

The Bird of Paradise

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Appeal No. : 72 U.S. 545

Appellant : The Bird of Paradise

Judgement :

The Bird of Paradise - 72 U.S. 545 (1866)

U.S. Supreme Court The Bird of Paradise, 72 U.S. 5 Wall. 545 545 (1866)

The Bird of Paradise

72 U.S. (5 Wall.) 545

APPEAL FROM THE CIRCUIT COURT FOR

THE NORTHERN DISTRICT OF CALIFORNIA

SYLLABUS

1. Shipowners, as a general rule, have a lien upon the cargo for the freight, and consequently may retain the goods after the arrival of the ship at the port of destination until the payment is made. Presumption is in favor of the lien, but it may be modified or displaced either by direct words or by stipulations incompatible with the existence of such a right.

2. Insolvency of the shipper occurring while the goods are in transit or before they are delivered will not absolve the carrier from an agreement to take an acceptance on time, instead of cash, for the freight, nor authorize him, when he had made such an agreement, to retain the goods until the freight is paid. On the other hand, as a bill of exchange or promissory note given for a precedent debt does not extinguish the debt unless such was the agreement of the parties, a bill or note falling due before the unloading of the cargo and protested and unpaid is no discharge of the lien; and the shipowner, in such a case may stand upon it as fully as if the acceptance had never been given.

Hence where, in the case of a vessel chartered from Liverpool to San Francisco, freight was to "be paid in Liverpool on unloading and right delivery of the cargo" at a rate fixed by the parties,

"such freight to be paid, say one-fourth in cash and one-fourth by charterer's acceptance, at six months from the final sailing of the vessel, and the remainder by like bill *at three months from date of delivery, at charterer's office in Liverpool, of the certificate of the right delivery of the cargo agreeably to bill of lading,* or in cash, under discount at five percent, at freighter's option. The ship and her freight are bound to this venture,"

HELD

i. That the "charterer's acceptance at six months from the final sailing of the vessel" having been dishonored and he become bankrupt, it was no

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payment of the one-fourth agreed to be so paid for, and that the lien for that fourth was not displaced.

ii. That as to "the remainder," which was to be by like bill, *at three months from date of delivery, at charterer's office in Liverpool, of the right delivery of the cargo agreeably to bill of lading* -- the lien had been displaced, notwithstanding that the charterer had become bankrupt before the vessel arrived at San Francisco.

Appeal from the Circuit Court for the Northern District of California, decreeing against a lien set up by shipowners for freight on libel filed against a cargo. The case was thus:

On the 16th March, 1863, Eccles, of Liverpool, chartered at that place from Taylor & Co., owners of the ship *Bird of Paradise*, that vessel to carry a cargo of coal of which Eccles was the owner to San Francisco, California at a rate agreed on per ton.

"The freight to be paid in Liverpool, on unloading and right delivery of the cargo, one-fourth in cash, one-fourth by the acceptance of Eccles, the charterer, at six months from the final sailing of the vessel, and the remainder by like bill, at three months from delivery, at charterer's office in Liverpool, of certificate of right delivery of cargo agreeably to bills of lading, or in cash, less five percent, at freighter's option. The vessel to be addressed to the freighter's agent abroad. 500 to be advanced in cash at the port of discharge on account of the freight. *The ship and her freight are bound to this venture. The penalty for nonperformance of this agreement is to be the chartered freight in pounds sterling.* "

The master signed and the freighter, Eccles, accepted a bill of lading in the usual form for the cargo deliverable "to order or assigns, he or they *paying* freight at the rate of __, *as per charter party.* "

The vessel sailed from Liverpool April 16, 1863, and arrived at San Francisco on the 26th December, 1863, a voyage of eight months and ten days.

The charterer, Eccles, paid the promised one-fourth of the freight before sailing, and gave his acceptance for the second fourth, at six months, falling due October 19, 1863, more

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than two months before the vessel arrived, *but it was never paid, Eccles having failed in business, and remaining insolvent and a bankrupt.* On the arrival at San Francisco, the 500 agreed to be advanced in cash at the port of discharge, was

also paid; but the second acceptance, the one, to-wit, for the residue of the freight, *was not given*, nor the amount paid in money.

