

THE ELLA B.¹

AUSTIN and others v. THE ELLA B.

*(District Court, N. D. New York. January 16, 1886.)***MARITIME LIEN—HOME PORT—SUPPLIES FURNISHED VESSELS NAVIGATING CANALS—WESTERN AND NORTH-WESTERN LAKES—NEW YORK STATUTE CONSTRUED.**

If supplies are furnished in the home port, the duration and requisites of the lien depend upon the terms of the state statute. If the vessel be engaged in canal navigation, the specification of the debt must be filed in the office of the canal department; or if in lake navigation, her employment therein must be shown. The burden of proof is on the libelant. An occasional venture on a lake does not make the vessel a lake boat, if her size, equipment, and other circumstances indicate that such is not her usual employment.

In Admiralty.*George S. Potter*, for libelants.*Joseph V. Seaver*, for respondent.

COXE, J. The libelants bring this action to recover for supplies furnished to the steam-tug *Ella B.*, in her home port, during April and May, 1884, the statutes of New York providing for a lien in such cases. Specifications of the debt were filed in the Erie county clerk's office, February 2, 1885, upon the supposition that the tug was a vessel "navigating the western and north-western lakes," or one of them, pursuant to the provisions of the laws of New York for 1862 as amended in 1863. 3 Rev. St. N. Y. (7th Ed.) 2404, 2405, 2410.

It is admitted that the libelants cannot succeed, unless their proceedings can be sustained under the extended limitation provided by the amendment of 1863. If the *Ella B.* was not a vessel navigating the lakes, the libelants' debt ceased to be a lien at the expiration of six months after it was contracted, namely, in November, 1884. It is therefore incumbent upon the libelants to satisfy the court that the *Ella B.* was a vessel navigating Lake Erie. It seemed to be the theory of the respondent, upon the argument, that she was called upon to prove affirmatively that the tug was "used or fitted for the navigation of the canals," requiring the specifications of the debt to be filed with the canal department at Albany. This is not necessary. It is enough if the libelants fail to prove that she was a lake vessel.

The *Ella B.* is a tug of less than five tons burden. She is 35 feet in length and 10 8-10 feet beam. She is not provided with an anchor, compass, cooking apparatus, cabin or sleeping accommodations. Her bunkers hold but two or three tons of coal. The principal theater of her operations has been Buffalo creek and harbor, and the waters adjacent thereto. She has occasionally been out upon Lake Erie and the Niagara river, but never for more than a few hours at a time. She

¹ Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

has also navigated the canals in the vicinity of Buffalo as far as Tonawanda and Lockport. Since 1882 she has not been enrolled. 24 Fed. Rep. 508. She is emphatically a harbor tug, towing and shifting canal-boats and other vessels about the still waters of the harbor, but is entirely unfitted, by reason of her size, construction, outfit and limited capacity, to navigate the stormy waters of the lakes. As well might it be argued that a tug navigating New York harbor is an ocean-going vessel, because occasionally, in fair weather, she goes out beyond Sandy Hook.

It is thought that the law-makers in passing the amendment of 1863, relating to vessels navigating the western and north-western lakes, did not have in mind, or intend to provide for, a tug so diminutive in size that almost certain disaster would await her if she ventured beyond the Buffalo breakwater in stormy weather,—a tug without any of the tackle or appliances necessary for an extended trip upon the lakes,—a tug, in short, hardly less fitted to navigate the Atlantic ocean than Lake Erie.

The specific language of the statute, as well as the object which the legislature intended to accomplish, precludes the idea that it was ever intended to include such a vessel within its terms. But if the court should be inclined to adopt the view that because the tug had occasionally been out upon the waters of Lake Erie she was therefore a lake boat, it would not aid the libelants, for the respondent has introduced similar, and perhaps more satisfactory, proof, and has made use of similar arguments to prove that she was intended for the canals. If she was a vessel "built, used, or fitted for the navigation of the canals," it was necessary also to file the specifications of the debt in the office of the canal department at Albany, pursuant to the amendment of 1879. 3 Rev. St. N. Y. (7th Ed.) 2405. This the libelants have not done. It is entirely obvious that if the few occasions when she ventured upon Lake Erie at its extreme easterly end would justify the court in finding that she was a vessel navigating one of the north-western lakes, the larger number of occasions when she is proved to have been upon the Erie canal would require a finding also that she was "used or fitted" for canal navigation. There is no theory upon which the libelants can recover. The libel must therefore be dismissed, with costs.

The foregoing views compel the dismissal, with costs, of the libels filed by Mary A. Weller and James C. Austin.

In the case of David Bell the work was done and the materials furnished in April and May, 1885. The libel was filed in June of the same year. The libelant is therefore entitled to a decree for the amount demanded, with interest and costs, within the doctrine of *The Julia L. Sherwood*, 14 Fed. Rep. 590. The tug did not "leave the port at which such debt was contracted," within the meaning of the second section of the law.

UNITED STATES *ex rel.* ATTORNEY GENERAL v. PITTSBURGH & L. E. R. Co.*(District Court, W. D. Pennsylvania January 18, 1886.)*

1. NAVIGABLE RIVERS—BRIDGES—ACTION BY UNITED STATES.

The United States may maintain a suit to compel a company assuming to exercise the authority conferred by the act of Congress of December 17, 1872, (authorizing and regulating bridges over the Ohio river,) to comply with the provisions thereof, or to abate as a public nuisance an unlawful structure so erected, when an obstruction to navigation.

2. SAME—OBSTRUCTION—JURISDICTION OF DISTRICT COURT.

Litigation between the government and such company touching an obstruction to the navigation of the river, created by the construction of a bridge under said act, presents a cause within the terms of the sixth section, and hence is cognizable by the designated district court.

3. SAME—INFORMATION IN EQUITY—PROPER REMEDY.

In such case the appropriate remedy is by an information at the suit of the attorney general in equity.

4. SAME—ORDER OF SECRETARY OF WAR—DIKE.

A company proposing to construct a bridge over the Ohio river, under said act, submitted its designs, etc., to the secretary of war, who, pursuant to the provisions of the act, convened a board of engineers to examine the case, which board, after hearing the parties interested, recommended certain changes of location and plan, a dike 300 feet long being one of the new features so recommended. The company, accepting the recommendations of the board, modified its plan to conform thereto, and the same was approved by the secretary of war. Official notice of such approval having been given to the company, it proceeded to construct its bridge at the appointed location in accordance with the approved plan. After the piers were erected, and the superstructure almost finished, the secretary of war made an order directing the company to construct a dike 918 feet in length. *Held*, that the secretary of war had no authority to make that order, and the company was not bound to comply with it.

In Equity.

Wm. A. Stone, U. S. Atty., for the United States.

D. T. Watson, for defendant.

ACHESON, J. While the jurisdiction of this court in this cause has not been called in question, but has been tacitly conceded by the defendant's learned counsel, it nevertheless is proper to examine the grounds upon which our authority rests. The subject-matter of the suit is a bridge constructed by the defendant over the Ohio river, near the town of Beaver, in the Western district of Pennsylvania, under the act of congress of December 17, 1872, (17 St. at Large, 398,) entitled "An act authorizing the construction of bridges across the Ohio river, and to prescribe the dimensions of the same;" the complaint, in substance, being that the defendant's said bridge has not been constructed in accordance with the limitations and provisions of said act, but in violation thereof; and that, as built and maintained, it is an unlawful obstruction to the navigation of said river, and a public nuisance. The sixth section of the act contains the provision following:

"And in case of any litigation arising from any obstruction, or alleged obstruction, to the navigation of said river, created by the construction of any