7 B. & C. 212 at 216.
(7) [1882] 9 Q.B.D. 546 at 552.
(8) [1830] 1 B. & Ad. 605 at 612.
(9) [1875] L.R. 10 Ex. 337.

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Having said so much and approaching the consideration of the question in the light of these elementary principles I am led to find that the custom in question or usage applied only to cannery people and the people engaged in fishing, and not to persons, who did not fish but only limited their business and avocation to buying fish. Are we to include all merchants buying and selling fish, in or outside cities, into this custom because they own vessels engaged in buying fish for them, and which they afterwards sell to wholesalers? Could they thereby become bound by this alleged understanding among the cannery and fishing people—people actually engaged in fishing? Stating the case is answering it. Our city fruit dealers are not fruit growers. Our city fish merchants are not people engaged in fishing.

The plaintiffs, under the evidence submitted do not come within the ambit of this alleged custom. The defendant has failed to prove the custom could apply to a person engaged exclusively in buying fish, and who was not engaged in actual catching or canning fish. This custom cannot be imposed upon outsiders who are not engaged in either the business of fishing or cannery.

A general understanding, or custom, such as alleged cannot be extended beyond what the evidence *clearly* shows to be the limits of its sphere, and beyond what cogent evidence shows to have been the originating principle giving rise to the same. It may be that a custom or usage of the sort might have arisen among cannery and fishing people—distinguished as a class by themselves—as a policy or measure of *local* co-operation between members of the class. But what might be valid and binding as between them, could not operate to the detriment of positive rights enjoyed by people outside of the class.

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Sec. 759 of the Canada Shipping Act (R.S.C., ch. 113) reads as follows:—

"759. When, within the limits of Canada, any vessel is *wrecked*, abandoned, stranded or in *distress*, and services are rendered by any person in assisting such vessel or in saving any wreck, there shall be payable to the salvor by the *owner* of such vessel or wreck, as the case may be, a reasonable amount of salvage including expenses properly incurred."

(See also sec. 827 thereof).

In the view I have taken of the case, upon the evidence submitted, it becomes unnecessary to decide whether or not a custom such as alleged, being in clear derogation of the statute, could claim any validity and could be enforced in a court of law. See *Girdlestone* v. *O'Reilly* (1); *Darling et al* v. *B. T. Hitchcock et al* (2); *Cossman* v. *West* (3); *Neilson* v. *James* (*ubi supra*); *Daun* v. *City of London Brewery Co.* (4).

There were a number of minor but interesting questions raised at bar, but it would carry us too far afield to enter into the consideration of the same especially since the view I have taken of this appeal makes it unnecessary to do so. I will, however, casually cite on this question as to what is necessary to allege in the pleadings the Rule of Court 64, which limits such allegation to facts only.

Quantum.

Request was made at bar that in the event of the appeal being allowed, the Court should assess and the judgment should also include the amount the plaintiffs would be entitled to recover, thus saving costs and expenses to all parties.

(1) [1862] 21 Up.C.Q.B.R. 409.
(2) [1866] 25 Up.C.Q.B.R. 463.
(3) [1888] 13 A.C. 160.
(4) [1869] L.R. 8 Eq. 155.

Acceding to such request, I will point out that the *R.S.*, on the 28th and 29th July, 1920, came within the ambit of sec. 759 of the Canada Shipping Act. She was in such state that no one could remain on board, she being sunk and submerged. As to being abandoned, it is well to bear in mind some of the crew was left on shore to keep an eye on her, but that could not be done during night. Captain Jackson, the captain of the *Fir Leaf* on the morning of the 29th had almost given up hope of finding her.

However that may be, the *R.S.* on those two days was in great danger of becoming a total loss. Had she drifted near the shore, it is self-evident the seine would have caught on the beach or on the rocks near the beach and would have been pulled down and become a total loss. Both the seine and the craft were rescued and saved.

Whether the *Freiya* undertook to look for the *R.S.* of her own free will or at the bidding of others makes no difference. (Williams & Bruce, Admiralty Practice, 3rd Ed., p. 128). She actually steamed out in search of the *R.S.* when she heard of the mishap. She was free to do so or not. She was out at night when it was blowing hard with choppy sea. She was out all night, using her searchlight and she finally sighted and found this submerged craft and was in the act of towing her quietly when the *Fir Leaf* arrived and indeed extended great help. The *Freiya* did not rescue her alone although she might have done so according to the evidence—*she was materially assisted by the Fir Leaf and her scow.* But the *Fir Leaf* on the previous day had not attempted to salve her alone in plain day time.

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Taking all the circumstances of the case into consideration I have come to the conclusion that the sum of $250 tendered for such services is insufficient, and that the plaintiffs are entitled to recover for all she has done, the sum of $500.

Therefore, there will be judgment allowing the appeal and condemning the defendant in the sum of $500. The whole with costs in both courts against the defendant.