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Tuesday, February 6.

## SECOND DIVISION.

[Lord Blackburn, Ordinary.

### NICHOLSON AND OTHERS v. LEITH SALVAGE AND TOWAGE COMPANY, LIMITED, AND OTHERS.

*Ship—Salvage—Services Rendered by Master and Crew of Tug Belonging to Tug-owning and Salvage Company who had Undertaken as Part of their Ordinary Employment to Render such Services when Required—Failure to Prove Agreement by Master and Crew to Abandon Right to Salvage—Admissibility of Evidence of Custom as to Statutory Requirements being Dispensed with—Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), sec. 156.*

The Merchant Shipping Act 1894, section 156, enacts—“(1) A seaman . . . shall not by any agreement abandon . . . any right that he may have or obtain in the nature of salvage, and every stipulation in any agreement inconsistent with any provision of this Act shall be void. (2) Nothing in this section shall apply to a stipulation made by the seamen belonging to any ship, which according to the terms of the agreement is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by that ship to any other ship.”

A ship having gone on the rocks the owners entered into an agreement with a tug-owning and salvage company, in terms of which the company agreed to save the ship “on no cure no pay terms, the amount of the remuneration for the above services to be settled by mutual agreement or arbitration.” The company having successfully accomplished the operation by means of three of its tugs, made a claim in an arbitration for remuneration for salvage services and obtained an award of £10,000. The claim bore to be a claim by the owners, and “masters, officers, and crews” of the three tugs. In an action by the master and crew of one of the tugs against the company for payment of a portion of the £10,000 the defenders averred that it was a term of the contract of service, known to and accepted by the pursuers when they

entered into the service, that the pursuers’ ordinary duties were to include salvage operations, and that “apart from the remuneration paid to them for such duties they were not to be entitled to any further remuneration in the form of salvage award.” The defenders averred further that “the arrangement is also in accordance with the established custom prevailing between salvage contractors and their servants for the carrying out of all salvage operations. After a proof the Court (*rev.* the judgment of the Lord Ordinary (Blackburn)) granted decree, holding that (1) the services rendered by the pursuers were truly of the nature of salvage services, even if the pursuers had undertaken as part of their employment to render such services; (2) the defenders had failed to prove that any of the pursuers had agreed to abandon claims for salvage; and (3) evidence of custom as to statutory requirements being dispensed with was inadmissible.

*Opinion* that section 156 of the Merchant Shipping Act 1894 does not apply to the master of a vessel.

Robert Nicholson, Leith, the master, and William A. Gray and others, certain members of the crew of the steam tug “R. Nicholson,” *pursuers*, brought an action against the Leith Salvage and Towage Company, Limited, *defenders*; and also against John Williamson, marine engineer, Leith, and others, the remaining members of the crew for their interest, *defenders*, for payment of £1000 as their share of salvage money paid to the principal defenders, and for apportionment among the pursuers in such manner as the Court should deem just of the aforesaid sum of £1000.

The Leith Salvage and Towage Company, Limited, lodged defences.

The following narrative of the *facts* of the case is taken from the opinion of Lord Hunter *infra*:—“The pursuers were the master and some of the crew of the steam tug ‘R. Nicholson’ at a time when certain services were rendered by the said tug to the s.s. ‘Graciana.’ In this action they seek to recover from the owners of the ‘R. Nicholson’ a portion of the sum recovered by the latter under an award by an arbiter fixing the sum of £10,000 as payable by the owners of the s.s. ‘Graciana’ for salvage services rendered to that vessel. The ‘Graciana’ had in the early morning of Thursday, 27th May 1920, in a dense fog gone ashore on a reef of rocks near one of the Farn Islands lying off the Berwick coast. The defenders, who carry on the business of tug owners and salvors of vessels, employed three tugs, the ‘R. Nicholson,’ on which the pursuers were employed, the ‘Earl of Powis,’ and the ‘Flying Fish,’ in connection with the operations which were successful in pulling the ‘Graciana’ off the rocks and enabling her to dock in West Hartlepool on Wednesday, 2nd June 1920. These services were rendered under an agreement between the defenders and the

master of the 'Graciana' on behalf of the owners and underwriters of that vessel dated 27th May 1920, under which it was provided that the services were to be rendered on "no cure no pay" terms—the amount of the remuneration to be settled by mutual agreement or arbitration. By a memorandum of agreement dated 9th November 1920, on the narrative that salvage services had been rendered by the defenders to the 'Graciana,' her cargo, and freight, in the month of May 1920, it was agreed between the defenders and the owners of the 'Graciana,' her cargo, and freight, that the amount of remuneration payable to the defenders for the said salvage services should be referred to the arbitration of Mr Bateson, K.C. In the claim put in by the defenders the claimants are described as the owners, masters, officers, and crews of the salvage steam tug 'Earl of Powis' and the steam tugs 'R. Nicholson' and 'Flying Fish,' who are said to have rendered salvage services to the respondents' steamship, her cargo, and freight off the Berwick coast in the North Sea during the months of May and June 1920.

