CROSBY STEAM GAGE & VALVE CO. *v.* ASHCROFT MANUF'G CO.

(*Circuit Court, D. Massachusetts.* June 30, 1883.)

PATENTS FOR INVENTIONS—ANTICIPATION—INFRINGEMENT—PATENT NO. 145,726 VALID.

Patent No. 145,726, for an improvement in pressure-gages, granted to George H. Crosby, December 23, 1873, was not anticipated by patent 23,032, known as the Lane patent, granted in 1859, and is infringed by defendant's gage which unites the ends of a Bourdon tube by a piece of metal, which, as to its operative parts, is the solid V-link of patent No. 145,726.

In Equity.

Before GRAY and LOWELL, JJ.

W. A. Herrick and *J. H. Millett*, for complainants.

T. W. Clarke, for defendants.

LOWELL, J. The plaintiffs are owners of patent No. 145,726, granted to George H. Crosby, December 23, 1873, for an improvement in pressure-gages. In his specification, the patentee declares the invention to consist of a new mechanism for connecting and transmitting the motion of the arm, or arms, of a Bourdon tube to the rack, or equivalent device, that carries the pointer, or index, in order to utilize, as far as possible, the upward, or vertical, as well as the horizontal movement of said tube, or tubes, which enables him to use a stouter tube for the same pressure.

"To accomplish this result," he says, "I employ two links, connected or jointed together at one end and separately pivoted at their opposite ends, which are spread apart in such manner that the two links constitute the sides of a triangle, of which the point where they are joined or connected together is the apex, and the line drawn between their separately pivoted ends is the base. In case two Bourdon tube arms or branches are employed, then one of said links is pivoted to the end of one of the branches, and the other link is pivoted to the other branch. In case but one branch or arm is used, then one of the links is pivoted to the end of this branch, and the end of the other link is pivoted to the case of the gage."

He then describes, with the assistance of drawings, several forms of gage in which his improvement may be used, and concludes:

"In all the modifications represented, it will be seen that there is one feature common to all, of two links jointed together at one end, with their other ends spread apart and pivoted separately, one, at least, of said ends being pivoted to the Bourdon tube, and connected, through their common pivotal point, with mechanism to operate the index-shaft of the gage, said mechanism deriving its movements from the changes of position of said common pivotal point; and, in all the modifications, the vertical movement of tube, or tubes, is fully utilized. In lieu of jointing together the two links at the apex, these ends of the links may be solidly united, the two thus forming, in effect, a solid V-link, the legs of which are separately pivoted, as before described."

The defendants make a gage which unites the ends of a Bourdon tube by a piece of metal which, as to its operative parts, is the solid V-link of the plaintiff's patent; and the points taken in defense are

two: that the patent, though it mentions this solid link, does not claim it; and that there was no patentable novelty in the improvement itself.

Taking the latter point first, it seems to us to be proved that a connecting device of the sort described in the patent, that is, a triangular link, is new in form. The instrument described in the Lane patent, No. 23,032, granted in 1859, approaches very nearly to the Crosby gage, and without the test of actual experiment we might not be able to detect any difference; but the experiments tend to show that the plaintiff's link, in some forms of gage, at least, saves some motion which Lane's rack and pinion loses. That the gage possesses this advantage to as great a degree as the patentee supposes, or that he has made a discovery of great importance, or even that the instrument works precisely as he supposes it to work, it is not necessary to say; but the plaintiff's experimental tests are not met by similar experiments on the other side, but with mathematical reasoning not sufficient to convince us of the fallacious character of those tests.

There is no doubt that Crosby's claim includes the solid V-link. It is in these words:

"In a pressure or vacuum gage, the means herein described for operating the index-shaft by both the upward, or vertical, as well as the horizontal movement of the Bourdon tube or tubes, the same consisting of two links joined or connected together at one end, with their other ends spread apart and pivoted separately, as specified, in combination with intermediate mechanism, transmitting the movement of said links to the index-shaft; the whole constructed and operating substantially in the manner shown and set forth."

The claim follows presently after the statement that the solid V-link may be used instead of the jointed link, and it carefully uses the words "joined or connected," instead of "jointed," to include both modes of joining the ends which made the apex of the triangle.

