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### Recommended Citation

G. H. Robinson, *Admiralty Law of Salvage*, 23 Cornell L. Rev. 229 (1938)  
Available at: <http://scholarship.law.cornell.edu/clr/vol23/iss2/1>

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## THE ADMIRALTY LAW OF SALVAGE\*

G. H. ROBINSON

The general definition of salvage<sup>1</sup> as a maritime term<sup>2</sup> is, "a reward for saving property at sea". Reward for saving life has also come up and will be discussed, but historically, salvage has to do with the saving of property.<sup>3</sup>

\*This article is a chapter from the book by Professor Robinson on Admiralty Law which will appear shortly.

<sup>1</sup>The best recent discussion of the subject of salvage in a short compass is the introduction to Arnold W. Knauth (1936) 36 COL. L. REV. 224, *Aviation and Salvage*. In the first few pages, Mr. Knauth states the whole theory of salvage. See also note, *The Nature of Salvage Service* (1920) 33 HARV. L. REV. 453; *Salvage at Sea, An Historical and Legal Survey* (1931) 1 FORTNIGHTLY L. J. 845; G. L. Canfield, *Salvage* (1915) 22 CASE & COMMENT 118; J. D. Dewell Jr., *The Laws of Salvage* (1912) 21 YALE L. J. 493, and his *Jurisdiction in Salvage Cases* (1908) 17 YALE L. J. 513; H. B. Sharpe, *Maritime Salvage* (1906) 22 LAW Q. REV. 163. C. K. Allen, *Legal Duties* (1931) 40 YALE L. J. 331, offers a philosophical discussion of the volunteers' act and its legal results, illustrated from various sources of the law and from admiralty at page 373; J. Heilman, *Rights of a Volunteer . . . in Roman Law and in Anglo-American Law* (1926) 4 TENN. L. REV. 83 discusses the salvor. See also, Admiralty Rules 18 and notes in 28 U. S. C. A.; The Admiralty Rules, notes 36, 67, 92, 127.

In a note by the court in the case of *The Lamington*, 86 Fed. 675 (C. C. A. 2d 1898) at p. 685, there is a list of salvage awards in the federal courts dating from 1797 down to 1896, showing the amounts awarded under various circumstances of effort, danger, and value of the salvaged property. The salvage cases of the last twenty-odd years are gathered in the Five-Year Digest of the American Maritime Cases. In the first-Digest, 1923-27, at page 818; in the second Digest, 1928-32, at page 897. See on the nature of salvage service (1921) 30 YALE L. J. 757.

Among the texts see: JONES, *LAW OF SALVAGE INCLUDING THE AMERICAN CASES* (London 1870); KENNEDY, *THE LAW OF SALVAGE* (London, 3rd ed., 1936).

<sup>2</sup>The word "salvage" is also used in the vocabulary of insurance law. In *Holmes v. Payne* (1930) 2 K. B. 301, where an insured necklace was lost, paid for by the insurer, and later found, the insurers failed in their attempt to recover the settlement and force the necklace back upon the insured. The latter was entitled to retain the money, and the necklace remained with the underwriters as "salvage." It is used in Marine insurance when stranded property as in the case of *The President Hoover* is abandoned to the underwriters. See notes (1930) 30 COL. L. REV. 167; (1931) 29 MICH. L. REV. 644, where the word is similarly applied in cases of stolen automobiles, later recovered.

<sup>3</sup>The contrast between the admiralty view and the common law view in respect to the treatment of the volunteer salvor, brought out by Chief Justice Marshall in *Mason v. The Ship Balireau*, 2 Cranch 240 (1804) at p. 266: "If the property of an individual on land be exposed to the greatest peril, and be saved by the voluntary exertion of any person whatever; if valuable goods be rescued from a house in flames, at the imminent hazard of life by the salvor, no remuneration in the shape of salvage is allowed. The act is highly meritorious, and the service as great as if rendered at sea. Yet the claim for salvage could not, perhaps, be supported. It is certainly not made. Let precisely the same hazard be rendered at sea, and a very ample reward will be bestowed in the courts of justice."

Both the amount of the property at risk and the reward has increased with the greater values of maritime ventures during modern times, and it was during the early nineteenth century that the salvage doctrines of the admiralty took their present form, largely under the hands of Lord Stowell, who was judge of the admiralty court in England for thirty years, from 1798 to 1828.<sup>4</sup> In the expanded definition of Mr. Justice Clifford in *The Blackwall*.<sup>5</sup> "Salvage is the compensation allowed to persons by whose assistance a ship or her cargo has been saved, in whole or in part, from impending peril on the sea, or in recovering such property from actual loss, as in cases of shipwreck, derelict, or recapture. Success is essential to the claim; as if the property is not saved, or if it perish, or in case of capture if it is not retaken, no compensation can be allowed.

"Compensation as salvage is not viewed by the admiralty courts merely as pay, on the principle of a *quantum meruit* or as a remuneration *pro opere et labore*, but as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property.

"Public policy<sup>6</sup> encourages the hardy and adventurous mariner to engage in these laborious and sometimes dangerous enterprises, and with a view to withdraw from him every temptation to embezzlement and dishonesty, the law allows him, in case he is successful, a liberal compensation." It is also an underlying assumption that the property is not yet *bona vacantia*. An inquiry into this fact may be a part of the case as in *The Tubantia*.<sup>6a</sup>

The salvage idea thus involves a service to marine property which is at risk or in peril and it is stressed that the service must be by those who are under no legal obligation to render it. Although the cases argue that it must result in success, it will appear that the success need not be completely achieved by the particular salvors claiming a share of the total reward.

#### TYPES OF SALVAGE SERVICE

The service may take a multitude of forms. Saving a derelict, or a wreck which has been abandoned at sea, is the favorite subject of the ad-

<sup>4</sup>This is pointed out in the note in (1931) 1 FORTNIGHTLY L. J. p. 83 and an interesting discussion of the life of Lord Stowell is to be found in (1936) 52 L. Q. REV. at p. 327.

<sup>5</sup>The *Blackwall*, 10 Wall. 1 (1869), 19 L. ed. 870, at p. 12.

<sup>6</sup>So strong is the public policy in favor of the salvage award that in *The Star*, 53 F. (2d) 890 (D. C. Wash. 1931), when a libel for salvage service was met by the defense that there was a custom among the fishermen of the waters in question to render service to each other without obligation on the part of the aided vessel, save to render like assistance, the court would not receive evidence of the policy. It said: "The custom relied upon . . . If it exists, being against public policy." But see to the contrary, *The Freiya v. The "RS"*, 59 Dom. L. R. 330, noted (1922) 35 HARV. L. REV. 615. The case arose in British Columbia among fishermen also.

<sup>6a</sup>Note 41, *infra*.

venture writer. Such a story is Kipling's "Bread upon the Waters", in "The Day's Work". It may take the form of protecting marine property from wreckers and looters, saving marine property from fire, for which the award was given in *The Blackwall*, *supra*. The illustrations will appear as this paper goes on.

#### MARITIME PROPERTY THE SUBJECT OF SALVAGE

The property to which the service is rendered must be marine property. Just what objects fall into this category is frequently fought over in the cases. The ship itself is a most obvious example. So also is a box or cask lost overboard from a ship and upon the sea. Even if it is washed ashore and is there saved, salvage may be claimed upon it. But if a train were wrecked while passing over a long trestle such as used to be found on the Florida Keys, and some of the cargo left floating upon the water, it would not, apparently, be subject to salvage. The subject matter of salvage was much bruited in the famous case of *Cope v. Valette Dry-Dock Co.*,<sup>7</sup> already discussed in previous articles with reference to "What is a vessel?"<sup>8</sup> There the Court denied salvage to persons who rescued a dry-dock which had broken loose from permanent moorage. After giving various definitions from the texts, Mr. Justice Bradley said: "If we search through all the books from the Rules of Oleron to the present time, we shall find that salvage is only spoken of in relation to ships and vessels and their cargoes, or those things which have been committed to or lost in the sea or its branches or other public navigable waters and have been found and rescued." . . . "There has been some conflict of decision with respect to claims for salvage service in rescuing goods lost at sea, and from floating on the surface or cast upon

<sup>7</sup>*Cope v. Valette Dry-Dock Co.*, 119 U. S. 625, 7 Sup. Ct. 336, 30 L. ed. 501 (1887).

<sup>8</sup>See (1935) 21 CORNELL L. Q. at p. 74.

In England the subject matter of the salvage service was much discussed in *The Gas Float Whitton No. 2*, L. R. 1896 Prob. Div. 42 by the Court of Appeal. *The Gas Float Whitton No. 2* was a box made of iron, 50' long, 20' wide, without mast, sternpost, forepost or rudder: its interior was wholly occupied by a cylinder into which enough gas was pumped. The gas was piped to a light at the top of a 50' pyramid which the float supported and the whole was anchored in a navigable waterway as a beacon. After a painstaking review of the Anglo-American authorities this structure was held not to be a subject of salvage as not a ship or part of a ship. See a note (1896) 9 HARV. L. REV. 429, which shows a more liberal view to have been taken in respect to rafts of lumber in a number of American cases. S. C. Marsden in an article in (1899) 15 L. Q. REV. 353 entitled "Admiralty and Salvage—*Gas Float Whitton No. II*" says that the decision "is not in accordance with the practice of the admiralty which has prevailed for at least three centuries." Yet the House of Lords affirmed it (1897) A. C. 337.

In America since *The Blackheath*, 195 U. S. 361, 25 Sup. Ct. 46, 49 L. ed. 236 (1904), and *The Raithmoor*, 241 U. S. 166, 36 Sup. Ct. 514, 69 L. ed. 937 (1915), cases which built up the idea that even land structures, if an aid to navigation, are subject to admiralty tort; see Robinson, *Introduction to American Admiralty* (1935) 21 CORNELL L. Q. 45, at p. 77; it is arguable that we should treat such floating aids to navigation as this *Gas Float Whitton* or other buoys as subjects of salvage.

the shore. When they have belonged to a ship or vessel as parts of its furniture or cargo, they clearly come under the head of wrecks, flotsam, jetsam, ligan, or derelict, and salvage may be claimed upon them, but when they have no connection with a ship or vessel, some authorities are against the claim and others are in favor of it,"—showing conflicting decisions with reference to rafts of timber found floating at sea.<sup>9</sup>

In recent years the question of what is property subject to salvage has been agitated in respect to flying vehicles, and Judge Lowell's prophetic remark made in 1871 that salvage would be given "if the goods had been dropped from a balloon"<sup>10</sup> was put to the test.

In *Crawford Brothers No. 2*,<sup>11</sup> a libel *in rem* for repairs to an airplane was excepted to and the court sustained the exception, holding that it had no jurisdiction in the matter. The exception was entered by an intervening libellant who asserted claim for having saved the airplane after it had fallen into navigable waters, but he expressly stated that he did not wish to enforce a maritime lien for salvage. Inferentially, the court agreed with the idea that the salvor had no maritime lien for the salvage. In *Reinhardt v. Newport Flying Service Corporation*,<sup>12</sup> Reinhardt was injured while seeking to prevent an anchored aircraft from dragging her anchor and going on the beach at Gravesend Bay, in navigable waters of the United States. The case came up on his demand for workmen's compensation, which was denied.

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<sup>9</sup>In *50,000 Feet of Timber*, 2 Lowell 64 (D. C. Mass. 1871) Judge Lowell took a firm stand in respect to two rafts of timber found floating in Boston Harbor. He awarded salvage despite some prior cases to the contrary. Certainly in dealing with the sort of vast timber rafts that ply the Pacific seaboard, a contrary decision would be absurd.

But Judge Lowell went far beyond his needs, saying: "If the services are rendered, it is of no consequence whether the goods are a ship or part of a ship or were ever on board of a ship. A great many of the cases are of mere derelict goods picked up at sea; and no one has ever heard that it would be a defense to a proceeding for salvage, that the goods had been washed out to sea from the shore by a gale or a flood, or had been dropped from a balloon."

<sup>10</sup>See *supra* note 9.

<sup>11</sup>*Crawford Bros. No. 2*, 215 Fed. 269 (D. C. W. D. Wash. 1913), noted in (1914) 29 HARV. L. REV. 200 by a writer who remarked upon the "superficial plausibility" of the contention that an aeroplane might be a subject of a maritime lien for repairs. But the present writer is inclined to think that there is—or was at the outset—a considerable plausibility for the argument that the aeroplane and air navigation might well have been absorbed into the existing scheme of admiralty law and regulation. This would give the whole field to the federal government rather than the states, make intra-state vs. interstate distinctions immaterial and give nationwide unity to air traffic. See *Neiswonger v. Goodyear Tire etc. Co.*, 35 F. (2d) 761 (1929) and note (1930) 43 HARV. L. REV. 837, which remarks that "Constitutional amendment has been suggested as the only means of attaining national uniformity in aerial navigation rules." See A. W. Knauth, *Aviation and Shipping: Some considerations as to the Relations between Aircraft and Vessels* (1930) 1 AIR L. REV. 425-438. In the United States Maritime Commission Economic Survey of the American Merchant Marine of November 10, 1937, the Commission discussed the interrelation of aircraft and ships.

<sup>12</sup>*Reinhardt v. Newport Flying Service Corp.*, 232 N. Y. 115, 133 N. E. 371, 18 A. L. R. 1324 (1921).

Judge Cardozo incidentally remarked that: "A hydro-aeroplane, while afloat upon waters capable of navigation is subject to the admiralty . . . If, moving upon the water, it becomes disabled, and is rescued on the high seas by a ship, it will be subject to a lien for salvage."<sup>13</sup> In 1934 these casual expressions of judicial opinion were supplemented by *Watson v. S. C. Victor Co., Inc.*<sup>14</sup> One Hutchinson, an American aviator, undertook to cross the Atlantic in a seaplane, accompanied by his wife, two daughters, a crew of four, and some equipment, amounting in value to some \$15,000. Forced to make a descent onto the sea, the seaplane was damaged and sank near a bare, rocky islet,<sup>15</sup> on which the party found refuge, taking with it parts of the valuable equipment. Hearing their S.O.S., an English trawler came to the islet and rescued the party, along with the property. The trawler's suit for salvage was dismissed on the ground that a seaplane was not a vessel, so that the common law principles of maritime salvage, which relate only to vessels and their cargoes, would not apply in the trawler's behalf.<sup>16</sup> This ungracious decision is the subject of adverse comment.<sup>17</sup> Two international conventions have answered affirmatively the question which the court answered in the negative. They consider that a salvage service may be rendered to aircraft, at least upon the high seas.<sup>18</sup> Neither of these agreements refer to the Maritime

<sup>13</sup>We are here discussing the question of aid by a ship or some maritime apparatus to an airplane, and the question is whether or not the airplane is a subject of salvage. Whether service to a ship by an airplane or other aircraft would be salvage service seems clear in favor of the award, although it is possible to say that salvage rewards might be limited to owners of maritime property only. The British Air Navigation Act, 10 and 11 George V, Chap. 20, § 11 (1920), makes an award of salvage to an aircraft for assistance to the maritime object proper. See the discussion by Mr. Knauth in (1936) 36 Col. L. Rev. 231.

