34 Phil. 178

[G.R. No. 10051. March 09, 1916]

ERLANGER & GALINGER, PLAINTIFFS AND APPELLANTS, VS. THE SWEDISH EAST ASIATIC CO. (LTD.) ET AL, DEFENDANTS. THE "OELWERKE TEUTONIA" AND NEW ZEALAND INSURANCE CO. (LTD.), APPELLANTS.

D E C I S I O N

PER CURIAM:
The facts in this case are as follows:

First. The steamship *Nippon* loaded principally with copra and with some other general merchandise sailed from Manila on May 7, 1913, bound for Singapore. Second. The steamship *Nippon* went aground on Scarborough Reef about 4.30 in the afternoon of May 8, 1913. Third. Scarborough Reef is about 120 to 130 miles from the nearest point on the Island of Luzon. Fourth. On May 9, 1913, the chief officer, Weston, and nine members of the crew left the Nippon and succeeded in reaching the coast of Luzon at Santa Cruz, Zambales, on the morning of May 12, 1913. Fifth. On May 12, 1913, the chief officer sent a telegram to Helm, the Director of the Bureau of Navigation, at Manila, which was as follows:

"SANTA CRUZ, ZAMBALES,

"*May 12, 1918.*

"DIRECTOR OP BUREAU OF NAVIGATION, *Manila*.

"*Nippon* stranded on Scarborough Reef, wants immediate assistance for saving crew—boats gone.

"12.15 p. m. (Sgd.) "WESTON."

Sixth. On the same day (May 12) at 1.30 p. m., the Government of the Philippine Islands ordered the coast guard cutter *Mindoro* with life-saving appliances to the scene of the wreck of the *Nippon*. Seventh. On the same day (May 12) at 3 p. m. the steamship *Manchuria* sailed from Manila for Hongkong and was requested to pass by Scarborough Reef. Eighth. The *Manchuria* arrived at Scarborough Reef some time before the arrival of the *Mindoro* on May 13, 1913, and took on board the captain and the remainder of the crew. Ninth. The *Manchuria* was still near Scarborough Reef when the *Mindoro* arrived. The captain of the *Manchuria* informed the captain of the *Mindoro* that the captain and crew of the *Nippon* were on board the *Manchuria* and were proceeding to Hongkong. Tenth. The captain of the *Mindoro* offered to render assistance to the captain and crew of the *Nippon*, which assistance was declined. The *Mindoro* proceeded to the *Nippon* and removed the balance of the baggage of the officers and crew, which was found upon the deck. Eleventh. The Mindoro proceeded to Santa Cruz, Zambales, where the chief officer, Weston, and the nine members of the crew were taken oh board and brought to Manila, arriving there on May 14, 1913. Twelfth. On May 13, 1913, Dixon, captain of the *Manchuria* sent the following message:

"S. S. 'MANCHURIA', *May 13, 1913*.

> "All rescued from the *Nippon*. Stranded on extreme north end of shoal. Vessel stranded May 9. She is full of water fore and aft and is badly ashore. Ship abandoned. Proceed Hongkong.
>
> (Sgd.) "DIXON."

The captain of the *Nippon* saw the above message before it was sent. Thirteenth. On May 14, 1913, the plaintiff applied to the Director of Navigation for a charter of a coast guard cutter, for the purpose of proceeding to "the stranded and abandoned steamer *Nippon*." Fourteenth. The coast guard cutter *Mindoro* was chartered to the plaintiffs and started on its return to the S. S. *Nippon* on May 14, 1913. Fifteenth. The plaintiffs took possession of the Nippon on or about May 17, 1913, and continued in possession until about the 1st of July, when the last of the cargo was shipped to Manila. Sixteenth. The *Nippon* was floated and towed to Olongapo, where temporary repairs were made, and then brought to Manila. Seventeenth. The Manchuria arrived at Hongkong on the evening of May 14, 1913. When the captain and crew left the *Nippon* and went on board the *Manchuria*, they took with them the chronometer, the ship's register, the ship's articles, the ship's log, and as much of the

crew's baggage as a small boat could carry. The balance of the baggage of the crew was packed and left on the deck of the *Nippon* and was later removed to the *Mindoro*, without protest on the part of the captain of the *Nippon*, as above indicated. Eighteenth. The cargo was brought to the port of Manila and the following values were fixed:

"Copra (approximately 1317 tons) valued at less cost of sale by Collector of Customs	₱142,657.05
"General cargo—sold at customhouse	5,939.68
"Agar-agar	5,635.00
Gamphor	1,850.00
Curios	150.00
"Total	156,231.73″

Nineteenth. The ship was valued at ₱250,000. The plaintiffs' claim against the ship was settled for £15,000 or about ₱145,800.

The plaintiffs brought the present action (August 5, 1913; amended complaint, September 23, 1913) against the insurance companies and underwriters, who represented the cargo salved from the *Nippon*, to have the amount of salvage, to which the plaintiffs were entitled, determined.

The case came on for trial before the Honorable A. S. Crossfield. The Oelwerke Teutonia, a corporation, appeared as claimant of the copra. The New Zealand Insurance Company appeared as insurer and assignee of the owners of 33 crates of agar-agar; The Tokio Marine Insurance Company appeared as the insurer and assignee of 1,000 cases of bean oil and two cases of bamboo lacquer work; and The Thames and Mersey Marine Insurance Company appeared as a reinsurer to the extent of ₱6,500 on the cargo of copra. The court found that the plaintiffs were "entitled to recover one-half of the net proceeds from the property salved and sold (which has nothing to do with the steamship itself), and one-half the value of the property delivered to the claimants."

Judgment was entered as follows:

> "In favor of the plaintiffs, Erlanger & Galinger for one-half of the net proceeds of sales amounting to ₱74,298.36 and one-half of the interest accruing thereon, and against Carl Maeckler for the sum of ₱925, and against the New Zealand

> Insurance Company (Ltd.) for the sum of ₱2,800, and against whomever the two cases marked R—W, Copenhagen, were delivered to, and for the sum of ₱2,370.68, out of the proceeds of the sale of 1,000 cases of vegetable oil, and in favor of the 'Oelwerke Teutonia' for the sum of ₱71,328.53, now deposited with the Hongkong & Shanghai Banking Corporation, together with one-half of the interest thereon."

