1904
Oct. 28.

ADMIRALTY DISTRICT OF BRITISH COLUMBIA.

THE VERMONT STEAMSHIP CO. LTD.

AGAINST

SHIP "*ABBY PALMER.*"

Shipping—Basis on which salved vessel is valued—Reference as to value before trial—Salvage—Value of res—Market value—Value to owner.

Where, in a case of salvage, there is no market value for the ship in the port where it is brought by the salvors the *res* should be valued not on the basis of a forced sale but as a "going concern" in the hands of a solvent owner using it for the particular purposes of his trade at the sum for which the owner, as a reasonable man, would be willing to sell it.

THIS was an action for salvage services rendered by the Steamship *Vermont* on the west coast of Vancouver Island.

The case was heard before the Local Judge for the British Columbia Admiralty District, on the 22nd and 23rd days of January, 1904. Commander F. J. Parry, N.R., and Commander H. G. G. Sandeman, R.N. sitting as Nautical Assessors.

E. V. Bodwell, K. C. and *J. H. Lawson, Jr.*, for the plaintiffs cited The *Clyde* (1); *Williams & Bruce's Ad. Practice* (2); The *William Beckford* (3); The *Industry* (4); The *Ella Constance* (5); The *Thomas Fielden* (6); *Kennedy on Salvage* (7); *Bird* v. *Gibb* (8); The *Edenmore* (9); The *Erato* (10); The *Glengyle* (11); The *Janet Court* (12).

(1) Swab. 23.
(2) 3rd. ed. p. 110.
(3) 3 C. Rob. 355;
(4) 3 Hagg. Adm. 203.
(5) 33 L. J. Adm. 191.
(6) 32 L. J. Adm. 61.
(7) P. 199.
(8) 8 App. Cas. 559.
(9) [1893] P. 79.
(10) 13 P. D. 163.
(11) [1898] App. Cas. 519.
(12) [1897] P. 59.

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Argument of Counsel.

W. J. Taylor, K. C. for the ship cited The *Amérique* (1); The *Glengyle* (2); The *August Legembre* (3); The *Inchmaree* (4); The *Janet Court* (5); The *Hestia* and the *Derwent Holme* (6); The *Cleopatra* (7); The *I. C. Potter* (8); The *Glenduror* (9); The *Chetah* (10); The *Scindia* (11); *George Dean* (12); The *Stella* (13); The *Georg* (14); The *Dwina* (15); The *Edenmore* (16); The *Accomac* (17); The *Rialto* (18); The *Mark Lane* (19); The *Monarch* (20); The *Werra* (21); The *Laertes* (22); The *Lancaster* (23); The *Kenmure Castle* (24).

MARTIN L. J. now (October, 28th, 1904,) delivered judgment.

This is an action for salvage, and though by the statement of defence the plaintiff's claim is disputed not only as to the amount, but also as to the seamanship displayed in the salvage operations, yet during the trial not only was the latter position somewhat tardily abandoned, but the defendants counsel in his argument said "we do not attack their seamanship, but compliment them on it."

In view of this admission and that contained in the 16th paragraph of the defence, that the ship was in danger, the main issue is reduced to settling the amount of the reward that the plaintiffs are entitled to.

Now while the defendants admit in said paragraph that the ship was in danger, they set up that she was

(1) L. R. 6 P. C. 468.
(2) [1898] P. 97.
(3) [1902] P. 123.
(4) [1899] P. 111.
(5) [1897] P. 59.
(6) [1895] P. 193.
(7) 3 P. D. 145.
(8) L. R. 3 Ad. & Ec. 292.
(9) L. R. 3 P. C. 569.
(10) L. R. 2 P. C. 205.
(11) L. R., 1. P. C. 241.
(12) Swa. 290.
(13) L. R. 1 A. & E. 340.
(14) [1894] P. 330.
(15) [1892] P. 58.
(16) [1893] P. 79.
(17) [1891] P. 349.
(18) [1891] P. 175.
(19) 15 P. D. 135.
(20) 12 P. D. 5.
(21) 12 P. D. 52.
(22) 12 P. D. 187.
(23) 8 P. D. 65.
(24) 7 P. D. 47.

