BRITISH COLUMBIA ADMIRALTY DISTRICT

1924
June 12.

THE *PASCHENA* .....PLAINTIFF;

AGAINST

THE *GRIFF*

Shipping—Salvage Action—Appraisement—Varying same—Powers of Court.

Held:—That depreciation is an important element in arriving at the market value of a scow or vessel; and in appraising a vessel, its age and the care taken of her must be considered.

2. That in the case of a wooden scow twelve years old, but in good condition for its age, a depreciation at the rate of 2½ per cent for the first year, 5 per cent on the diminished value for the next five years and 10 per cent on the diminished value for the next six years is a fair depreciation to allow.

3. The power of the Court to depart from an appraisement made under its authority should only be exercised under extraordinary circumstances and with great caution and,

Semble. That where in a salvage action the defendants allow the Court to proceed to judgment and to award salvage upon such an appraisement without taking exception to it or making any application to have the value of the property ascertained by sale, they cannot call upon the Court to vary the decree merely because it has been found, for some unexplained reason, that the property has been sold at much less than the appraised value.

MOTION to vary an appraisement made under an order of Court in a salvage action.

Victoria, June 12, 1924.

Motion now heard before the Honourable Mr. Justice Martin.

E. P. Davis K.C. for plaintiff.

E. C. Mayers for defendant.

The facts and questions of law are stated in the reasons for judgment.

MARTIN L.J.A. now, this 12th June, 1924, delivered judgment.

This is a motion in a salvage action to set aside the appraisement of the salved scow *Griff* upon the ground that said appraisement has not been according to the true value of the scow, as directed by the commission to the marshal but had proceeded upon a wrong principle. The certificate of value, dated 27th April, 1924, signed by the deputy mar-

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shal and two appraisers and returned to the court under the said commission, fixed the value of the ship at $10,000 and the cargo at $3,213. It is only the value of the ship that is attacked. The long established practice of this court upon an application of this kind is, I find after examining a large number of cases, that unless *a speedy application* is made to the court to set it aside, it *will unless under extraordinary circumstances* stand as binding upon the parties even though a higher or lower price may have been realized upon a later sale. Williams & Bruce's Adm. Prac. (1902) 199; Mayer's Adm. Prac. (1916) 283; Roscoe's Adm. Prac. (1920) 305; *The R. M. Mills* (1); and the *Cargo Ex. Venus* (2), wherein Dr. Lushington said:—

> It would in my opinion, unless under extraordinary circumstances be imprudent on the part of the Court to allow an appraisement made under its authority, to be departed from. In the first place, an appraisement made by the authority of this Court is made with great care and perfect impartiality, and is always considered to be a fixed sum, unless it is objected to on particularly strong grounds at the moment it is brought in. But an appraisement might be attempted to be barred in both ways —by one it might be attempted to be said the appraisement is too high, and by the other it is too low, and great delay and expense would be incurred if the Court encouraged proceedings of this kind. I cannot do so. I must adhere to the appraisement.

This decision was cited and followed by Sir William Young in the Vice-Admiralty Court of Nova Scotia, in *The Scotswood* (3) and in *The Georg* (4), by Bruce J., who also said, at p. 333-4:—

> There are authorities which establish the power of the Court to rehear cases, and, in its discretion, to vary its decrees in cases where it has proceeded upon a mistake; *The Monarch* (1 Wm. Rob. 21) *The Markland* (Law Rep. 3 A & E. 340); *The James Armstrong* (Law Rep. 4 A. & E. 380); but this power ought to be exercised rarely and with great caution, for otherwise much inconvenience and uncertainty would ensue. (The learned judge then dealt with the figures as to the appraisement and the sale, and continued): Beyond the discrepancy between the figures of the appraisement and the proceeds of the sale, there is nothing in the case before me to point to any mistake in the appraisement. The defendants allowed the Court to proceed to judgment on the appraisement without taking any exception to it, and without making any application to have the value of the property ascertained by sale.

It seems to me to be clear that where the defendants have allowed the Court to proceed to award salvage upon the

(1) [1860] 3 L.T. 513.
(2) [1866] L.R. 1 A. & E. 50.
(3) [1867] Young's Ad. R. 25.
(4) [1894] P. 330.

appraisement they cannot call upon the Court to vary the decree merely because it has been found for some reason which is not explained that the property has been sold at much less than the appraised value.

