COMPETING SALVORS

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I. INTRODUCTION

1. The principal motive behind the law of salvage is *the desire to encourage the salvor*. This desire has been most directly expressed in the rules concerning the assessment of the salvage remuneration. In the case of a successful salvage, the payment to the salvors is assessed on a liberal scale, so that it considerably exceeds any ordinary payment for the work done and for the use of the salvage vessel and its equipment. To that extent salvage remuneration is more in the nature of a reward than a compensation. In making the assessment, the first consideration is the degree of danger: the greater the danger of loss of the disabled vessel, or of injury to the salvors themselves, or of lack of success on their part, the more the salvors need to be encouraged, and the more highly remunerative the task must be made. But, in addition, the value of the salvaged vessel plays a considerable part.[1] The amount of the salvage remuneration is far larger when assets to the value of, say ten million Norwegian kroner are salvaged than when only one million kroner are involved, and this is the case even if the salvors' effort was practically the same in both cases. It is not uncommon for salvage remuneration calculated at 5–10 per cent of the salvaged assets to be paid; sometimes it may be even higher. In these days, when even a medium-sized vessel with its cargo may often have a value of between ten and twenty million kroner, this means that salvage remuneration may run to very considerable amounts. The prospect of being able to gain such a reward will be a strong incentive to make the necessary effort.

The encouragement of the salvor is also the motive behind another of the principal rules of salvage, namely the "no cure no pay" rule, in other words the rule that salvage remuneration can only be claimed in the event of a successful salvage.[2] It is not

[1] See the Scandinavian Maritime Codes (in short S.M.C.), sec. 225, subsec. 1.

[2] Cf. by implication S.M.C., sec. 226, subsec. 1. An explicit rule is given in the Salvage Convention ("Convention pour l'unification de certaines règles en matière d'assistance et de sauvetage maritime", concluded in Brussels, September 23, 1910), see art. 2, clause 2, of the Convention, reproduced *infra*, p. 92, note 9.

sufficient that the salvors shall have shown skill and endurance, and have sacrificed time and money. If, for example, the disabled vessel, after ten days' hazardous but successful towing, goes to the bottom in a violent storm a few miles from a safe port, the salvors cannot claim a penny, not even reimbursement of the actual expenses of towing.[3] Just as the principle of a liberal assessment of salvage remuneration will tempt salvors to undertake difficult and perhaps dangerous tasks, so will the principle of "no cure no pay" induce them to do their utmost to bring the work to a successful conclusion; should it fail, they will have wasted time and effort and have incurred expenses in vain.

The provision securing a claim for salvage by means of a maritime lien of high priority[4] on ship and cargo is another link in the chain of encouragement; salvors can feel assured that they will receive payment of the salvage remuneration they have earned. The same considerations apply to the rules entitling the master and crew to claim a certain portion of the salvage money.[5] Salvors are further encouraged by the provision that salvage remuneration can be claimed without regard to the existence of any prior agreement as to salvage. As a rule, salvors do not need to obtain a consent from the disabled vessel before they start operations—only when a clear and justified prohibition of salvage is expressed does any further attempt on the salvors' part become unlawful.[6]

2. The effectiveness of this system of encouraging salvage is clearly shown whenever a ship gets into difficulties during a stay in port or when traversing frequented sealanes; would-be salvors stream in from all sides. When the *Queen Elizabeth* grounded near Southampton in 1947, a total of 16 tugboats came to her assistance,[7] and during a conflagration in Hoboken, New Jersey, in 1900, when four large German ships were endangered, about 70 tugboats offered their services.[8] Thanks to radio, corresponding

[3] Where it is not likely to be misunderstood, the term "salvor" is used to include "the unsuccessful salvor", i.e. one who attempts to salvage without succeeding, and also "the potential salvor", i.e. one who can be regarded as willing to undertake the task of salvage.

[4] See S.M.C., sec. 267, subsec. 1, no. 3, cf. sec. 269 and sec. 276, subsec. 1, no. 1, cf. sec. 276, subsecs. 2 and 3.

[5] See S.M.C., sec. 229.

[6] See S.M.C., sec. 224, subsec 2, and section II.1 below.

[7] *The Queen Elizabeth* (1949) 82 Ll. L. Rep. 803 P.

[8] *The Bremen* (1901) 111 F 228, *The Kaiser Wilhelm der Grosse* (1901) 106 F 963, and *Merritt & Chapman* v. *North German Lloyd* (1902) 120 F 17.

situations can now arise even when a ship gets into difficulties off the beaten track. SOS signals from the disabled vessel will be picked up by a number of other vessels and stations on land, and may perhaps be relayed by them. A number of vessels will change course and proceed as swiftly as possible to the position given by the disabled vessel; others will put out from near-by ports.

The fact that a number of would-be salvors will offer their services in this way is, as already indicated, a result of the system of encouraging salvage, and is a circumstance that must on the whole be reckoned fortunate. The chances that the disabled vessel will obtain timely and effective assistance are considerably increased. In many cases there will also be a real need for a number of salvors. For example a single tug may not be able to refloat a grounded vessel; with three tugs, it may be achieved. It may also happen that a number of salvors voluntarily cooperate with one another even though such combined efforts are not really necessary. This should not give rise to any problems.

Conditions can, however, be such that it is out of the question for all who have offered their services to be employed. It may be physically impossible; for example, the operations may take place in such narrow waters that there is only room for one salvage vessel. And even when it is possible for several salvors to work together, this may not be a practical proposition: the salvors may get in one another's way, the coordination of their efforts may present problems, and so on. The adage "too many cooks spoil the broth" has its application here, too.

Moreover, in many cases it will be difficult to organize effective cooperation. A single salvor may think that he can manage on his own, and be unwilling to allow others in on the task. Such an attitude is very often motivated by the thought of the potential reward; if several jointly effect a salvaging that one could manage alone, the amount of the latter's compensation must inevitably diminish. It is also conceivable that a salvor may refuse an offer of cooperation purely from considerations of effectiveness. The result may easily be a dispute between salvors, a dispute that must often be settled under the pressure of time and in difficult circumstances.

There is clearly a need here for some regulation. One cannot run the risk that the disabled vessel may be lost because the various would-be salvors cannot agree on who shall undertake the task. A rather paradoxical situation arises. The policy of encouraging salvors, which first requires the summoning of salvors from

all points of the compass (the more the better), can at a later stage endanger the whole salvage enterprise. It may become necessary to switch to opposite tactics: to get rid of perhaps most of those who have offered their services, and to entrust the salvage operation to one or a few of them. In that case the opportunity to salvage which originally lay open to them all will be narrowed to a right for one or a few to effect the salvage, while the others are deprived of any right to take part.[9]

On what basis should it be decided who is to have the right to salvage? How should the decision be made? And what will be the consequences of an infringement of the salvor's rights? These are the questions that will be discussed in the following pages. The questions are especially relevant when a number of would-be salvors offer their services. But similar conflicts can arise even when only one salvor is involved. Even a single salvor must at one stage or another be granted a right to effect salvage, so that the owner of the disabled vessel cannot deprive him of the possibility of earning a reward by arbitrarily forbidding him from commencing or completing the task.

3. If by way of introduction we consider the problems from the point of view of legal policy, we can draw up the following list of considerations that must be taken into account:

(1) Any rules that are drawn up must, first and foremost, provide for an effective method of carrying out salvage operations. As has been shown above, the need for the regulation of the right to salvage arises primarily from considerations of the effectiveness of the operations.

(2) One must, however, also seek to devise rules that will appear just from the point of view of the competing salvors. If salvors get the impression that the right to salvage is granted arbitrarily or in a prejudiced manner, the result may be to reduce their willingness to undertake the task.

[9] The general opportunity to salvage is also sometimes described as a right to salvage, especially in cases where the opportunity is regulated by rules of public law. See, for example, the Danish Wrecks Act of 1895, sec. 4, regarding the sole right for "bjærgelav" (salvage association) for salvaging carried out from the coast, and the Supplementary Act of 1909, sec. 9, providing that anyone except the ship's owner must have permission from the Naval Ministry in order to be able to salvage ships stranded or sunk in Danish territorial waters—cf. Sindballe, pp. 112 f. and 118–20, and Nørgaard in *N.T.I.R.* 1956, pp. 48–67. In this article the expression "right to salvage" is used only in the above-stated narrower meaning.

(3) A third and very important factor comprises the legal technicalities. As mentioned above, disputes concerning the right to salvage must often be settled under pressure of time and in difficult circumstances; it will therefore be a great advantage if the rules drawn up are constructed in accordance with simple and easily ascertainable criteria.

(4) Finally, one must consider the owner of the disabled vessel. Under normal conditions the owner has a far-reaching authority to dispose of his own ship. Is this authority to be curtailed because the ship is in danger and perhaps more or less helpless?

With this list as the background, one's first notion, when seeking to solve the problem on a free evaluation, will be that the salvage operation should be entrusted to the salvor who is best fitted to perform the task. If, for example, two tugs compete for the task of refloating a grounded vessel, the one that has the greatest horsepower and the strongest hawsers should be accorded clear priority.

Closer consideration, however, will show that a general solution along these lines is not acceptable. Such a solution satisfies fully enough the requirements of item (1) above, and to a reasonable extent those of item (2). But from the point of view of legal technique, item (3), it is unfortunate. In the first place it is easy to imagine cases where one salvor must be assumed for all practical purposes to be just as effective as the other. Secondly, even if there is a difference from an objective point of view, how is it to be established which of the competing salvors is best equipped to undertake the task? It will be of no use leaving the salvors to decide—they are hardly likely to agree. And the master or owner of the disabled vessel will seldom be in possession of the data on which such a decision must be founded. As a rule, the matter must be dealt with immediately; there will be no time for any form of procedure, not even the simplest.

Even if the criterion of effectiveness cannot furnish a general principle on which a selection can be made, it can be of assistance in more particular cases. As we shall see in section IV below, it forms a sort of lower limit for the right to salvage. A salvor who is entitled to carry out the salvage operation under the provisions of the other rules that are to be framed must give way to other, more effective salvors, if he has no reasonable possibility of succeeding in the task.

The next possible solution that presents itself is to take priority in time as the basis, and so to accord the right to carry out the salvage operation to the first salvor to reach the disabled vessel. Such a rule will go a long way towards satisfying the requirement of effectiveness. Aid rendered promptly can be of double value, and often more than that for those in peril at sea. In cases of relatively small intervals of time, however, there will often be other factors that are of greater weight in an evaluation of the chances of salvage. The fact that tug A reaches the disabled vessel half an hour earlier than tug B means very little in a case where it will take at least three days to tow the disabled vessel to safety; the fact that B has a very powerful engine, while A's might not be powerful enough, is far more important. But even in such cases there is good reason to put a premium on the swiftness of the salvors' reactions—the salvors cannot always tell beforehand how precarious the situation of the disabled vessel may be. As a further ground for taking priority in time as the basis, one can advance considerations of legal technique: priority in time is a comparatively simple matter to ascertain. Moreover, considerable weight must be attached to the fact that the maxim "qui prior est tempore potior est jure" is regarded as being in accordance with widespread and deeply rooted ideas of justice. In the competition between several rival salvors a selection made on this basis will therefore normally be accepted as a reasonable arrangement. That priority in time can also be decisive for the right to salvage *de lege lata* will be made clear in section III below.

Priority in time as a principle of selection may be said to represent a reasonable compromise between the considerations mentioned in the first three items above. But the fourth item, concerning the owner of the disabled vessel, is not covered. One can easily imagine a case in which the owner does not wish to accept the assistance of the salvor who is first to reach the disabled vessel; the explanation may, for example, be that the owner has concluded an agreement with another salvor, who indeed was then less favourably placed than his rival, but whom the owner nevertheless wished to engage. Must this wish be respected by the other would-be salvors?

De lege lata, the answer will in a number of cases be in the affirmative. The principle of the owner's right to choose is actually the guiding principle in this question. How far this principle extends to details may indeed be a matter of some doubt—these questions will be more thoroughly dealt with in section II below.

First, however, we shall attempt to evaluate *de lege ferenda* the principle of the owner's right to choose, as we did with the two preceding principles of selection.

Some will perhaps find such a discussion superfluous; they take it for granted that an owner should control his own property—the ship—in all respects, so long as he does not injure other persons. This must also apply when the ship is in peril and it is a question of whether it is to be salvaged and who shall be entrusted with the salvage operation.

This point of view can possibly be accepted as a formal starting point. But a further justification is required. The question of salvage is not an entirely private matter which can, without more ado, be left to the owner's whims. When a ship is imperilled at sea and is in danger of being lost, many interests are involved. Besides the owner himself, one may mention the mortgagees, the charterer, the cargo owners, the crew, the passengers and—one may safely add—the community at large, since it is clearly of interest to the community to prevent the loss of such considerable assets as the ship and cargo represent. The provisions of the law must by all means seek to encourage salvors, and must therefore provide against any arbitrary use that the owner of a ship in peril may make of his right to choose, if any, for example by giving preference to salvors who from an objective point of view are less able than their competitors. The owner may have his reasons for making such an apparently prejudiced choice. He may, for example, prefer a certain salvage company to another because he has a financial interest in it, or because it is domiciled in his own country, while its competitor is a company to which he has no relation.

When, nevertheless, the owner's right to choose has been accorded so important a place, the rational justification must, in my opinion, be sought in the following circumstances.

First, there is a strong presumption that the owner will loyally and efficiently do his best to get his ship salvaged, and that he will therefore choose the most suitable salvor, taking all considerations into account. In very many cases the choice will be made by the master of the ship as the owner's agent. The master is on board the disabled vessel and normally has the best qualifications for evaluating the situation. The fact that the persons on board, including the master, are often personally in danger will also counteract the influence of irrelevant considerations. If the salvage operation fails wholly or partly as a consequence of the

owner's prejudiced or unfortunate choice of salvors, the owner will, moreover, face claims for damages from passengers (or their dependants), cargo owners and other persons, and he may find himself in difficulties with his insurers.