The pursuers averred, *inter alia*—" (Cond. 1) The pursuer Robert Nicholson, master, the pursuer William A. Gray, mate, the pursuer Charles M'Gregor, second engineer, and the other two pursuers, formed five of the eight members of the crew of the steam tug 'R. Nicholson' belonging to the defenders when the salvage services after mentioned were rendered by the said tug to the s.s. 'Graciana.' The three defenders called for their interest were the other three members of the crew of the said tug on said occasion."

The defenders averred, *inter alia*— (Ans. 2) "All of the vessels of the defenders' fleet of salvage and other tugs are, as and when required, used by them in connection with the salvage operations which the company may undertake under contract or otherwise. The masters, officers, and crews whom the defenders engage assist, as they are bound by their engagement to do, in such operations. It was well known to the pursuers that their duties were to include the carrying out of and assisting at salvage operations, and this was accepted by them as part of their ordinary duties when they entered the service of the defenders. It was further well known to and agreed to by the pursuers that apart from the remuneration paid to them for such duties they were not to be entitled to any further remuneration in the form of a salvage award. This arrangement has been acquiesced in and acted on by the pursuers, and in particular by the pursuer Robert Nicholson over a long number of years. The arrangement is also in accordance with the established custom prevailing between salvage contractors and their servants for the carrying out of all salvage operations. Denied that the pursuer Nicholson or any other employee of the defenders' company have ever shared in a salvage award either with the defenders or their predecessors. Further, as is well known to the pursuers, the 'R.

Nicholson' and other tugs belonging to the defenders are fitted with a special steam valve available for use in connection with salvage pumps as and when required during salvage operations."

The pursuers pleaded, *inter alia*—"1. The pursuers having voluntarily rendered the salvage services condescended on, are entitled to be compensated therefor. 4. The pursuers not having been engaged to perform the salvage services condescended on, as part of their ordinary employment, and for which the defenders have been paid, are entitled to be compensated therefor by the defenders."

The defenders pleaded, *inter alia*—"1. The pursuers' averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. 2. The services founded on having been rendered in the ordinary course of the pursuers' employment with the defenders, the pursuers are not entitled to a salvage award, and the defenders should be assoilzied. 3. The pursuers having been engaged and paid by the defenders to perform the services founded on as part of their ordinary employment, without any additional remuneration for salvage operations, are not entitled to any additional remuneration therefor, and the defenders should be assoilzied. 4. The defenders not having received any remuneration in which the pursuers are entitled to participate are entitled to be assoilzied."

The agreement between the defenders and the owners of the s.s. "Graciana" was as follows:—

"1. NO CURE NO PAY' SALVAGE AGREEMENT between defenders and owners of s.s. 'Graciana,' made at Crimston Rocks.

"Crimston Rocks, 27/5/1920.

"Salvage Agreement. No cure No pay.

"Agreement entered into this day between Captain F. R. Park, master of the steamship 'Graciana,' acting for the owners and underwriters of the steamship 'Graciana' and her cargo, and Captain C. G. Bonner on behalf of the Leith Salvage and Towage Company, Limited, salvage contractors.

"(1) The said Captain C. G. Bonner, on behalf of the Leith Salvage and Towage Company, Limited, of Leith, agrees to refloat the s.s. 'Graciana' and her cargo and escort her to a port of safety. (2) It is mutually agreed that these services be rendered on no cure no pay terms, the amount of the remuneration for the above services to be settled by mutual agreement or arbitration."

The claim lodged by the defenders in the arbitration was as follows:—

"The 'Graciana.'

POINTS OF CLAIM.

"1. The claimants are the owners, masters, officers, and crews of the salvage steam tug 'Earl of Powis' and the steam tugs 'R. Nicholson' and 'Flying Fish,' and rendered salvage services to the respondents' steamship 'Graciana,' her cargo and freight, off the Berwick coast in the North Sea, during the months of May and June

1920, in the circumstances hereinafter appearing.

"The claimants ask for such an amount of salvage as may be just, and costs."

On 7th December 1921 the Lord Ordinary (BLACKBURN) before answer allowed the parties a proof of their averments so far as relevant to the terms on which the pursuers were employed by the defenders—the defenders to lead in the proof.

