be sustained in the Courts of the United States; and that there is no error in the judgment which was rendered against them in the District Court of Illinois.

Judgment affirmed, with costs.

ARCHIBALD GRACIE and others, *Plaintiffs in Error,*

v.

JOHN PALMER and others, *Defendants in Error.*

By a charter-party, the sum of 30,000 dollars was agreed to be paid for the use or hire of the ship, on a voyage from Philadelphia to Madeira, and thence to Bombay, and at the option of the charterer to Calcutta, and back to Philadelphia, (with an addition of 2000 dollars, if she should proceed to Calcutta,) the whole payable on the return of the ship to Philadelphia, and before the discharge of her cargo there, in approved notes, not exceeding an average time of 90 days from the time at which she should be ready to discharge her cargo. The charterer proceeded in the ship to Calcutta, and, with the consent of the master, (who was appointed by the ship-owners,) entered into an agreement with P. & Co. merchants there, that if they would make him an advance of money, he would deliver to them a bill of lading stipulating for the delivery of the goods purchased therewith to their agents in Philadelphia, free of freight, who should be authorized to sell the same, and apply the proceeds to the repayment of the said advance, unless the charterer's bills, drawn on G. & S. of Philadelphia, should be accepted, in which event the agents of P. & Co. should deliver the goods to the charterer. The goods were shipped accordingly, and a bill of lading signed by the master, with the clause, "freight for the said goods having been settled here." The bills of exchange drawn by the charterer were refused acceptance, and the agents of P. & Co. demanded the goods, which the owners of the ship refused to deliver without the payment of freight: *Held*, that the owners of the ship had a lien on these goods for the freight.

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ERROR to the Circuit Court for the eastern District of Pennsylvania. This was an action of assumpsit, brought by the defendants in error against the plaintiffs in error, to recover back the sum of 10,500 dollars, paid under the circumstances stated in the following case, to be considered as a special verdict.

On the 23d of October, 1818, the defendants, being the owners of the ship America, chartered her to Hugh Chambers, by the following charter-party: "This charter-party, indented, made, and entered upon, this 23d day of October, in the year of our Lord 1818, between Archibald Gracie, William Gracie, and Charles King, the persons constituting the copartnership or house of trade, under the firm and style of Archibald Gracie & Sons, of the city of New-York, owners of the ship or vessel called the America, of New-York, of the burden of 460 tons, or thereabouts, register admeasurement, of the first part, and Hugh Chambers, of the city of Philadelphia, merchant, of the other part, witnesseth, that the said owners have let, and the said Hugh Chambers hath taken and hired the said vessel, to freight for the voyage, upon the terms and conditions following: whereupon the said owners do covenant, promise, and agree, to and with the said charterer, by these presents, that the said vessel shall be tight, stanch, and strong, well and sufficiently fitted, manned, provided, and furnished with all things needful and necessary for such vessel, on her intended voyage, herein after mentioned, and provisioned for the term of eighteen months, and

fully and properly armed with large and small arms, and with sufficient ammunition for the same; and that she shall, on or before the 15th day of November next, be in readiness, at the port of Philadelphia, to receive and take on board, and shall there, when tendered within reach of her tackle, receive and take on board all such lawful goods and merchandise, as the said charterer may think proper to ship, not exceeding what she can reasonably store and carry, over and above her tackle, apparel, provisions, armament, and other necessaries, and the privileges herein after reserved for the master, and first and second officers, and the lading of the dollars to be shipped by the owners, as herein after mentioned; and that the said ship shall be in readiness to sail from Philadelphia aforesaid, and, on being loaded and afterwards despatched, shall and will, (wind and weather permitting,) set sail from the said port of Philadelphia, on or before the 30th day of November next, and proceed to the island of Madeira; and shall and will there make a right and true delivery of such quantities of goods and merchandise, as shall be there deliverable, loaded at Philadelphia aforesaid, to such persons as the same shall have been consigned to; and the same being so unloaded, the said ship shall and will receive and take on board all such legal goods, wares, and merchandise whatsoever, as shall be offered and tendered, within reach of her tackle, by or for account of the said Hugh Chambers, not exceeding as aforesaid. And as soon as the said ship shall be thus loaded at Madeira afore-

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said, she shall and will set sail and depart from thence, (wind and weather permitting,) and directly proceed on her voyage, and put into the port of Bombay, in the East Indies; and that she shall, at the option of the said Hugh Chambers, his agent or agents, be allowed also to put into Calcutta, and deliver her cargo, and take in returns there. And at the said ports of Bombay and Calcutta, respectively, unlade all such goods and merchandise as shall remain on board, and relade such lawful goods, wares, and merchandise, as the said charterer, his agents, factors, or assigns, shall think fit to charge and lade on board, over and above, and not exceeding as aforesaid, and the lading, for account of the said owners, in respect of the returns for the said funds, in dollars, to be shipped by them; and that the said ship shall and will, with her said return loading, (wind and weather permitting,) sail and proceed back to the said port of Philadelphia; and there deliver unto the said charterer, his executors, administrators, or assigns, the full and entire cargo laden and taken on board the said ship at Bombay, and Calcutta, aforesaid, for his account; upon the entire delivery whereof, the said intended voyage shall end and be determined, (the dangers of the seas, restraints of princes and rulers, and all other unavoidable casualties, always being excepted by these presents.) And it is hereby agreed, that the said owners shall load and ship, on board the said vessel, for the said voyage, 15,000 Spanish milled dollars, to be invested in goods and merchandise in India, in like manner

