Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of the Compagnie Générale Transatlantique and Others v. *the Owners of the "F. T. Barry;" and the Same* v. *the Owners of the "Spray" (the "Amérique"), from the High Court of Admiralty; delivered 19th December*, 1874.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Robert P. Collier.

THESE appeals are upon a question of salvage. The vessel salved, the "Amérique," was a very large iron screw steamer of 4,600 tons register, running habitually as a passenger vessel between Havre and New York. In the afternoon of the 14th of April, 1874, being on her return voyage from New York, with eighty-three passengers and a very valuable cargo of merchandize, she was abandoned by her master, crew, and passengers, under the apprehension that she was sinking, and left to the mercy of the wind and waves, when about seventy or eighty miles west of Ushant.

In that condition she was first seen early in the morning of the 15th by the barque "Auburn," which, having made for her, succeeded in putting four men on board of her about 10.30 A.M. Very shortly afterwards she was also boarded by a boat's crew from the screw steamship "Spray," consisting of the mate of that vessel and two other men, who were afterwards joined by the engineer and a fireman from the "Spray." The "Amérique," when first boarded, was found to be on the starboard tack, with two close-reefed top-sails; the foot of her

mizen was out, and she had a strong list to port. On examination it was found that she had a good deal of water in her, coming partly through a port of which the glass was out; that the pumps were choked; and that the water was too high to allow the mate and engineer to get at the machinery. From what they observed, and from the fact that her own master and crew had abandoned her, those who made the examination might fairly conclude that the condition of this derelict vessel was far worse than it afterwards proved to be. The master and crew of the "Spray," with the aid of two men whom the master of the "Auburn" agreed to leave for that purpose, nevertheless undertook the task of taking the "Amérique" to a port of safety. It is unnecessary to state in detail the measures which they adopted for this purpose. It is sufficient to say that the "Spray," having towed the "Amérique" during the whole of the night of the 15th, at the rate of about two knots an hour, sighted the "F. T. Barry" early in the morning of the 16th, made signals to her, and ultimately agreed with her that she should assist in towing the "Amérique" to a safe port. The two steamers, with more or less of misadventure, succeeded in getting the "Amérique" safely into Plymouth on the evening of the 18th of April; but she continued to be under charge of the master and crew of the "Spray" until 7 P.M. of the following day, when she was taken in charge by the Collector of Customs.

The admitted value of the vessel and cargo thus salved is 190,000*l.*

The "Spray" was a screw steamship of 393 tons net register, manned by a crew of sixteen hands, all told, with engines of 80 horse-power nominal, but working up to 390 horse-power. She had left Newport on the 12th of April laden with coals and bound for Gibraltar. And it is pleaded that at the time of the services she was of the value of about 15,000*l.*; her cargo being of the value of 650*l.*; and her freight out and home being of the value of 1,270*l.* She does not appear to have sustained any serious damage during the service, beyond breaking her hawser, and having two butts on the port side torn out. In fact, by her pleading she assesses this damage at only 60*l.*; the loss incurred by the owners by reason of the deviation from her voyage

at 130*l.*; and the extraordinary expenses incurred by them at 379*l.* 6*s.* 9*d.*

The "F. T. Barry" is an iron screw steamship of the burthen of 545 tons net register, valued at about 20,000*l.*, and propelled by two compound direct acting engines of 99 horse-power, working up to 400. Her crew at the time of the salvage service consisted of her master and twenty-two hands. She was homeward bound, having left Villa Real in Portugal, with a cargo of mineral ore and fruit of the value of 4,000*l.* for Newcastle on the 9th of April, 1874. She seems to have sustained damage to the amount of 600*l.*; and to have been delayed on her voyage for repairs for about twenty-one days.

There were two distinct suits for salvage. The one by the owners, master, and crew of the "Spray;" the other by the owners, masters, and crews of both the "F. T. Barry" and of the "Auburn." These suits were heard together before the Judge of the Admiralty Court, who awarded by way of salvage the gross sum of 30,000*l.*, which he divided in the following proportion, viz.:—15,500*l.* to the "Spray;" 14,000*l.* to the "F. T. Barry;" and 500*l.* to the "Auburn"—these sums to be taken in full satisfaction of all damages and expenses, as well as in compensation for the salvage services.

The present Appeal is against that decision.

That the vessel salved was a derelict, and that she and her cargo were saved by the exertions of the Respondents, that their services were in a high degree meritorious, and deserved a large measure of remuneration, are propositions which are not disputed by the Appellants. But they contend that the sum awarded by the learned Judge is out of all proportion to those services, and, on the ground of its exorbitancy, ought to be reduced by this Tribunal sitting as a Court of Appeal.

