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SUPREME COURT OF NEW SOUTH WALES

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SUPREME COURT OF NEW SOUTH WALES

SOCIETE MARITIME CALEDONIENNE v. the ship CYTHERA and her cargo

MACFARLAN, J.

23, 26 February, 1, 2, 8 March 1965

Shipping—Salvage—Application for salvage award by salvor—Matters necessary to be proved for prima facie case to be established—Requirement that ship be in danger—Ship in hands of persons whose object to feloniously and permanently deprive owner of his proprietary rights—Whether ship in danger—What acts necessary to constitute salvage of vessel—Whether sufficient if salvor, by standing by, enables acts to be done by other persons or ships which, if salvor had not stood by, would not have been done—Whether plaintiff in salvage claim required, in his case, to justify steps taken, or to show that what was done was done without fault or negligence—When necessary to prove such matters—Factors to be taken into account in fixing amount of award—Actual value of ship saved—How calculated.

F and his wife owned a 31 ton steel-hulled yacht *Cythera*. In March 1963, the yacht left Sydney for New Zealand, the crew being F and his wife and daughter and three men, two of whom, during the course of the voyage and whilst the yacht was anchored at Lord Howe Island, took the yacht out to sea and made off with it against the will and without the consent of the owners. It was the intention of the two men, who were competent navigators and seamen, to sail the yacht to South America. After some days, the yacht came close to Norfolk Island where a single screw cargo ship of 1062 tons, the *Colorado del Mar*, was unloading cargo. The *Colorado del Mar* was owned by S M C. The Administrator of the island would not allow the Government launch to put to sea to pursue the *Cythera*, in view of the prevailing wind and seas, and after discussion with the representative of the Commonwealth Police on the island, the master of the *Colorado del Mar* put to sea in pursuit of the *Cythera*. After some miles, the *Colorado del Mar* came up level with the *Cythera* but the two men on the Cythera refused to heave to and on a number of occasions made circles, being under sail and power, designed to avoid the *Colorado del Mar*, which had a much greater turning circle. Attempts were made to intimidate the men on the yacht to surrender, but without success. Whilst the vessels were manoeuvring, there was a collision when the ship struck the yacht. The two men jumped overboard and were apprehended, but further attempts by the *Colorado del Mar* to take possession of *Cythera* were unsuccessful and one attempt resulted in a further collision. Ultimately, it was arranged for the Government launch to come out and collect the yacht, this being made possible by the presence of *Colorado del Mar*. S M C brought proceedings in Admiralty against *Cythera* and her cargo, praying that the *Cythera* and her cargo might be condemned in such an amount of salvage remuneration as to the Court might seem just, and also be condemned for the costs of the action. It was contended for F and his wife, who defended the action, that, during the period of time preceding the collision, the navigation of *Colorado del Mar* was so negligent and unseamanlike that the plaintiff thereby became disentitled to receive a salvage award at all, or, if an award were made, it should be considerably reduced by reason of these circumstances.

Held: (1) the work undertaken by *Colorado del Mar* was undertaken voluntarily;

(2) where a ship is in the hands of persons whose declared object is feloniously and permanently to deprive the owner of his proprietary rights, the physical safety of the ship (which in many decided cases constituted the danger) ceases to be the dominant element in assessing the degree of danger and the deprivation of the property is sufficient to constitute danger to the ship;

The Trelawney (1802), 4 Ch. Rob. 223; *The Francis and Eliza* (1816), 2 Dods. 115; *The Calypso* (1828), 2 Hag. Adm. 209, referred to.

(3) accordingly, *Cythera* was in danger;

(4) the work undertaken was in relation to a recognized subject of salvage;

(5) *Cythera* was saved from the danger in which she had been placed;

(6) it is not necessary that the salvor do positive acts actually on or directly in relation to the salved vessel, but it is sufficient if the salvor, by standing by, enables acts to be done by other persons or ships which, if the salvor had not stood by, would not have been done;

(7) *Colorado del Mar*, by the exertions of her master and crew, had materially contributed to saving *Cythera* from danger;

(8) in a salvage claim, a plaintiff is not concerned as part of his case to justify each and every step which is taken, nor is such plaintiff obliged to show that what was done was done without fault or negligence and in accordance with the practices of good seamanship, and he need only prove these matters if they are raised by evidence given in the defendant's case;

The Charles Adolphe (1856), Sw. 153, referred to.

(9) the plaintiff had, therefore, made out a case for salvage award;

(10) the evidence did not disclose any want of reasonable skill and knowledge in the master or crew of *Colorado del Mar* in her pursuit of *Cythera*, and the defence of the defendants based on alleged negligent and unseamanlike navigation of *Colorado del Mar* must fail;

(11) as to the amount to be awarded, the Court was not concerned with the cost of building *Cythera* or a new yacht in her place, but with the actual value of what was saved, and this related to the value of the yacht in the condition she was when restored to her owners, allowance being made for damage done to her in the course of salving operations;

(12) applying this test, the salved value of *Cythera* was £9000, being its value undamaged as a seagoing proposition (£9000) plus value of equipment and cargo (£1500), less cost of repairing damage done in the course of salving operations (£1500);

(13) an award of salvage should be made in an amount equal to a little more than one sixth of the value of *Cythera*, namely £1625.

ACTION

The facts and the nature of the proceedings appear sufficiently in the judgment of Macfarlan, J.

Street, Q.C., and *D. A. Yeldham*, for the plaintiff.

H. J. H. Henchman, for the defendants.

Cur. adv. vult.

MACFARLAN, J.:

Daniel James Barrie and Derrick Brewin are, it appears, men of agreeable appearance and pleasant manners. But in the early part of 1963 they were also criminals who, by the use of considerable craft and determination feloniously stole a yacht named *Cythera*. The stealing took place at Lord Howe Island which, for all material purposes, is part of the State of New South Wales. It was the commission of this felony and the events which subsequently befell the *Cythera* which gave rise to the present action.

The *Cythera* was and is a sea-going yacht of 31 tons gross. At all material times she was owned by Peter Alexander Fenton and his wife, Patricia Mary Fenton, both of whom entered an appearance on behalf of the defendants in this action. Mr. Fenton describes himself as an engineer by occupation and, either in the exercise of that skill or some other, he himself built the yacht. In the early part of 1963 he and his wife were minded to sail the yacht to New Zealand and for this purpose arrangements were made to engage a competent crew, and for the supply of proper provisions and stores. On 31 March 1963, the *Cythera* cleared Port Jackson, bound for Lord Howe Island, as the first leg of her journey. At the time of her departure the crew of the *Cythera* was described in the Customs Clearance as follows: Mr. Fenton, captain, Mrs. Fenton, cook, Penelope Fenton, aged 9, supernumary, Derrick Brewin, sailing master, Daniel Barrie, for'ard hand, and Charles Scriber, navigator. Of this crew, I should say that I am quite satisfied that Mr. Brewin was a man of adequate skill and experience to take charge of the yacht and to navigate it; and that Mr. Barrie was also competent to perform the duties of the position he accepted as a member of the crew. I should also say that I am satisfied that unbeknown to any other persons than themselves Barrie and Brewin had, before leaving Sydney, formed an intention to take possession of the yacht by force or craft as was necessary, and to sail it themselves to the west coast of South America. In aid of this purpose, they had acquired, in Sydney, charts covering the route likely to be taken and these charts were,

without the knowledge or approval of the Fentons, brought aboard the *Cythera*. They remained aboard the *Cythera* until shortly before the collision which I shall afterwards describe.