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as the residue of the cargo in general, and that they shall be chargeable with freight on the returns thereof, at the rate of 50 dollars per ton; or, if the said returns shall be in goods and merchandise, usually chargeable with, or taken on, freight, by weight, that the same shall be estimated at such rate as shall be equivalent to that sum by the ton; and also, that the commission to be allowed the supercargo of the said ship, shall be a clear commission of five per centum on the amount of the investment in India. And it is further agreed, that the said charterer shall furnish and supply the needful and sufficient cabin stores to and for the supercargo, master, and officers, of the said ship, for the said voyage, and that the owners shall and will allow, and pay to him therefor, the sum of 1500 dollars; and, also, that the cabin shall belong to the said charterer, (excepting the respective state rooms in which the master and officers shall sleep.) And it is hereby further agreed, and granted and reserved, that the master shall have a privilege of six cubic tons, freight free; the first officer a like free privilege of three cubic tons, and the second officer a like free privilege of two cubic tons, provided, that neither of the said privileges shall be used for the purpose of shipping flour out in the said ship. And the said charterer, for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said owners, that the said charterer will well and truly pay and satisfy all the port charges and expenses of the said ship, as well abroad as at Philadelphia aforesaid, until she shall have discharged

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her return cargo, excepting always the sea-stores, the wages of the master, officers, and crew, and the repairs and outfits of the said ship, with all which she is to be chargeable. And it is hereby further agreed, that there be allowed, and are granted, one hundred and twenty working days in all, for the loading and unloading of the said ship at the ports and places of loading and delivery, and that the time not used and occupied at one port or place, may be taken or made up at the others, so that the whole do not exceed the number allowed as above mentioned; and that for every detention, over and above the said one hundred and twenty days, the said charterers shall pay to the said owners the sum of 75 dollars per day, to be paid in like manner as the freight. And the said charterer, for himself, his heirs, executors, and administrators, doth hereby promise and agree, with the said owners, their executors, administrators, and assigns, that he will cause the said ship or vessel to be loaded at the said port of Philadelphia, on her being in readiness to receive her funds and cargo there, and reloaded at the island of Madeira, and at Bombay and Calcutta, in the manner above expressed; and that he will pay to them, on the return of the said ship to Philadelphia, and before the discharge of her cargo there, in approved notes, not exceeding an average time of ninety days from the time at which she shall be ready to discharge her cargo, the clear sum of 30,000 dollars; and if she shall have proceeded to Calcutta, the further sum of 2000 dollars, for the hire and freight of the said ship, for

the said voyage. In witness whereof, the said owners and charterer have to these presents, in duplicate, set their hands and seals, the day and year first above written.

"ARCH. GRACIE & SONS. [L. S.]

"HUGH CHAMBERS." [L. S.]

On the 28th of November, 1818, the America sailed from Philadelphia, upon the voyage in the charter-party mentioned, laden with sundry goods, and also 15,000 dollars in specie, the property of the defendants. The flour and other merchandise were delivered at Madeira, and the quantity of 207 pipes of wine, purchased with the proceeds, or part thereof, was there laden on board the America, and made deliverable in India. The America proceeded from Madeira to Calcutta, where the quantity of about 324 tons of her burthen was filled up from the proceeds of the outward cargo, and with such parts of the wine, taken in at Madeira, as was not disposed of at Calcutta; and the merchandise so taken in was made deliverable to sundry consignees, in the port of Philadelphia. Hugh Chambers, the charterer, was on board the said ship at Calcutta, and it was impracticable to obtain any freight for the said ship at the said port, beyond the amount so laden as aforesaid; nor could any person be induced there to ship on board of her any other goods, deliverable in the United States, upon the condition of paying, or being liable, for any freight whatever. Whereupon, the said Chambers applied to the plaintiffs to make him an advance, for the purpose of purchasing merchandise to ship on board the

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ship America, and did then and there, with the knowledge and consent of Edward Rosseter, the captain or master of the said ship America, enter into an agreement with the plaintiffs, that if they would make such an advance, he would leave the merchandise purchased therewith in their hands, as a security for the said advance while in Calcutta, and would, when shipped on board the America, deliver to them a bill of lading, stipulating for the delivery thereof to their agents in Philadelphia, *free of freight*, who should be authorized to sell the same, and apply the proceeds to the payment of the said advance, unless the said Hugh Chambers' bills for the same, drawn upon Messrs. Grants & Stone, of Philadelphia, should be accepted, and the consigner should feel perfectly assured they would be paid at maturity; in which event, the said agents should deliver the said merchandise to him. That the said plaintiffs accordingly made the said advance, received the said goods as they were purchased, and shipped them on board the said ship America; for which shipment, the said master signed and delivered the following bill of lading to the plaintiffs, which the said Chambers endorsed.

"Shipped, in good order, and well conditioned, by Hugh Chambers, in and upon the good ship, called the America, whereof is master for this present voyage, Edward Rosseter, and now lying in the port of Calcutta, and bound for Philadelphia, to say, seven hundred and forty-six bags, and sixty-five boxes of sugar, five hundred and eighty-nine bags of saltpetre, ten hundred and sixty

bags of ginger, thirty-five bags of aniseed, thirty-two boxes of borax, thirty-two of castor oil, three hundred and three bundles of twine, thirty-five bales of goat skins, six thousand one hundred and sixty horns and horn tips, two hundred and sixty cow hides, fifteen hundred and sixty-nine gunny bags, two bales of seersuckers, two boxes of choppas, six bales of sannahs, five bales of checks, twenty-two bales of gurrahs, and one box of mull muslins. On account and risk of Hugh Chambers of Philadelphia, being marked and numbered as in the margin; and are to be delivered in the like good order, and well conditioned, at the aforesaid port of Philadelphia, (the danger of the seas only excepted,) unto Messrs. T. M. & R. Willing, or to their assigns. Freight for the said goods having been settled here.

"In witness whereof, the master or purser of the said ship, hath affirmed to five bills of lading, all of this tenor and date; one of which being accomplished, the others to stand void. Dated Calcutta, 7th of September, 1819.

"Contents unknown.

"EDWARD ROSSETER."

"Marks and numbers on the back of this bill, countersigned. Hugh Chambers."

