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Gracie Vs. Palmer

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Appellant : Gracie

Respondent : Palmer

Judgement :

Gracie v. Palmer - 21 U.S. 605 (1823)
U.S. Supreme Court Gracie v. Palmer, 21 U.S. 8 Wheat. 605 605 (1823)

Gracie v. Palmer

21 U.S. (8 Wheat.) 605

ERROR TO THE CIRCUIT COURT FOR

THE EASTERN DISTRICT OF PENNSYLVANIA

SYLLABUS

By a charter party, the sum of $30,000 was agreed to be paid for the

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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 $2,000 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 ninety days from the time at which she should be ready to discharge her cargo. The charter proceed in the ship to Calcutta, and with the consent of the master (who was appointed by the shipowners), 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 stipulation for the delivery of the goods purchased therewith to their 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. would 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 those goods for the freight.

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, paid under the circumstances stated in the following case, to be considered as a special verdict.

On 23 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 23 October, 1818, between Archibald Gracie, William Gracie, and Charles King, the persons constituting the co-partnership 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, hereinafter mentioned, and provisioned for the term of eighteen months, and

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fully and properly armed with large and small arms and with sufficient ammunition for the same, and that she shall, on or before 15 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 hereinafter reserved for the master and first and second officers, and the lading of the 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 dispatched, shall and will (wind and weather permitting) set sail from the said port of Philadelphia on or before 30 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 aforesaid,

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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, 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, 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 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 percentum 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 $1.500, and also that the cabin shall belong to the said charterer (excepting the respective staterooms 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

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 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, and if she shall have proceeded to Calcutta, the further sum of $2,000 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"

"HUGH CHAMBERS"

On 28 November, 1818, the America sailed from Philadelphia upon the voyage in the charter party mentioned, laden with sundry goods, and also $15,000 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 burden 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

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 saltpeter, 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, 7 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 8,042 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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nonpayment, 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 29 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 1 March, 1820, the said Chambers replied to the defendants that he was unable to comply with the requisitions of the charter party. On 2 March,

1820, the deter-party. gave notice to all the consignees of goods on board the *America,* as by letter of that date to T. M. & R. Willing. On 3 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 6 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, which payment was made in acceptances of the defendant's drafts, dated 29 March, 1820, at ninety days, and duly paid, 30 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

goods for freight, judgment to be entered for the plaintiffs for the sum of $10,500, 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.

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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 8,000 pounds, upon the following stipulations:

"That Chambers should draw bills in favor 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 *America,*

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the shipmaster 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." Endorsed 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 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 shipmaster, 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 Willings,

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 favor 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 shipowner 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 shipmaster 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 shipowners 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

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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, 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 shipowner 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 shipowner, and the law will not suffer that possession to be violated until the laborer 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 shipowner.

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

That the shipowner 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 shipowner, 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. 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 shipowner for freight. In the present instance, a *pro rata* freight only is demanded. In the same case, it was further decided that the shipowner retained his lien for freight, on goods shipped by third

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persons, even after the drawing of freight bills in favor 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 v. 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 shipowner 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 further 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,

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 shipowner?

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 shipowner 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 divest 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 shipmaster 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 meantime, 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 fulfillment 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

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 shipowners 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.

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