It is not material to inquire whether the voyage from Sydney to Lord Howe Island was eventful or uneventful but whatever its character, the yacht arrived at this first destination on 7 April. It anchored in the lagoon about 100 yards off shore and, so far as the evidence indicates, those who sailed in her occupied themselves in pleasurable activities or inactivities during the succeeding three days. On the night of 10 April the Fentons, Barrie and Brewin, were present at a dance held at the R.S.L. Club. In the course of the evening's entertainment, but before the time scheduled for its termination Barrie and Brewin, without the knowledge of the Fentons, left the dance and returned secretly to the yacht. Having boarded the yacht they weighed anchor and made off to sea. There is not any doubt in my mind that this taking of the yacht was against the will and without the consent of the owners and that it occurred in what, in a territorial and constitutional sense, is part of New South Wales. At any rate, when the day of retribution inevitably arrived, Barrie and Brewin, by their pleas of guilty, assented to these truths.

The *Cythera* then disappeared into the vastness of the Pacific Ocean, and beyond human ken. No doubt a hue and cry was raised through all official channels and from what subsequently appears it is obvious that details of the escapade became known to the inhabitants of Norfolk Island.

The evidence satisfies me that after they had stolen the *Cythera* Barrie and Brewin set about with skill and resolution to effectuate their intention of bringing the yacht to South America. They maintained the *Cythera's* log and this was in evidence before me. I do not doubt that during the first seven days there were occasions when the yacht met with rough weather and the fact that she ultimately came through these hazards unscathed lends support to my view of the skill of Brewin and Barrie, and their capacity, if unhindered, to navigate the yacht the full width of the Pacific Ocean. They sailed generally in a north-easterly direction and intended to make a landfall at Norfolk Island for the purpose of a navigational check. Norfolk Island was sighted from the *Cythera* in the early morning of 17 April and, unhappily for the felons who believed there was not any shipping in the area, they were closer to the island than had been originally intended. Barrie in fact saw the *Colorado del Mar* but, unflatteringly, mistook her superstructure for huts erected on the ground.

Early on the morning of 17 April the *Colorado del Mar* was being discharged of cargo in Cascade Bay. Cascade Bay is on the north of Norfolk Island and the practice is for the ships to be moored in the Bay and for the cargo to be unloaded over the side into lighters, which ferry the cargo to a pier on the edge of the shore. Early in the morning of 17 April, Captain Savoie, who commanded the *Colorado del Mar* observed the *Cythera* and it is quite obvious to me that at the time he observed her he was aware of what had happened at Lord Howe Island seven days before. At the time or shortly after this observation was made, waterside workers were on board the *Colorado del Mar,* and her hatch covers were off. The evidence there gives some account of messages passing to and from the Administrator of Norfolk Island and Captain Savoie. The courier who conveyed these messages was Sergeant 2nd Class Hudson of the Commonwealth Police Force, who was the chief and only member of the police force. Sergeant Hudson was obviously well informed about the shortcomings of Barrie and Brewin and it was his concern to apprehend them and bring them to justice. He, however, in circumstances which I shall later describe, did not have any means of doing this from his own resources. The only unit of sea transport commanded by the Administrator was a Government launch and, in the condition of the wind and the seas on that day, the Administrator refused to allow it to be used to attempt an interception of the *Cythera*. However, Sergeant Hudson was authorized by the Administrator to discuss the general situation with Captain Savoie and, if Captain Savoie decided that he would attempt a recovery of the yacht, Sergeant Hudson was authorized to accompany him. The evidence is not completely clear in respect of everything that must have happened at this point but I am of the opinion that whatever may have been Sergeant Hudson's legal duties with respect to the apprehension of the suspected criminals, Captain Savoie was not under any such duty and that his decision to put to

sea in pursuit of the *Cythera* was his decision, voluntarily made by him, and not in pursuance of any legal obligations or any request made by the Administrator or Sergeant Hudson for the purpose of law enforcement.

At any rate *Colorado del Mar* weighed anchor, replaced the hatch covers, and put to sea about 11 o'clock with the waterside workers still on board. There were also on board Sergeant Hudson and Mr. Noel Menzies, a Customs Officer. *Colorado del Mar* then travelled in the direction of the *Cythera* at about 6 to 8 knots and made up with her about 12 to 15 miles out from the island. It was, as I find, about 11 a.m. when *Colorado del Mar* left Norfolk Island. The motor vessel *Colorado del Mar,* which at the time was owned by the plaintiff, is a single screw cargo ship of 1062 tons gross. The plaintiff is a company registered in New Caledonia and the Captain and the crew of the *Colorado del Mar* are of French nationality.

I must say I have found the evidence somewhat vague and confusing about the events which occurred from the time when the *Colorado del Mar* first came up with the *Cythera* but it may well be—and this is a matter which I shall discuss later—that counsel for the plaintiff is right when he submits, at any rate from the point of view of the plaintiff's claim, that I am not greatly concerned with this detail. By and large I am of the opinion that the clearest and most reliable accounts were given by Barrie and Brewin though they were not asked to speak about everything that occurred; nor do I discard the evidence given by Sergeant Hudson and Captain Savoie, much of which I find important and reliable. Weighing all the evidence, it seems to me that the following description of what occurred is substantially accurate. The *Colorado del Mar* came up level with the *Cythera* on her starboard side, at a distance of about 30 yards. Sergeant Hudson by word of mouth challenged Barrie and Brewin to heave to as he wished to come aboard. They however refused his demand and emphasized their refusal by the use of rude and insulting gestures. At this time the yacht was under sail and also under power. Sergeant Hudson then fired two monitory shots from his revolver but the only effect which this produced was that the yacht drew away to port and made a circle, with the intention of coming up behind the *Colorado del Mar.* When the yacht manoeuvred in this way, the *Colorado del Mar* also turned but, owing to its size, its turning circle was much greater than that of the *Cythera* and some time elapsed before the *Colorado del Mar* was able to come up again at about the same distance on the starboard side of the *Cythera.* On this occasion the captain of the *Colorado del Mar* told his crew to pelt the men on the yacht with potatoes. No doubt the captain is right when he says that his crew, being Frenchmen, did this with some degree of excitement and enthusiasm but Barrie and Brewin were still not intimidated and again they drew away to port and repeated the manoeuvre that they had undertaken on the first occasion. In a general way, the *Colorado del Mar* also pursued the same course and after the lapse of further time again came upon the starboard side of the *Cythera.* On this occasion different means were adopted as an attempt to intimidate those on board the *Cythera.* Under the direction of Captain Savoie, the contents of some bottles of beer were consumed and the empty bottles were then filled with sea water and flung apparently on to the deck of the yacht where some of them burst. While this course may have conveyed to Barrie and Brewin some impression of the stern resolution of Captain Savoie to bring the *Cythera* under his control it did not deflect them from the intention they had formed of eluding lawful authority and escaping with the Fentons' yacht to South America. Indeed, as will appear in a moment, the determination of those in charge of the *Colorado del Mar,* as well as the approach of darkness, inspired in the minds of the two felons a plan to foil their pursuers by the adoption of a ruse. At any rate, in the meantime they again drew away to port and described what had by now become the customary circle, and *Colorado del Mar* did the same. When this manoeuvring was completed or nearly completed, I judge the position to be that both ships were sailing in a north-easterly direction, the *Colorado del Mar* being some distance astern of the *Cythera.*