That the said Chambers, at the same time, drew, and delivered to the plaintiffs, the said bills of exchange upon Messrs. Grants & Stone, for the sum of 8042 pounds 8 shillings and 4 pence sterling, being the amount of the said advance; which said bills were afterwards duly presented to Grants & Stone for acceptance, who refused to accept the same, and they were afterwards duly protested for

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non-payment, and now remain unpaid. That the said agreement to deliver the said goods without paying freight, and the said bill of lading and endorsements, were made by the said Chambers, by Edward Rosseter, and by the plaintiffs, in good faith; and without them the said plaintiffs would not have made the said advance, nor shipped the said goods; and the receipt of the said goods on board the America, by the said master, under the said agreement, and signing the bill of lading in the terms aforesaid, were, under the circumstances of the case at the time, the best he could do for the interest of the owners of the ship. That the said plaintiffs were informed by Hugh Chambers, that the America was chartered by the said Chambers for a specific sum, and that the stock or merchandise originally placed on board of her at the commencement of the voyage, and its proceeds, were solely and sufficiently a pledge for the payment of the same. That the America arrived in the port of Philadelphia, on or about the 29th of February, 1820, when the defendants gave notice to the said Chambers, that they had entered the ship, and were ready to deliver the goods, after payment of the freight stipulated by the charter-party. On the 1st of March, 1820, the said Chambers replied to the defendants, that he was unable to comply with the requisitions of the charter-party. On the 2d of March, 1820, the defendants gave notice to all the consignees of goods on board the America, as by letter of that date to T. M. & R. Willing. On the 3d of March, 1820, Thomas M. & R. Willing, the consignees of the merchandise shipped by the plaintiffs, demanded

of the defendants, and of Edward Rosseter, the master, the delivery thereof, without paying freight, and protested against the payment of any freight. On the 6th of March, 1820, the defendants refused to deliver the said merchandise without paying freight. On the same day, the said T. M. & R. Willing, on behalf of the plaintiffs, replied to the defendants, and repeated the protest against paying any freight for the said merchandise, and their refusal to pay any freight, unless they should be compelled to do it, in order to obtain possession of the said goods. The said T. M. & R. Willing, being unable otherwise to obtain the said merchandises from on board the ship America, paid, as the agents of the plaintiffs, and in their behalf, to the defendants, the sum of 10,000 dollars; which payment was made in acceptances of the defendant's drafts, dated the 29th of March, 1820, at ninety days, and duly paid, the 30th of June, 1820. The said payment was compelled by the defendants, under their claim of freight, and in consequence of their having the custody of the said merchandises, and was made under protest by the said T. M. & R. Willing. In consequence of the said payment, the said merchandises were delivered by the defendants to the said T. M. & R. Willing, as agents and consignees of the plaintiffs. There were other merchandises on board the said ship, exclusive of those consigned to the said T. M. & R. Willing, sufficient in value to pay the whole freight due by the said charter-party. If, upon the whole matter, the Court shall be of opinion, that the defendants had no right to detain the said

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goods for freight, judgment to be entered for the plaintiffs for the sum of 10,500 dollars, with costs of suit.

If, upon the contrary, the Court shall be of opinion that the defendants had such right, then judgment to be entered for the defendants.

Judgment being given upon this case for the plaintiffs below, the cause was brought by writ of error to this Court.

March 5th.

Mr. *D. B. Ogden*, for the plaintiffs in error, stated, that the general principle being, that the ship-owners have a lien for the freight, it must be shown that they have parted with it in this case, either by the terms of the charter-party, or are deprived of it by the particular circumstances of the case.

1. As to the terms of the charter-party; the question is, whether the possession is fully parted with, so that the charterer has the complete control of the ship.[a] The entire instrument must be taken together, and by that it will appear, that the ship-owners hired and paid the master and crew; and there is an express covenant, on the part of the owners, for the carriage and delivery of the goods, and on the part of the charterer for the payment of the freight before the goods are delivered.

2. As to the particular circumstances of the

a Hooe v. Groverman, 1 *Cranch's Rep.* 237. Marcardier v. Chesapeake Ins. Co. 8 *Cranch's Rep.* 39. 49. Christie v. Lewis, 2 *Brod. & Bingh.* 410. The Nereide, 9 *Cranch's Rep.* 388. 424.

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case, the question is, was any freight due? By the charter-party, the vessel was bound to receive all goods shipped by the charterer or his agent. This cargo was of that description. He borrowed money, and purchased the goods on his own account. They were to be delivered to the Messrs. Willings, as a security for the repayment of the money borrowed, and to be sold by them as the agents of the lender. Can the charterer, by any separate act of his, vary the right of the owner? Must not all the goods shipped by the charterer, be considered as under the charter-party? It is not within the scope of the master's authority to dispense with the conditions of the charter-party. The moment the goods were put on board the ship, they were in possession of the owners, who had a lien on them for the freight. The bill of lading could not discharge this lien. The consignees alone were capable of endorsing the bill of lading, so as to operate a valid transfer. The charterer had no right to pay his own debt with the freight due to the owners, and the master had no right to bring goods free of freight.