The amount due for unpaid freight, regarding the first or dishonored acceptance as a nullity was thus \$7,050.

The captain refused to deliver the cargo to the agents of Eccles, but kept control of it himself.

These agents accordingly filed their libel in the District Court for the Northern District of California against the cargo to recover possession of it, the delivery being resisted under a claim of lien for freight.

That court considered that the claim was unfounded and decreed accordingly, and the decree being affirmed by the circuit court, the correctness of such a view was now the question here on appeal.

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MR. JUSTICE CLIFFORD delivered the opinion of the Court.

Assignees of the charter party and of the bill of lading libeled the ship *Bird of Paradise*, her tackle, apparel, and furniture in a cause of contract, civil and maritime.

Breach of contract alleged in the libel is the refusal of the master of the ship to deliver the cargo as stipulated in the

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charter party and bill of lading. Voyage was from Liverpool to San Francisco, and the cargo consisted of nine hundred and fifty-two tons of coal. Terms of the charter party material to the inquiry are that the freight shall "be paid in Liverpool on unloading and right delivery of the cargo" at the rate therein prescribed and in full of all other specified charges.

"Such freight is to be paid, say one-fourth in cash and one-fourth by charterer's acceptance at six months from the final sailing of the vessel, . . . and the remainder by like bill at three months from date of delivery, at charterer's office in Liverpool, of the certificate of the right delivery of the cargo agreeably to bill of lading, or in cash under discount at five percent per annum, at freighter's option."

Other material clauses are, that the "vessel shall" be addressed to the freighter's agent abroad, that five hundred pounds sterling shall "be advanced in cash at port of discharge on account of the freight," and that "the ship and her freight are bound to this venture," but it does not contain the usual clause that the cargo is bound to the ship. Bill of lading is in the usual form and contains the clause, "they paying freight for the goods at the rate as per charter party." Sum advanced for first installment of freight was subject to three months' interest at five percent per annum and cost of insurance. Charter party was signed by the claimants, and the bill of lading was signed by the master. Ship was loaded by the charterer, and it is proved she arrived in safety at the port of destination with the cargo on board. Consignees demanded the goods, but the master refused to deliver the same unless the freight was paid contemporaneously with the delivery, placing the refusal upon the ground that the ship had a lien upon the cargo for the unpaid balance of the freight, but the libellants claimed that they were entitled to the delivery of the cargo without paying any freight except in the manner provided in the charter party.

1. Proofs showed that the ship sailed on the sixteenth day of April, 1863, and that she arrived at the port of destination on the twenty-sixth day of December in the same year.

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Cash installment of freight was paid as stipulated in the charter party. Acceptance of the charterer given for the second installment, payable in six months from date, was delivered to the claimants on the day the ship sailed from the port of departure. Before she arrived at the port of destination, the charterer failed in business and became and is insolvent and bankrupt.

Payment of the acceptance was never made, and the proofs show that it is still held and owned by the claimants. Whole freight remains unpaid except the cash installment paid before the ship sailed and the five hundred pounds stipulated to be advanced in cash at the port of discharge. Amount due and unpaid is seven thousand and fifty dollars in gold, deducting the sum advanced at the port of discharge and including the residue of the last installment and the unpaid and protested acceptance. Pending the suit, the cargo was delivered to the consignees under a stipulation that it should be returned to the master in case the claim of lien for freight should be sustained. Decree of the district court was that the claim was unfounded; that the ship had no lien for freight on the cargo, and that the stipulation for the return of the cargo should be given up to be cancelled. Circuit court affirmed the decree, and the claimants appealed to this Court.

2. Equities of the case in view of the whole record are strongly with the shipowner, but the questions presented for decision are questions of law, and must depend upon the construction of the contract as expressed in the charter party. Reference need not be made to the bill of lading, as it is in the usual form, and refers to the charter party as the controlling evidence of the contract in respect to the matter involved in this controversy. Shipowners unquestionably, as a general rule, have a lien upon the cargo for the freight, and consequently may retain the goods after the arrival of the ship at the port of destination until the payment is made unless there is some stipulation in the charter party or bill of lading inconsistent with such right of retention and which displaces the lien.

