1940
* May 7, 8.
* June 29.

THE OWNER, MASTER AND MEMBERS OF THE CREW OF THE MOTOR VESSEL *SHANALIAN* (PLAINTIFFS) ... APPELLANTS;

AND

THE MOTOR YACHT *DR. BRINKLEY II* (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Yacht stranded—Refusal by owner of offer to haul it off the shore—Alleged contract with master of yacht to pull yacht off—Claim for salvage services—Whether yacht in imminent danger or distress—Liability of owner of yacht.

Respondent pleasure motor yacht, while on a cruise from Galveston, Texas, to Nova Scotia, stranded on the southwest coast four or five miles northeast of Yarmouth on a smooth ledge at approximately high tide; and at low tide, she was lying practically high and dry with but a foot or two of water under her stern. The owner of respondent yacht refused an offer made by the master of the appellant vessel to haul the yacht off the shore on the next tide for $1,000. Later on the same day, the managing owner of the appellant vessel went in to the respondent yacht to negotiate with the yacht's master, knowing that the owner was staying at a hotel in Yarmouth, and offered to tow the yacht off and look to the insurance underwriters for his compensation, with the understanding that he would not hold the owner or the master of the yacht responsible for any charge. The master of the yacht accepted this offer. Unknown to either the owner or the master of the yacht, the policy of insurance did not cover her while in Canadian Atlantic waters. The yacht was floated easily at high tide, was towed to Yarmouth and, some days later, proceeded under her own power to Halifax where it was found she had sustained practically no damage. The trial judge found that the respondent yacht was in distress and danger, that the services rendered by the appellant vessel were voluntary and in the nature of salvage and he awarded compensation to appellant. On appeal, the Exchequer Court of Canada held that the respondent yacht was not, at the time the services were rendered, in any imminent danger or distress, and dismissed the appellant's action.

Held that the dismissal of the appellant's action by the Exchequer Court of Canada ([1935] Ex. C.R. 181) should be affirmed. According to the facts and circumstances of the case as found by the President of the Exchequer Court of Canada, it has not been established that the respondent yacht was at the time the salvage services claimed by the appellants were rendered, in any imminent danger or distress within the meaning of the Admiralty rule; and, therefore, the appellants rendered no services which can properly be regarded as salvage services in the sense of that rule.

The Pretoria (5 Lloyd L.R. 112) disc.

* PRESENT:—Crocket, Davis, Kerwin, Hudson and Taschereau JJ.

APPEAL from the judgment of the Exchequer Court of Canada, Maclean J. President (1), reversing the judgment of Carroll J., District Judge in Admiralty for the Nova Scotia Admiralty District, and dismissing the appellants' action for compensation for salvage services.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

V. J. Pottier K.C. and *D. J. Fraser* for the appellants.

F. D. Smith K.C. and *W. H. Jost* for the respondent.

The judgment of Crocket, Kerwin and Taschereau JJ. was delivered by

CROCKET J.—This appeal arises out of an action against the pleasure motor yacht *Dr. Brinkley II* for salvage services alleged to have been rendered to it by the plaintiffs appellants on Sunday, June 30th, 1935, at or near Chebogue Point on the southwest coast of Nova Scotia 4 or 5 miles northeast of Yarmouth.

The yacht having proceeded to Halifax from Yarmouth on the second day after the alleged salvage services had been rendered and there arrested and released on bail, the trial of the action was commenced on July 6th, 1935, before the late Mr. Justice Mellish, Local Judge in Admiralty for the Nova Scotia Admiralty District, when its owner, master, wireless operator and three other witnesess first gave their testimony. This comprised the whole of the defendant's case. The hearing was then stood over, no doubt on account of Mr. Justice Mellish's illness, and the action was retried before Mr. Justice Carroll as his successor in November, 1937, nearly two and one-half years later, when the managing owner and master of the *Shanalian* and one other witness were heard, and the evidence taken before the late Mr. Justice Mellish tendered and received with the consent of counsel.