Secondly, the rule that the owner has the right to choose has clear advantages from the point of view of legal technique. As we shall see, there can arise cases in which doubt exists whether a certain salvor has or has not been accepted. But today, thanks to radio, it is at any rate technically possible to give swift and clear notice of the choice that has been made.

Having thus presented and evaluated the different principles for the selection of the salvor or salvors who are to be accorded the right to carry out the salvage operation, we shall now examine more closely how the principles are applied in the law as it stands today. Our attention will primarily be given to Norwegian and other Scandinavian law; in many instances, however, the theory and practice of other legal systems will be referred to for comparison and illustration.

II. SALVAGE ON THE AUTHORITY OF THE OWNER OF THE DISABLED VESSEL

1. *So long as the owner,* whether personally or through his employees, *is in control of the disabled vessel, he normally has the last word* both with regard to whether or not assistance from salvors shall be accepted, and as regards the choice between several available salvors.

That the owner normally is fully entitled to refuse to accept assistance appears from art. 3 of the Salvage Convention, which states: "N'ont droit à aucune rémunération les personnes qui ont pris part aux opérations de secours malgré la défense expresse et raisonnable du navire secouru." In form this is only a rule relating to the right to compensation for taking part in a salvage operation. The real effect, however, of the provisions of this article is to prohibit forced salvage; normally the vessel in distress can refuse all help. An exception is made only for cases where the refusal would not be "raisonnable", or "beføiet" as it is termed in the corresponding provision in sec. 224 of the Scandinavian Maritime Codes (hereinafter referred to as S.M.C.).

In a case where the owner of the disabled vessel is entitled to refuse all assistance, it seems clear that he may also stop short of doing this and simply refuse all would-be salvors except the one or ones he wishes to employ.[1] More doubtful is the case where the vessel is in such difficulties that it would be unreasonable to refuse all assistance. Must the owner then accept the salvor who is the first to offer his services? Or the one salvor out of several who seems to have the best qualifications for performing the task?

In this instance also, the solution can presumably be derived from art. 3 of the Salvage Convention, cf. S.M.C., sec. 224, subsec. 2. It would appear that the question whether a refusal of the assistance offered is justified must be decided on the facts in relation to each of the would-be salvors. Thus, one can envisage a case where the refusal of one salvor is justified because the owner has engaged or is about to engage another salvor, who has announced his approach over the radio and is expected to arrive in a short time. The result of this interpretation is that the owner is given the right to choose from the circle of would-be salvors who, taking into account their capabilities and positions, have a reasonable chance of carrying out the salvage operation. Only when the owner goes outside this circle does his prohibition become unjustified.[2]

In the foregoing, I have emphasized the negative side of the owner's right to choose: his right to refuse unwanted salvors. But his right to choose has a positive side also; if the owner has accepted a salvor, he is bound by his choice. The salvor concerned acquires a right to carry out the salvage operation and thereby to earn the right to salvage remuneration.[3] If the owner dismisses the salvor he has chosen before the salvage operation is completed, or if—contrary to the conditions (express or implied) of employment—he brings in other salvors, the salvor first employed will normally be able to demand to be put in the same financial

[1] Cf. Schaps-Abraham, § 742, note 10, and Le Clere, *L'assistance aux navires et le sauvetage des épaves*, 1954, p. 165.

[2] Cf. Beckman, p. 220, note 10, Sindballe, p. 403, Wildeboer, p. 133, and Ripert, *Droit maritime* III, 4th ed. 1953, p. 120.

[3] Wildeboer, pp. 134–6, assumes, on the other hand, that it depends entirely on the facts of each particular case whether an engaged salvor shall be considered to have obtained a right to complete the salvage operation. This point of view is in poor harmony with the principle of "no cure no pay", cf. *infra*, p. 95, note 2.

position as if he had been permitted to complete his task without outside interference.

From the principle of the chosen salvor's sole right to carry out the salvage operation, certain exceptions must be made. By far the most important arises from the requirement of effectiveness: it must be a condition for the salvor's sole right that he has reasonable prospects of being able to perform the task successfully. If it appears that he does not have the appropriate equipment, or that he is not carrying out the work with the necessary energy or skill, he must yield to more effective helpers (see section IV below). One can also envisage other cases of failure of implied conditions in which the owner may be entitled to revoke his acceptance of a salvor (see (5) below).

2. Far more doubt attends *the question of the owner's right to make a decision regarding the salvage operation when the disabled vessel has been abandoned by the crew.* Abandoned ships have in several respects been placed in a special category in the law of salvage. In Continental law this is clearly shown in the basic terminology: "Bergung" or "sauvetage" refers only to the salvaging of abandoned ships; other salvaging is "Hilfsleistung" or "assistance".[4] And in Anglo-American law, where "salvage" properly covers both types of operation, the term "derelict" plays a prominent role. A derelict is a disabled vessel left by its master and crew (abandoned) "sine spe recuperandi", i.e. without hope of recovering it, and "sine animo revertendi", i.e. without any intention of returning to it.[5] If the disabled vessel is left because it is thought that it will go down in a short time, it will normally be a derelict; but if, for example, the crew has rowed ashore in order to obtain help, it will not be a derelict.

The term "derelict" may very well call to mind the word "dereliction" in the sense of abandonment of property. In earlier times, when the rights to wrecks and the foreshore played a major role, it often happened that the former owner's right to wrecks and wrecked goods was disregarded; in any event it would often be difficult for the owner to protect his right when he did not have his crew present. But as early as the Middle Ages there appears a clear legal trend towards protecting the property of the shipowner and the cargo owners.

[4] See H. G. B., sec. 740, cf. Schaps-Abraham, § 740, notes 27–42, and Ripert, *op. cit.*, pp. 121–6.

[5] Cf. Kennedy, pp. 387–90, and Norris, pp. 221 f., with further references.

Today it is regarded as axiomatic in civilized society that the right of property is not lost because the crew has left the ship or has perished through shipwreck.[6] Abandonment is a relinquishing of the immediate control (possession) of the ship, not of the right of property.[7] Not even when the ship sinks in deep waters is the right of property automatically lost.[8] Nevertheless, there appears to be a widespread misconception, not least in nautical circles, that the shipowner's right of property is lost when a ship is abandoned at sea, and that anyone who later salvages the ship consequently becomes its owner by virtue of his occupation of an ownerless thing.

The distinction between salvage of abandoned ships and other cases of salvage has played its greatest part in connection with the rules concerning the amount of the salvage remuneration. Compensation for the salvage of an abandoned ship also includes a finder's reward. Especially in earlier times, when it might be difficult to discover who the owner was, and when often the whole crew perished in the shipwreck, there was a close parallel with the rules concerning lost articles; the salvage remuneration was in the nature of a finder's reward often fixed at a certain percentage of the value of the salved ship.

In accordance with the Salvage Convention, and thus in accordance with most of the present maritime laws, no distinction is now drawn in this respect between the salvage of an abandoned ship and any other salvage. In both cases the salvage remuneration must be assessed freely and upon the same principles; the value of the salved ship and cargo is the only upper limit, and this applies to every form of salvage (see arts. 1, 2, subsec. 3, and 8 of the Convention). This does not mean, however, that the amount

[6] In 1909 N.D. 41 (the Maritime and Commercial Court) a statement that it is open to all to appropriate a ship sunk outside all territorial waters is characterized as quite untenable.

[7] Cf. Norris, pp. 246–8.

[8] If the owner has not expressly relinquished his right of property, the right will only be lost if over a long period of time he remains completely passive with regard to the wreck and his right of property in it. From American legal decisions mention may be made of *Murphy* v. *Dunham* (1889) 38 F 503 ED Mich, concerning a cargo of coal that had lain at a depth of 40 feet on the bottom of Lake Michigan for one year, and *The Port Hunter* 1934 AMC 783 D Mass, which concerned a wreck that had lain at a depth of about 75 feet outside Vineyard Haven for about 15 years—in both cases the owner's right was considered to be still existing. See, on the other hand, *The Clythia* 1960 AMC 1774 ED Va, where a salvor was accorded the property right to 123 tons of Italian marble which he raised, in 1960, from a Norwegian schooner that had foundered off the coast of Virginia in 1894.

of the salvage remuneration under the present rules is not influenced by whether the disabled vessel was abandoned or not. The fact that the disabled vessel has been given up by its crew will normally imply that it has stood in great peril, which clearly points to a substantial salvage remuneration. Whether all on board have taken to the boats or whether one or two men have been left on board in order to prevent the ship's being regarded as a derelict is of minor significance in this connection. In the last-mentioned case the disabled vessel will still be helpless—one or two men cannot by themselves manoeuvre a ship of any size. But even if the degree of danger is practically the same, the fact that one or two men are left on board may lead to a somewhat smaller salvage award than would otherwise have been given, because the men on board can in various ways cooperate with the salvors, for example, by giving signals, making fast hawsers, and so on.[9]

Another field where abandoned ships seem to have been put in a special category is in the rules concerning the right to salvage. Thus, according to English and American law, it appears that the shipowner's right to make decisions with regard to the salvage operation does not apply when the disabled vessel is a derelict.[1] In *Cossman* v. *West* (1887) 6 Asp. M.C. 233 P.C. at page 238 f. the principle is stated thus:

> In the case of salvors there is a distinction between a derelict and a vessel which, though in great danger, has not been abandoned by the master and the crew. In the case of a derelict, the salvors who first take possession have not only a maritime lien on the ship for salvage services, but they have the entire and absolute possession and control of the vessel, and no one can interfere with them except in the case of manifest incompetence; but in an ordinary case of disaster, when the master remains in command he retains the possession of the ship, and it is his province to determine the amount of assistance that is necessary. . . .

A corresponding rule as regards Scandinavian law can perhaps be derived from S.M.C., sec. 224, subsec. 2, cf. art. 3 of the Salvage Convention. In the former provision there is the expression "ut-

[9] In *The Janet Court* (1897) 8 Asp. M.C. 223 P. the grounds for a high assessment of the remuneration for the salvaging of a derelict are clearly explained.

[1] Cf. Kennedy, pp. 146 f., 258 and 260 f., Parsons, *Law of Shipping*, vol. 2, Boston 1869, p. 291, note 1, Gilmore and Black, pp. 445 f., and Norris, pp. 201 and 221.

trykkelig og beføiet forbud av *den som har kommandoen ombord*" (clear and reasonable prohibition of *the person who is in command on board*), and the latter provision has the expression "la défense expresse et raisonnable *du navire secouru*".[2] It is here clearly provided that the prohibition is to be given by someone who is present on board the disabled vessel.

That decisive weight is thus given to the fact that the crew of the disabled vessel are still on board is easy to explain from an historical point of view. The rules of salvage were in most instances developed before the introduction of modern means of telecommunication. In those days, when a ship was away from its home port the master himself had to take all necessary decisions, since he could not wait for instructions from the shipowner. Especially in cases of shipwreck and in questions of salvage, it must earlier have appeared axiomatic that it was the master who must deal with the matter.[3] The shipowner would not normally be informed of the shipwreck until much later on, when he would have had no practical possibility of intervening.

Today the situation is quite different. The shipowner can be kept informed of developments by radio, however far away he is. The master who finds that he must leave his wrecked ship for safety reasons will immediately inform the shipowner of this and notify the ship's position, and the shipowner can then request a particular salvage company to attempt to tow the wreck into harbour.

The question thus arises whether this very important alteration of the practical background should lead to a corresponding adjustment of the legal rules. In other words, should it now be decreed that the owner's right to make decisions as regards the salvage operation is in principle the same whether the disabled vessel is abandoned by the crew or not?

De lege ferenda such a rule may arouse certain misgivings. If the owner is given the right of disposal despite the fact that he is not present at the scene either personally or through his agent, the risk of unfortunate decisions is greatly increased. The situation can, for example, be envisaged that the owner refuses the services of salvor A, who has already reached the disabled vessel, and engages another salvor B, who he thinks will be able to arrive in time, but who in fact arrives too late, with the consequence that the disabled vessel is lost. Salvor A can indeed in

[2] My italics.
[3] Cf. Platou, *op. cit.*, pp. 502 f.

such a case be entitled to intervene in spite of the owner's prohibition, because the latter must be considered unjustified. But in practice the great majority will be rather shy of undertaking a "forced" salvage; it is by no means certain that a court of law will in due course agree that the conditions for a lawful intervention obtained.

These misgivings must be allowed considerable weight. But they are not different in kind from the misgivings that arise in relation to the rules as to the owner's right of disposal in the case where the disabled vessel is still under the control of the owner's employees. In such situations, also, the owner may, through the master, adopt so unreasonable and negative an attitude towards offers of help that the chances of salvage are marred. It therefore seems unjust to allow the owner's right of disposal to depend automatically on whether or not the crew have left the disabled vessel. In many cases it will be unobjectionable to give the owner the right to decide as regards the salvaging of an abandoned ship —for example, where it is a matter of choice between two possible salvors lying at about the same position, both of whom must be considered fully competent for the task. If the owner lacks the necessary knowledge of the circumstances, he will in most cases certainly make his dispositions carefully. The unfortunate dispositions that are bound to occur sometimes can be dealt with by a liberal application of the rules as to unjustified refusal, which, of course, must also apply here. A salvor must, for example, be permitted to take an abandoned vessel in tow, contrary to the owner's instructions, if it is clearly apparent that the owner is relying on incomplete or incorrect information, and that he would have accepted the salvor's help if he had been able to make a full survey of the situation.

The misgivings as to allowing the owner the last word even when the disabled vessel has been abandoned by the crew must in any event be weighed against the advantages that will accompany such an arrangement. Most important are the possibilities created for a rational planning and coordination of the salvage operation. The circumstances may be such that the owner's intervention may have the effect of preventing an unnecessarily large muster of salvage vessels and a headlong and expensive race to reach the disabled vessel first. If several salvors are already on the scene, all willing to set to work, the owner may, by choosing one or two of them, prevent troublesome conflicts about who has a prior right to salvage.