No costs were taxed.

The Oelwerke Teutonia, The New Zealand Insurance Company (Ltd.), and Erlanger & Galinger appealed from this decision. The Oelwerke Teutonia made the following assignments of error:

> "(I) The court below erred in finding that the plaintiffs are salvors of the copra in question. (II) The court erred in holding that the plaintiffs are entitled to recover one-half of the proceeds of the copra. (III) The court erred in rendering judgment in favor of the plaintiffs for half of the proceeds of the copra. (IV) The court erred in disallowing the defendants' counterclaim. (V) The court erred in over-ruling defendant's motion for a new trial."

The New Zealand Insurance Company (Ltd.) made the following assignments of error:

> "Now comes the New Zealand Insurance Company (Ltd.), defendant and appellant in the above-entitled cause, and avers that in the proceedings in the said cause, in the Court of First Instance of Manila, there was manifest error to the prejudice of this appellant, in this, to wit:
>
> > "(I) That said court found that plaintiffs are entitled to one-half of the value of thirty crates of agar-agar delivered to this appellant; (II) That the said court ordered judgment in favor of the plaintiffs and against this appellant for the sum of ₱2,800; (III) That the said court denied the motion of this appellant for a new trial."

The appellants, Erlanger & Galinger, made the following assignments of error:

> "Error No. 1. The court erred in ruling that the plaintiffs were not entitled to a reimbursement of their expenses, out of the gross value of the salved property, before the division of the remainder into moieties between the salvors and the claimants. Error No. 2. The court erred in holding that the cargo and the vessel are equally chargeable with the expense of salvage. Error No. 3. The court erred in refusing to award the plaintiffs, out of the proceeds of the sale of the cargo, the sum of ₱28,755.86 as compensation and the sum of ₱98,720 as reimbursement of expenses, or a total of ₱127,476.08. Error No. 4. The court erred in awarding into the claimant 'Oelwerke Teutonia' the sum of ₱71,328.53, or any part thereof out of the proceeds of the salved cargo. Error No. 5. The court erred in denying the motion of the plaintiffs for a new trial."

The assignments of error and the briefs of all of the appellants raise but three questions: (1) Was the ship abandoned? (2) Was the salvage conducted with skill, diligence, and efficiency? (3) Was the award justified?

The general rules and principles governing salvage services and salvage awards are well settled. This branch of the law of the sea dates back to the early history of navigation. We find recorded in the Laws of Oleron, which were promulgated sometime before the year 1266, at article IV:

> "If a vessel, departing with her lading from Bordeaux, or any other place, happens in the course of her voyage, to be rendered unfit to proceed therein, and the mariners save as much of the lading as possibly they can; if the merchants require their goods of the master, he may deliver them if he pleases, they paying the freight in proportion to the part of the voyage that is performed, and the costs of the salvage. But if the master can readily repair his vessel, he may do it; or if he pleases, he may freight another ship to perform his voyage. And if he has promised the people who help him to save the ship the third, or the half part of the goods saved for the danger they ran, the judicatures of the country should consider the pains and trouble they have been at, and reward them accordingly, without any regard to the promises made them by the parties concerned in the time of their distress." (See 30 Fed. Cas., at page 1172).

The courts of the United States and England have, in a long line of adjudicated cases, discussed the various phases of this important subject. In general, salvage may be defined as a service which one person renders to the owner of a ship or goods, by his own labor, preserving the goods or the ship which the owner or those entrusted with the care of them have either abandoned in distress at sea, or are unable to protect and secure. The Supreme Court of the United States and the other Federal Courts of the United States have had occasion numerous times to quote with approval the following definition from Flanders on Maritime Law:

> "Salvage is founded on the equity of remunerating private and individual services performed in saving, in whole or in part, a ship or its cargo from impending peril, or recovering them after actual loss. It is a compensation for actual services rendered to the property charged with it, and is allowed for meritorious conduct of the salvor, and in consideration of a benefit conferred upon the person whose property he has saved. A claim for salvage rests on the principle that, unless the property be in fact saved by those who claim the compensation, it can not be allowed, however benevolent their intention and however heroic their conduct." (*The Job H. Jackson*, 161 Fed. Rep., 1015, 1017; *The Amelia,* 1 Cranch, 1; *The Alberta*, 9 Cranch, 369; Clarke *vs. Dodge Healy,* 4 Wash. C. C, 651; Fed. Cas. No. 2849.)

In the case of Williamson *vs*. *The Alphonso* (Fed. Cas., No. 17749; 30 Fed. Cas. 4, 5), the court laid down practically the same rule.

> "The relief of property from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligation to render assistance, and the consequent ultimate safety of the property, constitute a case of salvage. It may be a case of more or less merit, according to the degree of peril in which the property was, and the danger and difficulty of relieving it; but these circumstances affect the degree of the service and not its nature."

In Blackwall *vs.* Saucelito Tug Company (10 Wall., 1,12), the court said:

> "Salvage is the compensation allowed to persons by whose assistance a ship or

> her cargo has been saved, in whole or in part, from impending peril on the sea, or in recovering such property from actual loss, as in case of shipwreck, derelict, or recapture."

It will be noticed from the above definitions that there are certain definite conditions which must always exist in a case of pure salvage. The Supreme Court of the United States, speaking through Mr. Justice Clifford, in the case of *The Mayflower vs. The Sabine* (101 U. S., 384) makes those conditions three (p. 384).

> "Three elements are necessary to a valid salvage claim: (1) A marine peril. (2) Service voluntarily rendered when not required as an existing duty or from a special contract. (3) Success, in whole or in part, or that the service rendered contributed to such success."

These are the general principles governing salvage.

The question whether or not a particular ship and her cargo is a fit object of salvage depends upon her condition at the time the salvage services are performed. In the present case the plaintiff-appellant claims that the *Nippon* was a derelict or quasi-derelict and that their claim should be adjudged upon this basis. A derelict is defined as "A ship or her cargo which is abandoned and deserted at sea by those who were in charge of it, without any hope of recovering it (*sine spe recuperandi*), or without any intention of returning to it (*sine animo revertendi*). Whether property is to be adjudged derelict is determined by ascertaining what was the intention and expectation of those in charge of it when they quitted it. If those in charge left with the intention of returning, or of procuring assistance, the property is not derelict, but if they quitted the property with the intention of finally leaving it, it is derelict, and a change of their intention and an attempt to return will not change its nature." (Abbott's Law of Merchant Ships and Seamen, Fourteenth Edition, p. 994.)

