

Lordship's opinion, and I have come to the same conclusion for the reasons therein expressed.

The Court reversed the determination of the Commissioners, and sustained the assessment of £4652.

Counsel for the Appellant—Solicitor-General (Dickson, Q.C.)—A. J. Young, Agent—P. J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for the Respondents—W. Campbell, Q.C.—Chree, Agents—Morton, Smart, & Macdonald, W.S.

Tuesday, June 19.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

LIVERPOOL STEAM TUG COMPANY, LIMITED v. CORNFOOT AND OTHERS ("GANTOCK ROCK.")

Shipping Law—Salvage—Remuneration for Services—Measure of Award—Increase by Court of Amount Awarded by Judge of First Instance.

A sailing vessel of the value, with her cargo, of about £40,000 was rescued from a position of imminent danger near a rocky coast by two steam tugs. In an action for salvage it was proved that the services in question had been rendered without material risk to either tug-boat; that the larger tug-boat could have rescued the vessel without assistance, while it was doubtful if the smaller tug could have done so; the latter, however, had rendered useful service before the arrival of the larger tug. The Lord Ordinary assessed the value of the services rendered at £1000, awarding £650 to the owners of the larger, and £350 to the owners of the smaller tug. The Court, on a review of the circumstances, *increased* the amount awarded to the larger tug to the sum of £1200, but *refused* to interfere with the Lord Ordinary's decision as regards the sum to be awarded to the smaller tug.

Per Lord Trayner—"The Court will not interfere with the award made by the Judge of first instance unless that award is plainly and unreasonably inadequate or unreasonably extravagant. The award must be greatly in excess or notably inadequate before the Court of review will interfere with that award."

The sailing ship "Gantock Rock" of Glasgow, 1556 tons register, left Glasgow for Sydney on Friday 14th October 1898, with a general cargo, and a crew of twenty-five on board. During the night she found herself close to the Irish coast near Rathlin Island, and as an increasing gale was blowing inshore she anchored in Ballycastle Bay, off the coast of Antrim. The gale increased, and on the morning of the 15th

her chain parted and her anchor was lost. The port bow anchor was then let go, and the vessel was brought up within eighty feet from a rocky shore. The stream anchor and spare bower anchor were also dropped. She remained in that position until the morning of Monday the 17th during an increasing gale, and in such a depth of water that at certain states of the tide she struck the bottom, when the steam tugs "Pathfinder" and "Samson," which had been sent in search of her the previous day, came to her assistance. The "Samson" arrived before daylight, some hours before the "Pathfinder," and had already made fast a line when the "Pathfinder" came up. The two tugs towed the vessel to a position of safety in Church Bay, Rathlin Island, where they stood by her till Wednesday the 19th, when they towed her to Greenock. The "Pathfinder" was a tug specially adapted for towage and salvage, her registered tonnage being 221, and her nominal horsepower 213, working up to 1200. She was also fitted with disconnecting engines. The "Samson's" registered tonnage was 33, and her horsepower 50, working up to 450.

The Liverpool Steam Tug Company, Limited, owners of the "Pathfinder," raised an action against James Cornfoot and others, owners of the "Gantock Rock," concluding for £10,000 for salvage services rendered by their vessel to the "Gantock Rock." John Steel and others, owners of the "Samson," raised a similar action, also concluding for £10,000. The defenders pleaded in both actions that the sum claimed was excessive. In the action at the instance of the owners of the "Samson," the master and crew were sisted as pursuers. The actions were thereafter conjoined, and proof was led before the Lord Ordinary sitting with a nautical assessor.

The import of the evidence sufficiently appears from the following summary of the replies given by the nautical assessor to certain questions put to him by the Lord Ordinary. These answers were to the effect that the "Gantock Rock" was in serious danger on the morning of Monday the 15th October, and that the danger was immediate; that she was not likely to have ridden out the Monday if left where she was, but in all probability would have gone ashore and become a total wreck; that the "Pathfinder" and "Samson" incurred risk beyond the risk of ordinary towage in rescuing the vessel, although neither incurred any great risk; that the extra risk to the "Samson" consisted in her proceeding in the darkness to assist a vessel anchored close to a dangerous rock-bound coast during a rising gale and a heavy sea; that the risk incurred by the "Pathfinder" was less than that incurred by the "Samson," in respect that she refrained from going to the vessel's assistance till daylight, and that though a larger boat she could manoeuvre in less space than the "Samson" owing to her having disconnecting engines; that the "Samson" performed useful services, con-

tributing to the safety of the vessel, before the arrival of the "Pathfinder," and in particular enabled her to get in one of her anchors; that it was possible but scarcely probable that the "Samson" would have succeeded without assistance in towing the vessel into a position of safety, while in all probability the "Pathfinder" would have been able to do so unaided; and that the co-operation of the "Samson" was useful and important, but was not essential in effecting the rescue.