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not in a hopeless condition and that even if she had not been rescued by the *Vermont* they would have been able to save the said ship from actual loss. On this point I am advised by the assessors, and I concur with them, that the ship was in such a dangerous condition, because of the wreckage, that having regard to the season of the year, the unsettled weather, and to the currents, she would have helplessly drifted ashore on that dangerous part of the coast and in the manner indicated by Captain Walbran; and that this could only have been avoided by the happening of extraordinary events which there is no ground for believing would have happened. And further, that the account of the master of the *Vermont* as to the position of his ship and his statements generally should be accepted seeing that they are corroborated by the speed and time of towage; but that on the contrary the story of the master of the *Abby Palmer* regarding the alleged eight mile drift backward, and his position, and otherwise, is unreliable. And further, that the master of the *Vermont*, though there was great danger and risk under the circumstances of fouling his screw with the hawser, which would have placed his ship and cargo (valued at $350,000) in a position of peril, performed the salvage services as a whole, and handled his ship throughout, in a highly creditable and seamanlike manner. And further, that the contention that the barque could have been relieved by the sailing ship, stated to have been signalled, is rejected.

Having regard to the foregoing findings, and those facts which are undisputed, what sum should he awarded? But before this can be arrived at the value of the property salved, here the ship only, must be determined, for it is an important ingredient in fixing the amount, and it is disputed, which raises a difficult

and, in this class of action, unusual question, which has necessitated a lengthy and careful investigation of the authorities.

And I pause here to say, for the future guidance of litigants, that this is a separate and distinct question which causes inconvenience and delay to enter into during the trial of a salvage action, as was done here, and for which no precedent has been found. One proper course to pursue on such a dispute arising is to direct a reference to the Registrar and Merchants as preliminary to the trial, or its further progress. This was the course decided upon by Dr Lushington in the case of the *George Dean* (1), where the point came up, but on his suggesting that an agreed value should be taken, as is usually done, that was ultimately acceded to and the trial proceeded. And it will be seen that a reference to fix the value was directed in *Dobree* v. *Schroder* (2). The most convenient and expeditious way, probably, would be to have an appraisement by the Marshal (3).

Up to a certain point the principle of valuation is clear. Thus in *Roscoe's Practice* (4), it is said: "If the value of the salved property is not agreed upon the usual practice is to assess it at the port of arrest; but, in strictness, the assessment should be the value as salved, at the place where, and the time when, the salvage service terminated, etc." And see *Williams & Bruce's Admiralty Practice* (5), to the same effect. "For the purposes of salvage the property saved is to be estimated at its value at the port where the services terminated."

But while it is clear that the value of the ship is to be taken as at the place and time above mentioned,

(1) Swab. 290.
(2) 2 My. & C., 489.
(3) Roscoe's Adm. Practice, 1903 p. 127, note (a).
(4) 1903 ed., p. 127.
(5) 1902 ed., p. 177.

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the question arises upon what basis is that value to be ascertained? Doubtless in an ordinary case of salvage, as in that of a total loss by collision, value means "market value", but does that mean and contemplate the proceeds of a forced sale? That is what the defendants contend for, but none of the cases cited by their counsel bears out that view. In fact in one of them, and a salvage case, *The Georg*, (1) the point was taken by counsel that "a subsequent forced sale is no proof that the estimated value of the property to the parties, at the time it was brought into safety, was incorrect;" and on this point the court says (2):

"The circumstance that the property sold for a comparatively small sum is not, I think, proof that the defendants were correct in stating the values of the ship and cargo to be less than the values at which they were appraised by the Marshal."

