

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Steamship "City of Peking" v. The Compagnie des Messageries Maritimes and others, from the Vice-Admiralty Court, Hong Kong; delivered 14th December 1889.]*

---

Present :

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

[*Delivered by Sir Barnes Peacock.*]

This is an appeal from a decree or order of the Vice-Admiralty Court at Hong Kong of the 27th of March 1888.

The point determined was the amount of damages which the Respondents the Compagnie des Messageries Maritimes were entitled to recover in a suit instituted by them against the Appellant the steamship "City of Peking" in respect of a collision which took place on the 29th of November 1886 in the harbour of Hong Kong between the said steamship "City of Peking" and the steamship "Saghalien," of which the Company were the owners.

In that suit the "City of Peking," having been found to have been alone to blame, was condemned in damages and costs by a decree (subsequently affirmed by this Board), by which it was referred to the Registrar of the Court to be assisted by merchants to ascertain the amount of damages and to report thereon.

60482. 100.—12/89.

▲

The Company brought in their claim containing many items, amounting to 1,491 francs and 95 centimes, 6,035*l.* 12*s.* 11*d.*, and 66,133 dollars and 25 cents, of which the particulars are set forth at page 5 of the Appendix, together with interest thereon at eight dollars per cent. from the 29th of November 1886 until payment.

One of the items of the claim is "No. 50, "demurrage for the steamship 'Saghalien' from "the 29th November 1886 to the 25th January "1887, being 56 days, 5,352*l.* 4*s.*"

The "Saghalien" was a vessel of about 3,823 tons gross, and M. de Champeaux, the agent of the Company at Hong Kong, stated that he claimed demurrage at 6*d.* a ton a day on the gross tonnage.

The Assistant Registrar, on the 6th of February 1888, after hearing both parties, reported that he allowed the amount, 5,352*l.* 4*s.*, claimed for demurrage, and all the other items of the Plaintiff's claim with some comparatively slight deductions, which are not material to be considered with reference to the present appeal. The total so allowed being 1,491 francs 95 centimes, 5,819*l.* 0*s.* 9*d.*, and 66,068 dollars and 79 cents, with interest at 8 per cent. until paid.

No objection was made to this report by the Plaintiffs, but the Defendant Appellant on the 21st February 1888 objected to the item allowed for demurrage. The Appellant also objected to several other items, the objection to which has since been abandoned, and is therefore not now material. The objections were heard by the learned Judge who delivered judgment thereon, and by an order dated the 9th of March 1888 referred back the report to the Registrar and merchants, with a direction to ascertain the number of days the "Saghalien" was prevented by the collision from taking up her position on her own day from Marseilles,

referring, as will hereafter appear, to the 30th January 1887, a day on which the "Saghalien," as one of a line of steamers belonging to the Company, was appointed to commence a fresh voyage from Marseilles to Shanghai.

The Deputy Registrar assisted by the same merchants having in pursuance of the last-mentioned order heard both parties, together with fresh evidence, including an affidavit of M. de Champeaux, again reported to the Court on the 21st March 1888 that 56 days' demurrage be allowed, and also specified his reasons for such report. To that report the Defendant on the 24th March 1888 objected, and contended that it should be varied, and that no demurrage ought to be allowed.

The learned Judge having again heard the case on the 27th March 1888, without assigning any further reasons, pronounced that the sums of francs one thousand four hundred and ninety-one centimes ninety-five (frs. 1,491. 95), five thousand eight hundred and nineteen pounds and ninepence (5,819*l.* 0*s.* 9*d.*), and dollars sixty-six thousand and sixty-eight and cents seventy-nine (\$66,068. 79) to be due to the Plaintiffs in respect of their claim, together with interest and costs. And he condemned the Defendants and their bail in the said sums, interest, and costs. The sum of 5,819*l.* 0*s.* 9*d.* so held to be due to the Company includes the sum of 5,352*l.* 4*s.* claimed by them and allowed by the first report for demurrage.

