

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Moore and others and Kirby and others v. the Owners of the "Scindia" (ship "SCINDIA"), from the Vice-Admiralty Court of the Cape of Good Hope; and Papayanni and others v. Hocquard (ship "TRUE BLUE"), from the Vice-Admiralty Court of Malta; delivered 26th June, 1866.

Present:

THE JUDGE OF THE HIGH COURT OF ADMIRALTY.
SIR JOHN TAYLOR COLERIDGE.
SIR EDWARD VAUGHAN WILLIAMS.

THEIR Lordships are about to deliver Judgment in the two suits which have recently been heard before the Court. They are cases, in which the same questions arise, and upon which similar arguments have been used, though the circumstances and the value of the property concerned in each case are totally different.

It is perfectly true, as it has been argued on behalf of the Respondents in these two cases, that this Court is always very reluctant to review cases of salvage, either coming from the Court of Admiralty or from the Vice-Admiralty Courts, on the sole ground of the pecuniary reward which has been bestowed in those Courts being deemed to be insufficient; because it is manifest that in all these cases there is the exercise of individual discretion, and that exercise of individual discretion almost always differs among different persons. Still, however, if they think that the justice of the case has not been attained, it is the duty of this Court, sitting as a Court of Appeal, to remedy any grievance which may appear to exist, and to do

that which under the circumstances they may consider to be right.

Having made this observation, the first point to which we will refer is that which has been very much argued, the question of deviation. In both these cases that question arises. There is no doubt whatever that in the strict sense of the term the vessel in each case was guilty of a deviation; and the consequences of being guilty of a deviation may be of the utmost importance.

In the first place the consequence of a deviation may be the voidance of the policies of insurance altogether, or, as was argued by Mr. Cohen, the consequence might be that actions might be brought by the owners of the cargo against the owners of the ship, according to the case he then cited.

Now with regard to the present state of the law upon this subject, it undoubtedly is left in an undecided state. Their Lordships will state all that they know about it; but they are satisfied from having formerly made as narrow an examination into the authorities as they possibly could, and again since yesterday, that it never has been directly decided by any Court in this country what is the effect of a deviation, where the object of that deviation has been the performance of salvage service with reference either to life or to property.

All that we know of the law upon the subject (having looked at the cases referred to as authorities) is to be found in the last edition of Mr. Justice Park's book on Marine Insurance, in which there are the following words: "And a ship may go out of her regular course in order to afford assistance to another ship in distress, without being guilty of a deviation." And, whoever may have used those words, he cites as authorities in support of that assertion, 6 East, p. 54, and 3 Robinson's Admiralty Reports, p. 294. There is also cited the case of the "Jane" in 2 Haggard's Admiralty Reports.

Now with regard to the "Jane," that case leaves the question exactly where it was before; it says nothing beyond expressing a doubt whether the law goes to the full extent of saying that in every case a policy of insurance would be vitiated under such circumstances. Nor does the case cited from 6 East, and the observations which fell from Mr. Justice Le Blanc in that case, appear to me to support

the passage which has just been read from Mr. Justice Park's book. The American authorities are well known to have taken a distinction between risk incurred in life salvage and in the salvage of property ; but it is also known (though it is impossible to refer to it, because it was merely the *ipse dixit* of a very learned person) that a Judge used this argument, he said it would be exceedingly injurious to the mercantile marine of England if in every case in which assistance should be rendered to another merchant vessel, the policy of insurance should become void ; and he expressed a doubt whether, under such circumstances, it would not be an exceedingly injurious thing to lay down an universal rule that policies shall always be vitiated, and that if the cargo be lost or damaged, an action will always lie against the owners of the vessel.

Now in these cases, their Lordships have been invited to solve that question. Their Lordships beg leave to decline that invitation. If we could have given it a direct solution at once, without taking time for consideration, we should have been very glad so to have done ; but we are of opinion that this question ought to be raised, not incidentally before this tribunal, but directly before another tribunal, as the great question at issue, and there receive the most careful deliberation, until at last it comes to a final solution and is set at rest.