And as to the great weight to be attached to the Marshal's valuation, see *The Cargo ex Venus* (3).

There are three cases under certain repealed sections of *The Merchant Shipping Act* which are of some assistance: *Dobree* v. *Schroder* (4); *African Steamship Co.* v. *Swanzy* (5); and *Leycester* v. *Logan* (6).

In the first, a collision case with total loss, it was said by the Lord Chancellor "that a valuation and appraisement is the proper mode of ascertaining the value of the ship is clearly the meaning of the Act," and therefore that it was incorrect to base it on original cost and subsequent deductions in proportion to age. In the second case, one of total loss at sea, Vice-Chancellor Page Wood held, under the section in question (514th) that "the natural and obvious meaning of the term in question ('value') and that which

(1) [1894] P. 330.
(2) *Ibid.* p. 335.
(3) L. R. 1 A. & E. 50.
(4) 2 Myl. & C. 489.
(5) 2 K. & J. 660.
(6) 4 K. & J. 725.

under ordinary circumstances the court would attribute it, is what the ship would have fetched had she been sold immediately before the loss." But he goes on to point out some important limitations of that general rule in favour of resorting to original cost and depreciation under certain circumstances as follows (1):

"It is true, that the sum which the ship would have sold for, cannot, in all cases, be a true criterion of its value. Cases might arise, in which to adopt that criterion would lead to undue depreciation. A particular class of ships might be adapted for one particular description of traffic, and for that alone; and that description of traffic might be entirely occupied by one company, with which it might be hopeless to compete, so that there would be no market for a ship of that particular description. If such a case should ever occur, it would be necessary for the court to adopt some other criterion. One I venture to suggest might be, to ascertain the price given for the ship, and the subsequent deterioration. Some such criterion would have to be adopted; for otherwise the value of the ship would be what the ship would sell for to be broken up. Here, however, no one suggests that the value of this ship is to be taken at what she would have fetched to be broken up."

And in the third case, one of collision and total loss, the same learned judge, under the same section, said, after the ship in fault had been sold, "the value of the ship is what a purchaser is willing to give for her. That is to him the value of the ship."

This, it will be noted, is the value to the purchaser, not the owner, and the language will have to be taken in conjunction with, and in the light of, the remarks in the prior case and in the *George Dean* (2).

(1) 2 K. & J. at p. 664. (2) Swab. 290.

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It must be remembered that these three cases are in Chancery, and not salvage, and are decisions on a particular statute.

Turning again to the Admiralty Court, in the case of *The Clyde* (1), one of collision and total loss, Dr. Lushington says that:

"The value is the market price at the time of the destruction of the property, and the difficulty is to ascertain what would be the market price."

That is the difficulty which the court experiences in the case at bar.

And again at p. 25, after saying that "there are various species of evidence that may be resorted to—for instance, the value of the vessel when built," the same learned judge goes on to state:

"It is the market price which the court looks to and nothing else. It is an old saying 'the worth of a thing is the price it will bring.'"

Light is thrown upon the sense in which the expression "market price" is employed at p. 27, wherein the learned judge refers to it as "the ordinary price in the market of a vessel of this size and description at the time she was lost." That is a very different thing, to my mind, from a forced sale; a valuation on the basis of a forced sale is on the assumption that an "extraordinary price," and that a very low one, must be allowed for and provided against.

In the case of the *Ironmaster* (2) where there was a total loss following collision, the same learned judge lays down at p. 443 certain principles for ascertaining value as follows:

"The best evidence is, first, the opinion of competent persons who knew the ship shortly previous to the time it was lost; that evidence is manifestly entitled to most weight, because, assuming their competency

(1) Swab. at p. 24. (2) Swab. p. 441.

to form a just judgment, they had a personal knowledge of the state and condition of the vessel herself, whereas all other persons, however skilful, could only draw general inferences from their acquaintance with the prices of vessels somewhat similar about the same time. The second best evidence is the opinion of persons such as I have just described, persons conversant with shipping and the transfers thereof. In addition to testimony of this description, many other circumstances may be called in aid,—as the original price of the vessel; the amount of repairs done to her; the sum at which she was insured, and other circumstances of a similar nature. It is manifest that facts of this kind, though not to be wholly excluded, have a slighter bearing upon the case; for after a lapse of years the amount of price might, from a change of circumstances, have little bearing upon the question; so, to a certain extent, it would be with respect to repairs and insurances."