This contention of the plaintiffs raises the first question: (1) Was the ship abandoned?

The defendant-appellant Oelwerke Teutonia contends that the captain and the crew did not leave the ship *sine animo revertendi,* but that it was their intention to go to Hongkong and procure assistance with which to save the ship and her cargo. Whether the intention to return exists in a particular case is always difficult to determine. It is indeed a rare case

when the master of the ship will leave without the intention of returning, if there is the slightest hope of saving his vessel. In the case of *The Coromandel* (1 Swab., 208) Dr. Lushington said:

> "It may be perfectly true that the master and these fifteen men, when they had got on board *The Young Frederick*, and were sailing away to Yarmouth, intended, if possible, to employ steamers to go and rescue the vessel, which was at no great distance. But is not that the case every day? A master and crew abandon a vessel for the safety of their lives; he does not contemplate returning to use his own exertions, but the master hardly ever abandons a vessel on the coast without the intention, if he can obtain assistance, to save his vessel. That does not take away the legal character of derelict. (Norcross *vs. The Laura*, 14 Wall., 336.)"

Judge Crossfield found that:

> "At the time the plaintiff commenced the attempt to salve what was possible of the S. S. *Nippon* and cargo, it was justified, from all the conditions existing, in believing that it had been abandoned and in taking possession, even though the master of the vessel intended when he left it, to return and attempt salvage.
>
> "Such intention, if it existed, does not appear to have been very firmly fixed, considering the leisurely manner in which the master proceeded after he reached the Port of Hongkong."

The evidence amply supports this finding. The chief officer, Weston, upon reaching the coast of Zambales, on May 12, 1913, sent the following telegram to the Director of the Bureau of Navigation:

> "SANTA CRUZ, ZAMBALES,
>
> *"May 12, 1913.*
>
> "DIRECTOR OF BUREAU OF NAVIGATION, *Manila*.
>
> "*Nippon* stranded on Scarborough Reef, wants immediate assistance for saving

crew boats gone—12.15 p. m.

(Sgd.) "R. WESTON."

On the evening of the same day Weston sent the following telegram:

"SANTA CRUZ, ZAMBALES,

"May 12, 1913.

"DIRECTOR OF BUREAU OP NAVIGATION, *Manila*.

"Left with nine hands at noon, 9th, 26 men still on board, ship well on reef, stern part afloat, about ten feet of water in holds, starboard list, heavy swell breaking over, little hope of saving ship—6.27 p. m.

(Sgd.) "WESTON."

On May 13, 1913, Captain Dixon of the S. S. Manchuria, after rescuing the remainder of the crew, left on board the Nippon, sent the following telegram to the Director of Navigation:

"S. S. 'MANCHURIA,' *May 18, 1913.*

"All rescued from the *Nippon*. Stranded on extreme north end of shoal. Vessel stranded May 9th. She is full of water fore and aft, and is badly ashore. *Ship abandoned.* Proceeding Hongkong—9.40 a. m.

(Sgd.) "DIXON, *Master."*

On May 14, 1913, after the members of the crew who came ashore with Weston had reached Manila, they made the following signed statement:

"MANILA, P. I., *May 14, 1913.*

"We, the undersigned officers and part of the crew of the Swedish steamer *Nippon*, do hereby declare that the S. S. *Nippon* struck on Scarborough Reef,

about 4.30 on the afternoon of Thursday, May 8, 1913. Two of her boats were lost after we struck the reef, leaving only two aboard and those damaged. The ship was filled with water and pounding on the reef and we considered her a wreck. In company with the chief officer, we left the ship about noon on Friday, May 9,1913, in a small boat and reached Santa Cruz, Zambales, a distance of 130 miles on the morning of Monday, May 12, 1913, and immediately the chief officer wired to the Director of Navigation at Manila for assistance to rescue the balance of the crew left aboard the *Nippon*, as we considered their lives in danger and the ship a wreck, with little hope of saving her.

(Signed.)

"F. Carman,
"G. E. Johansson,
"W. Bratt,
"B. Nyolram,
"E. Petterson.
"A. G. Ericksoon,
"F. Palm,
"J. Karlberg,
"E. Thulin."

On May 16, 1913, Captain Anderson of the coast guard cutter *Mindoro*, made the following report to the Director of Navigation:

"S. S. 'MINDORO.'

"MANILA, P. I., *May 16, 1913.*

"SIR:

"I have the honor to make the following report of voyage made to Scarborough Reef, May 12 to 14, 1913 for officers and crew of S. S. *Nippon*.

"May 13, 1913, being 2½ miles south of reef, I observed S. S. *Nippon* stranded on the N. E. edge of reef. I immediately steered northward around the western edge of reef and arrived off stranded ship at 9.30 a. m. S. S. *Manchuria* was laying to about 1½ miles northward of reef, making signals for me to come alongside. I immediately proceeded out to the *Manchuria*; upon arrival alongside the Manchuria the captain of the same ship informed me that the S. S. *Nippon* was abandoned and that he had the captain and crew on board for Hongkong. I then asked the captain of the *Manchuria* if the captain of the *Nippon* cared to go to

Hongkong, as I was there to bring him and the crew to Manila if he desired to go. The captain of the *Manchuria* again informed me that the captain of the *Nippon* intended to go to Hongkong. I answered 'All right, I will then go and have a look at the *Nippon* and see how badly she is wrecked.' The captain of the *Manchuria* made the remark that she was half full of water and that she was very badly wrecked, but that there was still some baggage left on board. He also informed me that he had a wire from the Director of Navigation ordering me to proceed to Santa Cruz to pick up boat's crew from *Nippon*. I said, 'All right. I will go and get baggage and have a look at the wreck.' I then left the *Manchuria* and steamed over to the wreck. On arrival alongside of the wreck I took on board all baggage packed standing on deck and 'sounded around the ship, fore and aft, finding 11 feet of water forward at low water and 20 feet aft in board, gradually decreasing from forward to aft and I found in holds about 8 feet of water and the cargo as far as I could see, on top, was nice and dry, and it is my opinion that with the position the ship is laying in and with the Southwest monsoon blowing the ship and most of the cargo can be salved, if work is started before the heavy typhoon season sets in. After leaving the wreck, I proceeded to Santa Cruz and picked up the first officer and crew of nine men and brought them to Manila.