The trial judgment was delivered on February 19th, 1938, and the formal entry thereof made on March 22nd. His Lordship held that salvage services had been rendered and made an award of $600 against the defendant yacht and its bail.

(1) [1939] Ex. C.R. 181.

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The defendant appealed to the Exchequer Court of Canada, which set aside the trial judgment and dismissed the action with costs, the learned President having concluded upon his review of the evidence that the services claimed for were not in the nature of a salvage operation for the reason that at the time they were rendered the yacht was not in any imminent danger or distress within the meaning of the Admiralty rule. I am of the same opinion.

The yacht was a vessel of 211 tons with an overall length of 130 feet, equipped with two Diesel engines of 500 horse power each. While proceeding at slow speed in a dense fog and calm sea she ran ashore on a smooth ledge shortly after 9 a.m. at approximately high tide. Her engines were immediately reversed and worked full speed astern in an effort to free her, but without effect, and as the tide receded she gradually settled on the rock with a starboard list, so that two or three hours later she was lying practically high and dry with but a foot or two of water under her stern. Everything possible was done by her own master and crew to prevent any further listing or the yacht's being carried farther forward on the next incoming tide. To this end both bow anchors were put out, carried to within 30 or 40 feet of the stern and made fast to the largest available boulders on either side by the use of an electric windlass.

This was the situation when the master of the *Shanalian,* who had immediately motored to the scene from Yarmouth on learning of the stranding from the latter's managing owner, made his first offer during the forenoon to pull the yacht off on the next tide for $1,000—an offer which the owner of the yacht, who was himself present, as well as the yacht's master plainly gave him to understand they would not consider. They had already been informed by friendly neighbours, who had come to the shore, that they would have from one to three feet higher water on the night high tide, due around 10 p.m., and felt they would then require no assistance to get her out to sea again. Certainly everybody recognized, when the *Shanalian's* services were thus tendered during the forenoon, that it would be sheer folly for any tug boat to attempt to pull the yacht off the ledge before the night tide approached its highest level. That both the master and the managing owner of the *Shanalian* were fully aware of the intention

of the owner and master of the yacht to await the higher night tide and see if the yacht could not come away under her own power before arranging for the assistance of any tug boat can scarcely be doubted. At all events it is clear when they went aboard the *Shanalian* in the late afternoon and proceeded to Chebogue Point they did so entirely on their own initiative and in the hope of prevailing on the master of the yacht to accept the service of their motor tug. When they went in to the yacht in the motor launch to negotiate with the yacht's master, knowing that the owner was staying at the Grand Hotel in Yarmouth 4 or 5 miles away, and obtained the master's permission to bring a tow rope from their motor tug and fix it around the stern of the yacht upon the understanding that they would not hold the owner or the master of the yacht responsible for any charge, and look to the insurance underwriters for their compensation for any assistance the *Shanalian* might render in towing the yacht off the ledge, the yacht had righted herself on the rising night tide, and there is not a particle of evidence to show that she was in any such imminent danger or distress as to require the proffered assistance. The fog was still thick. The sea was admittedly still calm with nothing but the usual ground swell, which could not possibly cause any damage in view of the yacht's crew itself having taken the precautions already indicated to hold her fast against any further forward movement. There was no wind and no indication of any approaching storm.

It is the yacht's situation at the time the assistance is tendered, with reference to which the question of imminent peril or distress, I think, must be decided. The mere fact that the yacht was stranded does not place her in imminent danger or distress. As Mr. Justice Mellish suggested in his question to Captain McKinnon, a well known pilot of wide experience, during his examination before him, stranding is not an unusual thing at all. Captain McKinnon replied: "No, vessels very frequently strand all along the coast." The test, as I understand the cases, as to whether a ship is in such danger as to oblige the master to accept the service of another for its relief and safety is whether a prudent owner or master would have accepted the services of the other when proffered in the situation in which his ship is found at that time. Upon my examination