A rule that gives the owner the right of decision even in respect of an abandoned ship will perhaps also counteract the widespread but rather inhumane notion that the master has a moral duty to remain on board the disabled vessel so long as there is the least hope of salvage, a conception that has all too often resulted in misplaced heroism and the unnecessary loss of valuable lives. It is true that a master's decision to remain on board may often be due to mixed motives. Besides the wish to prevent the disabled vessel's being regarded as a derelict and so left to the mercy of the first salvor, he may be influenced by the fact that his remaining on board will probably result in the salvor's compensation being less than it would have been if the ship had been entirely abandoned. In some cases the master probably acts under the misconception that the shipowner will lose his property right to the ship if it is abandoned.[4] Finally, a powerful if irrational motive comes into play—the regard paid to what the proud traditions of the sea demand from the master of a ship.[5] Even if all the special rules relating to abandoned ships were abolished, it would scarcely prevent a number of masters from sacrificing themselves in vain by remaining on board too long. But it would be a step in the right direction.

That the owner is entitled to make decisions about the salvaging even in the case of an abandoned ship seems in practice to have been accepted for an important group of cases, namely for ships sunk or lost in some other way, e.g. driven onto a sandbank, which are at the same time in relative security in so far as there is no danger worth mentioning of a further deterioration of their situation. It is quite common—at any rate in Norway—for professional salvors to purchase such ships (wrecks). The salvors' object cannot here be simply to secure for themselves the former owner's right to the normally rather modest proceeds remaining after the wreck has been salvaged and the salvage remuneration paid. The intention must clearly be that the salvors, as owners of the wreck, shall have the sole right to salvage it when it suits them.

It would not be so striking in itself if there were a special rule in cases of wreck. The distinguishing feature here is that the time

[4] Cf. *supra*, p. 75, note 8.

[5] Cf. Gilmore and Black, p. 446. The doctrine establishing that a shipowner can only refuse offers of help so long as he or his employees have possession of the ship "when coupled with judicial generosity in making salvage awards, gives a commercial basis to the gallant behaviour of masters who remain aboard otherwise abandoned ships while waiting for the owner's tugs to show up and undertake the rescue".

element has receded into the background. The wreck lies fast on the bottom; if it is not raised this summer, the salvor can try again next summer, indeed, he may perhaps decide to wait even longer in the hope that the price of scrap iron will rise to such an extent that the salvage will yield a substantial return. The situation is quite different when an abandoned ship is drifting on the sea out of control, or is stranded on a shoal in an exposed position. Here the salvor must often proceed to his task without delay.

In spite of this, one should not draw up different rules as regards the owner's right to make salvage decisions according to whether the case is one of wreck or of something else. Such an arrangement would be unfortunate from the point of view of legal technique. It is in practice very difficult to make a clear demarcation between the two groups; from cases where the danger that the ship will be lost in the course of a short time is overwhelming, there is an even progression to cases of relative safety. One must instead frame the rules as to the owner's right of disposition in such a way that the necessary consideration will be paid to the time element (see further under (3) below).

De lege ferenda the conclusion must, in my opinion, be that the owner's right to make decisions as regards salvage should in principle be the same whether the disabled vessel is abandoned by the crew or not. I think also that this rule—at any rate so far as Norwegian law is concerned—must be accepted *de lege lata*.[6] There are no relevant legal decisions. And the assumption as to another rule that can be said to be contained in S.M.C., sec. 224, subsec. 2, cf. art. 3 of the Salvage Convention, cannot be decisive now that technical advance has created an entirely new situation.[7]

3. *Protection of salvors acting in good faith.* If the shipowner is accorded the right to make decisions concerning salvage even when the disabled vessel has been abandoned by the crew, rules must at the same time be drawn up to protect salvors who have set to work on the task of salvage without knowing that the shipowner has already entrusted the task to another and has refused all other offers of help. Such a salvor, acting in good faith, must

[6] Cf., also, Wildeboer, p. 127.

[7] It must, however, be added that opinion among salvors in Norway hitherto seems to have been that expressed by Thorbjörnsen in *N.D.* 1935, pp. 129 ff., namely that the right of the first-come salvor to salvage an abandoned ship is in no way affected by the owner's dispositions.

have the same right to salvage as he would have had as first-come salvor if the shipowner had not made any dispositions with regard to the salvage (see further under section III below). If such protection is not given, there is the risk that potential salvors will remain idle until they find out what steps the owner is taking; thereby valuable time may be lost and the chances of a successful salvage may be reduced.

The time element plays an important part for the more exact framing of this rule as regards acting in good faith. If the disabled vessel is in immediate danger, only sure and positive knowledge of the shipowner's dispositions can be considered significant. No general duty to seek contact with the shipowner before the salvage is commenced can here be laid upon the salvor. Such a duty of investigation could at most be mooted when the situation is not clear, for example, when one of the competing salvors, who has not yet reached the disabled vessel, claims to have obtained the sole right to salvage, but the owner of the disabled vessel gives no indication. However, in this case, also, the correct course must be to permit the first salvor to get on with the work without more ado. In a situation where every hour is precious he must be freed from committing himself upon disputed questions of fact and law on the basis of short and often contradictory announcements emanating from different quarters. Salvors must as far as possible have entirely clear lines to go on (cf. by analogy the provision in S.M.C., sec. 224, subsec. 2, that a prohibition against salvage must be clear). If the owner of the disabled vessel will not avail himself of the help A offers, he must send a clear direction to A; and A must respect an unequivocal "hands off".

The situation is quite different if it is a question of the salvaging of a disabled vessel that is lost but is in relative security, e.g. because it is sunk at a considerable depth but in sheltered waters and upon a level and firm bottom. The raising of such a vessel demands comprehensive preparations and will normally take a good deal of time. Here, it is therefore possible and reasonable to pay greater regard to the owner's interest by laying upon would-be salvors a definite duty to seek to ascertain who is the owner of the wreck; if they succeed in finding the owner, they must also obtain his consent before they undertake the work of salvage.[8] The salvors need not disclose the position of the wreck

[8] In 1909 N.D. 41 (the Maritime and Commercial Court) there is a statement to the effect that a salvor of parts of a wreck which lay on the sea bed should have made an application to the owner before beginning his salvage

—if the owner does not know it and therefore wishes to avail himself of the salvors' knowledge, it is open to him to assign them the right to salvage.

If the crew—or at any rate the master—continues to remain on board the disabled vessel, the rules as to the master's full authority to bind the shipowner will normally give the salvor in good faith the protection he needs (see under (4) below). If necessary, however, the salvors must here also be able to invoke the rule as to acting in good faith that is suggested above in respect of the salvaging of an abandoned ship.

It is the salvor's good or bad faith at the time when the salvaging is actually commenced that is decisive. Before this moment the salvor is not protected against possible competing salvors who may be on their way to the disabled vessel; to that extent the salvor incurs expenses without any certainty that he will be permitted to attempt the salvage. There cannot be any reason, either, to protect him against the owner's dispositions at this juncture. But if the salvor is informed at a later stage, e.g. after he has taken the disabled vessel in tow, that the shipowner had already engaged another tug before the towing commenced, his right to salvage is not thereby annulled. Now he may demand to be given the chance to earn salvage remuneration and thereby to get a return for the time spent and the outlay incurred. One can, of course, envisage cases where the salvor receives notice from the shipowner just after the towing has been commenced, and at a stage where the salvor's outlay is still very modest; for example, a cargo vessel in the course of its voyage finds an abandoned ship, to which it attaches a towline without any loss of time worth mentioning. Even in such cases, however, the decisive moment must be the same one. We are here concerned with a rule relating to a distribution of risk; in the framing of such rules one should as far as possible avoid criteria calling for a subjective estimate.

I shall return in section III to a closer determination of the moment when the salvage operation actually begins.

undertaking. However, as the salvor had presumed that the owner had given up any further salvaging, and since from the circumstances it was to be assumed that he acted in good faith, he was awarded salvage remuneration.

If the owner of sunken objects has made it plain by a buoy or marker, or by public announcement, that he does not want help from salvors, it appears that United States law also would not grant salvage remuneration to a self-appointed salvor; see Norris, p. 258.

4. *When does the choice of salvors become binding?* In principle this question must be solved by applying the ordinary rules for the conclusion of contracts. Where agreements as to salvage are concerned, however, the circumstances are often rather special, and a closer discussion of some aspects of the problem is called for.

(a) *The respective authority of the master of the ship in peril and the shipowner.* It clearly lies within the scope of the master's legal authority pertaining to his office to conclude agreements for the salvaging of the ship, cf. S.M.C., sec. 64, concerning "contracts relating to the conservation of the ship". Like other agents, however, the master must follow the instructions he receives from his principal, the shipowner.[9] If, for example, the shipowner telegraphs the master to engage salvage vessel A, which is on the way, the master has no right to conclude an agreement with salvage vessel B, even though B has already reached the disabled vessel and, in the master's opinion, is better suited to the task than A is.[1] A couple of important reservations must, however, be made in this connection. First, it must be permissible to depart from the shipowner's instructions when the master has reason to believe that they have been given on the basis of incorrect or incomplete information on the existing circumstances, but it is not possible to refer the question to the shipowner again before the decision must be taken. The master must in this case make such a decision as he presumes the shipowner would have made if full information had been to hand. Secondly, the master must set aside the shipowner's instructions if by following them he would expose the ship and those on board to an unreasonable risk. The master has in this instance an independent responsibility; he cannot excuse himself by pleading that he acted in accordance with the shipowner's orders.[2]

Even if the master is quite unjustified in accepting a salvor

[9] It is another matter that a cautious shipowner will often, for fear of the risk of unlimited liability (cf. S.M.C., sec. 254, subsec. 2, *in fine*), refrain from giving definite instructions with regard to the salvaging.

[1] Cf. Schaps-Abraham, § 742, note 17. See, on the other hand, Thorbjørnsen in *N.D.* 1935, pp. 135 f., "every decision must come from the captain and rest on his authority. An order from the shipowner or the insurer can only be a directive for him." See also Thorbjørnsen, p. 223, on the termination of a salvage agreement. As an example of a case where the need for help was assessed differently by the owner and the master of a ship, there can be mentioned 1957 N.D. 117 (Oslo City Court); see especially pp. 121 f.

[2] See S.M.C., sec. 62, and the Norwegian Criminal Code, sec. 313, subsec. 1. Cf. also Beckman, *Fartygsbefälhavarens rättsliga ställning* I, 1936, p. 250, at note 3.

against the shipowner's instructions, the engagement becomes binding on the shipowner in accordance with the principles of the law of agency[3] if the salvor is acting in good faith. The requirements as to good faith cannot in this connection, either, be especially stringent; one must not cripple the salvors' ability and will to work by taxing their judgment with complicated questions. Good faith is clearly established when the salvors do not know, and cannot be expected to know, the instructions the shipowner has given. But even when the salvors are aware of the instructions, they must in many cases be entitled to rely on an agreement made with the master. As mentioned above, the master may have a right, sometimes even a duty, to set aside the shipowner's orders, and the salvor must be able to assume that the master is exercising a reasonable judgment in this respect. The need for clear and simple rules seems to demand that only in absolutely clear cases of breach of duty on the master's part ought the salvors to be met with the objection that the master could not bind the shipowner.

The fact that the master in his capacity as the owner's agent can conclude salvage agreements in no way hinders the shipowner himself from concluding such agreements either directly with the salvors or through other representatives, e.g. hull insurers or their agents. If the shipowner avails himself of this opportunity, he will normally inform the master immediately, so that a duplicate engagement is avoided. It is, however, conceivable that the shipowner and the master each engage a salvor, e.g. in cases where radio contact between them has broken down. In this event the last-engaged salvor must also be allowed the right to salvage, unless he was acting in bad faith when he undertook the task. For example, bad faith will normally be manifest if the salvor engaged by the master knows that the shipowner has already concluded an agreement with another salvor and at the same time understands that the master does not know of this agreement.

(b) Of practical importance is the question *under what circumstances the master (or in the appropriate case the shipowner) must be taken to have accepted one of the salvors* hastening in the direction of the disabled vessel to offer their services.

An express agreement is not required; the master of the disabled vessel can accept the aid of a particular salvor by a conclusive

[3] Cf. the Norwegian Contracts Act, 1918, sec. 11, subsec. 1.

act, e.g. by accepting and making fast the hawsers the salvor offers. Before the salvor reaches the disabled vessel, however, it is possible that an acceptance may be made over the radio or otherwise. In such a case it may sometimes be difficult to decide whether the disabled vessel shall be considered bound or not. The fact that signals of distress are sent out from the disabled vessel over the radio cannot be enough, even when the master is clearly aware that there is only one vessel near by and that this vessel will most probably receive the signals. Nor can the disabled vessel be bound by the fact that a vessel, on receiving the signals of distress, replies that it has changed its course and is proceeding at full speed to the disabled vessel. Doubt first arises in the case where the master sends a request for help to a particular salvor, who proceeds to the rescue as swiftly as possible or replies immediately that he is coming at once to render assistance. In such a case the application from the disabled vessel certainly comes very close to a contractual offer that the salvor accepts by his reply, or possibly by arriving to offer his services. This was the conclusion reached by the *Hanseatisches Oberlandesgericht* in HansRG 1928. B. 579:

> The master of the French ship S. S. *Docteur Pierre Benoit,* which had grounded on Juels Sand in the Elbe, sent the following telegram to a Hamburg tugboat firm, B, with which his shipping firm had a standing agreement for towing: "Send tugboat juels for steamer docteur pierre benoit." B, who sent several of their tugboats to the stranded ship, wished to have a signed salvage contract on Lloyd's Form, but the master, who had meanwhile been in touch with his company's agent in Hamburg, was not agreeable. Instead the agent obtained an offer from another tugboat firm, S, which was willing to tow off the stranded vessel and bring it to Hamburg for a fixed amount. When B refused to undertake the task on the same terms, S was engaged. The court found that a salvage agreement had been concluded between B and the shipping company, in that the master's telegram must be construed as a contractual offer that B had accepted by sending their vessels to the stranded ship, and B was awarded damages for the loss of the salvage remuneration.

