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March 8.

## BRITISH COLUMBIA ADMIRALTY DISTRICT.

THE "ANDREW KELLY",  
 PLAINTIFF;

v.

THE "COMMODORE",  
 DEFENDANT.

*Salvage—Definition of—Proof—"Official log"—Amendment to log—  
 Merchant Shipping Act, art, 239 and following.*

During a heavy easterly gale, the "Commodore", towing the barge "St. David", and bound from Valdez to Anyox, B.C., had her rudder carried away and two of her four propeller blades broken, and was rendered practically helpless. She was drifting and leaking fast and was flying distress signals. The plaintiff managed to make fast a line to the "Commodore" and after twice breaking away succeeded in towing defendant into safety.

*Held*, that the services rendered were skilful, considerable and meritorious, and, while not in a strict sense unusually hazardous, were in the nature of salvage services and not merely of the nature of towage.

*Vermont Steamship Co. v. The Abby Palmer* (1904), 8 Can. Ex. 446, and 9 Can. Ex. 1, referred to.

2. That the "log" kept in this case was an "ordinary ship's log" and not "official" within the meaning of sec. 239, *Merchant Shipping Act*, and statements therein will not be accepted in evidence for the ship, but may be used against it to correct a statement made at a subsequent time.

3. One year and four months after the accident, it is asked to add sheets of manuscript notes to the log, alleged to have been made by the master, but not proved to have been made at the time nor for the purposes of incorporation in the "log".

*Held*, that permission to so amend the "log" will be refused.

*Bryce v. C.P.R. Co.*, (1907), 13 B.C.R. 96, (affirmed by P.C. 15 B.C.R. 510), referred to.

THIS is an action for salvage services rendered by the plaintiff trawler against the tug "Commodore".

The case was heard at Vancouver on March 4 and 5 before the Honourable Mr. Justice Martin, Local Judge in Admiralty.

The facts of the case are stated in the judgment hereinafter printed.

*E. C. Mayers*, for plaintiff.

*E. P. Davis*, K.C., for defendant.

MARTIN, L.J.A. (March 8, 1919) rendered judgment.

This is an action for salvage services rendered by the steam trawler "Andrew Kelly" (95 registered tons), to the tug "Commodore" (216 registered tons), in the North Pacific Ocean on the Alaskan coast off Yakutat Bay, in October, 1917. Briefly, it appears that the "Commodore" bound from Valdez to Anyox, B.C., having in tow the barge "St. David" laden with copper ore, while about 60 miles south west of Yakutat during a heavy easterly gale, had her rudder carried away and two of her four propeller blades broken about 4 o'clock a.m. on October 28, which rendered her practically helpless, and she continued to drift, leaking fast through a damaged stern post or stern bearings, and sending up and flying distress signals, with the leak increasing and the pumping gear damaged so that the hand pump had to be resorted to, till about noon of the 29th, when the "Andrew Kelly" came to her assistance and finally made fast about 2.15 and began to tow her to Yakutat, but she broke adrift in about half an hour. The "Kelly" made fast again and towed the "Commodore" and barge for about nine

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hours at a speed of about 3 knots towards Cape Spencer, Cross Sound, in an east by south direction, which was the safest course in the existing heavy sea and wind, which had been moderating before 6 p.m. but increased thereafter, and by midnight the wind had hauled back to the eastward and was blowing a gale. Shortly after midnight, on October 30, the tug and barge again broke adrift owing to the tug's chain cable having parted. After some inevitable delay in picking up the fouled gear in the darkness, the trawler went after the tug, and picking up her search light, reached her about 4.30 o'clock on the 30th and stood by her till daylight (at which time the wind had dropped but the sea was still high) and after sending a life boat at the request of the tug, this letter, thrown into the boat in a tin can, was sent by her master to the master of the trawler:

"Dear Captain:—

"We are leaking badly, propeller and rudder gone, our main discharge pipe broken and only able to give very little assistance with our engines.

"Weather conditions very unfavourable; we are scared to get a lee shore and have to abandon the two ships, in our opinion we think it advisable to abandon the barge, whilst you can get the crew off and proceed to some safety with Commodore.

"After reading this please pass it on to the barge captain, also state your opinion on this paper and let Capt. Bistrom add his and bring the paper back.

A. J. BJORNE".

The master of the trawler decided to make a final effort to tow both the tug and the barge, and made fast again about 8.30 but after towing about 25 minutes towards Yakutat, then distant about 30 miles,

they broke adrift again, so he decided it was impossible to tow both and sent a life boat to the barge and took the master and seven men off her in two trips and then made fast again to the tug for the fourth time about 2.30, and succeeded in towing her safely into Yakutat that same night about 9 o'clock, after having to heave-to outside owing to a heavy squall of snow which started about 5.30 off Ocean Cape.

Later the barge with her valuable cargo, worth about \$370,000, was picked up by the tug "Daniel Kern" then in Yakutat, in moderate weather, but was lost for some strange reason in coming into Yakutat on a calm night. The twelve fishermen on the "Andrew Kelly" had refused to consent to look for the barge the next morning, October 31, no more lives being in danger; on the "Kelly" there were 24 souls all told. The injuries sustained by the "Commodore" were various and serious and were adjusted by the underwriters at \$15,934.

The value of the "Commodore", exclusive of the barge, is agreed to be \$75,000. A dispute arose as to the value of the "Andrew Kelly", I am of opinion that at the time of the salvage a fair valuation would be \$100,000. She had also 40,000 lbs. of halibut on board, her full load being 160,000 lbs.