"On my second trip to the wreck, May 15th, I examined *Nippon* more fully and I believe that if the cargo is taken out the ship can be saved after the holes are pathed up, if this is done before the heavy weather sets in.

"Very respectfully,

(Sgd.) "GEO. ANDERSON,

"*Captain, 'Mindoro.*'

"THE DIRECTOR OF NAVIGATION, *Manila*.

"Copy sent Struckman & Company, May 16, 1913.

(Sgd.) "A. S. Thompson, *chief clerk*."

The testimony of Captain Eggert of the *Nippon* regarding the circumstances of the wreck, is as follows: (2d part of record, p. 327).

"(P. 334.) Q. When the *Manchuria* visited the scene of the wreck on May 13, how many of you went on board?— A. We all went on board.

"Q. By 'all' you mean yourself, passenger, and all the members of the crew that remained?—A. Yes.

"Q. What did you take with you?—A. Just personal luggage, not all, what you could carry in a small boat; it could not be very much considering that the boat was broken and there were 27 men, the ship's chronometer and ship's papers.

"Q. What do you mean by 'ship's papers'?—A. Register, articles.

"Q. Did you take the ship's log?—A. Yes; that is the first thing I take.

"Q. That is the first thing you take under what circumstances?—A. Under any circumstances of accidents to the ship; because it is the official record up to the time an accident happens.

"Q. Do you mean to state, captain, that in the event of any accident to a ship, no matter how slight, that the ship's log and register and articles are taken ashore?—A. The ship's log on any occasion has to be brought before the Swedish Consul.

"Q. How about the register and articles?—A. Of course not.

"Q. Under what circumstances do you take ashore the ship's articles and register?—A. When I leave the ship myself I have, of course, to take those papers with me.

"Q. Every time you leave the ship?—A. No. Every time when I leave it stranded as she was. If I go on shore and try to get means for taking my ship off the ground, I have to prove what ship it is and all that. In the meantime a gale may come up and the ship be torn off the rook and destroyed and the papers lost."

"(P. 336.) Q. What were the conditions prevailing aboard the ship from the time that she stranded until the *Manchuria* arrived ?—A. The first night there was very bad sea and high wind. The ship was thrown up on the reef and bumping. Seas were washing right over all the time. Couldn't leave in the boats if we had tried to. The next morning was also bad, but a little better. It became so much better

that we could send the boat off about 11 o'clock in the forenoon by using precautions, oil, etc. The third and fourth day the weather was fine."

"(P. 337.) Q. And do you now admit that you were mighty glad to get off the Nippon?—A. We were all mighty glad.

"Q. Why were you mighty glad?—A. Chiefly because the crew had insisted on leaving the ship in some way, by building rafts, or in that boat of ours. And secondly because of the uncertainty. We did not know if our boat had reached shore. The scene of the accident was quite out of the track of any vessel, so it was quite natural when we saw that ship coming up we were glad to get into communication with the outside world.

"Q. You say that the crew had insisted on leaving the ship?—A. They were not insisting on it because they can not insist against the master of a ship. But they would like to get off.

"Q. Why were they discussing the question?—A. Because they considered it better to leave the ship and reach land rather than stay on the ship, not knowing if the boat had reached land or not.

"Q. They considered it better for what purpose?—A. Being safe.

"Q. You mean better from the standpoint of safety of their life and limb?—A. Yes. To their lives."

"(P. 343.) Q. Captain, if your purpose in leaving the *Nippon* was to go to Hongkong for the purpose of arranging for her salvage, why did you not leave some of the crew on board?—A. How could I leave some of the crew on board when there was no attendant? There could be a gale at any time and the ship would have slipped off and broken to pieces. I first of all was responsible for their lives."

" (P. 348.) Q. (By Mr. Rohde.) Captain, did you or did you not leave the *Nippon*, with the intention of returning and the hope of recovering your ship and cargo?—A. I left the *Nippon* with the full intention of returning to the ship and try to recover her, and I discussed that matter during the three days we were on the reef with every member I could see in the crew, and with the passenger.

Everybody knew as soon as I put my foot on the *Manchuria* it was for the purpose of getting assistance. Captain Dixon knew, his officers knew it, and his crew knew it.

" (Mr. Cohn.) You have not fully replied to the question asked you by counsel for the defendant, which is whether you had the hope of recovering the ship.—A. I had hope if the weather continued fine.

" (Mr. Cohn.) If you had that hope why didn't you leave some of your crew on board?—A. Because the hope would not justify me leaving any of the crew on the ship.

" (Mr. Cohn.) Your hope was so slight it did not warrant your leaving anybody on board?—A. A hope is always slight. I mean to say your hope will never justify you to risk another man's life, even if you have a very good foundation for your hope. Life comes before property.

"(Mr. Cohn.) Just what do you mean by 'hope'?—A. I mean to say that if the weather continues fine there is no risk, but if there is a typhoon or gale we will be worse off and the ship will be smashed and the crew perish. That is what I mean by a 'hope' in this occasion.

" (Mr. Cohn.) What you mean, Captain, is that you were going to Hongkong and if you could find some one that was willing to go out and look for your ship, and if your ship was still there, that you would undertake to salve her if you could.—A. Of course."

Chief Engineer Emil Gohde was asked why the crew wanted to get ashore.

"(P. 353.) Q. Why did they want to get to shore?- A. They wanted to save their lives. We didn't know the weather in the China Sea. We could have expected a typhoon in a couple of days and very likely the ship would have gone into the sea."

"Captain Eggert sent the following cablegram to the owners of the *Nippon*, after reaching Hongkong on May 14, 1913:

"(P. 360.) *Nippon* wrecked during typhoon eight May Scarborough Shoal latitude 15 longitude 118 probably total wreck bottom seriously damaged ship full of water chief officer and nine men took to boat for rescue landed twelfth Luzon mailsteamer Manchuria saved captain and remaining crew morning thirteenth. Arrived Hongkong tonight. Wreck on edge of reef, will probably slip off and sink by first gale captain arranging to visit wreck and attempt salvage.

"EGGERT."