We will only add that in all these cases where the Judge considers in his own mind what he ought to do with respect to the amount of salvage to be given, he can never forget that there was possibly a risk incurred by those on board the salving vessel in respect to the vacation of policies of insurance, and in regard to actions which might be brought against the owners of the vessel by owners of cargo.

So much for that point. The next point to which their Lordships must very briefly advert—which has been very much enlarged upon—is the question of derelict : that is, how far a case of derelict differs from one which is not derelict. On this point there are some very important observations in one of the earliest Judgments of Lord Stowell. It is in the case of the "Aquila," which is among the very first of his Judgments, and is to be found in 1 C. Robinson's "Admiralty Reports," page 37. In that case, after

a research into all the authorities which could be found upon the question, Lord Stowell considered what was the amount of salvage proper to be awarded in cases of derelict; whether or not there was an ancient usage of giving a moiety to those who rescued the vessel: whether there was any fixed proportion, or whether the fit and proper rule was not to look at all the circumstances, and give what, in the judgment of the Court, was the estimate of the proper amount; and he stated that the result to which he had arrived was that, though there was an ancient custom of giving a moiety of the value, which custom had lasted down to the time of Charles II, since that reign it had fallen into desuetude. He then goes on to state what had occurred from time to time, and comes to the conclusion 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 salvaged, and the risk to the property of the salvors?

Now, in truth and in fact, when the Court comes to consider the question of derelict or not, it takes into consideration the danger to the property; and so it does where the vessel is not derelict: the property may be in infinite danger though it is not derelict: but the Court always considers that one of the material ingredients, upon which it gives a large salvage, is the danger to the property; and the danger may be (we do not say it is, but the danger may be), and in certain cases of salvage it is, as great to the property which is not derelict as it is in other cases where the property is derelict. Therefore the proper course to pursue in all these cases is to consider the fact of derelict as being, as it were, an ingredient in the degree of danger in which the property is.

Now having said that, and disclaiming altogether the notion that there ought to be any particular proportion awarded in a case of derelict, though of course from the very principle we have stated, in the case of derelict a larger proportion of salvage would be given than in other cases, we now come very briefly to notice the cases which have been argued before us.

It appears that in the case of the "True Blue" the vessel which effected the salvage was the

"Laconia," a steam-vessel, the value of which was 30,000*l.* 300*l.* was given by the Court below. The value of the property salvaged was 1,452*l.* The vessel was taken possession of about 240 miles from Malta at noon on the 14th of February, and reached Malta on the 16th of February.

Now that the vessel was in danger when she was so taken possession of, having been so many days before abandoned by her own crew, there can be no doubt whatever; but there was nothing in the particular state of the weather at that time, nothing in the particular locality where the vessel was, to show there was any immediate danger of absolute destruction to the vessel. Every vessel when abandoned at sea, left without any one on board, is, of course, in considerable degree of danger, because, perhaps, in a short time it is almost absolutely certain that that vessel will come to entire destruction.

Well, now, with regard to the salvors themselves, this is a case in which the salvage was effected by a steamer, consequently there was no great degree of labour to those on board the vessel. A certain degree of additional labour there might be, but nothing to any great extent. Danger to the salvors there was none whatever. The vessel was afterwards detained at Malta for a certain length of time; as far as it is to be collected from the evidence of the master and crew, it was for about eleven or twelve hours. Now the question is whether regarding the value of the vessel salvaged, viz., 1,452*l.*, their Lordships ought to approve of the Decree of the Court below for 300*l.*: and we are all of opinion that it is not sufficient. We are of opinion that there ought to be a certain increase; we all think the sum which ought to have been given is 450*l.*

Mr. Brett.—Including the 300*l.*

The Right Hon. Dr. Lushington.—Including what has already been given. That is 150*l.* additional.

We now proceed to consider the case of the "Scindia."

The salvors in this case are the "Aminta" and the "Alicia Annie," and the property salvaged is very considerable. The value, as near as we can make out, is admitted to be about 31,000*l.* There is a

difference in the statements of the value; one case states it at 30,281*l.*, the other at 31,281*l.*, but probably about 31,000*l.* is a fair statement of the value.