From that order or decree the present appeal has been preferred by the Defendant upon the ground that no demurrage ought to have been allowed, or in the alternative that the demurrage allowed was for too many days and at too high a rate, and also upon the ground that the rate of interest allowed was unreasonable. Their Lordships in the course of the argument intimated

their opinion that no objection having been made in the Lower Court in respect of the interest allowed the Appellant could not now support the appeal against such allowance.

The only question now to be decided is whether the Defendant ought to be held liable for the 5,352*l.* 4*s.* allowed for demurrage, or any part of that amount.

It was objected on behalf of the Respondents on the argument of the appeal in support of the third reason of their case that the objection to the demurrage taken in the Court below was not to the rate or number of days, but that no demurrage at all was due, and that the rate and number of days were not objected to in the Court below and were therefore not subject to appeal to Her Majesty in Council; but their Lordships are of opinion that that objection cannot be supported. The objection to the first report was that the report be varied, the following items (of which No. 50, "Demurrage for 'Saghalien,' 5,352*l.* 4*s.*, was one) being "objected to." In the objection to the second report the language was, no doubt, altered, the objection being, "that the report be varied, and that no demurrage be allowed." Their Lordships are disposed to think that even if the latter objection stood alone the Appellant would have been at liberty to contend that part of the sum allowed for demurrage ought to be disallowed, even though it might fail in showing that no demurrage ought to be allowed; but reading the second objection, coupled with the first, they have no doubt that the Appellant is at liberty to show that the whole or some part of the item of 5,352*l.* 4*s.* ought to be disallowed. In dealing with the case their Lordships consider that the Plaintiffs must be held to their claim for demurrage, from the 29th November 1886 to 25th January 1887, or in other words, during

the detention of the "Saghalien" at Hong Kong and that they are not at liberty to claim as demurrage any detention of the vessel at Marseilles after her arrival there on the 25th of February 1888, the 6*d.* a day claimed and allowed being limited to the period of her detention at Hong Kong, between the dates mentioned in item No. 50 of the claim.

There is no doubt<sup>r</sup> as to the rule of law according to which compensation is to be assessed in cases of this nature, where a partial loss is sustained by collision. The rule is *res-titutio in integrum*. (The "Black Prince," 1 Lushington's Reports, 573.) The party injured is entitled to be put, as far as practicable, in the same condition as if the injury had not been suffered. It does not follow as a matter of necessity that anything is due for detention of a vessel whilst under repair. In order to entitle a party to be indemnified for what is termed in the Admiralty Court a consequential loss resulting from the detention of his vessel, two things are absolutely necessary, actual loss and reasonable proof of the amount. (The "Clarence," 3 Wm. Robinson's Reports, 283; the "Argentine," 13 Law Reports, Probate and Admiralty Division, 61.)

There is no dispute as to the principal facts as stated by the learned Judge, page 21 of the Record :—

"The 'Saghalien' is one of the steamers of the Company which run regularly every fortnight from Marseilles to Shanghai. These steamers are subsidized by the French Government to carry mails from France to China and the ports on that course, and to take return mails to France. The China terminus is Shanghai, and it is from there that they commence their return voyage homewards after staying for a time at Shanghai something between a fortnight and three weeks it would seem from the evidence before the Registrar.

"They also stop for a short time apparently at Marseilles after the completion of the round trip and before commencing a fresh voyage to China.

“On the 29th November 1886 the ‘Saghalien’ was lying in the harbour of Hong Kong, having arrived from Shanghai two days before. She was homeward bound next day at noon. The ‘City of Peking’ arriving with the American mails in coming up to her anchorage collided with and damaged the ‘Saghalien’ so that she could not proceed on her journey to France, but had to be taken into dry dock. On the same day the steamship ‘Melbourne,’ another of the Company’s steamers arrived in Hong Kong from Europe with passengers, mails, and cargo, and in the ordinary course would have proceeded to Shanghai on the following day. The agent of the Company, M. de Champeaux, at once decided to send on the ‘Melbourne’s’ cargo, mails, and passengers by outside steamers to Shanghai, and to send the ‘Melbourne’ back to Europe instead of the ‘Saghalien.’ This decision was very promptly executed, and the ‘Melbourne’ having discharged her northern cargo had transferred to her the ‘Saghalien’s’ cargo, passengers, &c.”