<sup>14</sup>*Watson v. R. C. A. Victor Co., Inc.* 50 Lloyd's List L. Rep. 77 (1935), 1935 U. S. Av. REP. 147, 1935 American Maritime Cases 1251.

<sup>15</sup>It would seem clear that the party and the goods were still in marine peril, although actually ashore on the islet. The stranded vessel is a subject of salvage. Cf., however, *The Francis L. Skinner*, 248 Fed. 818 (D. C. W. D. Wash. 1917) where a stranded vessel had been for years on the beach and the service of refloating was held not to be salvage. Generally cargo ex ship remains subject to salvage as long as it is imperiled, whether jetsam i.e., thrown overboard, to lighten the ship; flotsam, i.e., washed overboard; lagan, i.e., lying in the water and anchored to a buoy, or a wreck that is washed ashore. See Mr. Knauth (1936) 36 Col. L. Rev. 225.

<sup>16</sup>The British Air Navigation Act of 1920, 10 and 11 Geo. V. Ch. 80, § 11, provides that: "The law relating to wrecks and to salvage of life or property and to the duty of rendering assistance to vessels in distress shall apply to aircraft on or over the sea or tidal waters as it applies to vessels." In the Hutchinson case, however, the court took the view that the Act of Parliament did not cover acts done in Danish territorial tidal waters, where the islet was situated, and further that even if the wrecked seaplane could be called a vessel, it was not a British vessel and hence not within the British Act.

<sup>17</sup>See Mr. Knauth's paper in (1936) 36 Col. L. Rev. at p. 224, referred to *supra* note 1.

<sup>18</sup>Mr. Knauth refers to the Havana Air Convention of 1928, Art. 26, 1932 U. S. Aviation Report, 298. This Convention is now in effect among Mexico, Nicaragua, Panama, Guatemala, The United States, The Dominican Republic, Costa Rica and Honduras. The Paris Air Navigation Convention of 1919, Art. 23, known as the Convention Relating to the Regulation of Aerial Navigation (see text in HOTCHKISS, AVIATION LAW (1928) at p. 103) now in effect among various countries provides that in absence of

Salvage Convention of 1910 at Brussels, since adopted by many nations, including the United States, which enacted corresponding domestic legislation referred to hereafter.<sup>19</sup> Of this legislation, as stated in *The Impoco*,<sup>20</sup> "The purpose is to harmonize our law with the provisions of the salvage treaty adopted by the Conference at Brussels in 1910. The United States ratified the Convention in 1912 [37 Stat. 1658 (1912)], and the treaty relates to salvage of both seagoing vessels, things on board, freight and passage money, and also services of the same nature granted to each other by seagoing vessels and vessels of inland navigation."

Our statute of 1912, however, does not list the subject matter of salvage. It does not, therefore, include airplanes specifically, and we must assume that the subjects of salvage remain the same as the general maritime law.<sup>21</sup> But a salvage convention for aviation is now being drafted which is set forth in some detail in a recent article,<sup>22</sup> and which specifically includes the aircraft with the categories of maritime salvage so long, of course, as the rescue is otherwise maritime in its aspects.

#### LIFE SALVAGE

In *The Zephyrus*,<sup>23</sup> persons who claimed salvage from the owners of a vessel did what the court called a very meritorious service in attempting to rescue vessel and cargo. In this endeavor they met complete failure, but did rescue the crew of the ship. Upon general principles a mere attempt to save vessel and cargo, if unsuccessful, could not bring a salvage reward. Dr. Lushington accordingly gave none. He then addressed himself to the claim for salvage based upon the rescue of the persons. He denied the claim. The point became settled that life salvage brought no salvage award.<sup>24</sup> The bare statement, however, requires explanation for life salvors are not always left unrewarded. In *The Zephyrus*, the rescuers rescued life only, and no property. For doing it they got nothing. But if they rescue life and also property, the admiralty law gives the salvors in that case an allowance out of the property for having rescued life. In such a case neither the passengers nor the crew are liable anymore than if life only were saved. The reward is only out of the property saved. The American cases agree on these points

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an agreement to the contrary, salvage of aircraft at sea is to be governed by the principles of maritime law.

<sup>19</sup>See 46 U. S. C. A. § 727, and § 731, Chapter 19, Wrecks and Salvage.

<sup>20</sup>*The Impoco*, 287 Fed. 400 (D. C. N. Y. 1922).

<sup>21</sup>Other cases on the airplane as an admiralty object are set forth in the chapter on The Maritime Lien.

<sup>22</sup>(1936) 36 COL. L. REV. 234.

<sup>23</sup>*The Zephyrus*, 1 W. Rob. 329 (1842).

<sup>24</sup>Cases in accord with *The Zephyrus* are: *The Emblem*, Davies 61; *The Mulhouse*, 17 Fed. Cas. 962 (D. C. 1859); *The Plymouth Rock*, 9 Fed. Rep. 413 (D. C. 1925); *The George W. Clyde*, 80 Fed. Rep. 157 (D. C. 1899).

with the English. The *George W. Clyde*<sup>25</sup> held that the tug which took off the passengers and crew but did nothing for the ship or cargo got nothing. "Services of that character do not give rise to a claim for salvage against the ship." To make the owner of the ship rescued pay a greater amount of salvage if life and property are saved than he would pay for the mere saving of his vessel, has seemed to some writers unjust.<sup>26</sup> But it must be remembered that the persons on board are part of the ship-owner's responsibility to begin with.

The injustice which the present writer feels lies in our failure to make provision for salvage for mere life. Salvor's lives and salvor's property are more imperilled sometimes in such services than in the cases where the salvors rescue property. Often the conditions are so adverse as to permit only taking people off of the distressed vessels and seas and winds prevent salvage of property. In England this injustice has led to some modification of the law. The British Act of 1854 went to the extent of making claim for life salvage prior to the claim for the property salvaged. The whole of the property saved might, conceivably, thus be applied to the payment of life salvage, so that the ship owner whose vessel was saved along with the lives got no benefit from the ship's rescue.<sup>27</sup> Later, England made funds available for life salvors who saved no property.<sup>28</sup> The legislation of the United States passed to carry out the International Salvage Convention does not go so far as this. It reads: "Salvors of human life, who have taken part in the services rendered on the occasion of the accident giving rise to salvage, are entitled to a fair share of the remuneration awarded to the salvors of the vessel, her cargo and accessories."<sup>29</sup> The statute thus merely perpetuates the previous rule that property must be saved if the salvors of life are to get anything, and that the salvors get their reward out of the property saved. As was stated in *The Doctor George J. Moser*,<sup>30</sup> "This [statute] gives to salvors of life a share in the award of those who save property." The Moser took from another tug, when both had arrived at the scene of disaster to a tank steamer, a member of the tanker's crew who had been injured by being blown off the vessel. The Moser took him ashore then came back and aided the tanker. Taking the man ashore was regarded as pure life salvage, and no award was made for it against the tanker. The court said, however, that in the very

<sup>25</sup>The *George W. Clyde*, 80 Fed. Rep. 157 (D. C. E. D. N. Y. 1897).

<sup>26</sup>See Frederick Cunningham, *Life Salvage* (1905) 17 GREEN BAG 708. The article is summarized in (1906) 19 HARV. L. REV. 310; See also R. C. Dunlap, *Life Salvage* (1899) 15 SCOT. L. REV. 44.

<sup>27</sup>See *The Renpor*, L. R. 8 P. D. 115; *The Annie*, L. R. 12 P. D. 50; *The Pacific*, L. R. (1898) Probate 170.

<sup>28</sup>England now provides that where no property is saved "the Board of Trade may in their discretion, award to the salvor, out of the Mercantile Marine Fund." See *The Merchant Shipping Act, 1894* (57-58 Victoria C. 60) S. 544 (3).

<sup>29</sup>46 U. S. C. A. § 729, Act of Aug. 1, 1912, c. 268, § 3, 37 STAT. 242.

<sup>30</sup>*The Doctor George J. Moser*, 55 F. (2d) 904 at 905 (C. C. A. 2d, 1932).

case "It does not impose a lien upon the salvaged vessel because of the rescue of her crew. So far as The Moser has any claim under it, it is therefore against the award of those whom she set free to help the ship." In the proposed Air Salvage Convention, referred to above, it is provided that if both lives and property are saved, the life salvor shall, in addition to his indemnity for expenses, have a "fair share" of the remuneration of the property salvor, thus carrying out the idea in the courts mind in the *Moser* case.

#### THE PERIL

It is, of course, not sufficient that the property be merely a maritime object. It must be also a maritime object which is in fact in peril; and a peril not brought about by the salvor's fault. This appeared in *The Charlotte*<sup>31</sup> where men put out from shore and rescued a ship which they considered to be in danger and which her master averred was not. This is a not infrequent case and is considered in a case *infra* p 244 by the Supreme Court of the United States which remarked: "It is enough that if under the circumstances any prudent man would have accepted" the offer of assistance. In *The Charlotte*, Dr. Lushington said: "According to the principles which are recognized in this court . . . all services rendered at sea to a vessel in danger or distress are salvage services. It is not necessary, I conceive, that the distress should be actual or immediate, or that the danger should be imminent and absolute. It will be sufficient if, at the time the assistance is rendered the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered." In the actual case, the vessel was among the breakers and the mast and all her sails had been cut away; the court considered that she was a vessel in distress.<sup>32</sup>

The peril need not be on the seas nor yet a peril of the seas. If a ship, tied to a wharf, is in danger from a fire spreading from the land, its rescue makes it liable to salvage. This was held in *The Kaiser Wilhelm der Grosse*,<sup>33</sup> a consolidation of no less than nineteen cases involving twenty-three tugs which had hauled the Atlantic Queen of her day from a historic fire on her owner's piers. That rescue from fire was a salvage act had long before been decided in *The Blackwall*.<sup>34</sup> How far a maritime object may be "out of its element" and yet in such peril that its rescue may base a salvage claim

<sup>31</sup>The Charlotte, 3 W. Rob. 68 (1848), 71.

<sup>32</sup>Judge Shipman remarked in *Towle v. The Great Eastern* (D. C. S. D. N. Y. 1864) Fed. Cas. No. 14110 at p. 80, first column: "This doctrine (of the Charlotte) has been repeatedly sanctioned by the courts of the United States and very recently by this tribunal. See also, *Hennessey v. Versailles*, Fed. Cas. No. 6365; *Williamson v. The Alphonso*, Fed. Cas. No. 17749; *Winso v. The Cornelius Grinnel*, Fed. Cas. 17883."

<sup>33</sup>The Kaiser Wilhelm der Grosse, 106 Fed. 963 (D. C. So. D. N. Y. 1901).

<sup>34</sup>The Blackwall, 10 Wall. 1 (1870).

has been considered in several cases involving a ship under repair. A ship may be in a dry dock at the time of her peril and still be a subject of salvage. This was decided in *The Steamship Jefferson*.<sup>35</sup> The vessel was under repair—that is, she was not a new vessel building, in which case, on the authorities, she would not have been a maritime object. She was locked in a dry dock which was actually dry at the moment when fire broke out in the plant. The fire had attacked her upper structure when the salvors got to work. They played water on her. The libel was dismissed below<sup>36</sup> because the ship was in dry dock. The court considered it not subject to maritime peril. The Supreme Court, in reversing, reviewed the fire cases and the cases where salvage for rescue had been awarded whether the ship was at sea or at a pier. It held that the fact that the ship was in dry dock did not take it out of admiralty jurisdiction for salvage, relying on *The Robert W. Parsons*.<sup>37</sup>

#### VOLUNTARY SERVICE BY THOSE UNDER NO LEGAL OBLIGATION

One of the conditions of the salvage award is that the person rendering the service must be under no legal obligation to render it. He must, that is, be a "volunteer". He is often an eager volunteer, and, as the court remarked in *The Moser*,<sup>38</sup> "Salvage must not, of course, be made merely an opportunity for officious interlopers. A vessel in distress is not to be killed by kindness, particularly that of interested friends." In *The Moser* case, various tugs rushed to the aid of a big tanker. Of the tanker, the court said: "At least she can turn away these which she does not want." Ordinarily, at least, the distressed vessel has no duty to the would-be salvor<sup>39</sup> to submit to being rescued—a point dealt with later. Nor has the salvor first on the spot an absolute right to do the rescue. This last point is brought out in the cases where the first salvor on the spot seeks to "shoo away" others who rush in with their assistance. In *The Amethyst*<sup>40</sup> three schooners at sunset fell in with a derelict. Men from one boarded the derelict but did not stay and the three schooners agreed to stand by during the night and tow the derelict in next day. They stood near enough to be in danger of collision with the derelict. They saw the wreck at ten and at twelve o'clock, but when daylight came the derelict was a mile away and a fourth schooner bearing down on it. In the rush for possession the stranger's boat arrived first. In the fight that followed the stranger's men were ousted; and the three towed in the wreck. It was greatly injured by a storm which arose en route. The

<sup>35</sup>*The Steamship Jefferson*, 215 U. S. 130 (1909), noted (1910) 19 YALE L. J. 584.

<sup>36</sup>158 Fed. 255, noted (1908) 21 HARV. L. REV. 634.

<sup>37</sup>*The Robt. W. Parsons*, 191 U. S. 17, discussed by Robinson, *Introduction to American Admiralty* (1935) 21 CORNELL L. Q. 45, 81.

<sup>38</sup>THE MOSER *supra* note 30.

<sup>39</sup>55 F. 2d, 904 (C. C. A. 2d 1932).

<sup>40</sup>*The Amethyst*, 2 Ware (Nov. 20) 28, 1 Fed. Cas. 762 No. 330 (D. C. Me. 1840).

court considered that the wreck was in the "legal possession" of the three schooners, yet "the boarding her" was also stressed<sup>41</sup> as giving them "the right to possession" which "having become perfect was not lost" by their other acts. But, the fourth argued, the three owed a duty to the owners of the derelict to act for the latter's safety; it therefore was their duty to accept aid even though it would diminish their share of the salvage. The argument presents a question not without its thorns. The court conceded that if the salvor first on the spot cannot handle the job he is bound as a matter of duty to the distressed vessel to let the others aid. "If [he] cannot with his own force [act] without imminent risk of a total or material loss, he cannot consistently with his obligation to the owner refuse the assistance." The question of fact is obviously a most difficult one. In the very case on the facts found, the stranger was awarded nothing.

In *The Edilio*,<sup>42</sup> the salvage issue was complicated by the fact that the ship, imperilled by being ashore, was still under command. Great point is made of whether or not the captain contracted with the first salvor, Hayes, to get her off entirely or only to pull at the vessel to see if she could be got off by that method. Hayes worked two days to no avail and another person was hired to lighten her who got her off. Hayes would not cast off his lines and the ship cut them. The dispute hinged on this fact and the form of the arrangements.