Connected with this question, there is some evidence which appears to be intended to prove that the operation of the solid link is not, in all respects, and under all pressures, precisely like that of the jointed link; but this is of no consequence, since both are sufficiently described and claimed, and one is infringed. We have not sufficient confidence in the actual superiority of the Crosby gage over that of Lane to order a peremptory injunction, but shall refer the case to a master to ascertain the real value of the improvement, and reserve all other orders until the coming of his report.

Decree for the complainants.

THE FANNIE TUTHILL and others.

(District Court, N. D. Ohio, E. D. 1883.)

1. COLLISION OF VESSELS—DAMAGES.

   Where a vessel has been damaged by a collision the owner is entitled to recover as damages whatever sum is found necessary to restore his vessel to the same degree of efficiency and usefulness as existed before the collision took place, notwithstanding that in such restoration new and more valuable material is used; nor is the sum actually contracted to be paid in the making of such repairs, though *prima facie* the measure of the sum, necessarily conclusive. Yet no sum greater than that actually expended should be allowed, in the absence of any claim by the shipwright for more compensation.

2. SAME—DEMURRAGE.

   The injured party may recover for the loss of the use and services of his vessel during the period required for her repairs; but it should only include the minimum time required for that purpose, and this should fall within the season of navigation, or within a time in which, but for the injury, his vessel could have been properly used.

3. SAME—TOWAGE AND DOCKAGE.

   Expenditures for towage or dockage made necessary wholly by the collision, also constitute a rightful claim for damages.

In Admiralty.

This was a suit to recover damages arising from a collision of the barge Harvest with libelants'. vessel, the schooner Minnie Davis, while the barge was being towed by the tug Tuthill. On trial the tug and barge were found to be equally in fault, and a decree rendered accordingly. The cause was referred to Earl Bill, a circuit court commissioner, to take testimony and report to the court the damages of libelants arising from the collision.

Omitting the formal parts, the commissioner reported as follows:

In arriving at the conclusions of this report, from the facts shown in the testimony, the undersigned assumes as a legal principle that, as the collision is in the nature of a tort, the wrong-doer is bound by law to pay to the injured party, as damages, whatever sum is found necessary to restore his vessel to the same degree of efficiency and usefulness as existed before the collision took place, notwithstanding that in such restoration new and therefore more valuable material is used, and that for such difference in value no allowance should be made; and further, that while the sum actually contracted to be paid in the making of such repairs is, *prima facie*, the measure of the sum so necessary, it is not conclusive, for either the work may be contracted to be done for much less than the actual value, on the one hand, or, by collusion, an inordinately large sum may be contracted for. In the one case the contractor, and in the other the wrong-doer, would suffer injustice by the rigid enforcement of such a rule of damages. But any departure from it should only be taken with much care. and evidence of inadequacy should be severely scrutinized.

The right of the injured party to be indemnified for the loss of the use and service of his vessel during the period required for making his repairs is also recognized; but it should only include the minimum time required for that purpose, and this should fall wholly within the season of navigation, or within which, but for the injury, his vessel could have been profitably used. The value of such use and service is, in general, best proven by showing from the vessel's books what her earnings had been prior to the collision, and her current expenses, thus affording the means of estimating her net revenue.

Expenditures for towage, made necessary wholly by the collision, will also constitute a rightful claim for damages on the part of the libelants.

Guided by these principles the undersigned finds from the testimony—

That libelants contracted with one Lant, a ship-carpenter, for the repair of so much of the injury to their vessel by said collision as was inflicted upon her stern, for the sum of $400, not including the expense of dockage to the amount of 20 cents per ton of the vessel. It is somewhat difficult to determine, from a perusal of this contract, whether it was intended by the parties to it to include a complete restoration of the vessel, so far as the after-part of it was concerned, to its condition prior to the collision, or only the items of work and materials particularly specified in it. But, in the view taken of the matter by the undersigned, it is deemed unnecessary to pursue the inquiry. Lant proceeded with the work under it, and as he had, in the judgment of persons to whom the question was submitted, performed more than the contract required in the sum of $80, that sum was paid him by libelants' agent, in addition to the $400 stipulated in the contract.