But suppose the goods were the property of the Messrs. Palmers; the right to freight must depend on the circumstances. The master has power to bind the owner as to the contract of affreightment, but not to transport without freight. The owner may limit his powers by the charter-party; and all that can be required, is, that the shippers of goods should know, or have an opportunity of knowing, the restrictions upon the master's authority. The master was not on a general

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voyage, seeking for freight, but was to perform his duty to the owners under that charter-party. The shippers knew this, and had an opportunity of inspecting the charter-party, and judging for themselves whether the master was authorized to assent to such a contract. They knew that the cargo was pledged for the freight, both by the general law, and by the particular provisions of this charter-party. This case is precisely similar to the very recent case of *Faith* v. *The East India Company*, where the English Court of K. B. held, that the ship-owner could not be devested of his lien for freight, by such a transaction between the charterer and shipper, who were cognizant of the terms of the charter-party.[a] The

a 4 *Barnw. & Ald.* 630. [The case of *Faith* v. *The East India Company*, was as follows: The plaintiff, Faith, was the owner of the ship Eliza, of which Sivrac was master, and entered into a charter-party with Gooch, by which freight was agreed to be paid, for the use or hire of the ship, at a certain rate per ton, for a voyage to India, out and home, in the following manner, viz. a certain sum in advance, on the ship's clearing outwards, and the residue, half in cash, and half in approved bills, upon the delivery of the homeward cargo. The owner appointed Sivrac master, at the request of Gooch, the charterer, who executed a bond, conditioned for the faithful performance of the master's duty; and the owner instructed the master to be careful to sign all bills of lading with the clause "freight payable as by charter-party." The ship was consigned to Colvins & Co., in Calcutta, by whom she was put up, for her homeward voyage, as a general ship, and different merchants shipped goods by her, C. & Co. taking, for homeward freight, bills payable 60 days after delivery of the cargo; and a new master having been appointed by C. & Co., in conjunction with Sivrac, signed bills of lading with the clause "paying freight agreeable to freight bill." The freight bills were made payable in London, to Bazett & Co., to whom the charterer was indebted for

case of *Hutton* v. *Bragg*,[a] which determined against the lien, in a case of a general letting of the ship, has been since overruled.[b]

Mr. *Sergeant*, contra, contended, 1. That the goods of a third person, carried in a chartered ship, are not liable for the freight due by charter-party, but only for what is due for their own carriage, as stipulated by the bill of lading at the time of shipment. It would follow, that if the freight be paid beforehand, *bona fide*, or it be stipulated, that they shall be carried free of freight, they are not liable at all.

2. That the goods in question were, both at law and in equity, the goods of a third person. It would follow, that having been fairly shipped under an agreement made with the charterer and the master, that they should pay no freight, the ship-owners had no lien upon them.

1. The first position is equally supported by authority, by principle, and by the convenience

advances on the outward cargo, and who, as well as Colvins & Co., were cognizant of the terms of the charter-party. The Court of King's Bench held, that the owner of the ship had a lien on these goods to the extent of the homeward freight. Colvins & Co. also put on board the ship goods purchased by them on account of the charterer; but he being indebted to them, and Bazett & Co., their agents, those goods were, by the bill of lading, consigned to B. & Co. The Court also held, that as between the owner of the ship and Bazett & Co., the goods were to be considered as the goods of the charterer, and liable to the owners lien on them for the freight due by charter-party.]

[a] 2 *Marsh. Rep.* 339. 7 *Taunt.* 14.

[b] Christie v. Lewis, 2 *Brod. & Bingh.* 510.

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and necessities of trade. The case of *Paul* v. *Birch*,[a] decided by Lord Hardwicke, in 1743, seems less the introduction of a new doctrine, than an authoritative declaration of what had been before, and was then, understood to be the usage and law. It has since frequently been cited with approbation by elementary writers, and confirmed by judicial authority.[b] The only question growing out of this undeniable position is, whether, in the case of a general letting and hiring of a ship, the goods of the charterer himself are liable for the freight.

In *Hutton* v. *Bragg*,[c] it was determined by the English Court of C. B., that there was no lien in such a case. This authority has, however, been very much weakened by subsequent decisions,[d] and at last solemnly overruled (Lord Ch. J. Dallas dissenting) by the same Court.[e] But in none of these cases, is it even intimated, that there is any lien upon other goods than those of the charterer *for the charter freight*. The word *freight* is used in two different senses. (1) To signify the price or consideration of the carriage of goods on board a ship. (2) To signify the price or hire of a ship for a given time, or for a given employment. The first, which is the appropriate sense of the word, may be, by contract, express or im-

a 2 *Atk.* 621.

b *Abbott. Shipp.* 192, 193. 2 *Barnw. & Ald.* 509. 3 *Camp. N. P. Rep.* 202. 2 *Brod. & Bingh.* 410.

c 2 *Marsh. Rep.* 339. 7 *Taunt.* 14.

d 2 *Barnw. & Ald.* 503.

e Christie v. Lewis, 2 *Brod. & Bingh.* 510.

plied; but the *form* of the contract is not material. It may be by bill of lading, or it may be by agreement or charter-party; or without stipulating a price.

Now, to constitute a lien, it is necessary, (1) That there be a debt due, on account of the goods of the shipper, for the carriage of those goods. (2) That the goods be in the possession of the creditor, with the assent of the debtor, for the purpose of the carriage from which the debt arises. How is the lien acquired at all, or whence is the right of lien derived, for freight due by charter-party? If it be asked, how it is derived in the case of a bill of lading, stipulating freight or not, or where there is no bill of lading, the answer is readily furnished. It is a *particular* lien for the carriage of the goods; the same which a common carrier has by the custom of the realm, and given by the common law, or by the law merchant, which is a part of the common law. It is restricted to the very goods carried; for the common law knows of no such thing as a *general* lien. The utmost extension it has ever received, is to all the goods in the same bill of lading; and, by a modern decision in England, to goods of the same shipper, on board the same ship, though in a different bill of lading.[a] And that is upon the ground of an understanding to that effect, when the first goods are delivered.

The lien for freight due by charter-party, stands

[a] *Abbott. Shipp.* 245. Birley v. Gladstone, 3 *Maule & Selw.* 220.