Thereafter on 15th March 1922 his Lordship pronounced an interlocutor in which he sustained the second plea-in-law for the compearing defenders and assoilzied them from the conclusions of the summons.

*Opinion.*—"The evidence which has been led in this case has at least satisfied me of the wisdom of the defenders in asking that the proof should at its initial stages be directed to the question of the employment of the pursuers, because I think by so doing a great deal of unnecessary time and a great waste of money has been avoided.

"The defenders are a company carrying on the business of towage and salvage at Leith, and it is proved that the salvage work is the principal part of their business. The pursuers are men who have been employed by the defenders to serve them in the conduct of their business. The defenders necessarily possess a fleet of tugs, and an endeavour has been made in the course of the case to distinguish between what have been called towage tugs and what have been called salvage tugs. I confess I am unable to appreciate any such distinction, because in many cases of pure salvage nothing more is required than towage services, and therefore every one of these tugs kept by the defenders was capable of rendering under certain circumstances complete salvage service. I have no doubt that some of the tugs belonging to the defenders are specially equipped for use in salvage operations of some special character. Where pumping is required, and so on, some of the tugs may be more adapted for that purpose than tugs which are only used for towing purposes, but that does not mean that a tug which is not equipped with pumping facilities is incapable of doing salvage work. I think it was, perhaps, a little unfortunate that the defenders, probably with the view of strengthening their case, made any reference to the steam valve attached to the boiler of the tug the 'R. Nicholson'—which is the tug in question in this case. I have no doubt that the existence of that valve makes this particular tug available for certain salvage purposes which other tugs not fitted with a valve of that sort could not render. But it has not been part of the defenders' case that the 'R. Nicholson' has ever been used for the purpose of pumping in the course of salvaging derelict vessels. The fact that there apparently was no special adjustment to enable the pump hose to be attached to the valve shows that the tug could not have been used for that purpose in the past, but an adjustment of that sort is a simple matter, and there is no doubt that the tug, if required, might have been used for salvage operations of that character.

"Now the pursuers were employed by the defenders to serve upon their vessels, and so far as the terms of their engagement are concerned, which are the terms laid down by their union, there is no difference between the terms on which men were engaged to serve on a tug specially adapted for a particular form of salvage and the terms on which men were engaged to serve on a tug only adapted for the purpose of towing. In each case the wages are the same for the 10-hours' day, and the only distinction in the pay of the men employed for the time in salvage operations and the pay of those employed on towage operations which are not of the nature of salvage is that the men at salvage work are remunerated on a rather more generous overtime basis than the men employed on simple towage work, while the men on towage work get an extra allowance for work done at a distance from home. Now that being the position I have no hesitation in coming to the conclusion that when the pursuers were engaged they knew that they might be employed on salvage operations on behalf of the defenders and that they undertook to render such services as part of their employment.

"It is said for the pursuers that to disentitle them to share in a salvage award which might result from salvage operations it was necessary that a renunciation of their right to share in any salvage award must have been expressly stipulated for in the agreement entered into between them and their employers—Merchant Shipping Act 1894, sec. 156 (1) (2). I think that raises directly the question whether the operations rendered in this case were truly of the nature of salvage services within the sense of section 156 of the Merchant Shipping Act. Now salvage services have been frequently defined. They are very well defined by Lord Ardwall in the '*Clan*' case (1908 S. C. at p. 658) to which I was referred, where he says they must be voluntary and spontaneous and not rendered in respect of any contractual or official duty. There was a remark made by the witness Robert Nicholson which emphasises this description of salvage services. Robert Nicholson said in the box that he had always understood that it was the duty of a seaman to render assistance in all cases of distress at sea. This is undoubtedly the case, and there is a passage in L. J. Kennedy's book on salvage where he says that no one except a freebooter would refrain from rendering such services. But services so rendered are a duty to the person or the ship which is assisted and to no one else. Clearly when a vessel manned by a crew which has only been engaged to navigate the ship from port to port meets a sister ship in distress and proceeds to render her assistance the services which are rendered by the crew of the salving vessel are rendered under their sense of duty to the ship in distress and not under any sense of duty to their employers or in terms of their contract with their employer. This seems to me to be the distinction between the salvage service contemplated in section 156 of the Merchant