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3. Such a lien is regarded in the jurisprudence of the United States as a maritime lien, because it arises from the usages of commerce, independently of the agreement of the parties, and not from any statutory regulations. Legal effect of such a lien is that the shipowner, as carrier by water, may retain the goods until the freight is paid, or he may enforce the same by a proceeding *in rem* in the district court. But it is not the same as the privileged claim of the civil law, nor is it an hypothecation of the cargo which will remain a charge upon the goods after the

shipowner has parted unconditionally with the possession. Although the lien is maritime and cognizable in the admiralty, yet it stands upon the same ground with the lien of the carrier on land, and arises from the right of the shipowner to retain the possession of the goods until the freight is paid, and is lost by an unconditional delivery to the consignee. [[Footnote 1](#)]

Parties, however, may frame their contract of affreightment as they please, and of course may employ words to affirm the existence of the maritime lien, or to extend or modify it, or they may so frame their contract as to exclude it altogether. They may agree that the goods, when the ship arrives at the port of destination, shall be deposited in the warehouse of the consignee or owner, and that the transfer and deposit shall not be regarded as the waiver of the lien, and where they so agree, the settled rule in this Court is that the law will uphold the agreement and support the lien. [[Footnote 2](#)]

4. Presumption is in favor of the lien as already explained, but it may be modified or it may be excluded or displaced by direct words or by the insertion of some stipulation wholly incompatible or irreconcilable with the existence of such a right. Contracts of affreightment, like other commercial contracts, where the language employed is ambiguous or of doubtful meaning, are subject to judicial construction, and it often happens that the terms of the instrument

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in respect to the payment of freight and the delivery of the cargo are so inaptly chosen that it gives rise to very close and embarrassing questions. Where the stipulation is that the goods are to be delivered at the port of discharge before the freight is paid, without any condition or qualification, it seems to be agreed that the lien of the shipowner for the payment of the freight is waived and lost, as the right of lien is inseparably associated with the possession of the goods. Unless the stipulation is that the delivery shall precede the payment of the freight, and the language employed as applied to the subject matter and the surrounding circumstances is such as clearly to show that the change of possession is to be absolute and unconditional, the lien is not displaced, as the presumption of law is

the other way, which is never to be regarded as controlled except in cases where the language employed in the instrument satisfactorily indicates that such is the intention of the parties.

5. Such precedent delivery, if absolute and unconditional, displaces the lien for freight, because it is repugnant to it and incompatible with it, but where the payment or security of payment is to be concurrent or simultaneous with the delivery of the cargo the lien exists in full force, and the shipowner cannot be required to make the delivery until the payment of freight, or security, as the case may be, is tendered. Judge Story says the lien exists if it appears that the payment is to be made before or at the delivery of the cargo, or even if it does not appear that the delivery is to precede such payment. *The Volunteer*, 1 Sumner C.C. 571. Accordingly he held in that case that the stipulation that the freight should be paid within ten days after the vessel returned to the port of departure did not displace the lien on the return cargo, as the unlivery of the cargo might be rightfully postponed beyond the ten days after the return of the ship, when, by the terms of the charter party, the freight would become due. Same defense -- that is the waiver or displacement of the lien by a clause in the charter party giving credit for the payment of the freight -- was set up in a subsequent case before the same court, in which the terms of the

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clause relied on afforded more color to the views of the respondent. [[Footnote 3](#)]

Terms of the stipulation in that case were that the freight should be paid "in five days after the vessel's return to and "discharge" in the return port of the voyage." Argument of the respondent was that the word "discharge," as used in the clause, meant not merely the unloading of the brig, but the delivery of the cargo to the charterer or owner of the goods. Aided, however, by the terms of the bill of lading, which referred to the charter party, the court came to the opposite conclusion, and held that the word discharge, as there used, meant merely the unlading of the cargo from the ship, without any reference to a delivery to the owner or consignee. Exactly the same rule was adopted and applied by this Court in the construction of

a similar clause of a charter party in a case heard and decided at the last term.