The case is long, and to read it is in itself an education in practical aspects of salvage as a business. The court said: "It is well settled, upon just principles, that as between two sets of salvors if it appears that the claim of a set of salvors to a share in the salvage reward is based upon the dispossession, against their will, of other persons who were at the time continuously engaged in salving the vessel in distress, and who were willing themselves to persevere in the service which they had begun, the court allows the claim only, if it is clearly proved that the first salvors had not any fair prospect of success. In the absence of such proof, the burden of which lies upon the second set of alleged salvors, the court holds the dispossession to be wrongful, and treats the subsequent service rendered by the wrongdoers as inuring wholly to

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<sup>41</sup>In *The Tubantia*, 1924 p. 78, noted (1924) 33 YALE L. J. 789, the English admiralty court dealt with the claims of rival salvors. Major Sippe in 1922 organized an effort to raise *The Tubantia*. He located the wreck on the high seas, sent down divers and after working during the summer buoyed her for further operations in 1923. In 1923 while Sippe was at work on her, Grech et al. anchored their salvage outfit near Sippe's and interfered with his efforts. As a defense to Sippe's suit, Grech denied Sippe's possession, and his capacity to handle the job. The court considered that there was admiralty jurisdiction; it was assumed that the *Tubantia* was not *bona vacantia* and that the matter was one of salvage. It concluded that the Sippe expedition was so sufficiently in control that it "had the possession of the *Tubantia* and her cargo" and that the Grech party had trespassed on the possession by "strong arm" methods.

<sup>42</sup>*The Edilio*, 246 Fed. 470 (D. C. E. D. N. C. 1917).

the benefit of those who have been dispossessed, and not as entitling the wrongdoers to any share in the salvage award. Kennedy, *Salvage*, 168.

"From this principle it follows that if, as contended by libelants, the captain of the *Edilio* made a contract with Mr. Hayes, as alleged, and he (Hayes) was ready, willing, and able to perform on his part, he was entitled to do so, and the refusal on the part of the captain wrongful."

When the salvor appears, the property, as in the *Edilio*, may still be in charge of those who were originally in charge of it. It may be abandoned, that is, no persons are present aboard it or in connection with it. The difference in the circumstances makes it possible to talk of "contract salvage", as from "voluntary salvage", since those in possession will bargain as distinguished best they can. This furnishes another aspect of voluntariness. Neither in voluntary non-contract nor in contract salvage can an award be made to those who are under a duty to aid the vessel. If there is an antecedent duty, the contract, if one is made, is not a valid one.<sup>43</sup> The whole theory of salvage is predicated upon the proposition that by the general admiralty law there is no legal duty to aid a thing or person who is in distress. However much this problem may exercise the mind of the legal philosophers, the admiralty basis of salvage is that there is no such duty.<sup>44</sup>

The present statute of the United States, however, creates the curious situation of imposing a duty to aid and at the same time continuing the salvage law in its original form. Section 928 of 46 U. S. C. A. provides "The master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, crew, or passengers, render assistance to every person who is found at sea in danger of being lost; and if he fails to do so, he shall, upon conviction, be liable to a penalty of not exceeding \$1,000 or imprisonment for a term not exceeding two years, or both." This applies only to the assistance of persons in danger. No one can complain under it that his derelict ship or other maritime property was left to its own devices. If, however, the assistance is to a vessel and to persons, and the vessel is saved, the rescuers including the captain would be entitled to salvage. That the master is also obeying the obligation of the statute does not deprive him of his share. In *Warschauer v. Lloyd Sabaudo S. A.*,<sup>45</sup> Warschauer invoked the

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<sup>43</sup>In *Stilk v. Myrick*, 2 Comp. 317, under familiar principles of contract, the contract with the seamen was denied validity: see on the topic, WILLISTON, *CONTRACTS* (Rev. ed. Williston & Thompson 1936) § 130.

<sup>44</sup>See Ames, *Law and Morals* (1908) 22 HARV. L. REV. 97, 111. Other authority is collected in the comment in (1932) 17 CORNELL L. Q. 505 on *Harris v. Pennsylvania R. R. Co.*, 50 F. (2d) 866 (C. C. A. 4th 1931) where the employer of a seaman who without fault of the ship fell overboard was held liable for failure to attempt a rescue. The duty was here found in the relationship. It has also been held that a ship must exercise effort to rescue a passenger, *Melhodo v. Poughkeepsie Transp. Co.*, 27 Hun (N. Y.) 99 (1882). Both instances are put on a pre-existing relationship as the basis of a positive duty to act.

<sup>45</sup>*Warschauer v. Lloyd Sabaudo S. A.*, 6 Fed. Supp. 433 (1933) (D. C. S. D. N. Y.),

statute. He was adrift on the high seas in a disabled motorboat without gasoline and without food, and, he alleged, the defendant company's steamship passed within hailing distance, ignoring his signal of distress, which, he asserted, was clearly observed. He sued the owner for damages and the district court dismissed his complaint. The Court of Appeals affirmed. In the International Salvage Treaty which our Act of 1912<sup>46</sup> was designed to carry out, the corresponding section has the addition: "The owner of the vessel incurs no liability by reason of the contravention of the foregoing provision." This treaty the court considered self-executing,<sup>46a</sup> and that the employer came under no liability, either civil or criminal, as a result of the captain's neglect. This reading of the act makes the statute of little pecuniary value to the non-rescued. The legislation at its best seems largely to be a humanitarian gesture. Without it, gallant rescues were made in the past. Since its enactment, the master lives under a threat. He has a heavy burden in deciding whether he can give aid "without serious danger etc." to his own vessel, its crew and its passengers. He may be called upon to risk the whole ship and a thousand lives to save thirty-five or forty. He is practically certain to be called upon to risk a boat's crew. He must necessarily be the sole judge, and he must make his decision on the spot and under the conditions then prevailing. Sometimes his passengers, who are safeguarded by his decision, and the newspapers ashore have undertaken to tell him what he might have done, and he may be called upon to face an official armchair review when he comes ashore. In the Gilbertain sense, his life is not a happy one.

Another phase of the doctrine that the service must be done "voluntarily" concerns the particular persons who may be entitled to salvage. Those who are under obligation to serve are disentitled. The most obvious of these who are disqualified are the imperilled ship's own crew.<sup>47</sup> Let the ship be imperilled and their duty to save it increases with the peril. Why or how she is in peril is of no consequence. Salvage is also denied when the ship saves its own cargo. The ship is, of course, bound to do this anyway. Judge Woolsey in *Tice Towing Line v. James McWilliams Blue Line*<sup>48</sup> quotes Kennedy's

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aff'd 71 F. (2d) 146 (C. C. A. 2d 1934), noted (1934) 12 N. Y. U. L. Q. REV. 301-3; (1935) 3 GEO. WASH. L. REV. 256-7.

<sup>46</sup>Act of 1912 (37 STAT. 242, 46 U. S. C. A. § 728).

<sup>46a</sup>By this is meant that the treaty was in force as law without congressional legislation enacted to effectuate it. See HUDSON, CASES INT. LAW (2d ed. 1936) 875 *et seq.*; see E. D. Dickinson, *Are the Liquor Treaties Self Executing?* (1926) 20 AM. JOUR. INT. L. 444.

<sup>47</sup>The claims of a crew for a salvage award for saving the cargo of a ship on which they are employed, in general, fail, but there can be circumstances where the service is in excess of the duty required of the crew. A crew retaking their vessel from a captor or from a pirate have been allowed to claim salvage. For the cases, see the note in 46 U. S. C. A. § 731, note 8, and (1921) 30 YALE L. J. 757. The latter states "The rescue of vessels from pirates and plunderers has been held to be a salvage service," citing English cases and *Parter v. The Friendship*, 1831 D. Mass. Fed. Cas. No. 10783.

<sup>48</sup>*Tice Towing Line v. James Williams Blue Line*, 51 F. (2d) 243 at 249 (D. C. S. D.

"The Law of Civil Salvage"<sup>49</sup> thus: "This proposition which is universally recognized as sound salvage law . . . [is that] the shipowner cannot look to the cargo owner for any contribution to the salvage where the occasion for the salvage service has arisen through a breach of contract or duty on the part of the shipowner himself, or of those for whose conduct he is responsible." Indeed, even though the situation of danger be not brought about by the carrier, he may still be denied a salvage award if the saving of the cargo otherwise falls within his duty. This was brought out in *Robert Sizer v. Chiarello Bros.*<sup>50</sup> where the Chiarellos undertook to lighter lumber from ship side to another dock. After their vessel had been loaded with the lumber and while it was tied up alongside the ship, heavy swells from a passing vessel tilted some of the lumber overboard. The court held that the proof eliminated any suggestion of negligence on the part of the bailee, and there was no liability on him for the damages. Relieved of this liability, Chiarello Brothers then claimed for expense in replacing the lumber on the deck of the lighter. They argued that they had salvaged the lumber for the owner, and, therefore, were entitled to an award. To this the court said: "While this extra work done might, under other circumstances, come under the definition of salvage . . . Chiarello Bros. had promised to load, convey and deliver this lumber at the Tisdale Dock. It was their duty to do all this. The lumber was in custody as bailee. Under such circumstances the voluntary rendition of the service in question is absent."<sup>50a</sup> This same doctrine denies salvage to a pilot. While acting in the strict line of his duty, he cannot claim salvage. In *Hobart v. Drogan*,<sup>51</sup> however, the inward pilot had taken the ship as far as the usual place inside the bar where he was dropped, and thereafter the vessel was struck by a hurricane and driven ashore. She was left by her crew on the bank, and the court said the mere fact that her salvor was a pilot did not prevent an award for salvage for getting her off. Other illustrations of the doctrine are to be found in the casebooks.<sup>52</sup>

The passenger on board a vessel in distress is so far a part of the general venture that his efforts to save the ship go unrewarded. "All hands to pumps" may include him as well as the crew but like them it is only for extraordinary services that he may claim. This is brought out by the case involving the

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N. Y. 1931). The ship's own sacrifices are not the bases of a claim in its behalf for general average contribution from the cargo. See the Chapter on General Average.

<sup>49</sup>KENNEDY, *THE LAW OF CIVIL SALVAGE* (2d ed.) p. 207.

<sup>50</sup>*Robert Sizer v. Chiarello Bros.*, 32 F. (2d) 333 (D. C. E. D. N. Y. 1929).

<sup>50a</sup>In *Ralli v. N. Y. & T. S. S. Co.*, 154 Fed. 286 (C. C. A. 2d 1907) the carrier's negligence caused a lighter to sink whereby 500 bales of Ralli's cotton was wetted. It was raised, unpacked and dried by the carrier. In the shipper's suit for the damage the carrier sought to recoup the expense of fishing up the cotton and rehandling it. The court denied the recoupment. "It is the duty of the carrier . . . to minimize the loss. By such exertions he benefits as well as the cargo owner."

<sup>51</sup>*Hobart v. Drogan*, 10 Pet. 108, 9 L. ed. 363 (1836).

<sup>52</sup>LORD & SPRAGUE, *CASES ON ADMIRALTY*, p. 419.

famous *Great Eastern*, *Powle v. The Great Eastern*<sup>53</sup> where an American passenger rigged a steering apparatus after the ship's steering device had broken down and thereby salvaged the great vessel. He was awarded a \$15,000 salvage sum. Incidentally, he was saving himself but no point was made of the fact. It figured largely however in another fascinating and dramatic salvage job recorded in the report of *The Lomonosoff*.<sup>54</sup> The Lomonosoff, flying the flag of the "Government of Northern Russia" (White Russian), was in a port of that Government which was captured by the Bolsheviks, who proceeded to take over the ships in the harbor. The Lomonosoff had been trying to get away before the capture of the port. Two Englishmen, Marshall and Wood, and Tilmant and Viscur, Belgian officers, with 23 men, all "Northern Russians" boarded the Lomonosoff, partly deserted at her pier. For three hours they held off the Bolsheviks gathering on the pier while they got up steam. Then they took the ship out of the harbor and to England. Three Belgians were wounded in the fighting at the pier, and the remnant of the crew still on board helped little and hindered some. The court held these bold fellows to be "volunteers" although they were primarily saving themselves from capture and to have done nothing to prejudice their claim for salvage by the fact that they took over the ship from the captain, who undecided whether to stay white or go red, shut himself up in his cabin, nor by the fact that they consumed the ship's stores on the voyage. The danger of the ship's capture was the obvious peril from which she was saved. This has been traditionally a peril, dating from pirate days, for which awards are give.

#### EFFORTS RESULTING IN BENEFIT TO THE PROPERTY EVENTUALLY SAVED

Success in the salvage effort is also a condition of an award. The typical success, of course, occurs when the salvor brings the salvaged vessel safely into port unassisted, and the success is complete. The typical failure of success is where his effort is frustrated and he does nothing for her. In between, however, are cases where the salvage claimant may have done something to assist the general victory ultimately achieved either by the people in charge of the vessel or by other people who take hold of her after the first salvor's efforts have been defeated. "It is not necessary in order to establish a claim for salvage that the salvor should actually complete the work of saving the property at risk. It is sufficient if he endeavor to do so and his efforts have a casual relation to the eventual preservation of it." In *The Strathnevis*<sup>55</sup> the salving steamer, unable to get the imperilled vessel into port, was forced to leave her 60

<sup>53</sup>*Powle v. Great Eastern* (D. C. S. D. N. Y. 1864), Fed. Cas. No. 14, 110.

<sup>54</sup>*The Lomonosoff* (1921) Prob. 97, noted (1921) 34 HARV. L. REV. 670; (1921) 69 U. OF PA. L. REV. 377; (1921) 30 YALE L. J. 757.

<sup>55</sup>*The Strathnevis*, 76 Fed. 855, 862 (D. C. Wash. 1896).

miles off shore. Her services in towing the disabled vessel nearly 500 miles and bringing her nearer to port and in the way of passing vessels was sufficient to entitle her to salvage. In *Adams v. Island City*<sup>56</sup> the salving schooner endeavored to tow into port, but was unable to do so and abandoned the attempt, leaving the wreck anchored several miles offshore and in a dangerous position. Arriving in port, she gave notice of the location and danger of the disabled ship and help was sent to it. It was held that the schooner was entitled to salvage. *The Annie Lord*<sup>57</sup> shows the possibility of reward for work which contributed to the ultimate success of the salvage operation as a whole. The Lord was waterlogged and unmanageable in midwinter, and the crew exhausted with exposure when the Oliver found her, and took off her crew whom she carried safely to port. She also towed the Lord for some distance, but had to abandon her. On the Oliver's arrival in port, however, she gave knowledge to the United States revenue vessels of the location of the Lord, and they brought her in. The court found that the services of the Oliver and her crew were the proximate cause of assistance being sent out to the Lord, and awarded salvage. In *The Killeena*<sup>58</sup> the Killeena met disaster at sea, was abandoned; the Nora sighted her and put five hands on board. After a few days these gave up the attempt to save the Killeena and hoisted a distress signal. This was answered by the Beatrice, which took the Nora's men off and put some of her own on, took the Killeena in tow and towed her for some days toward port, when the tow rope parted. The men from the Beatrice then worked the Killeena further along until they fell in with the Leipsig, a steamer, which took the Killeena in tow.<sup>59</sup> Although the Nora had weakened herself by leaving five men aboard the Killeena, the court gave her and her men nothing, since the men had abandoned the Killeena, making her again a derelict. The Beatrice and her men, however, had contributed to the ultimate salvage of the Killeena and the court awarded them the major part of an award of 4,200 pounds on a value of 12,663 pounds. From these cases it is, therefore, clear that the success need not be achieved ultimately by any one salvor so long as it is in fact achieved; and the award will be apportioned to several salvors who may assist in the general rescue of the property. These illustrations show a seriatim of salvage acts. There may also be awards for cooperation simultaneously; and it is the knowledge of this that drives the flock of salvors across the water to aid as in the cases *supra* p. 237.

