

BENNETT v. LINGHAM.¹

(District Court, E. D. New York. May 27, 1887.)

CHARTER-PARTY—TIME OF SAILING—BREACH—PREVIOUS ACQUIESCENCE—LIABILITY.

Defendant agreed to ship cattle by the steamer N. H., "sailing from New York about the middle of September." The vessel was at sea when the contract was made. On September 14th defendant inquired the steamer's probable sailing day, and was told, about September 27th, to which he made no objection. On September 22d, the defendant, being notified that the steamer would sail on the 29th, declined to ship cattle by her, on the ground that his contract did not require him to ship at so late a day. *Held*, that the ship having construed the indefinite phrase, "about the middle of September," to mean as late as the twenty-seventh of the month, and defendant having acquiesced therein, and that, too, on a day before the middle of September, it was not open to the defendant to say that a tender on the 29th was not a compliance with the contract. His refusal to ship was therefore a breach of the contract.

In Admiralty.

Ulo, Ruebsamen & Hubbe, for libellant.

Butler, Stillman & Hubbard, for respondent.

BENEDICT, J. This action is brought by the owners of the steamer Notting Hill to recover damages of the defendant for an alleged breach of a live-stock freight contract, made by the defendant, whereby he agreed to ship on the said steamer about 460 head of cattle, to be transported in said vessel from New York to Deptford, at a price named. The contract was in writing, and was made in New York on the eleventh of August, 1883, at which time the steamer was upon a voyage from New York to London and back. The contract, when designating the steamer in which the cattle were to be transported, adds to the steamer's name the words, "sailing from New York about the middle of September."

The steamer was unable to get back to New York before September 22d. On September 22d the defendant was notified that the steamer would be ready to sail on the 29th, but declined to ship cattle by her, upon the ground that his contract did not require him to ship at so late a day. I should have been inclined to support the defendant in this refusal were it not for the additional fact that on the fourteenth day of September, in answer to the defendant's inquiry as to the date on which the steamer left London, and also "her probable date of sailing from New York," was informed by telegraph that she had sailed from London on the sixth of September, and would be dispatched from New York about September 27th, and he then made no objection of any kind to shipping his cattle on her.

The phrase in the contract, "about the middle of September," is indefinite. It has no definite meaning in the trade. In this instance it

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

was construed by the ship to cover a day as late as September 27th. This construction was made known to the defendant on September 14th, and he then made no objection to that construction. After this interpretation of the indefinite phrase, "about the middle of September," acquiesced in by the defendant, and that, too, on the day before the middle of September, it was not open to the defendant to say that a tender of the ship on the twenty-ninth of September was not a compliance with the contract. The defendant's refusal to ship cattle on the steam-ship was therefore a breach of the contract on his part, and he is liable for the damages resulting therefrom.

SVENDSEN *v.* STURSBURG and others.¹

(District Court, E. D. New York. May 27, 1887.)

CHARTER—WARRANTY OF SEAWORTHINESS—REJECTION OF VESSEL.

Four impartial, competent, and experienced persons having, after examination of a vessel, expressed the belief that she was not seaworthy, and the owner having refused to dock the vessel and settle the question, it was held that, notwithstanding the subsequent good performance of the ship, the charterers were justified in rejecting her.

In Admiralty.

Libel to recover damages for failure of claimants to ship cargo by her in terms of charter-party.

Butler, Stillman & Hubbard, for libelant.

Jas. K. Hill, Wing & Shouddy, for claimants.

BENEDICT, J. In the case of *Premuda v. Goepel*, 23 Fed. Rep. 410, it was decided by Judge Brown that the warranty of the seaworthiness of a ship is a warranty that the ship is in such a fit condition for all the ordinary hazards of the contemplated voyage as to be approved as seaworthy in the judgment of impartial, competent, and experienced men, versed in that business. If such be the legal effect of the warranty of seaworthiness, and I incline to the opinion that such must be its effect, the libelant in this case cannot recover; for the proof shows that four impartial, competent, and experienced persons, agents of various underwriters, after examining the ship, formed and expressed the judgment that the ship was not seaworthy; while the agent of the Norwegian underwriters, and the agent of the ship, himself an experienced shipmaster, formed a contrary opinion.

No bias against the ship on the part of those who rejected her is shown, and no reason assigned for their adverse opinion other than the condition of the ship as visible to them. The difference in opinion thus disclosed could have been terminated at once by having the ship docked, and the

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