In similar cases the Supreme Courts of both Norway and Denmark reached the opposite solution. The Norwegian judgment, 1907 N.D. 193 (Norwegian Supreme Court), concerned S.S. *Senator Hollesen,* which at 1900 hours on 23rd October had gone aground at Tjelsund. The master telegraphed next morning to Bodø Dykkerselskab: "Steamer Senator Hollesen grounded at Tjelsund fore-

hold filled with water, speediest assistance", and received the following reply: "Salvage vessel Ulabrand departed to assist midday". When the *Ulabrand* arrived at the stranded ship after steaming for twelve hours, it appeared that another salvage vessel had been engaged. The maritime court held that a salvage contract had been concluded between the ship and Bodø Dykkerselskab, and awarded the latter damages for loss of the salvage remuneration. The Supreme Court, on the other hand, came to the opposite conclusion. This was partly based on considerations of the effectiveness of the salvage operations. Mr. Justice Prydz expressed himself as follows:

> A master whose vessel has run aground and stuck fast is generally not in a position where he can justifiably refuse to accept the first offer of help he receives. It will indeed usually be the case that it is important to receive help as soon as possible, and if there is an opportunity to send out requests for help to several quarters, a master could not in such circumstances justifiably confine himself to summoning help from only one of those quarters. In the present case it appears that a message was sent to Harstad by a northbound steamer and also that a telegram was sent to Bodø. But I cannot accept that the master, after he has received the necessary help from the salvage vessel that is first to arrive, should be further liable to pay, to the one or more vessels summoned which may later present themselves, expenses for their voyage both ways and also damages corresponding to the amount they would have earned had they rendered assistance.

But Mr. Justice Prydz also pointed out that a salvor always runs a certain risk that the voyage to the disabled vessel will be in vain; the disabled vessel may have succeeded in rescuing itself before the salvage vessel arrives, or it may be lost altogether. He thus concluded with the following statement of the principle involved:

> A salvage company cannot therefore, in my opinion, justly regard an application for assistance from a grounded vessel as a contractual offer by the acceptance of which the company, in the event of the vessel's being rescued before their salvage vessel arrives, becomes entitled to demand payment as if they had actually rendered assistance.

In entire agreement with this case is the decision of the Danish Supreme Court in 1925 U.f.R. 368.[4] The facts were as follows:

[4] Also reported—though incompletely—in 1925 N.D. 133.

The master of the Norwegian S.S. *Visna*, which on February 18 went aground near Falsterbo, telegraphed at 1900 hours on that day to Svitzers Salvage Company in Copenhagen and informed them that the ship needed immediate help. Svitzers on the same day at 2240 hours sent their ship *Pluto* to help and informed the *Visna* accordingly. However, the *Pluto*, which was not equipped with radio, became trapped in the ice. It later freed itself but did not find the disabled vessel because its position had not been clearly stated. A tugboat and an icebreaker belonging to another company, which had learned about the stranding, set out from Copenhagen later the same day and managed to reach the *Visna* on February 20 at 1100 hours; they then concluded a salvage agreement with the *Visna*. On that day Svitzers sent their vessel *Kattegat* to help; the *Visna* was informed of this at 1230 hours. The *Visna* replied that she had now received the necessary help.

Svitzers were unsuccessful in their claim for a reimbursement of the expenses incurred in the trips made by the *Pluto* and the *Kattegat*. The judgment of the Maritime and Commercial Court, which was upheld by the Supreme Court on the same grounds, contained the following passage:

The circumstance that the Norwegian captain telegraphed to the company concerning his dangerous situation cannot be regarded as binding on the ship to the effect that the latter became liable in damages to the company by accepting other prior assistance, nor can the company's telegram in reply bind the ship. The telegrams cannot be regarded as a final agreement between the parties. In a situation such as the present the ship in peril must be accorded the right to accept the help that is first offered.

If a disabled vessel, after sending out distress signals, is informed that a particular vessel is proceeding to her assistance and replies that the message has been received, this would also appear to come very close to a binding acceptance. Especially will this be the case if the disabled vessel requests the other vessel to make haste or makes use of any expression that points directly to an acceptance. An example of this is the case of *The Hassel* [1959] 2 Lloyd's Rep. 82 P:

M. V. *Hassel* received considerable damage in a collision with another ship near Folkestone in the Straits of Dover and called for help over the radio. The French salvage tug *Jean-Bart* put out from Boulogne at 0235 hours and informed the *Hassel* of this at 0304 hours, at the same time asking if assistance was required. The *Hassel* replied evasively, but the *Jean-Bart* made two fresh attempts, and finally at 0410 hours the *Hassel* telegraphed the *Jean-Bart:* "Please come here captain says need assistance and accept." At

0418 hours the *Jean-Bart* heard over the radio that an English salvage tug, the *Lady Brassey,* had gone to help. When the *Jean-Bart* at 0427 hours asked the *Hassel* to give a direction-finding signal, the *Hassel* replied that it intended to accept the first tug to arrive. At 0437 hours the *Hassel* telegraphed the *Jean-Bart* that the *Lady Brassey* had arrived. A short time afterwards the *Jean-Bart* sighted the *Hassel,* and came alongside at about 0500 hours. The *Hassel,* however, refused its offer of help. About 0600 hours another English salvage tug, *Lady Duncannon,* arrived, and the two 'Ladies' took the *Hassel* in tow and beached her near Folkestone at 0610 hours.

The Court of Admiralty held that the *Jean-Bart* had been engaged by the *Hassel* and was entitled to compensation, not only for direct expenses but also for the lost opportunity to earn salvage remuneration. The compensation was assessed at £1,000.[5]

The four judgments here referred to deal with cases involving rather different sets of facts; this to some extent explains the widely differing outcome. But I think it can be said that the trend in the German and English judgments follows a direction diverging from that of the Scandinavian judgments. The German and English judgments consistently follow ordinary principles of the law of contract concerning offer and acceptance, while the Scandinavian judgments seem to attach more importance to the special nature of the salvage situation and to the need to secure the most effective help for the disabled vessel. Personally, I have considerable sympathy for the latter point of view. That agreements regarding salvage must in many ways be accorded a special status is certainly something that has long been clear.[6] In the case of the *Hassel* one can very well say that it was difficult to declare the master not bound, when a word so unambiguous from the legal point of view as "accept" had been used. But it is not entirely satisfactory that a salvage vessel should, like the *Jean-Bart,* be enabled to exact an acceptance from a disabled vessel, which in a moment of peril is ready to agree to almost anything in order to secure help. It is highly probable that the *Jean-Bart* would have continued its approach to the *Hassel,* even without receiving the acceptance; a voyage of only 50 minutes remained to be made when the acceptance was received.

(c) *Can a salvor who has been refused claim compensation for the "reliance loss"?*

[5] See also *The Bengali* (1935) 52 Ll. L. Rep. 315 P.
[6] See to this effect art. 7 of the Salvage Convention, cf. S.M.C., sec. 227.

In the foregoing we have simply dealt with two alternative solutions. The first is to regard the owner of the disabled vessel as not bound at all—the salvor who has been refused cannot then claim any compensation. The second is to lay down that a right to salvage exists—if the right is violated, the salvor can claim to be compensated for the loss he suffers by being deprived of the opportunity to attempt to carry out the salvage operation and thereby to earn the salvage remuneration. This loss calls for the so-called full recompense for breach of contract, i.e. for the injured party being placed in the same position as if the contract had been performed. A third possibility, however, exists in the shape of the following compromise: the salvor is denied the right to salvage, but is awarded compensation for the "reliance loss", i.e. compensation for vain expense and other loss that he has incurred because he counted on being permitted to carry out the salvage operation.[7]

This compromise is clearly applicable in one group of cases, namely when the salvor's loss can be said to be attributable to a culpable action or omission on the part of the disabled vessel, but where nevertheless the latter is found to be not contractually bound. An important practical example is the following. The vessel in distress calls for help over the radio, and thereupon receives notice from several vessels that they are coming to the rescue. So soon as it is clear to the owner or master that there is no need for all the assistance offered, messages rejecting the help of those vessels that are not required must be sent. A culpable neglect in this respect will render the owner liable for the relevant expenses that would have been saved by timely notice of rejection.[8] A corresponding solution must be adopted in other cases of neglect on the part of the disabled vessel, e.g. a negligent misstatement of the ship's position.[9] An example in point is the case 1925 U.f.R. 368 (Danish Supreme Court). The judgment has been referred to under item (b) above in relation to Svitzers' principal claim that the master had made a binding acceptance. As regards Svitzers' subsidiary claim, that the master had acted negligently, the following passage in the judgment of the Mari-

[7] Cf. Brækhus in *T.f.R.* 1947, pp. 516 ff. and 527 ff.

[8] Cf. Sindballe, p. 410.

[9] It is clear that improper use of distress signals can lead to liability in damages—cf. Kennedy, pp. 22–24—but this goes beyond the strict limits of the law of salvage.

time and Commercial Court met with the approval of the Supreme Court:

> As regards the circumstance specially invoked by the company that the telegram was so worded that Svitzers properly inferred from it that the ship was located at Bredegrund, not even this circumstance can be taken to provide fully adequate grounds for holding the shipping company liable in damages to the salvage company. The latter is not entirely blameless, despite the mistake in the telegram, for the failure of its vessels to make contact with the ship. The vessels of the United Towing Company, which to start with must be presumed to have had no other information than that available to Svitzers, were nevertheless able to find and assist the ship.

Far more doubtful is the question whether this compromise is available in cases where the disabled vessel is in no way at fault. A rule that guarantees to the salvors concerned that expenses incurred in proceeding to the rescue will be met—even when another obtains the right to salvage—will certainly provide an attractive additional incentive to go to the rescue in cases where the prospects of being entrusted with the work of salvage are considered uncertain. On the other hand, the rule would have the effect that in all the owner would be saddled with very considerable expenses—the payment of compensation additional to the full salvage remuneration payable to the salvor or salvors who obtain the right to salvage.

English law does not allow salvors to claim any compensation in these cases. It is another matter that the rules relating to a so-called "engaged service" or "employed service"[1] can in some cases lead to practically the same result as a rule regarding compensation for the "reliance loss". As mentioned under item (b) above, English law appears to be readier than Scandinavian law to hold that a preliminary salvage arrangement amounts to an "engagement". If such a preliminary arrangement subsists, e.g. to go to the rescue, the salvor concerned will, under English practice, be awarded a minor salvage remuneration if the salvage is successful, even if his contribution has had no influence at all on the successful result.[2] If no such preliminary arrangement subsists, the

[1] Cf. Kennedy, pp. 112–19.

[2] To this effect also 1919 S.H.T. 462 (the Maritime and Commercial Court). This practice appears to be in conflict with art. 2, clause 2, of the Salvage Convention, cf. *infra*, p. 92, note 9.

salvor can claim nothing. Cf. *The Stiklestad* (1926) 17 Asp. M.C. 191 P, where Mr. Justice Bateson awarded a lesser amount for "engaged services" with the following comments:[3]

> I do not shrink from this result in other cases where a ship is definitely asked to come to another ship's help. This judgment will not mean that when a ship sends out an S.O.S. message, every other ship on the sea is thereby entitled to go to that ship and then say: "Now I want to be paid a salvage award." I do not think that follows at all. In this case there was a definite request to this particular ship to come to the help of the *Stiklestad* and she did come to her help, although as events turned out she was not able to do much good.

See also *The Elswick Park* (1903) 9 Asp. M.C. 481 P.

In Scandinavian legal writing it has been asserted by several writers that salvors who have been summoned must be entitled to claim reimbursement of their direct expenses if they are not entrusted with the salvage operation.[4] A certain support for this point of view is to be found in 1907 N.D. 193 (Norwegian Supreme Court). One cannot, however, regard this judgment as furnishing any conclusive precedent. The court merely expressed an *obiter dictum;* furthermore, the judgment precedes the salvage convention, which is based squarely on the "no cure no pay" principle.[5] From later Norwegian decisions one can only cite as showing the same trend 1951 N.D. 712, where the Bergen city court states—*obiter*—that three vessels "by reason of the special request to go to the rescue were assured of a certain recompense, even if the salvage operation had not succeeded".[6]

The opposite solution also has its supporters in Norwegian legal writing.[7] In my opinion it is the better solution. It must

[3] The judgment was confirmed by the Court of Appeal on the same grounds, see 43 T.L.R. 118. A more detailed, but somewhat divergent report of the judgment in the court of first instance is to be found in 25 Ll. L. Rep. 254.

[4] Cf. Møller in *U.f.R.* 1918 B, pp. 30 f., and in Grundtvig, *Den danske Søret,* 2nd ed. 1922 by Møller, p. 186, Knoph, p. 321, Beckman, p. 224, and Schmidt, *Föreläsningar i sjörätt,* 1944, p. 154 (on condition that the request for help has been directed to a particular person).

[5] See *infra,* p. 92, note 9.

[6] 1939 N.D. 475 (Swedish Supreme Court) (= 1939 N.J.A. 678), which is quoted in this connection by Schmidt and Beckman, *op. cit.,* concerns compensation for assistance by "standing by" in a case where this assistance must be supposed to have contributed to the salvaging of the vessel.