The defenders admitted that the value of the "Gantock Rock" was £6000, and that the value of the cargo and freight at risk was £33,050.

On 31st January 1900 the Lord Ordinary pronounced an interlocutor in which he assessed the value of the services rendered by the "Pathfinder" at £650, and of those rendered by the "Samson" at £350, apportioning the latter sum in the proportion of £200 to the owners, £50 to the master, and £100 to the crew equally among them, and decreed accordingly.

Opinion.—"In this case I do not propose to resume the facts, which so far as in my view material, are not in controversy. I have fully considered the evidence, and in fixing the salvage, and in apportioning it among the competing vessels, I have endeavoured to keep in view the various elements which in the decided cases have been recognised as material. The result is that I propose to award £650 to the 'Pathfinder' and £350 to the 'Samson.'

"I have no doubt that the services of the two tugs, the 'Pathfinder' and the 'Samson,' were proper salvage services. The salvaged vessel, the 'Gantock Rock,' was, I think it clear, on the Monday morning in question in a position of danger. Her safety depended practically on the holding of a single anchor. If that anchor had ceased to hold she must have gone on the rocks and been dashed to pieces. Nor can it be doubted that her danger was not only serious but also in a reasonable sense immediate. Her anchor, it is true, still held, and had done so during the two preceding days, and it was therefore not impossible that it might have continued to hold. But the probabilities were, I think, the other way. A gale was blowing, and blowing inshore, and though varying in intensity it was according to the weight of the evidence increasing. It was certainly not diminishing; and it has also to be noted that the vessel, occasionally at least, touched the ground and so increased the strain. Altogether, the chances were, I think, against the vessel riding out the gale. In other words, the chances were that, unless rescued on the Monday in question, she would have become a wreck.

"On the other hand, I do not think it appears that the salvaging vessels incurred in the operation of salvage any serious risk—that is to say, any risk materially greater than that incident to ordinary towage. They were both tug-steamers, whose business was towage. They were both—especially the 'Pathfinder'—well adapted for such services, and while un-

doubtedly the situation was somewhat exceptional and may have involved even such steamers in some risk, the degree of risk (I mean as compared with the risk of ordinary towage) was in my opinion slight.

"As to the value of the salvaged vessel and her cargo, there is no dispute that it was considerable, and that it affords an ample margin for any award of salvage which could be made. It was in round numbers about £40,000, and that, of course, is an element which cannot be left out of sight. Neither can it be left out of sight that the rescue of the vessel was well and efficiently performed, and involved certainly some amount of merit and enterprise on the part of the salvaging steamers. There was not, of course, any question of deviation. But, on the other hand, the time occupied was considerable. Both the 'Pathfinder' and the 'Samson' may be held to have been engaged for about four days in all. They went in search of the vessel on the Sunday. They towed her into Church Bay on the Monday morning. They stood by her all Monday and Tuesday, and on the Wednesday they towed her across to Greenock.

"All these things considered, I do not, I think, greatly err in awarding, as between the two vessels, the sum of £1000.

"As to the apportionment between them, we start with this—that both *de facto* co-operated in taking the 'Gantock Rock' in tow, and bringing her first into a position of practical safety in Church Bay, and thereafter taking her across to Greenock, where her lost anchors could be replaced and her voyage recommenced with due equipment. It is also perhaps common ground, at least it is clear, that neither vessel proposed to dispense with the co-operation of the other, or indeed would in the circumstances have acted sensibly in doing so. The question which has been raised rather is, whether as between the two vessels the salvage was not substantially the work of the 'Pathfinder,' the 'Samson' helping, no doubt, but helping rather in the towage than the actual salvage.

"On this matter I am quite satisfied that the 'Pathfinder' was quite capable (being a specially powerful tug, fitted with disconnecting engines and all other appliances) to have got into position to have got her hawser attached, and (barring accidents) to have herself towed the 'Gantock Rock' into a position of safety. On the other hand, I think it at least doubtful—perhaps more than doubtful—whether the same could be said of the 'Samson.' But while that is so, it is, I think, equally clear (1) that the 'Samson' was first on the scene, and had been so for some hours before the 'Pathfinder' appeared, and (2) that during that period she rendered useful service, not only in getting up the starboard anchor, but also in towing the vessel up to her port anchor, and thus to some extent relieving the strain which was the real source of danger. I cannot in these circumstances see my way to treating the two tugs as having an equal share in the salvage, and to rejecting the claim of the 'Pathfinder' to the larger share of the two. But, on the whole, I

think I do not go far wrong in making the apportionment which I named at the outset, viz., £650 to the 'Pathfinder' and £350 to the 'Samson'.

"In reaching the above results, so far as depending on matters of expert opinion, I am glad to find myself in concurrence with my assessor Captain Wood, to whose answers to certain questions put to him in terms of the statute I beg to refer."