Part of the charter money in that case was agreed to be paid and was paid before the ship sailed or during the voyage, and the stipulation was that the balance should be paid "one-half in five and one-half in ten days after the discharge of the homeward cargo," and the decision was that the stipulation, construed in the light of another clause in the same instrument, which provided in effect that the ship should be bound to the merchandise and the merchandise to the ship, was not inconsistent with the right of the owner to retain the cargo for the preservation of the lien, as the clause was intended for the benefit of the charterer, giving him time to examine the goods and ascertain their condition and to decide whether he would or would not take them and pay the freight. But the court remarked that the credit might be for so great a period as to justify the inference that the shipowner intended to waive his right of lien, and it was decided in an earlier case that the lien may be waived without express words to that effect if the charter party contains stipulations inconsistent with the exercise of such a right, or

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where it clearly appears that the shipowner meant to trust to the personal responsibility of the charterer. [[Footnote 4](#)]

6. Repeated decisions of the courts in Westminster Hall have adopted the same general rule, and in some decisions of very recent date the same principles have been applied in cases entirely analogous to the one now before the Court. Settled doctrine of those courts is that the law merchant gives to the ship a lien for the freight, or rather the right of the shipowner to retain the goods until the freight is paid. [[Footnote 5](#)] They hold it to be a common law right not cognizable in the admiralty, but they admit that special clauses in the charter party or bill of lading inconsistent with it operate as a waiver, and may destroy the right. [[Footnote 6](#)]

Unless, however, the special agreement is absolutely inconsistent with the retention of the goods, the waiver or displacement is not shown and the right remains. [[Footnote 7](#)]

Recent decisions in that country put the principal question under consideration in a clear light and leave no doubt, if the case were pending there, how it would be solved. Take, for example, the case of *Alsager v. Dock Co.*, [[Footnote 8](#)] which was decided in the Court of Exchequer. Charter party in that case contained two clauses material to be noticed. First clause was that the vessel might discharge in any dock the shipper might appoint "on being paid freight" at the prescribed rate per ton. Second clause was that the freight should be paid "on unloading and right delivery of the cargo, two months after the vessel's inward report at the custom house." Conclusion of the court was that the two clauses of the charter party must be construed together, but they

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held that the freight was not payable until two months after the inward report, and that the shipowner had not any lien on the cargo for the freight, because the delivery of the goods was required to precede the payment of the charter money.

Terms of the charter party in the case of *Foster v. Colby*, [[Footnote 9](#)] were substantially the same so far as respects the principal question in this case. Freight was payable in that charter party in three installments, but the terms of the first two payments are unimportant. Material clause reads as follows, to-wit:

"The remainder in cash, two months from the vessel's report inwards, and after right delivery of the cargo, or under discount at five percent per annum, at freighter's option."

Held that the charter party did not create any lien in respect of that part of the freight which was payable two months after the vessel's inward report, although the charter party contained the stipulation that the owners of the ship should "have an absolute lien on the cargo for all freight, dead freight, and demurrage." Latter clause was intended, as the court held, not to enlarge the right of lien for freight, as generally understood, but to include dead freight and demurrage within the operation of the general provision.

7. Words of the charter party in this case are that the third installment shall be paid by

"bill, at three months from date of delivery at charterer's office in Liverpool of the certificate of the right delivery of the cargo agreeably to the bills of lading."

Giving the usual meaning to language, it is plain that the intent of the parties was that the delivery of the goods should precede the payment of the freight, and it is equally clear that the delivery was to be without qualification and unconditional. Certificate of right delivery of the cargo could not be obtained until the vessel was discharged and the cargo delivered, and, if forwarded by the next steamer, a month would elapse before it could be delivered at charterer's office in Liverpool, which would

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extend the credit to four months from the delivery of the cargo.