Captain Eggert did not make any determined effort to arrange for the salvage of the *Nippon*, as will be seen from the testimony.

"(P. 330. Captain Eggert testifying). Q. What did you do upon your arrival in Hongkong?—A. The first thing I did—it was about 5 o'clock in the afternoon—I went to the office of our agents—my owners' agents. It was then closed up so I had to proceed to the private residence of the manager. From there I dispatched a telegram to the owners.

* * * * * * *

"Q. What date was this telegram sent?—A. On the evening of the 14th.

"Q. Of what month?—A. Of May.

"Q. Did you enter into any negotiations with persons or firms?—A. Yes. The first thing in the morning of the 15th I visited together with the Swedish Consul the Tykoo dockyard people, the Hongkong dockyard people, and went to the Mitsui Bussan Kaisha branch office, and those people sent a wire to their home office in Nagasaki.

"Q. What, if anything, interrupted your negotiations with the firms and persons in Hongkong relative to the salvage of the *Nippon* and her cargo?—A. A wire from my owners.

* * * * * * *

> "Q. When was this telegram received by you, Captain?— A. On the 17th.
>
> "Q. What did you do then?—A. I tried to find out when the next steamer was leaving for Manila and there was none leaving before the 20th, the steamer I took and proceeded here."

From the above it will be seen that Capt. Eggert had over two days in which to arrange for salvage operations and he did nothing, while the plaintiffs, who were strangers and had no interest, sent out a salvage expedition in twenty-four hours after they discovered that the ship was wrecked.

The evidence proves that the *Nippon* was in peril; that the captain left in order to protect his life and the lives of the crew; that the *animo revertendi* was slight. The argument of the defendant-appellant to the effect that the ship was in no danger is a bit out of place in view of the statement of the captain that she would sink with the first gale, coupled with the fact that a typhoon was the cause of her stranding.

The Federal Courts have, a number of times, had presented to them cases in which the facts were very similar to the facts in the present case. The claim for salvage was allowed in each of these cases. In *The Bee* (Fed. Cas. No. 1219; 3 Fed. Cas., 41), the facts were as follows: *The Bee* Bailed from Boston to Nova Scotia. Three days after leaving port a gale was encountered which forced her to run into a cove on the north side of Grand Manan Island, where an anchor was let out. The ship was somewhat injured from the force of the storm. The master and the crew stayed on board for 24 hours and then went ashore to procure assistance. The island was very sparsely settled. They met on shore a number of men (the libel ante) to whom they explained the predicament and position of the ship. These men immediately went to the ship, boarded her, and took possession. After the master had been ashore about five hours he returned to the ship and found the libelants in possession. The owners contended that the master was excluded from the ship wrongfully and therefore the libelants could not claim salvage. The court stated the law as follows (p. 44):

> "When a vessel is found at sea, deserted, and has been abandoned by the master and crew without the intention of returning and resuming the possession, she is, in the sense of the law, derelict, and the finder who takes the possession with the

> intention of saving her, gains a right of possession, which he can maintain against the true owner. The owner does not, indeed, renounce his right of property. This is not presumed to be his intention, nor does the finder acquire any such right. But the owner does abandon temporarily his right of possession, which is transferred to the finder, who becomes bound to preserve the property with good faith, and bring it to a place of safety for the owner's use; and he acquires a right to be paid for his services a reasonable and proper compensation, out of the property itself. He is not bound to part with the possession until this is paid, or it is taken into the custody of the law, preparatory to the amount of salvage being legally ascertained. Should the salvors meet with the owner after an abandonment, and he should tender his assistance in saving and securing the property, surely this ought not, without good reasons, to be refused, as this would be no bar to the right of salvage, and should it be unreasonably rejected it might affect the judgment of a court materially, as to the amount proper to be allowed. Still, as I understand the law, the right of possession is in the salvor. But when the owner, or the master and crew who represent him, leave a vessel temporarily, without any intention of a final abandonment, but with the intent to return and resume the possession, she is not considered as a legal derelict, nor is the right of possession lost by such temporary absence for the purpose of obtaining assistance, although no individual may be remaining on board for the purpose of retaining the possession. Property is not, in the sense of the law, derelict and the possession left vacant for the finder, until the *spes recuperandi* is gone, and the *animus revertendi* is finally given up. (*The Aquila*, 1 C. Rob. Adm., 41.) But when a man finds property thus temporarily left to the mercy of the elements, whether from necessity or any other cause, though not finally abandoned and legally derelict, and he takes possession of it with the bona fide intention of saving it for the owner, he will not be treated as a trespasser. On the contrary, if by his exertions he contributes materially to the preservation of the property, he will entitle himself to a remuneration according to the merits of his service as a salvor."

The court allowed salvage in this case. They held that the master had taken insufficient precautions to protect his vessel and although the ship was not a legal derelict, the libelants were salvors and entitled to salvage.

In The *John Gilpin* (Fed. Cas. No. 7345; 13 Fed. Cas., 675) the ship *John Gilpin*, in

attempting to leave New York harbor in a winter storm, was driven ashore. The ship's crew sent for help and in the meantime put forth every effort to get her off. Help arrived toward evening, but accomplished nothing. The master and crew went ashore. The same night the libelants went out to the ship with equipment and started working. It was contended that the master had gone ashore for assistance. He returned the next morning with a tug and some men and demanded possession, which was refused. Salvage was allowed. The court said (p. 676):

> "The libelants, in the exercise of their calling as wreckers, coming to a vessel in that plight, would be guilty of a dereliction of duty if they failed to employ all their means for the instantaneous preservation of property so circumstanced. This may not be strictly and technically a case of derelict (Clarke *vs*. *The Dodge Healy*, Case No. 2849), if really the master of the brig had gone to the city to obtain the necessary help lo save the cargo and brig, in ten din; the time, to return with all practicable dispatch. It appears he came to the wreck by 8 or 9 a. m. the following day, in a steam-tug, with men to assist in saving the cargo. The *animus revertendi et recuperandi* may thus far have continued with the master, but this mental hope or purpose must be regarded inoperative and unavailing as an actual occupancy of the vessel, or manifestation to others of a continuing possession. She was absolutely deserted for 12 or 14 hours in a condition when her instant destruction was menaced, and the lives of those who should attempt to remain by her would be considered in highest jeopardy. She was quite derelict; and being thus found (*The Boston*, Case No. 1673; Rowe *vs*. The Brig, Case No. 12093; 1 Sir Lionel Jenkins, 89) by the libelants, the possession they took of her was lawful. (*The Emulous*, Case No. 4480.)
>
> "Possession being thus taken when the vessel was, in fact, abandoned and quite derelict, under peril of instant destruction, the libelants had a right to retain it until the salvage was completed, and no other person could interfere against them forcibly, provided they were able to effect the purpose, and were conducting the business with fidelity and vigor."