Barrie and Brewin said in evidence what their next move was intended to be. They said that they intended to give an impression to those in charge of the *Colorado del Mar* that they were submitting to the threats, and encouraging Captain Savoie to put a boarding party on the *Cythera.* As a means of

conveying this general impression *Cythera's* engine was throttled back and both men commenced to lower the sails. But as they said in the witness-box, and I believe them, they did not have any intention at all of surrendering to the *Colorado del Mar*. Their intention was to induce the *Colorado del Mar* to lose forward way to put a boarding party into a boat and, when the boat was midway between the *Colorado del Mar* and the yacht, to regain speed on the yacht and to disappear before the *Colorado del Mar* could overcome the delay involved in picking up her boat and renewing the chase. For his part, Captain Savoie also brought cunning to bear. He said he had observed their "corner"—though precisely what he meant by this I do not know. I infer that he intended to head off the yacht by some anticipatory movement on his part, when she drew away to port as she had done on three previous occasions. Whether or not the inference I have drawn of Captain Savoie's evidence is correct I am unable to say because he did not express his intention explicitly. The subsequent events rather suggest that the inference I have drawn may well be wrong but at least it is clear that Captain Savoie intended to undertake some fresh manoeuvre that would bring a further pressure upon the occupants of the yacht to surrender, and enable him to recover the yacht.

At any rate what then happened was that while Barrie and Brewin were furling the sails *Colorado del Mar* was moving a little distance behind the *Cythera* and slightly on her port quarter. Barrie formed the opinion that she was coming too close and, to avoid collision he swung the helm and changed the course of *Cythera* 90 degrees to starboard. At or about the same time, I am satisfied that the bow of the *Colorado del Mar* also swung to starboard and a collision occurred between the ship and the yacht. In the course of the ensuing confusion, it is probable, I think, that Brewin jumped overboard to save himself, and that Barrie having become aware that Brewin was in the water and wearing clothing that would probably cause him to sink, jumped in afterwards for the purpose of saving him. Barrie and Brewin shortly after that were taken aboard the *Colorado del Mar*.

But although the sails of the *Cythera* had probably been furled, she was still under some power from her diesel engine and made off on courses that were not predetermined but were governed by the effect of the wind and the waves upon such way as her engine power gave her. For a while, as it seems to me, *Colorado del Mar* endeavoured to take possession of the yacht, but owing to the condition of the sea, this was found to be impracticable and all attempts failed. Indeed, in the course of one attempt a further collision occurred between the *Cythera* and the *Colorado del Mar*. Ultimately a message was sent from the *Colorado del Mar* to the Administrator requesting the services of the Government launch. Whether or not the *Colorado del Mar* went into Cascade Bay and escorted the launch out, or whether, as the statement of claim alleges, she simply stood by the *Cythera*, I am unable clearly to say. The reason why the Administrator had previously refused to allow the Government launch to be used by Sergeant Hudson was because of the condition of the sea. However, after mature consideration, I am prepared to accept the submission of counsel for the plaintiff that, in the conditions then prevailing this Government launch was enabled to come out either because the *Colorado del Mar* came into Cascade Bay and made a lee for it or because the *Colorado del Mar*, remaining as she was in the vicinity of the *Cythera*, was a source of succour if difficulty, or near disaster, should befall the launch. At any rate my conclusion is that the presence of the *Colorado del Mar* provided a basis for the launch to put out to sea. When the launch arrived, one of the persons travelling in her boarded the *Cythera* and thereupon the *Cythera*, the launch and the *Colorado del Mar*, returned to Cascade Bay. Barrie and Brewin remained in custody and were subsequently charged. Before leaving this aspect of the case, it is desirable to state that, at about the time of the collision and in the general area where the collision occurred, the wind was about a 5-knot wind, though gusty and variable. I also find that the seas were in long swells probably ranging in height from 6 to 10 feet, the tops of the seas being slightly disturbed. As Barrie said, and I accept him, the sea was not a short choppy sea but was a long swell.

The present action is one in which the plaintiff, Societe Maritime Caledonienne, prays that the yacht *Cythera* and her cargo may be condemned in such an amount of salvage remuneration as to Court may seem just and also

be condemned for the costs of the action. Salvage, it will be observed, is not claimed by either the master or the crew of the *Colorado del Mar* but only by the owner of the ship. The basis of the claim, as is alleged in the statement of claim, is that the yacht was in the hands of pirates who had unlawfully and feloniously removed her from the lawful custody and control of her owners and that the express and sole purpose of the *Colorado del Mar* putting to sea was to recover the *Cythera* from the pirates. It was further alleged in the statement of claim that the *Colorado del Mar* lost time and incurred expenses in rendering the salvage services and also that the ship was damaged by the collision with *Cythera* and lost further time and incurred further expense in repairing that damage. As I have said, appearances were entered by Mr. and Mrs. Fenton on behalf of the defendants and, by their answer, they substantially denied the material facts upon which the plaintiff founded and also alleged that during the period of time preceding the collision the navigation of the *Colorado del Mar* was so negligent and unseamanlike that the plaintiff thereby became disentitled to receive a salvage award at all or, if an award were made, it should be considerably reduced by reason of the existence of the circumstances. The answer of the defendants also counter-claimed for damages against the plaintiff. The basis of the counter-claim was the alleged negligence and unseamanlike navigation of the *Colorado del Mar* and the amount of damages claimed was the cost of repairing the damage which *Cythera* sustained in consequence of the collision. The parties agreed that if, in my judgment, any sum were payable by reason of the counter-claim that amount should be £1500. In support of its claim, the plaintiff put forward the cost of repairs to the *Colorado del Mar* as being £1000, the value of the time rendering the alleged salvage services as being £200 and the value of the time lost effecting repairs as being £225, making a grand total of £1525. These figures were agreed as being proper figures for the repairs and services I have mentioned if, in my judgment, salvage were properly awarded, and if in my judgment it was proper to include in the amount of salvage any consideration of the matters which these figures represent.

