Hooe & Co. *v.* Groverman.

Charter-party.—Demurrage.

A charter-party which lets the whole tonnage of a vessel for the voyage, and contains covenants by the owner, that the outward and homeward cargo shall be delivered, damages of the seas excepted, and that he will keep the vessel apparelled and manned during the voyage, does not render the hirer the owner *pro hâc vice.*

If, by the terms of a charter-party, the ship is to be navigated at the charge and expense of the owner, and especially, if her whole tonnage is not let to hire, the charterer is not owner for the voyage.[1]

Error from the Circuit Court of the district of Columbia, in an action of covenant, by Groverman, owner of the brig Nancy, against Hooe & Co.,
*215] *the freighters, for demurrage, at the port of Falmouth, in England, from the 19th of June to the 11th of September 1798, at the rate of 6*l.* 6*s.* sterling *per diem.*

The declaration alleged the breach of the covenant in not paying the demurrage, and the cause went to trial in the court below, upon the issue of covenants performed. The jury found the following special verdict, viz.: We, of the jury, find that the defendants and plaintiff made and executed the charter-party hereunto annexed, in these words, to wit:

"This charter-party indented, &c., witnesseth, that the said Groverman hath granted and to freight letten, to the said R. T. Hooe & Co., the brig, whereof he is owner, called the Nancy, commanded by James Davidson, a citizen of the United States aforesaid, now lying in the port of Alexandria, of the burden of 197 tons or thereabouts; and for and in consideration of the covenants hereinafter mentioned, doth grant and to freight let, unto the said R. T. Hooe & Co., the whole tonnage of the aforesaid vessel, called the Nancy, from the port of Alexandria, in Virginia, to the port of Havre de Grace, in France, and back to the said port of Alexandria, in a voyage to be made by the said R. T. Hooe & Co. with the said brigantine, in manner after mentioned, that is to say, to sail, with the first fair wind and weather that shall happen after she is fully and completely laden, from the said port of Alexandria, with a cargo of tobacco, to be shipped by the said R. T. Hooe & Co. to the said port of Havre de Grace; and there deliver said cargo to Messrs. Andrews & Co., of that town, merchants, or to their assigns, in good order, the danger of the seas only excepted. And at the said port of Havre de Grace, to take on board a full freight or lading of such goods as the said Andrews & Co. may think proper to put on board said brig, as a return-cargo; with which, said vessel is to make the best of her way directly back to the port of Alexandria, and there safely deliver such cargo, the danger of the seas only excepted, to the said R. T. Hooe & Co. And the said Groverman doth further covenant and agree to and with the said R. T. Hooe & Co., their executors, &c., that the said brig now is, and at all times during
*216] the said *voyage, shall be, to the best endeavors of him the said Groverman, and at his own proper cost and charges, in all things made and kept tight, stiff, staunch, strong and well apparelled, furnished

[1] And see Marcardier *v.* Chesapeake Ins. Co., 8 Cr. 39; Leary *v.* United States, 14 Wall. 607; The Volunteer, 1 Sumn. 551; Certain Logs of Mahogany, 2 Id. 589; The Nathaniel Hooper, 3 Id. 544; The Othello, 5 Bl. C. C. 342.

and well provided, as well with men and mariners sufficient and able to sail, guide and govern the said vessel, as with all manner of rigging, boats, tackle and apparel, furniture, provisions and appurtenances fitting and necessary for the voyage aforesaid. And the said Groverman doth further covenant and agree to and with the said R. T. Hooe & Co., that he will allow them twenty-five running days from the date hereof for the lading on board the said vessel, the aforesaid cargo of tobacco, at the port of Alexandria; ten working days for discharging said cargo at the port of Havre de Grace, to be computed from the day after she comes to her moorings at the said port; and twenty days more, after the said ten days run out, for lading on board the aforesaid return-cargo; also ten working days after said vessel arrives back and is permitted to an entry at the custom-house at Alexandria for receiving her inward cargo, which is to be delivered at the wharves of said R. T. Hooe & Co.

"In consideration whereof, the said R. T. Hooe & Co. do covenant, promise and grant to and with the said W. Groverman, his executors, &c., by these presents, that they the said R. T. Hooe & Co., or their consignee, shall and will pay to the said W. Groverman, or his assigns, at the port of Havre de Grace, the sum of 21,000 livres tournois, in hard money, on discharge of the cargo of tobacco aforesaid; also 7200 livres, in hard money, on shipment of the return-cargo aforesaid; and further, that they the said R. T. Hooe & Co. shall and will pay, or cause to be paid, to him the said W. Groverman, or his assigns, the sum of 8*l.* 8*s.*, current money of Virginia, day by day, and for every day's demurrage, if any there should be, by default of them the said R. T. Hooe & Co., at the port of Alexandria. And the sum of 150 livres, in hard money, day by day, and for every day's demurrage, if any there should be, by default of them the said R. T. Hooe & Co., or their assignee, at the port of Havre de Grace. And the said R. T. Hooe & Co. do further covenant to and with the said W. Groverman, and the aforesaid *James Davidson, commander of the brigantine aforesaid, that [*217
Andrews & Co., their consignee aforesaid, shall pay to the said captain, for his primage, five per cent. upon the outward and inward freights at Havre de Grace, and before his departure therefrom. For the true and faithful performance of the covenants in this charter-party, the parties bind themselves, each to the other, in the penal sum of 3000*l.* current money of Virginia, to be recovered by the party observing, against the party failing to perform the same. In witness whereof, we have hereunto interchangeably set our hands and affixed our seals, this tenth day of April 1798.