The latest decision upon the practice is *The San Onofre* (1) wherein the President said, at p. 103:—

> The ship was valued by her owners at a sum of about 160,000 pounds. The salvors were not contented with that value, and obtained an order for appraisement by the marshal of the Court. The result of the appraisement is that the value of the ship is stated to be more than double the value given by the owners of the vessel. I allowed counsel for the defendants to make an application in this case, as if he were moving the Court, on proper material, to vary or set aside the appraisement of the marshal. Only in very exceptional cases can that be done, because, ordinarily speaking, where there has been an appraisement by the marshal of the Court that appraisement is conclusive on the point. I do not say that there may not be instances—there may be an obvious mistake or some other good ground for varying the appraisement—where such a motion would be entertained.

The ground there advanced was that the appraisement had not taken into consideration the value of the charter party but it was held that the valuation was "based upon right principles" in disregarding such an element.

The ship having been salved the salvors are entitled to arrest the *res*. If bail were not given, the ship might be sold. She would not be sold subject to charter parties, but sold as she was, to any body who wanted to buy a ship of her description.

The only modern case in which I have found a departure from the practice is *The Hohenzollern* (2) wherein Mr. Justice Deane, allowed an appraisement to be re-opened and a new valuation made on the ground, apparently, that the disparity between it and the owners' valuation was so great that the marshal must have omitted to notice important matters which decreased the value. This, with all due respect, unsatisfactory proceeding led to inevitable difficulty and to a consultation with the President of the Court after which the learned judge said (according to the better reports given in the Law Journal and Aspinall). See 10 Asp. at p. 297.

> I have seen the President about the matter, and he has seen the valuation and the appraisement. His view is that in the ordinary cases it is

(1) [1917] 86 L.J. Adm. 103; 14 Asp. 74; [1917] P. 96.

(2) [1906] 76 L.J. Adm. 17; 10 Asp. 296; [1906] P. 339.

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not desirable to go behind the appraisement, so I have gone rather farther than he would have gone in ordering this further valuation. His view is that following the judgment in *The Harmonides* (ubi sup.) (1) there is a proper principle upon which the appraisement should be made, and it does not appear from the appraisement upon what principle it has been made. As it is undesirable that the gentlemen who appraise should be brought into Court to be examined and cross-examined as to how they arrive at their conclusions, I shall ask Mr. Lachlan to send me a report as to the principles on which he proceeded in arriving at his conclusion.

With this object lesson in mind, I propose to avoid difficulty by adhering to the practice and approaching this matter in the proper spirit indicated by the decision of the Nova Scotia Vice-Admiralty Court in the *Scotswood, ubi supra,* wherein it was said, p. 30, in very appropriate language:—

I have been moved therefore, to set aside the appraisement, and issue a new one. But this is a delicate office, implying distrust either of the judgment, or the integrity of two men of the first standing in their respective communities, and who were chosen by the parties themselves.

The grounds relied upon herein to set aside the appraisement are two. The first is that the appraiser (Captain McCoskrie) appointed at the instance of the plaintiffs, deposes that though at the time of the appraisement he valued the scow at $23,000 from personal inspection, yet he did reduce that valuation to $10,000 because of his reliance upon the alleged statement made to him by Captain Cullington (the appraiser appointed by the defendants) that Cullington's proposed allowance for depreciation

was the usual rule and was accepted by the Court of Admiralty and that the Court of Admiralty had full jurisdiction to consider the matter.

Captain Cullington in his affidavit in answer to this allegation says:—

6. On the 29th April, 1924, I attended at the office of Jarvis McLeod, the Marshal's Deputy, and there in company with the said Jarvis McLeod and Captain McCoskrie whom I was informed by him and believe to have been the plaintiff's appraiser, discussed the value of the said scow.

11. The discussion between the said gentlemen and myself lasted for an hour and a half, and the whole subject was thoroughly discussed and the principle and the methods of my calculation were accepted by the said Mr. McLeod and Capt. McCoskrie.