8. Appellants contend that inasmuch as the charterer failed in business and became a bankrupt before the vessel arrived at the port of discharge, the case is taken out of the operation of those rules of law even in respect to the last installment. Basis of this argument is a supposed analogy between the shipowner as against the shipper, and the vendor of merchandise as against the vendee, as exemplified in the law of stoppage *in transitu*, but it is not perceived that any such relation exists between the shipowner and the charterer or that there is any foundation whatever for the argument. Intention of the parties in the contract of affreightment, as in other commercial contracts, must be ascertained from the language employed, the subject matter, and the surrounding circumstances, and it is clear that the question of construction cannot be affected in the smallest degree by the subsequent solvency or insolvency of one of the contracting parties. Credit was given in this case to the charterer for the payment of the last installment of the freight of four months from the time when the goods were required by the terms of the instrument to be delivered to the consignee at the port of discharge, and it is too plain for argument that the subsequent insolvency of the charterer can neither

erase that clause from the charter party or shorten the term of the credit. [[Footnote 10](#)]

Insolvency of shipper occurring while the goods are in transit or before they are delivered will not absolve the carrier from his agreement as made nor authorize him to retain the goods until the freight is paid unless the lien exists independently of that occurrence. [[Footnote 11](#)]

9. Claim of the appellants also is that the ship in this case had a lien for the second installment of the freight, secured by the charterer's acceptance, made payable in six

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months from date and delivered to the shipowner on the day the ship sailed. Acceptance became due, and the charterer also became a bankrupt before the vessel arrived at the port of discharge, and it is admitted that the acceptance is still held and owned by the shipowner.

Established rule in this Court is that a bill of exchange or promissory note given for a precedent debt does not extinguish the debt or operate as payment of the same unless such was the express agreement of the parties. Agreement of the parties filed in the case and made a part of the record shows that the acceptance was presented to the bankrupt court and that it has never been paid, and it is not pretended that it is of any value. Valueless as the acceptance is, the objection, if made, that it had never been tendered to be cancelled would be a mere technicality, but no such objection is made, and as the parties agree that it has never been negotiated, it must be understood that any such objection is waived. Payment of that installment of the freight therefore is not proved, and there is no evidence in the record tending to show that the lien for that installment of the freight was ever waived. Ship owner under the circumstances has a right to stand upon the original contract and to seek his remedy to that extent of his claim in the form to which it originally belonged as fully as if the acceptance had never been given. [[Footnote 12](#)]

Entire freight under this charter party, except the small advance stipulated to be made at the port of discharge, was to be paid in the port of shipment. Port of shipment was also the port where the ship lay when the contract was made, and the terms of the contract afford the most plenary evidence that the parties regarded the charter money stipulated to be paid at that port as freight in the usual and proper sense in which that word is understood in the maritime law. [[Footnote 13](#)]

10. Suppose, however, a different rule could be applied to

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the sum actually paid or advanced before the vessel sailed. Still that concession, if made, would not affect the question as to the second installment in this case, because that installment was not advanced in money, and has never been paid. Separated from the acceptance, which, under the decisions of this Court, was not payment, it presents the ordinary case of a promise to pay freight and a failure to fulfill the contract, and in this point of view the case is clearly distinguishable from the decision in which it is held that sums stipulated in charter parties to be paid in advance and not dependent on the carrier's contract do not have the incidents of freight, and are not protected by the lien of the shipowner, unless by usage or special contract. [[Footnote 14](#)]

11. Foundation of those decisions is that money advanced as freight cannot be recovered back -- not even in case the ship is lost on the voyage and the freight is never earned -- because, as it is said, payment determines the lien, and anything accepted as an advance, such as a bill of exchange, is the same thing unless there is an express agreement to the contrary. Undoubtedly an actual payment determines the lien to that extent, but it is not correct to say that a bill of exchange has the same effect unless it be so agreed between the parties, and the settled doctrine in this country is that freight paid in advance is not earned unless the voyage is performed, and that the shipper may recover it back if for any fault not imputable to him the contract is not fulfilled. [[Footnote 15](#)]

12. Absence of the clause that the merchandise is bound to the ship cannot affect the question, as that is the presumption of the law merchant, from the relation between the ship and the cargo, independently of any express stipulation, unless the presumption to that effect is negated by the language of the contract. [[Footnote 16](#)] Whenever the owners of the

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ship constitute one party and the owners of the cargo the other, the law of freight applies, and the fundamental rule, says Mr. Parsons, is that the rights of the respective parties are reciprocal, and that each has a lien against the other to enforce those rights, and the better opinion is, that the lien for freight commences as soon as the goods are delivered into the control of the master, or certainly as soon as they are put on board. [[Footnote 17](#)]

Usually the charter party contains a clause binding the ship to the merchandise and the merchandise to the ship, but the law merchant, as already explained, imposes that mutual obligation even if it be omitted. [[Footnote 18](#)]

Decree of the circuit court must be reversed with costs, and the cause remanded for further proceedings in conformity to this opinion. Libellants, upon the payment of the amount of the protested acceptance and interest and costs of suit, will be entitled to a decree that the stipulation given for the return of the goods shall be given up to be cancelled. Otherwise the libel must be dismissed.