W. Groverman. [Seal.]
R. T. Hooe & Co." [Seal.]

And the provisional articles in these words, to wit: "The following provisional articles are concluded upon, made and agreed to by and between William Groverman, owner of the brigantine Nancy, commanded by James Davidson, and R. T. Hooe & Co., since entering into the charter-party hereto annexed.

"1. The captain or commander shall be instructed by his owner, previous to his sailing from the port of Alexandria, to touch at Falmouth, in such manner as to appear to his crew that there was a necessity for his so doing, there to lay off and on twenty-four hours, or longer if desired, in

day-light, during which time, there will come off orders from Mr. Fox, the American consul, Mr. Thomas Wilson, of London, or Messrs. Andrews & Co., of Havre de Grace. 2. On receiving these orders, the captain or commander must proceed directly for Havre de Grace, London, Hamburg, Bremen or Rotterdam, as he may be directed, and at one of these ports, deliver his cargo to such person or persons as the aforesaid orders may direct. 3. If the vessel arrives at any other of the aforesaid ports than Havre de Grace, the time of discharging the outward cargo, taking in her inward cargo, demurrage, if any there should be, her outward and inward freight, primage, &c., shall be the same as if she had arrived at and discharged at
*218] Havre *de Grace. 4. The outward freight shall be considered as 875*l.* sterling; the inward freight 300*l.* sterling, primage five per cent. on the freights, and the demurrage 6*l.* 6*s.* sterling per day. And if the vessel discharges in London, the payments shall be made in sterling cash; if at any other port, in good bills of exchange, at 60 days, on London, without diminution of the above sums, except so much as the captain may be authorized to receive for his port-charges and disbursements. 5. If the vessel is detained over twenty-four hours at Falmouth, demurrage shall be paid for the time, at the rate stipulated in the charter-party. 6. These articles shall not be made known to any person whatever, except the captain and chief mate. The vessel shall be cleared out for Havre de Grace only, and furnished with a *role d'equipage*, and all other papers whatever that may be necessary at this custom-house. No letters whatever shall be received on board, except such as the said R. T. Hooe & Co. puts into the possesion and care of the captain. 7. The charter-party first entered into, the copy of which is hereunto annexed, shall be in force and considered as the only contract between the parties for this voyage, and go, unconnected with these articles, to Havre de Grace, and there and from thence govern, unless in the case of the vessel being, from Falmouth, ordered to a different port; then, and in that case, the charter-party shall only be considered as the great outlines of the bargain between the parties, to be positively governed by these articles; but the 4th article to be in force as to payments at any place. In testimony whereof, we have hereunto set our hands and affixed our seals, this 11th day of April 1798.

William Groverman, [Seal.]
R. T. Hooe & Co." [Seal.]

We find, that James Davidson, master of the brigantine Nancy, in the said charter-party and provisional articles mentioned, on the morning before the departure of said vessel from the port of Alexandria, signed an acknowledgment, written on said provisional articles in these words, to wit:

*219] "I do acknowledge that I am *to act agreeably to the foregoing provisional articles, notwithstanding the charter-party to Havre de Grace.

James Davidson."

We find, that the said James Davidson, before he sailed from Alexandria, on the voyage in the said provisional articles mentioned, was told by R. T. Hooe, one of the defendants and freighters of said vessel, that on his arrival off Falmouth, a town in England, he would receive instructions from

Mr. Fox, the American consul, and that he must abide by such instructions. We find, that on the 20th of June 1798, the said vessel arrived in Falmouth roads, about three leagues from the port of Falmouth, and the said James Davidson, the master thereof, laid the vessel to, off Falmouth, and immediately proceeded in a pilot-boat to Falmouth, went on shore, and applied to the said Fox, the American consul, for orders where to proceed with the said brigantine and cargo. The said Fox told the said Davidson, that he had not received any orders for him, and that, therefore, he must bring the brigantine Nancy into the port of Falmouth, and there remain with the said brigantine and her cargo, until orders were received for him to proceed to his port of discharge. Upon receiving which answer and orders from the said Fox, the said Davidson, in conformity thereto, returned on board his said vessel, with a pilot employed by said Fox for the purpose of conducting said vessel into the port of Falmouth; and on the same day, the said Davidson brought said vessel to anchor in the port of Falmouth aforesaid. We find, that the said Fox informed the said Davidson, that he must wait with said vessel, at anchor in the port of Falmouth, until the said Fox could procure orders for him from Thomas Wilson, of London; which said Fox and Wilson are the same persons mentioned and named in the aforesaid provisional articles. We find, that on the 21st day of June 1798, the said James Davidson again went on shore and reported his said vessel, and delivered his papers to the collector of the customs for the port of Falmouth aforesaid, which papers the said collector refused to return, saying that he suspected the cargo on board said vessel was French property, and on the same day, caused the said vessel to be seized. We find, that on the 23d day of the said month of June, the said Davidson received orders from the said *Thomas Wilson, through the said Fox, to proceed with the said [*220 vessel and cargo to the Downs, and thence to London. We find, that the said vessel was detained in the port of Falmouth aforesaid, from the said 21st day of June 1798, until the 11th of September following, in consequence of the seizure aforesaid. We find, that on the said 11th day of September, the said vessel proceeded from the port of Falmouth to the Downs, by the aforesaid order of the aforesaid Thomas Wilson. We find, that the said brigantine and cargo were the *bonâ fide* property of American citizens alone. We find, that by an act of parliament of Great Britain, passed in the 29th year of George III., c. 68, § 12, and in force at the time the said brigantine arrived off Falmouth as aforesaid, it is enacted and provided in the following words, to wit:

"And be it further enacted, &c., and by the 30th section of the said act, it is enacted and provided in the following words, to wit, 'Provided always,'" &c.

