unloaded, is established by so much testimony, as against the single witness for the libelant, that it is impossible for me to find the libelant's theory on that point sustained, viz. that the fall of the boxes was occasioned through any collision with the descending load of barrels; since any such collision must have occurred before the resin barrels reached the bottom of the hold.

The testimony of the winchman who attended on the boxes of logwood, furnishes a simple explanation of the accident. The descent of the load was regulated by a brake, managed by the foot. He says that when the draft of logwood boxes was part way down, he felt it ease, as though it had touched; and that he let his foot slip from the brake, when the draft immediately ran away from him, with five or six more turns of the axle, equivalent to about fifteen or eighteen feet. The gangman who was attending that whip also says that load went down too fast. Of the latter there is no doubt. It is not entirely certain from the testimony of the winchman, whether this was through an unintentional slip of the foot, or from his voluntarily easing it, at the moment when he says he thought the load had touched the deck. If the latter is correct, the winchman's mistake might easily be accounted for by the momentary catching of the load on the deck above, there being two decks above the orlop deck, where the logwood was landed. The load was landed upon the platform on the hatch of the orlop deck, where it belonged. It was landed too suddenly, whatever the cause, so that several of the boxes bounded off, and fell into the hold. The too sudden descent plainly arose from the mistake or fault of the winchman. As he was a fellow workman with the libelant, his errors were one of the risks of the libelant's employment. Quinn v. Lighterage Co., 23 Fed. 363; Steamship Co. v. Merchant, 133 U. S. 375, 10 Sup. Ct. 397; The Queen, 40 Fed. 694, 696.

Deplorable as the results were to the libelant, the law does not afford him any redress, in the absence of any proof of fault in the owners or agents of the ship.

Without considering, therefore, the other matters which have been so ably presented by counsel, I am constrained to dismiss the libel; but without costs.

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## THE IDLEWILD.[1]

## THE HAVANA.

## ROBINSON et al v. THE IDLEWILD.

## SAME v. THE HAVANA.

(District Court, S. D. New York. December 26, 1893.)

WHARFAGE—TITLE OF WHARFINGER—ESTOPPEL.

Vessels which have made use of a wharf, whether under express or implied contract, are not entitled to refuse payment of wharfage on the ground that the wharfinger is not the legal owner of the property.

In Admiralty. Libels to recover wharfage. Decree for libelants.

[1] Reported by E. G. Benedict, Esq., of the New York bar.

Owen, Gray & Sturges, for libelants.
Goodrich, Deady & Goodrich, for The Idlewild.
Mr. Hotchkiss and Mr. Middlebrook, for The Havana.

BROWN, District Judge. These libels were filed to recover wharfage charges against the above-named steamships while they lay at the libelants' wharf off the foot of Court street, Brooklyn, in the early part of 1893.

As regards the Havana, I find, that the receipt given on March 24, 1893, to her owners, upon the payment of $375 "in full for wharfage to April 17, 1893, or date of sale," must be construed in favor of the defendants, and as payment of wharfage up to April 17th, although the sale took place on April 2d; so that there remains unpaid upon the Havana five days' wharfage only, amounting to the sum of $32.75.

The principal question litigated, is the right of the libelants to recover at all, payment being resisted on the ground that the easterly side of the wharf, where the vessels lay, encroached along its whole length by about six feet beyond the exterior bulkhead line, as established by law; and that the libelants not being the legal owners of so much of the wharf property, could not recover wharfage.

The evidence shows that the libelants' testator became the owner in fee of a strip of land bounded on its easterly side by the established bulkhead line, and that Downing & Lawrence became the owners in fee of the land adjoining on the westward of the libelants' testator; that the latter in 1878, in conjunction with Downing & Lawrence, built the wharf in question, which is 24 feet wide, and from 300 to 400 feet long. The middle line of this wharf was the division line between the two owners. The easterly line of the wharf, as above stated, was built out some six or seven feet beyond the proper bulkhead line. From that time until the present, the libelants, or their testator, have been in the possession and management of the whole easterly half of the wharf, and in the ordinary use thereof for wharfage purposes, and have accommodated vessels there, collecting the usual charges for wharfage. So far as the evidence shows, there has never been any interference by the state, or by the city authorities, with the libelants' possession, or collection of wharfage.

Under such circumstances, I do not see how the claimants are in a situation to raise the question presented. The Havana engaged wharfage under a specific contract with the libelants to pay at specified reduced rates therefor; and it has received the benefit of its contract. No express contract is shown in the case of the Idlewild; but she went there in the ordinary course of business; has had the benefit of the facilities of the wharf built and maintained by the defendants, a part of which wharf is undeniably the libelants' property as against all the world. Vessels had no right to use this wharf as against the libelants' consent. The circumstances import an implied agreement to pay wharfage, if not at the statutory rate of fees accruing to one who was strictly an "owner,"

at least a reasonable charge for such wharfage facilities as the libelants actually furnished to the steamer. A reasonable charge is proved to be not less than the single statutory rate; and no objection is made on this point. No other person makes, or can make, any claim for compensation for the wharfage facilities afforded. So long as neither the state nor city interferes with the libelants' possession, and letting of the wharfage facilities, I see no reason why the vessels enjoying the use of it, should be entitled to dispute the libelants' right to a fair compensation, any more than a tenant should be allowed to dispute his landlord's title, as a defense against the payment of rent. These views seem to me all implied, or directly asserted in the case of Wetmore v. Gaslight Co., 42 N. Y. 384.

There must, therefore, be a decree for the libelants as against the Idlewild for 19 days' wharfage at the rate of $5.43 per day, with interest; and against the Havana for the sum of $32.75, the balance above stated, with costs.

## THE ALVAH.

## MORRIS v. THE ALVAH.

(District Court, E. D. New York. February 2, 1894.)

1. SHIPPING — MARITIME CONTRACT — PRELIMINARY OR UNAUTHORIZED CONTRACT—CONFIRMATION.
   A contract binds the ship when it is confirmed by those who have authority, and the ship has actually entered upon the performance of it, although it may have been a contract preliminary to a maritime contract, or made by brokers acting without sufficient authority.
2. SAME — TRANSPORTATION OF CATTLE — WARRANTY OF SUFFICIENT VENTILATION—DAMAGES FOR FAILURE TO PROVIDE.
   In a contract for transportation of cattle, it is implied that the space allotted shall be sufficiently ventilated, and when the ship's brokers reported that the ship would insure, but insurance could not be effected on cattle placed in a certain portion of a ship without additional ventilation, which the shipmaster refused to provide, *held*, that the shipper was justified in not furnishing cattle to fill such portion of the ship, and the ship was liable for the failure to transport the cattle, provided for by contract, but shut out by the ship's refusal to provide further ventilation.

In Admiralty. Libel in rem for damages for failure to transport cattle. Decree for libelant.

Foster & Thomson, for libelant.
Convers & Kirlin, for claimants.

BENEDICT, District Judge. This is an action against the steamship Alvah to recover damages for a violation of a contract of affreightment. It appears that Brigham & Pillsbury, shipbrokers, claiming to act on behalf of the steamship Alvah, agreed with the libelant for the transportation of 374 head of cattle, in the steamship Alvah, from Boston to London. When the Alvah was ready to receive the cattle, the fittings for the transportation of the cattle were made, and a space for the transportation of 374 cattle arranged. Of this space a part, being the after part of No. 2 and No. 3 between decks, was declared by the agent of the insurers of the