

DALLAS, Circuit Judge. By the libel in this case it was sought to enforce an asserted lien against the steamship Havana for a balance due for repairs which were ordered by her managing owner, and were made by the appellants, at Baltimore, which was not her home port. The court below dismissed the libel upon the ground that the facts did not sustain the claim of lien (87 Fed. 487), and we think it was right. "In the absence of an agreement, express or implied, for a lien, a contract for supplies [or for repairs] made directly with the owner in person is to be taken as made on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived." *The Valencia*, 165 U. S. 264-271, 17 Sup. Ct. 323. There certainly was not in the present case an express agreement for lien, and the record discloses nothing which would warrant the implication of such an agreement. Our own examination of the evidence satisfies us, as the learned judge found, that this work was, in point of fact, done, not on the credit of the vessel, but on that of the owner. Where repairs are ordered by an owner, even in a foreign port, a lien for their cost is not presumed to have been contemplated, and cannot be created by any act of the party doing the work, which he may claim to be indicative of a design on his part to look to the vessel for his compensation, unless it also appear that the other party had so understood that act, and had, at least impliedly, assented to its purpose. There is nothing to show such understanding or assent by the owner in this instance, and his testimony is, in effect, that he at no time supposed that the Havana would be subject to a lien. *The St. Jago de Cuba*, 9 Wheat. 409; *The Grapeshot*, 9 Wall. 136; *The Mary Morgan*, 23 Fed. 196; *Thomas v. Osborn*, 19 How. 22; *The Norman*, 28 Fed. 383; *The Pirate*, 32 Fed. 486; *The Aeronaut*, 36 Fed. 497; *The Now Then*, 5 C. C. A. 206, 55 Fed. 523. The decree is affirmed.

THE SCOW NO. 15.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 101.

1. WHARFAGE—STATUTORY RATES—SCOWS.

Under Laws N. Y. 1882, c. 410, § 798, classifying vessels, and fixing the rates for wharfage accordingly, a scow engaged in carrying stone should be classed with the description "market boats and barges."

2. SAME—CUSTOM.

A customary rate of wharfage for scows cannot control the rates fixed by Laws N. Y. 1882, c. 410, § 798, since it includes all vessels engaged in carrying freight or passengers.

3. MARITIME LIENS—DOMESTIC VESSELS.

A maritime lien is created by the furnishing of wharfage to a domestic vessel.¹

Appeal from the District Court of the United States for the Southern District of New York.

¹ For maritime liens as to supplies and services, see note to *The George Dumois*, 15 C. C. A. 679.

This cause comes here upon cross appeals from a decree of the district court, Southern district of New York, awarding the libelant \$32.50 for 26 days' wharfage, for the use and occupation of a berth at the pier at foot of 134th street, North river. The determination of the cause involves the construction of Laws N. Y. 1882, c. 410, § 798, which reads as follows:

