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Comment on Some Interesting Admiralty Cases Involving Novel Points of Law

S. Hasket Derby*

The writer has had a considerable number of maritime cases involving both legal and factual points of considerable importance; and a few of these may be of interest to the bar and the community.

The first and most important case is that of the Norwegian bark Aggi, reported as The Edgar H. Vance.¹ The Vance above mentioned was a steam schooner equipped with wireless apparatus and made an agreement to tow the Aggi and her cargo of beans and barley from San Francisco to Panama, on the latter's voyage to Norway. The two started on Thursday, April 29, 1915, each vessel having a licensed pilot on board. When the pilot of the Vance boarded her at about 8 a.m. he informed her captain that the velocity of the wind at Point Reyes at 7 a.m. was 14 miles an hour.

When the vessels got outside the Heads, they struck a terrific hurricane, under which they staggered until 10 a.m. Friday morning, at which time the Vance, having seven feet of water in her hold and her engines disabled, was compelled to set the Aggi adrift.

The Aggi then was herself in bad shape, with water covering her decks, and many of her sails torn to pieces, but she succeeded in remaining afloat and making what might be termed forced progress on her voyage until Monday, at which time she determined to go into Santa Barbara for repairs. While attempting this and passing between the islands of San Miguel and Santa Rosa, she stranded on Talcott Shoal, off the latter, and became with her cargo a total loss, totalling over $200,000.00.

It was at first thought that this was one of the vicissitudes of nature, and no libel was considered and the marine underwriters paid a total loss on both vessel and cargo. About a year later, one of these underwriters discovered that, before sailing that morning, the wireless operator on the Vance had received a wireless message from the

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¹ (C.C.A. 9th, 1922) 284 Fed. 56.

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Farallone Islands, stating that the wind was blowing 65 miles an hour. This at once gave rise to the thought that the *Vance* had been negligent in starting the voyage, but the question still remained *why* the *Aggi* had stranded on Talcott Shoal. It then developed that, when a witness before a board of inquiry convened by the Norwegian Consul in San Francisco, the master of the *Aggi* was asked the following question and made the following reply:

Q. "Was there any defect in charts, lights, buoys, beacons and the like?"
A. "I used the chart of the West Coast of North America from San Blas to San Francisco, Blue Back, London, 1898. The scale was small and the shoal was not set off on the chart."

He was also asked what, in his opinion, was the cause of the loss and replied that "the shoal did not appear on the chart we steered by."

Suit, which had not before been thought of, was then filed against the *Vance*, based on her negligence in taking the *Aggi* to sea in the prevailing storm; and soon after filing this suit, it was clearly established that, before sailing that morning, the *Vance* had received the wireless message in question, this being proved by the third officer and wireless operator of the *Vance* herself, and the sending of the message being proved by the wireless operator at the Farallones. Expert witnesses were also called who established that it was negligent to undertake the tow under such circumstances. This part of the case was, therefore, sewed up tighter than a drum.

There remained, however, the problem of offering an acceptable excuse for the stranding, and, in order to establish this, counsel for libelants sent for and received the chart above mentioned, and, when it finally arrived, they were astonished to find Talcott Shoal plainly marked on it. This necessitated an entire change of front, to effectuate which, counsel called the master and pilot of the *Aggi*, who testified in substance as follows:

By reason of the negligence of the *Vance*, the *Aggi* was thrown into a hurricane of almost unparalleled force; she was listed at all times with her lee rail generally under water (sometimes six feet under), and her life boats were made unseaworthy; there was no rest or sleep for either master or crew during the first two days and nights; and during all this time not only their vessel, but they themselves were being buffeted by wind and wave, and were "wet as drowned rats" and tired out; they went entirely without food till
Friday afternoon, and then were served by the cook standing in water up to his waist; it was thereafter believed that the vessel was gradually sinking, and with unseaworthy life boats, conditions were most distressing. Her master had but approximately four hours' sleep during the entire experience, and her pilot had little, if any more; all were soaking wet from start to finish with no opportunity to change their clothes, and finally, when the passage between the islands was attempted, her master was worn out from stress, strain and worry. He examined his make-shift chart before making the passage, did not see the shoal and therefore thought that all was clear, and testified that his failure to see the shoal must have been due to his being overanstrengt (a Norwegian term meaning "strained or overworked to the breaking point").

