

Statement of the case.

BOYD v. MOSES.

1. The stipulation of a charter-party of a ship to take a cargo of lawful merchandise, implies that the articles composing the cargo shall be in such condition, and be put up in such form, that they can be stowed and carried without one part damaging the other.
2. The master of a ship may, therefore, refuse to take goods offered for shipment, if in his honest judgment they are in such condition or of such character, that they cannot be carried without injury to the rest of the cargo, without violating a charter-party containing the condition mentioned.
3. Accordingly, where lard, leaking from casks in which it was packed, was brought to a ship, for shipment, under a charter-party, containing a condition to take "a cargo of lawful merchandise," the hold of which ship was, at the time, loaded with grain, the master was justified in refusing to receive it in that condition, he being of opinion, in the honest exercise of his judgment, that it could not be carried without injury to the rest of the cargo.
4. The master having refused to receive the lard, in its leaking condition, unless the charterers of the ship gave him an agreement to hold the ship harmless; and they thereupon having written to him a letter referring to his refusal, and requesting him to receive the lard, and agreeing to pay any damages which he or the ship might be subjected to on the discharge of the cargo, arising from the stowage of the lard between decks, and its running on any other part of the cargo; and upon the receipt of this letter, the master having consented to take the lard, and having stowed it between decks, and damages having subsequently occurred to the grain in the hold, from the leaking of the lard—*Held*, that the agreement contained in the letter was a modification of the terms of the charter-party in respect to the lard, and relieved the ship from the responsibility of safe carriage of the cargo, so far as that was affected by the lard; and was equivalent to a stipulation to that effect embodied in the charter-party; and that the stipulation, though of no efficacy as between shipper and vessel, was valid as between charterer and owner.

THIS was an action in *personam*, brought originally in the District Court for the Southern District of New York, by the libellants against the appellants, to recover a balance due upon a charter-party. The District Court rendered a decree dismissing the libel. The Circuit Court for the district reversed that decree, and rendered a decree for the libellants. From this last decree an appeal was taken to this court.

The charter-party was executed in July, 1862, at the city

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of New York, in the harbor of which city the ship then lay. The voyage stipulated was to be from New York to Havre, with a cargo of lawful merchandise, which the charterers were to provide. The ship was to be tight, stanch, strong, and every way fitted for the voyage. She was to load "under inspection," and to "go consigned to charterers' friends."

The cargo furnished by the charterers consisted principally of grain, lard, and tallow. The grain, which was partly in bulk and partly in bags, was stored in the hold. A portion of the lard was stored between decks. By the leaking of this lard a part of the wheat in the hold was damaged, and the question was, whether the damage should be borne by the owners or the charterers of the ship. It was charged to the ship at Havre, and paid by the consignees, who collected the freight, and its amount was withheld by them from the charter-money. The present action was by the owners against the charterers of the ship for the balance thus withheld.

When the lard was brought to the ship to be taken on board it was leaking from the casks in which it was packed. It appeared to be mostly in a liquid state, and the stevedore having charge of the loading refused without the consent of the master to receive it, and store it between decks,—the only part of the vessel not then occupied by merchandise. He was apprehensive that in its liquid state, leaking from the casks, it would penetrate through the deck and damage the wheat in the hold. The master, to whom the matter was referred, also refused to take it, and informed the charterers that he could not receive it unless they gave him an agreement to hold the ship harmless. They thereupon wrote to him a letter stating that they understood he objected to their shipping lard between the decks of the ship, requesting him to receive it, and agreeing to pay any damages which he or the ship might be subjected to on the discharge of the cargo at Havre, arising from the stowage of the lard between decks, and its running on any other part of the cargo. Upon the receipt of this letter the master consented to take the lard, and it was stowed between decks.

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There were between three and four hundred casks, and the lard was leaking from nearly all of them. The weather was unusually hot during the time the ship was receiving cargo, so that it became necessary to relieve the stevedores by *extra* men, and on some days they could not work at all. The weather continued warm during the greater part of the voyage, which lasted over a month. Upon the discharge of the cargo twenty-six casks were found entirely empty, and three hundred and twenty-seven partly empty. The decks were covered with lard in a liquid state, being in some places two or three inches deep, which had destroyed the pitch in the seams and rotted the oakum, and had dripped through and injured a large quantity of the wheat in the hold.