"Sec. 798. It shall be lawful to charge and receive, within the city of New York, wharfage and dockage at the following rates, namely: From every vessel that uses or makes fast to any pier, wharf, or bulk-head within said city, or makes fast to any vessel lying at such pier, wharf, or bulk-head, or to any other vessel lying outside of such vessel, for every day or part of a day, except as hereinafter provided, as follows: From every vessel of two hundred tons burden and under, two cents per ton, and for every vessel over two hundred tons burden, two cents per ton for each of the first two hundred tons, and one-half of one cent per ton for every additional ton, except that, save as hereinafter provided, vessels known as North river barges, market boats, and barges, sloops employed upon the rivers and waters of this state, and schooners exclusively employed upon the rivers and waters of this state, shall pay for every such vessel under the burden of fifty tons, at the rate of fifty cents per day; for every such vessel of the burden of fifty tons, and under the burden of one hundred tons, at the rate of sixty-two and a half cents per day; for every such vessel of the burden of one hundred tons, and under the burden of one hundred and fifty tons, at the rate of seventy-five cents per day; for every such vessel of the burden of one hundred and fifty tons, and under the burden of two hundred tons, at the rate of eighty-seven and a half cents per day; for every such vessel of the burden of two hundred tons, and under the burden of two hundred and fifty tons, at the rate of one hundred cents per day; for every such vessel of the burden of two hundred and fifty tons, and under the burden of three hundred tons, at the rate of one hundred and twelve and a half cents per day; for every such vessel of the burden of three hundred tons, and under the burden of three hundred and fifty tons, at the rate of one hundred and twenty-five cents per day; for every such vessel of the burden of three hundred and fifty tons, and under the burden of four hundred tons, at the rate of one hundred and thirty-seven and a half cents per day; for every such vessel of the burden of four hundred tons, and under the burden of four hundred and fifty tons, at the rate of one dollar and fifty cents per day; for every such vessel of the burden of four hundred and fifty tons, and under the burden of five hundred tons, at the rate of one hundred and sixty-two and a half cents per day; for every such vessel of the burden of five hundred tons, and under the burden of five hundred and fifty tons, at the rate of one hundred and seventy-five cents per day; for every such vessel of the burden of five hundred and fifty tons, and under the burden of six hundred tons, at the rate of one hundred and eighty-seven and a half cents per day; for every such vessel of the burden of six hundred tons and upwards, to pay twelve and a half cents, in addition for every fifty tons in addition to the rate last mentioned, for every day such ship or vessel shall use or be made fast to any of the said wharves; but no boat or vessel over fifty tons burden shall pay less than fifty cents for a day or a part of a day, and the class of sailing vessels now known as lighters shall be at one-half the first above rates. Every other vessel, making fast to a vessel lying at any pier, wharf, or bulk-head within said city, or to another vessel outside of such vessel, or at an anchor within any slip or basin, when not receiving or discharging cargo or ballast, one-half the first above rates; and from every vessel or floating structure, other than those above named, or used for transportation of freight or passengers, double the first above rates, except that floating grain elevators shall pay one-half the first above rates; and every vessel that shall leave a pier, wharf, bulk-head, slip or basin, without first paying the wharfage or dockage due thereon, after being demanded of the owner, consignee, or person in charge of the vessel, shall be liable to pay double the rates established by this section."

The opinion of the district court is reported in 88 Fed. 305.

Peter Alexander, for libelant.

Peter S. Carter, for claimants.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The section referred to (Laws N. Y. 1882, c. 410, § 798) is so ungrammatically phrased that it is not susceptible of any literal construction which would not lead to some inconsistency or absurdity. In such cases interpretation according to intent is peculiarly applicable. While we do not entirely agree with the reasoning by which the district court reached its conclusion, we do concur in that conclusion, which requires vessels like claimant's to pay the same rate as barges, which they resemble more nearly than they do any other vessel specifically enumerated in the section. The contention of the claimant that wharfage should be at the rate of 50 cents cannot be sustained, under section 800 of the same statute, since the evidence does not show that the vessel was "engaged in freighting brick on the Hudson river"; nor on any theory of a customary rate for scows of this description, since the statute is manifestly intended to be comprehensive of all vessels engaged in transporting freight or passengers.

There is no force in the suggestion that there is no general maritime lien against a domestic vessel for wharfage. The converse is held, upon sound reasoning, in *The Allianca*, 56 Fed. 609; *The Advance*, 60 Fed. 766; *The Kate Tremaine*, 5 Ben. 60, Fed. Cas. No. 7,622; and *Woodruff v. One Covered Scow*, 30 Fed. 269; and we find nothing to weaken the authority of those cases in the circumstance that in *Ex parte Easton*, 95 U. S. 68, the supreme court declined to pass upon a question not before it. Nor do we consider that *The Lottawanna*, 21 Wall. 558, is an analogous case, dealing as it did wholly with the question of materials and supplies. The decree of the district court is affirmed, but, since both sides appealed, without interest or costs.

In re CENTRAL R. R. OF NEW JERSEY.

(District Court, S. D. New York. March 3, 1899.)

1. COLLISION—STEAMERS MEETING HEAD AND HEAD—SIGNALS.

The Catskill and the St. Johns, side-wheel steamers, met in North river in the evening. The Catskill was going up at a speed of about 10 knots, and the St. Johns coming down at a speed of about 13 knots. Both carried the regulation lights. When about one-third of a mile apart, the Catskill gave the signal for passing to the left, which was at once contradicted by the St. Johns. Both vessels sheered to the westward, and the same signal was again given and contradicted. Both vessels then reversed, but a collision followed almost immediately, in which the Catskill was sunk. Each vessel claimed that when the signals were first given the other was further to the eastward. *Held*, that the evidence established that the vessels were approaching about head and head, and the Catskill was in fault for not passing to the right, as required by the rules, and also in further violating the rules by failing to reduce speed to bare steerageway at once, on the first contradiction of her signal, both of which faults were material.