Shipping Act and the services which were rendered in the present case. 'Services rendered as I have described, under a sense of duty to the ship or the people who are being assisted, are spontaneous, and they are voluntary, because no man is under any obligation except a moral obligation to render such services. But the services rendered in this case to the 'Graciana' were not services rendered by the pursuers under a sense of duty to the 'Graciana' or under anything except their sense of duty to their employers. I agree with the remark made by Mr Mitchell for the pursuers that the fact that services are rendered under contract does not necessarily prevent them from being both voluntary and spontaneous. It is quite common, where a ship in distress is assisted on the high seas, that before any salvaging operations are performed a contract is made between the salvors and the ship as to the terms of remuneration, and the fact that a contract of that sort is entered into does not make the salvage operations any less voluntary and spontaneous in their character. But the salvage operations in this case were something entirely different. The defenders had entered into a contract on dry land with the owners of a ship which was on the rocks at the Farne Islands to save the ship off the rocks and take her to a place of safety. This contract was not entered into under any sense of duty to the stranded vessel but as a matter of the ordinary business carried on by the defenders, and the crew of the 'R. Nicholson' were acting under their contract of service with their masters and nothing else. No one can suggest for a moment that there is any duty on a tug lying at Granton or Leith to steam away to the Farne Islands in order to save a ship off the rocks. It may be the duty of some one nearer to rescue the crew, but there can be no duty on a crew lying at Granton. Accordingly I think that the real distinction between the services rendered by the pursuers in this case and salvage services such as are contemplated in section 156 of the Merchant Shipping Act, are that these services were not rendered under any sense of duty to the 'Graciana,' but simply from a sense of duty to their employers, by whom they had been engaged to do such work as they might be required to do in the ordinary course of the defenders' business.

"Now I am also satisfied on the evidence that it is well recognised in practice that in cases similar to this the crew of the salvors' tugs are remunerated by the extra overtime wages which they get, and are not entitled to claim any part of the salvage award which their employers may obtain if the work of salvage is successful. At any rate no instance was cited of a salvage award earned by professional salvors in circumstances like the present being shared with the crews. But there was in the evidence reference to quite a different class of case to that with which we are dealing—cases which were referred to as 'pick-up cases,' where tugs have on their own initiative voluntarily and spontaneously gone to the

assistance of a vessel in distress with whom their employers had had no negotiations and no contract whatever. The services rendered in these cases come, to my mind, very close to what I have tried to describe as proper salvage services, because they are rendered out of a sense of duty to the ship in distress and not necessarily under any sense of duty to their employers. The employers, of course, benefit in such cases if the salvage is successful, and it is to their interest to encourage their employees to undertake such voluntary and spontaneous duties. It is proved that in such cases the crews of the vessels always receive some extra remuneration for the job they have performed. The question whether that is to be regarded as a gratuity, to reward them for pushing their masters' business, or as an award of salvage to which their services entitle them, is not raised in this case. It is a question of some nicety which may come up in another case, and on which I express no opinion. Nor, again, is the question which was mooted in the evidence properly raised in this case, namely, whether the pursuers were paid their proper wages in consideration of work done—that is to say, whether they were paid on the more generous scale for overtime appropriate to salvage operations, or on the less generous scale appropriate to towage operations. That is a matter not raised on record. The only question before me, and raised in this action, is whether the pursuers are entitled to a share of the salvage award in respect of the services rendered to the 'Graciana.' In my opinion they are not entitled to a share, on the ground that the services they rendered were not rendered out of any sense of duty to the ship salvaged, but under and in terms of their engagement with the defenders.

"Accordingly I shall sustain the second plea-in-law for the defenders, and assolvie them from the conclusions of the action, with expenses."

The pursuers reclaimed, and argued—I. The defenders had failed to prove any agreement between the defenders and the pursuers that the latter would forego their right to salvage. The only agreement between them was an agreement by the crew to do towage work, and that was the only duty which the crew owed to the defenders. Salvage was not a duty owed to a master. It was a public duty. Salvage was a voluntary service rendered by ships at sea, which were not under a contract to render the service, *e.g.*, a contract under which vessels were sailing as consorts for their mutual protection—Kennedy on Civil Salvage (2nd ed.), p. 84. A claim for salvage was not a contractual claim—Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), sec. 546. It did not originate in a written agreement. The contract which the defenders had entered into with the owners of the salvaged vessel as to the amount to be paid for the assistance to be given did not alter the character of the service or of the reward—Kennedy on Civil Salvage (2nd ed.), p. 225. A contract such as that did not preclude a claim for salvage. In order to

