IN THE MATTER OF MERCHANT LICENSE NO. 377432
AND ALL OTHER SEAMAN'S DOCUMENTS NO. BK-073985
Issued to: Burris W. WOLTERS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1863

Burris W. WOLTERS

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 12 February 1971, an Examiner of the United States Coast Guard at Detroit, Michigan, suspended Appellant's seaman's documents for thirty days upon finding him guilty of negligence. The specification found proved alleges that while serving as master on board SS SYLVANIA under authority of the license above captioned, on or about 21 November 1970, Appellant failed to render assistance to two persons in danger of being lost in the waters of Amherstburg Channel, Detroit River.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of several witnesses.

In defense, Appellant offered in evidence the testimony of certain witnesses and his own testimony.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of thirty days.

The entire decision was served on 12 February 1971. Appeal was timely filed on 3 March 1971. Appeal was perfected on 2 August 1971.

FINDINGS OF FACT

On 21 November 1970, Appellant was serving as master on board SS SYLVANIA and acting under authority of his license while the ship was in the Detroit River.

[I hereby adopt the Examiner's findings of fact and quote them, from here on, without quotation marks.]

The SS SYLVANIA is a typical single screw Great Lakes bulk cargo vessel built in 1905, having an overall length of 575 feet, a beam of 54 feet and a depth of 30 feet. She has a rated horsepower of 1,800, and on the evening of 21 November 1970 was underway up the Detroit River on a regular trip from Toledo, Ohio to Detroit Michigan with a cargo of 9,377 tons of coal. In that condition her full ahead speed through the water was approximately 11 miles per hour and she was drawing 18 feet 7 inches forward and 18 feet 11 inches aft. Captain Burris W. Wolter, MMD Book 073985, was serving as her Master under the authority of his License No. 377432, he having been her Master since 1960 and having been licensed as a Master for the Great Lakes since 1948.

After the SS SYLVANIA entered the Detroit River she was on a general northerly heading and stemming a current of speeds varying between two and four miles per hour. The wind was from the south with a force of about 13 knots, the air temperature was about 42 degrees, the water temperature was about 45 degrees, and the weather was clear. Since on that evening at 6:08 p.m., the SS SYLVANIA was abeam Detroit River Light and at 7:19 p.m. was abeam the Upper Entrance Light, also known as Livingstone Crossing Light, Lights which are separated by nine and one-half miles, her average speed over the grounds had been just over eight miles per hour, although throughout she had been proceeding on a full speed ahead bell. When just north of Bois Blanc Island in the Amherstburg Channel, a pleasure craft estimated to be 26 feet in length had overtaken and passed her on her port side and then disappeared into the night ahead.

After the SS SYLVANIA had passed out of the Amherstburg Channel she came left and proceeded up the Ballards Reef Channel. Ballards Reef Channel at that point is approximately 600 feet wide, is, like the Amherstburg Channel, one way for upbound vessels and according to the chart is approximately 27 feet deep, whereas witnesses at this hearing consistently testified that it was 30 feet deep. It is a dredged and dynamited channel which has been blasted out of rock. At the lower end of Ballards Reef Channel the river bottom is flat rock with vertical walls on each side, but at the upper end the bottom becomes flat shale. Outside the channel limits the river bottom is rock with water depths between 15 and 18 feet, according to the chart. A vessel proceeding upbound on the Ballards Reef Channel course has the current about 20 degrees on her starboard bow and she, therefore, must steer a couple of degrees to the right of the channel course in order to compensate for the effects of the current, which at that point has an average force of two or three miles per hour, depending in part on the direction of the wind.

