previous salvage task has equaled this in magnitude, and the ship was saved with comparatively small damage. The amount awarded on the other hand, though not large, if measured by a percentage upon the values involved, seems to me to be a sufficient recognition of the importance of the services of the salvors, the necessities of the ship and the success achieved; and also to be sufficiently liberal to serve as an inducement to the maintenance, in the most efficient condition, of such wrecking companies as were here employed, without which the safety of the St. Paul could not have been so completely effected, nor could other steamers of her class, when stranded, be saved from great injury, and perhaps total loss.

2. Cargo. The circumstances of the present case, as respects the limited extent of the danger that was common to both ship and cargo and the consequent limited community of interest between them; and as respects the rights of cargo owners to a speedy delivery of their goods on a stranding like this, so near the close of the voyage, and the corresponding duty of the master as their representative, are almost identical with the circumstances in the case of L'Amerique, 35 Fed. 835, in which this court held, upon consideration at length, that the community of interest, and consequently the community of burden or expense, as between ship and cargo, were severed from the time they parted company. The unloading of the vessel being indispensable for the purpose of lightening her in order that she might be got off, and equally necessary for the safety of the cargo, this part of the salvage work was there regarded as done in the common interest and for the common benefit; and, therefore, under the adjudged cases, required to be shared in common; but it was held that in circumstances like the present, where the cargo has been unloaded for the purpose of making delivery of it to the owners by other means, there is no longer any community of interest between ship and cargo in the subsequent expenses of getting the ship afloat. The cargo has no interest in that work, not only because the ship is no longer needful to the cargo, but because it is not intended to make any use of the ship for the further prosecution of a joint adventure. The separation of interests is, therefore, complete from the time ship and cargo part company.

In cases like the present, it is obvious from the first that the necessities of the ship and cargo are wholly different. The work of relieving the ship is likely to be long, difficult and doubtful in result; relief for the cargo comparatively quick and sure. The dangers to the ship are not only much greater, but for the most part different in kind, from the danger to the cargo; and the means available and the measures required for the relief of each are so different, that no real community of interest exists between them beyond the time when the cargo is unloaded. After that is finished and the cargo is in safety, the principal and most difficult part of the work of getting the ship off still remains to be done. To hold the cargo chargeable for the expense of that work when it has no interest in the result of the work, would be an arbitrary appropriation and sacrifice of the cargo for the ship's use, with no benefit or intended benefit to the cargo, present or prospective; a sacrifice contrary to common reason and

equity and to the recognized mutual rights of ship and cargo. See L'Amerique, supra.

If the stranding is light and the ship can be got off and is got off with the cargo on board, no doubt the whole service is a common charge. Reasonable efforts to that end, according to the circumstances, or if those efforts are not successful, then the unloading of cargo, which becomes equally indispensable to the safety of each, should be at the common charge pro rata, because wholly incurred for the common benefit. Beyond that the common charge should cease.

In deciding the case of L'Amerique, the adjudged cases up to that time were considered. I find no later cases holding differently under similar circumstances; while in the City of Worcester, 42 Fed. 916, a similar case, Judge Shipman made the same separation of interests between ship and cargo, and awarded about 1.2 per cent. on the value of the cargo, and about 13.4 per cent. upon the value of the ship, and this was affirmed on appeal. 45 Fed. 119. In the case of Pacific Mail S. S. Co. v. New York, H. & R. Min. Co., 20 C. C. A. 349, 74 Fed. 564, also a similar distinction was made on appeal as respects specie removed before the salvage operations began; although in this court it was considered that the specie in that case ought to be held for its proportion of the salvage service in pumping out and raising the ship, because that service was made necessary by a previous voluntary act of sacrifice for the common benefit of the ship and specie alike, and because the salvage operation merely diminished the general average burden which the previous act of sacrifice had already imposed upon the whole cargo while the specie was still on board; the same as in the case of salvage services rendered to a ship and her cargo which had been voluntarily stranded for the common safety, or in case of goods necessarily jettisoned, and subsequently rescued by salvors.