The question of the immediacy of any one salvor's aid is a bothersome one in these cooperative rescues. Merely incidental assistance will not base a salvage claim, as it brought out by *Merritt and Chapman Company v.*

<sup>56</sup>*Adams v. Island City*, 1 Clifford 210, Fed. Cas. No. 55 (D. C. Mass. 1859).

<sup>57</sup>*The Annie Lord*, 251 Fed. 157 (D. C. Mass. 1917).

<sup>58</sup>*The Killeena*, 6 Probate 193 (1881).

<sup>59</sup>*Ibid.*

*United States*.<sup>60</sup> There the "Leviathan" was tied up at a pier in Hoboken with only a skeleton crew and with no steam up. A fire started on the wharf and the Merritt and Chapman people used their salvage tug to put out the fire. They claimed salvage from the Leviathan on the ground that preventing the spread of the fire was an aid to the Leviathan. There was no claim that the Leviathan or anyone on her behalf had requested or accepted assistance, or that the tug boat played any water on the vessel itself. Said Butler, J.: "While salvage cannot be exacted for assistance forced upon a ship, (*The Bolivar v. The Chalmette*, Fed. Cas. No. 1, 611, 1 Woods 397), her request for or express acceptance of the service is not always essential to the validity of the claim. It is enough if, under the circumstances, any prudent man would have accepted. . . . Plaintiff in error claims as a volunteer salvor, going at his own risk to the assistance of the ship on the chance of reward in case of success, . . . It did not communicate with or enter into the service of the Leviathan. Its fireboats did not put water upon her. The fires that started on her were put out by other means. All effort of plaintiff in error was put forth directly for the purpose of extinguishing fire at and about pier 5, and to save property not at all related to the Leviathan. The elimination of that fire contributed immediately to her safety. But, whatever the aid or benefit resulting to her, it was incidental and indirect for which, in the absence of request for or acceptance of the service, a claim for salvage cannot be sustained. *The Annapolis*, Lushington 355 (P. C. 186) 167 Eng. Reprint p. 150, supra; *The City of Atlanta* (D.C.) 56 F. 252, 254; *The San Cristobal* (D.C.) 215 F. 615; *Id.* (C.C.A.) 230 F. 599."

In *The Manchester Brigade*,<sup>61</sup> the Manchester Brigade during several days stood by the Davidson County getting several lines on the latter during the time none of which however held. The Davidson County was finally taken over by another Shipping Board vessel which had been sent to its aid, and the Manchester Brigade, dismissed, proceeded after a loss of two days time. "It is insisted that . . . since the services performed . . . accomplished nothing that contributed, physically speaking, to the ultimate safety of the vessel, no salvage, as such, is allowable. . . . It is not asserted that [she] go wholly unpaid for her services, but that the amount should be based upon a *quantum meruit*, rather than upon a reward for salvage services." "It is true," said the court "it has been held by some of the American courts that an indispensable element of salvage compensation is that the service shall be to some degree beneficial: that the effort of the salvor must at least have contributed to the rescue; but in no case . . . has there been

<sup>60</sup>*Merritt & Chapman Co. v. U. S.*, 274 U. S. 611, 47 Sup. Ct. 663 (1927).

<sup>61</sup>*The Manchester Brigade*, 276 Fed. 410 (D. C. E. D. Va. 1921), noted (1922) 35 HARV. L. REV. 887.

a refusal to award salvage as such in a case in which the salvage service has been requested by the distressed vessel, and the failure . . . to render the substantial service contemplated by the rule is due to the act of the distressed in discharging the salvor just at the moment when success would otherwise attend the efforts being made." The award was put at one fourth the amount which success in the contemplated towing (which would have consumed eight days) would have brought. Thus a distinction is taken between solicited and unsolicited assistance.

In *Atlantic Transport Co. v. United States*,<sup>62</sup> the question of what service will earn an award was recently much discussed in a case where the salvor "Bardic" went off course to the assistance of the Powhatan. After much manoeuvring in a heavy sea in the January North Atlantic, the Bardic got a light line, and later a manila line on the Powhatan, but the steel towing hawser attached to the manila line never reached the Powhatan. It got entangled in the Bardic's port propeller and the Bardic left the scene for a port of refuge. Other salvors thereafter rescued the Powhatan. The court awarded the Bardic salvage, and also the costs of her repairs and expenses saying: "While there are cases which hold that success is necessary . . . to an award . . . it is necessary to invoke some general principle." He found it in the general policy to have vessels assist each other. There is always risk and danger in the attempt. It is easier to pass by and not make the venture. He concluded therefore that it was "policy" to be liberal where there is an honest effort whether it "resulted in the final saving of the vessel or not." Various decisions cited in the opinion upheld the result and no one can quarrel with the general principle of liberality who reads the long list of the salvage cases. Only a few are high-lighted here.

#### THE CONTRACT SALVAGE

Notwithstanding that a salvage award bases upon a service done without legal obligation to render it, the courts have raised a doctrine of contract salvage. This has already been adverted to but it needs amplification. When a ship, still possessed by her officers and crew, wirelesses for assistance and the responding ships arrive, the question will often be whether there is a salvage service at all, contract or otherwise, as contrasted with merely a towing service. A towage award rather than salvage award is given if the service rendered is for the mere purpose of expediting the voyage without reference to any circumstances of danger, whereas the salvage service is by definition a service to a vessel in distress. The sort of squabble which may arise from these distinctions was brought out sharply by Judge Brown in *McConnochie et al v. Kerr*.<sup>63</sup> There the Pomona, signalled by the Colon,

<sup>62</sup>*Atlantic Transport Co. v. United States*, 42 F. 2d 583 (Ct. Claims 1930).

<sup>63</sup>*McConnochie et al. v. Kerr*, 9 Fed. 50 (D. C. S. D. N. Y. 1881).

found that the machinery of the Colon had broken down and her master desired assistance in getting to a point where she could repair it. The nearest safe anchorage was some 57 miles distant in the direction opposite to the Pomona's course. The disabled ship's policy is to make a bargain at as low a figure as it can; it is to the other ship's advantage to make no bargain but rely on a salvage award. The master of the Colon sought agreement upon a lump sum; the master of the Pomona was unwilling to take the question of compensation away from his owners. The court found, as a matter of fact, that the Colon was helpless. It therefore held that there was a salvage rather than a towage service.<sup>64</sup> The difference in dollars and cents is vastly greater if "Salvage Service" is the label affixed. But even if the service is salvage it may be rendered under contract. There has been litigation, often enough, on the question whether or not a contract was in fact made. There has been frequent litigation on whether the contract as made shall be given judicial sanction.

In *The Eastern Glen*<sup>65</sup> the Maersk, a vessel of large value and loaded with oil took fire and radioed for assistance. The Eastern Glen, 74 miles distant, replied and came on the scene soon after. The Maersk's engines were wholly disabled, the living quarters and all provisions destroyed, but otherwise there was no damage to hull or cargo. The master of the Maersk desired the other captain to sign a Lloyd's "no cure, no pay" salvage agreement. The Eastern Glen's master refused insisting that compensation should be left to the owners, and under his terms the Eastern Glen started to tow to Boston, the agreed place. The case illustrates the modern conditions at sea which make much of the older law outmoded in the instances where the imperilled ship is neither abandoned nor too badly hurt to use her wireless. The two ships were in constant communication with each other, and with their respective owners; and the owner of the Maersk objected to her being taken to Boston and arranged to have tugs to go out and take her to another port. The Eastern Glen people, however, insisted upon the original agree-

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<sup>64</sup>On towage versus salvage, see also *The Emanuel Scabrouis* (D. C. Md.) 23 F. (2d) 214 (1927). The Scabrouis was in port when a fire broke out on board another vessel on the other side of the pier from her. Several tugs towed the Scabrouis away from the pier. There was irreconcilable conflict of testimony as to whether the vessel authorized the tugs to take hold of her. The court considered that she had so authorized the tugs. No arrangement as to amount, however, had been made, and the court proceeded to an award in the absence of an agreed sum. It distinguished salvage service from towage service "in that the latter is a service which is rendered for the mere purpose of expediting a vessel's voyage without reference to any circumstances of danger, although the service in each case may be and frequently is, rendered in the same way." In *The Lowther Castle* 195 Fed. 604 (D. C. N. J. 1912) the court said: "That no loss would have been sustained by the steamship had it remained at the pier; that no injury resulted to the steam tug in the service rendered; that no real danger had been to the crew of the steam tug during the rendition of such service; that but little time was consumed in the moving the steamship from the pier to its anchorage up the stream, does not affect the character of the services nor change it from salvage to towage."

<sup>65</sup>*The Eastern Glen*, 11 Fed. Supp. 995 (D. C. S. D. N. Y. 1935).

ment. The salvor refused to cast off the Maersk; and the Maersk, after an exchange of communication, finally cut the towing line. The court considered that the case was one of salvage. It agreed that the Eastern Glen should have let the Maersk go when requested, but held that the refusal did not forfeit an award for salvage, although nothing was awarded for service after the time when the request to let go was made by the Maersk. The other vessels sent out brought the Maersk in so that in this case as in the *Annie Lord*, *supra*, the court considered that the service was a salvage service although the ultimate success was not brought about wholly by the Glen.<sup>66</sup>

The case is interesting, also, for the fact that the line having parted, the towed vessel came down upon the towing vessel and damaged her. For this damage, the court allowed the salvor recovery. When the rescuing vessel injures the towed vessel, it has been decided that the salvor gains no award. For the salvor's conduct in doing the job of rescue may be put under scrutiny and it may cost him a loss or diminution of his award, if not positive liability, in addition. In *The Bremen, The Main*<sup>67</sup> the rescuers hauled the Bremen out of a burning pier, beached her and pretty well extinguished her fire. Later, they hauled out the Main, all ablaze, and beached her so close to the Bremen that they could not work between the two. The Bremen re-kindled and could not be extinguished for hours. The court said at page 234: "Salvors are responsible for the reasonable care of the property . . . both as respects the property itself, as well as respects inflicting damage on other property. *Serviss v. Ferguson*, 84 Fed. 202; *The Sumner*, 1 Brown, Admiralty, 52 Fed. Cas. No. 13, 608."<sup>67a</sup> Yet though the judge considered the conduct of the five tugs which so beached the Main to be "wholly inexcusable" increasing the damages "far in excess of any possible award", he simply declined to make any salvage award to these five tugs. Could they have been sued for this extra damage? The good Samaritan is held liable for his faults in beneficence.

Contract salvage, if found, may, as pointed out by Mr. Justice Brown in

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<sup>66</sup>The distinction between mere towage and salvage was much discussed in *Atlantic Transport Co. v. United States*, 42 F. (2d) 583 (Ct. of Claims 1930). The court said that it depended upon the facts in each particular case and the burden was upon the party asserting that it was a contract to establish that fact, citing *The Comanche*, 8 Wall. 448, 477, 19 L. ed. 397 (1870) and other cases.

<sup>67</sup>*The Bremen, The Main*, 111 Fed. 228 (D. C. So. D. N. Y. 1901).

<sup>67a</sup>*The Clarita and the Clara*, 90 U. S. (23 Wall.) 1 (1874) records another Hoboken fire in which the salvors took a burning ferry boat into the river using a hempen hawser which burned off and the blazing ferry boat drifted down upon a schooner and set her on fire. The Court found the salvor negligent in using a hempen hawser and liable to the schooner. Thus a salvor's efforts may expose him not only to claims from the property he is salvaging but to claims as well of third parties who are injured by his fault in the course of the salvage operations. The ferry boat owners were not liable to the schooner. See the analogies in the towage cases in the discussion of towage.

*The Elfrida*,<sup>68</sup> be rendered under an agreement for a *per diem* or a *per horam* wage, and payable in all events. It may be for compensation payable only in the case of success, as under the Lloyd form discussed in the Eastern Glen. In *The Elfrida*, the contract stipulated for compensation payable only in the event of success, and, as Justice Brown remarked: "Such contract may be set aside by the court if corruptly entered into or made under fraudulent representations, under a clear mistake, or a suppression of important facts in regard to the danger to the ship, and in general when their enforcement would be contrary to equity and good conscience." Justice Brown was thinking of its being set aside in the interest of the salvor. The cases have been concerned also with the protection of the imperilled ship against the salvor's taking advantage of his control of the situation. He had the whip hand ordinarily and the duresses of economic necessity formerly operated heavily upon the rescued. But under the present conditions at sea of communication and so on, there is not so much chance of raw inequality as heretofore, and the contract salvage is more common today. The conditions which move the courts to scrutinize the contract are, however, the conditions which are prevailing at the time when the transaction is entered into, rather than those which are disclosed by the illuminations of hindsight. Good faith and fair play are read as of the time of making the deal.

This is brought out by the distinction between the cases of *The Magnolia Petroleum Co. v. National Oil Transport Co.*<sup>69</sup> and *The Elfrida*, mentioned above. In the *Magnolia Petroleum* case, the barge "Bolikow" was in distress some 120 miles from Tampico, Mexico, when it sighted the tug Greer, with which it entered upon negotiations for a tow to Tampico. The tug's master asked for \$20,000 for this service but after some haggling agreed, in writing, to take \$15,000. The Greer, which already had another barge in tow, then simply added the Bolikow to the string, and brought her in. In a suit brought upon the agreement, the Bolikow's master testified that he considered the sum unreasonable and that he made the agreement only because he was afraid to take the risk to crew and vessel of staying out longer. Said the court (at page 340): "I think it clear that this case is ruled by the general principles announced in *The Elfrida* and other cases that there is a clear right in the court to set aside a salvage agreement when made on the high seas under compulsion or hardship, morally or otherwise, when such agreement is unconscionable and unequitable as this agreement plainly is. The evidence shows that without any danger to the crew of the Greer or to the Greer herself or her barge in tow . . . the Greer took the Bolikow in tow at 10:30 A.M. on November 25, having sighted her at 8:00 A.M. on the same day, and at 2:15 P.M. November 26 let her go in the harbor of Tam-

<sup>68</sup>*The Elfrida*, 172 U. S. 186, 19 Sup. Ct. 146, 43 L. ed. 413 (1898).

<sup>69</sup>*Magnolia Petroleum Co. v. National Oil Transport Co.*, 281 Fed. 336 (D. C. Texas 1922), noted (1923) 36 HARV. L. REV. 489.

pico." He agreed that the condition of the Bolikow, her fires being dead, her water exhausted, and she without self-propulsion, made the service a salvage rather than a towage job. An award was made notwithstanding that it might seem that if the contract itself were found unconscionable and the oppressor party denied the enforcement of it, he might also be denied any salvage award at all.

