

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.

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SVENDSEN *v.* STURSBURG and others.<sup>1</sup>

(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 libellant.

*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 libellant 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

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.

condition of her bottom thus disclosed. The ship was not put on the dock, nor was such an examination of her tendered. This omission indicates to my mind that what was visible of the ship afforded just ground for the belief that such an examination would disclose an unsound bottom. No reason is suggested for omitting to dock the ship, except the expense. That reason appears to me to be an insufficient one, under the circumstances. The rejection of the ship by one insurance inspector was of itself so serious a matter for the ship that it seems to me that some other reason than the expense of docking the ship must have existed to cause the omission to tender that examination, that would have laid to rest all doubts as to the seaworthiness of the ship.

I have not overlooked the subsequent performance of the ship, but the question is not whether the ship would make the contemplated voyage in safety, but whether the condition of the ship was such as to justify the belief of competent persons that she was not in fit condition to be exposed to the hazards of the contemplated voyage.

If that be the question, it seems clear that the charterers were justified in rejecting the vessel, and the libel must be dismissed, with costs.

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THE CRAIGENDORAN.<sup>1</sup>

THE CLANDON.

BARTLETT and others *v.* THE CRAIGENDORAN.

SAME *v.* THE CLANDON.

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

1. WHARFAGE—HOW COMPUTED—TONNAGE OF VESSEL—REGISTERED TONNAGE.

The wharfage act of 1877 of the state of New York (Laws 1877, c. 315) regulates the rates of wharfage in New York and Brooklyn by the tonnage of the vessel. *Held*, that the tonnage so taken to calculate the wharfage is the registered, not the gross, tonnage.

2. SAME—BRITISH VESSELS.

The rule is the same for British vessels; the secretary of the treasury having by the treasury regulations of 1884, art. 182, directed that their tonnage shall be determined by reference to their certificate of registry.

In Admiralty.

*Goodrich, Deady & Goodrich*, for libellant.

*Whitehead, Parker & Dexter*, for claimants.

*Butler, Stillman & Hubbard*, for the Clandon.

BENEDICT, J. This is an action to recover wharfage for the use of a wharf in the city of Brooklyn. The rates of wharfage chargeable for the use of wharves in the city of Brooklyn and the city of New York are regulated by a statute of the state, enacted in 1877. The provision in the laws of the state now, and at the time in the libel mentioned, in

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.