The decisions above cited must be followed here. They require the pro rata charge to be limited to the period during which the salvage service was rendered for the common benefit. This was for a period of four days, viz., up to 10 a. m. of Wednesday, the 28th of January, when the unloading was completed. The whole salvage service occupied 11 days. The cargo is evidently not entitled to exemption for the first day's work, during which the passengers and mails were removed, and efforts made to move the ship without unloading. The removal of the passengers was the first duty of the master as the representative of the whole adventure, and that must be at the charge of the whole; and the efforts to move the ship before unloading were in the common interest.

No authorities, moreover, warrant treating the salvage of the ship and the salvage of the cargo as two distinct operations from the first; the exigencies of the ship would not permit two wholly independent salvage operations at the same time. There was but one salvage operation in fact; and, as I have said, there is no authority for severing it by construction, so long as the work is carried on for the common benefit.

Nor do the authorities justify any distinction in the proportion charged against different parts of the cargo. This point was well

considered by Sir R. Phillimore in the case of The Longford, 4 Asp. 385, and any such differences, even in favor of specie, were disallowed as illogical and liable to lead to great difficulties and embarrassments.

The proctors of the libelants and of the shipowners have stipulated that $1,500,000 may be taken as the value of the vessel. As the proctors of the cargo owners, however, do not agree to this, I cannot accept it in fixing the pro rata share of the cargo; and upon the other evidence I think the ship should be considered worth $2,000,000. Her pending freight was $16,902.

For the first four days' work, therefore, the share of the cargo will be a little less than two-elevenths of the whole award of $160,000; or more accurately, 1.45 per cent. on the cargo values. I therefore fix upon that percentage (1.45) as the proportion chargeable upon the cargo, amounting to $28,987.52, for which a decree may be entered in the libel in personam, with costs; and in the libel in rem, a decree may be entered for the residue of $131,012.48, with costs.

THE PILOT.

PHILLIPS v. THE PILOT.

(District Court, E. D. Pennsylvania. July 18, 1897.)

1. MASTER AND SERVANT—NEGLIGENCE—ORDINARY RISKS OF EMPLOYMENT.
   A master of a tugboat who ordered one of the crew to jump ashore to attach a line, is not guilty of negligence if the latter, by reason of his being unaccustomed to jumping, received injuries in attempting to execute the master's order, where it does not appear that the master had knowledge of his inability, since a master of a tugboat is justified in assuming that a member of the crew is accustomed to all ordinary duties required of men on such vessels.
2. MASTER AND SERVANT—NEGLIGENCE—ORDINARY RISKS OF EMPLOYMENT.
   In such case the master is not guilty of fault, unless the distance from the wharf was so great as to render the service unnecessarily dangerous to a man of ordinary strength and activity.
3. MASTER AND SERVANT—NEGLIGENCE—EMERGENCY.
   The plaintiff, who while jumping ashore to attach a line failed to light upon the wharf, and slipping down its breast into the water was struck by the boat and injured, alleged as negligence on the part of the master his failure to keep the boat off from the wharf after the plaintiff had fallen in the water. *Held*, that the master was not guilty of negligence, since it appeared that he had acted in the emergency with which he was confronted in a manner which seemed best to him under the circumstances.

S. Morris Waln, for libelant.
Henry Flanders and Edward F. Pugh, for respondent.

BUTLER, District Judge. The undisputed facts are that the libelant was a member of the respondent's crew, as fireman; that on January 10, 1895, when the tug rounded to at Point Coal Piers, he attempted to jump ashore, to attach a line; that he failed to light upon the wharf, and slipped down its breast into the water, where he was struck by the boat and hurt; that the tide was strong ebb, and the wind east, driving the boat towards the wharf, although her engine had stopped. The libelant charges that he was ordered up from below and directed to jump, by the master; that he hes-

itated, but on receiving a second order, jumped; that the master did nothing to keep the boat off subsequently, although by backing he could have done so. These charges are severally denied, and the testimony respecting them is conflicting.