The outward voyage of the “Saghalien” from Marseilles commenced on the 26th September 1886. If the collision had not taken place she ought in ordinary course to have left Hong Kong on her homeward voyage on the 30th November 1886, and to have reached Marseilles about the 3rd of January 1887, and according to the arrangements of the Company would have remained there unemployed until the 30th January in that year, when she was timed to take her turn and to start upon a fresh outward voyage to Shanghai. In consequence, however, of the collision she was detained at Hong Kong until the 25th January 1887, 56 days after the collision. She left on that day, arrived at Marseilles on the 25th of February in that year, and remained there unemployed until the 27th March, when she again sailed for Shanghai.

The “Melbourne” left Hong Kong on the 2nd of December 1886, two days after the “Saghalien” ought to have started, she arrived at Marseilles in due course early in January 1887, and remained there unemployed until the 30th of that month, on which day she took the turn which, but for the collision, would have

been taken by the "Saghalien," and sailed on a fresh outward voyage for Shanghai.

The "Melbourne" having been substituted for the "Saghalien" on the homeward voyage, was necessarily prevented from continuing her outward voyage to Shanghai and back, and other arrangements had to be made for carrying on to that port the mails, passengers, and cargo of the "Melbourne," and for her return voyage to Marseilles. These arrangements were attended with very considerable expense, in addition to the loss sustained by the withdrawal of certain passengers and freight, booked by the "Melbourne" from Hong Kong to Shanghai, but the whole of these expenses and losses were included in the Plaintiffs' claim, and have been allowed both by the Assistant Registrar and by the Judge, in addition to the claim of 5,352*l.* 4*s.* for demurrage. (See claim and report, Record, p. 18, items No. 28 to 30, &c.)

As to the homeward voyage from Shanghai, which would have been made by the "Melbourne" if she had not been substituted, M. de Champeaux, in his affidavit of the 18th March 1888, says:—

"The Company's steamship 'Amazone,' instead of remaining at Shanghai, according to the time tables of the Company, until the 6th day of January 1887, was despatched from Shanghai on the 23rd day of December 1886, to supply the place of the steamship 'Melbourne,' and the Plaintiff Company's steamship 'Yangtse,' instead of remaining in Shanghai until the 20th day of January 1887, was despatched from Shanghai on the 6th day of January 1887, in the place of the said steamship 'Amazone.'

"The Company's steamship 'Volga' was taken off the Hong Kong and Japan line, and was despatched from Shanghai on the 20th day of January 1887, in place of the said steamship 'Yangtse,' and she carried the mails, passengers, and cargo to Hong Kong, where they were transhipped into the said steamship 'Saghalien,' thus enabling that vessel to sail on the 25th January 1887 for Marseilles, otherwise the said steamship 'Saghalien' would have had to proceed to Shanghai for the mails, passengers, and cargo, which would have caused her to leave Marseilles again two weeks later than the 27th day of March 1887, the day she did leave.

"The Company's steamers usually remain at Shanghai for about 17 to 21 days, in order to thoroughly overhaul their engines and machinery, and in consequence of the earlier despatch of the said steamships, 'Amazone' and 'Yangtse,' as aforesaid, they were only at Shanghai about three or four days, and the usual overhaul of the engines and machinery could not be and was not effected.

"The Company's steamers usually remain at Marseilles for about four weeks after their arrival before being again despatched to China."