We find, that the said Fox urged the danger arising under the said act, as a reason why the said vessel should be brought to anchor in the port of Falmouth, there to wait for the orders of the said Thomas Wilson, of London, and why the said vessel should not lay off Falmouth, without the limits of the said port. We find, that the said vessel was, on the said 20th of June, laden in part with 240,000 pounds of tobacco of the growth of the United States. We find, that the said Davidson, at Falmouth aforesaid, made and entered a protest in these words, manner and form following, to wit, "To all people," &c.

We find, that it was by the default of the defendants or their agents, in failing to have orders ready, on the arrival of the said vessel off Falmouth as aforesaid, designating and directing to which of the ports of discharge mentioned in the second article of the provisional articles aforesaid the said vessel was to proceed, and by the orders given to the said Davidson by the said Mr. Fox, that the said Davidson, did bring the said vessel to anchor in the said port of Falmouth, and that the said vessel and cargo were subjected to the seizure and detention aforesaid. If the law be for the plaintiff, we find
*221] for the plaintiff 794*l.* 19*s.* 9*d.*, Virginia *currency, damages; if the law be for the defendants, we find for the defendants.

The court below being of opinion, that the law was for the plaintiff, judgment was entered accordingly; and the defendants sued out the present writ of error.

Swann and *Simms*, for the plaintiffs in error. *C. Lee* and *E. J. Lee*, for the defendant.

Simms.—In this case, it is material to ascertain, whether Hooe & Co. ought to be considered as the owners of the vessel, and the master as their agent, for the voyage; or whether Groverman is to be considered as the owner, and the master as his agent. Whether the freighter or owner of a ship is to be considered as the owner for the voyage, depends upon the nature of the contract between them. If the freighter hires and employs the master, and the master is subject to his orders and direction, during the voyage, then the freighter is considered as the owner for the voyage; but if the owner hires and employs the master and hands, then he is the owner for the voyage, and liable for their misconduct. This fully appears from the case of *Vallejo* v. *Wheeler*, Cowp. 143.

In the present case, Groverman was to employ and pay the master and the mariners. He covenants that they shall perform a specific voyage; that the vessel shall sail with the first fair wind, after she is fully laden; that the cargo shall be delivered in good order, the danger of the seas only excepted; that the vessel was, at the time of making the charter-party, and should continue during the voyage, at his expense, tight, staunch and well found. The master and crew, therefore, must have been subject to the control of Groverman, during the voyage, and he was liable for their misconduct, and if any loss happened thereby, he, and not the freighters, was to bear it. Indeed, it is expressly stipulated, that the owners shall give instructions to the mas-
*222] ter to touch at Falmouth, *there to lay off and on twenty-four hours, or longer, if desired, in day-light, for orders from Mr. Fox, Mr. Wilson, or Messrs. Andrews & Co., and that on the receipt of such orders, he should proceed to the port directed by those orders.

If the master has disobeyed his instructions from his owner and employer the freighters surely cannot be liable. Groverman must look to his agent, the master, for redress. It is probable, however, that the master did the best he could for the interest of all concerned; and there is no more reason that the owner should look to the freighters for indemnification for the detention of his ship, than there is for the freighters looking to the owner for indemnification for the detentiou of their goods. If the master deviated from his instructions, it was at his and his employers' risk.

But the master was bound by the provisional articles to carry the vessel

into Falmouth. She was there, in the regular course of her voyage, and by the articles, Hooe & Co. had a right to detain her there, upon payment of the stipulated sum for demurrage. Being, then, in the regular course of the voyage, the detention by a foreign power, gives no right to claim demurrage for the time she was in the hands of the British government, under the seizure. The remedy of Groverman was against his insurers, and not against the freighters. If he has not insured, it was his own fault, and he must stand his own insurer. Park on Insurance, 87, 88, 89. *Goss* v. *Withers*, 2 Burr. 696. If the owner could recover demurrage from the freighters on the detention by a foreign government, that detention might continue so long that the stipulated demurrage might amount to twice the value of the ship and cargo. He had a right to abandon to the underwriters; but the freighters can never be presumed to have become insurers. Hooe & Co. contracted to pay demurrage for such detention only as should happen through their default; but here, the detention was by the British government. The court below have, therefore, erred in giving judgment for the plaintiff on the special verdict, for the whole demurrage, from 21st June to 11th of September 1798. The vessel was seized before the expiration of the twenty-four hours, which were allowed by *the agreement. [*223
Hooe & Co. therefore, were not liable to pay any demurrage at all. Or, if it shall be considered, that Hooe & Co. were liable for demurrage after the vessel had been twenty-four hours at Falmouth, until orders were received from Thomas Wilson, they could be bound to pay only for two days, because it is found that the master received his orders to sail for London, on the 23d of June. If Hooe & Co. were liable for those two days' demurrage, and no more, the court below ought to have awarded a *venire facias de novo.*

But if Hooe & Co. had not a right to order the brig to Falmouth, yet Groverman has not a right to recover the damages he may have sustained thereby, in the present action, but his remedy was by a special action on the case. An action of covenant can only be maintained, for not doing an act covenanted to be done, or for doing an act covenanted not to be done. There was no covenant on the part of Hooe & Co., that the vessel should not go into the port of Falmouth; and if there was, yet the plaintiff in his declaration does not aver such a covenant, nor declare on the breach of it: the only breach assigned is the non-payment of demurrage.