After making her turn into Ballards Reef Channel the SYLVANIA followed the channel course of about 342 degrees try by steering somewhat to the right, headed on a Light ahead. At 7:19 p.m. she was approximately in the center of the 600 foot channel and nearly abreast of Upper Entrance Light, also known as Livingstone Crossing Light. Captain Wolters and the First Mate were in the wheelhouse along with the wheelsman, and the front window and starboard door were open. No lookout was posted. At that time all three men heard voices calling "Help" and "Mayday." While Captain Wolters first turned the searchlight on top of the pilothouse to port, the Chief Mate ran to the starboard wing and called to the Captain that the voices were coming from that side. Thereupon the Captain by turning the handle on the overhead of the pilothouse, switched the searchlight to the starboard side just in time to pick up in its beam two men floating in the water, close together, both hollering and holding each other, while held well above the water, evidently by the orange life jackets they were wearing, and drifting down the river, about 50 feet from the starboard side of the SYLVANIA and just abreast of her pilothouse. The First Mate called to them, "Keep your heads up, help is on the way." The beam of the spotlight soon became obstructed by equipment aft of the pilothouse as the SS SYLVANIA continued up the river and the floating men were carried down the river and passed out of sight. They had passed clear of the vessel a half-minute after they were first sighted.

Mr. William Caminiti of Gibraltar, Michigan was the owner of a 26-foot Chris Craft inboard motor boat and on the afternoon and evening of 21 November 1970, which was a Saturday, he had been operating that boat in the Detroit River in the company of a Mr. E. Bruce LeBold of Trenton, Michigan. For an unknown reason and at an unknown location while north of the junction of Livingstone and Ballards Reef Channel, before 7:19 p.m. that evening, that boat was caused to break up, leaving the two men in the water. Mr. Caminiti and Mr. LeBold were the two men sighted floating down the Ballards Reef Channel as described above.

After sighting the men in the water Captain Wolters immediately, on the radio telephone FM Channel 16, called the U.S. Coast Guard Station at Belle Isle, Michigan, which was some 20 miles distant, and reported what he had observed. The call was acknowledged by that Coast Guard Station and Captain Wolters was instructed by that station to stand by on the telephone. The SS U.S. GYPSUM, a 511 foot long Great Lakes bulk cargo vessel not unlike the SS SYLVANIA in type, but slower by about two miles per hour, was known by Captain Wolters to be underway upbound in the Amherstburg Channel and about three miles astern. Captain Wolters, therefore, also on FM Channel 16 by radio telephone, then also called the SS U.S. GYPSUM, talked with her watch officer and

learned that she had overheard his report to the U.S. Coast Guard Belle Isle Station. Captain Wolters asked her to be on the lookout for the two men, stating that they would be on her starboard side.

At about 7:20 p.m. the mate on watch aboard the SS U.S. GYPSUM, after having talked by radio with the Master of the SS SYLVANIA, called his Master and reported the situation to him. At that time the SS U.S. GYPSUM was about alongside Bois Blanc Island. The Master immediately came to the bridge, ordered a lookout to take station and turned on the vessel's searchlight. At about 7:40 p.m., after having traveled at an unreduced speed for about two miles over the ground from her position when first called, while his vessel was near Light 75D, the Master of the SS U.S. GYPSUM heard voices from the water. Light 75D is nearly one mile south of Livingstone Crossing Light, where the men had been sighted at 7:19 p.m. The Master of the SS U.S. GYPSUM, despite using the searchlight, did not see the men in the water, but one of his deck watch saw them at a distance estimated by him to be more than 50 feet to starboard an he threw a life ring in their direction. Upon hearing their voices the Master ordered his engine speed reduced to one-half speed ahead and sent his mate to stand by the anchor. Thinking that the men in the water might be close to his starboard side and therefore endangered by his propeller, he then stopped his engines. After he thought that his tern was clear of the men he backed down full and, after his headway had been reduced, dropped his starboard anchor. That anchor at first dragged but as he let out the chain, finally, at about 7:45 p.m. (having traveled approximately half a mile after first hearing the voices of the men in the water) his vessel was at a stop in the water with her anchor holding. Meantime, the Captain had ordered his 12-foot aluminum work boat to be made ready to be put into the water. While that procedure was underway, but before the work boat was launched he noticed that a Canadian vessel astern was better positioned and was attempting to assist the men in the water. Therefore his work boat was not lowered.