exclude a claim for salvage the contract to give services must be one which was entered into before the wreck took place. The contract in the present case was not entered into until after the wreck took place. Section 212 of the Merchant Shipping Act 1894 prohibited the assignment or sale of salvage payable to a seaman, and sub-section 1 of section 156 invalidated agreements by seamen to abandon their right to salvage, except such agreements as fell within sub-section 2 of the same section. Sub-section 2, however, only meant that all agreements by seamen to forego their right to salvage were not necessarily illegal—*The "Ganges,"* (1869) L.R., 2 A. & E. 370; Kennedy on Civil Salvage (2nd ed.), p. 260. The agreement between the owners and the crew in the present case did not fall within that sub-section. It did not satisfy the three conditions laid down by Dr Lushington in the "*Pride of Canada,"* (1864) 9 L.T. (N.S.) 546, at p. 547. 2. Even if the agreement between the owners and the crew in the present case were an agreement which fell within sub-section 2, nevertheless it was an invalid agreement, because at the time when it was entered into the crew were unaware of its effect—*The "Pride of Canada,"* (cit.). 3. Even if the agreement between the owners and the crew in the present case were an agreement which fell within sub-section 2, nevertheless it was an invalid agreement because it was an inequitable agreement. The Court would examine an agreement to see whether it was equitable—*The "Ganges,"* (cit.); Kennedy on Civil Salvage (2nd ed.), pp. 257 and 261—and there was an onus on the party founding on an agreement to show that it was equitable. 4. The defenders had failed to prove any custom whereby the statutory requirements were dispensed with, and in any event no such custom could be recognised as a bar to salvage—*The "John,"* 28th January 1846, Pritch. Adm. Dig. (3rd ed.), vol. ii, p. 1890. 5. Even if the tug were specially equipped with salvage plant, that circumstance should not invalidate the pursuers' claim to participate in the salvage award—*The "Morgana,"* [1920] P. 442, per Hill, J., at p. 445. In that case the claim was debarred by reason of the language of the Merchant Shipping (Salvage) Act 1916 (6 and 7 Geo. V, cap. 41), sec. 1, but that Act did not apply to the claim in the present case.

Argued for the respondents—1. Even if the services rendered by the defenders to the owners of the disabled vessel were salvage services as between these parties, nevertheless in so far as regards the pursuers the services were not salvage services properly so called, because so far as regards the pursuers the services were contractual and not voluntary—*Clan Steam Trawling Company, Limited v. Aberdeen Steam Trawling and Fishing Company, Limited*, 1908 S.C. 651, 45 S.L.R. 462, per Lord Justice-Clerk (Kingsburgh) at 1908 S.C. 657, 45 S.L.R. 466, and Lord Ardwall at 1908 S.C. 658, 45 S.L.R. 466; *The "Solway Prince,"* [1896] P. 120, per Sir F. H. Jeune at p. 127; *The "Sappho,"* (1871) L.R., 3 P.C. 690, per Mellish,

L.J., at p. 694-5; Kennedy on Civil Salvage (2nd ed.); pp. 2 and 28. There was proof that the pursuers had knowingly contracted to do salvage work for the defenders when called upon as part of their ordinary work, and to do it without any paid memento. Such a contract was not illegal, because sub-section (1) of section 156 of the Merchant Shipping Act 1894 did not apply to a case like the present, where no salvage services properly so called had been rendered by the master or crew. In any event the sub-section did not apply to the case of the master of a vessel—*The "Wilhelm Tell,"* [1892] P. 337; Merchant Shipping Act 1894, sec. 742. 2. Even if the services rendered by the master and crew were to be regarded as salvage services, the contract which the pursuers entered into with the defenders excluded claims by the pursuers for salvage remuneration, and the contract was not illegal because it fell within sub-section 2 of section 156. Moreover, it was not the custom to give salvage remuneration, and the defenders must be held to have known and acquiesced in the custom.

At advising—LORD ORMDALE read the following opinion by LORD HUNTER, which was the opinion of the Court (LORD JUSTICE-CLERK, LORD ORMDALE, and LORD HUNTER):—[After the narrative, supra]—On record the defenders make the following statements:—"All of the vessels of the defenders' fleet of salvage and other tugs are, as and when required, used by them in connection with the salvage operations which the company may undertake under contract or otherwise. The masters, officers, and crews whom the defenders engage assist as they are bound by their engagement to do in such operations. It was well known to the pursuers that their duties were to include the carrying out of and assisting at salvage operations, and this was accepted by them as part of their ordinary duties when they entered the service of the defenders. It was further well known to and agreed to by the pursuers that, apart from the remuneration paid to them for such duties, they were not to be entitled to any further remuneration in the form of a salvage award. This arrangement has been acquiesced in and acted on by the pursuers, and in particular by the pursuer Robert Nicholson, over a long number of years. The arrangement is also in accordance with the established custom prevailing between salvage contractors and their servants for the carrying out of all salvage operations." Among their pleas-in-law are—"(2) The services founded on having been rendered in the ordinary course of the pursuers' employment with the defenders, the pursuers are not entitled to a salvage award, and the defenders should be assolzied. (3) The pursuers, having been engaged and paid by the defenders to perform the services founded on as part of their ordinary employment, without any additional remuneration for salvage operations, are not entitled to any additional remuneration therefor, and the defenders should be assolzied."