Certain bills for materials, amounting to $31.02, were also paid by libelants, as to which it might be said that they were within the terms of the contract of Lant. It is also claimed that services were rendered by the master of the injured vessel while the repairs were going on, by way of superintendence of the work. There is also testimony showing payment by libelants on account of other materials used in the repairs, to the amount of $42.25. The items thus enumerated amount to the sum of $553.27. But it appears from the testimony, to the satisfaction of the undersigned, that the estimate of said Lant made prior to the execution of his contract, as to the outlay necessary for restoring said vessel to its condition of usefulness and efficiency, was erroneous and insufficient by reason of the decayed condition of the timbers, whereby it became necessary to extend the repairs to points beyond those to which they would of necessity have been carried had the unbroken parts been sound, in order to a secure fastening of the parts added by way of repair; such decayed and rotten condition being unknown to said Lant. If the fact of the rottenness was known to libelants and not disclosed or

apparent on inspection, there is at least a moral, if not a legal, obligation on the part of libelants to compensate Lant for his losses in the performance of his contract.

In the light of these facts the contract price ceases to be a true measure of libelants' damages, and we are to look to other means for their ascertainment, to-wit, the testimony of the experts as to the actual expense necessary to restore the vessel, as to her injuries at her stern, to its condition of usefulness and efficiency; and also to take into consideration the facts and circumstances developed in the actual making of the repairs aforesaid. As the estimates of witnesses who testified on this point have a range of from $130 to $800, the undersigned is compelled to rely greatly upon the opinion of the witness Lant, who did the work, and had, therefore, the most complete means of knowing the true value. His estimate is from $600 to $800, and is most nearly in accord with that of those witnesses (other than himself) whose skill, means of knowledge, and disinterestedness invite the confidence of the commissioner. Such true value is, therefore, found to be $700.

It is claimed that in making the repairs aforesaid the new work was extended beyond any necessity caused by the collision, by the insertion of new materials in place of old not injured or broken, thereby wrongfully enhancing the expense, and that the estimates of Lant, and the other witnesses last referred to, are tainted with the same infirmity. In repairing injuries to an old vessel whose timbers are decayed, it is difficult to fix, by testimony, at least, the true line where the insertion of new material should cease; and unless bad faith on the part of the injured party be shown, strict proof is required of the measure and value of the superfluous labor and materials. No evidence of bad faith appears in this case, and the undersigned is unable from the proofs to find any such excess that is susceptible of estimation.

Besides the injuries to the stern or after-part of the schooner Minnie Davis, to which the foregoing finding relates, it is found that the forward part of the vessel was injured by said collision, which libelants did not undertake to repair. The sum found necessary to make this repair is found to be $175.

It is also found that there was paid by libelants, for the use of the dock at which said schooner lay while undergoing repairs, the sum of $35, and that the same is justly chargeable as a part of their damages in this cause. Also, that they paid for towage in the Cuyahoga river, made necessary by said collision, the sum of $20 being allowed on that account. When the collision occurred the Minnie Davis was loaded with limestone, and she was cut down so nearly to the waterline that she was in danger of sinking, and the dock to which her cargo was destined by consignment being occupied, and inaccessible for the purpose of discharge of cargo, her master was compelled to proceed to another place, where he could and did discharge so much

of it as would enable him to avoid the peril of sinking. For this service, and for towage from the dock of her original destination to the place where the repairs were made, the above allowance is made.

It only remains to consider the question of demurrage, or the sum required to indemnify libelants for the loss of the use and services of their vessel during the period necessary to make the required repairs, and while the lake was still open for navigation. It is found that, although a longer time was in fact consumed, yet that 18 days were sufficient for the repair of the vessel had it been done with ordinary vigor and speed; and from the date of the collision to the close of navigation more than that number of days intervened, and in estimating the loss of service that number is adopted. Testimony as to the value of such service per day is conflicting, the range being from $8 to $30. As the books of the vessel, showing what, in fact, she had been earning, were not produced in evidence by the libelants, the commissioner is forced to rely upon the estimates of experts, or those engaged in like trade, and this kind of testimony is deemed quite unsatisfactory. As the vessel's books are esteemed to be evidence of a higher nature, this secondary proof is of necessity subject to a rigid scrutiny. On consideration of all the testimony on this point, the undersigned finds the value of said use and service at $20 per day, amounting to the sum of $360.

