Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Turner and Another v. *Haji Goolam Mahomed Azam, from the High Court of Judicature, Bombay; delivered the 22nd June* 1904.

Present at the Hearing:

LORD MACNAGHTEN.
LORD LINDLEY.
SIR ARTHUR WILSON.

[*Delivered by Lord Lindley.*]

The question raised by this Appeal is whether the Appellants, who are shipowners, are entitled to a lien for freight payable under a time charter on the goods of the Respondent who was no party to that charter, but whose goods were carried in the Appellants' ship under a sub-charter and bill of lading. The Judge of First Instance decided this question in favour of the Appellants. His decision was reversed by the Court of Appeal in Bombay, and the present Appeal is from the decision of that Court.

The undisputed facts are as follows:—

The Appellant Glanville was the registered owner of the steamship "Bombay," and the Appellant Turner was her Captain. By a charter dated the 20th August 1898, and entered into by the agents of the owners and some Bombay merchants named Issabhoy Thaver & Co., the owners agreed to let and the charterers agreed to hire the ship for six calendar months. She

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was placed at their disposal with a full complement of officers and men at Bombay for employment in the Indian Ocean and other Eastern waters as the charterers or their agents should direct, on certain conditions of which the following are important:—(2) The owners were to pay the Captain and crew. (4) The charterers were to pay freight monthly in advance at the rate of 7*s.* 6*d.* per ton, which came to Rs. 18,000. (8) In default of such payment the owners were entitled to withdraw the steamer from the service of the charterers without prejudice to any claim the owners might otherwise have against them. (14) The Captain, although appointed by the owners, was to be under the orders and directions of the charterers as regards employment, agency, or other arrangements. Bills of lading were to be signed at any rate of freight the charterers or their agents might direct without prejudice to that charter, and the captain was to attend daily, if required, at their offices to do so. The charterers were to indemnify the owners from all consequences or liabilities that might arise from the captain doing so except for short delivery. (21) The charterers were to have the option of sub-letting the steamer. (22) The owners were to have a lien upon all cargoes for freight or charter money due under the charter, and the charterers were to have a lien on the ship for all moneys paid in advance and not earned.

The 14th, 21st and 22nd conditions are those which have given rise to the controversy between the parties; but, before considering them, it will be convenient to state what was done, and, for the purpose of avoiding confusion, the charterers under this charter will be referred to as the "time charterers" in order to distinguish them from the Respondent, who is their sub-charterer.

Shortly after the time charter was made the ship was sub-chartered to the Respondent for a round voyage from Saigon to Réunion and back from Mauritius to Bombay. She was to take rice from Saigon to Réunion and sugar from Mauritius to Bombay. Freight was to be payable for the whole voyage at the rate Rs. 1. 8 per bag of 168 lbs., calculated only on the cargo, shipped from Saigon to Réunion. There was to be no freight payable by the sub-charterer to the Time Charterer for any other cargo. On account of the freight thus estimated, Rs. 37,500 were to be paid at Bombay before the steamer sailed from Saigon, Rs. 25,000 at Réunion or Mauritius, and the balance was to be paid at Bombay after delivery of the cargo there.

It will be observed that neither of these documents took the ship out of the legal possession of the owners so as to deprive them of the power of detaining goods on board, and of enforcing any lien to which they might be entitled. The Captain retained possession for the owners, and was in a position to enforce the lien expressly conferred by the time charter if it was properly enforceable against the goods in question.

The steamer completed this voyage, and on the 2nd February 1899 she arrived at Bombay, having on board a quantity of sugar put on board by the sub-charterer at Mauritius, and for which he had received bills of lading from the captain. The freight payable by these bills of lading was at the rate of 6 annas per 75 kilograms, and this freight was prepaid by the sub-charterer in Mauritius, so that when the ship arrived in Bombay nothing remained to be paid by the sub-charterer to the owners in respect of the bill of lading freight. It appears, however, that something was due from the

sub-charterer to the time charterers for money payable under the sub-charter.

There was also due to the owners a month's freight, *i.e.* Rs. 18,000 (1,197*l.*) from the time charterers under the time charter, and the owners claimed a lien for this amount on the sub-charterer's sugar. Hence the dispute between the parties. The sub-charterer brought an action to recover his sugar, or its value, and damages for its detention, and the shipowners defended the action relying on their lien.

So far there is no dispute about the facts. The shipowners, however, also defended the action upon the ground of misrepresentation alleged to have been made by the sub-charterer to the Captain before the sugar was shipped, and on the faith of which he is said to have signed the bills of lading.

This alleged misrepresentation was denied and a considerable amount of evidence upon it was adduced. The Judge of First Instance thought the defence proved. But the Court of Appeal took a different view. The evidence has again been laid before their Lordships and they have carefully considered it. It appears that the sub-charterer had paid to the agents of the shipowners some of the freight payable in advance under the time charter, and there was undoubtedly some misunderstanding on the part of the Captain as to similar payments being made in future. But their Lordships are not satisfied that the sub-charterer made any false statement to the owners' agents or to the Captain, nor any representation or promise which could confer on the owners any lien on the sub-charterer's goods other than such as the documents above referred to entitle them to assert.