If the vessel had no right to go into the port of Falmouth, then her going in is not a case provided for by the contract, and consequently, the contract can form no rule for ascertaining the damages. If the vessel had a right to go into Falmouth, then the consequent seizure is not chargeable to Hooe & Co. If she had not a right to go in, then no damages can be recovered in the present form of action; nor in any other, because the act complained of is Groverman's own act, or the act of his agent, the master, for whose conduct Groverman himself is responsible.

It is true, the jury have found that it was by the default of Hooe & Co., in not having orders ready at Falmouth, that the vessel was obliged to go into the port, and that the seizure and detention took place. But if this is a breach of any one of the covenants, yet it is the breach of a covenant not declared upon; nor is the breach assigned, and therefore, no damages can be given in this action for the breach of that covenant.

E. J. Lee, for the defendant in error.—Hooe & Co. were owners for the voyage. The master was bound to obey their orders. Fox and Wilson were their agents. They, by their agent, ordered the vessel into port, contrary to the terms of their agreement; the detention was the consequence of their misconduct, and they ought to be liable for demurrage.

If a person hires a chattel, the hirer is the owner for the time for which he has hired it. *Vallejo* v. *Wheeler*, Cowp. 143. In that case, p. 147, it is said, that "there seems to be great reason for a distinction between a general ship, and one that is let to freight to a single person only. The former carries the goods of all mankind; every man that chooses it, is at liberty to load his goods aboard her; and the merchant who ships his goods in such a vessel has no command over her. He does not hire or employ the master; neither is the master subject to his order or direction during the voyage. But in the case of a vessel let to freight to one merchant only, and by him alone freighted, he may be supposed to employ the master, and have the direction of the vessel and the voyage; and therefore, whatever is done by the master is to be considered as done by the merchant's servant." The master, therefore, in taking the vessel into the port, when, by the agreement, he was only to lay off and on, acted as the servant of Hooe & Co., and by their orders, expressly given through their agent, Mr. Fox.

But if Hooe & Co. were not owners *pro hâc vice*, yet, having been the cause of the vessel's going into port, whereby she was seized, they are liable. It is said in Molloy, 375 (257), book 2, c. 4, § 9, that "if the ship, by reason of any fault arising from the freighter, as lading aboard prohibited or unlawful commodities, occasions a detention, or otherwise impedes the ship's voyage, he shall answer the freight contracted and agreed for." It is immaterial, what was the immediate cause of the detention; if it happened by the fault of Hooe & Co., here is a positive covenant to pay demurrage, if the vessel is detained.

*225] *But it is said, we have not brought our action for damages for carrying the vessel into port. It is true, that we have not; and the reason is, that the parties themselves having, by covenant, fixed the rate of damages, no action but covenant would lay.

The furnishing the vessel with men, furniture, &c., does not make Groverman the owner. The master signed the provisional articles, by which he bound himself to obey the orders of Fox and others, the agents of Hooe & Co., and whether the master was the agent of Groverman, or not, still, Hooe & Co. have rendered themselves liable, by ordering him to go into the port.

C. Lee, on the same side.—It is of no importance, who was the owner; for the detention is clearly the consequence of the default of Hooe & Co. The action is brought for not paying demurrage, according to express covenant. The defence set up is, that the vessel was improperly carried into the port; and that the master, being the agent of Groverman, he must abide the loss. We admit, that it was unlawful for the vessel to go into the port; this is the ground of our right. Suppose, the master was the agent of Groverman, and Fox the agent of Hooe & Co.; by whose fault or orders was the vessel carried in? Clearly, by the orders of Hooe & Co. No man has

a right to order my servant; but if he does, and by that means misleads him, and a loss happens, he must be liable. Hooe gave instructions to the master how to act. If it was lawful for him to do so, then he must be considered as the owner, and the obedience to his orders, in all its consequences, is chargeable to him. If it was not lawful, then his improper interference, if it misled the master, is also chargeable to him. Unless he was the owner, he had no right to instruct the master; it was a wrongful act. If he was the owner, there is no pretence for not paying the demurrage.

If it should be said, that the act of parliament referred to in the special verdict, and which is generally called *the *hovering* act, justified the orders to carry the vessel into port, the answer is, that the parties must be supposed to have understood that business, and agreed to the risk. [*226

The finding of the jury, respecting the orders not being ready, although it is apparently in favor of the defendant in error, is not considered as materially affecting the case, because, by the agreement, Hooe & Co. were not bound to have the orders ready, but might keep the vessel waiting, upon paying the stipulated demurrage.

Swann, for the plaintiffs in error.—The questions which seem to arise in this case are these: 1. Are Hooe & Co. liable at all for this detention? 2. If they are at all liable, are they liable in this form of action?

1st. The vessel had a right to go into the port of Falmouth, and was, therefore, in the regular course of her voyage. If so, then the seizure and detention of the vessel by the British government, was not by the default of Hooe & Co., and the case is not within the contract.