Well, then, the next consideration is, what is the value of the salving ships and their cargoes? We are not able to fix it exactly. We are not at all aware what the value of the "Alicia Annie" was, though probably it was very considerable. The other vessel and cargo were certainly of very large value, worth 140,000*l.* or 150,000*l.*; it cannot be fixed more nearly, nor is it important that it should be done in this case. The number of salvors on board the two salving ships was no less than about forty men. Now the sum of money which was tendered was 2,000*l.*, and that sum the Judge of the Vice-Admiralty Court at the Cape of Good Hope deemed adequate. He deemed 2,000*l.* to be sufficient, and there he left the case. It appears he left the case there without doing anything more, because having pronounced his opinion that 2,000*l.* was sufficient for both ships, he may have thought that application would be made to him to wind up the case. We understand that is what he meant, though he does not express himself very definitely. He expected applications would be made to him on behalf of the two Appellants, with regard to the agreement which was made between them with reference to the division of the salvage.

The circumstances of this case are soon told.

The derelict vessel was at a certain distance from the shore, of course there is a difference in the evidence as to what the distance was; if there had been no difference in the testimony at all, it would have been the most surprising case their Lordships ever had to consider; however, there is a difference, though it is a matter of no great importance—it was at a distance of something like twelve or fourteen miles; but they say with great truth the vessel was in great danger, and so beyond all doubt she was at that period, with her port-holes open, her scuttles open, three feet of water in her, and the quantity of water of course increasing every hour, because that would be a matter of course even in calm weather, and if the weather had come on to blow she would have been in very imminent danger indeed. As to all the discussion about "immediate danger," if it is meant

that she was in "immediate danger" at that moment of going down and sinking, she certainly was not; but she was in "immediate danger" in another sense of the word, namely, unless some one came to her rescue in a very short time she would have been lost and destroyed altogether. Therefore, upon this point the question turns upon the effect of the word "immediate." When the "Alicia Annie" came to the assistance of the "Scindia," she certainly was not strong enough, looking at the number of her crew, to perform the work of salvage successfully in a short time; and when the "Aminta" comes up she makes an agreement with her that they shall share the salvage equally, the "Aminta" being a much larger vessel, and having a much larger crew, so that they could put on board the "Scindia" a sufficient number of sailors to effect the rescue of the vessel. That was done, and the vessel was, without much labour, conveyed safely into port. The distance signifies nothing; a few hours' sailing accomplished the whole distance, and the vessel was brought safely into port.

Now a tender having been made of 2,000*l.*, and that having been deemed by the Judge of the Court below sufficient, the question comes to us shortly in this shape—Was this a sufficient tender? That is the whole question, looking at the values, and taking into consideration (that which it is impossible for any one to define) the additional risk from having to make a deviation, in not the actual event, but the possible event, of the cargo being lost or damaged, an event which must to a certain extent not be forgotten in estimating the amount of salvage to be awarded.

Now we are all of opinion that 2,000*l.* was not sufficient, and we shall pronounce for an additional 1,000*l.*, which will make 3,000*l.*

But there is another matter remaining behind, and that is with regard to the "Alicia Annie." What their Lordships will do will be this: of course the costs must be paid, because we reverse the Judgment of the Court below. According to the agreement, 1,500*l.*, a moiety of the salvage, must be paid over to the owners of the "Aminta;" but with regard to the other 1,500*l.*, there is a difficulty as to what was going to be decreed by the learned

Judge of the Court below. We shall do this: we shall require 1,500*l.* to be left in the Registry, and then either the owners of the "Aminta" or the owners of the "Alicia Annie" may make an application to their Lordships, and they will decide, according to the justice of the case, what ought to be done with that 1,500*l.*

Mr. Brett.—With reference to the case of the "Aminta," your Lordships have decreed that the sum shall be 1,500*l.*; and as to that, there was a request that it should be apportioned.

The Right Honourable Dr. Lushington.—We were asked to distribute it?

Mr. Brett.—Yes, that your Lordships should say how much should go to the owners of the ship, and how much among the captain and crew.