The jurisdiction thus invoked is one which this Committee, and also, as would appear from the "Cuba" (Lushington, p. 14), the Court of Admiralty when sitting as an Appellate Court, has always been slow to exercise. The general rule of non-interference has been within the last few years stated and enforced at this Board in the "Clarisse" and the "Neptune," both reported in 12 Moore, P.C. Reports; the "Carrier Dove," 2 Moore, P.C. N.S., p. 243; the "Fusilier," 3 Moore, N.S., 269; and

the "England," 5 Moore, P.C. 344. The object of the Appeal was in the "Clarisse" and the "England" to increase, in the other cases to reduce, the amount awarded. The general rule is nowhere better stated than in the "Clarisse," in which Lord Justice Knight Bruce said :—"It is a settled rule, and one of great utility with reference to cases of this description, that the difference (that is the difference between the sum awarded, and that which the Appellate Court may think ought to have been awarded) must be very considerable to induce a Court of Appeal to interfere upon a question of mere discretion. And in the "Neptune" Lord Kingsdown, after citing this passage from the Judgment in the "Clarisse," observed that the same rule must apply in diminishing the amount of compensation which is applied in increasing it.

The cases which establish and illustrate the exception to the general rule are the "Thetis," 2 Knapp, 390; the "Scindia" and "True Blue," 4 Moore, N.S. 101, and the "Glenduror," 8 Moore, N.S., 22, in which the amount awarded was increased; and the "Inca," 12 Moore, P.C., 189, and the "Chetah," 5 Moore, N.S., 178, in which it was reduced. It may be observed that in delivering judgment in the "Chetah," Lord Chelmsford stated that "it had been agreed by the Counsel on both sides that no case was to be found where, upon an appeal from a Decree for salvage services, the amount awarded had ever been reduced." But this statement of the authorities was obviously inaccurate, since the case of the "Inca," in which the amount awarded was largely reduced, and in which the Judgment of this Board was delivered by Dr. Lushington, was decided in 1858. Upon the authorities it cannot be doubted, nor, indeed, was it denied at the Bar, that the amount awarded may be reduced if the Appellate Court is satisfied (to use the words of Dr. Lushington in the "Cuba"), that it "is so exorbitant, so manifestly excessive, that it would not be just to confirm it."

To establish a case for the exercise of this exceptional and delicate jurisdiction it would obviously be material to show that the Judge of First Instance, in estimating the amount of remuneration to be awarded, had miscarried, by allowing his judgment to be influenced by something which ought not to

have influenced it at all; or else either by giving undue consideration, or by failing to give due consideration, to some circumstance fairly within his consideration. And accordingly the learned Counsel for the Appellants have laboured to show some such miscarriage in the judgment under appeal.

Their arguments were founded first, on the observations made by the learned judge in pronouncing against the defence, founded on alleged acts of pillage on the part of the salvors, which was originally set up by the Appellants. Their Lordships, however, cannot see the slightest ground for supposing that, whatever the learned Judge may have felt touching this plea, he allowed that feeling in any degree to affect his judgment in estimating the amount of remuneration which he awarded. Another argument was more plausibly founded on the reference made by the learned Judge to the French law, and to the compensation which a French Court would have awarded to the salvors had they carried this derelict vessel into Brest. It must, in their Lordships' opinion, be admitted that, if the judgment of the learned Judge was influenced by that consideration, it was not properly so influenced. The consideration how the courts of another country, and that the country of the owners of the vessel salved, would deal with a subject *communis juris*, like salvage, might be legitimate, and even useful, if the courts of that country proceeded upon the same principles as those which govern our courts. But where it appears that the French courts are governed by a positive rule of law which prescribes that a fixed proportion of the value of a derelict is to be awarded to the salvors, and that our courts have for nearly two centuries repudiated that hard and fast rule of proportion, it is obvious that nothing can be deduced from the French law except an inference that the Appellants might have been in a worse case if their ship had been carried into a French port. It affords no ingredient which can legitimately be imported into the calculation of the sum to be decreed against them in an English court.

Their Lordships however, though unable to account altogether for this reference to the law of France, find that in the paragraph in the judgment which immediately follows it, the learned Judge expressly stated that the case was to be decided by

the *lex fori;* and their Lordships are, therefore, not satisfied that he did not intend to decide it upon the principles by which his own Court is habitually governed without reference to the French law. They will, therefore, deal with the question before them as simply one of alleged excess or exorbitancy.

