Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bird and others v. *Gibb and others* (*the "De Bay"*) *from the Vice-Admiralty Court of the Island of Malta, delivered* 30*th June* 1883.

Present :

SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR JAMES HANNEN.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

The "Mary Louisa," a new steamer of 1,287 registered tonnage, with engines of 200 horse power, and a crew of 26 hands, left Marseilles on the 11th December 1881, in ballast, bound for Girgenti, in Sicily, under charter party, to load from that and other ports a cargo of fruit for New York or Baltimore. At 8 p.m. of the 13th Cape Granitola, in Sicily, was sighted, and at 10 p.m. three vertical red mast-head lights of a steamer were seen on the starboard bow, the signals indicating that she had broken down, and rockets were also being fired from her. This steamer proved to be the "De Bay," which had lost her propellor, and was heading towards the coast of Sicily at a distanceof about 10 miles.

The "De Bay" was a screw steamer of 1,085 tons register, of 160 horse power, and a crew of 37 hands, with a general cargo, and five adult passengers and three children, bound for

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Rangoon. The master of the "De Bay" requested to be towed to Malta. The master of the "Mary Louisa" hesitated, as he would thereby be deviating from his voyage to Girgenti, then nearly accomplished, and might forfeit his charter party; but in consideration of the risk to the "De Bay," and the lives of those on board of her, if assistance were not given, he ultimately consented to take the "De Bay" in tow to Malta.

At 2.30 a.m. of the 14th the towage commenced, a steel hawser from the "De Bay," and a new thirteen-inch Manilla rope of the "Mary Louisa" being used. The wind gradually increased to a gale, causing great difficulty in the towing; and, ultimately, at 3.20 p.m. of the 14th, the steel hawser parted, and soon after the Manilla tow rope also gave way, and great danger arose of the propeller of the "Mary Louisa" becoming fouled in the hawsers. It was impossible to renew the towage that afternoon, and the "Mary Louisa," at the request of the "De Bay," endeavoured to remain by her during the night; but, in consequence of the violence of the storm the vessels lost sight of one another. At 9 a.m. of the 15th the "Mary Louisa," which had been in search of the "De Bay," again sighted her, and at 10.45 came up with her. The steel hawser and Manilla rope were again made fast, and the towage was resumed; the steel hawser, however, parted, and the towage was continued with the Manilla hawser throughout the rest of that day and the following night; and on the 16th, at 5 p.m., the two vessels arrived at Valletta.

The services thus rendered to the "De Bay lasted altogether during a period of 62 hours. In the earlier part of this time these services were rendered in circumstances of great difficulty and some danger, and during the 20 hours in which they were interrupted the "Mary Louisa" showed great perseverance in standing by the "De Bay,"

and seeking her in order to renew the efforts for her assistance.

The agreed value of the "De Bay," her cargo and freight, is 67,000*l.*

A suit for salvage was instituted by the "Mary Louisa" in the Admiralty Court at Malta against the "De Bay." The Court was assisted by two experts, Captain Keston, chosen by the Plaintiffs, and Captain Dyer by the Defendants.

Captain Keston places a much higher estimate than Captain Dyer does on the value of the services rendered by the "Mary Louisa" to the "De Bay," but Captain Dyer stated that in his opinion "the service rendered by the 'Mary "Louisa' to the 'De Bay' was most important "and valuable, being conducted with much per- "severance." He further says, "The Captain "and crew of the 'Mary Louisa' should be well "considered, for they showed much perseverance "in sticking by the 'De Bay,' and they had a "most trying and anxious time throughout." Captain Bird, in a declaration made before a Notary, on the 21st December, stated that the "'Mary Louisa' prolonged her voyage and "suffered considerable damages consequent on "the services rendered," and that his own "vessel was in a perilous condition, being un- "manageable and near the land and reefs." Upon this and other evidence in the cause their Lordships think that the Judge was well warranted in finding that the "De Bay" and her cargo, crew, and passengers were "rescued from "a serious danger of total loss, though without "any serious danger incurred by the 'Mary "Louisa.'" For these services the learned Judge awarded the sum of 8,535*l.* 1*s.* 6*d.*

It was objected on behalf of the Defendants that this sum is excessive, and the decision of the learned Judge was specially impugned, on the ground that he has allowed the specific amount

of 3,535*l.* 1*s.* 6*d.* for the damage, losses, and expenses alleged to have been incurred by the "Mary Louisa," to which he has added 5,000*l.* for salvage services. The particulars of the damage, losses, and expenses will be found at page 116 of the Appendix.

