

Case No. 7,117.
[Newb. 69.]¹

IVES v. THE BUCKEYE STATE.

District Court, D. Michigan.

1856.

SHIPPING—LIBEL FOR REPAIRS—WHARVES—DOCKAGE.

1. In the case of a libel for repairs to a vessel, whether an estimate of profits that the vessel might have made had she not been unreasonably detained by the libelant in making the repairs, can be allowed as a set-off to the libelants bill. Quere?
2. Dockage in a dry dock is in the nature of rent, and subject to the will of the proprietor of the dock.
3. A printed tariff of charges at a dry dock not brought to the notice of the master or owner of a vessel taken into such dock for repairs, is not binding upon such master or owner.
4. Where the proprietor of a dry dock charges twenty shillings per day for the labor of his men in repairing vessels taken into the dock, but only pays them eighteen shillings per day,

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the proprietor having also charged for his own time in superintending the men and their work, at the rate of \$4 per day, *held*, that under the proofs of the case the extra two shillings per day on the men's time was an improper charge.

The libel in this case was filed by Lewis Ives, proprietor of a dry dock in the vicinity of Detroit, to recover payment of a bill for docking and repairing the steamer, during the month of October, 1854. The amount claimed by the libelant for the docking of the boat was \$955.50. Of this sum \$318.50 was for "half dockage," so called, which was sought to be recovered on the ground that the steamer was detained in the dock four days beyond the time that it was understood she was to be kept in. Another item of the libelant's claim was for the work and labor of his men, amounting in all to two hundred and fifteen and a half days, for which he charged at the rate of twenty shillings per day; he also charged for his own time in superintending the men, nine and a half days at \$4 per day. Among the charges for materials used in making the repairs were nine bales of oakum at \$6.50 per bale, and three barrels pitch at \$6.50 per barrel. From the testimony in relation to the charge for half dockage, it appeared that this was not a customary charge at similar docks in Buffalo, Cleveland and other places along the Lakes, and although it appeared, from a printed tariff of the charges at the libelant's dock, that such a charge was usual there, in cases where vessels were detained in the dock beyond four days, yet it was not clear from the evidence that the master or owner of the Buckeye State ever saw this printed tariff before they allowed the steamer to go into the dock. It also appeared from the evidence, that the libelant only paid the men who worked on the repairs of the steamer at the rate of eighteen shillings per day, and for the oakum used at the rate of \$6 per bale, and for the pitch at the rate of \$5.50 per barrel. The charge for extra dockage, and the amounts charged for labor and materials, above the amounts actually paid by the libelant, were resisted by the claimant of the steamer. It was set up in the answer, and insisted by way of defence to the entire amount of the libelant's demand, that the steamer was detained in the dock an unreasonable length of time: that the libelant did not place the requisite number of men at work on the repairs, and that by reason of his neglect so to do, the steamer was detained in the dock several days longer than she otherwise would have been, and that by reason of the delay in getting the steamer out of the dock, she lost an opportunity of making several trips in the most profitable line of steamers on Lake Erie, from which trips she could have cleared the sum of \$1,500, over and above all expenses, and this sum the respondent claimed to set off against the libelant's demand. Upon the question whether the steamer was detained in the dock an unreasonable space of time, or not, there was conflict in the testimony, but the preponderance of evidence on this point, in the judgment of the court, was in favor of the libelant. On the question of profits that might have been made by the steamer had she been released from the dock several days sooner than she was, the evidence fully sustained the allegations of the answer. It was further set up in defence, that the repairs to the steamer for which the libelant sought to

recover, were not properly made; but this defence, as will be gathered from the opinion of the court, was not sustained.

G. T. Sheldon and John S. Newberry, for libelant.

Lothrop & Duffield, for claimant.

WILKINS, District Judge. The libel was filed in this case on a bill for dockage and repairs. The court does not deem as tenable, the principal matters set up as defence to the libelant's demand, and for these reasons: 1st, as a question of fact, it does not satisfactorily, appear, that the loss sustained by the claimant, if any, was the consequence of the negligence of the libelant. The boat was not detained beyond the time requisite for the repairs ordered: 2dly, as a question of law, the court is not prepared to adopt the rule, to the extent contended for, viz: that an estimate of probable profits for the time lost by the steamer is to be deducted as a set-off, from the bill of the libelant "When such a rule shall be enforced by this court, it will be on the clearest and the most unquestionable testimony. 3d. The other matter of defence, that the work was not performed in a workmanlike manner, is refuted by the preponderance of the evidence. Bloomer, Atkinson and Johnston are conclusive upon this point.

Thus disposing of the defence, the question arises, has the libelant established his account by satisfactory proof? It is not for the court to determine, without proof, whether or not a bill is exorbitant. The first item is for dockage, which being the pecuniary compensation, for the use of a dock, while a vessel is undergoing repairs, is subject solely to the will of the proprietor. It is in the nature of rent, and the owner of a dry dock, has a right to demand from those who seek its use, whatever he considers a fair compensation, uncontrolled by the custom of other docks, in other places. House rent in Buffalo or Cleveland, is not to govern landlords in Detroit; although where there is no special agreement touching the subject, the usual rent of similar buildings in the same locality, would enlighten the judgment of a court as to what such property was worth.

From the testimony of John Ives, it appears there was a special agreement in this case between Mr. Philips (the owner of the Buckeye), and the libelant, when the vessel was brought into dock, as to what the latter

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would charge for dockage. He says: "Captain Philips applied for the dockage of the Buckeye State, saying that she would have to be in three or four days. We told him that the dockage was fifty cents per ton. She was taken in on the 20th; my brother and the captain superintended taking her in: she was in dock until the 1st of November." This witness also testified to a printed tariff of charges to be made by the dock of the libelant, in which appears the charge of two shillings a ton, for the four days succeeding the first four days, and that he, as clerk, always made the half dockage charge; but it is not clear, that this tariff was brought to the knowledge of Philips or his captain, so as to bind him to an extra charge over the fifty cents per ton, agreed upon before the steamer was taken in, provided her repairs should occupy a longer time than was then anticipated. The charge for dockage, is \$637, and if the item for half dockage be superadded, it would make the rent of the dock, for eleven days, \$955.50; a sum so improbable for the mere use of the dock, independent of repairs, that, without more direct proof, I cannot consider the charge for half dockage, as having been contemplated by the parties. This item is, therefore, rejected.

It is in proof, that but eighteen shillings per day was paid to the men hired to do the work, while twenty shillings is charged in the bill. On no principle of justice, can the court sanction this charge. The libelant is responsible for the actual wages of the men employed, but no more. This additional charge, over and above what was paid to each man, cannot be considered in the light of compensation for the libelant's time, for he charges for his own superintendence at the rate of \$4 per day, for nine and a half days. The charge, therefore, for 215½ days' work, at twenty shillings, amounting to \$538.75, must be reduced by subtracting this extra charge of two shillings per day, which amounts to \$52.75, and makes the item properly chargeable, \$486. The clerk will revise this calculation, and correct the amount accordingly. On the same principle, the additional four shillings advance on the articles purchased and used in repairing the vessel, cannot be allowed. Why should the libelant be allowed to charge more than the market price for the articles used in the repairs? He paid \$6 per bale for oakum, and charges \$6.50. He paid \$5.50 per barrel for pitch, and charges \$6.50. These additional sums must be deducted from the several charges. The deductions thus directed, reduce the libelant's bill to \$867.89, for which amount, with interest, let decree be entered. Decree for \$940 and costs.

¹ [Reported by John S. Newberry, Esq.]