Obvious reasons impel the courts to grant awards even in such circumstances. If good work is done even by a grasper, good work must be encouraged. The work at least is compensated for, though the added reward for the encouragement of salvage efforts in general, which so often figures in the judge's mind, may be withheld. The principle has survived even in the face of very sharp practice on the part of the salvor.<sup>70</sup> For, as Judge Hutcheson in *The Magnolia* case pointed out, at page 341: "While the award of service for those who display natural human kindness on the high seas is liberal, 'when, however, the service is not rendered in this spirit in reliance upon a reasonable and fair award being made, but upon . . . an agreement evidencing the hard and unscrupulous exactions of a legalized piracy,' the court in making its own award cannot be influenced by that spirit to make it less than it would otherwise have been."

In *The Elfrida*, already mentioned, the court refused to revamp the contract at all. It rejected hindsight illumination and regarded the contract as made fairly. The *Elfrida* had grounded in the Mississippi River and gradually worked herself tight into the bank. She was in no immediate danger, but it was the season of storms and other vessels in like situations had been total losses. The master first tried to get her off with his own anchors, then telegraphed to his owners and to Lloyd's. The latter sent a surveyor who advised the captain to invite bids. He got two, one for \$24,000 and one from a Mr. Clark for \$22,000, and he accepted the latter. By the contract Clark agreed to float the *Elfrida* within 21 days, the master reserving the right to abandon the ship in lieu of paying the \$22,000 and specifying that the work was on the "no cure no pay" basis. If Clark failed to float the ship and place her in a position of safety within 21 days, he

<sup>70</sup>The *Claudeboye*, 70 Fed. Rep. 681 (C. C. A. 4th 1895), noted (1896) 9 HARV. L. REV. 484, is an illustration of a much too canny tugboat man of the prewireless days. The *Claudeboye* put into a Bahama island disabled and sent her mate in a boat to Savannah for help. From Savannah he telegraphed the owners who arranged, for \$5,000, with the tug *Morse*. But the skipper of the *Dauntless* who knew all the facts rushed to the Bahamas and made a bargain with the innocent captain for \$10,000. The *Claudeboye* owners settled with the *Morse* which arrived to find that "the cupboard was bare" and the question of the case was whether *The Dauntless* should get its \$10,000. It did the job as agreed. The trial court awarded \$10,000; but the Circuit Court of Appeals could not stomach the result. It admitted the captain's authority to contract with *The Dauntless*, but it was willing to class the "relation of salvor and saved"—despite its not having yet been entered into when the contract was made—as "a fiduciary one." Yet it granted *The Dauntless* \$1,000 for its services. One of the judges rebelled at that; he felt that "in a case of this character a court of admiralty is a court of equity . . . and a party who asks its aid must come before it with clean hands . . ." See, however, the discussion in the *Magnolia Petroleum* case.

was to receive no compensation whatever for anything he did. The master made a canny bargain, but Clark, who knew the river, did the job easily within two days; and the shipowner cried "oppression". Mr. Justice Brown said: "The circumstances under which the contract was made put the case in a very different light [from the hold-up cases]. In the first place, the libelant offered to get the vessel off with such salvage as the court might award, but the master declined and invited bids for the service. . . . The conditions imposed upon the libelant were unusual and somewhat severe. . . . Further than this, if, in getting her off or after she had been gotten off, she proved to be so much damaged that she was not worth the stipulated compensation, the master reserved the right to abandon her."<sup>70a</sup>

Judicial review of unconscionable bargains does not however, extend to the remuneration of Mr. Clark in a case like the one above, in the event that he failed to get the ship off. The "no cure, no pay" contract is not itself regarded as unconscionable. It has been uniformly sustained by the courts. If Clark failed to do the job as he agreed, he would have received nothing. This "no cure, no pay" principle is, however, subject to the usual contract rule that the rescued ship may not itself prevent the other's performance. The salvor cannot be dismissed or cut loose on the eve of success. Such a trick as that does not save the ship about to be rescued which desires to do the final act itself from paying an award.

#### THE AMOUNT OF THE AWARD AND ITS DIVISION AMONG VARIOUS SALVORS

##### 1. *The Value of the Adventure*

In the judicial technique of handling the salvage cases, the first step is to state the respective values of the vessels, or rather of the ventures, for the value of the cargo on the rescued ship is also stated. The award is made with reference to these values, and to the danger involved. In the danger is reckoned both that in which the rescued vessel was at the time, and the risk to which the other vessel exposed itself in aiding her. The length of the service and its danger and difficulty, and the degree of success attained, the value of the salvor's property risked—all are factors in the problem of how much the actual award will be. These items are used to base an award in addition to the actual out-of-pocket expense or the incidental expense, loss of time, etc., for deviation and so on to which the salvors may be exposed.<sup>71</sup>

The value upon which the salvage award is based is the value at the time

<sup>70a</sup>Since the contract had fixed a price, a personal liability in a set sum had been created. Such a provision was necessary as personal liability does not arise in the non-contract salvage if there is, in fact, a res to which the salvage lien may attach. See cases cited, notes 79, 80, 81.

<sup>71</sup>See *Atlantic Transport Co. Ltd. v. United States*, 42 F. (2d) 583 (Ct. Claims 1930); *The Shreveport*, 42 F. (2d) 524 (D. C. E. D. S. Car. 1930); *The Nikara*, 15 F. (2d) 73 (D. C. E. D. La. 1926).

of the salvage, which usually means that the property rescued is then in a damaged state. The problem is rendered doubly difficult thereby. In *The Lomonosoff*, *supra*, the vessel was valued at \$48,000 subject to a deduction of \$300 for damage by the Bolsheviks in the fight at the pier. The cost of the repairs is more easily found than the value of the vessel. The courts run into the same difficulty in the salvage cases that is so frequently encountered in determining value in other branches of the law. In *Rand v. Lockwood*<sup>72</sup> a yacht, built for \$42,000 nine years prior to the salvage, had been bought by the then owners for \$9,000. The salvor showed the cost of reproduction new—a "value" accepted in a leading collision case<sup>73</sup> and urged a value on that basis at \$30,000. Said the court (at page 759): "In a salvage case . . . it (the property) should not be appraised at more than it is worth to its owner. Ordinarily that is what he can get for it in the market. If it is not saleable, its value would be measured by what it earned for him, or by the value he puts upon the pleasure he gets out of it, not exceeding what it would cost to build another like it. In this as in other salvage cases, it is unnecessary to reach anything more precise than a rough approximation of the worth of the salvaged property in the condition it was upon the completion of the salvage service." It then took a jump, and decided that, after the explosion and fire had done their work, the yacht was not worth more than \$7,500, and made an award of \$1,500, cutting down the District Court's award, which had been \$2,500. In *The Shreveport*<sup>74</sup> the court remarked: "The great contest has been as is usual in such cases over the sound value of the Shreveport [the salvaged vessel] and the necessary re-

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<sup>72</sup>*Rand v. Lockwood*, 6 F. (2d) 757 (C. C. A. 4th 1927), noted (1927) 40 HARV. L. REV. at 1018. The Harvard note states: "The value of the property saved . . . has been determined in various ways. Some courts have taken the market value. The *San Onofre* (1917) p. 96. Others have arrived at the value by deducting the cost of repairing the salvaged ship from the proceeds of its sale after repairs. The *Lamington*, 86 Fed. 675 (C. C. A. 2d, 1898). The value to the owners has also been taken as a basis for the award even though it was apparently greater than the market value. The *Hohenzollern* (1906) p. 339. In the absence of a market, the value has been computed by one court by deducting annual depreciation and the cost of repairs from the cost of constructing a similar ship. The *Anahuac*, 295 Fed. 346 (D. Me. 1924), *aff'd* 3 F. (2d) 250 (C. C. A. 1st 1924). In that case the value thus found exceeded the value to the owners, for it turned out to be greater than the amount left after deducting the cost of repairs from the proceeds of the sale of the repaired ship. This method of computation was borrowed from a collision case, where the owner of a sunken vessel was entitled to restitution from the negligent defendant. The *Cushing*, 292 Fed. 560 (C. C. A. 2d 1923). In such a case the replacement cost may well be a fair compensation to the owners. But the court in the principal case properly distinguished collision cases from salvage cases, in which there is no element of restitution. In salvage cases the award itself can never exceed the value of the salvaged property to the owners. See *The Lamington*, *supra*, at 678. And it seems that since the award in a salvage case is a bounty for saving another's property, the important consideration in determining the amount of the award should be the value of that property to its owners."

<sup>73</sup>*Standard Oil Co. v. So. Pacific Co.*, 268 U. S. 146 (1925). The ship cost in 1900 the sum of \$557,000 to build. Judgment for her loss in 1918, when replacement was at a peak, was for \$1,225,000. The matter is discussed under collisions.

<sup>74</sup>*The Shreveport*, 42 F. (2d) 524 (D. C. E. D. Car., 1930).

pairs." After quoting *Rand v. Lockwood*, the court continued: "The opinions of the experts in this case are in hopeless conflict." The claimants had placed the value \$40 per dead-weight ton: The salvors placed it at \$50 per dead-weight ton. The court concluded that the salvor's experts were "nearer the mark", but it split the difference and put her value at \$47 per ton, a total for sound value of \$472,000. Repairs came to approximately \$340,000, which left a total salvaged value of some \$142,000. On this basis the court awarded one third of the salvaged value.

The "value" for the basis of a salvage award is that of the whole venture, vessel, cargo and, indeed, the freight, assuming that the salvage assistance is such that it enables the ship to earn freight.<sup>75</sup> The three together—ship, cargo, and freight are the classic combination on which salvage awards are figured in ascertaining "value" on the side of the rescued. Value is also considered on the salvors side; what he risks in property values is also an item in calculating the salvage award. The value on the salvor's side, however, is confined to that of the ship and freight. The salvor's cargo is not included since the latter is given no share of the award as will be shown later. The value of the salvor ship is squabbled over in the same terms as the value of the rescued ship. The value of the salvor's freight is not a difficult matter to ascertain as a rule but there has been some question about the value of the rescued vessel's freight. The freight for the actual voyage if the voyage is made possible by the salvor is a clear value. But a ship going out to get a return cargo may be rescued. The ship's share of the "adventure" on which general average<sup>76a</sup> is figured has been held to include not only the freight actually being earned at the time of the disaster but the freight which a ship sent out in ballast was to earn on her return voyage.<sup>76</sup> Whether it would be an item in the "value for salvage" was the subject of several English discussions, but the latest edition of Kennedy's "Salvage"<sup>77</sup> does not mention the point. It may well be that the general average cases should be followed.

Intangible values other than the freight have been required to contribute,

<sup>75</sup>When freight is earned is discussed in the chapter on "The Maritime Carrier." See also Borchard, *THE EARNING OF FREIGHT ON INCOMPLETED VOYAGES* (1921) 30 *YALE L. J.* 362.

<sup>76a</sup>The subject of general average is dealt with in a separate paper. Its essence is, like that of salvage, a rescue of the adventure; but it is done by the efforts of the imperilled ship alone, without external assistance. The cost of this effort is charged upon the surviving values by what is known as the general average contribution which they make to the owner of the values sacrificed in the effort to save all.

<sup>76</sup>See H. B. Sharpe, *Maritime Salvage and Chartered Freight* (1908) 24 *L. Q. REV.* 206. He says that chartered freight in course of being earned by a vessel in ballast is not a subject of maritime salvage. M. A. Rundell, *Maritime Salvage and Chartered Freight* (1908) 24 *L. Q. REV.* 385 examined the English cases as did Mr. Sharpe and reached the opposite conclusion.

<sup>77</sup>The 3rd ed. (1936) at p. 241 has a long discussion on "How the freight is valued."

notably in *United States v. Cornell Steamboat Co.*<sup>78</sup> The tug Townsend saved from fire 1883 bags of sugar on board a lighter. This sugar, not yet delivered to the consignees, was still in the control of the customs. It had been assessed a duty of \$6,000 which had been paid,<sup>78a</sup> but the Secretary of the Treasury was "authorized"<sup>78b</sup> in case of destruction by fire to refund the duty. The salvor figured that he had saved the United States \$6,000. The courts agreed with him. They awarded him \$600. The Supreme Court considered that the salvor's remedy *in personam* could be invoked since it "extends to one who has a direct pecuniary interest in such property". This language carries one into a field which can be large and speculative. Does an insurer, who would have had to pay for averted disaster, personally owe salvage money to the rescuer? Does the mortgagee—the mortgagee under the ship mortgage act already discussed in the lien section of this volume—also owe? Does the owner of a ship which is under a demise-insurer charter at the time of her rescue? All of these and others more remote, such as prospective shippers have some pecuniary interest in the property. They may be taken to have insurable interest in it. The English decisions relied on in the Sugar case raise these questions with respect to the interest which is part of salvage value but do not answer them all. In the *Five Steel Barges*<sup>79</sup> certain barges were salvaged. The contract of a builder, who had a duty to deliver a barge in a stated time was made enforceable and the installments already paid to him were thus made unrefundable. He was found to have a sufficient interest to be held *in personam*. *The Port Victor*<sup>80</sup> dealt

<sup>78</sup>*United States v. Cornell Steamboat Co.*, 202 U. S. 184, Sup. Ct. (1906), noted (1907) 20 HARV. L. REV. 241.

<sup>78a</sup>It dutiable goods are brought into the United States by salvors the goods are subject to the duty. But the salvors claim for an award is given priority to the government's claim for the duty. See *Albury v. Cargo of the Lugano*, 213 Fed. 963 (D. C. Fla. 1913). The matter was discussed by Judge Benedict in *Merritt v. One Package of Mdse.*, etc. 30 Fed. 195 (D. C. E. D. N. Y. 1886). "If the United States," he said, "receive any duties at all it is solely because of the exertions of the salvors."

<sup>78b</sup>There was dispute over the effect of the word "authorized." But the court assumed that the secretary would have refunded the \$6,000.

<sup>79</sup>In *The Five Steel Barges*, 15 P. D. 142 (1890), the tug rescued five barges then in private ownership of which two were being delivered to the government and were in fact delivered prior to suit. The tug claimed in rem against three and in personam against the private owner in respect to the two. The court said that on the authorities an action in personam lies after the property had been transferred to others and the lien lost. But in the actual case the government owned the barges as they were built. (See WILLISTON, SALES, § 275, for the English rule in the matter of ship building: it has not found favor in the United States). The court said, however, p. 146: ". . . the right to sue in personam is not confined to the case of the defendant, being the actual legal owner of the property saved. I think it exists in cases where the defendant has an interest in the property saved which interest has been saved by the fact that the property is brought into a position of security."