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precisely on the same foundation. A *general* lien can only be by general usage, by a particular usage, or by contract.[a] The charter-party gives no lien in terms. The ship and goods are (commonly) mutually bound for the performance of the covenants, among which is the covenant for the payment of freight. But here the goods are not so bound; and if they were, it would only extend to the goods of the charterer. But even the goods of the charterer are not bound for the performance of covenants; because, (1) There is no lien for port dues, or demurrage, or any other charges of a similar nature. (2) There is no lien till freight *actually earned*, and, therefore, not if prevented by the freighter, or by a stranger. Yet the owner can recover on the covenant.[b] (3) There is no lien upon the goods of the charterer, for what is termed dead freight, i. e. of the unoccupied space.[c] And this lien has no greater extent in equity, than at law.[d] The cases cited, while they disaffirm the lien by contract, equally negative the existence of a *general usage*, operative either at law or in equity. How, then, can it be that there is a lien upon the goods of a third person *for the charter freight?* They do not owe it by contract. The shipper, or the consignee, is not liable for it. Equity first gave the owner a lien for the freight reserved *by bill of*

a 2 *Meriv.* 401.

b 2 *Holt. Shipp.* 178.

c Id. Philips v. Rodie, 15 *East's Rep.* 547. Birley v. Gladstone, 3 *Maule & Selw.* 205.

d Birley v. Gladstone, 2 *Meriv.* 401.

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lading, and the law has followed equity. But neither law nor equity have ever gone farther. It follows, that if the freight be paid beforehand, or the bill be *freight free*, and this be fairly done, there is no lien at all.

If it be competent to the master, with the assent of the charterer, to receive goods on board, on other terms than those of the charter-party, it will follow that he must be the conclusive judge of the terms. The authority of the master, in this respect, in a foreign port, is the same in the case of a chartered ship, as in the case of a ship not chartered. The only difference is, that he must have the assent of the charterer. If it were not so, the ship must, in many cases, return home empty; which would be neither for the interest of the owner and charterer, nor would it promote the general interests of commerce and navigation.

The agreement between the charterer and shippers, in this case, was fairly made, with the assent of the master, and for the manifest benefit of the owners. Was it, then, competent for the master to bind the owners by his assent? The authority of the master of a chartered ship, in this respect, is no further restricted by the charter-party, than to require the assent of the charterer, and to receive the goods of the charterer himself, only on the terms of the charter-party. In the event, then, of the failure, in whole or in part, by the charterer, is it not competent for him to fill up the ship? The only limitation is, where goods are put on board, under or in pursuance of the charter-party; or where the conduct of the master

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is collusive and fraudulent, and intended to injure his owner. The express contract, then, was, that the goods should be free of freight; and there can be no implied, where there is an express contract.

If there was no freight due by contract, express or implied, for the carriage of these goods, it follows, from the principles already stated, that there could be no lien. It follows, also, from another principle. There can be no lien created or continued without a rightful possession. The possession acquired by the agreement, if held in violation of the agreement, would thereby become a tortious possession.

Could any action be maintained against the consignee for the carriage of these goods? It is well settled, that where freight is due for the carriage of goods, the consignee to whom they are delivered, impliedly contracts to pay the freight, and assumpsit may be maintained against him.[a] But here no action could be maintained upon the charter-party, for he is no party to it; nor on the bill of lading, for it stipulates that no freight is to be paid; nor on the implied assumpsit, for there is none.

The case is thus reduced to a single point, and that is, whether the goods in question were the property of Chambers, so that they could not be carried in the ship on any other terms than that of paying the charter freight. Wherever the interest of a third person intervenes, and is connected with the power of control, the master has a discretion,

a Abbott. Shipp. 277. 2 *Holt. Shipp.* 163.

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and may accept or reject. If he accept, he is bound, and so is the owner, as against such third persons, by the terms he agrees to. Suppose the charterer's goods to be pledged in a foreign port, and the pawnee (the charterer being unable to redeem) to refuse to ship under the charter-party, or unless he has priority; or suppose them to be attached, or arrested by a creditor; the master has an election, and the owner must abide by the decision.

But it is unnecessary to discuss this question further; for it is plain, that the property, before the shipment, at the time of the shipment, and upon the arrival of the vessel, was, and continued to be, the property of the plaintiffs below. Admit that the surplus, in case of sale, would belong to Chambers, and the plaintiffs were only mortgagees; still, as mortgagees, in possession, they are owners, and Chambers had only an equity of redemption. Nor does a mere interest in the profit and loss, make any difference;[a] nor that they were shipped for account and risk of Chambers.[b]

Mr. *Webster*, for the plaintiffs in error, in reply, stated, that it was not contended that these particular goods were bound for all the freight of the ship; but considering them as the goods of Messrs. Palmer & Co. the claim was for a *pro rata* freight only. It is clear, by the charter-party, that the

a Haile v. Smith, 1 *Bos. & Pull.* 563. Evans v. Maclett, 1 *Lord Raym.* 271.

b The St. Jose Indiano, 1 *Wheat. Rep.* 208. The Aurora, 4 *Rob.* 218. cited in Note. 1 *Wheat.* 214. 13 *Mass. Rep.* 76.

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ship-owners retained possession of the ship, so as to have a lien for the freight; and that this lien was also expressly reserved by the terms of that instrument. It is equally clear, that this lien extends to all sub-shippers or strangers. There is no difference as to the validity and strength of this lien, whether it is on the goods of a charterer, or on those of other shippers, although there may be as to its extent; the goods of other shippers being liable for the freight stipulated by them, and the charterer's goods being liable for the whole amount of the charter freight. Have the ship-owners, then, waived the lien which is thus secured to them by the general law, and by this particular contract? If they have done so, it is by some act subsequent to the charter-party. All that is relied on, is what the master did at Calcutta. But supposing the goods to be Palmer's, could the master bind the owners by this agreement? We contend he could not, because he was limited by the express terms of the charter-party, which provided, that freight should be paid at Philadelphia before the delivery of the cargo. The contract was, that whatever goods were brought should not be delivered till freight was paid. The shippers, and the master, were cognizant of this contract. This provision was a direct limitation of the master's power. He was as much bound by it as by any other part of the charter-party. It is said, that if the master may take goods for *diminished* freight, the same reason authorizes him to take goods for *no* freight. But it is very obvious, that a freight diminished by cir-