M. de Champeaux, in his affidavit of the 9th January 1888, paragraph 15, also stated that, in consequence of the detention of the steamship "Saghalien," she lost her turn in the line of mail steamers, and the Company suffered great inconvenience, and incurred heavy loss, both pecuniarily and in reputation; but on cross-examination, at page 15, he says:—

"I do not know if any loss has actually occurred. Loss might have occurred by the steamers not staying long enough at Shanghai to clean their engines. The service of the steamers was also made irregular. We were exposed to a claim from the French Government.

"If there had been no collision the 'Melbourne' would have got to Shanghai about 3rd December, and would have stayed about 14 days there, and ought to have left here, i.e., Hong Kong, on 28th December. The 'Yangtse' probably left on 28th December. The next steamer to the north after the 'Melbourne' was the 'Yangtse.' These steamers were turned round at Shanghai. So far as profits were concerned the Compagnie lost nothing. The crew and officers are engaged for the voyage, and some of the crew are discharged at Marseilles. Taking the 'Volga' off did not interfere with the service from Yokohama to Hong Kong. I cannot say what extra expense was caused by taking the 'Volga' off her proper voyage. I do not know if any actual gains were lost to the Company by the change of steamers, nor can I say what actual expenses were incurred."

There appears to be a slight mistake in the statement that the "Yangtse" was the next steamer north after the "Melbourne," for it appears from a later affidavit, as already stated, that the "Amazone" was the next, and the "Yangtse" the next after the "Amazone," and that the "Amazone" was the steamer which supplied the place of the "Melbourne" on the



23rd December, but the mistake does not in the least degree alter the case.

M. de Champeaux again, at page 16, says,—

“The ‘Saghalien’ is three times as large as the ‘Volga.’ If I had sent the ‘Saghalien’ up to Shanghai instead of using the ‘Volga’ the expense would have been more, as a fortnight would have been lost. If I had sent the ‘Saghalien’ the ‘Volga’ would not have come down to Hong Kong. Whilst in dock other steamers were earning the profits of the ‘Saghalien.’ I did not hear of any cargo being shut out at Shanghai.”

It seems clear that no damage was sustained by the Company in consequence of the “Melbourne’s” not having completed her outward voyage, and been at Shanghai for her return voyage. The profits of her homeward voyage, though earned by other steamers, were earned by other steamers of the Company and for the Company.

As to the sending of the “Volga” to Shanghai to carry the mails, passengers, and cargo from thence to Hong Kong to be reshipped on board the “Saghalien,” and carried by her to Marseilles on her voyage which commenced on the 25th January, it seems clear that no damage has been sustained by the Company, as all the expenses of the “Volga” were claimed by the Company and have been allowed by the Judge, the sums allowed being 433*l.* 4*s.* 4*d.* and 624 dollars and 77 cents. (See Record, page 19.)

The learned Judge, on allowing these amounts, remarked at page 26,—“The allowance for the “‘Volga’ in connecting the Shanghai end of “the line with Hong Kong is most moderate, “and seems to me to have been the cheapest “service that could have been rendered for the “‘City of Peking.’”

The learned Judge was mistaken in treating the case of the “Black Prince” as analogous to

the present. The two cases are very different. In the "Black Prince" the vessels belonged to different sets of owners, so that the profits earned by one ship belonged to one set of owners, and the profits earned by a different ship to another set of owners, whereas in the present case the profits earned, whether by one ship or another, all belonged to the Company.

Again, in the case of the "Black Prince," the arrangement as to the turns fixed for the voyages to be made by several ships was made by the several owners, each set of owners having a distinct interest in having the arrangement adhered to so that their ship might be employed in its proper turn; no set of owners had the power to alter the turns allotted without the consent of all the others. In the present case the order in which the ships were appointed to leave Marseilles was one made for the Company's own convenience and to preserve regularity in the departure of their own vessels. It could be changed or varied at any moment at the will of the Company in the case of emergency, or if the interests of the Company appeared to them to require it, and, in fact, it was very properly changed by M. de Champeaux in consequence of the inability of the "Saghalien" to proceed on her voyage.