<sup>80</sup>*The Port Victor* (1901) P. D. 243, noted (1901) 15 HARV. L. REV. 232. In *The Cargo ex Port Victor*, *infra* note—the ship was under charter for thirty-six months but "the master and crew remained the servants of the owners and in possession of the ship on their behalf." Of the owner the court remarked incidentally at p. 254: "Now counsel . . . do not say that the action in personam cannot be brought against the owners

with a case where an operator of a chartered ship carried British Government stores. "By the terms of the contract they are to be liable in any event for these stores." The salvors did not arrest the cargo and the government refused to pay on the ground that the stores were at risk of the people operating the ship. The latter were in fact in the position of insurers of the cargo and when the salvors turned to them for payment the courts sustained the claim, at page 255: "Now when the accident happened . . . what were the real interests which were at risk and at stake? There was the interest of the owners of the ship, the interest of the owner or charterer in the freight—because the owner's freight may be an entirely different thing from the charterer's freight—in fact it is quite possible that the chartered freight would not be at risk at all (as paid in advance)—and then there is the interest of the owner of the goods. . . . That includes for the purpose of [this] case all the persons who were collectively or singly the owners of goods for the purpose of that adventure . . . in a common maritime adventure of this kind, at least, the persons who have the interest of owners in the goods by virtue of the contract they have made for the purpose of delivery have an interest for the purpose of salvage." Thus it is clear that the owner of purely intangible values which are saved by the salvor's efforts may be liable to the salvor *in personam*, but the category of the values remains undeveloped.<sup>81</sup>

## 2. *The Apportionment of the Award among the Salvors*

Having ascertained the salvaged value of the rescued vessel, the value of the salvors vessel and equipment, etc., the risks and the effort, the courts now have the material upon which to make the award. If the rescued vessel is entirely a derelict, there is a frequent tendency to grant the salvor one half value. The English once regarded it as obligatory to give such a share.<sup>82</sup> In *The Shreveport*, *supra*, however, the court said: "I do not think the moiety rule is a fixed rule of law, even in the case of technical derelicts." In addition to the salvage the courts will award also the expense of making the rescue and allowance for time loss, etc., from the prosecution of the salvor's voyage. This was set forth in detail in *Atlantic Transport Co. v. United States*<sup>83</sup> where the *Bardic*, the salvor, sustained injuries, and at Halifax made expenditures for survey and, subsequently, for dry-docking and re-

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of the ship. They admit, and I do not think they could possibly have contested it, having regard to long practice, that against any person in the position of owner of the ship an action *in personam* can be brought."

<sup>81</sup>The note in (1901) 15 HARV. L. REV. 232 well remarks the difficulty found in defining the interests liable for salvage service. HALSBURY'S LAWS OF ENGLAND cites only these cases (2nd ed. vol. 1) p. 102 for its text that "persons directly interested in the preservation of the salvaged property be liable . . . in personam." In the United States the sugar case has been cited only twice and in neither case on the point here discussed.

<sup>82</sup>See Kennedy, *infra* note 86.

<sup>83</sup>*Atlantic Transport Co. v. United States*, 42 F. (2d) 583 (Ct. Claims 1930).

pairs. The items included provisions and wages during the extra period at sea, ship stores, coal consumed, and loss of profits, making a total during an eight and three-quarter day period for all these items of \$21,000, which the court awarded in addition to a salvage award of a moderate character in the sum of \$9,000. The whole subject of the amount of award was much discussed in *The Lamington*,<sup>84</sup> showing the percentages in the various cases under various circumstances, and other awards, not on a percentage basis, as already stated. The notes in the report to this case show the amounts of awards over a period of approximately one-hundred years in our admiralty experience. The elements of the problem have been put forth by Mr. Justice Clifford in *The Blackwall*<sup>85</sup> as follows: "Courts of admiralty usually consider the following circumstances as the main ingredients in determining the amount of the reward to be decreed for a salvage service: (1) The labor expended by the salvors in rendering the salvage service. (2) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. (4) The risk incurred by the salvors in securing the property from the impending peril. (5) The value of the property saved. (6) The degree of danger from which the property was rescued."

Having once decided what the salvaged ship or salvaged cargo or the salvaged ship and cargo must pay, the total sum must then be apportioned. It must be apportioned among those who pay, if various interests are salvaged and also among the salvors on their side. All these items are of fact and need not be enlarged upon here.<sup>86</sup> The working out of what the salvaged ship and what its cargo separately contribute is a process somewhat like that of making a general average apportionment. What they pay has, then, to be distributed among the salvors. It goes to the salvor ship and its crew.<sup>86a</sup> To the ship is given the larger share of the award. It is true that the owners do not risk anything personally. Their skins are not hazarded but their property is, and by that fact they qualify. If the ship is under

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<sup>84</sup>The *Lamington*, 86 Fed. 674 (C. C. A. 2d 1898).

<sup>85</sup>The *Blackwell*, 10 Wall. 1, 19 L. ed. 870 (1869).

<sup>86</sup>See also A. R. Kennedy's *Salvage Awards* (1908) 33 LAW MAGAZINE AND REVIEW 300, for an exposition of the English methods and a citation of the cases on the other side of the Atlantic. The practice is in general to limit the award to one half if the owner appears. If he does not the value of the salvaged property itself is the only limit.

<sup>86a</sup>The *Dumper No. 8*, 129 Fed. 98 (C. C. A. 2d 1904) may perhaps mean that the crew was given an award when the owner would not have been. The Moran Company sent out tug X with two dumpers. It later notified The Ivins, another of its tugs, that the dumpers were "adrift" and The Ivins found them "abandoned by their tug." The Ivins' crew brought them in. The Moran Company "released" the dumper from any claim of the Ivins for salvage but her crew were awarded \$1,175. Whether the Moran Company's tug X was in fault was not discussed at all, and why the Moran Company itself made no salvage claim is not stated. But it had a general contract to tow all the dumper owner's vessels, and if the tug X was in fact in fault in abandoning the dumpers in the first place the Moran Company's restraint in not claiming salvage for itself is explained by the cases *infra*.

charter when she engages in a salvage service the fact invites a contest between the owner and the charterer over the division of the ship's award. The carefully drawn charter provides for the matter. If it does not the form of the charter is decisive. In the *Kaiser Wilhelm der Grosse*<sup>87</sup> Judge Brown said at page 669: "This charter was a charter of demise, under which the charterer agreed for the entire use of the vessel and to pay all the expenses of running her, including wages, coal and insurance. It received from the owner the 'bare boat' and agreed unconditionally to return her to the owner in as good condition as it received her, reasonable wear and tear alone excepted. If the vessel were damaged in any salvage operation the charterer alone was bound to make good the loss. It was fully owner *pro hae vice*, and as such entitled to all her earnings including salvage. 2 Pars. Shipping and Admiralty 279. The case of *The Scout* (1871) L. R. 3 Adm. & Ecc. 512 is precisely in point. It is otherwise on a charter of affreightment only. *The Waterloo*, 2 Dod. 433. Many charters contain an express clause providing for a division of any salvage earned. But I do not perceive any ground upon which I can decree a division under a charter like this, in the absence of any provision." The crew is usually given less than the ship.<sup>87a</sup> In *Atlantic Transport Co. v. United States*<sup>88</sup> the ship was awarded some \$21,000 for expenses, repairs, etc.,<sup>89</sup> and \$9,000 for salvage. The \$21,000 was of course for the shipowner's interest but the \$9,000 was distributed

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<sup>87</sup>In *Castner Curran and Bullitt v. United States*, 5 F. 2d 214 (C. C. A. 2d 1925) Judge Hough remarked (p. 216): "Doubtless under many circumstances a charterer is equitably entitled to some share in the owner's salvage, absent any express contract contained in the charter party of which an instance is *The Arizonan* 144 F. 81 (C. C. A. 2d 1906)." In the *Arizonan* as in Judge Hough's case there was no demise but the charterer "had bought, paid for and was entitled to the entire service of the tug." It was towing the charterer's derricks when it discovered a fire on the *Arizonan*. The tug tied up the derricks and rushed to the salvage of the ship on fire. In dividing the award equally Judge Coxe said (p. 82): "It is true that several text writers have stated the rule broadly that a charterer is not entitled to salvage unless he becomes the owner *pro hac vice*, but we are referred to no controlling authority to that effect and we are not impressed by the rationale of the rule. The theory of salvage is to reward all who have contributed anything to the work of saving the imperilled property. Thus it has included the risk assumed by the salving vessel, her services and the services of her master and crew not only but it has been extended to service rendered by passengers, and in some instances remuneration has been awarded for the risk to her cargo. There never has been any difficulty in segregating these interests and we see no reason why it may not be done even when the risk to the vessel and the services she renders are represented by different individuals." *The Kaiser Wilhelm der Grosse*, 106 Fed. 963 (D. C. So. D. N. Y. 1901).

<sup>87a</sup>The lien for salvage is given a high priority: See *The Maritime lien* chapter.

<sup>88</sup>*Atlantic Transport Co. v. United States*, *supra* note 83.

<sup>89</sup>After reciting Justice Clifford's list, Judge E. F. Cochran, in *The Shreveport*, 42 F. (2d) 524, at 534 stated: "In this case there is involved also the question of whether or not the vessel saved was a derelict and whether or not the moiety rule should be applied." Adding: "It is also proper to consider the degree of success achieved and a proportion of value lost and saved. See *The Sandringham*, 10 F. 556, 573." The salvaged value between \$50,000 and \$60,000, and the court gave one-third of the salvaged value.

“to the officers and crew of the *Bardic*, the sum of \$2,250 and thirty-seven and one-half per cent or \$3,375 each to The Atlantic Transport Company, Limited, the charterer (the form of the charter is not stated but the division was 50-50 a usual ‘split’), and the Oceanic Steam Navigation Company, Limited, owner.” Thus the charterer got the cost of repairs and the loss of service award. The terms of the charter are not stated in the case but no doubt such items were under the charter for charterer’s account. Not only does the court divide between ship and crew, but it has also the further task of dividing the sum awarded the crew into actual figures for each man participating. If various ships have participated in the salvage, the court first faces the always ungracious task of determining how much each ship is to be awarded<sup>89a</sup> and then dividing it among ship and crew. The division among the crew, is as wholly factual in character as any of the other divisions. Only the circumstances of the case can guide the judicial largesse in any of these instances. In *The Lomonosoff*, *supra*, where no rescuing ship was involved and the division was wholly among the men, the court awarded £800 each to the four officers and £2,900 to the twenty-three men, giving a double share to the sergeant, to the two interpreters, and to the three men who were wounded—a total of £6,100 for the rescue of a ship valued at £48,000.

### 3. *Whether the Cargo on The Rescuing Ship is Entitled to Participate*

The cargo on the rescued ship is bound to contribute to the salvage award. It must bear its share of the cost of its salvation. This is a most obvious duty since the ship and the cargo are a unity “venture” so far as the salvor is concerned. It would seem logically symmetrical to say, also, that the cargo on the saving ship should participate in the benefits of a salvage award. Aboard the salvor, the ship and cargo are also a unity and both are ventured in the rescue. But the courts have refused to grant a salvage award to the cargo. A typical case is *The Menominee*.<sup>90</sup> The packers, Swift and Company, shipped cargo on the *Montana*, under a bill of lading which provided that the vessel should be “at liberty . . . to deviate for the purpose of saving life and property.” The *Montana*, well upon her voyage, fell in with the *Menominee* and towed her for about two weeks. This greatly delayed the *Montana*. The *Montana*’s cargo of foodstuffs was damaged thereby to the sum of some \$5,500. Swift libeled the *Menominee* as for a salvage award. On exceptions to the libel, the District Court held that no cause of action was stated. Its dismissal of the libel was affirmed by the Circuit

<sup>89a</sup>See, as an example, *The Anahuac*, 295 Fed. 346 (D. C. Me. 1924) *aff’d* 3 F. (2d) 250 (C. C. A. 1st 1924). The technique is to apportion the amount of each vessel’s assistance—“a case for the exercise of sound judgment,” as the court remarked.

<sup>90</sup>*The Menominee*, 300 Fed. 461 (D. C. S. D. N. Y. 1924), *aff’d*, 300 Fed. 464 (C. C. A. 2d 1924), commented on by Fred. Green in (1925) 19 ILL. L. REV. 445.

Court of Appeals, which refused to accept a ruling in *The Colon*<sup>91</sup> where Judge Choate in 1878 had allowed the cargo owner a salvage recovery under similar circumstances. Judge Choate's view was contrary to that prevailing in 1878. The Menominee opinion said: "It stands alone." But statutory changes since 1878 make the Menominee decision in 1924 unfortunate. The Harter Act of 1893 and the 1936 Carriage by Sea Act upset the ship's liability to her own cargo in cases where cargo losses follow saving life or property at sea. Prior to this legislation the shipowner would have been liable to his cargo. Consequently if he had incurred liability or had even risked liability for damage to his cargo this increased the amount of salvage awarded him. He paid his cargo and was reimbursed by an award sufficient to cover what he was liable for to his cargo. From this it followed that in the pre-Harter Act cases the cargo owner had no standing as a salvage claimant. The cargo damage was not his risk but only that of the carrier.<sup>92</sup> But excluding him after the statutes had put the risk of loss on him is an injustice which at once drew criticism. "The Harter Act by relieving the carrier from liability to his own cargo and so decreasing the amount of his salvage award, results largely and often wholly in benefiting the owner of the property saved at the cost of the owner of the cargo on the salvaging ship."<sup>93</sup> The fact that the cargo is at risk might be some basis for allowing it to share in the salvage award. The actual salvors in each case are the master and crew of the salvaging ship, yet the shipowner, staying ashore, gets, as we have seen, the lion's share of the salvage money, merely because his ship has been risked. The cargo has, of course, been equally risked. If the Harter Act, The Carriage of Goods by Sea Act, or the shipping papers operate to relieve the salvor vessel from liability to its own cargo for damage due to salvage operations, the result in *The Menominee* is wrong. Simple justice to the salvor's cargo owner nowadays supports the decision in *The Colon*.

#### COMMON OWNERSHIP OF SAVED AND SALVOR

By the Federal Statute of August 1, 1912, "The right to remuneration for assistance or salvage services shall not be affected by common ownership of the vessels rendering and receiving such assistance or salvage services."<sup>94</sup> This legislation was enacted to conform to the International Convention of the Third Conference on Maritime Law, at Brussels, in 1910. Obviously there is no reason for giving the shipowner<sup>95</sup> a salvage award from his ship

<sup>91</sup>*The Colon*, Fed. Cas. No. 3,024 (D. C. So. D. N. Y. 1878).

<sup>92</sup>See *The Nathaniel Hooper*, 3 Sumner 542, Fed. Cas. No. 10,032 (1839); *The Ereza*, 124 Fed. 659 (D. C. Pa. 1903).

<sup>93</sup>The quotation is from F. Green's comment *supra* note 90. See also his article, *The Harter Act* (1903) 16 HARV. L. REV. 157.

<sup>94</sup>Statute of Aug. 1, 1912, C. 268, § 1; 37 STAT. 242, 46 U. S. C. A. § 727.