[7] See Klæstad, p. 33, Sindballe, p. 410, and Thorbjørnsen, p. 261. 1925 U.f.R. 368 (Danish Supreme Court), which Sindballe mentions in this con-

be clear that a strict liability for the "reliance loss" cannot be imposed on the owner of the disabled vessel in a case where the salvage operation is not successful—the economic basis for charging the owner is wholly lacking.[8] But even when the salvage operation is successful the solution must be the same—otherwise it will be inordinately expensive to summon help. Nor does an unconditional right to demand reimbursement of direct expenses fit in well with an established system of "no cure no pay". *De lege lata* art. 2, clause 2, of the Salvage Convention appears to be conclusive: "No remuneration is due if the services rendered have no beneficial result."[9]

5. *A closer examination of the implied conditions for engagement of a salvor.* When the shipowner engages a salvor who possesses a sufficiently powerful vessel and sufficient equipment to warrant the assumption that he can carry out the salvage operation by himself, the presumption must be that the salvor has a sole right to carry out the said operation. In many cases, nevertheless, if the shipowner has engaged several salvors the salvor must put up with it (see section V. 1 below), but he can claim to have his salvage remuneration assessed as if he alone had carried out the task.

The presumption as to the engaged salvor's sole right will in many cases be abolished by a clear agreement to the contrary, or if it appears from the circumstances surrounding the conclusion of the agreement that the salvor will only be one of several. If the salvor at the time of his engagement knows that the ship-

nection, offers some support for this view. But the judgment is not a clear precedent, inasmuch as it was to some extent the salvor's own fault that he reached the disabled vessel too late.

[8] Still less can the owner of the disabled vessel be held liable for damage suffered by a salvor while proceeding to his assistance, after being summoned by distress signals or the like; see 1948 N.D. 641 (the Maritime and Commercial Court).

[9] "Aucune rémunération n'est due si le secours prêté reste sans résultat utile." France, at the Brussels conference in 1910, proposed the addition of the following two items: "Toutefois, le remboursement total ou partiel des dépenses peut être accordé selon les circonstances. Il en est de même lorsqu'un navire appelé et venu au secours d'un autre n'a pu prêter à celui-ci aucune assistance." However, the proposal was rejected; see the conference's *Procès-Verbaux,* pp. 45 and 100; cf. also Wildeboer, pp. 95 f. and 113. The English doctrine of "engaged services" (cf. *supra,* p. 90, note 1), on the other hand, was regarded by the conference as being compatible with art. 2, clause 2, in that it was concerned with the case where there subsisted "un véritable contrat de louage de service" which did not come within the Convention; see *Procès-Verbaux* 1909, pp. 61, 137 f., and 1910, p. 100. Cf. also Ripert, pp. 145 f. This attempt to create harmony between the rules of the Convention and English law scarcely succeeds, cf. Wildeboer, p. 118.

owner has already contracted with another salvor, he must, until otherwise informed, reckon that he will work in cooperation with the first-engaged salvor, and he cannot therefore reckon on receiving salvage remuneration at a sole salvor's rate.

The right that a salvor obtains by virtue of an agreement with the owner of the disabled vessel can also be lost or modified by virtue of the doctrine of implied conditions. When one is dealing with a ship in peril at sea, the situation will often undergo swift and surprising developments. A shipowner who from a home port engages a particular salvor to aid the disabled vessel will therefore in many cases make his arrangements with insufficient knowledge of the actual situation at that moment, or do so upon assumptions that soon afterwards are seen to be false. It can also be envisaged that the salvor engaged will come across unforeseen hindrances on his way. In order that the shipowner's salvage agreement shall not bind him so firmly that the effectiveness of the salvage operation becomes threatened, one must therefore make a liberal application of the principle of the alteration or abrogation of agreements on the ground of failure of implied conditions. If it appears that the salvor engaged is delayed, e.g. by a mechanical breakdown or as a result of ice obstacles on the way, the shipowner must in many cases be permitted to engage another salvor in lieu of, or in addition to, the first without thereby becoming liable for breach of contract.[1] The same consideration must apply when the situation of the disabled vessel suddenly deteriorates, so that it becomes too risky to await the arrival of the first-engaged salvor. The doctrine of implied conditions here clearly leads us to the principle discussed in section IV below.

A quite special case of failure of an implied condition occurs when a salvor who has been engaged to salvage an abandoned ship finds on his arrival that the disabled vessel has already been taken in tow by another salvor, who has acted in good faith, and who therefore has a secured right to salvage (cf. (3) above).

In the last-mentioned case the failure of an implied condition should presumably be accorded relevance. Furthermore, the shipowner must be able to consider himself released from the agree-

[1] Cf. 1925 U.f.R. 747 (Eastern Appeal Court), where the first-engaged salvor arrived a couple of hours later than expected, but where he would nevertheless have been in a position to carry out the salvage operation within the time actually taken by salvor no. 2, and where the owner of the salvaged vessel vainly invoked a failure of implied conditions against the first-come salvor.

ment with the first-engaged salvor if the latter has given him incorrect or misleading information about his position, about the time it will take him to reach the disabled vessel, about the horsepower and salvage equipment he has available, and so on, at any rate when the erroneous information can be supposed to have had some significance for the shipowner, and without regard to whether the error can be attributed to the salvor. If a grounded vessel has got itself afloat again before the salvor engaged has arrived, the salvage agreement comes to an end. The fact that the wind has lessened or that the situation has for other reasons become less critical than it was when the agreement was concluded —so that the disabled vessel now finds it justifiable to attempt to make its way without the salvor's aid—ought not, on the other hand, to be accepted as a relevant failure of an implied condition if the disabled vessel must still be considered to be "in danger". Besides, it is scarcely possible to draw up general rules regarding when the failure of an implied condition shall be considered relevant. One can only require of the judge a proper balancing of the need, on the one hand, for effective help and of the consideration, on the other, of the engaged salvor's justifiable expectation of being permitted to attempt the salvage and thereby to earn the salvage remuneration.

The question of relevance is closely connected with the question of what legal effect a possible failure of an implied condition should have. The most far-reaching alternative is to set the engaged salvor completely aside. But it is also conceivable that he continues to participate, but in cooperation with the other salvor or salvors now engaged. A possible compromise is to give the first-engaged but later dismissed salvor the right to compensation for his "reliance loss", first and foremost reimbursement of the direct expenses of his voyage to the disabled vessel and back. The right to such a compensation, however, must also be subject to a condition that the disabled vessel is salvaged.

III. SALVAGE BY VIRTUE OF PRIORITY IN TIME (THE RIGHT OF THE FIRST-COME SALVOR)

The right to salvage by virtue of priority in time is recognized in Scandinavian as well as in other systems of maritime law in those cases where the owner or master of the disabled vessel has not wished to designate a particular salvor or has been precluded from

so doing.[2] If one assumes, contrary to what has been submitted in section II.2 above, that the owner is precluded from making decisions concerning salvage after the disabled vessel has been abandoned by its crew, then the principle of the right of the first-come salvor will apply even if the owner designates another salvor. In any event the right of the salvor acting in good faith in dealing with an abandoned ship must be protected; cf. section II.3 above.

The rules regarding the first-come salvor's right are clearly of essential importance in regard to the salvaging of an abandoned ship. But they must also be applicable in a case where persons are still on board the disabled vessel if they omit to make any choice between the salvors who offer their services—it is, for example, conceivable that the crew might be so exhausted or apathetic that they do not react at all when salvors appear.

In a number of cases the relative priority in time between several competing salvors will be quite clear. If, for example, salvor A has got a towline on board the disabled vessel and has actually begun towing when salvor B arrives, A has undoubtedly the right of the first-come salvor. But the rules as to priority in time need to be precisely stated to cover the quite conceivable case where several salvors appear at about the same time.

The fact that a salvor A has found the disabled vessel before the others cannot be sufficient to secure him priority.[3] The locating of the disabled vessel can certainly often amount to a significant contribution, whether it is a question of an abandoned ship drifting on the sea or of a ship sunk in comparatively deep water without its exact position being known. If the locating results in the salvaging of the disabled vessel by others, A will in such a case be able to claim a corresponding share of the salvage remuneration.[4] But A obtains the right to salvage and with it the prospect

[2] See, however, Wildeboer, p. 134, who would not recognize any real right to salvage unless an agreement subsists with the owner of the disabled vessel. A salvor who operates without the authority of an agreement is only a *negotiorum gestor,* and can therefore be dismissed at any time by the owner without the latter incurring any obligation to pay damages for the lost prospect of earning salvage remuneration! The author overlooks the fact that the "no cure no pay" principle creates a profound difference between salvaging and *negotiorum gestio*: it would be quite unreasonable if a salvor could be arbitrarily precluded from the possibility of recouping the expenses he has invested in a salvage operation that remains uncompleted.

[3] Cf. Norris, p. 250, at note 17.

[4] Cf. *The Egypt* (1932) 44 Ll. L. Rep. 21 P., where it was disputed how far the first-come salvors had really located the wreck, and how far their

of earning the full salvage remuneration only if he exploits his advantage by starting on the actual work of salvage as first-comer.

When can one say, then, that the actual work of salvage has begun? The fact that a salvor A has reached the disabled vessel with the necessary gear, ready to set to work as soon as weather conditions permit, is not enough. It is a bitter pill for A, who alone has ridden out the storm all round the clock in the immediate neighbourhood of the disabled vessel, that he must compete on equal terms with salvors who arrive just when the storm has abated sufficiently for the feasibility to be considered of attaching a towline to the disabled vessel. The policy of encouraging salvors, however, clearly demands that the reward shall go to the first who actually makes contact rather than to the first who is ready to make contact. If it is a case of taking an abandoned ship in tow, the decisive factor must be which salvor is the first to get a crew on board the disabled vessel.

An example is furnished by the case 1925 N.D. 545 (Oslo City Court):

> M.V. *Segovia* encountered off Lindesnes S.S. *Berit,* which lay drifting with a severe list, abandoned by its crew. The *Segovia* put a crew on board the *Berit* and made ready to tow; when the *Segovia* was about to manoeuvre towards the *Berit,* in order to establish a connection, its engines refused to function. While the work of repair was in progress, the master of the *Berit* came back to his ship in a motorboat. He requested the crew from the *Segovia* to leave the *Berit* and concluded a towing agreement with S.S. *Lyngdal,* which had arrived on the scene in the meantime. The court stated that it could not "appear doubtful that the *Segovia* had commenced the task of salvage, in that the captain had placed on board the *Berit* a crew who had set about doing what was necessary to establish a towing connection, and it must be assumed that the *Segovia* had *under ordinary circumstances* the right to complete the salvage operation." On account of the *Segovia's* mechanical failure, however, its right to salvage could be set aside.

The first-come salvor A can forbid a competing salvor B from boarding the disabled vessel; if B nevertheless does so, it gives him no right to salvage, not even if his crew establishes a towing connection before A's does. A is also entitled to refuse to give way to the shipowner of the disabled vessel and his employees,

contribution in this respect had been of assistance to the later salvors (who raised gold, etc., to the value of over £730,000 from a depth of 400 feet).

e.g. the crew of the disabled vessel if—after weather conditions have cleared up—they wish once more to board the ship they earlier abandoned.[5]

If two sets of salvors board the disabled vessel at the same time, they must be considered to have equal rights to carry out the salvage operation. In these cases tense situations can arise, with attempts to resort to force. But even if the maxim "might is right" should at first prevail, the courts will later see to it that the salvor who has thrust his way to the fore reaps no advantage from his conduct when the salvage remuneration comes to be assessed.

If a salvor A has obtained priority, e.g. by taking the disabled vessel in tow, he does not lose his right as first salvor because he temporarily loses control, e.g. by the towline's breaking at a time when he has no crew on board the disabled vessel. But the condition imposed is that A shall immediately take steps to recover control. If instead he sets his course for the nearest harbour, e.g. in order to obtain more towing gear, the disabled vessel will again be regarded as an abandoned ship, which a new "first-come salvor" can freely take charge of. From American case law we may here cite *The Amethyst* (1840) 1 Fed. Cas. 762 DMe:[6]

> Three schooners came across an abandoned ship at sundown; a crew from one of them went on board the ship but immediately abandoned it again. During the night the schooners lay near the disabled vessel; the plan was to take it in tow next morning. When day dawned, however, the disabled vessel lay a mile away, and a fourth schooner was bearing down on it. In the race that followed it was the newcomer's crew that won; after a hand-to-hand combat, however, they were ousted, and the first three schooners towed the disabled vessel into harbour. The court held that these three had kept the disabled vessel in their possession during the night, and that their "right to possession ... having become perfect was not lost" by the fourth schooner's intrusion.

Some special problems arise concerning the salvaging of sunken ships or of cargo from such ships. When can one in these cases say that the work of salvage has begun, so that the salvor acquires the right of the first-come salvor? And what is required to maintain the priority?

It is clear that the salvor cannot secure for himself the sole

[5] Cf. Thorbjørnsen in *N.D.* 1935, pp. 134 f., and Norris, p. 248. To the contrary Wildeboer, pp. 131 f.

[6] Here reported from Robinson, *Admiralty Law*, 1939, pp. 720 f.

right merely by marking the position of the wreck with buoys and by notifying his intention of attempting to salvage it or the cargo it contains.[7] On the other hand, it is not necessary for the salvor to have sent his divers down to the wreck, or to have fastened lifting cables round it. The decisive factor must presumably be that the salvor as first-comer has positioned his salvage vessels with the necessary equipment over the place where the wreck lies and that he is ready to set to work. If in such a case a competing salvor could bring his vessels alongside those of the first-come salvor, there would be the risk of moorings, cables, and wires becoming entangled with one another, and of impeding or preventing the divers' work.

As regards the maintenance of the sole right, the same uninterrupted efforts as in the case of towing cannot be demanded. If the wreck lies in an exposed position, the first-come salvor must be permitted to cease work and seek shelter when weather conditions demand it, without losing his sole right.

