

could not rank above the lien of the attaching creditor, but should rank as one derived under the attachment. It represents nothing more than the right of the attaching creditor to include in his recovery against the joint owner whose interest was attached, the expenses of the wharfage as part of the costs or taxable expenses of the suit. If the vessel had been sold on final process in the suit in which the attachment issued, the right of the mortgagee to take possession and exercise his power of sale under the mortgage would not have been impaired. The purchaser on the execution sale would have acquired an interest which would have permitted him to redeem upon tendering the mortgage debt, but the sale could not have prejudiced the mortgagee, or deprived him of the security of the vessel to the full extent of the mortgage debt. Certainly the mortgagee is in no worse plight under the stipulation by which the vessel was sold, and her proceeds brought into the district court, than he would have been if she had been sold upon an execution in the suit of the attaching creditor. The wharfinger must look to the sheriff personally for the wharfage, and the sheriff must look to the attaching creditor. There is no hardship in requiring the wharfinger to look for his wharfage to the person who brought the vessel to his wharf. Although there is an implied license to vessels upon navigable waters to use such structures in the manner and for the purposes contemplated by their erection, the wharfinger may terminate this general license, or may withhold permission to a particular person. *Heaney v. Heaney*, 2 Denio, 625; *Swords v. Edgar*, 59 N. Y. 28.

Inasmuch as the proceeds of the sale in the registry were not sufficient to satisfy the lien of the mortgage, the decree of the district court, in effect, compelled the mortgagee to pay the claim of the attaching creditor against one of the joint owners of the vessel, to the extent of his expenses for wharfage.

The decree of the district court is reversed, with costs of the district court and of this court, to be paid by the appellee.

THE HONORA CARR.

(District Court, N. D. New York. July 2, 1887.)

1. LIBEL FOR WAGES—EVIDENCE.

Both Connolly and Carr claimed wages as mate of the H. C. during the same season. *Held*, on the evidence, that the libel of Connolly must be dismissed, and the claim of Carr allowed.

2. ADMIRALTY.—SUBMITTING CAUSE WITHOUT ARGUMENT.

The practice of submitting a cause in admiralty without argument or brief, and leaving the court to ascertain and determine the issues upon the pleadings and proofs, is not to be encouraged.

On the first of June, 1886, Edward Carr filed a libel against the schooner *Honora Carr*, to recover \$281.67, the alleged balance due to

him for services as seaman and first mate from May 1, 1885, to and including November 10, 1885, at the rate of \$50 per month. On the twenty-fourth of June, 1886, Edward B. Connolly filed a libel against the schooner to recover \$135, the alleged balance due him for services as seaman and mate from June 10 to October 6, 1885, at the rate of \$45 per month. The parties have stipulated that each of these libels may be regarded as an answer to the other. The proceeds of the sale of the vessel now in the registry of the court are not sufficient to pay all of the claims filed.

Josiah Cook, for Carr.

Williams & Potter, for Connolly.

COXE, J. As this cause is submitted without argument or brief, the court is left to ascertain the issues, and determine them upon the pleadings and proofs, as best it may, without the assistance of counsel. Such practice is not to be encouraged, and, could it be done without subjecting the parties to a long delay, I should, even now, require counsel at least to submit their views in writing.

The only dispute seems to be between Connolly and Carr as to which was the mate of the schooner during the season of 1885, and, as incidental thereto, the amount of wages which the master agreed to pay, and did pay, to each. Connolly enters this contest heavily handicapped. He signed no shipping articles; he kept no books or memoranda; he is not corroborated by a single witness or a solitary extraneous circumstance. He stands upon his own unsupported assertion. His statement, even though uncontradicted, is entitled to but little weight. His memory is utterly unreliable upon all material points. It was with difficulty that he recalled the name of the vessel in question. He does not recollect the time he began or ended his employment, or when he was paid, or the amounts, except in one or two instances. He says he charged \$40 per month. He does not say that the master agreed to pay him that sum. Add to this the admission that his health and habits of intemperance were such that he was frequently incapacitated from performing services as seaman, and it is quite apparent that it would be well-nigh impossible to base an accurate finding upon his testimony, even if it stood alone. But Connolly is contradicted by four witnesses, three of whom are, perhaps, interested, but all of them are apparently respectable. Michael Carr, who was the master of the schooner, testifies that his son Edward Carr acted as first mate during the season of 1885; that Connolly was not employed as mate, but as seaman, at \$20 per month, which was the going rate of wages at that time; that he was intoxicated whenever the vessel was in port; that he abandoned her at Detroit, and that he was paid \$82, which was \$10 more than he was entitled to under the contract. This testimony is fully corroborated in many important particulars by Edward Carr, Henry B. Carr, and Allen Palmer. It is clear that the libel filed by Connolly must be dismissed.

It follows from the foregoing considerations that Edward Carr is entitled to a decree for the amount claimed by him. No one but Connolly

disputes his right to recover. There is no disagreement as to the terms of the contract by which he was employed to act as mate, or as to the amount already received by him. His testimony in this regard is sustained by the master and all of the other witnesses in the case, Connolly excepted.

There should be a decree in accordance with these views.

THE JOSEPH FARWELL.

EDWARDS and others v. THE JOSEPH FARWELL and Cargo.

(District Court, S. D. Alabama. June 6, 1887.)

1. SHIPPING—GENERAL AVERAGE—REPAIRS.

When a vessel, disabled at sea, puts into a port of refuge for repairs, the ordinary expenses incurred, including pilotage, towage, quarantine dues, docking, wharfage, surveys on the ship and cargo, cost of unloading, storing, and reloading cargo, and an allowance for wages of the crew, and provisions from the moment of departure from the course of the voyage until its renewal, or so long as its renewal remains in expectancy, are chargeable to general average.

2. SAME—CARGO.

Where the interests are temporarily separated, as by unloading and storing the cargo in order to repair the vessel, and it is expected to reload the cargo, and complete the voyage, then, even though by reason of unforeseen circumstances, as the inability to repair the vessel and make her seaworthy again, this expectation is not realized, the entire expenses of saving and protecting the different interests, until the hope of reuniting them is abandoned, are chargeable to general average.

3. SAME—ABANDONMENT OF VOYAGE.

The cost and expenses incident to repairs to the vessel, incurred in the expectation of continuing the voyage, are not chargeable to general average, when the voyage is subsequently abandoned.

4. SAME—FREIGHT.

Freight *pro rata itineris* is not earned where, from necessity, cargo is accepted before arrival at the port of destination; accordingly there is no contribution on freight.

In Admiralty. Libels for general average. The facts sufficiently appear from the opinion.

J. L. & T. H. Smith, for libelants Edwards and others.

Smith & Gaynor, for master and crew and material-men.

L. H. Faith, for material-men.

Peter & Thos. A. Hamilton, for claimants of cargo.

TOULMIN, J. When a vessel is disabled at sea, and puts into a port of refuge for repair, the ordinary expenses incurred are regarded as general average. A general average contribution is a division of the loss or expense among those benefited, and has its foundation in equity and natural justice. General average expenses include the charges of entering the harbor, as pilotage, towage, quarantine dues, docking, wharfage,