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cumstances, may still be just and reasonable; whilst a contract to carry goods without any freight cannot be so under any circumstances whatever. It necessarily supposes, that freight is paid to the charterer in some other way, to the prejudice of the owners' rights; since it is absurd to suppose an agreement to carry goods without any compensation. If the charterer might take part of a cargo in this way, he might take the whole, and then what becomes of the owners' rights? Of what use, in such a case, would be the covenant to load the ship? The shippers here assist the charterer in an attempt to break his contract with the owners, by which he had stipulated, that the goods should be holden for freight. The master cannot, where there is a charter-party, vary the rights and duties of the owner by the bill of lading. If he cannot vary the contract in favour of the charterer, neither can he in favour of any body else. If goods be brought with the assent of the owner, though there be no contract, and not even a knowledge of the master, the lien attaches. Nobody was authorized under the charter-party to receive the owners' freight before it was earned, or elsewhere than in Philadelphia.

We contend, then, that the owners' lien is not lost by the agreement made at Calcutta with the assent of the master. (1) Because it is, in effect, an agreement made between the shippers and charterer, to violate the charter-party, to which the master was not competent to assent. (2) Be-

[a] Hunter v. Prinsep and others, 10 *East's Rep.* 378.

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cause the general authority of the master, as agent of the owners, was limited by the charter-party. The shippers knew of this limitation; and could not, consequently, derive any right under an agreement made with him, beyond the scope of his authority. (3) There is no ground here for saying, that the master was acting independent of the charter-party, as setting up a general ship; nor could he do this, under the circumstances of the case.

But the true view is, that these goods were the goods of Chambers, the charterer, as between him and the ship-owners. They were purchased and shipped by him, and for his account. They were at his risk *in transitu*. There is no document showing any interest whatever in Palmer & Co. But there was a parol agreement, that the goods should go consigned to the Messrs. Willings, and that the latter should hold them against the bills drawn by Chambers. The legal property was either in Chambers, or the Willings. The *general* residuary property was in Chambers; a pledge or lien only existed in favour of Palmer. If there was a loss, Chambers was to bear it; if a gain, it was to be his. If the goods have been sold for more than Palmer's debt, Chambers is entitled to the balance. Before the plaintiffs recover back this money, ought they not to show, that the goods, paying freight, do not leave them enough to pay their debt? The lien claimed by them may exist, and yet, in commercial law, the goods may be the property of Chambers. It is so in the contract of insurance; else no man

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would ever insure goods liable to freight, or commissions, or duties, or any other species of lien.

No goods are brought across the seas without being subject to liens of various sorts; some arising from express contracts, others from the operation of general principles. No one could own goods, if the ownership implied an absence of all liens. Therefore, in the commercial world, he is esteemed owner, for whose account, and at whose risk, they come. Chambers had a clear insurable interest in those goods to the whole amount of their value, whatever that might be. Palmer had an insurable interest only to the amount of the bills of exchange. The plaintiffs' claim rests on the operation of the bill of lading; but, that very bill of lading says that the goods are shipped on account and risk of Chambers. This circumstance alone is conclusive. It would be so in the law of prize. The consignee would not be allowed to show an interest by a lien for advances.[a] But Palmer's interest was contingent; he was to have no proprietary interest in the goods, until failure of the acceptance of the bills of exchange, or equivalent security; i. e. until after the arrival of the goods. Whatever the words are, that is the legal effect. Now, it has been repeatedly determined in this Court, that where goods are sent to a vendee, to be received at his option, or conditionally, they are the goods of the vendor, until that option be expressed, or

a The Frances, 8 *Cranch's Rep.* 335. 418.

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that condition happen.[a] So, if goods be shipped, to be sold on joint account of the shipper and consignee, or the latter alone, at his option, the property is not vested until the election is made.[b]

March 13th. Mr. Justice JOHNSON delivered the opinion of the Court. This is a writ of error from the Circuit Court of Pennsylvania, on a judgment, in which the defendants in this Court were plaintiffs in the inferior Court. The suit instituted in that Court, was for the recovery of a sum of money paid under the following circumstances:

The Gracies, being owners of the ship America, chartered her to one Chambers, on a voyage to India. Chambers accompanied the vessel, and, at Calcutta, put her up as a general ship, with notice, however, of his being charterer, not owner. Finding it difficult there to obtain freight, he entered into an arrangement with Palmer, in pursuance of which, the latter supplied him with a quantity of goods, to the value of 8000 pounds, upon the following stipulations: "That Chambers should draw bills, in favour of Palmer & Co., upon his correspondent in Philadelphia, and that the goods should be consigned to the Willings, correspondents of Palmer, in the same place; to whom they should be delivered, *freight free*, in pledge for the due payment of Chambers' bills."

When the goods were laden on board the Ame-

a The Venus, (Magee's claim,) 8 *Cranch*, 253. 275. The Merrimack, (claim of Kinmel & Alberts,) *Id.* 328.

b The Frances, (Dunham's claim,) 8 *Cranch*, 354. S. C. 9 *Cranch*, 183.

rica, the ship-master signed bills of lading, stating them to be shipped on account and risk of Chambers, to be delivered to the Messrs. Willings of Philadelphia. And in that part of the bill of lading in which the freight is usually specified, are inserted these words: "Freight for the said goods having been settled here." Indorsed on the bill of lading are the marks and numbers of the several packages, and on its face are written these words: "Marks and numbers on the back of this bill, countersigned. Hugh Chambers." This is the endorsement noticed in the stated case. A charter-party, with all the usual covenants and formalities, was entered into by the parties, in which the owner undertakes to furnish and navigate the ship, and the charterer to pay the sum of 32,000 dollars for the use of her, with certain specific reservations not material to the decision of any of the questions raised in argument. The clause which stipulates for the payment of the compensation is in these words: "The said charterer covenants," &c. "that he will pay to the owners, *on the return of the said ship to Philadelphia, and before the discharge of her cargo there*, in approved notes," &c. the sum stipulated for.