Cf. in this respect *The Tubantia* (1924) 18 Ll. L. Rep. 158 P.:

> S.S. *Tubantia* was sunk in 1916 by a German warship in the North Sea, about 50 miles from the English coast and about 25 miles from the Dutch coast. It was said that the wreck contained German gold marks to a value of £2 million. In 1922 an English salvage expedition succeeded in locating the wreck at a depth of 19–20 fathoms. During the summers of 1922 and 1923, in so far as weather and tides permitted, these salvors worked with two pairs of divers on the task of bringing up cargo from the wreck. The time in which it was possible to do anything was, however, severely limited, and by the end of the 1923 season not much of value had been recovered. On the other hand the expenses had mounted to £40,000.
>
> In July 1923 a group of competing salvors arrived with *Semper Paratus,* a powerful and well-equipped salvage vessel, and started preparations for the work of salvage in a way that greatly disturbed the first-come salvors. The court held that the first-come salvors had the *Tubantia* in their possession, and that their competitors had committed a trespass; it therefore granted an injunction against the latters' doing anything that could hinder the first-come salvors in the work of salvage, until further order.

[7] Cf. *The African Queen* 1960 AMC 69 EDVa.

IV. SALVAGE BY VIRTUE OF THE REQUIREMENTS OF THE NAUTICAL SITUATION

1. *The Principle*

It may become apparent that the salvor who has gained the right to salvage—by virtue of the owner's decision or as first-come salvor—cannot manage to complete the salvage operation, at any rate not without summoning further help. If the salvor could nevertheless demand the continued recognition of his right, despite the availability of other help, one would risk losing ship and cargo in a number of cases where salvage would otherwise be possible. Such a result would be in conflict with the fundamental purpose of the law of salvage, and it is clear that legal policy here requires restriction in principle of the right with which the salvor has been endowed: he must yield his right if this is necessary in order to prevent the disabled vessel or its cargo from being lost. Such a restriction has also been laid down time and again in legal practice. It is conceivable that the first-entitled salvor must yield his entire right; for example, if it is a question of refloating a grounded vessel and it is not possible for two tugboats to do the work jointly. But it is also conceivable that it is only the first-come salvor's sole right that is disregarded to the extent that he must allow the joint participation of other salvors. The disregarding of the first-entitled salvor's right may occur either on the shipowner's orders or by the second salvor's intervening on his own initiative. If the disregarding is lawful, the salvor concerned can only claim salvage remuneration for his actual contribution, i.e. for his sole effort before the intervention and for any share he may have in the subsequent work; the condition to be fulfilled here as elsewhere in the law of salvage is that his effort shall contribute materially to the final salvage.[8] On the other hand, the first-entitled salvor cannot claim damages for loss attributable to the fact that he was not permitted to accomplish the salvage operation alone.

[8] In English law, where the first-come salvor is treated with especial generosity, he is sometimes awarded a considerable salvage remuneration for what is, from a subjective point of view, a valuable effort, even if this effort has had no effect worth mentioning on the salvage operation. See Kennedy, pp. 252 f., and, for example, *The American Farmer* (1947) 80 Ll. L. Rep. 672 P. See also Norris, pp. 361 f. This practice appears to be in conflict with art. 2, clause 2, of the Salvage Convention, cf. *supra*, p. 92, note 9.

The restriction of the right of the first-entitled salvor here discussed has its parallel in the restriction that must be made of the owner's right to make decisions concerning the salvage operation. From art. 3 of the Salvage Convention, cf. S.M.C., sec. 224, subsec. 2, it is evident that salvaging against an express prohibition from the disabled vessel may be warranted in certain circumstances, viz. where the prohibition is unreasonable. This will first and foremost be the case where it must be assumed that the disabled vessel could not manage without the proffered aid. The salvor who has lawfully forced his help on the disabled vessel obtains a right to salvage, and he can claim salvage remuneration in accordance with the ordinary rules if the salvage operation succeeds.

The rules as to the disregarding of the right of the first-entitled salvor, as well as the rules as to forced salvage, can be regarded as concessions to the legal policy of ensuring the effectiveness of salvage operations. The point of departure, and the usual case, is that the right to salvage depends upon the owner's decisions or, failing that, on the priority of the first-come salvor. But, when necessary, these principles must be set aside; in this respect the requirement for effective operations has a close kinship with the recognition of a principle of necessity that is found in various parts of the legal system.

But while forced salvage is a comparatively rare phenomenon,[9] it happens fairly often that the first-entitled salvor must yield his right to later salvors because of the requirement for effective operations; conflicts of this type have come before the courts on a number of occasions.

This difference can be explained quite simply. The master (or owner) of the disabled vessel must strike a balance between the risk of loss of ship and cargo, and perhaps also the danger of loss of human life, on the one hand, and the possibility of having to pay salvage remuneration, on the other. If the risk of loss is serious, reasonable men will scarcely be in doubt as to the choice. But difficulties can arise, for example, when the master has become unbalanced through overexertion, excessive drinking, or like causes,[1] or when he too slavishly follows politically inspired

[9] Some examples are found in United States legal decisions; see Norris, pp. 195–201.

[1] Cf. Wildeboer, p. 130.

instructions to accept help only from compatriots.[2] When it is a question whether the first-entitled salvor shall allow himself to be ousted by a later and more effective salvor, the matter must be evaluated in another way. Salvor no. 1 has the same motive as the owner for refusing further help: it may cost him money. He hopes to be able to accomplish the salvage operation alone and thereby to earn a considerable sum as salvage remuneration. If he is (lawfully) ousted by salvor no. 2, or must content himself with cooperating with him, his share of the potential remuneration will be less—he may perhaps not receive any at all. On the other hand, salvor no. 1 will not be influenced by the same counter-considerations as the owner. If the ship and cargo should be lost, the loss does not hit the salvor. Nor will the danger of loss of human life normally play any part here. Those remaining on board the disabled vessel can always be taken on board the salvage vessel if the situation should become critical.

It is not taken for granted that the rules as to forced salvage and those as to disregarding the right of the first-entitled salvor entirely coincide. The problems involved, however, are so closely related that it is permissible to deal with both types jointly.

2. *Further discussion of the principle of necessity*

We shall first attempt to set out more precisely when it is lawful to force help upon a disabled vessel or to disregard the right of the first-entitled salvor. In the former case, as mentioned above, the conclusive factor according to the Convention and the Code, respectively, is whether or not the owner's prohibition is "raisonnable" or "beføiet" (reasonable). The intention must be to refer to an estimate of what is nautically justifiable when refusing the salvor's offer of assistance. The question is: Is the probability that the ship will manage alone so great that it is reasonable to refuse the offer of help, taking into account the danger to those on board, to the cargo, and to the ship?

> Klæstad, pp. 68 f., cf. Knoph, p. 321, and Thorbjørnsen, p. 211, seeks to define the concept "unreasonable prohibition" by a reference to the master's duty to save the ship and the persons on board and the cargo. "If it is clear that he cannot fulfil this duty without

[2] See, *inter alia*, an article in *Lloyd's List & Shipping Gazette* for March 13, 1965, entitled "Russian ships in casualty. Reticence to call for foreign help." Cf. the official Russian reply in the same publication for April 29, 1965.

> accepting the help offered him by others, he acts in breach of his duty if he refuses to accept this help." (Klæstad, *loc. cit.*) It is certainly correct that it would be in conflict with a master's obligations if he issued an unjustified prohibition against salvage. But these obligations are not so well defined that they offer any foundation for a thorough explanation of when a prohibition against salvage is unjustified. On the contrary, a definition of what is justified in this connection contributes to a clarification of the master's obligations. When it is the shipowner himself who issues the prohibition against the salvaging of an abandoned ship sailing in ballast, the duty aspect recedes into the background.

As regards the conditions that apply for the proper disregarding of the right of the first-entitled salvor, neither the Convention nor the Code gives any guidance. But, on the other hand, legal decisions have in this instance much to offer.

Fundamental to English law is the following statement by Lord Stowell in *The Blenden-Hall* (1814) 1 Dods. 414:[3]

> It is most undoubtedly the duty of those who claim as salvors, and dispossess others who were acting as such, to shew, if not an actual, at least an apparent, necessity for their intrusion, and to offer some excuse that may fairly justify their interference in that with which they had otherwise no manner of business. ... I have no hesitation ... in confirming the doctrine I have over and over again laid down, that persons dispossessing original salvors without reasonable cause shall receive no benefit from the services they may afterwards perform, but the whole reward shall go to those who have been wrongfully dispossessed. Those who are wrong-doers shall take no advantage from their own wrong.... Under these principles the Court is to consider whether any such necessity is shewn.—I do not say any absolute necessity, but such as, under all the circumstances, and the impression they were calculated to make, would justify the interference....

The decisive factor is thus whether the later salvors have a "reasonable cause" for ousting the first-come salvor, and this will be present when there exists "if not an actual, at least an apparent, necessity for their intrusion". In *The Pickwick*[4] Dr. Lushington lays decisive weight on the factor that there was "no fair probability that the vessel could be brought into port in safety in due time by the first set (of salvors)", and in *The American Farmer*[5] Mr. Justice Pilcher frames the question whether "the

[3] Here cited from Kennedy, p. 225.
[4] (1852) 16 Jur. 669, here cited from Kennedy, p. 225.
[5] (1947) 80 Ll. L. Rep. 672 P.

prior salvor has a reasonable prospect of accomplishing the salvage service himself and is not endangering the safety of the salved property". Cf. also *Cossman* v. *West*,[6] where the Privy Council stated that the first-come salvor could be ousted only "in the case of manifest incompetence".

In Scandinavian legal practice the question of the disregarding of the right of the first-entitled salvor has hitherto only been discussed by the inferior courts. As a condition for the recognition of such disregarding as lawful, it is commonly required that there shall have been a nautical necessity, see, e.g., 1925 N.D. 545 (Oslo City Court) at p. 549: "The master of the *Berit* ... cannot be taken to have acted unjustifiably if it must have appeared to him necessary, in accordance with the normal standards of nautical skill and judgment, to entrust the towing to the *Lyngdal* (i.e. salvor no. 2)."

In 1948 N.D. 649 (Bergen City Court) at p. 651 the question is posed whether in accordance with "a sound nautical judgment" it was "necessary" to summon further help.

Finally, mention must be made of 1958 N.D. 532 (Bergen City Court) at p. 540:

> The captain must ... have a certain latitude for exercising judgment. Otherwise, out of fear of having to pay salvage remuneration twice for the same work, the captain could very well refuse to accept salvor no. 2, in spite of the fact that he ought to have accepted him. Since salvor no. 1 receives remuneration for the work he performs, no consideration for his interest requires that the captain should not be allowed a certain margin for the exercise of his judgment. The criterion must be whether the captain's decision is an expression of a sound and reasonable judgment. If the captain concludes from the exercise of a sound nautical judgment that to continue with salvor no. 1 will be attended with a disproportionately great risk, he must be entitled to employ salvor no. 2.

One may ask whether the city court does not base the issue to rather too great an extent on the judgment exercised by the master of the disabled vessel, who here represents one of two contending parties. The problem stands out more clearly if one seeks to formulate a rule sufficiently general to cover, in addition to the cases where the master summons salvor no. 2, the cases where a salvor forces his help on the disabled vessel or on salvor

[6] (1887) 6 Asp. M. C. 233 at pp. 238 f.; cf. the citation in section II.2 above.

no. 1, or possibly ousts salvor no. 1 altogether. The following guidelines can then presumably be drawn for deciding whether it is necessary from a nautical point of view to accept (further) assistance.

(1) The decision must be based on the actual state of affairs at the place where the disabled vessel is present, and made at a time when the question whether to accept or refuse help is a live issue. The actual state of affairs includes the possibilities as to further developments that must then and there be taken into account. On the other hand, one must disregard what later comes to light concerning the way the situation actually developed. The fact that a grounded vessel lies in a position much exposed to a north-west wind and that a wind frequently blows from this direction can, for example, justify the summoning of salvor no. 2 even if the weather in fact remains calm throughout the time that would have been required for the work of salvage if salvor no. 1 had worked alone.

(2) The need for (further) help must be judged objectively from the point of view of what sound nautical judgment requires. The actual appraisal made by the master concerned will provide a guide, but it cannot be accorded decisive significance.[7] In the first place, it is clear that one must disregard purely subjective assessments. The fact that the first-come salvor, who has taken the abandoned vessel in tow, is an incurable optimist and convinced that all will go well is as little decisive as the fact that the intruding salvor adopts a correspondingly excessively pessimistic view. But even where the assessments of the masters fall within the limits of what can be called sound judgment, one cannot base the issue unconditionally upon them. It may indeed occur that the master of the disabled vessel, the master of salvage vessel no. 1, and the master of salvage vessel no. 2 come to different conclusions but without any of the assessments meriting the description unsound. One cannot here simply give precedence to the standpoint taken by the master of the disabled vessel or salvor no. 1—that would go far towards excluding the possibility of a lawful forced salvage. We are therefore forced to make an objective judgment, which in the last resort implies that the courts' judgment of what is nautically sound becomes decisive.[8]

[7] To the contrary see Schaps-Abraham, § 742, note 10.

[8] According to Kennedy, p. 257, the English courts will award some small compensation to salvor no. 2 if they find that "the dispossession of the original salvors was due to an honest and intelligible, although an erroneous, opinion

(3) The question of what is nautically sound cannot be entirely detached from the question of what is economically sound. An omission on the part of the shipowner or master to take extra safety precautions is more likely to be regarded as unjustified where such precautions require a relatively small outlay than where they necessitate considerable expense. As regards the question whether salvor no. 2 ought to be permitted access either in addition to or in place of salvor no. 1, however, this matter of expense causes certain difficulties. If the summoning of salvor no. 2 is in conflict with the right of the first-come salvor, the shipowner risks having to pay the full salvage remuneration twice over; the summoning of no. 2 would thus be a very costly extra safety precaution. On the other hand, if it is lawful to allow no. 2 access, the total salvage remuneration will not normally amount to an essentially higher sum than if only one salvor had taken care of the whole task—on this assumption, the summoning of salvor no. 2 is a "cheap" safety precaution which a conscientious shipowner ought to be eager to take. So one is caught in a vicious circle: what is sound depends, *inter alia,* on the expense entailed, but the expense is in turn determined by what is legally right and therefore by what is sound!