In *The Shawmut* (155 Fed. Rep., 476) the court allowed salvage upon the following facts: The four-masted schooner *Myrtle Tunnel* sailed from Brunswick bound for New York. The first day out a hurricane struck her and tore the sails away and carried off the deck load.

She was badly damaged and leaking. The master of the *Myrtle Tunnel* requested towage by the steamship *Mae* to the port of Charleston. The *Mae*, on account of her own damaged condition, was unable to tow but she took the master and crew of the *Myrtle Tunnel* off and landed them at Charleston. The owners were notified and they started an expedition out in search. Before this expedition reached her, the steamship *Shawmut* sighted the *Myrtle Tunnel*, and, finding that she was abandoned and waterlogged, took her in tow and succeeded in taking her to Charleston. The owners of the *Myrtle Tunnel* contended that she was not derelict, because the master had gone ashore to procure assistance. With reference to this question, the court said (p. 478):

> "The first question that arises is whether the *Myrtle Tunnel* is a derelict. *Prima facie* a vessel found at sea in a situation of peril, with no one aboard of her, is a derelict; but where the master and crew leave such vessel temporarily, without any intention of final abandonment, for the purpose of obtaining assistance, and with the intent to return and resume possession, she is not technically a derelict. It is not of substantial importance to decide that question. She was what may be called a quasi-derelict; abandoned, helpless, her sails gone, entirely without power in herself to save herself from a situation not of imminent, but of considerable peril; lying about midway between the Gulf Stream and the shore, and about 30 miles from either. An east wind would have driven her upon one, and a west wind into the other, where she would have become a total loss. Lying in the pathway of commerce, with nothing aboard to indicate an intention to return and resume possession, it was a highly meritorious act upon the part of the *Shawmut* to take possession of her, and the award must be governed by the rules which govern in case of derelicts; the amount of it to be modified in some degree in the interest of the owners in consideration of their prompt, intelligent, and praiseworthy efforts to resume possession of her, wherein they incurred considerable expense."

The first of these cases was decided in 1836 and the last in 1907. They indicate that the abandonment of a vessel by all on board, when the vessel is in peril, will justify third parties in taking possession with the *bona fide* intention of saving the vessel and its cargo for its owners. The mental hope of the master and the crew will in no way affect the possession nor the right to salvage. *See also The Hyderabad* (11 Fed. Rep., 749), *The Cairnsmore* (20 Fed. Rep., 519), Pearce *vs. The Ann L. Lockwood* (37 Fed. Rep., 233).

This brings us to the second question raised by the assignments of error: (2) Was the salvage conducted with skill, diligence, and efficiency? The court found:

> "While the plaintiff entered upon the salvage proceedings without proper means and not being adapted by their business to conduct their work, and while it may appear that possibly the salvage might have been conducted in a better manner and have accomplished somewhat better results in the saving of the copra cargo, yet it appears that they quickly remedied their lack of means and corrected the conduct of the work so that it accomplished fairly good results.
>
> "It does not appear from the evidence that anyone then or subsequently suggested or found any other course which might have been pursued and which would have brought better results."

There was some dispute whether Manila or Hongkong should be used as a base for operations. Capt. Robinson, who was the only one of the experts who had had any experience in handling wet copra, unqualifiedly approved Manila as a base for operations. (P. 437, 3d part of record):

> "Q. Assuming that you had been asked to undertake the work of salving the steamer *Nippon* and her cargo, please state whether you would have undertaken that work with the men and material available in Manila, or whether you would have gone to Hongkong and used Hongkong men and material and made Hongkong your base of operations.—A. Certainly not. I would have made Manila my base, which I always have done."

Lebreton, a stevedore, testified that he would have gotten some of his materials from Hongkong but that he would have freighted the salved cargo to Manila. All other things being equal, the fact that Hongkong is forty sailing hours from Scarborough Reef while Manila is less than twenty-four sailing hours would make Manila by far the more logical base.

The plaintiffs sent men into the hold of the ship and sacked the copra and brought it to Manila where it was sold. Some of the witnesses contended that other methods should have been used. They testified that "grabs" or "clam shells" would have brought better results,

but none of these witnesses had had any experience in unloading wet copra. Capt. Robinson was the only witness called who had had any experience in this class of work. He testified that the only way all the copra could be gotten out was by sacks or by canvas slings; that "grabs" would be of no use because of the inability to work with them between decks. The copra was in three layers. The top layer was dry, the middle layer was submerged every time the tide rose, and the lower layer was submerged all of the time. It was manifestly impossible to keep these layers separate by using "grabs" or "clam shells." The fact that wet copra is exceedingly difficult to handle, on account of the gases which arise from it, is also of prime importance in weighing the testimony of defendant's witnesses, because none of them had ever had experience with wet copra.

The plaintiffs commenced the actual work of salving the ship and cargo on May 18, 1913. The last of the cargo was brought to Manila the latter part of June. The last of the dry copra was brought to Manila on June 5. The estimates of the experts with regard to the time necessary to remove the cargo ranged from eight to twenty days. The greater portion of the cargo was brought in by the plaintiffs within fifteen days. The delay after June 5 was due to the difficulty in inducing laborers to work with wet copra. This difficulty would have arisen with any set of salvors and cannot be attributed to a lack of care or diligence on the part of the plaintiffs.

The plaintiffs were diligent in commencing the work and were careful and efficient in its pursuit and conclusion.

The third and last question is with regard to the amount of the award—(3) Was the award justified?

> "Compensation as salvage is not viewed by the admiralty courts merely as pay on the principle of *quantum meruit* or as a remuneration *pro opere et labore*, but as a reward given for perilous services, voluntarily rendered, and as an inducement to mariners to embark in such dangerous enterprises to save life and property." (*The Mayflower vs. TheSabine,* 101 U. S., 384.)