The case stated affirms, that the whole transaction in Calcutta was effected in good faith; that it was done with the knowledge and assent of the ship-master, and was, under all circumstances, "the best he could do for the interest of the owners of the ship."

The bill of lading was enclosed to the Wil-

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lings, with information of the arrangement between Palmer and Chambers; and the drawees of Chambers' bill, having refused to accept them, the Willings demanded the delivery of the goods, freight free. The Gracies refused to deliver the goods, insisting on their right to the freight usually paid on such goods from India, whether they were the property of Palmer, or of Chambers. And in order to get possession of the goods, the freight was accordingly advanced by the Willings, and this action brought to recover it back.

The cause was decided in the Court below upon a case stated, in nature of a special verdict, which finds alternatively for the one or the other party, according to the law of the case. The judgment of the Circuit Court was in favour of the defendants.

Much of the argument below appears to have turned upon the general rights and liabilities of owner and charterer under the contract of affreightment; but the learned and elaborate argument of the presiding Judge in the Court below, has relieved this Court from much discussion on that part of the subject. The doctrine, as laid down there, and as stated by the counsel here, exhibits no material shades of distinction. It is, in fact, the common law doctrine of bailment, and common carriers, applied to transportation on the ocean.

The carrier may hire his vehicle, or his team, or his servant, for the purposes of transportation; or he may undertake to employ them himself in the act of transporting the goods of another. It is

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in the latter case only, that he assumes the liabilities, and acquires the rights of a common carrier. So, the ship owner, who let his ship to hire to another, whether manned and equipped or not, enters into a contract totally distinct from that of him who engages to employ her himself in the transportation of the goods of another. In the former case, he parts with the possession to another, and that other becomes the carrier; in the latter, he retains the possession of the ship, although the hold may be the property of the charterer; and being subject to the liabilities, he retains the rights incident to the character of a common carrier.

On examining the cases in which this subject has engaged the attention of Courts of justice, it will be found, that the great difficulty generally has been, to decide in which of these two relations the ship-owner had placed himself, under the particular stipulations of the charter-party; and how far he has put it in the power of the charterer to defeat his acknowledged right to a lien for the freight. The present case suggests the additional question, how far it lies in the power of the ship-master to defeat this lien, or otherwise sanction a departure from the letter of the charter-party.

The cause has been argued as one vitally important to the commercial world; and very strong views have been presented of the injuries that might be sustained by foreign shippers on the one hand, and by ship-owners on the other, as the one or the other alternative of the stated case

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shall obtain the sanction of this Court. But it is obvious that most, if not all of these suggestions, have been the offspring of a zealous, rather than a calm survey of possible consequences.

The contract of affreightment, like every other contract, is the creature of the will of the contracting parties. It may be varied to infinity, and easily adapted to the exigencies of either party, or of any trade. It is only where the express contract is silent, that the implied contract can arise. It is possible, that a captain and a charterer might connive at a fraud, and pass a chartered vessel upon foreigners as an unchartered vessel; but it is not very probable, and would be extremely difficult. Yet it is not easy to conceive any other case in which a foreign affreighter can be exposed to imposition, while it is always in his power to inspect the charter-party, and determine, from its stipulations, how far he may venture to ship his goods upon a special contract. The general liability of goods for freight, is known to all mercantile men; and a stipulation in a charter-party, "that no goods shall be landed from the vessel until the freight is paid," will always alarm the fears of any prudent shipper.

But this case does not imperiously call for a decision upon the general question. The goods are expressly laden on board as the property of Chambers, "on his account and risk." And the question is not, how far his contract may exempt the goods of another from freight, but how far he may encumber his own goods with a lien, which

shall ride over or supersede their general liability for the freight.

We turn, in the first place, to the express contract of the parties, to afford a solution of the question. But there we find that the charterer cannot, without an express violation of his contract, deliver to the consignee a single article, not only until its own peculiar freight be paid, but until the payment of the sum of 32,000 dollars, the whole of the freight reserved to the owner.

On what principles rests the general lien of goods for freight? The master is the agent of the ship-owner, to receive and transport; the goods are improved in value, by the cost and cares of transportation. As the bailee of the shipper, the goods are in the custody and possession of the master and ship-owner, and the law will not suffer that possession to be violated, until the labourer has received his hire. But this is literally the effect of that provision in the charter-party, which deprives the charterer of the right of landing the cargo until the stipulated hire be paid; or rather, it would seem to go beyond it, and impose a liability beyond what the common law exacts. It may, therefore, be fairly construed into a stipulation, that the charterer should, under no circumstances, dispense with the legal lien of the ship-owner.

The question, then, is, who has trusted this charterer? for he that trusts must pay.

That the ship-owner would not confide in the charterer to land his goods without buying off his right to detain, is expressly proved by the contract.

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That contract was accessible to the foreign shipper, and ought to have been looked into to determine the extent of the power vested in the charterer. Whether he neglected this precaution, or contracted with the charterer knowing of this restriction on his power to contract, he is the party that trusts. The charterer has contracted with the shipper to do an act, which he could not perform without violating his own contract to the ship-owner, and must, therefore, be considered as having entered into a contract, subordinate in its nature to that previously existing between the owner and charterer. And as the undertaking of the charterer to Palmer, could only be performed upon first complying with his undertakings to the owner, he must be considered as having rested on the personal responsibility of the charterer for the removal of that obstacle.