16. With regard to paragraph 4 of the said affidavit the said Edward McCoskrie did not contend that my method was not a fair or proper way to value the scow, and I do understand the averment that my method of valuation did not take into consideration the condition of the said scow, because as before stated my valuation proceeded on the basis that the scow was in first-class condition for a scow of her age. I did not say that my method was accepted by the Court of Admiralty and that the said

(1) [1902] 9 Asp. 354; [1903] 72 L.J. Adm. 9.

Court had jurisdiction to reconsider the matter, as I neither had nor profess to have any knowledge of such matters. I did say that the method which I was adopting was the proper one for ascertaining the value of the scow to her owners at the time of the accident.

17. I do not know upon what principles the said Captain McCoskrie bases his valuation of $23,000, but I do know that that is not the figure which represents the value of the scow to her owners at the time of the accident.

In view of this specific denial by Captain Cullington and in the absence of any corroboration by the Deputy Marshal of the allegation against him, I would not be justified in holding that he had made the statement complained of, and therefore I must deal with the matter on the assumption that it was not made.

Then as to the second ground. It is objected that the depreciation relied on by Cullington is based on a wrong principle. He sets out in par. 10 of his affidavit and applied it after on examination of the scow while in drydock on the day preceding the appraisement and says (par. 5) that his "estimate of her value was based on her being in first class condition for her age." Pars. 10, 12 and 13 are as follows:—

10. Since the scow was built in 1911 I then applied depreciation at the rate of 2½ per cent for the first year, 5 per cent on the diminished value for the next five years, and 10 per cent on the diminished value for the next six years; thus with an initial value of $33,000, the depreciation for the first year amounted to $825 leaving a diminished value of $32,175 the depreciation on which at 5 per cent for five years amounted to $8,043.75, leaving a diminished value of $24,131.25, and the depreciation on this diminished value at 10 per cent for six years amounted to $14,478.75, leaving a value of $9,652.50.

12. The principle for depreciation and the percentages which I adopted are those which have always been applied by me in ascertaining the insurable value and amount of loss in the case of scows in good condition; the depreciation in scows not in good condition would be much heavier.

13. Thus if the scow had become a total loss on the day of the accident, which was on the 8th of February, 1924, the amount which the owners would have received would have been $9,652.50; and this therefore appeared to me to be what she was worth to her owners at the time of the accident; but in order to meet the express wish of the said McCoskrie I consented to her value being placed at $10,000.

It is unnecessary to quote further from this lengthy affidavit (all of which I have considered) going into the plans, specifications and quantities and setting out the deponent's special experience in valuations in these waters, the other contentious affidavits do not materially advance the matter.

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The question of the valuation of ships is sometimes a difficult matter to decide as I pointed out twenty years ago in *The Abby Palmer* (1), wherein I considered the question at length and very carefully; and also five years later in the case of *The Otter* (2), wherein most of the authorities are considered, and particularly the element of depreciation in the latter case, which was one of the value of a steam freighter seven years old, and an objection to a valuation under a reference by consent to the registrar (not a commission of appraisement to the marshal) was sustained on the ground that a deduction of 7 per cent per annum for depreciation *ab initio* was not a sound rule in the case of a vessel which was

better built than the average and had been well cared for and maintained

the Court observing, p. 438:—

> Whatever may be said of the allowance of such a depreciation in the case of wooden vessels on this coast as a rule, it must always very largely depend upon the manner in which the vessel was originally constructed and the care she has subsequently received. In the case of *The Otter,* I do not think such a rule could fairly be applied.

In the case at bar the wooden scow is twelve years old and the rule of depreciation applied is much lower than in *The Otter,* and I am unable to say in all the circumstances, that it is an unfair rule to apply to the scow in her present condition, which is admittedly first-class for her age; the rule of depreciation would of course vary with the condition of the vessel. It is beyond question that depreciation is an important element in arriving at the market value and upon the whole evidence before me I do not feel justified in disturbing the appraisement which in effect fixes that value at $10,000. The motion, therefore, will be dismissed with costs to defendant in any event.

Judgment accordingly.

(1) [1904] 8 Ex. C.R. 446.

(2) [1909] 18 B.C.R. 436; 12 Ex. C.R. 258.