A way out of this tangle is indicated by the discussion of the parallel problem of forced salvage, i.e. when it is open to the disabled vessel to refuse altogether the salvors' offers of help. Here the economic aspect of the matter is clear; it costs money to be salvaged, and one must weigh the risk the disabled vessel runs in refusing help against the salvage remuneration which one must assume will accrue if the help is accepted. The decisive factor must then in the first instance be an estimate of the prospects of the disabled vessel's being able to manage without help. If it is more probable than not that the disabled vessel will be lost or will at any rate be seriously damaged if help is refused, one can very well say that refusal is unjustified. If there is a risk to human life, a lower degree of danger can conceivably be considered decisive, for example, where a large passenger ship is involved. In an assessment of the degree of danger one must, as mentioned under section II.1 above, also take account of the disabled vessel's possibility of obtaining other help than that first offered.

as to its necessity on the part of those who claim as second salvors, and the latter have rendered beneficial services".

A further condition for regarding a refusal as unjustified must be that the salvor who offers help shall have a reasonable prospect of being able to carry out the task. Quite hopeless salvage projects may be rejected by the disabled vessel even if the danger is imminent. This last condition is rarely of any great practical importance—inasmuch as salvage remuneration is only payable on the "no cure no pay" principle, the disabled vessel does not run any economic risk by accepting ineffective help.

The results we have here arrived at regarding the conditions pertaining to a lawful forced salvage can presumably be given a corresponding application where it is a question of wholly or partially disregarding the right of salvor no. 1. In both cases there arises a conflict between the general interest in preventing the loss of valuable assets, and the individual's—the owner's or salvor no. 1's—interest in maintaining his right. And in this conflict there is scarcely any reason to protect the owner's interest further than the first-entitled salvor's interest. It is another matter that the owner—as previously mentioned—will far more seldom than salvor no. 1 maintain his right to the last.

My conclusion is therefore that it is lawful to set aside salvor no. 1 wholly or partially in favour of salvor no. 2 if it is more probable than not (1) that the disabled vessel will be lost or suffer serious damage if salvor no. 1 continues to work alone, and (2) that salvor no. 2 alone or together with no. 1 can salvage the disabled vessel, or, as the case may be, prevent it from being appreciably damaged.[9] If these conditions are fulfilled, one can say that it is necessary from a nautical point of view to bring in salvor no. 2. Less than this is insufficent. The fact that salvor no. 2 alone or together with no. 1 can carry out the salvaging more swiftly or surely than no. 1 alone is not enough.

The setting aside of salvor no. 1 must not go further than the conditions require. If there is only room for one salvor, e.g. while refloating a grounded vessel in a narrow channel, no. 1 must yield entirely. If, on the other hand, there are possibilities of cooperation, no. 1 must be permitted to continue, even if no. 2 can accomplish the task without help and would rather work

[9] The burden of proof as regards the fulfilment of these conditions must rest on the owner of the disabled vessel where he (or the master) has given salvor no. 1 the order to give way, and on salvor no. 2 when he has on his own initiative ousted salvor no. 1. Cf. Thorbjørnsen in *N.D.* 1935, p. 136, Kennedy, p. 254, and Norris, p. 252.

alone, inasmuch as it would normally give him the right to higher salvage remuneration.

3. *"Unnecessary" help can be accepted through lack of protest*

S.M.C., sec. 224, subsec. 2, requires, as has been mentioned before, that a prohibition against a forced salvage must be clearly expressed. This rule also has its parallel where it is a question of setting aside salvor no. 1. If salvor no. 1 without clear protest puts up with the participation of salvor no. 2 in the work, it will be construed as a relinquishing of his sole right, without regard to whether salvor no. 2 has been summoned by the shipowner or is acting on his own initiative.

> Of legal decisions there can be mentioned in this connection: 1944 N.D. 369 (Bergen City Court) at p. 377 (cf. 1946 N.D. 292, Appeal court), 1946 N.D. 300 (Oslo City Court) at p. 303 and 1948 N.D. 649 (Bergen City Court) at p. 651–2, where salvor no. 1 through lack of protest was considered to have accepted the cooperation of salvor no. 2, and 1948 N.D. 217 (Bergen City Court) at p. 222, where the court held that salvor no. 1 had made a sufficiently energetic protest.

V. WHAT DOES "A RIGHT TO SALVAGE" IMPLY?

In the foregoing we have constantly used the phrase "a right to salvage" without giving any further explanation of what the right consists of. Is it a definite right actually to attempt the salvage of the disabled vessel? ((1) below). Or is it only a right to demand payment from the shipowner of the amount which it can be assumed the presumptive salvor would have earned if he had been permitted to attempt the salvage operation? ((2) below). Finally, can one whose right to salvage has been disregarded claim damages from the salvors who have ousted him? ((3) below).

1. *Has the first-entitled salvor a right actually to take part in the salvage operation?*

(a) This question is closely connected with the question regarding *the right to direct the salvage operation.*

From the practical point of view it is absolutely essential that

some person should direct the whole salvage operation alone. The need for an overall direction is especially obvious in the case where a number of independent salvors are working together. But even where there is only one salvage vessel, the relative authority of its master vis-à-vis the master of the disabled vessel must be defined. There may be many ways of conducting a salvage operation, whether it is a question of the positioning of several tugboats which are to take an abandoned ship in tow in a rough sea, or of which harbour the towing shall be directed to, or of how the work of extinguishing a fire on board a burning tanker is to be organized, or of what would be the quickest method of lightening a disabled vessel heavily grounded in an exposed position. Where several salvors are working together, decisions will often be made on the basis of previous discussions. But one person must decide if unanimity is not reached, or in a case where there is no time for discussions. And the authority of the director of operations must—with one exception set out below—be absolute. If, for example, during the process of taking in tow he orders a participating salvage boat to keep away because there is no need for its participation, the order must be obeyed even if the salvor concerned has a "right to salvage". Here also the need for straightforward rules is imperative. At critical moments there is no time for wrangles or for academic discussions. If the director infringes some one's right by his orders, amends must be made in a subsequent financial settlement.

As long as the master of the disabled vessel remains on board his ship and is fit to act, it is clear that he is in charge of the salvage operation. He can accept or refuse salvors, he can order one salvor to cease his efforts and allow another access in his place, and he can accept further help in addition to what he has already accepted. He decides the method and the destination of the towing, what shall be done to lighten the disabled vessel, etc. He can delegate his authority to the master of one of the salvage vessels, but he can revoke this delegation whenever he wishes.[1] The fact that he on his part must normally follow the instructions his shipowner gives is usually an internal affair (cf. section II.4.a above).

[1] Thorbjørnsen in *N.D.* 1935, p. 136, finds it, however, "rather doubtful" whether a salvor must accept an order from a master who by a written salvage contract has expressly delegated the performance of the salvage operation to the salvor. To the contrary Thorbjørnsen, pp. 157 and 222. Cf. *infra*, p. 110, note 3.

Even after the master has left the disabled vessel, he ought presumably to be in charge of the salvage operation as long as he is present in the vessel's immediate vicinity, whether on land or on one of the salvaging vessels.

When the disabled vessel has been totally abandoned by master and crew, or where the master is unfit to act, e.g. because of exhaustion or illness, the direction of the salvage operation must devolve on the salvor who is the first to commence the work of salvage (cf. section III above). To give the direction to the owner or the master of the disabled vessel in this situation cannot be practical; the director must necessarily be at the scene of distress. It is clear that the first-come salvor must be in charge in the case where no agreement as to the salvaging has been entered into, and in the case where the first-come salvor is unaware that the shipowner has granted the right to salvage to another salvor. But the same rule must apply when the first-come salvor has commenced the salvaging with the knowledge that other salvors have concluded a contract with the owner. If the first-come salvor is convinced that a later-arrived salvor has a better right, he will, of course, give way voluntarily, inasmuch as he cannot reckon on receiving any remuneration for his contribution. If he refuses to allow another to take over the disabled vessel, it is presumably because he finds the position unclear in some factual or legal respect. In such a situation also one needs definite rules as to who shall decide, and it is difficult to find a solution other than to allow the first-come salvor to be in charge.

(b) From what has been said under (a), it follows that *the right to salvage does not normally imply that the salvor concerned can demand actually to accomplish the salvage operation or to take part in it.* If the master of the disabled vessel at a certain stage in the work of salvaging declares that he no longer has any need for the salvor's assistance, or that he prefers to accept help from another quarter, and therefore requests the salvor to withdraw, or even to remove an established towing connection, the order must be obeyed.[2]

Such a dismissal may certainly be most unwelcome to a salvor; for then he gets no opportunity to show that he could have accomplished the task. To give evidence of this in some other way, and thereby to establish the basis for an action for damages

[2] One can in this instance, too, rely on art. 3 of the Salvage Convention and S.M.C., sec. 224, subsec. 2, cf. Wildeboer, p. 134.

against the shipowner, may sometimes be difficult. Nor is a right to damages for lost opportunities of earning salvage remuneration quite equal in other respects to a right to salvage remuneration (see 2 (c) below). Nevertheless one must maintain that the master (shipowner) of the disabled vessel has in this situation also an unconditional authority.[3]

In this respect the first-come salvor, who has commenced the salvage operation after the disabled vessel has been abandoned by its crew, stands in the same position as the owner. His orders must be obeyed, even though they imply that a salvor who has gained "the right to salvage"—indeed, even one with a better right than the first-come salvor—is actually precluded from participating in the work of salvage.[4]

These principles have been defined time and again in English legal decisions. In *The Champion* (1863) Br. & Lush. 69, Dr. Lushington said:[5] "Unless the vessel has been utterly abandoned, and is according to the legal meaning of the word a derelict, the occupying salvor is bound to submit to the orders of the master, when the master appears and claims his authority."

See further *The Maasdam* (1893) 7 Asp. M.C. 400 P:

> S.S. *Maasdam,* which had broken a crank bolt about 1,000 miles from Queenstown on a voyage from Rotterdam to New York with about 450 passengers on board, summoned the passing S.S. *Winchester,* which upon request remained near by while the work of repair continued. When somewhat later the *Maasdam* began to proceed at a slow speed, the *Winchester* accompanied her. After a short time the *Maasdam's* engines had to be stopped again. A towing connection was then established with the *Winchester;* when towing was commenced, however, the hawser parted. Next morning, while a new towing connection was in process of being fitted, S.S. *P. Caland* arrived on the scene. This ship belonged to the same company as the *Maasdam,* and the two masters agreed that the *P. Caland* should take over the towing. The master of the *Winchester* was requested to remove his towline, a request with which after some hesitation he complied. Sir Francis Jeune expressed, *inter alia,* the following view:
>
> "If a vessel, which has been partially salved, for reasons of her

[3] Cf. Platou, *op. cit.,* p. 502, Klæstad, p. 69, Thorbjørnsen, pp. 157 and 222 (see, however, 1935 N.D. 136), Kennedy, pp. 260–2, and Norris, pp. 199–201. In German law the salvage agreement is regarded as a "Werkvertrag", and the right to terminate it arises therefore from *B.G.B.,* sec. 649. Cf. Schaps-Abraham, § 742, note 7, and HansGZ 1907. 77 Hamburg.

[4] Cf. Klæstad, p. 69.

[5] Here cited from Kennedy, pp. 260 f.

> own decides to have the salvage completed by another vessel, I do not know that she has not a right to do so, subject of course to this, that in that case remuneration will have to be paid for the second one probably, and certainly for the first."

This view was cited with approval by Mr. Justice Willmer in *The Loch Tulla* (1950) 84 Ll. L. Rep. 62 at p. 69.

If a salvor refuses to obey an order given by the proper authority, e.g. an order to give way in favour of another salvor, he can render himself liable for damages for the harm he thereby causes. The court is also empowered to reduce the salvage remuneration his contribution would otherwise have deserved, and possibly to refuse to award him any remuneration at all, even if he had "the right to salvage".[6]

(c) From the principle set out under (b) an important exception must be made. *The salvor who has the right to salvage by reason of what the nautical situation demands has the right actually to force his assistance on the disabled vessel.*

As regards a forced salvage, this follows *per contra* from S.M.C., sec. 224, subsec. 2. The salvor can claim salvage remuneration despite a clear prohibition on the part of the disabled vessel, if the prohibition is unjustified. The condition for such a claim, however, must be that the salvor has actually taken part in the work of salvage. A salvor who is able to intervene, but who refrains from doing so because of protests on the part of the disabled vessel, cannot claim salvage remuneration, even if the conditions pertaining to a forced salvage subsist. The same rule must apply in the relationship between the first-come salvor, who is in control of the salvage operation, and salvor no. 2, who has the right to force his help on the first-come salvor and possibly the right to oust him altogether.

It is conceivable that the master of the disabled vessel, or in the appropriate case the first-come salvor, will not content himself with a clear verbal refusal of the salvor who seeks to force help upon him, but also offers physical resistance, e.g. by preventing the salvor's crew from coming on board the disabled vessel, by cutting loose his hawsers, etc. Can the encroaching salvor in this event avail himself of the use of force? We assume that the conditions pertaining to a forced salvage subsist.

In my opinion one must in this situation allow the encroaching

[6] The analogy from S.M.C., sec. 224, subsec. 2, must here serve as authority. Cf., for English and American law, Kennedy, pp. 147 f., and Norris, p. 199.

salvor to take the law into his own hands to a certain extent.[7] The rules as to the right to salvage by reason of what the nautical situation demands have their roots in considerations of the common good: the wish to prevent unnecessary loss of human life and valuable assets, considerations that are so important that the more formal misgivings about taking the law into one's own hands must yield to them.