Hooe & Co. were not bound absolutely to have the orders ready, on the arrival of the vessel at Falmouth; but the contract provides for the case of the orders not being ready, and Hooe & Co. were at liberty to detain the vessel at Falmouth for orders, on paying a stipulated sum for demurrage. The words of the 5th provisional article are, that "If the vessel is detained over 24 hours at Falmouth, demurrage shall be paid at the rate stipulated in the charter-party." The parties are presumed to know the course of trade in the voyage about which they were contracting. (*Bond* v. *Nutt*, Cowp. 605.) They must have known that the vessel could not lawfully lay off and on, more than 24 hours, without being liable to seizure under the act of parliament: this created a necessity for the vessel's going into port. Not indeed a physical necessity; that was not requisite to justify it: it was *sufficient, if in prudence and discretion it was necessary and advisable for the general benefit of all parties concerned. (*Bond* v. *Nutt*, Cowp. 601; Park 310; Burn's M. Ins. 103, 133.) The words, "at Falmouth," strongly indicate this to have been the understanding of the parties themselves; and the very action itself, founded upon the contract for demurrage at the port of Falmouth, is a direct affirmance of the right to go into the port. If the vessel had no right to go into the port, then demurrage cannot be claimed under the contract, because it is a case not provided for by the contract. If the vessel had a right to go into the port, then she was still in the regular prosecution of her voyage, at the time when she was seized by the British government, and consequently, the detention cannot be chargeable to Hooe & Co. They have covenanted only [*227

against their own default, and their own acts. Groverman had other means of securing himself against all other risks. He ought to have insured; if he has not, it is his own fault; he stands as his own insurer, and his remedy is by recourse to the British government. Suppose, the vessel had been seized at Havre de Grace, by the French government; can it be supposed, that Hooe & Co. would have been liable? It will not be contended, that they would; and yet there is, in fact, no difference between the two cases.

Hooe & Co. cannot be considered as the owners, because, in the first place, the hiring of the vessel was not general, it is of the tonnage only; this excludes the cabin and the master's perquisites. Groverman employs the master and crew, and stipulates for the good condition of the vessel, during the voyage, and for the safe transportation of the goods, the danger of the seas only excepted; thereby clearly making himself responsible for the fidelity and good conduct of the master and mariners. Groverman was, therefore, clearly the owner of the vessel for the voyage. He covenants to instruct the master to touch at Falmouth and wait for orders. He covenants that the master shall proceed to such port as shall be mentioned in those orders. Now, he never would have done all this, if the master was not subject to his control. If, then, the master was the servant of Groverman, and has improperly carried the vessel into port, instead of laying off
*228] and on, how can Hooe & Co. be liable *for the consequences? It is said, because Fox advised or directed it; and Fox was the agent of Hooe & Co.

Then it amounts to this, that Groverman, by his agent the master, and Hooe & Co., by their agent, Mr. Fox, finding the vessel to be in danger by laying off and on, have consulted together as to the best means of preventing loss to all parties, and agreed, that the vessel should go into the port. To which of the parties is this error, if it is one, to be imputed? Certainly, to neither; it was their mutual act, intended for their mutual benefit, and neither has a right to complain, or to make the other liable for the subsequent, and perhaps consequent, seizure by the British government. Fox had no authority to order the vessel, except as to which of the ports mentioned in the provisional articles, she should go. The directions to the master, therefore, to come into the port, must have been considered by the captain only as a matter of advice: he was not bound to follow it.

Suppose, I advise an act to be done, and it turns out unfortunately; am I to be liable for the consequences? Suppose, even, that the vessel went in, purely to oblige and benefit Hooe & Co., yet they would not thereby become liable for accidents happening without their default. If my friend, in coming to serve me, receives an injury from a third person, am I liable? If the provisional articles do not provide for the vessel's going into the port, yet Mr. Fox and the master acted correctly. A case arose, not provided for by express contract; they did right, therefore, in mutually consulting for the common good of their employers, and although the result of their deliberations may have proved unfortunate, yet neither party can criminate the other.

2. If Hooe & Co. are liable at all, it is not in this form of action. The covenants which they are bound to perform are, 1. To pay the freight.
*229] *2. To furnish orders at Falmouth. 3. To pay so much *per diem* for their own detentions.

Now, it is admitted, that this detention was by the British government, and if the vessel was in her voyage while in the port of Falmouth, there was no default of Hooe & Co., by which that detention can be chargeable to them. But if the vessel was out of her voyage, and had been carried into port by Hooe & Co., contrary to the agreement, then it is a case not provided for by the charter-party, and therefore, demurrage, as such, cannot be claimed. In such a case, the remedy would be only for the tort. Suppose, they had burnt the vessel; no action of covenant would lay for that wrong. The injury complained of, is the ordering the vessel into port.

