

3FED.CAS.—4

Case No. 1,221.

BEECHER ET AL. V. BECHTEL ET AL.

{3 Blatchf. 40;¹ 30 Hunt, Mer. Blag. 196.}

Circuit Court, S. D. New York.

Sept. 23, 1853.²

SHIPPING—CHARTER-PARTY—AGREEMENT FOR FULL CARGO OF LUMBER—PIECES TOO LARGE FOR PORT-HOLE—DUTY TO “WIDEN.

The charter-party of a vessel provided that the whole of it, except the part necessary for the officers and crew, and for stowing sails, cables, and provisions, should be at the disposal of the charterer, for a specific voyage. The charterer agreed to furnish a full cargo of lumber and timber for the voyage, at a specified price per thousand feet. After the vessel had received part of her cargo, the charterer desired to put on board two pieces of timber that were too large to be received through the porthole of the vessel, and insisted that the porthole should be enlarged to receive them, and refused to furnish any more cargo till that was done. Thereupon, the master landed the cargo that had been taken on board, and left for another port, in ballast: Held, in an action by the owner against the charterer, to recover compensation for the loss sustained by the failure to furnish the cargo, that the undertaking of the charterer was to furnish a cargo of such timber as was suitable to the capacity and condition of the vessel, and that the owner did not undertake to convey a given quantity of lumber and timber generally, and was not bound to alter the port-hole of the vessel.

{Appeal from the district court of the United States for the southern district of New York.

{In admiralty. Libel by William K. Beecher and others against George J. Bechtel and John H. Dryer, Jr., for breach of a charter-party.} This was a libel in personam, filed in the district court, to recover compensation for the loss and damage sustained by the libellants, as owners of the brig *Buenovento*, by reason of the non-fulfilment, by the respondents, of a charter-party. The libel was dismissed by the district court, {Case No. 1,220a,} and the libellants appealed to this court. {Reversed.}

N. Dane Ellingwood, for libellants.

George F. Betts, for respondents.

NELSON, Circuit Justice. The brig *Buenovento*, of two hundred and fifty tons burthen, was chartered from the libellants by the respondents, at the city of New York, on the 2d of October, 1849, to carry a cargo of lumber and timber from Charleston, in South Carolina, to Barcelona, in Spain. The owners engaged that the whole of the vessel, except the part necessary for the accommodation of the officers and crew, and the stowage of sails, cables, and provisions, should be at the disposal of the charterers, who agreed to

furnish a full and complete cargo of lumber and timber for the voyage, and to pay, as freight, eleven dollars per thousand superficial feet, with five per cent, primage. The cargo was to be delivered and received alongside of the vessel, within reach of her tackles. The charter was to commence when the vessel should be ready to receive the cargo at her place of loading, and notice thereof should be given to the charterers.

The vessel, in pursuance of the charter-party, arrived at the port of Charleston on the 14th of the month, ready to receive her cargo. After she had received on board a considerable portion of it, the agent of the shippers delivered, for the purpose of being shipped on board, two large masts or spars—the one twenty-seven inches in diameter, and the other twenty-eight inches—round timbers, and sixty feet in length. The lumber was received through a square port-hole in the forward part of the vessel, called the bow port, and which could not receive timber of the length and dimensions of these spars, the port being only twenty-four inches square, which would not receive timber of the length of the spars exceeding twenty-two inches in diameter. The port-hole was of the usual size for vessels of the burthen of the *Buenovento*. The master, having waited some sixty-three days in all for lumber and timber suitable to the size and capacity of the vessel, and the agent of the shippers refusing to furnish other lumber till the spars were taken on board, and insisting that the port-hole should be enlarged so as to receive them on board, landed the portion of the cargo that had been taken on board, in pursuance of orders from the owners in New York, and left for another port, in ballast, after full notice to the agent of his intention so to do, unless the cargo of the vessel was completed.