It seems to be indisputable that the amount awarded in this case is larger than any that was ever awarded by an English Court of Admiralty, except that given in the case of the "Thetis." The services in that case, however, were of the highest merit. They lasted during many months; they involved the use of ingenious and complicated machinery; actual loss of life in at least one case; actual loss of health in many cases; great hardships, exposure, and privations to all actively concerned in them. In the present case their Lordships, without wishing in the slightest degree to detract from the courage with which the salvors undertook, and the ability with which they performed, the services in question, cannot but observe that those services, considered with reference to their duration, to the danger to life incurred by the men, to the damage or risk of damage incurred by the vessels employed, and to the consequences or probable consequences of their deviations from the voyages on which they were employed, fall far short of services which in other cases, and even in cases of derelict, have been remunerated by much smaller sums. It follows then, that the value of the property salved is the consideration on which, if at all, this exceptional award of remuneration is to be justified. And this raises the question to what extent, if any, undue effect has been given to that consideration.

It was argued on the authority of a case decided by Dr. Lushington in 1866 (the "Syrian," reported in 2 Maritime Law Cases, p. 387) that the value of the property salved is material only in so far as it supplies a fund adequate to the payment of a liberal remuneration for the services rendered; and that it ought not further to affect the measure of that remuneration. The passage in Dr. Lushington's Judgment which is relied upon is as follows: "In dealing with the present case, the Court also bears in mind that there is a large amount of property salved; but for the single purpose of remembering that it is enabled out of

an ample fund fitly to remunerate meritorious services well performed; and the Court does not hold the large value of the property salved as a fund for attempting to extort from the owners of that property or from the underwriters, as the case may be, more than full recompense for such services." Their Lordships do not think that this passage can fairly be taken to import a ruling that the *quantum* of remuneration is not in any degree to be affected by the value of the property salved. Such a ruling would be hardly consistent with what the same learned Judge has laid down in his Judgment delivered by him at this Board in the case of the "True Blue," 4 Moore, N. S., 104, in 1866. He then cited what Lord Stowell had laid down in the "Aquila," 1 C. Rob., p. 37, to the effect that "the proper mode of considering the question is, what is the fit and proper amount, with reference to all the circumstances, including the value of the property salved, and the risk to the property of the salvors? And at p. 106 he assigns the value of the vessel salved as a ground on which their Lordships ought to increase the sum awarded by way of salvage remuneration by the Court below. That the value of the property salved is, to some extent, to be treated as an ingredient in the calculation of the *quantum* of salvage remuneration is a proposition which might be supported by a long series of decisions beginning with those of Lord Stowell in the "William Beckford," 3 C. R., and Sir John Nicholl in the "Industry," 3 Hogg, 208, and coming down to the present time. And their Lordships do not conceive that it was the intention of the learned Judge who decided the case of the "Syrian" to run counter to, or even to qualify the decisions of, his predecessors on this point. The rule seems to be that though the value of the property salved is to be considered in the estimate of the remuneration, it must not be allowed to raise the *quantum* to an amount altogether out of proportion to the services actually rendered. And this is consistent with what is said by Lord Stowell in the "Blenden Hall," 1 Dodson, p. 421, "In fixing a proportion of the value the Court is in the habit of giving a smaller proportion where the property is large, and a higher proportion where the value is small, and for this obvious reason, that in

property of small value a small proportion would not hold out a sufficient consideration; whereas in cases of considerable value a smaller proportion would afford no inadequate compensation.

Applying these principles, their Lordships, with the most anxious desire not to infringe the wholesome rule which allows great latitude to the discretion of the Court of First Instance in cases of this description, have been unable to resist the conclusion that the learned Judge has given undue weight in this case to the value of the property salved, and has consequently awarded a sum which, having regard to the services rendered, their Lordships must pronounce to be excessive. Taking into consideration all the circumstances of the case, the nature and duration of the services, and also the fact, dwelt upon by the learned Judge, that the merit of the salvors was enhanced by their removing what might have proved a dangerous obstacle to navigation, and giving the utmost weight due to the value of the property salved, their Lordships are of opinion that 18,000*l.* is the utmost amount that can be given consistently with justice to the owners of the "Amérique," and the rules which govern the ordinary practice of Courts of Admiralty in England. And they will humbly advise Her Majesty that the sum awarded be reduced to that amount. Following the precedents of the "Inca" and the "Chetah," they think that each party should bear their own costs of this appeal. They do not propose to alter the proportions in which the judgment under appeal has apportioned the sum awarded amongst the different classes of salvors, and the result of their Lordships' judgment will be that the sum awarded to each class will be diminished by two-fifths.

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