February 23d, 1803. The CHIEF JUSTICE delivered the opinion of the court.—This is a writ of error to a judgment rendered in the circuit court of the district of Columbia, sitting in Alexandria, on the following case:

A charter-party was entered into between the parties, on the 10th day of April 1798, whereby Groverman let to Hooe & Co., a vessel of which he was owner, for a voyage to Havre de Grace. The first article states the indenture to witness, "that the said Groverman hath granted and to freight letten, to the said R. T. Hooe & Co., the brigantine Nancy, whereof he is owner, commanded by James Davidson, a citizen of the United States, now lying in the port of Alexandria, of the burden of 197 tons or thereabouts; and for and in consideration of the covenants hereinafter mentioned, doth grant and to freight let, unto the said R. T. Hooe & Co., their executors and administrators, the whole tonnage of the aforesaid vessel called the Nancy, from the port of Alexandria, in Virginia, to the port of Havre de Grace, in France, and back to the said port of Alexandria, in a voyage to be made by the said R. T. Hooe & Co., with the said brigantine, in manner hereinafter mentioned; that is to say, to sail with the *first fair wind and weather that [*230
shall happen after she is completely laden, from the said port of Alexandria, with a cargo of tobacco, to be shipped by said R. T. Hooe & Co., to the said port of Havre de Grace, and there deliver the said cargo to Messrs. Andrews & Co., of that town, merchants, or to their assigns, in good order, the danger of the seas only excepted; and at the said port of Havre de Grace, to take on board a full freight or lading of such goods as the said Andrews & Co. may think proper to put on board said brigantine, as a return-cargo, with which the said vessel is to make the best of her way directly back to the port of Alexandria, and there safely deliver such cargo to the said R. T. Hooe & Co." Groverman further covenants with the said R. T. Hooe & Co., that the vessel is, and shall, during the voyage, be kept, in good condition, and furnished with all manner of necessary and proper rigging, &c., and with mariners to navigate her. He further covenants to allow twenty-five running days for lading the vessel at the port of Alexandria, thirty days for discharging her cargo and taking on board the return-cargo at Havre, and ten days for receiving her inward cargo at Alexandria. In consideration of these covenants, R. T. Hooe & Co. engage to pay the stipulated freight, and 8*l.* 8*s.* for every day's demurrage, if any there should be, by their default, at the port of Alexandria; and one hundred and fifty-one livres by the day, for every day's demurrage, occasioned by their default, at the port of Havre de Grace.

On the 11th day of April, provisional articles were entered into between the same parties, by which it was stipulated that, 1st. The captain or com-

mander shall be instructed by his owner, previous to his sailing from Alexandria, to touch at Falmouth, in such manner as shall appear to his crew that there was a necessity for his so doing, there to lay off and on twenty-four hours (or longer if desired), in day-light, during which time, there will come off orders from Mr. Fox, the American consul, Mr. Thomas Wilson, of
*231] London, or Messrs. Andrews & Co., of Havre de Grace. *2d. On receiving these orders, the captain or commander must proceed directly for Havre de Grace, London, Hamburg, Bremen or Rotterdam, as he may be directed, and at one of these ports deliver his cargo, to such person or persons as the aforesaid orders may direct. The third and fourth articles apply the covenants of the charter-party, respecting the conduct of the vessel in the port of Havre, to the contingency of her being ordered to some other port; and to the freight, and stipulate the demurrage to be 6*l.* 6*s.* sterling by the day. The fifth article is in these words: "If the vessel is detained over twenty-four hours at Falmouth, demurrage shall be paid for the time at the rate stipulated in the charter-party."

On the 20th of June 1798, the vessel arrived in Falmouth roads, about three leagues from the port of Falmouth, where the master laid her to, and immediately went on shore, and applied to Mr. Fox, the American consul, for orders where to proceed. Fox replied, that he had received no orders for him, and that, therefore, he must bring the vessel into the port of Falmouth, and there remain, until orders were received for him to proceed to his port of discharge. These orders were given to avoid the penalties of the British hovering act, which subjected to forfeiture the vessel and cargo, if found in the situation in which the Nancy would have been, if she had waited for orders, without entering the port. The master immediately brought his vessel into port, where she was seized on suspicion of being French property, and detained for nearly three months. After the seizure, on the 23d day of June, the master received orders from Thomas Wilson, through Fox, to proceed with his vessel to London, there to deliver her cargo.

This suit is brought by Groverman to recover damages against R. T. Hooe & Co. for this detention. The declaration states the charter-party and
*232] provisional agreement, and then assigns a breach of them in these *words: "And the said plaintiff doth aver, that the said brig arrived off Falmouth, on the 19th day of June 1798, when the master, by the orders of the aforesaid Mr. Fox, the agent of the said defendants, conveyed her into the port of Falmouth, by means whereof, the said brig was detained in the aforesaid port of Falmouth more than twenty-four hours, to wit, from the 20th day of June last aforesaid, to the 11th day of September, in the year 1798, when she sailed, by the orders of Andrews & Co., the agents for the said defendants, for the Downs." And the declaration then charges that the defendants had not paid the demurrage stipulated in the charter-party, or in the provisional articles.

Issue was joined on the plea of conditions performed, and the jury found a special verdict, containing the facts already stated, and further, that before the vessel sailed from Alexandria, the master was told by R. T. Hooe, that on his arrival off Falmouth, he would receive instructions from Mr. Fox, the American consul, and that he must abide by such instructions; and that it was by the default of the defendants, or their agents, in failing to have orders ready on the arrival of the said vessel off Falmouth as aforesaid,

designating and directing to which of the ports of discharge mentioned in the second article of the provisional articles aforesaid the said vessel was to proceed, and by the orders given to the said Davidson (the master), by the said Mr. Fox, that the said Davidson did bring the said vessel to anchor in the said port of Falmouth, and that the said vessel and cargo were subjected to the seizure and detention aforesaid; if the law be for the plaintiff, the jury find 794*l.* 19*s.* 9*d.*, Virginia currency, damages; if the law be for the defendants, then they find for the defendants. The circuit court was of opinion, that the law was for the plaintiff, and rendered judgment in his favor.