It is not, and could not be disputed on the facts that salvage services had not been rendered, but it was suggested that they were more in the nature of towage. I am unable, however, to take that view; they were, while not in the strict sense unusually hazardous, nevertheless skilful, considerable, and meritorious, and after a careful consideration of all the circumstances I fix the sum of \$4,000 as my view of a just reward therefor.

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It was truly submitted by the defendant's counsel that the services here were not of so dangerous or deserving a nature as those before me in the *Vermont Steamship Co. v. The "Abby Palmer,"*<sup>1</sup> wherein the leading authorities are cited, and in which the sum of \$5,500 was ultimately awarded (after an appeal caused largely, I may say, by an oversight of counsel in omitting to put forward certain items of loss to the salving ship which were not in dispute) the salving ship and cargo valued at \$350,000 having been placed in a hazardous position, yet they were of the nature indicated and the times are considerably more expensive, money, consequently, not having the same value; so I feel that if I have erred it has been on the safe side. Of course if the barge had been salved a large sum would have been well earned.

The award I apportion, in the exercise of my discretion, as follows, on the principles cited in *The Vancouver Tugboat Co. v. The "Prince Albert,"*<sup>2</sup>

To the owners ( $\frac{3}{4}$ of total award).....	\$3,000
To the master (1-3 of the balance) .....	334
To the pilot, the mate, and the chief engineer each \$90 .....	270
To the 2nd and 3rd engineers each \$65....	130
To 3 firemen, 1 coal passer, 1 cook, 1 deck- hand, and Robert W. Thompson, a fisherman, who went in the life boat and appeared as a witness, in all 7 men, each \$38 .....	266
	<hr/> \$4,000

A claim in writing has been put in signed by seven of the twelve fishermen (other than said Thompson)

<sup>1</sup> 8 Can. Ex. 446, 9 Can. Ex. 1.

<sup>2</sup> (1913), *Mayers Adm. Law* 543, and *Kennedy on Salvage* 2nd ed. (1907), 168 *et seq.*

who were not members of the crew, asking for \$75 per man, not alleging any assistance in salving but simply that they were prevented from fishing for the time occupied in salving, but no one has come forward in support of it and I am left in the dark as to whether or not, during that more or less stormy period fishing could have been carried on at all, or to what extent. It does not appear that any of these claimants did in fact give any assistance in the salvage service, which passengers must do before their claims can be recognized. *The Coriolanus*,<sup>1</sup> and moreover they refused to go out to assist in the salvage of the barge as above noted though a large reward would have been reaped if successful, as was most probable. In the absence of any further facts being put forward on their behalf in the usual way (*Kennedy on Salvage, supra*), which would give these claims a meritorious complexion I do not feel warranted in taking action thereon.

There remains a question of evidence regarding the log. No "official log" in the proper sense of the word in the *Merchant Shipping Act*, sec. 239-243,<sup>2</sup> was kept but simply the "ordinary ship's log", sec. 239 (3);<sup>3</sup> which is not evidence for the ship for which it is kept but against it, though being "a statement made by the master at a time being contemporaneous with the event and therefore more likely to be correct it may be used for the purpose only of correcting a statement made at a subsequent time".—*The "Singapore"*<sup>4</sup>; Vide also the "*Henry Coxon*".<sup>5</sup> *The "Earl of Dumfries"*,<sup>6</sup> and cases cited in *Marsden's*

<sup>1</sup> (1890), 15 P.D. 103.

<sup>2</sup> See 8 Enc. L.E. 90, 26 Hals. 82; *Marsden's Digest*, 850.

<sup>3</sup> *Maclachlan on Shipping*, 5th ed. (1911), 211.

<sup>4</sup> (1866), L.R. 1 P.C. 378.

<sup>5</sup> (1878), 3 P.D. 156.

<sup>6</sup> (1885), 10 P.D. 81.

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*Dig., supra.* In the ship's log in question, entitled "Pilot House Log Book", kept by the master, the only entry relating to the salvage is as follows:

"Oct. 29th, 10 a.m. Sited (*sic*) tow.

"10.30 a.m. Sited tow boat with barge.

"St. David (*sic*) in tow with flag at her

"foremast head for help.

"Oct. 31st, 2.45. Left Yakutat."

There is no blank space, between said dates, the entries following on thus omitting any reference to any occurrences between the sighting and leaving Yakutat. The plaintiff's counsel applies to have three sheets of manuscript notes, produced by the master in the witness box, admitted in evidence as part of the ship's log on the ground that they were notes made at the time by the officer on the ship who kept the log (here the highest officer, the master) and therefore ought to be incorporated with it.

In *Bryce v. C. P. R. Co.*<sup>1</sup>; affirmed by the Privy Council,<sup>2</sup> I had to deal with the case of changes in a rough or scrap log of a nature similar to the one in question, made at the time, but what I am now asked to do is to sanction changes, by way of addition, after a lapse of more than a year and four months. Apart from all other aspects of the matter on this ground alone I must refuse the application being of the opinion that it would be too dangerous to open such a door. The master has not even ventured to say that he made these notes at the time for the purpose and with the intention of adding them to the log at the earliest opportunity and the way in which the entry is made would discourage such a view of the matter, and this is not a case of rough notes having

<sup>1</sup> 13 B.C.R. 96.

<sup>2</sup> 15 B.C.R. 510.

been mislaid and the entry being left consequently incomplete. Apart, therefore, from other questions raised on the application of the Act and secs. 260, 263-4, I think the said notes cannot be admitted in evidence as part of the log, but only to refresh the witnesses' memory apart from the same.

Let judgment be entered in favour of the plaintiff for \$4,000 and costs.

*Judgment accordingly.*

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