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of all the testimony bearing upon this point, I entirely agree with the view of the learned President that it was quite within the right of the owner at the time in question here to prefer his own means of releasing the *Brinkley* and reject the services of the *Shanalian,* if her aid in his judgment was not urgent and if the yacht was not then in fact in any real or sensible danger. The proffered service of the *Shanalian* was admittedly accepted upon the distinct understanding I have already mentioned, viz.: that the owner and master of the yacht would not be held responsible. While it is true, as Dr. Lushington put it in the case of *The Charlotte* (1), that it is not necessary, in order to create a liability for salvage, that the distress should be actual or immediate, or that the danger should be imminent and absolute—a dictum, which was approved by the Judicial Committee of the Privy Council in *The Strathnaver* (2), and upon which Carroll, L.J.A., based himself in the case now before us, there must at least be some danger, which was apparent or probable at the time the services were rendered. Sir Robert Phillimore, who delivered the judgment in the case of *The Strathnaver* (2), immediately after quoting and approving Dr. Lushington's dictum, proceeded to say:

> Their Lordships are of opinion that there was neither actual nor imminent probable danger at the time these services were rendered.

The Pretoria (3) affords I think a striking illustration of the application of the governing principle in a case of this kind. That ship was caught in the Thames Estuary by a sudden squall on the morning of April 15th and was laid on her beam ends. She shot her deck cargo. Her hatch covers were carried away and she shipped much water. Her anchor with 15 fathoms of cable was laid out. She settled down on the bottom of sand and mud, and her hull became wholly submerged, as the tide made. Her crew took to the boat and on arrival ashore telegraphed to Faversham, where the *Pretoria* was owned, that the barge had sunk off Warden Point. On the ebb-tide her crew returned and worked at the pumps but could not free her sufficiently to get her afloat, and when water flowed over her again on the evening tide they went ashore. On the

(1) (1848) 3 W. Rob. 68, at 71. (2) (1875) 1 App. Cas. 58, at 65.
(3) (1920) 5 Lloyd, L.R. 112.

morning of April 16th they went to Faversham and reported the position to C., a director of the owning company, who at once gave orders for the manning and fitting out of another barge (the *Bertie*) with pumps and sufficient men to pump out the disabled *Pretoria*. The *Bertie* was ready to go out that evening but did not do so, the wind being unfavourable. In the meantime the plaintiffs had seen the mast and top of the mizzen of the *Pretoria* while she was submerged and went out in a motor trawler, and tested the pumps, which they found in working order but nothing further could be done at that state of the tide. They telephoned C., reporting what they had done, and were informed that C. was sending another barge down and would lighten the *Pretoria* in the morning and that the plaintiffs' offer of assistance was therefore declined. Notwithstanding this, the plaintiffs returned to the *Pretoria* late in the evening, and in the early morning of April 17th when the tide was ebb, they pumped her out and towed her ashore. Hill, J., who tried the case, sitting with two of the Elder Brethren of Trinity House, found that the plaintiffs got the *Pretoria* off on the morning of April 17th, whereas the defendants would not have got her off until the evening of that day. He asked the Elder Brethren whether there was anything in the weather of April 17th, which made it important that she should be got off early on that day and they both said "No." He also asked the Elder Brethren whether, having regard to the circumstances of the case and what might be anticipated at the time of year and in the locality an owner of reasonable prudence would have refused the assistance of the plaintiffs. Both answered "Yes" and gave it as their opinion that C. was acting with prudence in preferring his own means of recovering the *Pretoria* and in rejecting the offer of the plaintiffs. His Lordship entirely agreed and therefore dismissed the plaintiffs' claim with costs.

I may add that, following the conversation between the owner and master of the *Shanalian* and the master of the *Brinkley* Sunday night, a tow-rope was in fact brought over from the *Shanalian* to the yacht, fastened around her stern, and carried to the tug boat. All hands then waited on the rising tide and at about 9.45 p.m.—about half an hour before full high tide—the yacht came off the ledge

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with the port engine of the yacht running full speed astern and both engines of the *Shanalian* running full speed ahead and was towed to a dock at Yarmouth.