Apart from making the two radio-telephone calls described above, neither Captain Wolters nor any member of his crew sounded any alarm or did or attempted to do any acts preliminary to assisting the men in the water. Captain Wolteres issued no orders to the engine room, the helmsman, an anchor detail or any member of the crew. The SS SYLVANIA was equipped with two 25 or 30 foot long oar propelled lifeboats, both of which were situated near her stern. Also she has a work boat, but the work boat had neither oar locks nor power of her own. She also had an inflatable life raft which was located near her stern, which could be thrown over the side to assist personnel in the water. She also has life buoys or rings, some with lights attached. So far as was known, this equipment was in working order although no man overboard or fire or

boat drills had been conducted since the vessel was inspected by the Coast Guard in late March or early April 1970, and the boats had not even been put in the water since then. Since she had no organized or trained boat crew the procedure involved in putting a lifeboat in the water would have been slow and even hazardous, particularly if the vessel had way on at the time that the boat was put in the water. Since the pilothouse of the SS SYLVANIA was situated on her extreme forward end, some 24 feet from her stem, and the lifeboats and inflatable life raft were located on her extreme stern or over 500 feet distant, there would also have been a considerable time lapse in reaching this equipment from the wheelhouse.

Under the conditions that prevailed the SS SYLVANIA could have been brought to an emergency stop in a distance of about one-quarter of a mile, but if she did so her stern would have swung sharply to port and in these waters the danger of grounding would have been great. If she attempted to assist her emergency stop by dropping either or both anchors, the bottom was such that the flukes would find little holding ground and there would be a danger of losing the anchor or anchors. In order to bring this vessel to a controlled stop under the prevailing conditions she would have had to travel at least one-half a mile over the ground.

The Canadian vessel referred to above was unsuccessful in rescuing the men and subsequently their bodies were found and identified, as was the wreckage of Mr. Caminiti's 26-foot Chris Craft motorboat.

[Certain observations must be made here].

[The Examiner found as a fact that SYLVANIA was in Ballard's Reef Channel when the persons in the water were heard and seen. The specification as found proved alleged that the episode occurred in Amherstburg Channel. The variance is not fatal, because the identification of "Detroit River" covers both channel, because there is no question raised by the evidence but that the vessel passed the persons in the water at the junction of Ballard's Reef Channel with Livingstone Channel, and because Appellant, who has not attempted to make an issue of the matter, was neither misled nor prejudiced.

[The Examiner found that when the vessel entered Ballard's Reef Channel the current shifted from dead ahead to a direction from about 20 degrees on the starboard bow and that therefore the vessel had to be steered to the right of the range. However, the Examiner said that "SYLVANIA followed the channel course of about 342 degrees by steering somewhat to the right, headed on a Light ahead." I cannot accept as a fact that SYLVANIA, making good a

charted channel course by steering to the right to compensate for current, was "headed on a Light ahead."

[The Examiner made certain inferences which influenced his findings as to when and in what distance of progress SYLVANIA could have been brought to a stop. This matter is discussed in my Opinion.]

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant's specific allegations of error need not be spelled out in detail, in view of the action to be taken here.

APPEARANCE: Johnson, Branand & Jaeger, Cleveland, Ohio.

OPINION

I

Appellant's statutory argument here is that 46 U.S.C. 728 does not apply in this case because SYLVANIA was in a channel of the Detroit River entirely within the territorial limits of Canada. He says that these waters are not "within the special maritime and territorial jurisdiction of the United States," and that only Canadian law applies.

Appellant's position is untenable. The special maritime and territorial jurisdiction of the United States extends, as to American Vessels, many miles up the Congo River in Africa. United States v Flores, 1933, 289 U.S. 137. It surely intends to the Detroit River when the section of the river is in Canada, even if it would not reach the sections of the river in Michigan.

Whether 46 U.S.C. 728 is limited in its application to the "special maritime and territorial jurisdiction of the United States" I need not decide because the issue has not been raised, but I must note that many laws relative to ships, shipping, and seamen are not so circumscribed. See, for example, the sixth offense enumerated under 46 U.S.C. 701 which makes criminal certain assaults against certain officers on certain vessels no matter where the vessels may be.

Between the two laws, it is apparent that Congress can reach to the Detroit River in Canada under the "special maritime and territorial jurisdiction" concept and to the Detroit River on the Michigan side under the commerce clause.

II

An invidious comparison is implied by the examiner between the actions of U.S. GYPSUM and SYLVANIA in that

(1) U.S. GYPSUM did in fact come to a stop in AMHERSTBURG CHANNEL using one anchor while SYLVANIA made no effort to anchor at all, and

(2) U.S. GYPSUM had prepared to launch a boat while SYLVANIA made no effort to launch a boat.