The latter point was, of course, the difficult one in the case and on this point we were fortunate in finding the case of Williams v. Hays. The proven facts in this case show that, the vessel's rudder having become useless, she was

"allowed . . . to drift with the dead swell upon the beach, with all sails set and no anchors out, in a light wind blowing off shore, in the middle of a pleasant afternoon, with two steam tugs lying by and offering a tow to a port nine miles distant." Of the circumstances which brought about the master's physical and mental condition of exhaustion in that case, the court of appeals says:

"It appears that during the storm he had had but little rest; had not gone to his berth or undressed; had eaten but little, and that for the last forty-eight hours he had been constantly on deck; that he was worn out, felt sick, and feared he was to have an attack of malaria."

The court of appeals, after reviewing the reasoning of the trial judge who directed a verdict for the plaintiff against the shipmaster, and whose judgment was affirmed by the appellate division, says:

"In this case, as we have seen, the storm commenced on Friday, continued through Saturday and Sunday, and it was not until 5

2 (1899) 157 N.Y. 541, 52 N.E. 589.
3 Ibid. at 550, 52 N.E. 589, 592.
4 Ibid. at 544, 52 N.E. 589, 590.
o'clock Monday morning that the defendant was relieved from the care of his vessel. For three days and nights he had been upon duty almost continuously, and for the last forty-eight hours had not been below deck. The man is not yet born in whom there is not a limit to his physical and mental endurance, and, when that limit has been passed, he must yield to the laws over which man has no control. When the case was here before, it was said that the defendant was bound to exercise such reasonable care and prudence as a careful and prudent man would ordinarily give to his own vessel. What careful and prudent man could do more than to care for his vessel until overcome by physical and mental exhaustion? To do more was impossible.\(^5\)

Other cases less strongly in point were cited and the district court finally rendered a very brief decision as follows:

"This is an important case, involving intricate questions of fact and of law. The testimony was all taken by deposition, and a voluminous record was presented to the court for consideration and study. Such consideration and study have been frequently interrupted, and even now I have not the time at my disposal in which to do other than announce my conclusions. These are:

1. That it was negligence on the part of the master of the Edgar H. Vance to take the Aggi into the storm then raging, with the knowledge that he had of existing conditions, and without inquiry as to whether such conditions were improving or becoming worse. Upon this proposition I find much less difficulty than upon the one that follows, because of the unusual character of the latter.

2. The loss of the Aggi is to be attributed to the original fault above mentioned, because the condition of the master of the Aggi and of the pilot on board was solely due thereto, and if they themselves were at fault in the navigation of the Aggi in the particulars claimed by respondents, at and prior to the time the vessel was stranded on Talcott Shoal, such fault was due to their condition of mental and physical exhaustion occasioned by their constant endeavors to save the vessel from the storm and its consequences, into which the negligence of the Vance had originally brought them.\(^6\)

Counsel for the Vance appealed to the circuit court of appeals, which, on the second point, held as follows:

"It was admitted by the proctor for the appellants, who examined the witness, that he was at the time in question 'undoubtedly sub-

\(^6\) *Supra* note 1 at 57, quoting opinion of district court in the same case.
jected to a great strain and trial of his strength,' and we think that no one who reads the evidence with care can reasonably come to any other conclusion than that reached by the court below that: 'if the navigators of the Aggi were at fault in her navigation in the particulars claimed by the appellants at and prior to the time of her stranding, it was due to their condition of mental and physical exhaustion occasioned by their constant endeavors to save the vessel from the storm and its consequences into which the Vance had originally brought them.'

Thus, we have a case presenting unusual difficulties, and resulting in a final holding that exhaustion may excuse a shipmaster who would otherwise be guilty of negligence—a very interesting point. The case is commented on in 36 Harvard Law Review 228, where the decision is approved. It is thought that this note and the authorities therein cited will be helpful in dealing with situations such as those now involved, namely, the effect of exhaustion on the doctrine of proximate cause, in which cases the forseeability of the result is no test of proximate causation.

Another interesting case in the experience of the writer is that of Sacramento Navigation Co. v. Sale8 [reversing 3 F. (2d) 759 (C.C.A. 9th, 1925)]. In that case, a steamer of the Sacramento Navigation Company was towing a barge, and caused it to come into collision with the steamer Ravenrock. It was held by the circuit court of appeals that the Harter Act, excusing a steamer carrying cargo from faults and errors in navigation, did not apply as between tug and tow, the court saying (at p. 760):

"We are of the opinion that the Harter Act applies only to the relation of a vessel to the cargo with which she is herself laden, and does not relieve the owner of a tug from liability for its negligence in towing the barge on which the cargo is carried. Cases directly in point are The Murrell (D.C.), affirmed in Baltimore & Boston Barge Co. v. Eastern Coal Co., The Coastwise (D.C.) affirmed 233 Fed. 1, 147 C.C.A. 71."