It was contended that some of these items ought not to be taken into consideration at all, as, for instance, the loss on charter; and it was further contended that in no case ought the items of loss or damage to the salving vessel to be allowed, as "monies numbered," but that they should only be generally taken into account when estimating the amount to be awarded for salvage remuneration.

Their Lordships are of opinion that this objection is not well founded. It was argued that, by allowing the several items of the account, and then a further sum for salvage, the salvors would receive payment for their losses twice over, but this is only on the supposition that the Court below, after giving the amount of the alleged losses specifically, has considered them again generally in awarding 5,000*l.* for simple salvage services. It is not to be presumed that the learned Judge has fallen into such an error, and, indeed, it appears that he has not done so, but that he considered the 5,000*l.* a reasonable amount for salvage reward, wholly irrespective of damage and expenses.

Their Lordships are of opinion that it is always justifiable and sometimes important, when it can be done, to ascertain what damages and losses the salving vessel has sustained in rendering the salvage services. It is frequently difficult and expensive, and sometimes impossible, to ascertain with exactness the amount of such loss, and in such cases the amount of salvage must be assessed in a general manner upon so liberal a scale as to cover the losses, and to afford also

an adequate reward for the services rendered. In the assessment of salvage, regard must always be had to the question whether the property saved is of sufficient value to supply a fund for the due reward of the salvors, without depriving the owner of that benefit which it is the object of the salvage service to secure to him. If, as in the present case, the fund is ample, it is but just that the losses voluntarily incurred by the salvor should be transferred to the owner of the property saved, for whose advantage the sacrifice has been made, and, in addition to this, the salvor should receive a compensation for his exertion, and for the risk he runs of not receiving any compensation in the event of his services proving ineffectual; for, if no more than a *restitutio in integrum* were awarded, there would be no inducement to shipowners to allow their vessels to engage in salvage services. If there be a sufficient fund, and the losses sustained by the salvor are ascertained, it would be unreasonable to reject the assistance to be derived from that knowledge when fixing the amount of salvage reward, and their Lordships are unable to appreciate the argument that that which is known may be taken into account generally, but not specifically.

There are several reported cases in which the Court of Admiralty has, besides awarding salvage services, decreed payment of damage and losses sustained by the salvor, and has directed them to be ascertained and reported on by the Registrar and merchants.

"The Salacia," 2 Hag. 270. "The Oscar," 2 Hag, 201. "The Watt," 2 W. Rob, 72. "The Saratoga," 1 Leesh, 322.

Their Lordships are therefore of opinion that the learned Judge below has not adopted an erroneous principle in first estimating the amount of loss sustained by the "Mary Louisa," and

then adding to it an amount for salvage services, but their Lordships are not prepared to accept all the items of loss which have been allowed in the Court below.

For example, their Lordships do not consider that the loss on charter party was established by the evidence. This item as to 200*l.* appears to have been arrived at by simply deducting the difference of freight payable under the substituted charter party which the "Mary Louisa" obtained, from that which she would have received under the one which she lost. But these charter parties were for different voyages and under different conditions. The sum to be paid under the original charter party included remuneration for proceeding from Marseilles to Girgenti in ballast, which the "Mary Louisa" had not to do under the second charter party. With the exception of the loss of commission on the freight under the first charter party, which is alleged to have been paid, though the proof of this loss is not very satisfactorily established, there is nothing to show that the second charter party was not as profitable as the first.

Their Lordships think that the item of interest ought not to have been admitted, and there are other items in the account which their Lordships would feel disposed to disallow if the matter were now being investigated for the first time before them, but no objection appears to have been taken to these in the Court below, and they do not in their aggregate amount to a sufficient sum to warrant the variation of the judgment appealed from. It is only where the amount awarded is grossly in excess of what appears to be right that their Lordships would feel justified in overruling the decision of a Court below on a question of salvage.