The Right Honourable Dr. Lushington.—We must consult upon that.

The Queen's Advocate.—We wish to understand about the costs. We do not quite understand the decision your Lordships have come to about the costs.

The Right Honourable Dr. Lushington.—You must pay all the costs. You must pay all the costs the "Aminta" has been put to.

The Queen's Advocate.—And the costs of the "Alicia Annie" too? We quite understand we are to pay the costs of the "Aminta" of course.

The Right Hon. Dr. Lushington.—We will consider that.

The Queen's Advocate.—Perhaps your Lordships will consider that.

Mr. Brett.—Perhaps your Lordships will allow me to say one word about the "Alicia Annie." With reference to the 1,500*l.* which would have gone to the "Alicia Annie" but for certain circumstances in the conduct of the crew, may I ask your Lordships to name a time within which any applicants should apply to have it out? because otherwise, if it is left open, it might remain here for a very long period before we could take it out.

The Right Hon. Sir J. T. Coleridge.—It is for you to make the application.

Mr. Brett.—The judgment, as I understand it, is that it is to remain in the Registry until the Respondents should apply.

The Right Hon. Sir J. T. Coleridge.—No.

The Queen's Advocate.—We, the Respondents, have nothing to do with it all.

Mr. Brett.—Then we are to make an application, giving notice to the other side.

The Right Hon. Dr. Lushington.—Yes.

[Their Lordships conferred together.]

The Right Hon. Dr. Lushington.—Their Lordships propose to distribute the 1,500*l.* awarded to the "Aminta" in this way: to give 1,000*l.* to the owners, the salvage having been in reality chiefly performed by the vessel; 200*l.* to the master for the responsibility he incurred; and 300*l.* among the crew.

Mr. Brett.—That is quite sufficient. I understand your Lordships' judgment to give the "Aminta" the costs both below and here.

The Queen's Advocate.—We do not quite understand about the "Alicia Annie," to whom it is competent to interfere with respect to the other 1,500*l.* Is it competent to the Respondents to interfere in that case?

The Right Hon. Dr. Lushington.—Their Lordships will not decide that question now.

The Queen's Advocate.—Your Lordships do not decide it all, either that it is or is not competent.

The Right Hon. Dr. Lushington.—Certainly not.

The Right Hon. Sir J. T. Coleridge.—When the "Alicia Annie" applies to this Court for a partition (if it ever does), the parties who are concerned in opposing that partition will appear. The "Alicia Annie" will come here with such a case as she can make out, according to Lord Justice Turner's judgment.

The Queen's Advocate.—We should not like to be precluded from showing we have a right in a certain event. Your Lordships have intimated some part of the salvage might be forfeited. If there should be any forfeiture on account of the misconduct of the "Alicia Annie," we should contend that should enure to our benefit; and we should like to have an opportunity of saying that.

The Right Hon. Sir J. T. Coleridge.—Certainly.

The Right Hon. Dr. Lushington.—This will be the course now. Those who represent the "Alicia Annie" will present a petition that the 1,500*l.* may

be paid to them. You will appear on that petition, and deny their right, either deny it altogether, and pray it may be paid over to you, or part.

The Queen's Advocate.—Then probably your Lordships will not make any order as to the costs now.

The Right Hon. Dr. Lushington.—No.

The Right Hon. Sir J. T. Coleridge.—The costs will abide the event of that petition.

The Queen's Advocate.—There is one more question. Are we to pay another 1,000*l.* into the Registry? There is already 2,000*l.*; that is, in your Lordships' Registry. Must we pay another 1,000*l.*?

The Right Hon. Dr. Lushington.—Yes, you must pay another 1,000*l.* into the Registry; 1,500*l.* must remain in the Registry.

Mr. Rothery (Registrar).—They might do this. Instead of paying the additional 1,000*l.* into the Registry, they may pay it to the parties, the owners of the "Aminta," and they can take 500*l.* of the 2,000*l.* out of the Registry to make up the 1,500*l.*

The Queen's Advocate.—That would come to the same thing.

Mr. Rothery.—Yes, only it would save expense.