Whether the yacht came off under its own power, or whether the *Shanalian* rendered any real service in bringing her off—a question regarding which there was some conflict of evidence—is, in my view of the case, quite immaterial. The operation in bringing her off seems in any event to have occupied but a few minutes at most. When she backed out the tow-line was shifted from the stern of the yacht to the bow and she proceeded with the *Shanalian* ahead to Yarmouth and there docked. She remained in Yarmouth on Monday, where the crew that day tried her out with the owner aboard, and, having been found perfectly seaworthy, left Yarmouth about noon Tuesday under her own power and proceeded to Liverpool and Halifax. On being dry-docked at Halifax a few days later it was found she had sustained no damage beyond a slight bending of one of the blades of her propeller shaft, which had caused some vibration on the operation of her port engine.

Having regard to the admitted and undisputed facts above referred to, I have concluded with all respect that the plaintiffs rendered no services which can properly be regarded as salvage services in the sense of the Admiralty rule, and that the learned President of the Exchequer Court of Canada upon that ground alone had no other recourse under the authorities than to order the dismissal of the action as he did.

With regard to the contention that the appeal to the Exchequer Court of Canada was barred by the limitation prescribed by Admiralty Rule 172, not having been brought within 30 days from the day when the judgment was pronounced, I think the learned President has correctly interpreted the rule as providing a limit of 30 days in the case of a judgment or order in any matter which is not "an action," and a limit of 60 days in the case of any judgment or order in a proceeding which is an action, and that the 30 days limitation runs from the date when the judgment or order is pronounced and the 60 days period from the date when the judgment is formally perfected. The appeal, though brought after the expiration of 30

days from the delivery of the trial judgment, was brought before the expiration of 60 days from its formal entry on March 22nd, and was therefore in time.

The appeal must, therefore, be dismissed with costs.

DAVIS J.—The appellants' case was mainly rested before us on the contention that the right to salvage is in no way dependent on contract and that a salvage contract only goes to amount. That may be so and no doubt is under certain circumstances but here the owner of the private yacht in question was on board himself at the time she got into difficulties. He did not consider the position of the yacht as one of any real danger and he definitely declined the assistance that the appellants offered him on certain monetary terms. In any event I agree with the conclusion of the learned President of the Exchequer Court, whose judgment is in appeal before us, that the evidence does not establish that the yacht was, in the practical sense, in any imminent danger or distress or that her position was so critical as to make it unreasonable for her owner to decide upon an attempt to float the ship by her own means at high tide, before seeking or accepting the assistance of a tug.

The services rendered by the appellants were not only declined by the owner of the yacht but were not rendered in such circumstances that they ought to have been accepted. See *The Pretoria* (1), *The Flora* (2).

I would dismiss the appeal with costs.

HUDSON J.—This action was brought for salvage and, in order to succeed, it was necessary for the plaintiff to prove that the ship to which services were rendered was in imminent danger or distress. Mr. Justice Carroll at the trial held that it was, but he was not assisted by a nautical assessor, nor did he himself hear the evidence given on behalf of the defendant. A court of appeal is, therefore, more free to review his finding of fact than would otherwise be the case. Mr. Justice Maclean in the Exchequer Court of Canada has done so and come to the conclusion that the ship was not, at the time the services were rendered, in danger or distress.

(1) (1920) 5 Lloyd, L.R. 112. (2) (1929) 34 Lloyd, L.R. 172.

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After careful review of the evidence, I am satisfied that Mr. Justice Maclean has come to the correct conclusion and I am also satisfied that the assistance given to the ship was given without the authority of Doctor Brinkley, the owner, and contrary to his specific instructions, to the knowledge of the plaintiff.

Under these circumstances, I do not think that the plaintiff is entitled to succeed. The discussion between the two captains as to insurance does not, even accepting the plaintiff's version, assist him, if the ship was not in danger. The relevant authorities have already been adequately discussed by my brother Crocket.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *V. J. Pottier.*

Solicitor for the respondent: *C. J. Burchell.*