fault of the Negaunee, and if he fails of his proof in that particular he cannot recover. The defense does not rest upon the fact that the collision was an inevitable accident, but upon the question whether it resulted from the fault of the Negaunee.

The libel is dismissed for want of equity, at costs of libelant.

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## THE GEN. MEADE.

*(Circuit Court, D. Nebraska.* July 23, 1884.)

1. LIEN ON VESSEL—WAIVER.
   A lien which has accrued upon a vessel for supplies furnished it, is not waived or lost by the acceptance of commercial paper belonging to the lessees of the vessel.
2. ADMIRALTY PRACTICE—PLEADINGS AND PROOF—VARIANCE.
   When the allegations in an answer are that the owners leased certain boats to a corporation for the term of three years, while the proof disclosed separate charter-parties for each year, including the one in question, there is not such a variance as will be regarded.
3. FRAUD ON CREDITORS—LEASE OF VESSEL—EVIDENCE.
   When the owners of boats lease them to a transportation company, evidence of an interest manifested by the owners in the success of the company is not a sign of bad faith in making the lease, or of an attempted fraud upon creditors.
4. LIBEL—CONTRACT FOR SUPPLIES—EVIDENCE.
   In a libel against a vessel evidence examined, and *held* to show that supplies used upon a boat leased by a transportation company were sold to the company and on its credit, and not on that of the boat.
5. SAME.
   Where supplies are furnished to and upon the credit of a transportation company, a libel cannot be maintained against a leased boat upon which they were used.

In Admiralty. On exceptions to the report of the referee.

*T. P. Murphy*, for libelants and intervenor.

*J. M. Woolworth*, for claimants.

BREWER, J. This was a libel filed against the steamer Gen. Meade for supplies furnished by the libelants in the season, and mainly in the month of April, 1882. The supplies were furnished at Bismarck, in the territory of Dakota, a foreign port. That the supplies were furnished is undisputed, but the contention of the claimants, who are the owners of the boats, was and is that they were sold to and on the credit of the Northwestern Transportation Company. After the seizure of the boat, the intervenor appeared and filed his claim for services as watchman at the port of Covington, in the state of Nebraska, also a foreign port. The case was tried in the district court, and a decree rendered in favor of the libelants and the intervenor. From this decree the claimants appeal to this court.

The case was submitted to the district court upon the testimony of the libelants, and apparently the question submitted to that court was whether, after the lien had accrued by the furnishing of the supplies,

it was waived or lost by the mere acceptance of commercial paper of the transportation company. That question the district court properly answered in favor of the libelants. After the appeal was taken, the claimants took the testimony of the general manager of the transportation company, and the case was, by consent, referred to the Hon. James W. Savage, to report on the law and fact. His report was filed on the seventh day of May, 1884, finding in favor of the claimants, and that the supplies were furnished on the credit of the transportation company, and not on that of the boat. Exceptions were filed to this report, and the case is now before me on those exceptions.

It is clear, from the testimony, that the owners in fact leased this boat and others to the transportation company, and that they were by such company operated during the season in question, as well as during the two prior years. It is true that in the argument some insinuations were thrown out against the *bona fides* of this transaction, and the letters of some of the owners were referred to as indicating an active interference in the management of the boats. I see nothing in the testimony of these letters to justify this. Doubtless, the owners, as owners, were interested in the success of the transportation company, for in its success was their assurance of pay for the use of the boats. Further, the owners of the boats, or some of them, at least, were largely interested as stockholders of the transportation company, and, of course, interested as stockholders in its success, and I see nothing which justifies any more than such natural and proper interest.

Again, it is said that there is a variance between the allegations in the answer of the claimants and the testimony in this: that the answer alleges that the owners leased the boats to the company for the term of three years, while the testimony discloses separate charter-parties for each year, one of them covering the year in question. This is a mere technicality, and must be disregarded.