To support this judgment, the special verdict ought to show that R. T. Hooe & Co., the defendants in the circuit court, have broken some covenant contained in the agreements between the parties; and that the breaches assigned in the declaration are upon the covenant so broken. *The [*233
breach assigned is the non-payment of demurrage stipulated to be paid, for a longer detention than twenty-four hours, at Falmouth; and it is to be inquired, whether the declaration makes a case showing demurrage to be demandable, and how far the special verdict sustains that case. The case made by the declaration is, that on the arrival of the vessel off Falmouth, the master took her into port, by order of Mr. Fox, by means whereof, she was detained more than twenty-four hours. The question arising out of this case, for the consideration of the court, is, does it show a breach of covenant on the part of R. T. Hooe & Co., which subjects them to demurrage for the detention stated?

The fifth article is supposed to be broken. The words of the covenant are: "if the vessel is detained over 24 hours at Falmouth, demurrage shall be paid for the time, at the rate stipulated in the charter-party." If this clause provides for every detention whatever, however it may be occasioned, the inquiry is at an end, and the judgment should be affirmed. But on looking into the provisional articles, the general expressions here used will be found to be explained. The first of these articles stipulates that the master should touch at Falmouth, there to lay off and on for twenty-four hours (or longer if desired), in day-light, during which time, there will come off orders from Mr. Fox, the American consul, Mr. Thomas Wilson, of London, or Messrs. Andrews & Co., of Havre de Grace. Here, then, is a power given to R. T. Hooe & Co. to detain the vessel longer than twenty-four hours, lying off and on at the port of Falmouth, waiting for orders, and it is the only rational construction which can be given the contract, to suppose that the fifth article refers to the first.

*A certain number of days are allowed for lading the vessel in [*234
Alexandria. But more days may be required, in which case, demurrage is to be paid. So with respect to discharging and relading the vessel at the port of delivery in Europe; and so with respect to the return-cargo in Alexandria: in each case, demurrage is stipulated, in the event of a longer detention than is agreed on. When, then, a time is given to wait for orders at Falmouth, it is reasonable to suppose, that the demurrage, which is to be paid, for a longer detention than the time given, relates to a detention occasioned by waiting for orders, or some breach of covenant by R. T. Hooe & Co.

The declaration does not state the vessel to have waited, lying off and on, for orders, but to have been taken into port by the orders of Mr. Fox, when

she was seized and detained by the officers of the British government. The covenant, then, was broken by taking the vessel into port, and it is to be inquired, who is answerable for this breach?

It has been argued, that R. T. Hooe & Co. are answerable for it, because, 1. Their orders for the further prosecution of the voyage ought to have been in readiness as stipulated. 2. The vessel was taken into port by the orders of their agent, for whose acts they are accountable. 3. The master was, for the voyage, their captain; and the stipulation to lay off and on, therefore, being broken by him, was broken by them.

To the first argument, founded on the non-reception of orders, the observation already made may be repeated. The declaration does not attribute the detention to that cause, but to a compliance with the orders of Fox in taking the vessel into port. If, however, the charge in the declaration had been, that orders were not ready on the arrival of the vessel, *that charge would have been answered by the contract itself, which allows a delay of twenty-four hours for the reception of orders, without paying demurrage, and a longer time, if required, on paying therefor at the rate of 6*l.* 6*s.* sterling by the day.

*235]

The failure, then, to have the orders, for the further destination of the vessel, in readiness, on the arrival of the master, or even within the twenty-four hours after his arrival, was no breach of contract on the part of R. T. Hooe & Co., since it was an event contemplated and provided for, by the parties; and the question whether, in the actual case which has happened, that is, of a delay longer than twenty-four hours in giving the orders, but of a seizure before that time elapsed, R. T. Hooe & Co. are responsible for demurrage accruing between the termination of the twenty-four hours and the receipt of the orders, cannot be made in this case, because there is no allegation in the declaration which puts that fact in issue.

2. The court will proceed, then, to consider whether, R. T. Hooe & Co. are made accountable for the vessel's being taken into port, since that measure was adopted, in pursuance of the instructions of their agent, Mr. Fox.

The finding of the jury goes far to prove that the defendants in the court below have made themselves responsible for the conduct of Fox. They find that R. T. Hooe informed the master, before he sailed from Alexandria, that on his arrival off Falmouth, he would receive orders from Mr. Fox, and that he must abide by such instructions. This finding creates some difficulty in the case. But this communication from Mr. Hooe to the master ought to be taken, it is conceived, in connection with the provisional articles. Those articles explain the nature of the orders to be received, and by which the master was directed to abide. In them, it is expressly stipulated, that on receiving these instructions, the master should proceed directly for Havre de Grace, London, Hamburg, Bremen or Rotterdam, as he should be directed. The orders, then, which he was to receive and obey, must be supposed compatible with this agreement. *This construction is the more reasonable, because, annexed to the provisional articles, is an acknowledgment on the part of the master, that he was to act conformable to them. He ought not to have understood declarations of the kind stated in the verdict, as directing a departure from a written agreement entered into by the owner and freighters of the vessel, and to which he had bound himself to conform. This article seems, too, to explain the power delegated by Hooe & Co. to

*236]

Fox; and to show that he was their agent, for the purpose of directing the further destination of the vessel, but for no other purpose.