It appears to their Lordships that all the damages sustained by the Company in consequence of the substitution of the "Melbourne" were included in the claim brought in before the Registrar, allowed by him, and finally sanctioned by the Court. The "Melbourne" and her crew having been substituted for the "Saghalien" and her crew on her homeward voyage, at what may now be termed the expense of the Defendant, was very properly, and perhaps necessarily, allowed to take the turn of the "Saghalien" on

the next outward voyage from Marseilles on the 30th January 1887.

The Company lost nothing, so far as the use of the ships was concerned, by substituting the "Melbourne," for if she had not been engaged on the homeward voyage she and her crew would have been occupied during the whole time in completing the voyage on which she was engaged at the time of the substitution.

It would be very unjust to charge the Defendant 95*l.* a day or anything for the loss of the use of the "Saghalien" during her detention at Hong Kong for the time during which the "Melbourne" and her crew were doing at the Defendant's expense the work which the "Saghalien" and her crew ought to have done. This includes the period from the 2nd December 1886 to the day in January 1887 on which the "Melbourne" arrived at Marseilles. No loss was sustained by the Company by the detention of the "Melbourne" from the day of her arrival at Marseilles and the day of her departure therefrom, for it was in consequence of the arrangements of the Company that she remained unemployed during that period; so also no loss was sustained by the Company in consequence of the "Saghalien's" not having been in Marseilles from the 3rd to the 30th of January 1887, as but for the accident she ought to have been, for if she had been there she would have been lying unemployed and earning nothing in accordance with the Company's own arrangements.

The learned Judge was clearly in error in referring back the report by his first judgment to the Registrar and merchants with a direction to ascertain the number of days the "Saghalien" was prevented by the collision from taking up her position on her own day, and to amend their report on the principles indicated, without

directing them to ascertain whether the Company sustained any loss in consequence. In giving that direction he was acting entirely upon the case of the "Black Prince," without adverting to the difference between that case and the present. He said:—"It may turn out that there were 56 days' delay, but although the 'Araxes'" (referring to the injured ship in the case of the "Black Prince") "was 38 days in dock she was only allowed 28 days' demurrage, such being the number of days she was prevented from taking her place on the line; in other words that she was not earning money for her owners."

The case went before the Deputy Registrar, Mr. Sangster, a different officer, and the same merchants, who reported that 56 days' demurrage be allowed.

The report is not very clear; but reading the whole report together it seems to their Lordships that the Deputy Registrar attributed the demurrage to the 56 days during which the "Saghalien" was in dock at Hong Kong, and not to any portion of the time during which she was unemployed at Marseilles.

Be this as it may, the learned Judge acting upon the report without giving any further reasons than those in his first judgment, and apparently under the erroneous impression that this case was governed by the ruling in the case of the "Black Prince," allowed the sum of 5,352*l.* 4*s.* claimed for demurrage, being at the rate of 6*d.* per ton upon the gross tonnage of the "Saghalien," or about 95*l.* a day for each of the said 56 days, and this without proof that any loss had been sustained by the Company in consequence of that demurrage.

It has been shown that the Company has claimed and been allowed all the damage sustained in consequence of the inability of the

“Saghalien” to proceed on her homeward voyage on the 30th November 1886, so far as the loss by the Company of the use of the vessel was concerned.

Mr. Champeaux very properly, and, as it appears to their Lordships, correctly stated, “that, “so far as profits were concerned, the Company “lost nothing,” and also “that whilst in dock “the other steamers were earning the profits of “the ‘Saghalien.’” The learned Judge, however, remarked that that statement required some explanation, and added, “Should they have “nothing for those services? I have stated “why I think they ought to have,” without adverting to the fact that he was allowing in other items of the claim all the expenses which had been incurred in consequence of the substitution of the “Melbourne.”