The first matter that arises for consideration is whether or not, in the circumstances I have described, any case for salvage has been made. In *Kennedy, Civil Salvage,* 4th ed., at p. 5, a salvage service is defined in the following words: "A salvage service in the view of the Court of Admiralty may be described sufficiently for practical purposes as a service which saves or helps to save a recognized subject of salvage when in danger, if the rendering of such a service is voluntary in the sense of being solely attributable neither to pre-existing contractual or official duty owed to the owner of the salved property nor to the interest of self-preservation." At p. 4 of the same work the learned author describes the subject of salvage in the following words: "Until the enactment of legislation relating to salvage of aircraft, the only property which could become the subject of salvage was a vessel, her apparel, cargo, or wreck and, so far as it may be called property, freight at risk. Apart from such legislation, this is still the case. The saving of other kinds of property such as a buoy adrift from its moorings or goods in a house on fire does not give rise to any right of salvage reward." The principal classes of salvage service are also listed in the same work and include: "... protection or rescue of a ship or her cargo or the lives of persons on board of her from pirates or plunderers".

It is quite apparent from a consideration of some of the cases that are cited in the textbooks that the class of case which will be recognized as a subject of salvage reward is not closed or, perhaps more nearly accurately, has not yet been fully stated. It is interesting to notice that the side note which Dr. Robinson wrote for his report of *The Trelawney* (1802), 4 Ch. Rob. 223, was in the following words: "Salvage of a new species—rescue of a slave ship from insurgent slaves on the Coast of Africa by another slave ship."

A general statement of the matters which must be considered by a court in determining whether there should be any award of salvage and, if so, the amount of the award appears in the judgment of Street, D.J.C. (as Sir Phillip Street then was), in *The North Coast S.N. Company* v. *The Ship Eugene* (1909), 9 S.R. (N.S.W.) 246, at pp. 249-250. At these pages his Honour said: "The essential elements in a salvage service are that the service must have been voluntary and successful, and that there must have been danger to the

subject of the service; while in calculating the amount to be awarded for a salvage service the material circumstances to be taken into consideration are, as regards the salved vessel, the degree of danger to life and property and the value of the vessel saved, and as regards the salvors the degree of danger to life and property, the value and risk of the salving property, and the time and labour expended, and loss, expense and responsibility incurred in the performance of the salvage service. In assessing the salvage reward, the Court of Admiralty exercises very wide discretion, looking not merely to the exact *quantum* of service performed but also to the general interests of the navigation and commerce of the country, which are greatly protected by exertions of this nature (see *The Wm. Beckford* (1801), 3 Ch. Rob. 355). The Court, however, always seeks to combine the consideration of what is due to the owners in the protection of their property with proper liberality to the salvors, and it will not allow salvage services, however meritorious, to unduly and unfairly degenerate into an opportunity for extracting the last penny possible from the pockets of others."

The present case raises some rather unusual points because it has been seen that the necessary foundation to a successful action for salvage is that that which has been rescued shall have been in danger. It was argued by counsel for the defendants in the present case that before the collision with *Colorado del Mar* the *Cythera* was never in danger. The argument then continued that it was only the wrongful act of the ship claiming to be the salvor that created a danger to the *Cythera*. This argument was elaborated in the following way. It was said firstly that Brewin and Barrie were competent navigators and seamen, that they were in control of the *Cythera* which was tight, staunch and strong and that while they were in control she was not at all likely to come to any harm in that sense that the probabilities were she would continue to remain tight, staunch and strong as a ship. It was then said it was only when the *Colorado del Mar*, by colliding with the *Cythera*, unmanned the yacht that the yacht became in such a condition that she might become a loss. It was argued that this was so because she was a yacht under power, without any person to control her helm or set her sails and that in such a condition it was not unlikely that the ordinary perils of the sea would bring her to disaster. It will be seen that this argument places emphasis upon the integrity of the ship as a structure and submits that the element of danger which is fundamentally essential in an action for salvage is a danger to the continuance of the ship as a ship. I find it difficult to take such a narrow view of the meaning of "danger". *Kennedy, Civil Salvage*, 4th ed., at p. 14, describes the meaning of "danger" in these words: "Upon the important question of the nature of the circumstances that will constitute that condition of danger which is essential in salvage, the fair result of the cases appears to be as follow: the danger necessary to found a salvage service, whether it arises from a condition of the vessel or of her crew or from her situation, is a real and sensible danger. On the one hand, it must not be one either existing only in fancy or vaguely possible, and, on the other hand, it need not be absolute or immediate. It must, however, it is submitted, be at least so near, so much a just cause of present apprehension, that, in order to escape out of it or to avoid it (as the case may be) no reasonably prudent and skilful seamen in charge of the venture would refuse the salvor's help if it were offered to him upon the condition of his payment for it of the salvor's reward."

There is no doubt that many of the cases which have been decided and which deal with this matter of danger have been cases where the danger involved was to the physical structure of the ship, even though other elements may have existed as well: cf. *The Erato* (1888), 13 P.D. 163. But there is not, in my opinion, any authority which has expressly limited the quality of danger in this way and from the manner in which Kennedy describes the situation of ships in the possession of pirates (see the passage I have already cited), it would seem that the important element in that kind of case is either the retention of the ship in the hands of its owners as against the threatened onslaughts of pirates or the recovery of a ship from the control of pirates and restoration to her owner. As it seems to me, the essential element in such a case is not that the pirates may destroy or damage the ship as much as that, by taking possession and control of her, they may deprive the owner of those same rights. In *Norddeutscher Lloyd* v. *"Cairnhill", Cargo and Freight* (1920),

5 Lloyd L.R. 386, Sir Henry Duke, as Lord Merrivale then was, allowed a claim for salvage for the recovery of a ship which at the particular time was drifting in a dangerous part of the Pacific Ocean, without a crew. In the course of his judgment the learned President said: "The salvors merely quitted their ordinary business from time to time to undertake this expedition, but there is a good deal more than time and labour to consider. I wonder what would have been said to an owner of this vessel who had gone to Lloyd's and made inquiries as to a rate of insurance for his vessel in the position in which he would have had to report her as her Master said, off all trade routes, when she had been drifting for many weeks, and when she was drifting quite free of control among the islands of the Bismarck Archipelago to the north east of New Ireland. I do not think it would have been easy to have found an insurer for a vessel in that State. I have to consider, among other things, to what extent the defendants had lost their property but for the intervention of the plaintiffs. I have asked myself what any reasonable man might have required as a contract payment to undertake the search for this ship upon the terms of no cure no pay. I treat the matter in these varying aspects. I do not treat the case as a case in which the *Cairnhill* was certainly lost, or in which there was more than even chance that she would be lost. The plaintiffs were upon the spot, it is true and what is to be given them is an Award which will reasonably encourage, from a commercial standpoint, vessels to respond with alacrity with assistance when vessels are adrift in such a remote region."