The plaintiff-appellant contends that the expenses incurred should be deducted from the entire amount of the salved property and the remainder be divided as a reward for the services rendered. This contention has no basis in the law of salvage compensation. The expenses incurred by the plaintiffs must be borne by them. It is true that the award should

be liberal enough to cover the expenses and give an extra amount as a reward for the services rendered but the expenses are used in no other way as a basis for the final award. A part of the risk that the plaintiffs incurred was that the goods salved would not pay them for the amount expended in salving them. The plaintiffs knew this risk and they should not have spent more money than their reasonable share of the proceeds would amount to under any circumstances.

In the case of *The Carl Schurz* (Case No. 2414; 5 Fed. Cas., 84) the actual expenditure by the libelant in salving the vessel in question was $568.95. The ship when sold brought $792. The libelant wanted the court to first deduct the expenses. The court refused to do this but decreed a moiety. The court said (p. 86):

> "A salvor, in the view of the maritime law, has an interest in the property; it is called a lien, but it never goes, in the absence of a contract expressly made, upon the idea of a debt due by the owner to the salvor for services rendered, as at common law, but upon the principle that the service creates a property in the thing saved. He is, to all intents and purposes, a joint owner, and if the property is lost he must bear his share like other joint owners.
>
> "This is the governing principle here. The libelant and the owners must mutually bear their respective share of the loss in value by the sale. If the libelant has been unfortunate and has spent his time and money in saving a property not worth the expenditure he made, or if, having saved enough to compensate him, it is lost by the uncertainties of a judicial sale for partition, so to speak, it is a misfortune not uncommon to all who seek gain by adventurous speculations in values. The libelant says in his testimony that he relied entirely on his rights as a salvor. This being so he knew the risk he ran and it was his own folly to expend more money in the service than his reasonable share would have been worth under all circumstances and contingencies. He can rely neither on the common law idea of an implied contract to pay for work on and about one's property what the work is reasonably worth with a lien attached by possession for satisfaction, nor upon any notion of an implied maritime contract for the service, with a maritime lien to secure it, as in the case of repairs, or supplies furnished a needy vessel, or the like. In such a case the owner would lose all if the property did not satisfy the debt, when fairly sold. But this doctrine has no place in the maritime law of salvage. It does not proceed upon any theory of an implied obligation,

> either of the owner or the *res*, to pay a *quantum meruit*, nor actual expenses incurred, but rather on that of a reasonable compensation or reward, as the case may be, to one who has rescued the *res* from danger of total loss. If he gets the whole, the property had as well been lost entirely, so far as the owner is concerned. (Smith *vs. The Joseph Stewart*, Fed. Cas. No. 13070.) I think the public policy of encouragement for such service does not, of itself, furnish sufficient support for a rule which would exclude the owner from all benefit to be derived from the service."

In Williams *vs. The Adolphe* (Fed. Cas. No. 17712; 29 Fed. Cas., 1350) the court said (p. 1353) :

> "The claim of the libelants is for salvage, the services rendered were salvage services and the owners are to receive their property again, after paying salvage for the services rendered them. What service would it be to them to take their property under circumstances calling for the whole of it by way of indemnity? The mistake of the captain and the supercargo, and part owner of the *Triton* as to the value of the property on board the *Adolphe*, should not operate to the injury of the owners thereof; the salvors must bear the consequences of their own mistake, taking such a proportion only of the property salved, as by the law of the admiralty should be awarded them."

In *The Edwards* (12 Fed. Rep., 508, 509), the court said:

> "It is true that in rendering a salvage service the salvor assumes the risks of failure, and his salvage depends upon his success and the amount of property saved; yet when there is enough to fully compensate him for time and labor, and leave a reasonable proportion for the owner, he should certainly be awarded that, if the amount will allow no more."

In *The L. W. Perry* (71 Fed. Rep., 745, 746), the court said:

> "Without regard to the element of reward which is intended by the salvage allowance, it is manifest that remuneration *pro opere et labore* would be placed

> in excess of the fund here, if such basis were allowable. Therefore, it is contended on behalf of the libelant that the entire sum remaining should be awarded for the salvage service; * * *
>
> "While salvage is of the nature of a reward for meritorious service, and for determination of its amount the interests of the public and the encouragement of others to undertake like service are taken into consideration, as well as the risk incurred, and the value of the property saved, and where the proceeds for division are small, the proportion of allowance to the salvor may be enlarged to answer these purposes, nevertheless, the doctrine of salvage requires, as a prerequisite to any allowance, that the service 'must be productive of some benefit to the owners of the property salved; for, however meritorious the exertions of alleged salvors may be, if they are not attended with benefit to the owners, they can not be compensated as such.' (Abb. Shipp. [London Ed., 1892], 722.) The claim of the libelant can only be supported as one for salvage. It does not constitute a personal demand, upon *quantum meruit*, against the owners, but gives an interest in the property saved, which entitles the salvor to a liberal share of the proceeds. * * *"
>
> "(P. 747.) One of the grounds for liberality in salvage awards is the risk assumed by the salvor,—that he can have no recompense for service or expense unless he is successful in the rescue of property, and that his reward must be within the measure of his success. He obtains an interest in the property, and in its proceeds when sold, but accompanied by the same risk of any misfortune or depreciation which may occur to reduce its value. In other words, he can only have a portion, in any event; and the fact that his exertions were meritorious and that their actual value, or the expense actually incurred, exceeded the amount produced by the service, cannot operate to absorb the entire proceeds against the established rules of salvage. (*The Carl Schurz*, Fed. Cas. No. 2414)."

The plaintiff-appellants contend that the award of the lower court of one-half is the established rule in cases of derelicts and should not be disturbed. It is well established now that the courts have a wide descretion in settling the award. The award is now determined by the particular facts and the degree of merit. In *The Job H. Jackson* (161 Fed. Rep., 1015, 1018), the court said:

> "There is no fixed rule for salvage allowance. The old rule in cases of a derelict was 50 per cent of the property salved; but under modern decisions and practice, it may be less, or it may be more. The allowance rests in the sound discretion of the court or judge, who hears the case, hears the witnesses testify, looks into their eyes, and is acquainted with the environments of the rescue. * * * An allowance for salvage should not be weighed in golden scales, but should be made as a reward for meritorious Voluntary services, rendered at a time when danger of loss is imminent, as a reward for such services so rendered, and for the purpose of encouraging others in like services."

