A COMPARATIVE STUDY OF THE SHIPOWNER'S LIEN FOR FREIGHT.

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(LL.M)

by

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DEDICATION

To the memory of my grand father who gave his life for a better future for generations to come.

ABSTRACT

The shipping business is an important element for the life of the trade of the different countries of the world. It had a very important role in the past it still has and it will always have, as it is the cheapest means of transportation of goods. However, despite the importance of this element the legal complexities born out of this business makes it a broad subject of study and research for the lawyers. This is because of the different documents used for the execution of the contract of transport by sea and because of the speed these deals are concluded and the different nationalities of the parties to the contract.

Thus, the carriage of goods by sea involves two types of documents, namely the charterparty and the bill of lading. The charterparty will hold a great deal of our intention as the it is the document which gives the shipowner a security or guarantee for the payment of the remuneration due to him, which is called freight. However, this guarantee in the form of a lien is subject to differences, as the nature of this lien is not very clear. Therefore, this work will focus on the nature of the shipowner's lien for the guarantee of payment of his freight, as the nature of this lien is different from one charterparty to another. In the case of a voyage or time charterparty, the nature of this lien is considered to be a possessory lien as the ship and therefore, the cargo are in the possession of the shipowner. However, the situation is different in the case of a demise charterparty, where the control of the ship and the cargo is in the possession of the charterer. In this case, the nature of the shipowner's lien is not possessory, because he has not any possession, whether of the ship or the cargo. Therefore, it is very difficult if not impossible for him to exercise his lien.

This study will be divided in two parts, the first part will focus on the various kinds of liens and defining possession and then the different possessory liens because the shipowner's lien is considered to be a possessory lien, and in

what category this lien is.

Then, in the second part , the nature of the shipowner's lien on the cargo for the guarantee of payment of his freight will focus at along with the charterer's lien on the vessel for all the moneys pad and not earned, and that is because the clause of the charterparty which gives the shipowner a lien for his freight, gives the charterer a lien for the money he paid and which has not been earned. moreover, this work will also deal with the shipowner's lien on sub-freight, sub-sub-freight and against the bill of lading holders. Finally, the exercise and the termination of the shipowner's lien on the cargo will be considered in the last chapter of the second part.

CONTENT

PAGE

ABBREVIATIONS

A.C.:	Appeal Cases.
All.E.R.:	All England Law Reports
App.Cas.:	Appeal Cases.
Asp.M.L.C.:	Aspinall's Maritime Cases.
Atk.:	Atkinson"s Quarter Sessions Records, Yorkshire.
	Atkyn's Chancery Reports.
Atkyns.:	Atkyns's Chancery Reports.
B. & Ad.:	Barnewall & Adolphus' King's Bench Reports.
B. & Ald.:	Barnewall & Alderson's King's Bench Reports.
B. & B.:	Ball & Beatty's Chancery Reports.
B. & P.:	Bosanquet & puller's Reports.
B. & S.:	Best & Smith's Queen's Bench Reports.
Bing (N.C.):	Bingham, New Cases, English Common PLeas.
Bing.:	Bingham's Common Pleas Reports.
	Borderip & Bingham's Common Pleas Reports
Bos. & Pul.:	Bosanquet & Puller's Common Pleas Reports.
Br. & B.:	Borderip & Bngham's Common Pleas.
Br. & L.:	Browning & Lushington's Admiralty Reports.
Bull.Civ.:	Bulletin des arrêts de la Chambre Civile de la Cour de Cassation (Fr.)
C. & J.:	Crompton & Jervis's Exchequer Reports.
C. & M.:	Carrington & Marshman's Nisi Prius Reports.
C. & P.:	Carrington & Payne's Nisi Prius Reports.
C.A.:	Court of Appeal.
C.B.(N.S.):	Common Bench Reports by Manning, Granger & Scott, New Series.

C.B.:	Common Bench Reports by Manning, Granger & Scott.
C.O.A.:	Contract Of Affreightment.
C.O.G.S.A.:	Carriage Of Goods by Sea Act.
C.P.D.:	Law Reports, Common Pleas Division.
Camp.:	Camp's Reports.
Car. & M.:	Carrington & Marshman's Nisi Prius Reports.
Car. & M.:	Carrington & Marshman's Nisi Prius Reports.
Ch.:	Law Reports, Chancery.
Cl. & F.:	Clark & Finnelly's House of Lords Cases.
Civ.:	Arrêt de la Chambre Civile de la Cour de Cassation (Fr.) Decision of the Cour de Cassation, civil division.
Cl.&.Fin.:	Clark & Finnelly's House of Lords Cases.
Com.Cas.:	Commercial Cases.
	Craig & Phillips' Chancery Reports.
Crim.:	Arrêt de la chambre criminelle de la Cour de Cassation (Fr.) Decision of the Criminal division of the Cour de Cassation.
Cro.Car.:	Croke's King Bench Reports Tempore Charles I
	Crompton & Meeson's Exchequer Reports.
D.S.:	De Gex & Smale's Chancery Reports.
Dears.C.C.:	Dearsley's Crown Cases Reversed.
E. & B.:	Ellis & Blackburn's Queen's Bench Reports.
E.R.:	East's Term Reports, King's bench.
East.:	East's Term Reports, King's Bench.
	English Reports.
Esp.:	Espinasse's Nisi Prius Reports.