From the manner in which the learned President says that he was satisfied there was not an even chance that she would be lost or that the *Cairnhill* would be certainly lost, it seems to me that his Lordship took a view of the meaning of "danger" which impliedly refuted that for which the defendants now contend. I cannot accept the argument that granted the presence of all other conditions justifying an award of salvage, an award nevertheless must not be made because it cannot be seen that there is the likelihood of damage to the physical structure of the ship. In my judgment, the kind of danger which falls within that considered by the Admiralty Court includes a danger to the proprietary rights of the owner and in cases where the ship is in the hands of persons whose declared object is feloniously and permanently to deprive the owner of his proprietary rights, the physical safety of the ship ceases to be the dominant element in assessing the degree of danger and the deprivation of the property, and the restoration of that property to the owners are sufficient. A consideration of the law as it was propounded towards the beginning of the last century supports, I think, the conclusion which I have reached. In *The Trelawney* (1802), 4 Ch. Rob. 223, Sir William Scott (as Lord Stowell then was) decided a claim for salvage made on behalf of one slave ship for the recovery of another slave ship. Although, as it seems to me, Sir William Scott, in the course of his judgment in this case, deals with the jurisdiction to award salvage for interruption or deprivation of property, a more convenient summary of the decision is to be found in a later decision by the same learned judge. In *The Francis and Eliza* (1816), 2 Dods. 115, at p. 118, Sir William Scott said of *The Trelawney*: "The case of *The Trelawney, supra,* which has been mentioned was one of great and extraordinary merit and was performed by the crew of one merchant vessel toward another with which they had no particular connection. *The Trelawney* was in the complete possession of insurgent slaves who had overpowered the master and the crew and had obliged them to quit the ship. To deliver the vessel out of the hands of such persons was equivalent to delivering her out of the hands of pirates; and it was but reasonable to consider the parties entitled to the same award as if they had in reality rescued the property from piratical seizure. The salvors in that case compelled the crew of *The Trelawney* to return to the performance of their duty, they afforded them assistance in it and finally succeeded in quelling the mutiny and recovering possession of the ship. After a severe and heroic contest and that, too, with persons of a very desperate description . . . ."

In *The Calypso* (1828), 2 Hag. Adm. 209, Sir Christopher Robinson sitting as the High Court of Admiralty decided a case with respect to the entitlement of the Flag Officer in charge of the West India Station to share in an award of salvage made in favour of a ship under his command. The details of the issues involved in that decision are not material to notice but in the course of stating his reasons Sir Christopher Robinson found it necessary to discuss the

origins of both military and civil salvage. At p. 217, the learned judge said: "It will be found, I think, that both these forms of salvage resolve themselves into the equity of rewarding spontaneous services rendered in the protection of the lives and property of others. This is a general principle of natural equity: and it was considered as giving a cause of action in the Roman Law; and from that source it was adopted by jurisdictions of this nature in the different countries of Europe. This is the account which Sir William Wiseman, who was Judge of this Court, gives of the origin of salvage. Referring to the title in the *Digest* (Dig. Lib. 3, tit. 5) he says (*Law of Laws,* p. 90): 'Upon the equity hereof is that proceeding in the Admiralty Court clearly justified, whereby, if a ship being set upon by pirates or by enemies shall be rescued by another ship reasonsably coming to her rescue, it charges the ship that is then redeemed with the salvage money to the other did so endanger herself to preserve her; that recompense being but in lieu of all damages thereby sustained, and for future encouragement to others to fight in the defence of those that they see assailed!' "

These decisions which are of great authority, in my opinion, support the view which I have formed and already expressed and lead to the conclusion that on this point I must reject the submissions of counsel for the defendants.

I pass now to the next material aspect of the plaintiff's claim. It is essential for the success of such a claim that not only shall the ship in danger have been saved but also that the exertions of the alleged salvor shall have materially contributed to that result. In the instant case, I am satisfied that *Colorado del Mar* did materially contribute to the rescue of *Cythera* from the danger in which she was placed. There is not any doubt in my mind but that if the *Colorado del Mar* had not appeared on the scene the *Cythera* could and would, in the circumstances in which she was manned, have made off still further beyond rescue and apprehension by competent and lawful authority. The *Colorado del Mar,* by the action which I have described, prevented this. Whether all the detail of those actions is justifiable or not is another matter to which I will later return but for present purposes it is sufficient to say that certainly the further escape of the *Cythera* was prevented when the yacht was unmanned at the time of the first collision. I would be prepared to hold that, in these circumstances and up to this stage, the actions of the *Colorado del Mar* had materially contributed to the rescue of the *Cythera* but I have already stated my views upon the part which *Colorado del Mar* played in enabling the Government launch to come out from Cascade Bay and undertake the formal action of boarding *Cythera,* and in my opinion, this part also constitutes a material contribution to the saving of the yacht. It is not necessary, in my opinion, that positive acts actually on or directly in relation to the salved vessel shall be done by the salvor; it is sufficient if the salvor, by standing by, enables acts to be done by other persons or ships which, if the salvor had not stood by, would not have been done. I cannot accept the argument submitted for the defendants that shortly after the collision the *Colorado del Mar* abandoned all intentions of saving the yacht.

The findings which I have already made mean that the work undertaken by *Colorado del Mar* was undertaken voluntarily, that the *Cythera* was in danger, that the work undertaken was in relation to a recognized subject of salvage, that the *Cythera* was saved from the danger in which she had been placed and, finally, that the *Colorado del Mar,* by the exertions of her Master and crew, had materially contributed to that result.

The case made by the plaintiff was, as I have already pointed out, somewhat vague and imprecise as regards the relations of the *Colorado del Mar* and the *Cythera,* and the details of the events which occurred both before and after the first collision. It is quite apparent to me that counsel for the plaintiff deliberately elected this course and at a later stage he submitted that it was in all respects proper and sufficient. The submission really was that in a salvage claim it is only necessary for a plaintiff to prove a general salvage intention and by that I think counsel meant the existence of those elements which I have already described as being fundamental to the success of such a claim and, after the proof of such a general salvage intention and acts done in aid of such intention, to prove that the acts of the salvor materially contributed to the rescue of the salved ship. In particular it was submitted that a plaintiff is not concerned as part of his case to justify each and every step

which is taken, nor is such a plaintiff obliged to show that what was done was done without fault or negligence and in accordance with the practices of good seamanship. The argument acknowledged that if the defendants in their case sought to establish that by its neglect, misconduct or violation of the principles of good seamanship, the plaintiff was either disentitled to an award at all or if entitled to an award then only to a reduced award, that the plaintiff would have to meet such a charge in his case in reply. But it was insisted in the argument that proofs of this kind were not required from the plaintiff until some evidence had been given by the defendants of a kind which called for a reply.