Their Lordships, however, agree with both Courts in India in their conclusion that the

sub-charterer knew, in a general way, of the time charter, and that the freight payable under it by the time charterers was Rs. 18,000, payable monthly in advance.

Bearing these conclusions in mind, their Lordships will consider the legal position of the parties.

The first question which arises is the effect of the bills of lading. Apart from them there was no contract between the shipowners and the sub-charterer. But he shipped his sugar on board the steamer on the terms of those bills of lading, and the Captain was authorised by the time charter to sign them. Whether he signed them for the shipowners or for the sub-charterer he had express authority from the shipowners to sign them. Under these circumstances the shipowners appear to their Lordships to have contracted with the sub-charterer that his sugar should be carried to Bombay in that ship on the terms of the bills of lading. This distinguishes the present case from *Colvin* v. *Newberry* (1 Cl. and Fin. 283), where the bill of lading given by the Captain of a chartered ship was held to bind the charterer only, although the shipowners retained possession of the ship by the Captain. Nor is the present case governed by *Small* v. *Moates* (9 Bing. 574) and others of that class, where the holder of the bill of lading had no better title than the charterer who was himself the Captain of the ship and the original shipper of the goods.

It further appears to their Lordships that the bills of lading in this case are not mere receipts for goods given to a charterer already bound to the shipowner by a charter party entered into between them and which the Captain had no authority to depart from.

Unless, therefore, the fact that the sub-charterer had notice of the time charter makes

a difference, the bills of lading entitled him to have his goods delivered to him on payment of the bills of lading freight. This was decided in *Fry* v. *The Chartered Mercantile Bank of India* (L.R.,1 C.P. 689), which was followed in *Gardner* v. *Trechmann* (L.R., 15 Q.B.D. 154). In both of these cases the bill of lading expressly referred to the charter party, but not in such a way as to incorporate either the obligation to pay the charter freight or the lien for it.

These cases, and others like them, show that notice by a shipper of a charter party has not the effect of incorporating into the bill of lading any terms which are inconsistent with it and which the Captain was not bound to embody in the bill of lading. If the charter party shows that the Captain exceeded his authority in signing the bill of lading, and the shipper knew this, he cannot enforce the terms of the bill of lading uncontrolled by the charter party. If the shipper knew that there was a charter party, and had an opportunity of reading it, and did not trouble himself about it, he might be treated as knowing its contents. In the present case the time charterer had authority to let other persons have the use of the ship for six months for any voyage in the waters mentioned in the time charter. The Captain was not only empowered to sign but was bound to sign bills of lading at any rate of freight which the charterers or their agents might direct, but without prejudice to that charter. These words introduce a difficulty. It is said that they limit the authority of the Captain to sign bills of lading which do not preserve to the owners the power to withdraw the ship under Condition 8 of the time charter and their lien on all goods under Condition 22. This construction is a possible construction, but it has long ago been rejected both by commercial men and by judicial decision.

There can be no doubt that the sub-charterer must, for this purpose, be regarded as an agent of the charterer. The words "without prejudice "to this charter" mean that the rights of the shipowners against the time charterers, and *vice versâ*, are to be preserved. That this is the true meaning and legal effect of the words "without "prejudice to this charter" has often been the subject of controversy and of judicial decision, and has long been treated as settled by authority. In *Hansen* v. *Harrold Brothers* (L.R. 1894, 1 Q.B. 612), Lord Esher said its meaning was "that it is a term of the contract between the "charterers and the shipowners that, notwith-"standing any engagements made by the bills "of lading, that contract shall remain unaltered." It means no more. Condition 8 in the time charter, empowering the owners to withdraw the ship cannot mean that, after the Captain has shipped goods for Bombay and given bills of lading for them to persons other than the time charterers, the owners can refuse to allow the ship to go to Bombay and deliver the goods there as agreed by the bills of lading. So as regards Condition 22 giving a lien upon all cargoes for freight or charter money due under that charter. This is a stipulation binding on the time charterer, and gives the shipowner a more extensive lien than he would have for freight payable in advance. But this clause does not override or limit the power of the Captain to issue bills of lading at different rates of freight, or entitle the shipowners to a lien on the goods of persons who have come under no contract with them conferring a lien for the freight payable under the time charter. A right to seize one person's goods for another person's debt must be clearly and distinctly conferred before a Court of Justice can be expected to recognize it.

If their Lordships had taken a different view of the legal effect of the bills of lading there might have been more difficulty in the case, for there is great force in Mr. Carver's argument that, if the bills of lading were mere receipts for goods put on board, the sub-charterer could have had no greater rights than those which the time charterers had themselves. It is not, however, necessary to solve the difficulties which would have arisen if there had been no bills of lading. For the reasons above stated, their Lordships are of opinion that the claim of the shipowners cannot be supported and that the Order appealed from ought to be affirmed.

Their Lordships observe that the Court of Appeal gave the shipowners the benefit of any lien which the time charterers had on the goods of the sub-charterer. This seems right and the sub-charterer's Counsel did not contend that it was not.

Their Lordships will therefore humbly advise His Majesty to dismiss the Appeal and the Appellants must pay the costs.