The pursuers in both actions reclaimed.

Argued for the owners of the "Pathfinder"—The sum awarded by the Lord Ordinary for the services rendered by the "Pathfinder" was inadequate. The principle adopted by the Court was one of liberal remuneration in such cases—Kennedy on Salvage, p. 116. The value salvaged was £40,000, and the vessel, in the opinion of the Nautical Assessor, was "in immediate danger." In no similar case had the Court awarded such a small percentage as 2½ per cent. of the value salvaged. See "*The Persia*," Merchant Shipping Gazette, where the danger was not imminent, and 7½ per cent. was awarded; *Com. Franchetti*, *ibid.*, Nov. 25, 1899, where 5¾ per cent. was awarded; "*The Metropolis*," *ibid.*, May 17, 1899, where 46 per cent. was awarded; "*The Accomac*" (1891), P. 349 (8 per cent. awarded); *Duncan v. Dundee, Perth, and London Shipping Company*, March 8, 1878, 5 R. 742, where the salvor's risk was slight, and nearly 5 per cent. was awarded. Looking to the imminence of the danger in the present case, the services of the "Pathfinder" might be fairly valued at 10 per cent. on the £40,000 salvaged, i.e., at £4000. In any view, the Lord Ordinary had wrongly apportioned the sum awarded. Although the "Samson" reached the vessel before the "Pathfinder," it was, in the Assessor's opinion "scarcely probable" that she could have salvaged her alone. The "Pathfinder" should be found entitled to three-fourths, and the "Samson" to one-fourth.

Argued for the owners of the "Samson"—The Lord Ordinary's award for the "Samson's" services was inadequate. The Court would readily interfere with the award of the Court of first instance—*Bird v. Gibb* (1883), 8 App. Cas. 559; "*The True Blue*" (1866), L.R., 1 P.C. 250; "*The Scindia*," *ibid.*, 241; "*The Chetah*," (1868), L.R., 2 P.C. 205; *Arnold v. Cowie* (1871), L.R., 3 P.C. 589; "*The City of Berlin*" (1877), 2 P.D. 187. 2. In any view, the proportion allotted to the "Samson" was too small. She was first on the spot, and but for her efforts there might have been no vessel to salvage. In the Assessor's opinion she incurred the greater risk in approaching the vessel before daylight, and she could less easily manoeuvre in small space. Three-fourths of the sum awarded should be allotted to her.

Argued for the defenders—The Court would not readily interfere with the discretion of the judge of first instance in salvage awards unless he had erred grossly, e.g., where the sum was too great or too little by a half—"Thomas Allen," 6 Aspinal's

Maritime Cases, 99, per Sir J. Hannen. In the present case the Lord Ordinary's award was ample remuneration for the services rendered. These were substantially towage services, and involved no risk to either of the salvaging vessels. The defenders further maintained that the Assessor's opinion was not supported by the evidence.

At advising—

LORD TRAYNER—It appears very clearly from the proof and the answers given by the Nautical Assessor to the questions put to him by the Lord Ordinary, that on the morning of the 17th October 1898 the "Gantock Rock" was in a very perilous position, and in imminent danger of going on the rocks and being wrecked. From this position she was extracted by the "Pathfinder," with some assistance from the "Samson." I think it is also proved that neither of the salvors incurred any material risk in going to the aid of the "Gantock Rock," or in the course of rendering her the services which they did render. The services of the salvors cannot be said to be highly meritorious, or indeed meritorious at all except in this, that they were promptly rendered and efficient. That both salvors are entitled to reward for their services is not disputed, but the pursuers say that the allowance made to them by the Lord Ordinary on that account is inadequate, having regard to the value of the ship and cargo salvaged. I agree with what has been said on several occasions in other cases, that the Court of Review should not interfere with the award made by the judge of first instance unless that award is plainly and unreasonably inadequate or unreasonably extravagant. The award must be greatly in excess or notably inadequate before the Court of Review will interfere with that award. But applying that rule, I think there is room in the present case for taking a different view of the amount to be awarded from that which the Lord Ordinary has taken. In coming to a conclusion as to the amount which should be awarded to the "Pathfinder," I leave out of view entirely her value, because, as I have said, I think she incurred no material risk. But she salvaged a ship whose value with the cargo and freight at risk amounted to about £40,000. That was the value salvaged, and it does not appear to me to detract from the value of the service, or the resulting remuneration to the salvor, that the service could be and was efficiently rendered in a comparatively short period of time. Taking the whole circumstances into account, I am of opinion that the "Pathfinder" is entitled to and should be awarded the sum of £1200.