There was no dispute as to the extent of the damage thus produced. As already stated, the question was upon whom should the damage fall, the charterers or the owners of the ship?

The consignees of the ship at Havre were designated by the charterers as their *friends*, pursuant to the stipulations of the charter-party, and acted as their agent, and not for the master, in collecting the freight.

Mr. E. C. Benedict, for the appellants; Mr. E. H. Owen, contra.

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court, as follows:

The stipulation of the charter-party to take a cargo of lawful merchandise necessarily implied that the articles composing the cargo should be in such condition, and be put up in such form, that they could be stowed and carried without one part damaging the other. Whether in any case articles offered can be taken with safety to other articles, will depend upon a variety of considerations; the nature of the articles, the state of the weather, the voyage contemplated, the amount of cargo already received, and other particulars. Lard, for example, can be carried in winter to a northern port in loose casks with little damage to other articles, whilst injury may be reasonably apprehended if the

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voyage is to be made through the tropics, and the casks are not perfectly tight. Very different care must necessarily be given by the master in receiving and stowing goods perishable in their nature from heat or moisture, and such as are unaffected by either. All that is required of him in such case—he being a competent officer—in determining whether particular goods are at the time in shipping order and condition, or can be received in the state and stowage of cargo already aboard, is that he shall not act capriciously or without due consideration, but shall exercise an honest and reasonable judgment in the matter.

In *Weston v. Foster*,* the whole of the vessel, except the cabin and room for the crew, sails, cables, and provisions, was let, and the owners covenanted to receive all such lawful merchandise as the charterers should choose to put on board. The master, who was a competent officer, took on board all the cargo he thought his vessel could safely carry, which, however, did not fill it, but left a space capable of holding fifty tons more, and the charterers insisted that there should be deducted from the freight-money the amount they would have received if fifty tons more had been brought. But the court held that the whole charter-money was earned, and that the honest opinion of the master, though not absolutely binding on the charterers, could only be controlled by decisive evidence of a mistake on his part.

The master was here sustained in refusing to take all the cargo the hold of the vessel could receive, because, in the exercise of his honest judgment, he thought it would endanger her safety, notwithstanding the terms of the charter-party. Upon the same principle he may refuse to take goods offered, if in his honest judgment they are in such a condition or of such character that they cannot be carried without injury to the rest of the cargo.

In *Weston v. Minot*,† where a vessel was chartered for a voyage to Calcutta and back, to carry all lawful goods placed on board, and for a gross sum for freight out and back, to

* 2 Curtis, 119.

† 3 Woodbury & Minot, 436.

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the entire capacity of the vessel, it was held that the charter-party must be considered to mean all goods not contraband nor diseased, and as many of them as could be put on board without making the vessel draw too much for safety, and that, if the goods put on board were heavy articles, and, before the ship was full, sunk her as low as is usual and proper without extra danger, the master might refuse to take more without violating the charter-party.

The principle upon which the action of the master was justified in these cases applies to the case at bar. Safety to the cargo received on board, though not so high a consideration as safety to the ship, is one which should constantly govern the action of the master.

That his apprehensions were well founded in this case is established by the result. His conduct, therefore, in insisting upon protection to his ship, was reasonable, and this was in effect conceded by the charterers, as otherwise they would have insisted upon the ship receiving the lard, or that the matter should have been submitted to the inspector under whose inspection it was stipulated the ship was to be loaded.

The agreement contained in the letter must be considered as a modification of the terms of the charter-party in respect to the lard in question. It relieved the ship from the responsibility of safe carriage of the cargo so far as that was affected by the lard. It may be regarded as a stipulation to that effect embodied in the charter-party; a stipulation which, though of no efficacy as between shipper and vessel, was valid as between charterer and owner.

If the charterers had owned the entire cargo, and had induced the master, against his objection, to receive and carry the lard in its leaking condition, they would not have had any right of action against the ship for the damage sustained, nor could they have recouped or set-off the amount of damage in an action against them for the charter-money. The principle upon which the ship would be exempt from liability in such case is applicable to the present case between the charterers and owners.

DECREE AFFIRMED.