After hearing parties in the procedure roll the Lord Ordinary on 7th December 1921 before answer allowed "to the parties a proof of their averments on record, so far as relevant to the terms on which pursuers were employed by the defenders (but excluding therefrom the averments in articles 4 to 10 of the condensation and answers thereto)." The averments excluded from proof related to the nature of the services which had been rendered to the "Graciana," and the part taken by the pursuers in rendering these. At the conclusion of the proof he assoilzied the defenders from the conclusions of the summons, and against that interlocutor the present reclaiming note has been taken.

In the course of his opinion appended to his interlocutor the Lord Ordinary expresses the view that the services rendered by the pursuers were not in the nature of salvage services. This appears to me to be a somewhat peculiar view, as the Lord Ordinary had excluded from proof the averments of the pursuers relating to the nature of the services rendered by them, and as the defenders had made a claim in the arbitration as for salvage services rendered by the pursuers. The Lord Ordinary bases his view upon the fact which he finds proved, that when the pursuers were engaged they knew that they might be employed on salvage operations on behalf of the defenders, and that they undertook to render such services as part of their employment; and upon the general principle that to found a claim for salvage award the services must have been rendered voluntarily and not be attributable to legal obligation, the interest of self-preservation, or the stress of official duty. In particular he founds upon the opinion of Lord Ardwall in the *Clan Steam Trawling Company v. Aberdeen Steam Trawling and Fishing Company*, 1908 S.C. at p. 658. I do not, however, think that the opinion of that learned Judge in that case affords any authority for the Lord Ordinary's view. There the salvage claim by the owners of a vessel rendering assistance to another vessel in distress was held to be excluded on the ground that the services rendered were contractual and obligatory. It is also the case that "both owner and seamen are precluded from obtaining salvage reward, although their vessel has rendered salvage services, . . . where the salvaging and the salvaged vessels are at the time of the salvage service sailing as consorts under a special agreement to give mutual protection"—See Kennedy on Civil Salvage, 2nd ed., p. 84. The contract or agreement, however, precluding a salvage award in such cases exists prior to the salvaged vessel being in a condition to require assistance. An agreement as to the nature of the services to be rendered or as to the amount of its reward does not preclude the entertainment by the Court of a claim for salvage. In the "*Hestia*," [1895] P. 193, Bruce, J., said (at p. 199)—"No doubt the parties may by contract determine the amount to be paid, but the right to salvage is in no way dependent upon

contract." At page 225 of Kennedy's work to which I have already referred, he says—"A salvage agreement, properly so called, is an agreement which fixes the amount to be paid "to the salvor for his assistance, but still leaves the right to any payment contingent upon the preservation of some part at least of the property in peril." The agreement in the present case between the defenders and the owners of the "*Graciana*" is essentially in the nature of a salvage agreement, and I was quite unable to follow the argument of the respondents that it was something different. Where salvage services have been rendered by one ship to another in distress the master and crew of the salvaging vessel have a claim to salvage independent of the owners. I know of no authority for the Lord Ordinary's view that the services rendered by the crew are not truly in the nature of salvage services if they have undertaken as part of their employment to render such services.

The Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60) enacts, *inter alia*—section 156—" (1) A seaman . . . shall not by any agreement abandon . . . any right that he may have or obtain in the nature of salvage, and every stipulation in any agreement inconsistent with any provision of this Act shall be void. (2) Nothing in this section shall apply to a stipulation made by the seaman belonging to any ship, which according to the terms of the agreement is to be employed on salvage services, with respect to the remuneration to be paid to them for salvage services to be rendered by that ship to any other ship." If the view of the Lord Ordinary be sound this second sub-section is quite unnecessary, for a man engaged as a seaman on a salvage ship would have no claim to salvage remuneration as he is only doing the work he has contracted to do. The statute, however, assumes the seaman's right to salvage even if he is serving on a ship engaged in salvage work unless his claim is barred by express agreement. In interpreting this sub-section (or rather the equivalent sections in the earlier statutes, *i.e.*, 17 and 18 Vict. cap. 104, section 182, and 25 and 26 Vict. cap. 63, section 18) judges in England have held that all such agreements are not necessarily binding or conclusive but are simply not illegal. The Court may still refuse to sanction an agreement that appears to it inequitable—see "*The Pride of Canada*," (1863) Brow. & Lush. 208, and "*The Ganges*," (1869) L.R., 2 A. & E. 370. The headnote to the report of the former of these cases is in these terms—"In order to deprive a seaman of his right to share in salvage, neither the agreement for the vessel to be employed in salvage services nor the stipulation that the seaman shall waive his claim for salvage, need be in writing to satisfy the 18th section of the Merchant Shipping Amendment Act 1862, but both must be clearly proved by those who dispute the seaman's right." The nature of the seamen's employment and the defence of their employers appear to have been similar to what they are in the present case. Dr Lushington said—"Looking to the terms