The sums so found on account of said repairs, towage, dockage, and demurrage, are exclusive of all other claims on said several accounts, the same being disallowed, and the aggregate of the sum so found is intended as a full indemnification for the damages done by said collision, which sums are hereby recapitulated, as follows:

For repairs of stern,	$700 00
For repairs of bow,	175 00
For towage,	20 00
For dockage,	35 00
For demurrage,	360 00
Total,	$1,290 00

It is, therefore, found that the true amount of the damages sustained by said libelants, by reason of the collision in their libel set forth, is the aforesaid sum of $1,290, with interest thereon from the date of said collision, viz., October 25, 1880.

Respectfully submitted,

EARL BILL, Commissioner.

To which report counsel for the respondent, Patrick Smith, owner and claimant of the tug Fannie Tuthill, filed 13 exceptions; and the same having been fully argued, a decision was rendered by the court at the April term, 1883.

Goulder & Weh, for libelants.

Charles L. Fish, for owner of the Tuthill.

WELKER, J. There are 13 exceptions filed by the respondent, owner of the Tuthill, covering all the findings of the commissioner. After full argument on behalf of both parties the exceptions are overruled and the report confirmed, except as to the item of repairs made to the libelants' vessel as allowed by the commissioner, to-wit, $700, found by him to have been the reasonable value of the repairs; and as to that item the court reduce the amount to the sum of $553.27, the actual expense of the repairs as found by the commissioner. The court holds that, although the rule adopted by the commissioner constitutes the usual measure of damages, yet when it appears that the repairs were actually done for less, and no claim made for more compensation by the shipwrights who did the work, in equity such should be the measure of recovery.

Decree accordingly.

THE JEANIE LANDLES.

(*District Court, D. Oregon.* July 3, 1883.)

1. SUPPLIES.

   The master of a vessel is not authorized to purchase supplies or incur indebtedness on the credit of the ship, or owner, in a foreign port, where the owner is represented by a known agent, unless under circumstances where the conduct of the owner or agent may fairly be construed as giving such authority.

2. STIPULATION BY CLAIMANT FOR THE DISCHARGE OF A VESSEL.

   The clerk is not authorized to take a stipulation for the discharge of a vessel, but the same must be done in court or at chambers, or before a commissioner; and in the former case notice thereof is given to the marshal by a writ of *supersedeas* issued by the clerk, and in the latter case by an order to the same effect issued by the commissioner; and in neither case is the marshal entitled to any fee or mileage for "serving" such writ or order, but he may charge any necessary expense incurred by him in consequence of such writ or order, as a part of the expense incurred under the process for the arrest and custody of the vessel.

In Admiralty.

David Goodsell, for libelant.

Erasmus D. Shattuck and *Robert McKee*, for claimant.

DEADY, J. On March 1, 1883, G. T. Reed, of the Caledonia saloon, in this city, brought suit in this court against the British ship Jeanie Landles for $159.50, of which sum $89.50 was alleged to be for vinous and spirituous liquors furnished the master as ship-stores, and on her credit; and $70 money loaned to him, as was alleged, on the credit of the vessel, for the payment of seamen's wages. The claimants, Meyer, Wilson & Co., of this city, as the agents of the owner, Mr. David Law, of Glasgow, answered the libel, alleging that they were the agents in this port for the owner of the vessel during her stay here, to the knowledge of the libelant, and denying that said liquors or money were necessary under the circumstances for said

vessel, or that she ever, in fact, had the benefit of them, or that they were furnished to the master of the Jeanie Landles on her credit, or otherwise than on the credit of the master and for his own use.