The use of force exercised by the encroaching salvor must not, however, exceed what is reasonable having regard to the value of what is at stake. If human lives are in immediate danger on board the disabled vessel, the salvor may act with a heavier hand than where it is only a question of salvaging material assets. But even in the latter case situations can be envisaged where the use of a certain amount of force on the salvor's side is justified.

In face of a justified use of force on the part of salvors, the crew on board the disabled vessel have no right to act in self-defence. Of course, it will be difficult to draw the line between what is lawful and what is unlawful in these cases—not least for someone who has to decide under the pressure of danger and great personal strain. There is a risk that both parties may in good faith seek to back up their opinion by using force, and that a head-on physical clash will result. This is, however, a risk that one must accept as an unavoidable consequence of the system. The only practical remedy lies in the subsequent financial settlement. If the encroaching salvors have no right to force their help on the disabled vessel or have employed unduly forceful methods of establishing their right, the court can award them a reduced salvage remuneration, or in the appropriate case deny them any remuneration at all. Besides, there may—at any rate theoretically—arise a liability in damages one way or the other.

2. *The salvor's right to be indemnified by the shipowner*

(a) *The basis of liability.* The most important, and in many cases the only, sanction that protects a salvor's "right to salvage" is the claim the salvor has to be financially indemnified by the owner of the disabled vessel, if the latter infringes the said right. The owner's liability is dependent on a fault or omission on the part

[7] To the contrary Schaps-Abraham, § 742, note 11. The place Schaps-Abraham accords to forced salvage is a very modest one; see the examples at the end of the note mentioned.

of himself or his employees; ignorance of the law, however, will have as little relevance here as it has under general principles of law.[8] The question of fault will seldom cause any difficulty. In the typical cases the intention is clear. The owner (master) dismisses the first-entitled salvor at the outset; he enjoins him to give way to another salvor after the work has been in progress some time, or he requires him to put up with the joint participation of other salvors—contrary to the conditions of the salvage agreement. It is possible that in these cases the owner thinks he has the necessary basis for his conduct in the rules dealt with in section IV above; if he has, no liability will attach to him. But if he is mistaken, he must indemnify the dismissed salvor. In some cases doubt may arise with regard to the question of fault, for example, when the salvor, X, whom the shipowner has engaged, is prevented from carrying out the salvage operation by another salvor, Y, who without a commission from the shipowner, but in good faith, has taken the abandoned vessel in tow. If the shipowner was acting in good faith when he engaged X, one must presumably conclude that the engagement fails on the ground of a failure of implied conditions (cf. section II.5 above). If, on the other hand, the shipowner knew that Y would probably arrive first, or if he ought to have known that, the question of his liability to X can arise, if indeed the shipowner did not beforehand give X the information he himself possessed.

(b) The principle for determining *the extent of the liability* is clear. The salvor must be put in an equally favourable financial position to that he would have been in if his right to salvage had been fully respected. The practical implementation of this principle may, however, offer difficulties. One will have to face a number of hypothetical questions. Would the displaced salvor have managed to perform the salvage operation as successfully as it has now in fact been carried out, if his right had been respected? Would he perhaps have done it better? How long would it have taken him in that event, and what expenses would he have incurred? What salvage remuneration would such an effort have indicated? What reduction must be made for expenses saved? And so on.[9] To give reasonably certain answers to these

[8] Cf. Karlgren, *Skadeståndsrätt*, 3rd ed. 1965, pp. 61 f.

[9] Wildeboer, p. 136, would also make a deduction in respect of "the risks not incurred by the salvor, notably the risk that the salvage activities might have remained without result". This cannot be correct. The salvor is entitled to damages for the very reason that he was deprived of the opportunity to

questions will often be difficult. Besides, if one takes into account the marked degree to which the assessment of salvage remuneration is an approximation even in cases where the course of events is known, it becomes clear that the assessment of damages for lost salvage remuneration must in many cases rest upon a very loose evaluation.[1]

In principle, damages for loss of salvage remuneration can be claimed even when the disabled vessel is lost.[2] The displaced salvor must in this case prove that he would have succeeded in the task if he had been allowed access, or, as the case may be, if he had not been set aside in favour of another salvor before the salvage operation was concluded, or if he had not been compelled to work in cooperation with another salvor whose lack of skill ruined the whole operation. It will normally not be easy to furnish such proof.[3] If the salvor who—without success—attempted the task was a normally capable and well-equipped salvor, there is a rather strong presumption that the displaced salvor could not have achieved a successful result either. The displaced salvor must furnish proof positive of the errors committed and must establish the probability that he would—even at the critical moment—have chosen another course of action which would have been successful.

(c) *Is a claim for damages on the same footing as a claim for salvage remuneration?* The damages awarded a displaced salvor resemble salvage remuneration in several respects. In some cases the damages appear to be awarded technically in the form of salvage remuneration. This is, first of all, the case where the salvor has wrongfully been compelled to cooperate with another salvor; here it is usually stated that the salvage remuneration payable to the former shall be assessed as if he had accomplished the salvage operation alone.[4] If salvor no. 2 has in such a case acted on his own initiative, there is hardly anything to be said against this arrangement—salvor no. 2 can then claim no compen-

take a risk he was willing to take. It is another matter that damages can only be awarded if there is reasonable ground to believe that the running of the risk would have produced some positive salvage result.

[1] Cf. the following statement by Lord Merriman in *The Hassel* [1959] 2 Lloyd's Rep. 82, at p. 89: "The amount is manifestly not capable of an exact calculation, and nobody pretends that it is. It is quite plain in the cases I have looked at that any Judge giving judgement has simply done his best to make an informed guess at the sort of sum which ought to be awarded ..."

[2] Cf. Thorbjørnsen in *N.D.* 1935, p. 137, Wildeboer, pp. 119 and 137.

[3] I have not found any decision in which an award of damages has been made in a case where the disabled vessel has been lost.

[4] See, e.g., 1948 N.D. 649 (Bergen City Court), at pp. 651 f.

sation, and, in all, there is only paid out the salvage remuneration that the completed salvage calls for. If, however, salvor no. 2 acts on the disabled vessel's request, he also will have a claim for salvage remuneration for his contribution; when the entire compensation to the first-comer is also characterized as salvage remuneration, then, in all, more than full salvage remuneration is paid.

Moreover, in the case where the owner (master) of the disabled vessel wrongfully enjoins the first-come salvor to give way to another before the salvage operation has been concluded, the former salvor will normally get his compensation in the form of salvage remuneration. He is accordingly awarded a joint sum, described as salvage remuneration, which is both a compensation for his contribution before he was dismissed and damages for the loss arising from his not being permitted to complete the work, without its being specified how much falls under each head.[5]

Simply as a matter of principle, however, one must maintain that salvage remuneration is a compensation paid for actual participation in a salvage operation that has succeeded, and that all other compensation paid to salvors is paid in the form of damages. The distinction between salvage remuneration and damages is relevant in several respects. Thus, it is only salvage remuneration that must be divided between the shipowner, the master, and the crew of the salvage vessel in accordance with S.M.C., sec. 229; it is only a claim for salvage remuneration that is secured by a maritime lien on ship and cargo, cf. S.M.C., sec 267, no. 3 and sec. 276 no. 1; finally, it may be mentioned that personal claims for salvage remuneration are subject to a special two-year period of limitation in accordance with S.M.C., sec. 284, no. 1, while a claim for damages for a lost opportunity to earn salvage remuneration is subject to the rules as to limitation generally applicable to claims for damages; in Norwegian law that would mean a three-year period of limitation.[6]

It is possible that the rules as to salvage remuneration ought

[5] See, e.g., *The Maude* (1876) 3 Asp. M. C. 338 P, *The Maasdam* (1893) 7 Asp. M. C. 400 P, at p. 402, and *The Loch Tulla* (1950) 84 Ll. L. Rep. 62, at pp. 70 f.

[6] If the shipowner's liability stems from his having acted contrary to his assignment to, or agreement with, the displaced salvor, the Norwegian statutes of limitations, 1896, sec. 5 no. 1 will apply; cf. Augdahl, *Den norske obligasjonsretts alm. del*, 3rd ed. 1963, p. 129. In other cases the Promulgation Act, sec. 28, of the Norwegian Criminal Code, 1902, will be decisive; see, e.g., 1953 N.D. 132 (Oslo City Court) at pp. 139 f., cf. p. 141.

in some cases to be applied analogously to claims for damages for loss of salvage remuneration. An analogy will especially be natural in the cases where damages are in practice incorporated in a joint sum awarded as salvage remuneration. In other cases the question is more doubtful. The analogy is strongest when the distribution rule in S.M.C., sec. 229, is involved. It is more questionable to apply the rules as to maritime lien. The strong reasons demanding that other holders of maritime liens and mortgagees shall yield priority to a salvor's maritime lien do not apply to a claim for damages, at any rate not where this is additional to an ordinary claim for salvage remuneration. That a salvor entitled to damages is denied a maritime lien means, on the other hand, that he is not put into as strong a financial position as if he had actually completed the salvage operation. Nor does an analogy seem to be fitting as regards the distinct positive-law rules concerning periods of limitation of action.

3. *Claim for damages against competing salvors*

The infringement of salvor A's right to salvage will as a rule be connected with the entry of another salvor B into the picture, either because B carries out the salvage operation instead of A, or because A is compelled to work in cooperation with B when he had the right to carry out the salvage operation alone. Can A in these cases hold B liable for the loss he suffers by being set aside?

The question must be split up into a discussion of cases where B is acting entirely on his own initiative ((a) below) and cases where he is acting in concert with the owner of the disabled vessel ((b) below).

(a) Let us first assume that B *without any encouragement or permission at all from the owner of the disabled vessel,* and without there existing any nautical necessity for setting A aside, has forced his cooperation upon A, or has completely ousted A, or, as the case may be, has undertaken the salvaging of an abandoned ship with positive knowledge that the owner had already granted A the sole right to salvage the ship. If the right to salvage is to have any real meaning, one must in these cases allow A a remedy directed against B. The owner of the disabled vessel cannot here be blamed in any way, and therefore cannot he held liable.

If the salvage operation is successful, the necessary remedy will in most cases be obtained through the rules as to the payment of

salvage remuneration. This is clear when the infringement simply amounts to B's having unlawfully forced his cooperation upon A—in this case A is awarded the full salvage remuneration, just as if he had acted alone, while B gets nothing. The solution is more doubtful when B has completely ousted A and carried out the salvage operation alone. A cannot without more ado be awarded the salvage remuneration that B's efforts have earned—a remuneration of which, perhaps, the greater part is a compensation for expenses incurred by B but not by A. The proper solution seems to be to award B the whole salvage remuneration, but at the same time to require B to indemnify A for the loss he has suffered, a loss that will in many cases correspond to the amount of the salvage remuneration less the amount of expenses saved. It will, however, be more advantageous for A to acquire a claim for salvage remuneration against the salvaged ship, with the greater security this implies. A rational if somewhat unconventional solution seems to be to assess the salvage remuneration on the basis of B's efforts, but to award A as much of this sum as corresponds to the amount of his loss, while B gets the rest.

If the salvage operation has been quite unsuccessful, the remedy against B must take the form of a claim for damages; the same rule applies where it has partially failed, so far as concerns the reduction in salvage remuneration that this entails. What has been said in this section (see 2 above) regarding the owner's liability for damages is correspondingly applicable here.

(b) *If B has acted upon encouragement or permission from the owner of the disabled vessel,* quite another case arises. The situation primarily envisaged here is where the crew of the disabled vessel is still on board, and where the master, after first having given A the right to initiate the salvage operation, unlawfully constrains A to allow B to participate, or in some cases to give way to B entirely. The same rules must, however, apply when the disabled vessel has been abandoned, and when the shipowner from land first requests A to undertake the towing in, and then—contrary to the agreement with A—gives the same task to B, who is the first to arrive.[7]

If A's right in these cases has been infringed as a result of the owner's decisions, A will be able to hold the owner liable in accordance with the rules discussed in this section (see 1 above).

[7] The rules must also apply correspondingly where a salvor who, in the capacity of first-come salvor, has control of the salvage undertaking enjoins A to give way to B, contrary to A's "right to salvage".

For this very reason there is less need here for a remedy against competing salvors. Added to this, however, is another, more important factor. As has been pointed out above, one must have clear rules about the direction of the salvage operation. If the director of operations orders A to allow B access as a joint salvor, or to give way to B entirely, it is not enough for A to obey this order; B must also follow up immediately, without regard to how far the order constitutes an infringement of A's right to salvage. If one is to ensure such a swift reaction on B's part, one must be very cautious about holding him liable to A for being a party to the director's wrongful treatment of A. B may very well be aware of A's original prior right without it being possible for him to decide whether the director now has the right to call in further help. It may be a case of a failure of implied conditions of the agreement between the director and A; B does not know the whole background and cannot evaluate it. It is also conceivable that the director now regards it as a nautical necessity to summon further help—B is not so well acquainted with conditions on board the disabled vessel that he can assess the correctness of the director's judgment. And even if B is fully acquainted with the relevant circumstances, it would be unfortunate if B were required—under threat of liability to A—to examine the director's considered decision. The result might then easily be that B would out of caution refrain from participating—which would weaken the effectiveness of the direction, and reduce the chances of a successful performance of the salvage operation. We return here to the basic theme in the law of salvage: the principle of encouraging salvors, which in this connection demands that a salvor must be free to follow an order given by the person directing the salvage operation, without anxiety as to whether he will thereby incur liability to competing salvors.

From this principle an exception ought only to be made in the case where there has been a clear breach of duty on the part of the intervening salvor B; for example, where B has influenced the director's decision by giving incorrect information about positions, horsepower and other salvaging capacity, about the disabled vessel, etc. This approaches the case of a fraudulent appropriation of another's business, where a liability must clearly be imposed.