This decision was, however, reversed by the Supreme Court, which held that, under a proper construction of the Harter Act, a tug and her tow were one vessel, and that in case of a loss by collision due

7 Ibid. at 60.
8 (1927) 273 U.S. 326.
to the tug’s negligence, the latter could take advantage of the Harter Act and prevent recovery by the cargo of the tow. This is a very far-reaching and important holding. In reaching it, the Supreme Court says in part:

"Considering the language of the bill of lading in the light of all the circumstances, it is manifest that we are dealing with a single contract and the use of the tug must be read into that contract as an indispensable factor in the performance of its obligations. To transport means to convey or carry from one place to another; and a transportation contract for the barge without the tug would have been as futile as a contract for the use of a freight car without a locomotive. In this view, by the terms of the contract of affreightment, in part expressed and in part necessarily resulting from that which was expressed, the transportation of the goods was called for not by the barge, an inert thing, but by the barge and tug, constituting together the effective instrumentality to that end." 9

A third case involving an important principle of law, in which the writer directed the conduct of the trial and the appeal, was that concerning the loss of the T. W. Lake and her cargo, where the vessel foundered in Puget Sound due to her own unseaworthiness. The owners of the Lake filed a petition for limitation of liability, which was denied because the unseaworthiness of the vessel was with their own fault and privity. Said owners then brought suit on their P. & I. (Protection and Indemnity) policy, claiming that, in such a suit, privity and knowledge was of no importance, although it would be a good defense to a suit on a policy of marine insurance. Both the district court and the circuit court of appeals held otherwise, however, the latter in Hanover Fire Ins. Co. v. Merchants’ Transp. Co., 10 saying:

"The object of this form of insurance is to afford protection to shipowners, in addition to that afforded by the ordinary marine policy, and the contract should be construed with that object in view. When so construed, we are clearly of opinion that it covered damages paid for loss of life arising from the negligence of the ship or shipowner; for, in the absence of negligence on the part of either, there would be no loss or liability to be indemnified against. And, if the policy covered loss arising from negligence, the courts will not attempt to distinguish between the different kinds or degrees of negligence, un-

9 Ibid. at 329.
10 (C.C.A. 9th, 1926) 15 F. (2d) 946, 948.
less, as agreed by counsel, the negligence was so gross as to amount to a willful, deliberate, and intentional wrong."

This case establishes a rule which it is important for all maritime practitioners to remember, namely, that privity and knowledge is no defense to a suit on a P. & I. policy, despite the maritime nature of such a policy, and that failure to disclose material facts is not, as in the case of an ordinary marine insurance policy, a defense to the action.

Prior to this case, the question as to the effect of privity and knowledge in defending a suit on a P. & I. policy had only come twice before the courts. In *The C. S. Holmes*, although the question was not there decided, the writer (representing the insured owners) admitted that there could be no recovery in such a case. And in *Sorenson & Neilson v. Boston Insurance Co.* it was squarely so held. These holdings, however, were not even mentioned by the circuit court of appeals in the *Lake* case. It is only fair to point out, however, that, on the appeal in the *Sorenson* case, the district court's decision was reversed and the *Lake* decision followed. It is believed that these are, so far, the only applicable decisions.

Another interesting case I handled was that of *The Siberia Maru, Oelbermann v. Toyo Kisen Kabushiki Kaisha* but it is sufficient to state the principle of the decision without going into its facts. That principle is that, where the time for presenting claims against a steamer has expired, a rejection of such a claim on the merits without advertting to its lack of timeliness is a waiver of the time provision in the bill of lading. While this principle seems well established, it has often been disputed and the decision of the lower court in the case in question was adverse to it. The court says:

"We agree that to constitute waiver there must be an intention to relinquish a known right. That intention may be evidenced by expressed words, by acts, or by a course of conduct, and we may accept it as settled that, in view of the well-known rule of law that if a carrier receives a claim of damages after the expiration of the time limited in the contract, and considers the items thereof, and makes its answer thereto on the merits, and makes no claim of defense on account of

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11 (D.C. N.D. Calif., 1925) 5 F. (2d) 358.
13 (C.C.A. 4th, 1927) 20 F. (2d) 640.
14 (C.C.A. 9th, 1925) 3 F. (2d) 5.
the delay in presenting the same, it gives the claimant the right to understand that its intention is to waive that defense. 15

To the same effect are 1 Hutchinson on Carriers, 3 ed., 473; 4 Ruling Case Law 799 and 13 Corpus Juris Secundum 493. The last named citation indicates a conflict of authority on the point (see p. 490), so the decision in the case now under consideration is of considerable importance in this circuit.