On the trial, it appeared from the testimony of the master, and otherwise, that the answer was true, and the court dismissed the libel; holding that by the maritime law the master is not authorized to purchase supplies or incur indebtedness on the credit of the ship in a foreign port where the owner is represented by a known agent, unless under circumstances where the conduct of such owner or agent may fairly be construed as giving such authority. 1 Pars. Shipp. & Adm. 8, 9, 15, 20, 332; Abb. Treat. 126. The claimant also had a decree for costs, and filed a cost bill, which includes these two items paid the marshal:

Service of warrant of delivery, - - - - -	$ 4 00
Mileage to Astoria, 110 miles, - - - - - -	17 00

To these the libelant excepted, and the clerk sustained the exception, and the claimant appeals.

Upon the arrest or seizure of a vessel in a suit *in rem*, the claimant is entitled to have her returned to him upon giving a stipulation, with sureties, in such sum as the court may direct, to abide by and pay the money awarded by the final decree of the court in which it is taken, or the appellate court. Adm. Rule 10.

By the admiralty rules 5 and 35 this or any other stipulation may be taken in court or at chambers, or before a United States commissioner. Or the claimant may, under the act of March 3, 1847, (section 941, Rev. St.,) procure a stay of the execution of the process, or a discharge of the vessel therefrom, if already arrested, by giving a bond or stipulation to the marshal in double the amount claimed by the libelant, with sureties, approved by the judge or collector of the port.

In this case it appears that the stipulation was taken by the clerk in the form of a bond in double the amount claimed by the libelant, conditioned to "abide and answer" the decree, and upon so doing the clerk issued a writ, entitled a "Warrant of Delivery," directed to the marshal, reciting that the district judge—naming him—had ordered the ship to be delivered to the claimant, and directing him to make such delivery. When this warrant was received by the marshal, it appears that the vessel was lying in the river at Astoria, bound out, in the custody of a deputy or keeper, and that the marshal undertook to "serve" it, by sending it by mail to his deputy at Astoria, who removed the keeper, and surrendered or delivered the vessel to the master or agent of the owner.

Before proceeding further, attention is called to the fact that the clerk was not authorized to take this stipulation, and that, the district judge not having taken it, he made no order for the delivery of the vessel as recited in the so-called "Warrant of Delivery." But sup-

posing the stipulation to be taken before the proper officer, there must be some method of giving formal notice of the fact to the marshal, and advising him that the process for the arrest of the vessel has been superseded, and therefore he must surrender or deliver the vessel to the claimant upon demand.

In 2 Conkl. Adm. 98, it is said that "if the stipulation is taken and acknowledged before a commissioner of a distant port, he at once orders the vessel to be discharged; and if it is given in court, a *supersedeas* is immediately issued to the marshal. This is the only suggestion on the subject that I find in the works on admiralty within my reach, and, comparing it with the mode of proceeding in analogous cases, I think it furnishes a proper and convenient rule in the premises. The stipulation is intended to operate as a *supersedeas*, and whoever takes it ought to give or cause to be given notice to the marshal accordingly.

If this stipulation had been taken in court, notice would have been given to the marshal by a writ issued by the clerk, and called a *supersedeas*, because of its effect upon the former process. And if it had been taken before a commissioner, he should have given similar notice to the marshal by an order to the same effect. But in either case the writ or order would be served *upon* the marshal, and not *by* him; and by the claimant, his attorney or agent, delivering the same to him. The writ or order should contain a recital of the issue of the process, the allowance of the stipulation, and require the marshal to forbear the further execution of the process, and to surrender or deliver the property taken thereon to the claimant on demand. Of course he can make no charge for serving this writ or order, for, as I have said, he does not serve, but it is served upon him, so far as it is served at all. If, in consequence of it, he is put to any expense, as in transmitting it, or giving direction in pursuance of it to his deputy or keeper in a distant port, he may, I suppose, charge the same as a part of the expense incurred under the process for the arrest and custody of the vessel. See section 829, Rev. St; Rule 59, of the Civil Code.

The taxation of the clerk is affirmed and the appeal dismissed.

The Oscar Townsend.

(District Court, N. D. Ohio. 1883.)

1. Collision—Anchoring Vessel in River—Precautions.

Although anchoring in a river in the night-time or day is not necessarily improper or dangerous, and although it may be customary to do so during stress of weather, yet, when so doing in the night, great care must be used to make ample room and space in the channel for passing vessels, and to so locate the anchorage as to avoid possible danger.