Further, it is insisted that the transportation company was a corporation organized under the laws of Iowa; that it does not appear that its charter was ever filed in the territory of Dakota, and therefore that it there had no legal existence. I do not see that that is material, for, whether corporation or merely partnership, it was composed of different persons than the owners of the boats, and was therefore a different legal entity, capable of leasing from the owners and transacting business on its own account. I think, therefore, there is no escape from a consideration of the main question, and that is whether the supplies were furnished to and upon the credit of the boat, or to and on the credit of the transportation company. The libelants testify that they sold to the boat and on its credit, and not to the transportation company, and this was the testimony on which the decree of the district court was entered. But it appears from other testimony that they had, in prior years, furnished supplies to

this and other boats similarly situated, on sales to and on the credit of the transportation company. The libelants claim that in January, 1882, they wrote to Iowa to ascertain the condition of the transportation company, and, from information received there and elsewhere, doubted its solvency, and thereafter sold on the credit of the boat; but, notwithstanding this testimony, it appears that, when they sold these supplies, they took drafts drawn by the clerk of the boat on the general manager of the transportation company, and that these drafts were renewed from time to time until the failure of the company. It does not appear that they ever notified the company or the officers of the boat that they intended to change the course of business that had been pursued the prior years, and, in fact, the manner of the business was continued the same. It also appears that the company had, during these years, a general agent at Bismarck who looked after the business of the company there, and was known to be such by the libelants, though, probably, the supplies were, in fact, ordered by the captain, steward, or clerk of the boat. Now, I think it very strong inference, when business is shown to have been conducted for one or more years in a certain way, with credit given in those transactions to a certain party, and the business is conducted the ensuing year, in fact, in the same way, with no notice given of any intent to change the debtor, that there was in fact no change. I am strengthened in this conclusion by the letters and telegrams of the libelants sent to the general manager of the transportation company subsequent to the sale of these supplies. Their general tenor and effect is that of communications from a creditor to a debtor.

The proctor for the libelants lays great stress on the fact that the supplies were charged on the book of the libelants to the steamer, and that bills were made out in the name of the steamer and handed to the clerk. This, standing by itself, is of course testimony of weight; but when it is coupled with the fact that on presentation of the bills a draft drawn by the clerk on the general manager was accepted, and when it is borne in mind that naturally it would be for the convenience of both libelants and the company to keep the accounts for each boat separate, the testimony will be seen to have much less weight. Of course, if the goods were sold to and on the credit of the transportation company, it cannot seriously be contended that this libel can be sustained. See *The Grapeshot*, 9 Wall. 129; *The Lulu*, 10 Wall. 192; *The Patapsco*, 13 Wall. 329.

I think, therefore, the exceptions to the report of the referee must be overruled, and the libel dismissed, at the cost of the libelants.

So far as the claim of the intervenor is concerned, under the stipulation of the parties I think it must be sustained; that he has a lien which must be satisfied and discharged out of the boat. I understand that the two cases of the same libelants *versus* the steamer Gen. Terry and *versus* the steamer Nellie Peck are precisely similar, and the same decision is announced for those cases.

## The Young America, Her Tackle, etc.

(*District Court, D. New Jersey.* July 2, 1884.)

1. Salvage—Vessel in Peril—Tug—Towage.
   A vessel whose captain and crew, apprehending danger from a fire raging in the immediate neighborhood, exhibit a signal for a tug, is afterwards liable to the tug which responds for *salvage* and not for *towage* service.
2. Same—Estimation of Service.
   The value of a service performed is not to be estimated by the light of subsequent events, but of the facts which seemed to surround it at the time.
3. Same—Panic—Exorbitant Demand.
   The court, in awarding the salvage, may take into consideration the unworthy conduct of the captain of the tug, who apparently sought to profit by the fright of the crew of the vessel, and reduce the amount from the exorbitant claim.

Libel for Salvage.

*Jas. K. Hill, Wing & Shoudy,* for libelants.

*Beebe & Wilcox,* for claimants.

Nixon, J. This is a libel *in rem* by the owner, master, and crew of the steam-tug Henry L. Waite to recover salvage for services rendered to the ship Young America under the following circumstances: At about a quarter before 2 o'clock on the afternoon of February 8, 1884, an oil tank exploded and a fire broke out in the yard of the Standard Oil Company, at Hunter's point, on the East river. The place of the explosion which caused the fire was upwards of 200 feet back from the river front, and about 50 feet south of the canal or creek which is the northern boundary of the yard, and that separates it from the Daylight or Empire oil-yard. This canal is about 125 feet in width. The Daylight oil-yard borders upon it on the south, and upon the East river on the west. When the fire began, the claimants' vessel, Young America, was lying on the river bulk-head of said yards, outside of the bark William K. Chapman, about 200 feet north of the creek, and fastened to the shore by lines. These lines were shortly afterwards cut,—by whom it does not appear,—and both vessels began to drift slowly towards the middle of the stream and down the river. It was about low water, and there is proof that there was a slight eddy, which carried them towards the mouth of the creek, and an east wind that blew them a short distance from the shore. She had a signal displayed on the port side, in her rigging, asking for a tow. The libelants' boat was docking a vessel at the foot of Fourteenth street, on the New York side of the river, when the explosion and the consequent smoke and fire in the Standard oil-yard attracted their attention. They hastened over to the other side in order to be in a position to render aid to vessels requiring help, and, being attracted by the signal on the Young America, they went alongside, fastened to her, and towed her up the river opposite to Blackwell's island, and left her there at anchor. The spars of the William K. Chapman were so entangled in the rigging of the Young America