In *The Lamington* (86 Fed. Rep., 675, 678), the court said:

> "While it appears most clearly that, since the old hard and fast rule of '50 per cent of a derelict' was abandoned, the award is determined by a consideration of the peculiar facts of each case, it is none the less true that the admiralty courts have always been careful not only to encourage salving enterprises by liberality, when possible, but also to recognize the fact that it is, after all, a speculation in which desert and reward will not always balance."

The award is largely in the discretion of the trial court and it is rare that the appellate court will disturb the finding.

> "Appellate courts rarely reduce salvage awards, unless there has been some violation of just principles, or some clear or palpable mistake. They are reluctant to disturb such award, solely on the ground that the subordinate court gave too large a sum, unless they are clearly satisfied that the court below made an exorbitant estimate of the services. It is equally true that, when the law gives a party a right to appeal, he has the right to demand the conscientious judgment of the appellate court on every question arising in the case, and the allowance of salvage originally decreased has, in many cases, been increased or diminished in the appellate court, even where it did not violate any of the just principles which should regulate the subject, but was unreasonably excessive or inadequate. (Post *vs.* Jones, 19 How., 161). Although the amount to be awarded as salvage rests, as it is said, in the discretion of the court awarding it, appellate courts will look to

> see if that discretion has been exercised by the court of first instance in the spirit of those decisions which higher tribunals have recognized and enforced, and will readjust the amount if the decree below does not follow in the path of authority; even though no principle has been violated or mistake made."

The property of the defendant-appellants which was salved was forced to pay the same proportion of the award without distinction. The dry copra and the agar-agar was salved with much more ease than the wet copra. The courts have, almost universally, made a distinction in this regard. In *The America* (1 Fed. Cas., 596), decided in 1836, the award was as follows: 25 per cent on cargo salved dry; 50 per cent on cargo salved damaged; 60 per cent on cargo salved by diving.

In *The Ajax* (1 Fed. Cas., 252), decided in 1836, the award was as follows: 33 per cent on the dry; 50 per cent on the wet; 50 per cent on ship's materials.

In *The Nathaniel Kimball* (Fed. Cas. No. 10033), decided in 1853, the award was as follows: 30 per cent on dry cargo; 50 per cent on wet, salved by diving and working under water.

In *The Brewster* (Fed. Cas. No. 1852), decided in 1848, the award was as follows: 33 per cent, and as to some cargo where diving was necessary, 60 per cent.

In *The Mulhouse* (Fed. Cas. No. 9910), decided in 1859, the award was as follows: 25 per cent salving dry deck cotton; 45 per cent salving cotton submerged between decks; 55 per cent salving cotton by diving.

In *The John Wesley* (Fed. Cas. No. 7433), decided in 1866, the award was as follows: 15 per cent; on damaged cotton a slightly higher per cent.

In *The Northwester* (Fed. Cas. No. 10333), decided in 1873, the award was as follows: 20 per cent on cotton dry; 33â…" per cent on cotton wet and burnt; 40 per cent on materials; 50 per cent on property salved by diving.

In Baker *vs.* Cargo etc. of *The Slobodna* (35 Fed. Rep., 537), decided in 1887, the award was as follows: 25 per cent on dry cotton; 33â…" per cent on wet cotton; 45 per cent on materials.

In the cases in which the full award of 50 per cent was allowed the court usually made the comment: "services highly meritorious," "meritorious service," "with great labor and

difficulty," or similar remarks.

In the salvage operations conducted by the plaintiff, the following property was involved:

First, the steamship Nippon , valued at	₱250,000.00
Second, copra, net value, salved	142,657.05
Third, agar-agar, net value, salved	5,635.00
Fourth, general cargo	5,939.68
Fifth, camphor, net value, salved	1,850.00
Sixth, curios, net value, salved	150.00

The plaintiff and the owners of the ship have heretofore, by mutual agreement, settled the question of the amount of salvage of the ship. The plaintiff received for that part of their services the sum of £15,000, or about ₱145,800.

No appeal was taken from the judgment of the lower court concerning the amount of salvage allowed by it for the general cargo, the camphor, nor the curios salved.

The only question raised by the appellants is as to the amount of salvage which should be, awarded to the plaintiff-appellants for the copra and the agar-agar. After a careful study of the entire record and taking into account the amount which the plaintiffs has heretofore received, we have arrived at the conclusion that in equity and justice the plaintiff-appellants should receive for their services the following amounts:

(*a*) 40 per cent of the net value of the wet copra salved.
(*b*) 25 per cent of the net value of the dry copra salved.
(*c*) 20 per cent of the net value of the agar-agar salved.

The net value of the wet copra, salved amounted to ₱40.381.94; 40 per cent of that amount would be ₱16,152.78. The net value of the dry copra salved amounted to ₱102,275.11; 25 per cent of that amount would be ₱25,568.77.

In ascertaining the net value of the copra salved, the expenses incurred by the Collector of Customs in the sale of the copra, amounting to ₱4,080.01, has been deducted from the total amount of the copra salved in the proportion of 2.5 to 1. Dividing the expense in that proportion we have deducted from the amount of the dry copra salved the sum of ₱2,914.39, and from the amount of the wet copra salved, the sum of ₱1,165.62.

The net value of the agar-agar salved amounted to ₱5,636; 20 per cent of that amount would be ₱1,127.

In view of all of the foregoing, it is hereby ordered and decreed that the judgment of the lower court be modified, and that a judgment be entered against the defendant-appellants and in favor of the plaintiff-appellant, as follows: First, it is hereby ordered and decreed that a judgment be entered against the defendant, the Oelwerke Teutoma, and in favor of the plaintiff in the sum of ₱41,721.55. Second, it is further ordered and decreed that a judgment be entered against the defendant, The New Zealand Insurance Company (Ltd.), and in favor of the plaintiff, in the sum of ₱1,127. Third, it is further ordered and decreed that the amount of the judgment hereinbefore rendered in favor of the plaintiff be paid out of the money which is now under the control of the Court of First Instance of the city of Manila. And without any finding as to costs, it is so ordered.

Arellano, C. J., Torres, Johnson, Carson, and *Trent, JJ.*

Date created: May 29, 2014