That, in ordinary cases of the hypothecation of goods, the lien for freight would take precedence, cannot be questioned; and in a late adjudication, on a case strikingly similar to the present, and in the Courts of a nation which thoroughly understands the laws and interests of commerce, (*Faith* v. *The East India Company*, 4 *Barnw. & Ald.* 630.) it has been held, that goods so circumstanced, were bound to the whole extent of the liability of the charterer to the ship-owner for freight. In the present instance, a *pro rata* freight only is demanded. In the same case, it was further decided, that the ship-owner retained his lien for freight, on goods shipped by third

persons, even after the drawing of freight-bills, in favour of another, by previous agreement.

But it is contended, that the case where goods are shipped freight free, or the freight has been actually paid, remains undecided; that the lien for freight attaches only where freight was actually due, but in neither of those cases, (that of payment or redemption,) could it be predicated of freight *that it was due.*

Had the reasoning of the Judges, in the case of *Faith* against *The East India Company*, been followed out to its unavoidable consequences, it would seem, that no doubt should have been expressed by them upon such a case. For, if the ground of that decision was, that the ship-owner was not bound to deliver the goods until his freight was paid, it would seem to be immaterial whether it had been previously paid to the charterer, or to any other not authorized to receive it on account of the owner. But whatever might be the opinion of this Court upon a cause so circumstanced, it is obvious, that this is not a case of that nature.

These goods were not shipped freight free, nor was the freight actually paid upon them. The words upon the bill of lading are, "freight settled here." And their ambiguity being explained by other parts of the case stated, there is made out a case, in which the freight was no farther settled than by the arrangement made with Palmer, for the purpose of postponing the freight to the defendant's lien for advances of money, or the payment of bills. The compensation for carriage,

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although disguised under the form of possible profits upon the sales of the goods shipped, still existed; for freight is one of the charges which the consumer pays. It is, then, only an evasion of the rights of the owner, and presents a facility to evasion which ought not to be encouraged. If it be said, that the payment of freight was, nevertheless, contingent and uncertain, the reply still is, that this is a subject for consideration between the charterer and the shipper, and could not be sanctioned as the means of evading the express provision in the charter-party against the right of delivery before the payment of freight. Although no freight had been due to the charterer, there was unquestionably a large sum due the owner; and by the terms of his agreement, literally construed, he was not bound to open the hatches until the whole sum was paid. This, however, is more than is contended for upon the plaintiffs' construction of the contract; and more, unquestionably, than would have been sustained as against other shippers; it is not, in this instance, insisted upon as against the charterer himself. But, in fact, this memorandum of the captain on the subject of freight, is altogether an immaterial circumstance in a bill of lading made to the charterer himself. With whom was he at liberty to settle the freight upon his own shipments, to the prejudice of the ship-owner?

And this leads to the consideration of the last point made in argument for the defendants; to wit, that the acts of the captain bound the ship-owner to a compliance with the stipulations made to the

defendants, Palmer & Co., to the prejudice of the lien insisted on by the present plaintiffs. That is, that either the captain alone, or the captain and charterer together, could devest the owner, both of his implied and express right to detain these goods.

Whence is such a power to be deduced? Not from the charterer's rights in the ship, nor from the master's power over the ship; but it is supposed to result from the necessity of the case, the nature of the interest acquired by the charterer, and the general powers of a ship-master, as incident to the duties which he is called upon to perform.

But it is perfectly clear, that it is not in the power of the master to release the charterer from his contract to the owner. It is only when the contract is at an end by misfortune, or by the acts of the charterer, that he is called to the exercise of that latitude of power over the ship, which may lead to a resumption of the right to lade her for the benefit of all concerned. In the mean time, he has no power to modify the contract entered into with his owner; since all the power delegated to him, while the charter-party continues to operate, is to perform the undertakings of his employer in the fulfilment of the contract. When abandoned by his charterer, he is of necessity cast upon himself to do the best he can for all concerned; and whether that be to return empty, or to take in such freight as may offer, he is still acting under his original relations with his owner; for, if not actually carrying into effect the

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stipulations of the charter-party, his general duty is to do nothing that can release the charterer from his liability under it. This is altogether inconsistent with the idea of his being authorized to modify or dispense with the terms of the charter-party.

So far as the interests of the charterer may be affected by the want of power to modify contracts for freight, in any manner that exigencies may require, it has been before observed, that this should have been attended to in making his contract with the owner. And as it is very certain, that a release from the ordinary security of the carrier, must have been purchased by an enhanced price or personal security; so, it would be highly unjust to subject the owners to a loss of their ordinary security, without compensation in price, or extraordinary security as the substitute. As to the interests of ship-owners themselves, it is enough, for the present case, to say, "let them judge for themselves."

But there is very great reason to think, that the acts of the master, in this case, have had views and effects attributed to them, directly the reverse of his intention and understanding in performing those acts. It is observed by one of the Judges, in the decision before alluded to, "that had the captain done his duty, he never would have taken goods on board on which the owner would have no lien." It is right that a construction should be given to the conduct of the master, which may comport both with a knowledge, and a due observance of his duty. And in this view of the case,

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notwithstanding his privity to the arrangement between the charterer and shipper, as he was himself called upon to do no act that could deprive his owner of his lien, he might well have considered the stipulation between the charterer and shipper as a matter *inter alios;* in pursuance of which, his employer could sustain no loss, however the charterer might render himself liable to the shipper for consequences. Such was certainly not the understanding of the shipper, as to the effect of his contract with the charterer, but he might have been better informed by studying the charter-party; and, *non constat,* if the captain had been required to sign a bill of lading to the shipper, with an explicit stipulation, that the goods should be free from liability to his owner, that he would have been betrayed into such a breach of duty, or assumption of power. He might well have supposed, that in signing this bill of lading to Chambers, and not to Palmer, he was doing no act that could impair the rights and interests of his employer.

We are, therefore, of opinion, that there is error in the judgment of the Circuit Court; that it must be reversed, and a mandate issue to enter judgment for the defendants below, agreeably to the case stated.

Judgment reversed.