In my opinion, these submissions correctly state the law. In *Kennedy on Civil Salvage,* at p. 149, the learned author says: "The burden of proving misconduct so serious as to deprive successful salvors of all reward lies upon those who impute it. The presumption is in favour of innocence and this rule applies so strongly in favour of salvors that the evidence must be such as leaves no reasonable doubt in the mind of the judge before they are found guilty." In *The Charles Adolphe* (1856), Sw. 153, Dr. Lushington was required to decide a case involving this point. At p. 156, the learned judge said: "It is quite clear whatever may be the nature of the services originally rendered, they are capable of being entirely forfeited by misconduct on the part of the salvors. We never can dispute that principle, for it is supported by the superior Court as well as in many instances before this tribunal. But there are many things requisite before you can come to that conclusion. First, if you make such a charge the evidence must be conclusive before the parties are found guilty; and, secondly, if the charge be made and it is proved that the property from the misconduct of the salvors has experienced great deterioration then perfect forfeiture is the result. But there may be a medium. In one case, that of the *Duke of Manchester,* by neglect of the salvors a ship and cargo were exposed to great loss; and this Court held and was supported therein by the Privy Council that the salvors although they had previously performed a service of considerable value, were not entitled to one sixpence, in consequence of their neglect having been the cause of the loss which subsequently occurred." The law, for reasons which are now well known, takes a lenient view of the position of salvors and as it seems to me the burden of making a case of careless or improper conduct on the part of the salvor rests upon those who allege the existence of such disentitling facts. In the present case the defendants do make such an allegation but, before I come to consider that, I will refer to an earlier defence which was submitted on their behalf.

This defence arises, so it was submitted, from the manner in which the plaintiff alleged its claim in the statement of claim. It was argued that the proper construction of the statement of claim meant that the plaintiff was, as an essential part of his case, claiming that Barrie and Brewin were pirates and that, accordingly, unless this were seen to be so the plaintiff's case failed *in limine.* The course taken by the defendants' argument on this point was to submit that Barrie and Brewin were not engaged in activities that amounted to piracy *jure gentium.* In support of the argument reliance was placed upon a passage in *Oppenheim's International Law,* Lauter-pacht ed., vol. I, p. 558, paragraph 272, where the following appears: "Piracy in its original and strict meaning is every unauthorised act of violence committed by a private vessel on the open sea against another vessel with intent to plunder *animo furandi.* The majority of writers confine piracy to such acts which indeed are the normal cases of piracy but there are cases possible which are not covered by this narrow definition, and yet are treated in practice as though they were cases of piracy, thus if the members of the crew revolt and convert a ship and the goods thereon to their own use, they are considered to be pirates, although they have not committed an act of violence against another ship. Again, if unauthorised acts of violence such as murder of persons on board the attacked vessel, or the destruction of goods thereon, are committed on the open sea, without intent to plunder, such acts are in practice considered to be piratical. Therefore several writers correctly it is believed oppose the usual definition of piracy as an act of violence committed by a private vessel against another with intent to plunder. But yet no unanimity exists among them, concerning a fit definition of piracy, and the matter is therfore very controversial. If a definition is desired which really covers all such cases as are in practice treated as

piratical, piracy must be defined as every unauthorised act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel; cf. In *Re Piracy Jure Gentium*, [1934] A.C. 586; [1934] All E.R. Rep. 506, and the *Republic of Bolivia* v. *Indemnity Mutual Marine Assurance Co. Ltd.*, [1909] 1 K.B. 785; [1908-10] All E.R. Rep. 260."

It was argued that an essential part of the definition of piracy is that there shall have been these piratical acts committed on the high seas, though whether or not an intention to undertake a future course of plunder is essential is not certain. In the result, there was not a great deal of disagreement between counsel on the meaning of piracy *jure gentium* because counsel for the plaintiff, for reasons which will be material to state when I come to discuss the considerations applicable to the amount of an award, argued that what happened in this case was not piracy *jure gentium*. This being the general attitude of counsel on both sides, I think it better that I should reserve the expression of my own opinion and act upon the common view which has been submitted by counsel, namely, that because the taking of the *Cythera* did not occur on the high seas it was therefore not a case of piracy *jure gentium*.

But counsel for the defendants then submitted that there is not any other kind of piracy than piracy *jure gentium* and that, accordingly, it is not possible to construe the statement of claim as being a reference to any form of piracy other than that which by concession I have held to be not applicable to this case. In particular, it was submitted that piracy as a crime is not known as such to the municipal law. However, this submission appears to run counter to what was said by Vaughan Williams, L.J., in the *Republic of Bolivia* v. *Indemnity Mutual Marine Assurance Co. Ltd.*, [1909] 1 K.B. 785, at p. 799, where his Lordship said: "Whatever the definition of piracy may be, in my opinion piracy is a maritime offence, and what took place on this river, running partly in Brazil and partly in Bolivia, far up country, did not take place on the ocean at all. That distant place was not the theatre on which piracy could be committed. It is a region which cannot be said to be, like the ocean, under the jurisdiction of no particular power. It was under the jurisdiction of either Brazil or Bolivia. That part of the river is not the highway of the world, where ships of all nations can go protected only by the law of nations. It is a place where, if any ships go, they go, not on the sea, but on a river running in occupied territory which is under the Government of a specific nation which has jurisdiction there. I wish to add one word in relation to the distinction between piracy *jure gentium* and piracy by municipal law. Whatever other limitation there might be in this policy, it could, in my opinion, only extend to piracy *jure gentium*, and not to robbery on a river which at that point had been running through land for a long distance and had to run for a further distance, and both banks of which there belonged to Bolivia."

The existence of piracy by municipal law is here clearly recognized by Vaughan Williams, L.J., but the full limits and extent of such piracy was not fully argued before me. In those circumstances and for the reasons which I shall immediately state, I do not propose to decide whether the plaintiff has made out a case of piracy by municipal law. I will assume for the purposes of my decision that the allegations in the statement of claim that relate to piracy have not been proved but I am satisfied that the allegations which remain and which have been proved are sufficient to found the plaintiff's claim. I hold that proof of the felonious taking of the yacht by Brewin and Barrie, and the continued deprivation of the owners from their right to possession of the yacht, was a sufficient act to found the claim made by the plaintiff.