However, there are other factors here that cannot be ignored. According to the Examiner's findings, supported by the record, U.S. GYPSUM had a twenty minute warning of the emergency, while SYLVANIA had none. This certainly should be weighed in determining whether U.S. GYPSUM's readiness to anchor and to prepare to launch a boat should be considered as a criterion for judgment of the master of SYLVANIA.

(Not up for consideration here in any manner is a comparison of the acts of the master of U.S. GYPSUM who had placed himself in a position to launch a boat and did not do so with the conduct of Appellant. Nor is it relevant that U.S. GYPSUM, having taken the actions it did, left the area in unsupported reliance on assistance attempts by a vessel still further downriver.)

More important, even, to my mind, is a juxtaposition of two findings of fact made by the Examiner. Of U.S. GYPSUM he says that the vessel was brought to a stop after traversing one half mile after hearing the men in the water. He found also, however, that SYLVANIA could have been brought to an "emergency stop" in a distance of one quarter mile and to a "controlled stop" in a distance of one half mile. The findings of the Examiner as to SYLVANIA are based upon inference.

The finding as to U.S. GYPSUM is based fully on the evidence as to what in fact happened. As to the SYLVANIA findings, it is conceded that findings of fact may be based on inferences from other facts, but the Examiner is bound to explain his inferences such as to justify the findings of fact.

The Examiner does not favor us with a statement as to whether the stop of U.S. GYPSUM was an "emergency stop" or a "controlled stop." Since the findings of fact presented to me acknowledge that U.S. GYPSUM was still, at the time of sighting the men in the water, despite an alert of twenty minutes that the men in the river could be expected on the starboard side, proceeding at full ahead, I must assume, to Appellant's benefit that U.S. GYPSUM came to a

"controlled" stop rather than to an "emergency" stop.

I am thus forced to accept that the inference by the Examiner that SYLVANIA could have come to an "emergency" stop within a quarter-mile is irrelevant to the issue. The "controlled" stop should be the guide to any further analysis.

A stop from a speed of eight mile per hour to zero miles per hour implies an average speed, from the moment of commencement of decleration to the moment of stop, of four miles per hour. If a vessel averaging four miles per hour can stop within one half mile, it comes to a stop in about seven and one half minutes under ideal circumstances. In view of the experience of U.S. GYPSUM, this includes the release of an anchor or anchors.

Since SYLVANIA was traveling at least two miles per hour faster that U.S. GYPSUM it is probable that it would have taken longer to come to a stop then did U.S. GYPSUM. This opinion is in accord with the Examiner's findings. With early warning to U.S. GYPSUM, he found that it took five minutes to come to a stop. It follows that SYLVANIA would have used close to seven minutes in coming to a stop. There is an inescapable inference that since SYLVAINA had no advance knowledge of the persons in the water, as U.S. GYPSUM did, additional time must be allowed for organizing the personnel needed to let go the anchors. It is not unfair to anyone to assume that the period would have been more that ten minutes. For SYLVANIA to decelerate from eight miles through the water to zero miles through the water would call, as I have pointed out, for an average speed of four miles per hour through the water. This would definitely have required at least two thirds of a mile of travel over the bottom, not one quarter or one half mile as the Examiner has found, on inference, as a fact.

My calculations, I think, provide a better inference for findings of fact than the Examiner's unexplained inferences. His findings on the matter, to this extent, are rejected.

It is apparent, therefore, that before Appellant could have launched a boat, the unfortunate persons in the river would have been at the least, over a mile astern of his vessel.

While there is no evidence in the record as to the speed of SYLVANIA's lifeboats, the only reasonable assumption that can be made is that Appellant's notice to U.S. GYPSUM would have provided succor from that vessel to the men in the water before any effort by SYLVANIA itself could have been effective or even on the scene.

III

I assume that 46 U.S.C. 728 applies in this case. Even if it did not Appellant's conduct is subject to scrutiny in a proceeding such as this because there are standards of conduct against which a master's actions may be measured. However, I cannot agree with the Examiner's holding that Gardner v National Bulk Carriers' Inc., CA 4 (1962), 310 F. 2nd 284 is controlling here or even particularly applicable. In the "Gardner" case the court was dealing with a missing crewmember. I cannot so easily bridge the gap between a master's duty to a crewmember or passenger overboard, two classes of person to whom a special duty is owed by virtue of a preexisting contractual relationship, and his duty to strangers found unexpectedly in distress.