The writer also wishes to call attention to the case of *The Walter A. Luckenbach*. 16 In that case there was a collision between the *Walter A. Luckenbach* and the *Lyman Stewart* (carrying a valuable oil cargo) in the Golden Gate, for which both vessels were held to blame. The *Lyman Stewart*, however, drifted ashore about 40 minutes after the collision and she and her cargo became a total loss. Ordinarily in a collision case the cargo of a colliding vessel can recover in full from the other vessel even if both are to blame, but in the case in question the district court denied said cargo all damages after the collision, saying:

"In smooth water, one-third cargo, flooded only forward, and down by the head little more than if full cargo, a low main deck, party awash forward, but lifted by jettison of cargo, bow, forward deck, and forecastle eight feet or more above main deck, engines in order, and men standing by to work them, anchors likewise, two vessels timely ready to give or take a line, the Stewart in a 3 or 4 knot current was permitted to drift like a helpless derelict for two miles, along an eddy of safe anchorage, and to and upon known rocks, without a turn of a wheel, until too late to save her, and without letting go a single anchor." 17

In reversing this conclusion the circuit court of appeals lays emphasis on the fact that *prima facie* a loss after a collision is due to the collision. (See 14 F. (2d) at p. 102.) The court then says (after disputing some of the findings of the district court):

"The question then arises: Is the master to be condemned? The problem confronting him was a problem of the sea, to be solved in the first instance by seafaring men. We should not view the situation in retrospect or from the shore, but from the viewpoint of the master on the bridge of the crippled ship, charged with full responsibility

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15 Ibid. at 6.
16 (C.C.A. 9th, 1926) 14 F. (2d) 100.
17 (D.C. N.D. Calif., 1924) 4 F. (2d) 551, 553.
for her safety and for the safety of her cargo and crew; and, when viewed in that light, we must not only be able to say that the course pursued was wrong, but we must be further able to say that it was so illly considered and so plainly wrong that a competent navigator would have rejected it, if placed in the like position. The master of the Stewart may have erred in the measures adopted to extricate his vessel from the perils in which she was placed by the collision, but, if he did, it was in our opinion an error of judgment only, such as any competent navigator might have committed under the like circumstances."

Hence the court allowed, the cargo of the Stewart (except that owned by the same owner) full recovery of all its damages and the writer believes that it was right in so doing. However, the case illustrates the important principle that there may be a distinction between damages suffered in the collision and damages occurring afterwards. This point is illustrated in the case of McDonald v. Hitchcock, Lloyd & Co.,\textsuperscript{18} The M. E. Luckenbach,\textsuperscript{19} and The Transfer No. 8,\textsuperscript{20} but there are many cases cited in the principal decision and to be found elsewhere where the facts are in doubt. The net result is that any reasonable excuse which a vessel can give for her conduct after the collision will be accepted rather than relieve the other colliding vessel from contributing to pay losses so suffered.

Another interesting case which the writer had early in his practice was the so-called "Manchuria" case, Pacific Mail S. S. Co. v. Commercial Pacific Cable Co.,\textsuperscript{21} involving the necessity of good faith on the part of a salving vessel in salvage operations. In that case the Pacific Mail liner Manchuria went ashore on a coral reef on the north-easterly side of the Island of Oahu (one of the Hawaiian Islands) about 15 miles from Honolulu on August 20, 1906. The cable ship Restorer was then lying in Honolulu harbor with cold boilers and disengaged. She was asked to go to the help of the Manchuria, but refused to do so without express orders from her home office in New York, but agreed to get up steam on her boilers provided the expense of so doing was guaranteed by the Manchuria's local agents, which was done. The requisite consent was received the next day and the Restorer proceeded to the Manchuria and thereafter, after two sal-

\textsuperscript{18} (C.C.A. 3d, 1927) 17 F. (2d) 449.
\textsuperscript{19} (D.C. E.D. N.Y., 1914) 214 Fed. 571.
\textsuperscript{20} (D.C. S.D. N.Y., 1898) 88 Fed. 551.
\textsuperscript{21} (C.C.A. 9th, 1909) 173 Fed. 28.
vage experts were sent down from San Francisco and an elaborate system of anchors were laid, the Manchuria was finally floated on September 16th. The owners of the Restorer promptly filed a libel for salvage for $300,000 and, after a long trial, were awarded over $60,000, of which $30,000 was a pure salvage bonus. The owners of the Manchuria appealed, which resulted in a printed record of over 3000 pages.