There is one item, however, of the claim for losses which calls for special notice; it is the sum

of 1,500*l.* for general depreciation of the "Mary Louisa." Their Lordships consider this a very large amount to allow for the depreciation of the vessel beyond the damage actually ascertained and repaired at Malta. This sum was arrived at on the assumption that the overstraining of the vessel and racing of the engines during the towage would be equivalent to six months' ordinary wear and tear of the vessel.

Captain Keston was disposed to fix it at a higher amount. Mr. Hinchcliffe, a surveyor called for the Plaintiff, fixed the amount of general depreciation at five per cent. Captain Baines, another surveyor, stated that the general depreciation would amount to four or five months' wear and tear, or, at the utmost, six months. Captain Dyer ultimately joined with Captain Keston in reporting that the explanation given at a conference they had with the surveyors allowed them to come to the conclusion that the wear and tear might amount to five per cent., which, upon the estimated value of 30,000, would give 1,500*l.*

It appears, therefore, that it was not disputed by the Defendants and it seems probable that some depreciation of the ship beyond the damage which could be actually seen would arise from straining, and upon the evidence before the Court at Malta, their Lordships are not in a position to hold that the sum of 1,500*l.* awarded was grossly excessive, still less to hold that the claim for general depreciation should be altogether disallowed.

But, while their Lordships are of opinion that the learned Judge has not erred in the principle upon which he has based his judgment, and that the amount which he has allowed for loss and damage is not so excessive as in itself to call for an alteration of the judgment, it is obvious that when the claim of loss, damage, and expenses have been ascertained and allowed, as in this case,

with assumed exactness, the rate of salvage remuneration pure and simple to be allotted in addition must be estimated on a more moderate scale than where the amount of losses, &c., cannot be fixed with precision, and their Lordships are of opinion that, in awarding the sum of 5,000*l.* in addition to the estimated losses, the learned Judge has adopted too high a standard of remuneration, and that the amount ought to be reduced. Their Lordships have the less hesitation in diminishing the amount awarded as they are able to see that the learned Judge has proceeded upon what their Lordships consider an erroneous view of the evidence with regard to this sum of 5,000*l.*

The "Mary Louisa" arrived in Valetta on the 14th December. On the 17th she was surveyed by Messrs. Hinchcliff and Stacey for the Plaintiffs, and they gave a written report in which, in addition to the specific damages they pointed out, they state that the vessel was much strained and damaged in decks and upper works by the heavy work she had done. After this survey the two captains had a conversation, in which Captain Bird, the captain of the "De Bay" asked Captain Gibb, the master of the "Mary Louisa," "what "he thought would be a reasonable compensa-"tion for what he had done." Captain Gibb replied, "Do you think 5,000*l.* remuneration "would be unreasonable?" Captain Bird said, "Not at all, I think it very fair indeed," and on the 20th December he telegraphed to his owners:—"'Mary Louisa' amicably demands "5,000*l.*; considering important salvage ren-"dered, amount reasonable. Wire instructions."

The learned Judge observes upon this evidence that he thinks that this must have been meant to be only for the reward and not including the expenses, because it does not appear that on the 21st, when the conversation took place and the

telegram was forwarded, they had any knowledge of what the expenses would come to, and that he cannot believe they would have seriously made to their respective owners a proposal of 5,000*l.* intended to cover a loss exceeding 3,500*l.*, leaving for apportionment a sum less than 1,500*l.* Their Lordships are of opinion that although the captains did not know the exact amount of the damages, they knew their general nature, and that they did intend the 5,000*l.* to include the whole claim. As this was never agreed to it was not binding either on the parties or on the Court, but the learned Judge appears to have taken it as a fair amount to be awarded for salvage in addition to expenses, because, he says, he "did not think that there was reason for "reducing the sum which Captain Bird declared "in his opinion was a fair and reasonable "proposal."

Their Lordships think that this is not the true construction of Captain Bird's language and telegram, and therefore that undue weight has been given to the supposed agreement of the captains.

Taking all the circumstances into consideration, their Lordships are of opinion that 6,000*l.* is a sufficient amount to award, and they will humbly advise Her Majesty that the judgment should be varied by reducing it to that amount.

Each party will bear his own costs of the appeal.