<sup>95</sup>Hough, J., in *Castner v. United States*, 5 F. (2d) 214 (C. C. A. 2d 1925) pointed out (p. 216) that the suit for salvage "is ordinarily, properly and fully according to the

A in favor of his ship B when the money will merely be transferred from one of his pockets to another. But the cargo on ship A cannot claim that the shipowner's duty to it is such that salvage by any of his other ships shall go unrewarded. The owner of ship A is barred by his duty from a reward for his efforts in behalf of A's cargo. But as owner of Ship B he may qualify for one in respect to A's cargo. It would be much too much, also, to say that all the employees of the owner of a fleet owed such a duty to him that no crew of one of his ships could claim salvage for their labors and hazards in salving another one or its cargo. The duty of Ship B's crew is to its own ship; it is, therefore, so far "volunteer" as to the rest of its employer's fleet that salvage awards may be earned for rescues of his other vessels and her cargo.<sup>96</sup> In *Jacobson v. Panama R. Co.*<sup>97</sup> the court awarded salvage to the master and crew of the salvaged vessel, notwithstanding common ownership and the fact of common employment. It followed *Gilchrist Transportation Co. v. 110,000 Bushels of Wheat*.<sup>98</sup> Where the salvors, ship, and crew filed against the cargo of the salvaged vessel. When the owner of this cargo undertook to avail itself of the common ownership of the salving and cargo carrying vessels the court replied: "It is well established by authority that where salvage services are performed by one vessel to another, both vessels belonging to the same owner, the crew of the salvor are entitled to recover remuneration. The reason for the rule is founded upon the contract of employment. Salvage services rendered by the crew in aid of a disabled ship have never been regarded as within the scope of

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course and practice of admiralty, brought by the owner, who may . . . sue in his own name, on behalf of all the other persons interested in the salvage recovery. The *Flottbek*, 118 F. 954." The crew, however, has the right to intervene with independent representation.

<sup>96</sup>The *Neptunus* was controlled by the Emergency Fleet Corp., and both vessels were considered government ships appropriated exclusively to public service. But even though there was common ownership by the United States, this has been held not enough to deprive the master and crew of the salving vessel of compensation for salving her. *Rees v. U. S.* (D. C.) 134 Fed. 146. The members of the crew had an independent right accorded them by law for compensation for salvage. They are entitled to a maritime lien as protection. *The New Orleans* (C. C.) 23 Fed. 903." This is from *Jacobson et al. v. Panama R. R. Co.*, 266 Fed. 344 (C. C. A. 2d 1920).

<sup>97</sup>*Jacobson v. Panama Co.*, 266 Fed. 344 (C. C. A. 2d 1920). In *The Olockson*, 281 Fed. 690 (C. C. A. 5th 1922) the chief engineer of *The Gorgona*, a government tug, on behalf of the captain and crew sought an award for the rescue of the *Olockson*, a government merchant vessel, and her cargo, on fire at sea after passing through the Panama Canal. The *Gorgona* was used to assist vessels through the canal. Salvage award was granted. "Whether the tug be strictly a merchant vessel or a quasi public vessel her crew are not . . . debarred . . . But we think that this vessel . . . should be classed as a merchant vessel. She was engaged in the aid of commerce for hire (\$25 an hour for towing in the canal was her fixed price) . . . She was wholly unlike a fire department extinguishing a fire, the very business for which it was maintained and paid." See note (1922) 32 *YALE L. J.* 183 which asks what would have been done if both ships were battleships; how far does duty go when you are in the Navy, now?

<sup>98</sup>*Gilchrist Transportation Co. v. 110,000 Bushels of Wheat*, 120 Fed. 432 (D. C. W. D. N. Y. 1903).

their employment." The court also made an award in favor of the salving ship. This, of course, is conditioned upon the question whether or not the danger to which the carrying ship was exposed was due to some cause for which the carrying ship was responsible. The common owner may not by his fault in respect to ship A put A into a danger, and then claim payment for rescuing her by using his ship B. Even if a ship is not responsible for causing the peril to its own cargo it may not claim salvage for rescuing it. But if the carrying ship is not responsible for the peril to its cargo another ship of the same owner may earn a salvage award from the cargo. Yet if the owner of ship A which is imperilled by the fault of ship A itself should rescue A and its cargo by use of his ship B, he can scarcely claim an award for rescuing A's cargo. The analogies to the general average situation govern; and they deny him a contribution from the cargo in such cases. Even if the shipowner is relieved of liability to his cargo notwithstanding his servant's fault as under the Harter Act, he would still be unable to claim a salvage award if the general average analogies are followed. Yet in general average, contract right to contribution is sustained and it is arguable that by analogy a salvage<sup>99</sup> claim might be sustained in favor of the owner of even a negligent ship if the ship officer's negligence was of a sort not imputable to the owner. The Harter Act and the Carriage of Goods by Sea Act both exempt him from liability to his cargo for certain errors and faults of his servants in charge of the ship.

#### SALVAGE AFTER A COLLISION

In a collision both ships may be in fault, or neither in fault; one may be in fault and the other not. There is a duty to stand by and the ships, of course, assist each other. Questions have arisen as to whether or not assistance given after collision by one of the vessels to the other may base a claim for salvage, and in *The Clarita and the Clara*<sup>100</sup> the Supreme Court stated the general doctrine. In that case the tug *Clarita* undertook to tow a blazing ferry boat to a flat. She negligently used a hemp hawser which burned, and the drifting tow set fire to the anchored schooner, *Clara*. After dragging the ferry boat away from the schooner, the tug let it sink, returned to the *Clara*, and extinguished the fire. For this service she claimed a salvage award from the *Clara*. Fault was placed entirely upon the tug and salvage was denied her.<sup>101</sup> "the insuperable objection . . . is that the peril . . . was caused by those who rendered the alleged salvage service." This general doctrine was reiterated in *The Jefferson*<sup>102</sup> later. The duty to repair the

<sup>99</sup>The reference is to the so-called Jason clause. See discussion on general average.

<sup>100</sup>*The Clarita and the Clara*, 23 Wall. (90 U. S.) 1, 23 L. ed. 146 (1874).

<sup>101</sup>The schooner's claim for her damage was sustained.

<sup>102</sup>*The Jefferson*, 215 U. S. 130, 141.

damage is, of course, the background of this doctrine that the vessel in fault gets no salvage from its victim.

In the collision cases, an initial inquiry is whether or not the present stand-by-and-assist statute<sup>103</sup> imposes such a duty to give aid that no salvage may be claimed under any circumstances even by a vessel not in fault. This point, which does not seem to have been dealt with in the United States,<sup>104</sup> has been settled in England by the House of Lords in 1925. In *Owners of S.S. Melanie v. Owners of S.S. San Onofre*,<sup>105</sup> the statutory duty, it was held, would not bar an award of salvage.<sup>106</sup> Since our act is part of the same international convention, we should presumably treat it the same way as the English and not bar an award to the vessel not at fault in the collision. In *The Clarita and the Clara* the Supreme Court said, at page 18: "Where two vessels come into collision, if one is not disabled she is bound to render all possible assistance to the other even though the other may be wholly in fault.<sup>107</sup> . . . and it is very clear that if the vessel in fault renders assistance to the one not in fault the former cannot make any claim for salvage either from the other vessel or the cargo on board. . . ."

Inferentially, this concedes salvage to an innocent ship if the other is in fault. If neither ship were in fault, presumably the assistance by one to the other in such a case would bring a salvage award. Where both ships are in fault it is settled in England<sup>108</sup> that no award will be given; neither to the owners nor yet to the crew. If we concede that mutual fault bars salvage—a matter which itself is arguable—to exclude the negligent master or officer seems fair enough and to make the owner stand or fall with him seems fair enough also. None of our statutes,<sup>109</sup> which excuse the owner from respon-

<sup>103</sup>33 U. S. C. A. § 367.

<sup>104</sup>This is stated from an examination of the notes to 33 U. S. C. A. § 367, the stand-by act and 46 U. S. C. A. § 731, the salvage act.

<sup>105</sup>*Owners of S. S. Melanie v. Owners of S. S. San Onofre* (1925) A. C. 246.

<sup>106</sup>The English Act, § 422 of Merchant Shipping Act of 1894, is almost identically worded with our Act *supra* note 103. Said Lord Phillimore (p. 261): "This is, . . . the first opportunity which this house has had of pronouncing" on the question. He accepted the view taken in *The Hannibal* and *The Queen*, L. R. 2 A. & E. 53 (1867), that "the duty cast by the Merchant Shipping Acts upon one of the two colliding vessels to stand by and render assistance does not prevent that vessel if he she renders assistance from claiming salvage." The salvage was claimed by the vessel not in fault and the case went off against her on the facts. The court considered that she had not done a salvage service. If she had, her recovery for it was conceded. The English cases are set forth in KENNEDY, SALVAGE (3d ed. 1936) p. 31. The ship in fault, regardless of the quantum of her fault, may not be heard to claim an award; see *The Duc d'Aumale* (1904) p. 61 (1903) where a tug got her tow into a collision with another ship which put the tow in a sinking condition. The tug rescued her. The fault lay with the tug and the tow but the "joint negligence" barred the tug. The owners' claim, the master's claim, were excluded without argument. After a review of the cases the crew of the tug were also denied salvage largely as a matter of policy.

<sup>107</sup>Citing English cases.

<sup>108</sup>See note 106 *supra*.

<sup>109</sup>See the discussion of the HARTER ACT and the CARRIAGE OF GOODS BY SEA ACT, *supra*, in the chapter on the Maritime Carrier in the book.

deat superior liability for negligent navigation and the like on the part of his officers, excuse him to persons other than his own cargo owners. He is, therefore, liable to the other ship and to her cargo for their fault.

Yet the mere fact that both ships are in fault should end the whole matter of salvage seems unfortunate. Something might be said in behalf of even the owner of a ship in fault particularly with reference to the crew of the ship in fault. This is especially true in England where the proportional damage rule is in effect.<sup>109a</sup> If it is possible to conceive of two \$1,000,000 ships in collision with ninety percent negligence on the part of one and ten percent on the part of the other, it might also be conceivable to let the ten percent negligent rescue the other at a ninety percent of the normal salvage. The English rule is illustrated in *The Kafirstan* *infra* note 118. In the United States, in collision cases, we do not proportion the negligence nor the damages. We presumably, therefore, will follow the English doctrine that fault on both sides bars either ship from a salvage award.<sup>110</sup> So far as the salvors crew is concerned, it may not be unjust to the salvor's crew to include them in the same category if they do "nothing more than their ordinary duties toward their owners and master with little or no risk" as the court said in *The Duc d'Aumale*.<sup>111</sup> But if they have no part in the negligence of owner or master, as the court in *The Duc d'Aumale* conceded they had not, and in the emergency they make great effort at high risk in saving the other ship the English holding which excludes the crew on the offending vessel seems harsh. It is arguable that they could make out a case against their own employer within the reasoning of the previous cases where salvors saved the government from having to refund the customs duty or saved a contractor from a danger which imperilled his contract rights.

The statements just made as to our views are largely inferential, for American reports reveal no instances of salvage litigation between the actual colliding vessels. Our inferences are drawn from several cases of which *The Pine Forest*<sup>112</sup> is an example. The Knickerbocker Company's tug,

<sup>109a</sup>The division of damage, etc., is dealt with elsewhere. See Huger, *Proportional Damages Rule in Collisions at Sea* (1928) 14 CORNELL L. Q. 561.

<sup>110</sup>In *The Pine Forest*, *infra* note 112, the Circuit Court of Appeals in 129 Fed. 704 (19 ) says: "Two vessels are in collision; No. 1 is seriously damaged and No. 2 only slightly injured or not injured at all. No. 1 appeals to No. 2 for assistance and immediately . . . the masters agree as to a round sum to be paid for the assistance if successful. All this is effectual if it is afterward determined that No. 2 is not in fault, but it goes for nothing if it is finally settled that she was the guilty vessel." Does he mean *solely* guilty?

<sup>111</sup>*The duc d'Aumale*, 1904 P. 61, 73. At p. 75 the court considered "it would be bad policy to encourage sailors, as it were, to hope and expect that their master might get the ship he was towing into danger so that they would have to render services for which they could recover." He refused to separate the crew from the master, the person actually negligent.

<sup>112</sup>*The Pine Forest*, 119 Fed. 99 (D. C. R. I. 1903), *aff'd* 129 Fed. 700 (C. C. A. 1st 1904).

Triton, sank the Pine Forest, the fault wholly on the Triton's side. The Pine Forest's owners libelled the Triton and the Knickerbocker Company petitioned for limitation of liability to the value of the Triton. By stipulation, the Triton's value was set at \$20,000.<sup>113</sup> The Knickerbocker Company had also raised the Pine Forest, using not the Triton but its other tugs and in the case here discussed it filed a libel for salvage for this service—\$8750. The Knickerbocker Company argued that if it were not given an award the limitation act was defeated since their liability would be \$20,000 plus \$8750 whereas limitation was permitted to the "value" of the tug only.<sup>114</sup> But the court denied salvage award; and the decision, which on this point follows the English precedents, may be taken to settle the connection between the limitation of liability and the salvage items. The holding was that if a vessel does negligent damage no other vessel of the same owner can be given an award for its salvage services. In this the court relied upon the doctrine of the law of general average which denies to the shipowner in fault any contribution for the sacrifices his vessel may make in saving the cargo his fault had imperilled. It is to be noted, however, that in the general average instance all the property involved is part of the "same venture." The general average cases limit contribution to the property comprised in the "venture". The essence of the salvor's argument is that he has in the salvage job ventured equipment, etc., not involved in the original disaster at all. The result of *The Forest Pine* however has been carried over<sup>115</sup> to bar not only salvage awards to vessels in common ownership but also to bar awards to vessels in various forms of association short of their actual common ownership.<sup>116</sup> Thus, it may be affirmed with some confidence that if fault is imputed to the salvor, his ownership of the salving agencies, will defeat his claim for an award. This is shaken, however, by a recent decision in England.

Cases where one ship of a line runs down a victim which is aided by another vessel of the same line as the original wrongdoer offer some interesting situations. On the question of salvage in a collision case when the offending vessel

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<sup>113</sup>The statute allowed limitation based on the value of the Triton. That is by surrendering her value the owner was freed of any liability to The Pine Forest in excess of Triton's value. The topic under the present amended statute is treated in a separate paper not yet published. The topic was much discussed on the occasion of the amendment in 1935.

<sup>114</sup>See J. E. Purdy, *The Recent Amendment to the Maritime Limitation of Liability Statutes* (1935) 5 BROOKLYN L. REV. 42; G. C. Sprague, (1935) 12 N. Y. U. L. Q. REV. 568; also A. I. Springer, (1936) 11 ST. JOHNS L. REV. 14; notes (1935) 35 COL. L. REV. 246-265; (1935) 10 TULANE L. REV. 119-130.

<sup>115</sup>In *Fleming v. Lay*, 109 Fed. 952 (C. C. A. 6th 1901) the owners of various tugs at Sandusky, Ohio, formed a voluntary association and instead of having all their tugs run out simultaneously and haggle for business hired a manager who managed all the tugs and distributed costs and income, etc. No award was made to association tugs for salvage following fault by a tug in the association.