At this point I must comment on one observation made by the Examiner, and this will involve a slight digression.

IV

This element is not dispositive of the case but should be analyzed as possibly improperly contributing to the Examiner's disposition of the matter. Emphasis was placed on the lack of lifeboat drills aboard SYLVANIA before the episode in question such as to contribute significantly to the master's failure in taking steps to recover persons found in distress. It must be recalled that on an inspected vessel lifeboat is keyed to the number of persons on the vessel. Lifeboats have often been used to assist persons from other vessels but the primary purpose is for the safety of crew and passengers aboard the vessel which carries the boat. A master who is negligent in maintaining his vessel's boats and insuring their operability has committed an offense, but if he encounters persons in the water who have no relationship to his vessel he must be judged under the criminal statute according to the means he has available at the time of the distress. His earlier negligence does not make him a criminal when he encounters persons in distress to whom he owed no earlier duty and to whom he owes no duty except under the terms of the statute. This is a reason why it is important to distinguish between "personnel" in distress and "persons" in distress.

The Examiner's opinion indicates how the distinction between words can become blurred. He speaks of equipment "needed to rescue personnel from the water." "Personnel" means, in the only sense applicable here, "the body of persons employed by or active in an organization, business, or service." American Heritage Dictionary of the English Language, New York, 1969. The persons in the water in the instant case were persons in the water; they were not personnel in the water. So too, a passenger from the vessel involved would not be "personnel" in the water, even though a duty to the passenger would exist. Only a crewmember of the vessel

involved would be "personnel" if found in the water. "Person" does not equal "personnel."

V

Certain statements by the Examiner are quoted;

(1) "There is no affirmative evidence to the effect that any other action taken by Captain Wolteres would have rendered assistance." D-11;

(2) "...the procedure involved in putting a lifeboat in the water would have been slow and even hazardous, particularly if the vessel had way on at the time the boat was put in the water." D-4

(3) "I am satisfied that [Appellant] could have, without serious danger to his vessel or crew, brought his vessel to a controlled stop in little more than half a mile form when he first observed the men in the water." D-6

(4) "There would have been some risk that he might lose an anchor or touch bottom or perhaps be carried down by the current..." D-6

(5) "I must agree that it is at least doubtful if in the prevailing circumstances any of the above mentioned actions would have been of positive assistance in accomplishing the rescue of these men..." D-6

I conclude from these statements that the launching of a boat, whether the vessel had way on or not, would have been hazardous. Whether or not the Examiner was "satisfied" that SYLVANIA could have been brought to a controlled stop in little more than half a mile from the time of sighting the persons in the water, I am not satisfied, as I have mentioned above, that the evidence supports an inference that the vessel could have been stopped in less than two thirds of a mile. Nevertheless, any deduction based on item(3) of the Examiner's opinion quoted above is negatived by the statements numbered (1), (2), (4), and (5) above.

VI

Briefly put, even the possibilities that the Examiner envisioned, not adequately supported by the record but only inferred from the record by the Examiner, would have involved hazarding of the vessel and the crew of any boat put over. Even the statute provides for discretion in the master if there would be "serious danger" to the vessel, its crew, or passengers.

In this connection, the Examiner said:

> "I must agree that it is at least doubtful if in the prevailing circumstances any of the above mentioned acts would have been of positive assistance in accomplishing the rescue of these men, and for that reason my initial reaction was to conclude that his inaction was not the negligence with which he had been charged. Certainly the law does not require him to make an idle gesture."

"On balance," the Examiner held that the mandate of the statute outweighed the hazards involved. "On balance," I find that the risks involved in attempting to take the speculative actions contemplated by the Examiner so far outweigh the possibility of successful rescue that there is no substantial evidence of the nature required that Appellant was negligent in the instant case.

ORDER

The order of the Examiner dated at Detroit, Michigan, on 12 February 1971, is VACATED. The charges are DISMISSED.

C. R. BENDER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 6 day of December 1971.

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