But then a second argument was submitted on behalf of the defendant. It was said that the actions of those in charge of the *Colorado del Mar* constituted such misconduct, negligence and want of good seamanship, as to disentitle the plaintiff from obtaining an award of salvage. I have stated my opinion that the onus of making good this claim rests upon the defendant. It was submitted that the proper inference to be drawn from the facts proved was that *Colorado del Mar* intended to ram the *Cythera* and that she succeeded in effectuating that intention. Whatever the legal consequences may be, if I were to hold that inference to be correct, I should say that, in my opinion, such inference may not properly be drawn from the evidence. I have not any doubt that Captain

Savoie was concerned to get possession of the *Cythera* and that he was prepared to do everything possible that was consistent with the safety of his own ship and with the safety of the *Cythera*. The situation was undoubtedly a difficult one for him because those on board the *Cythera* were determined and resolute, and the state of the seas as I have described it and the greater manoeuvrability of the *Cythera* did not make it practicable for *Colorado del Mar* to come alongside the *Cythera*. An attempt had been made to secure the yacht by throwing a grapnel but this attempt was defeated when the miscreants severed the rope. The general approach to the solution of problems which an argument of this kind raises is stated by Wilmer, J., as he then was, in *The Rene* (1955), 1 W.L.R. 263, at p. 269. At this page, his Lordship said: "Furthermore, it seems to me that I have to pay regard to the general principles of policy in relation to salvage which has been laid down over the years by this Court. These general principles require that this Court in judging the conduct of salvors should err, if anything, on the side of leniency towards the salvors in so far as their behaviour is criticised. As was pointed out very forcibly by Mr. Adams in his argument on behalf of the *Alenquer*, it would be a disaster and quite contrary to the public interest if the result of the decisions of this Court were such as to discourage salvors from taking risks and showing enterprise when rendering services at sea. The matter is summed up in a passage in Kennedy, L.J's, book on *Salvage*, to which I was referred in the course of the argument. There, at p. 162, the learned author says: 'In considering whether a salvor has shown such a want of reasonable skill and knowledge as ought materially to affect the Court's award or is guilty only of an error of judgment, the Court will incline to the lenient view and will take into favourable consideration any special circumstances which tend to exonerate the salvor from blame, such as, e.g., a request for help, the suddenness of the emergency or the absence of more efficient means of succour.' That appears to me to be the correct approach to the matter and I gladly adopt that paragraph as part of my judgment."

I am unable to see, in the unusual circumstances in which *Colorado del Mar* was placed, any evidence of want of reasonable skill and knowledge in the pursuit of that which the *Colorado del Mar* had set herself out to do. Inevitably there were risks involved but I think it is correct to say that, in the circumstances, Captain Savoie met the difficulties of his task with determination and skill. I am certainly not prepared to accept the single fact of the collision as evidence of want of skill on the part of Captain Savoie. In my opinion I must hold that the defendants have failed to make good their defence and for the same reasons I am of opinion that they have failed to make good their counter-claim which must therefore be dismissed.

Before parting from this aspect of the case, I should notice an argument submitted by counsel for the plaintiff that it would not be competent for me to make a finding of neglect against *Colorado del Mar* unless I had before me evidence from persons expert in the practice of good seamanship or was sitting with the assistance of an assessor. This point was referred to in *The Star of the Isles* (1938), 62 Lloyd's Rep. 139, which was a decision of the First Division of the Inner House of the Court of Session. The decision involved a number of matters which are not material to consider in this case but dealing with a point of what the Master of one of the ships involved should or should not have done; Lord Carmont who delivered the leading judgment, at p. 143, said: "The Lord Ordinary is not entitled without being informed by expert evidence to apply as appropriate for *The Star of the Isles* the action taken by the *Zelos*. It should also be borne in mind that the *Zelos* took the step she did after she had received warning from the breaking-away of *The Star of the Isles*, and it may be that the *Zelos* used her engines at a time when the storm was not so violent. The Lord Ordinary had no nautical assessor to assist him, and there was no evidence submitted to him from the mouths of experts to entitle him to say that the engines could or should have been used to keep *The Star of the Isles* alongside the *Pelagos*." Lord Moncrieff, at p. 147, said: "A defender in my opinion discharges the burden which he so underlies if there be no evidence against him of want of diligence or want of skill and positive evidence in his favour to show that he has exercised both diligence and skill in the discharge of his duties. Of the measure of diligence and skill demanded in particular circumstances, where a technical qualification such

as seamanship is in question, it is for qualified experts to advise. It is not open to the pursuer, through the medium of argument addressed to judges, to suggest that any particular action or non-action on the part of the defender in such affairs as seamanship may be assessed by such judges as evidencing a failure in seamanship or a failure in diligence. Such an argument must be supported by expert evidence or have the assent of a nautical assessor."

Lord Normand (Lord President) and Lord Fleming agreed with the judgments of Lord Carmont and Lord Moncrieff: see also *British Shipping Laws,* vol. IV, "Collisions at Sea", paragraph 381. In my opinion, it is unnecessary to pronounce upon the soundness of this submission. The submission as I understood it really means that a positive finding of fault or neglect cannot be made except with the assistance of evidence of an expert or in accordance with the views of an assessor. However, even assuming that the principle stated by the Inner House was applicable in this State it would not, in my opinion, apply to a finding of absence of fault where the basis for that finding was that the party carrying the onus of proof had failed to make good his case. The point, therefore, as to which I reserve my opinion is whether or not evidence of the kind I have described, or the assistance of an assessor, is necessary to support a positive finding of fault.

For the reasons which I have stated, I am of opinion that a prima facie case for an award of salvage has been made out and that the defences raised by the defendants should be overruled. It is therefore necessary to consider what should be the amount of that award. I have already referred to a statement of general principles by Street, D.J.C., in *The North Coast S.N. Company* v. *The Ship Eugene* (1909), 9 S.R. (N.S.W.) 246, but additionally there has been published in a work of authority a classification of the circumstances which are material for consideration: see *Kennedy on Civil Salvage,* 4th ed., at p. 174. The statement of these circumstances in *Kennedy* constitutes a convenient framework within which to deal with the points involved, and on at least two earlier occasions judges sitting in Admiralty have used the framework to form the basis of their judgments: see *The Bosworth (No. 1)* (1959), 2 Lloyd's Rep. 511, at p. 526; *The Owner, Master and Crew of The Ship Korowa* v. *The Ship Kooraka, Her Cargo and Freight,* [1949] S.A.S.R. 45, at p. 52. I propose to adopt this course in the present case and follow the plan that Kennedy suggests:—

A. As regards the salved property:—

(1) The degree of danger, if any, to human life.

I find that there was not any danger to human life.

(2) The degree of danger to the property.