Again, on p. 444:

"I do not place great reliance upon the original price, because the value of ships is so constantly fluctuating."

On the other hand, however, he continues, p. 445:

"Moreover, though I do not consider the price given as a criterion of the value to be assessed, it is evidence, and strong evidence, too, when looking to the opinion of those gentlemen, that this identical ship did actually fetch £2,000."

The sum of £2,000 was her original cost, unmetalled.

In the case of *The Kate* (1), the decision in the *Clyde* was not adhered to in an important feature, viz.: that in a case of total loss the owners are only entitled to recover the market value of the vessel at the time of her loss. The learned President, Sir F. H. Jeune, dissents from this view and holds that a profitable

(1) [1899] P. 165.

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charter held at the time should be computed and added to her value. He says (1):

"The proper measure of damage in this case is the value of the vessel at the end of her voyage plus the profits lost under the charter-party."

That is but another way of saying, as is said elsewhere in the judgment, that her value is to be taken at the end of the voyage after she has earned her charter, and not at the time of her loss; indeed even if she had had no cargo on board interest would be given from the time of the collision (2).

Commenting upon this decision it is stated in *Williams & Bruce's Admiralty Practice* (3) that:

"The price which a ship would have fetched at a forced sale cannot be regarded as a fair test of her value."

And in *Roscoe's Admiralty Practice* (4), it is said that:

"The owner of a vessel totally lost, without cargo, and not under contract, is entitled to her value just prior to the collision; and if there is no market value, owing, for example, to her special construction, then the value to her owners as a going concern at the time of her loss."

In *Lowndes on General Average* (5), the question of value is treated in relation to contribution by various interests, and after pointing out that the first of those interests is the ship, the author proceeds as follows:

"To determine the actual value of a ship is not always very easy. On principle, a merchant ship being simply a machine for earning freights, the real value of a ship to her owner is the present capitalized value of all her future earnings, so long as she can be used as a

(1) [1899] P. 175.
(2) [1899] P. 174.
(3) p. 110, note (r).
(4) p. 197.
(5) pp. 305-6.

ship, after deduction of her working expenses; to which must be added the present value of the sum for which she may eventually be sold to be broken up. But, as the data for such a calculation do not exist, we have to adopt other tests, in the way of approximation. One of such tests is the value in the market, which represents the current opinions of ship-owners on the point. This test can be adopted when there is a market for ships of the kind, sufficiently extensive to give a fair approximation to the ship's real value. In the case of ships of a peculiar build, or exceptional size, or having qualities which specially adapt them to some one limited trade, the value in the market may not come near to the real value. In such a case it may be necessary to take account of the first cost; to make a deduction for age and wear and tear; to allow likewise, for changes that may have taken place, since the ship was built, in the cost of materials or the price of labour, or for later improvements in construction which may diminish her relative value. In short, no inflexible rule can be laid down beyond this; the principle is, the ship is to be valued at that sum for which the owner as a reasonable man would be willing to sell her; and this sum must be ascertained by the adjuster as well as he can."

These instructive observations afford the best guide that I have been able to find for determining the present question, because general average is based upon the duty of all to contribute towards what is sacrificed in time of danger for the good of all, and therefore is more akin to salvage, which arises from a voluntary act to preserve the ship or cargo, than to insurance, which arises *ex contractu*, or to collision, which arises *ex delicto*, and so rules of valuation in such cases have different bases. And Mr Lowndes' observations are also largely borne out, in addition

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to much that has been herein before cited, by the case of *Grainger* v. *Martin* (1), an insurance case, wherein it is said by Mr. Justice Crompton (p. 467):

"It is clear, therefore, that in this case the value of the ship in the market cannot be the true test."