that she also was towed to about the middle of the river, when she became disengaged and was anchored. When the vessels were taken up by the Waite, they were adrift in the river near the eastern shore, and just above the mouth of the canal or creek which separates the Standard oil-yard from the Daylight or Empire yard, on the southern side of which the fire was raging in a threatening manner. Whether they were in immediate peril or not does not clearly appear, but the testimony shows that the crew of the Young America was badly scared, and that they availed themselves with great alacrity of the offer of the tug-boat to tow them to some place where their safety would be more apparent.

Was the work performed by the Henry L. Waite and her crew, under such circumstances, a salvage or a towage service? It was certainly something more than the latter, although, as affairs turned out, perhaps a low grade of the former. It is often difficult to get a fair estimate of the value of a service by viewing it in the light of subsequent events. It ought to be looked at in connection with the facts which seem to surround it at the time. We can look back now and easily come to the conclusion that the Young America was, at no juncture of the affair, in any real danger. We can see that, after she got beyond the influence of the eddy, the young flood-tide and the easterly wind would co-operate, if she were left alone, to remove her from the impending peril. But then there was great excitement. The oil tanks were exploding, the oil taking fire and running into the creek ablaze, and the flames were extending a hundred feet in the air. The surface of the creek was not covered, nor more than half covered, with the burning oil, and yet, to the excited imagination of a number of the witnesses, the flame extended from shore to shore, and threatened to creep over into the Daylight yard, and to come in contact with other inflammable materials. They never went quite to the mouth of the creek,—certainly not beyond the mouth,—and yet some spectators believed that the water was ablaze nearly a hundred feet into the river. Such was the condition of affairs when the Waite appeared upon the scene. She came, not merely as an angel of mercy, to relieve distress and avert threatened disaster, but with an eye to business and profit as well.

The captain of the steam-tug says that he saw the signal of distress in the rigging of the Young America; that he drew along-side and asked for the captain, and was told that he was forward. He then remarked to a man, whom he afterwards understood was the mate, "You tell the captain that I will take him out for $1,000;" and the reply came back, "Give him a line." The line was given and made fast, and the ship towed to the other side of the river.

The master of the Waite claims that a contract was entered into that he should receive $1,000 for the service of taking charge of the ship and removing her to a place of safety, and asks the court to so decree. The master of the Young America, on the other hand, de-

nies that he made any agreement; swears that he heard nothing about the charge of $1,000; and avers that he ordered the line to be given because he understood that the Waite had come with the offer of a mere towage service. He has an imperfect knowledge of the English language, and it is not clear from the proofs that he comprehended that $1,000 was to be demanded for the service to be performed. But even if he did, I am not sure that a contract made under such circumstances ought to be enforced by the court. Contracts of this nature, entered into in the midst of excitement, are justly regarded by the courts with suspicion, especially when they are of such an unconscionable character. Neither the Waite nor the Young America was subjected to any peril which authorized the demand for, or the agreement to pay, any such sum for a service without risk and of so short duration.

I have read all the testimony with care, and have come to the conclusion that $300 is a liberal allowance for the service rendered. A decree will therefore be entered for the libelants for that sum, with costs; one-half to be awarded to the owner of the tug-boat, $25 to the master, and the remaining $125 to be divided among the crew, including the master, in proportion to the rate of the wages, respectively, paid to them. If such division cannot be made by the proctors, a reference will be ordered. I should have made a larger allowance to the master of the Waite if I was not strongly impressed with the thought that, in his demand of $1,000 for such a service, he was attempting to profit by the fright and necessities of the claimants.

END OF VOLUME 20.