of the statute I do not think the agreement or stipulation need be in writing, but it falls upon those who dispute the seamen's claim to salvage to show that there was an agreement that the vessel was to be employed on salvage service and a stipulation that the seamen should waive their right to salvage money. Neither of these have been clearly shown by the company, and both are denied by the affidavit of the seamen. I must therefore pronounce for an apportionment."

It appears to me that the only relevant defence apart from amount that the defenders have to the pursuers' action is that they entered into an agreement with them which excludes a salvage claim. It may perhaps be doubted whether the defenders have made a relevant case of agreement, at all events so far as the pursuers other than the master of the "R. Nicholson" are concerned. In leading their evidence, however, they appear to have traversed a wide field of irrelevant topics, of some of which they had given no notice upon record. They attempted to prove that they were not in the habit of giving salvage allowances to seamen employed by them. To establish this they drew a distinction between what they described as "pick-up" cases, *i.e.*, where their vessels rendered assistance to other vessels without any arrangement being come to, and cases where their vessels were sent out to rescue ships in distress under such an arrangement as existed in the present case. They argued that salvage claims, properly speaking, applied to the former cases, and that the latter cases were not affected by the terms of section 156 of the Merchant Shipping Act. This point is not properly raised by the defenders' pleadings. I do not know of any authority that justifies such a construction of section 156, and I am prepared to negative it. The defenders have, in my opinion, failed to prove that the pursuers have never shared in a salvage award either with the defenders or their predecessors. Even if the defenders had established such a practice I do not see that it would necessarily have established their case. If the pursuers did not know of their rights under section 156 of the Merchant Shipping Act, their failure to assert a claim on previous occasions does not prevent their doing so now. Evidence was led of gentlemen connected with salvage companies in other ports than Leith to the effect that they were not in the habit of sharing salvage awards with their crews. I do not see what bearing this evidence has upon the present case. They may have made special arrangements with the men forming the crews of their vessels, but the fact that they did so cannot assist the defenders in proving that they also did so. I do not think that evidence of custom as to statutory requirements being dispensed with is legitimate. I am also at a loss to understand what assistance the defenders could expect to derive from evidence as to a Sheriff Court action where a Leith seaman on board a salvage tug had failed in an action by him to participate in a salvage award obtained by his

employers, the owners of that tug, or in proving that the "R. Nicholson" had a steam valve which might be used for salvage purposes, but which in fact had never been so used.

Out of a somewhat extraordinary medley of evidence the defenders maintain that they have established an agreement with the pursuers in virtue of which the pursuers are not entitled to insist in a claim to participate in a salvage award. I think that the contrary is proved on the testimony of their own principal witnesses. Mr Muir, the managing director for the salvage portion of the business of the defenders' company, after giving an account of the origin of the company in 1919 and the nature of its work, explains as to the footing on which their masters and men are employed. He refers to an agreement between the defenders and the National Seamen's and Firemen's Union, Leith, representing the masters and crews of the steam tugs. That agreement provided for the terms of employment, but it says nothing as to salvage claims. The agreement expired on 31st December 1919, but it was thereafter renewed for a further period with an increase of wages. Apart from this agreement no special arrangement seems to be made either verbally or in writing with men as they were employed. As Mr Muir says—"Any men seeking employment usually go to the office and ask if there is a job. If there is not they give in their names, and if the clerk in the office, or manager, is favourably impressed by any of these men a mark is put opposite that man's name and he gets the first chance of a job; a large proportion of the men we are employing at present have been in our service since we took over the company." In cross-examination in reply to the question whether any bargain as to the men's assisting in salvage work was entered into with them he replies, "No written agreement." To the further question, "Was any verbal arrangement made?" his answer is—"The verbal arrangement was simply that the men were taken on to carry out any work which, in the course of the company's business, fell to their lot to do. These particular men had in any case been in our employment for such a time as to enable them to know what the company's business was." Mr James Nicholson, another of the defenders' directors, gives evidence to the same effect. This evidence appears to me to fall far short of proof of such an agreement as Dr Lushington considered must be proved to bar a seaman from claiming salvage remuneration, and I do not think that the circumstance that the pursuers received extra overtime wages during the time they were engaged in the operation of salving constitutes such an agreement, though it may be an element to be taken into account in apportioning a salvage award. On turning to the evidence of the pursuers I find that they are unanimous that they did not enter into any arrangements, written or verbal, excluding their claim to salvage. From March 1919 until the occasion when she assisted in salving

the "Graciana," the "R. Nicholson" had never been employed on salvage work. She was engaged towing in the harbour and towing on the coast. While the pursuers were expected, and perhaps bound, to do salvage work if called upon, it cannot be said to be established that they were specially engaged to do that class of work.