And Mr. Justice Blackburn (p. 469) says that there was evidence that the value to be ascertained was the value of the ship to an owner wanting at that time such a ship for the particular purposes of his trade, and he goes on to say that:

"The ship being of a size and class for which there is no ordinary market, its value, as Mr. Mellish pointed out, is not to be tested by what it would sell for in the market where there are no buyers."

And see the note, at the foot of that case as reported in the Philadelphia Edition, from Baily's Essay in 17 *Law Magazine* (1864) 3rd series, 76, on the varying values of ships and different methods of computation.

There is a decision in an Admiralty Court of the United States, *Leonard* v. *Whitwill* (2), which throws light on this question of market value and is very applicable to the present case. Mr Justice Brown, after citing with approval the cases of the *Ironmaster* and *Dobree* v. *Schroder*, above mentioned, says that "those decisions recognize equally the competency of evidence of the cost and deterioration as bearing on the amounts to be allowed. "Where from stagnation in the market at the time of the loss there is difficulty in fixing the precise market value, a resort to other modes of ascertaining it, especially where the vessel has been built but a few years, is at least allowable to be taken into account in arriving at a conclusion. The evidence shows that in 1877, when this vessel was lost, the market for sailing vessels was in a state of stagnation, and it was almost impossible to

(1) 2 B. & S., 456. (2) 19 Fed. Rep., 547.

ascertain any actual sales which would furnish proper data or any criterion for the determination of the actual market value. The different values sworn to are after all but mere estimates, and not based on knowledge of similar sales in 1877. It is impossible in such cases to determine the amount to be allowed with mathematical certainty." (P. 548.)

And this principle that there must be a certain frequency in purchases and sales of ships to give a market value in the proper sense of that term is also recognized in the case of *La Normandie* (1).

And in ascertaining the value any special circumstance which adds to the vessel's desirability should be considered and given weight to; and it is on this principle that the owners of a French fishing vessel which had libelled, in the U. S. Admiralty Court, a British ship which had collided with and sunk the vessel off the Grand Banks of Newfoundland, were allowed her value at her home port in France, though much testimony was offered to show that a like vessel, which English and American fishermen considered superior for her purpose, could be built or purchased in the United States, or Canada, or Great Britain, for a considerably less sum. It was held that what the libellants were entitled to have restored to them was a French vessel of the kind used in France for the purpose, and where there was a regular price for them. *Guibert* v. *British Ship George Bell* (2). And similarly it was held in *The Blenheim* (3):

"If a foreign ship is destroyed in American waters, and if in such place her market value is low by reason of our navigation laws, the measure of damages for her loss would be her value in the home market."

(1) 58 Fed. Rep. 427, at p. 431. (2) 3 Fed. Rep. 581.
(3) 17 Fed. Rep. 608.

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And the converse of that would be, and is, that if the foreign ship is salved in the open sea and brought to British waters, and she has by reason of the navigation laws of her own country a high market value there, then her value would be that of her home market, less the cost of taking her to that market. This equitable principle is of much weight in the present case because the *Abby Palmer* has an United States register, and the operation of the navigation and coasting laws of that country are such as to give valuable trade privileges to the United States bottoms which are denied to those of foreign countries.