On the appeal, as in the trial court, much was made by appellant of the fact that the Restorer was not a volunteer and that its owners and agents were guilty of bad faith in the salvage operations.

Without attempting to detail all the elements of such bad faith, we call attention to the following facts brought out by cables between the Restorer's home office in New York and her local office in Honolulu.

The local office was instructed by the home office to keep a careful record of all operations, especially anything of value in determining salvage; to get the Manchuria off the reef if possible before the arrival of surveyors from San Francisco; to have attorneys advise from day to day as to the proper course to preserve salvage rights and to show, if possible, that, but for the Restorer's aid, the Manchuria would have been a total loss. Also when Captain Metcalfe, the surveyor, was advised by his principals that the Restorer's compensation (not salvage) would be adjusted in New York, libelant allowed him to continue in this belief. The cables exchanged are set out very fully in the report and would well repay perusal, but it does not seem necessary to set them out in this article. As illustrating the secrecy maintained by the Restorer's owners, however, the following extract from one of the cables is instructive:

"There is temporary telephone connection with shore near the wreck, but is controlled by agents, who have a man always within hearing."

In commenting on these cables and other evidence, the court says:

"If, notwithstanding all this, the libelant intended to claim a reward based on salvage principles, surely good faith required it to apprise Metcalfe of that fact. There was not only this bad faith on the part of the libelant, but its action throughout was not only calculating and mercenary in the extreme, but was entirely lacking in those

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22 Ibid. at 42.
elements which often induce courts of admiralty to make awards at
times greatly exceeding the expenses, losses, and actual value of the
salvor's services.\textsuperscript{23}

In view of the above, the court struck from the award the bonus
of $30,000 allowed the owners of the Restorer.

In this same case the court laid down another important salvage
principle, namely, that where a salvaging vessel is not a volunteer, the
ordinary principles of salvage compensation do not apply and that
an award to a non-volunteer should be less than to a volunteer, this
principle being also indicated by other cases cited.

Another interesting case was that of the Beaver-Selja collision
\textit{Lie v. San Francisco & Portland S.S. Co.}\textsuperscript{24} The Beaver was proceeding
north from San Francisco at full speed in a dense fog, while the Selja
was proceeding westward toward San Francisco at half speed or about
6 knots an hour. On hearing the Beaver's whistle at 3 p.m. she con-
tinued at half speed till 3:05, when she reduced to slow or 3 knots
an hour and at 3:10 she stopped her engines. The Beaver appeared
through the fog at about 3:13 and the Selja then went full speed
astern and was actually moving backward in the water when the
collision took place at 3:15, resulting in the sinking and total loss of
the Selja and her cargo. Owing to the large value of the cargo the
owners of the Selja could not, if both vessels were held in fault, re-
cover anything, because the Beaver could offset half the cargo dam-
ages against the Selja's half damages, which is what happened.

The Selja contended that the fault charged against her of not
stopping her engines at 3 p.m. when she first heard the Beaver's
whistle, as required by Collision Rule 16, did not contribute to the
collision because she was going astern when the collision took place.
Both the district court and the circuit court of appeals held, however,
that it was incumbent on the Selja to show that this fault not only
did not contribute to the collision, but that it could not have done so,
which was obviously impossible and this ruling was affirmed by the
Supreme Court on certiorari. In other words all three courts held
that the Selja could only escape liability by showing that the collision
would have occurred even if she had stopped her engines at 3 p.m.,
which, of course, could not be done. This was a very drastic holding
and, in the writer's opinion, it is wholly unsound.

\textsuperscript{23} \textit{Ibid.} at 45.
\textsuperscript{24} (1917) 243 U.S. 291.
Summing up the results of the seven cases herein discussed, they would appear to establish the following:

1. That exhaustion will excuse a shipmaster charged with what would, but for such exhaustion, be negligence.

2. That a tug, in a suit by the cargo of its tow for loss due to collision, may invoke the protection of the Harter Act excusing faults and errors in navigation.

3. That privity to and knowledge of a vessel’s unseaworthiness is no defense to a suit on a Protection & Indemnity policy of insurance.

4. That where a claim against a steamer for cargo damage is rejected on the merits, this constitutes a waiver of any time provision in a bill of lading.

5. That a collision is presumptively the cause of any subsequent loss primarily caused by a master’s error of judgment.

6. That a salvor guilty of bad faith cannot recover any salvage bonus.

7. That, in case of a violation of a statutory rule in a collision case, the offending vessel must show not only that her fault did not contribute to the collision, but that it could not have done so.