<sup>116</sup>In *The Relief*, 51 Fed. 252 (D. C. Md. 1892) a pilot boat's service was unrewarded when the rescued ship's grounding was due to the negligence of her pilot who was a member of the pilot boat's association; only a nominal sum was given.

and the salvor vessel are in common ownership, the English decisions had been in some confusion<sup>117</sup> until the whole subject was recently overhauled in the matter of the *Kafiristan's*<sup>118</sup> collision with the Canadian Pacific Company's *Empress of Britain*. The *Kafiristan* was in fault twenty-five percent., the *Empress* seventy-five percent. And the *Kafiristan* was given a salvage service by the *Beaverford*, also a Canadian Pacific vessel. In the *Beaverford's* claim for salvage, the judges of the Court of Appeal in eighteen pages laboriously reviewed all the authorities to reach the conclusion that no salvage award could be given. The House of Lords in a few words went the other way. They "could not accept the argument that the principles laid down by Sir Robert Phillimore in *The Glengaber*, (1872) L.R. 3 Ad. & Ecc. 534, were bad law, particularly where he said that he knew of 'no authority for the proposition that a vessel wholly unconnected with the act of mischief is disentitled to salvage reward simply because she belongs to the same owners as the vessel that has done the mischief'."

The *Kafiristan* case can be put on its own facts however. There was a *Lloyd's Salvage Agreement* between the parties. "That agreement put the matter beyond doubt, as it specifically provided for remuneration as salvors in the event of success, and there was no reservation for the possibility that the *Empress of Britain* was wholly or partly to blame."<sup>119</sup> Certainly, such a contract in so far as it assured an award for the salvor's crew should be upheld. Any breakdown of the English rule which excludes them is to be welcomed. But if a salvage company's vessel A should sink vessel B through fault, and then set its salvage fleet to work at raising B, one can scarcely visualize a successful outcome of the company's own suit for a salvage award or even, in such a case, of a similar suit in favor of its wrecking crews.

<sup>117</sup>The *Glengaber*, 1872 L. R. 3 A. & E. 534, favored an award. The *Glenfruin*, 10 P. Div. 103, (1885) which did not refer to the *Glengaber* excluded the common owner but granted awards to the salvor ship's crew. Kennedy, *Salvage*, 3rd ed. 1936 relies on the *Glenfruin*: but the rule is definitely set in favor of the *Glengaber's* view by *The Kafiristan*, *infra* note 118 in 1937.

<sup>118</sup>*Beaverford (Owners) v. Kafiristan (Owners)*, 1937 p. 63. The House of Lords [1937] A. C. Weekly Notes, Aug. 7, 1937, p. 301. In the *Kafiristan* case the salvage award to the *Beaverford* was £1850 to the owners, £550 for expenses, £250 for the master, £350 for the crew. The collision damage divided 75% to the *Empress*, 25% to the *Kafiristan*, is not stated in actual figures but it is possible that even under our 50%-50% method of division a salvor—either the colliding ship itself or another of the same owner—could do more salvage service than it did damage. Our rule makes no provision for such a case at all: the English does.

<sup>119</sup>This last sentence raised an interesting question in itself. If salvage is especially agreed upon in these cases, would our courts recognize the contract despite the views already set forth? If our denial of salvage is patterned upon our denial of general average in similar cases where there is fault as the court said, *ant. p.* that it was, it must be remembered that the "Jason" clause—a contract for general average notwithstanding the fault has uniformly been upheld. On the analogies the special contract for salvage would be upheld and the result of the English decision would be reached even here.

## SALVAGE AND GOVERNMENT PROPERTY

Although the general subject of sovereign immunity has already been discussed,<sup>119a</sup> a brief outline of the salvage of and the salvage by government ships, etc., is here given. In claims for the salvage of government vessels the salvor may, since March 9, 1920 rely on the enlightened suits in admiralty legislation of the United States of that year,<sup>120</sup> and on the still more commendable similar Act of March 3, 1925.<sup>121</sup> By each statute the United States accepts liability *in personam*. In 1920 it accepted liability for its government-owned or operated merchantmen; in 1925 it did the same for its purely public vessels. The 1920 Act provides that "In cases where, if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, a proceeding in admiralty could be maintained . . . a libel *in personam* may be brought against the United States or against such corporation [in which the United States or its representatives shall own the entire capital stock]" as owner or operator. The suit is filed like an ordinary suit in admiralty for salvage in the United States District Court of the libellant's residence or place of business. Under the 1925 Act the libel *in personam* may be filed "for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States."<sup>122</sup>

The 1920 Act was invoked in a salvage claim in *Castner Curren and Bullitt v. United States*.<sup>123</sup> In that case the "owner" Castner Curren had chartered the rescuer ship to Burtner Coal Company, but there was a provision that "all derelicts and salvage shall be for owners and charterers equal account." The owner as usual sued as representative of all interests. But the government, stipulating that salvage service was rendered to the sum of \$42,500, set up that the Burtner Company owed it for breach of contract and for taxes a sum greatly exceeding \$42,500. This claim, therefore, ate up the salvage award. But Judge Hough said that "there can be no such thing as a counterclaim [in admiralty] unless it arises 'out of the same contract or cause of action for which the original libel was filed.' Admiralty Rule 50 *United Co. v. New York Line*, 185 F. 386." He, therefore, protected

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<sup>119a</sup>In an earlier chapter of the forthcoming volume. In *City of Chicago v. White Transp. Co.*, 243 Fed. 358 (C. C. A. 7th 1917) the city's fire boat operated on a shore fire from a point so near the "Arizona" that she flooded the latter's holds and the Arizona sank. The court remarked that the firemen believed that "for any damage . . . in operating the fire apparatus no action would lie . . . and acted accordingly". But a libel in admiralty was sustained against the city under the doctrine of *Workman v. New York City*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. ed. 314 (19 ).

<sup>120</sup>41 STAT. 525, 46 U. S. C. A. 741 *et seq.*

<sup>121</sup>Act of Mar. 3, 1925, 43 Stat. 1112: 46 U. S. C. A. 781 *et seq.*

<sup>122</sup>8 F. (2d) 86 (C. C. A. 1923).

<sup>123</sup>5 F. (2d) 214, (C. C. A. 2d 1925). At page 216 Judge Hough said: "The Suits in Admiralty Act contemplates, as we have now fully pointed out, an ordinary Suit in Admiralty for Salvage."

the salvor against the counterclaim. The case indicates that all the customary rules and procedures of the ordinary salvage suits among private persons are adhered to in these cases where government is a party defendant under the Suits in Admiralty Act.

Not only is the salvage of government vessels covered by the present legislation. Salvage by vessels owned and operated by the United States is expressly covered also. By the 1920 Suits in Admiralty Act: "The United States and the crew of any merchant vessel owned and operated by [it or a government corporation] shall have the right to collect and sue for salvage services rendered . . ." Under this Act a government tug assigned to the job of aiding ships in the Panama Canal was so far a "merchant vessel" as to be entitled to a salvage award.<sup>124</sup> In *The Impoco*<sup>125</sup> the United States vessel which did the salvage service was "The Western Hope owned by the United States and used as an army transport . . . [It] was operated by the United States Shipping Board which appointed Harris Magill and Company" its operating agents. It was carrying, for the War Department, a cargo of ordinance, aviation, mechanical and other equipment. The *Impoco*, a private ship, admitted that it owed salvage to the *Western Hope's* crew but fought the claim of the United States as owner.

This *Impoco* case distinguishes between the class of government vessels which may claim salvage under the 1920 Act and those which, if the claim is otherwise meritorious, must find its justification elsewhere in the statutes, or in general admiralty law. In the *Western Hope's* behalf the United States relied on the 1920 statute. But the court was emphatic that she "was not a merchant vessel". There was no merchandising about her, it said. But "the United States relies upon its inherent right as an owner to recover for salvage service in accordance with the ancient doctrine of the maritime law." With this argument, Judge Ward agreed: "Such services are voluntary, and they are just as voluntary in the case of men-of-war and public vessels generally as they are in the case of private vessels, i.e. it is no part of their duty to render such service. While I can see that a sovereign would and perhaps should consider it beneath his dignity to ask for compensation for services in saving property at sea, I can imagine no legal reason to prevent him from doing so. . . . The claimant relies upon certain acts of Congress which do show the long practice of the United States not to ask for salvage compensation, but which I think in no respect affects its right to do so. While Congress may restrict the inherent right of the United States to claim salvage, that right remains as usual until it is restricted. . . . The United States may change its practice, either by Act of Congress or by executive authority which, I must presume directed this

<sup>124</sup>See *The Olockson*, 281 Fed. 690 (C. C. A. 5th 1922) *supra* note 97.

<sup>125</sup>*The Impoco*, 287 Fed. 400 (D. C. S. D. N. Y. 1922).

suit to be brought in its name just as we presume generally that the plaintiff has authorized the suit."<sup>126</sup> He granted salvage both to the United States as owner and to the crew.

Thus if the United States claims for salvage performed by a public ship it may rely on the general maritime law.<sup>127</sup> By the decision the public ships claim is not excluded because the 1920 Act refers only to "merchant ships" and the 1925 Act is silent concerning salvage by public vessels. But it can hardly be said that the Government makes a practice of claiming salvage for services by its establishments designed to aid ships.<sup>128</sup> There is now indeed a permanent government establishment for the purpose of aiding distress both at sea and on inland waters.<sup>129</sup> The Coast Guard vessels,<sup>130</sup> by the President's order, may "cruise upon the coast . . . to afford such aid to distressed navigators as their circumstances may require" (§53 of 14 U. S. C. A.).<sup>131</sup> By other sections of the Coast Guard Act similar service may be ordered "on the Mississippi and Ohio rivers and their tributaries" in flood times, (§55) on the Great Lakes (§60), on the North Pacific coast (§62). For the "removal or towing into port wrecks, derelicts" etc., a vessel is provided by Section 63. And, indeed, not only are ships used but also "for the purpose of saving life and property along the coasts" aviation stations are authorized and coast guard personnel may be detailed for aviation schooling in these stations.<sup>132</sup>

When Coast Guard vessels acting under these statutes make rescues or assist in rescues their efforts do not bring awards. Where the Coast Guard vessel is the sole salvor cases are lacking. But the conclusion that neither ship nor crew are rewarded is justified by the decisions in which the Coast Guard vessel is a participant. In *The Kanawa*<sup>133</sup> the revenue cutter Androscoggin took a hand in the rescue. The court briefly said, p. 764, that being

<sup>126</sup>He recited The English Merchant Shipping Act of 1854 §§ 484, 485 by which the sovereign renounced claims on behalf of the ship, and provided for consent of the Admiralty before any suit could be brought by the commander or crew.

<sup>127</sup>The *Impoco* herself was a private ship, it will be noted. Whether the crew of one battleship which salvages another has any claim on the government, i.e., whether duty in the United States navy goes beyond the duty to one's own ship is not decided in the cases; and is perhaps of no great importance here.

<sup>128</sup>In *The Mary S—Astoria 17*, Fed. Supp. 72 (D. C. E. D. N. Y. 1936) 1937 A. M. C. 150, the City of New York as owner of a ferry boat claimed and was given an award for salvage of a barge which had broken adrift. Citing *The Impoco* the court said it "could wish that the City had not asserted this claim, for obvious reasons".

<sup>129</sup>Coast Guard. 1936 A. M. C. at 810.

<sup>130</sup>The Coast Guard "in lieu of the Revenue Cutter Service and the Life Saving Service existing prior to January 28, 1915, is continued" by the Act of Jan. 28, 1915, at 20: 38 STAT. 800, 14 U. S. C. A. 1, Title on Coast Guard.

<sup>131</sup>The ice and derelict patrol in the North Atlantic was the subject of further legislation on June 25, 1936 (C. 807, 49 STAT. 1922: 46 U. S. C. A. § 738a). The President was authorized to conclude agreements with other nations to maintain the service, and the Commandment of the Coast Guard is to administer our part of it.

<sup>132</sup>§ 29 of 14 U. S. C. A., Jan. 2, 1919, C. 8; 40 STAT. 1054.

<sup>133</sup>*The Kanawa*, 254 Fed. 762 (C. C. A. 2d 1918).

government property no claim was made and what the cutter did was to be considered "only for the purpose of fixing the value of the entire service". It similarly excluded a Canadian government vessel. The meaning of this is brought out more clearly in *The Anahuac*<sup>134</sup> where several tugs and the revenue cutter, *Ossipee*, joined in saving the *Anahuac*, itself a government tanker. No special point is made of the latter fact; and the case is later treated as of general application. The court said that the *Ossipee* was "not eligible to receive an award in salvage". But the court saw to it that the government assistance benefited the vessel in distress rather than the other salvors for it fixed the sum of \$15,000 which it would have awarded to all the participants if all *were* eligible to receive it; it then divided this sum to each participant as if all were eligible. By this division it awarded \$6,000 to the revenue cutter, \$9,000 to the other tugs jointly. It then ordered an award of \$9,000 to the tugs, none to the cutter nor to her men.<sup>135</sup> In *The Borgfred Moller v. S. S. Borgfred*,<sup>136</sup> the same rule was applied in a case where the rescued *Borgfred* was a private vessel. Thus while the Coast Guard participation does not bring the Coast Guard an award, it does not enhance the amount of the awards granted other participating salvors, and the government aid to the vessel in distress is a free gift of the taxpayers of whom of course the salvaged vessel or its owner may be one. The rule does not seem to be confined to our own nationals however. The salvors claim is one which carries a maritime lien.<sup>137</sup> The general topic of the maritime lien has already been discussed and in that paper the particular lien for salvage has been set forth.<sup>138</sup>

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<sup>134</sup>*The Anahuac*, 295 Fed. 346 (D. C. Me. 1924), *aff'd*, 3 F. (2d) 250 (C. C. A. 2d 1924).

<sup>135</sup>In *United States v. Central Wharf Towboat Co.*, 3 F. (2d) 250, C. C. A. 1st 1924, the *Anahuac* decision was affirmed on all points. "The cutter being a government boat was not entitled to pay for its services and the Coast Guard (shore station) made no claim and so far as appears, stood in no better position to make a claim than the cutter.

<sup>136</sup>*The Borgfred, Moller v. S. S. Borgfred*, 1936 A. M. C. 804, D. C. Virgin Ids. 1936.

<sup>137</sup>The time limit for salvage suits is two years "from the date when such assistance or salvage was rendered, unless the court . . . (is) satisfied that during such period there had not been any reasonable opportunity of arresting the assisted or salvaged vessel within the jurisdiction of the court, or within the territorial waters of the country in which the libellant resides or has his principal place of business." Act of Aug. 1, 1912, C. 268; 37 STAT. 242, 46 U. S. C. A. § 730.

<sup>138</sup>The lien for salvage is a lien on the ship etc. salvaged. Where the owner of the salvaging vessel collects an award in behalf of all interests the crew of the rescuer do not have a lien on their own ship for their share. *The Neptune*, 277 Fed. 230 (C. C. A. 2d 1921).