The case presents but two questions that need be decided: First, was the master blamable for ordering the libelant to jump, supposing he did so? Second, was he blamable for not keeping the tug off subsequently? As respects the first, the libelant was subject to be called to the duty he undertook when jumping. On such vessels the entire crew assists about whatever is to be done when required. In ordering the libelant to jump the master was not, therefore, guilty of fault unless the distance from the wharf was so great as to render the service unnecessarily dangerous, to a man of ordinary strength and activity. There is no evidence that the distance was such. The libelant puts it at five feet, which was certainly not a very long jump; and in his brief (page 1) he assigns his failure to reach the wharf safely to the fact that he is not "accustomed to jumping." The master was justified in assuming that he was accustomed to all the ordinary services required of men on such vessels. This service of jumping ashore to attach a line is required many times daily, and one member of the crew is nearly as liable to be called to its performance as another. If the libelant was deficient in capacity to jump he should at least have said so; if he had, and notwithstanding had been required to jump, the result might possibly be different. His fall into the water must be regarded, under the circumstances, as the result of unfitness for the duty he undertook, and the folly of undertaking it. But even if the distance had been greater, and the master had given the order through error of judgment (and that is the most that could be charged in such case) the order could not be regarded as a fault which would render the vessel liable. The fall into the water under such circumstances, would be an accident, incident to the employment, and contemplated by the contract. The City of Alexandria, 17 Fed. 396; Paulson v. The Governor Ames, 55 Fed. 327.

Is the master blamable for not keeping off subsequently? If he did what seemed to him best under the circumstances, he is not chargeable with negligence, although it might now seem that something else would have been better. He was confronted with an emergency, was required to think and determine what should be done with no time for deliberation and a mistake under such circumstances would be excusable. The proofs do not satisfy me, however, that he made a mistake, or could have done better than he did. Possibly an effort to back might have been better, but it seems as probable that it would have been worse. It seems improbable that an attempt to back would have been serviceable; before the engine could have affected the motion of the boat it would have been likely to strike the libelant as it did; and if its motion had been thus affected earlier it is not unlikely that the blow would have been harder.

The other allegations of fact on which the libelant depends are thus seen to be unimportant.

The libel must, therefore, be dismissed with costs.

STANDARD OIL CO. v. BELL et al.

(Circuit Court of Appeals, Fifth Circuit. June 16, 1897.)

No. 598.

APPEAL AND ERROR—MOTION TO DISMISS AND AFFIRM.

Where the determination of a motion to dismiss a writ of error and affirm the judgment below involves the examination of a voluminous record, it will not be considered in advance of the regular call.

In Error to the Circuit Court of the United States for the Southern District of Florida.

On motion to dismiss the writ of error and affirm the judgment of the circuit court.

J. C. Cooper, W. W. Howe, W. B. Spencer, and C. P. Cocke, for plaintiff in error.

H. Bisbee, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. This is an action of ejectment, tried in the circuit court without a jury, and brought here for review on a transcript of 307 printed pages, with 12 assignments of error. Counsel for defendants in error have submitted the following motion, to wit:

"Come now the defendants in error, by H. Bisbee, their attorney, and move to dismiss the writ of error in the above-entitled cause upon the following grounds: First, because no exceptions were taken to any rulings or decisions of the court below in such manner and form as to entitle the plaintiff in error to any review thereof in this court. Second, because no exceptions were taken to the rulings and decisions of the court below upon which the assignments of error can be based. And defendants in error further move for the judgment of this court affirming the judgment of the court below on the ground that it is manifest that a writ of error was taken for delay only; second, on the ground that the objection to the jurisdiction of the court below is too frivolous to need argument."

The record plainly shows that, of the 12 assignments of error, at least half present rulings of the trial judge not reviewable on writ of error. The others, however, assign error as to the ruling of the court on the question of jurisdiction, and as to the rejection of evidence on the trial of the case, based upon exceptions duly taken, and in rulings on other questions, all proper subjects for review on writ of error. It is therefore clear that the writ of error cannot be dismissed for any of the reasons assigned in the motion. To pass upon the motion to affirm requires a careful examination of the entire record, which the court is indisposed to make in advance of the regular call, and without opportunity to the plaintiff in error to present argument on the points involved. The motion to dismiss and affirm is therefore denied.