As regards the "Samson," I am not disposed to interfere with the Lord Ordinary's judgment. She could not have salvaged the "Gantock Rock" herself, and although she did render some service before the "Pathfinder" came up, these services were not such as materially to reduce the risk or danger of the "Gantock Rock." The real salvor was the "Pathfinder." Had I been

dealing with the amount awarded to the "Samson," as the judge of first instance, I should have apportioned the amount found due somewhat differently between the owners and the crew of the vessel. But the difference would not have been very great, and therefore I would leave that apportionment as the Lord Ordinary has made it.

No question has been raised concerning the apportionment of the salvage found due to the "Pathfinder" between the owners of the "Gantock Rock" and the owner of her cargo. It may be that both ship and cargo were insured by the same underwriters, in which case no apportionment would be called for. But however that may be, as no question of apportionment has been raised, although both owners of ship and cargo are called as defenders, I have not dealt with that matter.

LORD MONCREIFF—The Lord Ordinary has gone very carefully into this case, and I agree with his judgment, except as to the amount of damages which he has awarded to the "Pathfinder." While I do not think that the "Pathfinder" incurred very serious risk, on the other hand the salvaged vessel was in a position of imminent danger, and as the Nautical Assessor says, "she was not likely to have ridden out the Monday if left where she was, but in all probability would have gone ashore and become a total wreck." This is what would in all probability have happened if a powerful tug like the "Pathfinder" had not come to her assistance, and considering that the total value salvaged amounted to £40,000, I think that the sum of £1000 awarded to the two salvaging vessels is too little. I therefore think that the total sum awarded should be increased to £1550. (The cases would, I think, have warranted even a larger award). Of this sum the "Pathfinder" should receive £1200, and the "Samson" £350. Although the "Samson" perhaps ran more risk than the "Pathfinder," I think it is clear that she could not by herself have rescued the "Gantock Rock," while the "Pathfinder" could have done so without the assistance of the "Samson." I therefore think that the "Samson" is sufficiently remunerated by the sum awarded by the Lord Ordinary, viz., £350.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

The Court varied the interlocutor of 31st January 1900 by assessing the value of the services rendered by the "Pathfinder" at £1200, and *quoad ultra* adhered.

Counsel for the Liverpool Steam Tug Co. Limited—Ure, Q.C.—Aitken. Agents—Macpherson & Mackay, W.S.

Counsel for the Owners of the "Samson"—Guthrie, Q.C.—A. S. D. Thomson. Agents—Whigham & Macleod, S.S.C.

Counsel for the Defenders—Salvesen, Q.C.—McClure. Agent—Campbell Fyall, S.S.C.

Tuesday, June 19.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

TERRELL v. KER.

Process—Amendment—Multiplepounding—Amendment of Claim after Final Decree of Ranking and Preference—Reclaiming-Note—Competency.

In an action of multiplepounding the Lord Ordinary pronounced a decree of ranking and preference which disposed of the whole fund *in medio* and of the question of expenses. After that interlocutor had become final, a claimant, who had been ranked and preferred to a share of the fund *in medio*, while the fund was still *in manibus curiæ*, moved the Lord Ordinary to allow him to amend his claim, with the object of showing that he was entitled to a larger share of the fund *in medio* than that which had been awarded to him.

Held that the motion was incompetent, and that the interlocutor of ranking and preference was not competently submitted to the review of the Court by a reclaiming-note reclaiming against the interlocutor refusing the motion for leave to amend.

By trust-deed dated 20th July 1874 William Wemyss Ker conveyed certain funds to trustees, with directions, *inter alia*, (1) to pay the income thereof to his wife during her life, (2) after her death to pay the income to himself, and (3) upon the death of the longest liver of himself and his wife to pay the capital to the children of the marriage. After the death of the truster's widow in 1898 certain questions arose with regard to the meaning and effect of this trust-deed, and the trustees raised the present action of multiplepounding for their determination. On 20th July 1899 the Lord Ordinary (KYLACHY) pronounced an interlocutor disposing of the whole fund *in medio*, by which he, *inter alia*, ranked and preferred one of the claimants, Arthur A'Beckett Terrell, upon the fund "in terms of the second branch of his claim, to the effect of his receiving payment of one-fifth of one-sixth part or share of the trust estate," and also ranked and preferred him in terms of a riding claim which he made; ranked and preferred the other claimants to certain shares, and *quoad ultra* repelled the whole claims of parties; found the claimant Terrell liable in expenses to certain of the other claimants, and *quoad ultra* found no expenses due to or by any of the parties. That interlocutor was not reclaimed against. An interim condescendence of the fund *in medio*, and a scheme of division in terms of the Lord Ordinary's interlocutor of 20th July 1899, were lodged, and on 8th December 1899 the Lord Ordinary allowed them to be seen and objected to for eight days. Before any further interlocutor had been pronounced in the cause the claimant Terrell on January 16th 1900 lodged a minute, in which he craved