Their Lordships are of opinion that the decree or order appealed against ought to be reversed so far as it allows the sum of 5,352*l.* 4*s.* claimed for demurrage, with interest thereon and costs. Mr. Champeaux stated in his affidavit of the 9th January 1888 that the portage bill of the steamship “Saghalien,” whilst lying at Hong Kong during the time she was being repaired, amounted to from 95*l.* to 100*l.* a day, and that it could not have been reduced. There seems, however, to be some mistake in that statement, unless the portage bill, the items of which are not before their Lordships, included the 53,000 dollars claimed and allowed for the repairs of the vessel. Their Lordships are of opinion that the amount claimed and allowed for demurrage, so far as it includes any damage on account of the loss of the use of the “Saghalien,” ought to be disallowed. They cannot, however, say that the Company may not have incurred some expenses in respect of the “Saghalien,” such, for instance, as the lodging, maintenance, and wages of the crew, and it may be other expenses incurred during the period of

her detention which would not have been incurred if she had not been detained. These may have been included in No. 50, the item claimed for demurrage, and, if so, their Lordships think that the Plaintiffs are entitled to recover them under that item. (See "The Inflexible," Swabey's Admiralty Reports, page 204.)

It would be very inconvenient and would be attended with considerable expense to the parties to send this case back to the Registrar at Hong Kong. The head office of the Company is in France, and they will doubtless be able to supply the necessary information and affidavits as to the items of the portage bill, and as to the nature and extent of the necessary and reasonable expenses, if any, incurred at Hong Kong with reference to the "Saghalien" during her detention there.

Their Lordships are not prepared to make any report to Her Majesty before it shall have been ascertained whether any and what expenses of the nature above indicated were incurred by the Company. They therefore refer it to the Registrar of Her Majesty in Ecclesiastical and Maritime Appeals to ascertain and report whether, having regard to the above remarks, any and what expenses were properly incurred by the Company with reference to the steamship "Saghalien" during her detention at Hong Kong between the 29th day of November 1886 and the 25th of January 1887, in addition to the several items included in the claim made by the Company at Hong Kong exclusive of that for demurrage in No. 50, and if the Registrar find that any such expenses were necessarily and properly incurred, then to report the amount and the several items thereof.

All further questions, including the question of costs, are reserved.

The Plaintiffs must bring in their claims in writing before the Registrar of Her Majesty

in Ecclesiastical and Maritime Appeals within the space of one month from the 14th day of December 1889, or within such further time as the said Registrar may allow.

---

*Final Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal in the matter of the steamship "City of Peking" and the Compagnie des Messageries Maritimes and others from the Vice-Admiralty Court at Hong Kong; delivered Saturday, 12th July 1890.*

---

Present:

LORD WATSON.

LORD MACNAGHTEN.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

[*Delivered by Sir Barnes Peacock.*]

Upon the hearing of this appeal their Lordships declared their opinion that the decree or order appealed against ought to be reversed, so far as it allowed the sum of 5,352l. 4s. claimed for demurrage, with interest thereon and costs, but they added that they could not say that the Company might not have incurred some expense in respect of the "Saghalien," such, for instance, as lodging, maintenance, and wages of the crew, and, it might be, other expenses incurred during the period of her detention, which would not have been incurred if she had not been detained,

and their Lordships referred it to the Registrar of Her Majesty in Ecclesiastical and Maritime Appeals to ascertain and report to this Board in respect of those matters.

Their Lordships having considered the report of the Registrar, and the evidence adduced before him, are of opinion that the whole of the sum claimed for demurrage ought to be disallowed, and that the Respondents have not shown that they are entitled to any sum in substitution thereof.

Under these circumstances, their Lordships will humbly advise Her Majesty that the decree or order appealed against ought to be reversed, so far as it allows the sum of 5,352*l.* 4*s.* claimed for demurrage, with interest thereon and costs, and that in other respects it ought to be affirmed. The Respondents must pay the costs of this appeal, including the costs of the reference to the Registrar, and of the motion to this Board consequent upon his report.

---