Decree reversed with costs.

[[Footnote 1](#)]

[66 U. S. 1](#) Black 113.

[[Footnote 2](#)]

Mordecai v. Lindsay (The Eddy -- REP.), *supra*, p. <72 U.S. 481|>481.

[[Footnote 3](#)]

Certain Logs of Mahogany, 2 Sumner 600.

[[Footnote 4](#)]

The Kimball, 3 Wall. 42; *Raymond v. Tyson*, 17 How. 59.

[[Footnote 5](#)]

Philips v. Rodie, 15 East 554.

[[Footnote 6](#)]

Lucas v. Nockells, 4 Bingham 731; *Chase v. Westmore*, 5 Maule & Selwyn 180; *Tate v. Meek*, 8 Taunton 280; *Horncastle v. Farran*, 3 Barnewall & Alderson 497; *Small v. Moaltes*, 9 Bingham 588.

[[Footnote 7](#)]

Crawshay v. Homfray, 4 Barnewall & Alderson 50; *Pinney v. Wells*, 10 Conn. 104; *Howard v. Macondray*, 7 Gray 516; *Wilson v. Kymer*, 1 Maule & Selwyn 157; *Neish v. Graham*, 8 Ellis & Blackburne 510; *Campion v. Colvin*, 3 Bingham N.C. 26.

[[Footnote 8](#)]

14 Meeson & Welsby 798.

[[Footnote 9](#)]

3 Hurlstone & Norman 715.

[[Footnote 10](#)]

Alsager v. Dock Co., 14 Meeson & Welsby 798; *Tamvaco v. Simpson*, 1 Law Rep.C.P. 371; *Same Case*, 19 Common Bench N.S. 478.

[[Footnote 11](#)]

Crawshay v. Homfray, 4 Barnewall & Alderson 50; *Chandler v. Belden*, 18 Johnson 157; *Fieldings v. Mills*, 2 Bosworth 498.

[[Footnote 12](#)]

[Steamer St. Lawrence](#), 1 Black 533; [The Kimball](#), 3 Wall. 45; *The Active*, Olcott Admr. 206; *Bark Chusan*, 2 Story 457.

[[Footnote 13](#)]

Gilkison v. Middleton, 2 Common Bench N.S. 152; *Neish v. Graham*, 8 Ellis & Blackburne 610; [Gracie v. Palmer](#), 8 Wheat. 605.

[[Footnote 14](#)]

How v. Kirchner, 11 Moore's Privy Council 21; *Kirchner v. Venus*, 12 *id.* 384; Maclachlan on Shipping 383.

[[Footnote 15](#)]

[The Kimball](#), 3 Wall. 44; *Benner v. Insurance Company*, 6 Allen 222; *Chase v. Insurance Company*, 9 *id.* 313; *Watson v. Duykinck*, 3 Johnson 335; *Griggs v. Austin*, 3 Pickering 20; 3 Kent Com. (11th ed) 304; *Pitman v. Hooper*, 3 Sumner 66.

[[Footnote 16](#)]

1 Parsons M.L. 124, 253.

[[Footnote 17](#)]

Parsons on Contracts (5th ed) 286; Abbott on Shipping 462; *Fragano v. Long*, 4 Barnewall and Creswell 219; *Cooke v. Wilson*, 1 Common Bench N.S. 153; Maclachlan on Shipping 353; *Tindall v. Taylor*, 4 Ellis & Blackburn 219; S.C., 28 English Law & Equity 210.

[[Footnote 18](#)]

Brig Casco, Davies 184; 2 Parsons on Contracts 303; 2 Parsons' M.L. 561.

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