If this be the correct mode of understanding this part of the verdict, and it is believed to be so, then the particular conduct of Hooe & Co. did not authorize the master to obey the orders of the American consul, in taking the vessel into port; nor are they responsible for the consequences of that measure, unless they could be considered as responsible for a violation of the covenant by the act of the master.

If these facts are to be differently understood, and the communication made by Hooe to the master is to be understood as authorizing him to obey any order given by Fox, though that order should be directly repugnant to the provisional articles, still the liability of Hooe & Co. in this suit, will depend on the question whether the covenant to lay off and on at the port of Falmouth, was a covenant on the part of the owner, or of the freighters, of the vessel. This depends so much on the question whether Groverman or R. T. Hooe & Co. were owners of the vessel for the voyage, that it will more properly be considered with that point.

3. Was the master under the direction of Groverman or Hooe & Co. for the voyage? This is to be determined by the whole charter-party, and the provisional articles taken together.

It has been observed at the bar, and the observation has considerable weight, that Groverman lets the tonnage of *the vessel, and not the whole vessel, to the freighters. The expression of the charter-party, [*237 it will be perceived, varies in the part descriptive of the agreement, from what is used in the part constituting the written agreement. The indenture witnesses, "that the said Groverman hath granted and to freight letten, to the said R. T. Hooe & Co. the brigantine Nancy, whereof he is owner," &c., but immediately proceeds to say, "and for and in consideration of the covenants hereinafter mentioned, doth grant and to freight let, to the said R. T. Hooe & Co., the whole tonnage of the aforesaid vessel, from the port of Alexandria, in Virginia, to the port of Havre de Grace, in France," &c. As the latter are the operative words which really constitute the contract, it is conceived, that they ought to prevail, in construing that contract. Groverman, then, has only let to Hooe & Co. the tonnage of the vessel, and therefore, is the less to be considered as having relinquished ownership of her during the voyage. There are other circumstances which serve to show that the direction of the vessel, during the voyage, was intended to remain with Groverman. The cargo is to be delivered to Messrs. Andrews & Co., of Havre de Grace, in good order, the dangers of the seas only excepted. This is an undertaking on the part of Groverman, which he certainly would not have made, if he had relinquished the direction of the voyage to Hooe & Co. If the vessel, *pro hâc vice*, had been their vessel, Groverman would not have contracted for the delivery of the cargo; and for the delivery to a specified person.

If the freighters had owned and commanded the vessel, they might have delivered the cargo in Havre to any other person, or have discharged at a port short of Havre, without injury to Groverman. So, the cargo taken on board at Havre is to be such as Andrews & Co. may think proper; which return-cargo is to be delivered to Hooe & Co., in Alexandria. These stipulations all indicate that the voyage was to be performed under the orders

of Groverman, because the acts stipulated are to be done by him, and the covenants are his covenants.

This is further evidenced by the subsequent language of the charter-party. The succeeding sentence begins with the words, "and the said Groverman doth further *covenant to and with the said R. T. Hooe & Co.," &c., showing that the preceding covenants were all on the part of Groverman. This further covenant is not only for the present condition of the vessel, but that she shall be kept well apparelled and well manned by the said Groverman, during the voyage. The master, then, was Groverman's captain, the mariners were Groverman's mariners; and this furnishes an additional reason for supposing the master and mariners to be under his direction. After some further covenants on the part of Groverman, the charter-party proceeds thus: "In consideration whereof, the said R. T. Hooe & Co. do covenant, &c., to and with the said W. Groverman, &c., that they will well and truly pay the freight stipulated therein."

*238]

Thus, the whole language of the charter-party goes to prove that the covenants respecting the voyage are on the part of Groverman, and on that account, as well as on the account of his letting only the tonnage of the vessel, and furnishing the master and mariners, &c., he is to be considered as the owner of the vessel for the voyage, under the charter-party. This opinion is strengthened rather than weakened by the provisional articles. The first article stipulates that particular instructions respecting the voyage shall be given to the master by Groverman, before its commencement. The words are: "The captain or commander shall be instructed by his owner, previous to his sailing from the port of Alexandria, to touch at Falmouth," "there to lay off and on twenty-four hours (or longer if desired) in day-light," &c. These orders, then, to the master were to be given by Groverman, and it was by his authority that the master was to act on that occasion. This explains the doubt as to the person who was to be considered as covenanting that the vessel should lay off and on, for twenty-four hours, at the port of Falmouth, and tends to show who was responsible for the breach of that covenant. This, too, is in addition to covenants in the charter-party, which are plainly Groverman's, and is, therefore, the more to be considered as a covenant on his part. The act was to be performed by his authority, and the covenant was his covenant.

*On a consideration, then, of the whole contract between the parties, the court is of opinion, that Groverman remained the owner of the vessel during the voyage, and is answerable for any misconduct of the master. The covenant to lay off and on at the port of Falmouth, being the covenant of Groverman, the freighters are not answerable in this action, for the breach of it, should the orders of Fox be understood as their orders. It is probable, that the course taken by the master was the most prudent course; but were it otherwise, the orders of of Fox might excuse the owner from any action brought by the freighters for loss sustained by them in consequence of going into Falmouth, but could not entitle him to this action against the freighters.

*239]

It is, then, the opinion of this court, that on this special verdict, the law is for the defendants.

Judgment reversed, and the circuit court to enter judgment for the defendants.