I agree with the defenders that the provisions of section 156 of the Merchant Shipping Act, as regards agreements of seamen, do not apply to the case of the master as under section 742 of the Act the expression "seaman" does not include master. No point on this distinction has been made on record, and I have not thought it necessary to treat the different pursuers' cases separately, as it does not appear to me that an agreement with any of the pursuers excluding a salvage claim has been established.

The defenders said that the result of a decision adverse to their contention would or might lead to a number of claims being advanced by the employees on salvage ships who had hitherto been content with their contract wages. The remedy is in their own hands. They can enter into agreements such as Dr Lushington indicated were contemplated by the statutes, and if these are not inequitable, effect will be given to them. If, however, they neglect to take this course they cannot complain that the provisions of the statute are founded on against them.

As regards the actual apportionment of the salvage award, that must be made in the light of all the facts and circumstances bearing upon the question. I understand both parties were agreed that if we were in principle in favour of the pursuers' claim the most convenient course would be to remit to Mr Bateson to make the appropriate apportionment. If this is so, I think that we might recal the Lord Ordinary's interlocutor, find that the pursuers are not barred from participating in the salvage award to the defenders, and of consent remit to Mr Bateson to deal with the question of apportionment.

The Court pronounced this interlocutor—

"Recal the said interlocutor: Repel the first, second, third, and fourth pleas-in-law for the defender: Of consent remit to Alexander Dingwall Bateson, Esq., King's Counsel, London, to adjust and apportion the amounts of salvage to be awarded to the pursuers," &c.

Counsel for the Reclaimers (Pursuers) — Mitchell, K.C. — Macgregor Mitchell. Agents—Miller, Mathieson, & Miller, S.S.C.

Counsel for the Respondents (Defenders) — Dean of Faculty (Sandeman, K.C.) — Cooper. Agents — Mackenzie & Fortune, S.S.C.

Friday, February 9.

SECOND DIVISION.

[Lord Constable, Ordinary.]

MULHERRON v. MULHERRON.

*Husband and Wife—Divorce—Desertion—Absence of Remonstrance—Willingness of Pursuer to Resume Cohabitation with Defender.*

A husband deserted his wife in 1915 after treating her with cruelty and remained in desertion thereafter, his wife continuing to reside in the family home. She made no attempt at remonstrance, her only opportunities for doing so occurring once during each of the first three years of the period of desertion, when she received letters from him disclosing his address, to which, however, she made no reply. The letters were couched in such terms as to repel rather than to encourage any remonstrance or entreaty on her part. In 1922 she brought an action against her husband of divorce for desertion, which was undefended. At the proof certain questions were put to her by the Court, her answers to which indicated that she was unwilling to live with him because of his cruelty. *Held (rev. judgment of Lord Constable, diss. Lord Hunter)* that the pursuer had not acquiesced in her husband's desertion, and that she was entitled to decree of divorce.

*Authorities examined.*

Mrs Grace Lumsden Leitch or Mulherron, Cupar, Fife, *pursuer*, brought an action of divorce for desertion against her husband Michael John Mulherron, *defender*. The case was undefended.

The *facts* appear from the opinion of the Lord Ordinary (CONSTABLE), who on 21st August 1922 after a proof found that the pursuer had failed to prove that the defender had been guilty of wilful and malicious non-adherence to and desertion of the pursuer and dismissed the action.

*Note.*—"I have carefully reconsidered this case and re-read the notes of evidence, but the result has been to confirm the impression which I formed at the hearing that I cannot consistently with well-settled rules of law grant the pursuer decree of divorce in respect of her husband's desertion.

"It appears clear that the original separation of the spouses in 1915 was due to the defender's misconduct. He gave way to drink. He was twice convicted for assaulting the pursuer. On his release from prison he returned to the house in a state of intoxication, smashed the windows, and suffered another term of imprisonment, after which he did not seek to return to the family home. In 1916 he joined the army under the Derby Scheme and remained in it until the end of March 1918, when he was demobilised. During that period the pursuer received the usual separation allowances from the Army Pay Department, but this of course ceased when her husband was demobilised, and since then though continuing to reside in