I have already stated my opinions and conclusion on what was the quality of the danger to the *Cythera* and it is unnecessary to repeat what I have said. In amplification, though, it is to be observed that the *Cythera* was in the hands of two men who had stolen her from her owners. These men had carefully planned the theft before the voyage from Sydney had commenced, and had purchased charts for a voyage to South America. They had on board food and provisions sufficient for two men for three months. *Cythera* was a seaworthy craft fully equipped for an ocean-going voyage of the nature contemplated (and there was on board a .303 and a .22 rifle together with ammunition). The two men, as I have said, were of adequate skill and competence to sail the ship to South America. Seven days had elapsed since the theft, without the vessel being sighted, and she was sailing eastwards into waters increasingly remote from New South Wales, and, accordingly, from the threat of apprehension. She was on one view in effect sailing towards safety, because successful apprehension was becoming increasingly improbable. This was so, because, as I have already stated, it was not a case of piracy *jure gentium* and, accordingly, *Cythera* was not liable to apprehension by the ships or authorities of other nations. It was also the intention of the two men to continue to outmanoeuvre *Colorado del Mar* until nightfall and then to escape. They would almost certainly have succeeded in this intention and it was only the persistence and determination of the captain of *Colorado del Mar* which frustrated that intention. *Cythera,* as it seems to me, was in a significantly more dangerous position so far as her owners were concerned than if she had been a mere derelict; she was in the hands of determined competent men whose

proved intention was to sail her away beyond the recall of her owners or of the Australian authorities. This intention had been successfully implemented over the preceding seven days and the probabilities favoured the ultimate success of the desperate venture. The owners' property was being directly (and thus far successfully) assailed by the two men. This, as it seems to me places *Cythera* in a worse case than a derelict which is threatened only by the random elements of wind and sea.

(3) The value of the property as salved.

In its statement of claim the plaintiff alleged that the value of the *Cythera* was £9500, together with a further unspecified sum for the cargo which she carried. Notwithstanding this claim, when the case was opened counsel for the plaintiff said that it was intended to prove the value of the yacht at £17,000 less the cost of repairs £1500, giving a salved value of £15,500. The only significant evidence adduced in support of this increased figure was contained in a statement made by Mr. Fenton shortly after the yacht had disappeared. In this statement he claimed a value of £17,000, made up as follows:—

Yacht	£15,000
Navigation Equipment	500
Other Equipment and Cargo	1,500
	£17,000

I am, however, not prepared to act upon this evidence, because in my view it is not directed to the proof of what is material in an action of this kind. I am not concerned with the cost of building the *Cythera* or of building a new yacht in her place, but I am concerned with the actual value of that which was saved. I agree with counsel for the plaintiff that the value of what was saved relates to the value of the yacht in the condition in which she was when restored to her owners, and an allowance must be made for such damage as may have been done to her in the course of the salving operations. It seems to me, therefore, that Mr. Fenton's evidence was directed to the wrong point. By and large, I prefer the evidence given by Mr. Vaux generally supported, as it seems to me, by that given by Mr. Kennedy. Mr. Vaux placed the value of the yacht undamaged, as a sea-going proposition, at £9000. Allowing in addition the sum of £1500 for the value of equipment and cargo (excluding the owners' £500 valuation of the navigational equipment which Mr. Vaux presumably included in his figure of £9000) this would total £10,500. There is, then, to be deducted from this sum £1500 which was the cost of repairing the damage done to *Cythera* in the course of the salvage operations. In my judgment, therefore, the salved value of the *Cythera* was approximately £9000, although it may have been slightly more.

B. As regards the salvors:—

(1) The degree of danger, if any, to human life.

The venture involved the apprehension of two known felons in circumstances which would almost inevitably lead to their conviction and imprisonment on a serious charge. There were rifles and ammunition on board the yacht and it could reasonably be anticipated that they were desperate and determined men bent on escape if that were humanly possible. Furthermore, manoeuvring in close quarters in the prevailing weather inevitably involved risk of collision. *Cythera* was a 30-ton steel-hulled yacht and collision with her could endanger the safety and lives of those on *Colorado del Mar* either by breaching her hull or, if the impact had been at the stern, by disabling her through damaging her rudder or propeller. In fact on the *Colorado del Mar* in the first collision "Considerable damage was done to the crew accommodation and water poured in"; and in the second collision *Colorado del Mar* was damaged near the stern. The repairs to *Colorado del Mar* cost £1100.

(2) The salvor's classification, skill and conduct.

The *Colorado del Mar* was a private trading ship and was not specially fitted for salvage work. I have already described the weather conditions and it is unnecessary to repeat that description. The *Cythera* was more manoeuvrable than the *Colorado del Mar* and could have kept away indefinitely. The skill and conduct with which *Colorado del Mar* was handled are matters to which I have already referred and therefore need not repeat.

(3) The degree of danger, if any, to property employed in the salvage service and its value.

The value of *Colorado del Mar* was, for the purposes of this action, agreed at the sum of £35,000.

(4) The time occupied and work done in the performance of the salvage services.

The work done has already been described and the time occupied in my opinion, amounts virtually to the loss of one effective day. This appears from the following statement of times in the evidence:—

At 10.30 a.m. *Colorado del Mar* prepared to depart.

At 11.00 a.m. *Colorado del Mar* departed.

At 12.00 noon *Colorado del Mar* caught up with *Cythera.*

At 1.30 p.m. Brewin and Barrie went overboard.

At 2.15 p.m. a radio message was sent by *Colorado del Mar* for the Government launch.

At 3.45 p.m. the Government launch arrived.

At 6.00 p.m. the vessels arrived back in Cascade Bay.

(5) Loss or expense incurred.

The repair of the damage to the *Colorado del Mar* as I have already stated, is agreed at the sum of £1100; and also the value of time in rendering salvage services at £200. The value of time taken in effecting the repairs was agreed at £225. Accordingly a total loss of £1525 is involved.

Bearing in mind all those matters and having regard to the liberality which should be shown to salvors, and yet having regard to the value of what was saved and a consideration of what is just and equitable in all the circumstances which I find proved, I am of the opinion that an award of salvage should be made in an amount equal to a little more than one-sixth of the value of the *Cythera* and I accordingly award the sum of £1625.

I reserve further consideration of the form of the order.

I order that the plaintiff bring in short minutes of the proposed order.

Award accordingly.

Solicitors for the plaintiff: *Ebsworth & Ebsworth.*

Solicitors for the defendants: *Norton, Smith & Co.*

R. J. D. LEGG
BARRISTER-AT-LAW

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29 MAR 2010

Dear Ms Fenton

I write in reply to your email requesting permission to reproduce part of the judgment in the case of *Societe Maritime Caledonienne v the ship Cythera and her cargo* from the New South Wales Reports, Part 1 pages 146 to 160.

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I trust that this information is of assistance to you.

Yours faithfully

Community Relations Unit
for Director