A good deal of evidence has been taken on both sides upon the point as to whether or not the port-hole could have been enlarged without injuring the strength and affecting the seaworthiness of the vessel. It is exceedingly doubtful, upon the evidence, whether or not the necessary alteration could have been made without permanently disabling her and rendering her unseaworthy; and the estimate of the expense varies from fifteen dollars to three hundred dollars, according to the various witnesses. I shall not undertake to weigh this evidence, as it respects the question either of the practicability of the alteration or of its cost; for, in my judgment, the owners, upon any just and proper construction of the charter-party, were not bound to make or submit to the required change.

The charter was entered into in the city of New York, and the vessel lay in That port at the time. An opportunity was thus afforded to the charterers to make any examination of her they might desire. Her tonnage is specified in the charter-party, and the only covenants entered into by her owners, in respect to her character and condition, are, that she shall be seaworthy; that, during the voyage, she shall be kept tight, staunch, well fitted and tackled, and provided

with every requisite, and with men and provisions necessary for the voyage; and that she shall receive on board all such lawful goods and merchandise as the charterers may see proper to ship, the same to be properly stowed by the ship's crew, or by such other suitable persons as the captain may employ, at the vessel's expense; the charterers agreeing to furnish a full and complete cargo of lumber and timber.

I agree that, if the owners had undertaken to convey from Charleston to Barcelona a given quantity of lumber and timber generally, for a specified price, they would have been bound to furnish a vessel that could have received and shipped any description of the article mentioned, which, according to the usage and custom of the trade, was ordinarily shipped at the former port. Such would have been the fair and reasonable import of the contract. But here, no such contract has been entered into. The owners have simply chartered their vessel, and have stipulated that the whole of it, with the exceptions stated, shall be at the sole use and disposal of the charterers during the voyage; and that no goods or merchandise whatever shall be laden on board, otherwise than by them or their agents, without their consent. It is an engagement, therefore, on the part of the owners, not that they will convey between the ports mentioned a given amount of lumber and timber for the price mentioned, but that the vessel named shall be employed, for the particular voyage, in the conveyance of those articles. It seems to me clear, therefore, that the undertaking of the charterers is to furnish a cargo, at the port designated, of such lumber as is suitable to the capacity and condition of the vessel; and that it would be carrying the contract beyond the intent and scope of it, to consider the same as an engagement to convey a given quantity of the article generally, without regard to the means of conveyance.

Some evidence has been given tending to show that it is not unusual to enlarge the port-holes of vessels employed in the conveyance of lumber, to enable them to receive on board spars of the size of those delivered in this case. But the evidence is slight, and does not approach to the establishment of a usage or custom in the trade, especially in the case of a charter-party like the one in question. It may well be that an owner who enters into an engagement generally, to convey a given quantity of lumber and timber, might find it necessary to alter materially the construction of his vessel, to enable him to comply with the terms and conditions of his obligation, as, under such a charter, he would be bound to carry any description of the article within the usage and custom of the trade. Under such a contract, there would be no reference to any particular vessel or mode of conveyance. But where, as in the present case, a particular vessel has been chartered for the conveyance of a cargo of lumber, the obligation is different, and the charterers are, in respect to the cargo to be furnished, bound to regard the capacity and condition of the vessel. I agree, that changes of a temporary character, as it respects the interior of the vessel, such as may be usual and customary in the trade, for the accommodation of the cargo, may be proper and within the duty of the owners. But changes affecting her safety

and sea-worthiness, and thereby permanently lessening her value, cannot, it seems to me, be regarded as falling within the contract; and this, even assuming that it may be matter of doubt whether the damage to the vessel will or will not be serious and permanent. The contract, in my judgment, does not impose upon the owners the hazard of the contingency supposed.

Upon the view, therefore, which I am obliged to take of the case, I think that the decree below is erroneous, and should be reversed. There must be a reference to the clerk to ascertain the loss and damage sustained by the libellants.

¹ [Reported by Samuel Blatchford, Esq, and here reprinted by permission]

² [Reversing Case No. 1220a.]