In reviewing the foregoing decisions it will be noticed that they result in this that there is no decision on what is meant by "market price" in cases of salvage, though in collision, insurance and general average cases there is a good deal of authority, and some of it difficult to reconcile. As the learned judge says in *The Clyde* (1), "the difficulty is to ascertain what would be the market price" in such a case as the present. The fact is that there is really no market, in the proper sense of the word, in this port for ships of her class, and, as Lowndes puts it (*supra*), the test of a market value can only be applied "when there is a market for ships of the kind sufficiently extensive to give a fair approximation to the ship's real value." Not one ship of the kind has been mentioned by the witness as having been sold of late years; an iron ship, *The Columbia*, still for sale here, was valued by one of the witnesses, Lloyd's agent, in April, 1903, but she has not as yet been sold, and in any event has not a United States register, and, moreover, is 21 years old—so for this and other reasons cannot be taken as a standard comparison. *The Abby Palmer*, therefore, must on the evidence and for the purposes of this action be regarded as a particular

(1) Swab. at p. 24.

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class of ship, both as regards her class generally and the peculiar privileges of her foreign register in particular.

Such being the case, the court must resort to those other means of ascertaining value hereinbefore mentioned, and consider all the surrounding circumstances aided by the opinions of "persons conversant with shipping" and having special means of knowledge, and having regard to the original cost, age, depreciation, present condition rates of freight, and to local circumstances such as, in this case, the close proximity to this port of large ports on Puget Sound in the United States, where buyers at a fair price can reasonably be expected to be obtained if the ship be duly advertised. In short, as between the owners of the salved property and the salvers, the ship should be valued not on a forced sale basis but as a "going concern," as Roscoe puts it (*supra*), in the hands of a solvent and reasonable owner using her for "the particular purposes of his trade," as Mr. Justice Blackburn says, and then she should be valued, as Lowndes states, "at that sum for which the owner as a reasonable man would be willing to sell her." A ship such as this, which has a life of thirty years of which she has completed ten, must be valued on a different principle from a bale of merchandise, and somewhat akin to that adopted in the case of the less substantial, and therefore short-lived, class of house property in this country. A ship is not, in general, built or purchased like a stock of goods, but with an eye to an investment of relatively long duration, and having in contemplation the fluctuations of commerce during that time. It has, not unreasonably, been commented on by counsel that the defendants herein have made no effort to ascertain the value of their ship by calling for tenders, or advertising, or putting her up for sale with a reserved bid, or

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in any way ascertaining her value on that market which they contend exists and in which they assert she has only a very low price.

Applying the foregoing principles to the facts and turning to the valuations of the various witnesses, the usual striking difference of opinion is encountered, and several of those giving their estimates have little if anything to base them on. These estimates run all the way from $10,000 to $38,000, and I have found it far from an easy matter to arrive at what I consider a just valuation; but in view of all the circumstances I feel that I am safe in fixing it at $28,000.

On this valuation then, the award must proceed in the light of the circumstances hereinbefore set out.

It was pointed out by this court, in *Canadian Pacific Navigation Co.* v. *The C. F. Sargent* (1), that on the grounds of public policy the reward should be liberal, but "it varies very much according to the imminence of the danger to the ship on the one hand, and the skill and enterprise and danger of the rescuers on the other hand. But the question of the ship's danger is the first thing to be considered." (P. 335.)

The amount there awarded was $2,000, being 10 per cent. of the value of the ship, $20,000.

In the English courts all the leading cases on the subject will be found conveniently collected in Marsden's *Digest* (2), and in the books of practice of this court, chiefly in *Williams & Bruce* in Chapter VI, and in *Roscoe* in Chapter 1, wherein the rules and principles are clearly laid down, and it would be mere repetition to go into them. But each case has from the nature of things to be determined in the light of its own circumstances, and counsel have been unable to cite one which closely resembles the present. After giving weight to all those elements which are entitled to

(1) 3 Ex. C. R. 332. (2) Pp. 592 *et seq.*

weigh with me, I have arrived at the conclusion that the award should be fixed at four thousand two hundred dollars, for which amount let judgment be entered with costs.

Judgment accordingly.

Solicitors for plaintiffs: *J. H. Lawson, Jr.*

Solicitor for ship: *H. B. Robertson.*