

But the questions presented in this case are: (1) Does an implied contract to pay wharfage dues result from a vessel's making fast at a place on the banks of the Mississippi river where no prohibition to land exists, and where no facilities whatever are furnished for landing vessels or goods? (2) Can the city of New Orleans, by ordinance, exact wharfage dues from vessels landing or making fast to the *batture* of the Mississippi river in front of the city, at places where no artificial facilities whatever are furnished?

"The use of the banks of navigable rivers or streams is public. Accordingly, every one has a right freely to bring his vessels to land there; to make fast the same to the trees which are there planted," etc. Rev. Civil Code La. art. 455. See enabling act providing for admission of Louisiana, (2 St. at Large, 641.)

From this it is clear that no implied contract to pay wharfage dues resulted from the landing or making fast of the *Lizzie E.* Without an express or implied contract, the maritime lien does not arise in this case. A city ordinance exacting dues as wharfage dues for landing vessels, where no facilities for landing either vessels or goods are furnished, is practically nothing but an ordinance levying a tax or charge for landing, and such tax is probably a tonnage tax, which cannot be laid without the consent of congress. See *Cannon v. New Orleans*, 20 Wall. 577; *Packet Co. v. Keokuk*, 95 U. S. 89. A charge for wharfage for that which is not a wharf, but merely the natural and unimproved shore of a navigable river, will not be maintained. *Packet Co. v. Keokuk*, *supra*; *Shreveport v. Coast Line*, 37 La. Ann. 562. Nor will a charge for wharfage in favor of a corporation be maintained and enforced, unless it appears from the evidence that it rests on services rendered by the corporation to vessels or boats by means of wharves or wharfage facilities provided and maintained at the expense of the corporation, and by means of which the loading and unloading of boats or vessels is materially and specially benefited. *Id.* The *Lizzie E.* might have used some of the mooring posts planted or owned by libellant, but she was not bound to.

A decree will be entered dismissing the libel, with costs of both courts.

Rehearing refused May 11, 1887.

THE FURNESSIA.¹

SMITH *v.* THE FURNESSIA.

(District Court, E. D. New York. April 12, 1887.)

MASTER AND SERVANT — NEGLIGENCE — FELLOW-SERVANT — BOATSWAIN AND STEVEDORE.

Libellant, a stevedore, was employed by the ship-owner to assist in loading a vessel. While so engaged, he was injured by the falling upon him of lumber out of a sling. The boatswain of the vessel was in charge of the steam-

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

winch by which the timber was handled. *Held* that, even if the accident occurred by the boatswain's negligence, libelant could not recover, as, under the circumstances of their hiring, he and the boatswain were fellow-servants.

In Admiralty.

John J. Allen, for libelant.

Hill, Wing & Shoudy, for claimant.

BENEDICT, J. Assuming that what caused the timber to fall out of the sling, and upon the libelant, engaged at the time in stowing the timber in the hold, was negligence on the part of the boatswain of the ship, who for the moment was in charge of the steam-winch by which the timber was lowered to the hold, still the libelant cannot recover. The operation in hand was loading the ship with the lumber. The libelant was a stevedore, engaged in the loading. He was selected by the boss stevedore to work as stevedore, but paid for his work by the ship's owner. The ship was not loaded under a contract, but by men employed by the ship to do the work required. The boatswain was employed by the ship, and his duties were those of a boatswain on a ship. While hoisting in cargo, the steam-winch was run by the ship's crew, and not by the stevedore's men, and the boatswain who was managing the winch at the time of the accident was not subject to the direction of the stevedore, but was one of the ship's crew. Nevertheless he and the libelant were fellow-servants, for they were engaged in a single operation, and each employed by the ship's owner to perform the same. *The Harold*, 21 Fed. Rep. 429. Being engaged with the boatswain in a common undertaking, he cannot recover for damages resulting to him from the negligence of the boatswain while so engaged.

The libel must be dismissed.

THE WISCONSIN.¹

CUSHING and others v. THE WISCONSIN.

(District Court, E. D. New York. May 6, 1887.)

SALVAGE — RUDDERLESS VESSEL — SERVICES — RISK — DOUBTFUL WEATHER — AWARD.

The steam-ship W. went ashore, and got off with the loss of her rudder. She approached close to the harbor of New York, moving backward, when she was met and taken into the harbor by the steam-ship N. The W. was sound and staunch, and in no especial danger, but the weather was doubtful, and her master desired to be in the harbor before the fall of night, in view of her disabled condition. The N. incurred little risk. Her value was \$450,000. The value of the W., her cargo, and freight, was \$505,234.87. *Held* that \$4,000 salvage should be allowed.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.