Ex.D.:	Law Reports, Exchequer Division.
F. & F.:	Foster & Finlason's Nisi Prius Reports.
F. & F.:	Foster & Finlason's Nisi Prius Reports.
F.Cas.:	Federal Cases.
Fed.Rep.:	Federal Reporter (USA).
Gale.:	Gale's Exchequer Reports.
Gaz.Pal.:	La Gazette du Palais (Fr.)
H.Bl.:	H. Blackstone's Common Pleas Reports.
H.L.C.:	Clark's House of Lords Cases.
H.L.C.:	Clark's House of Lords Cases.
H.L.Cas.:	Clark's House of Lords Cases.
Hagg.Adm.:	Haggard's Admiralty Reports.
J. & H.:	Johnson & Hemming's Vice Chancellors' Reports.
J.C.P.:	Jurisclasseur Periodique (La Semaine Juridique) (Fr.)
John. & H.:	Johnson & Hemming's Chancery Reports.
John.:	Johnson's Chancery Reports.
Jur.:	Jurist Reports.
	Justice of Common Pleas.
K.B.:	King's Bench.
L.J.C.P.:	Law Journal Reports, New Series, Common Pleas.
L.J.Ch.:	Law Journal Reports, Chancery, New Series.
L.J.K.B.:	Law Journal Reports New Series, King's Bench.
L.J.P.C.:	Law Journal Reports, New Series, Privy Council.
L.J.Q.B.:	Law Journal Reports, New Series, Queen's Bench.
L.R.A. & E.:	Law Reports, Admiralty & Ecclesiastical Cases.
L.R.P.C.:	Law Reports, Privy Council.
L.R.Q.B.:	Law Reports, Queen's Bench.
L.T.:	Law Times Reports.

L.T.R.:	Law Times Reports.
	Law Reports, Probate, Divorce & Admiralty Division.
Ld.Ray.:	Lord Raymond's King's Bench Reports.
Ld.Raym.:	Lord Raymond's KIng's Bench Reports.
Ld.Raym.:	Lord Raymond's King's Bench Reports.
Ll.L.R.:	Lloyd's List Law Reports.
Ll.L.Rep.:	Lloyd's List Law Reports.
Ll.Rep.:	Lloyd's Law Reports.
Lloyd's Rep.:	Lloyd's Reports.
Lush.:	Lushington's Admiralty Reports.
M'Clel. & Y.:	M'Cleland & Younge's Exchequer Reports.
M. & P.:	Moore & Payne's Common Pleas Reports.
M. & S.:	Manning & Scott's Common Bench Reports.
M. & W.:	Meeson & Welsby's Exchequer Reports.
Man. & G.:	Manning & Granger's Common Pleas Reports.
Mc.Clell. & Y.:	McClelland & Younge's Exchequer Reports.
Mer.:	Merivale's Chancery Reports.
Mod.:	Modern Reports.
Moo.P.C.:	Moore's Privy Council Cases.
	Moore & Scott's Common Pleas Reports.
Moore.P.C.N.S.:	Moore's Privy Council Cases, New Series.
P.:	Court of Probate.
P.C.A.:	Acts of the Privy Council.
P.D.:	Law Reports, Probate, Divorce and Admiralty Division.
Q.B.:	Law Reports, Queen's Bench.
Q.B.D.:	Law Reports Queen's Bench Division.

R.M.:	Rechtsgeleerd Magazijn (Neth.)
R.R.:	Revised Reports.
Rep.Eq.:	Gilbert's Equity Reports.
Req.:	La Chambre des requêtes de la Cour de Cassation (Fr.) Chamber of Requests of the Cour de Cassation.
Rev.Trim.:	Revue Trimestrielle (de droit commercial) or (droit civil) (Fr.)
Rose.:	Rose's Bankruptcy Reports.
Russ. & M.:	Russell & Mylne's Chancery Reports.
S.C.:	Session Cases (Scot)
S.C.:	Supreme Court.
S.L.T.:	Sctos Law Times (Scot.)
Sc(H.L.):	Session Cases, House of Lords (Scot.)
Sch. & Lef.:	Schoales & Lefroy's Irish Chancery Reports.
	Sctos Law Times Reports.
	Session Cases (Scot.)
Stark.:	Starkie's Nisi Prius Reports.
Strange.:	Strange's King's Bench Reports.
	Style's King's Bench Reports.
	Supreme Court.
T.L.R.:	Times Law Reports.
T.R.:	Caines' Term Reports.
Taunt.:	Taunton's Common Pleas Reports.
Term.Rep.:	Dunford & East's Term Reports.
Trib.Com.:	Tribunal de Commerce (Fr.) Commercial Court.
W.L.R.:	Weekly Law Reports.
Wheat.:	Wheaton's Supreme Court Reports.

INTRODUCTION

The law relating to the contract of affreightment is perhaps one of the most difficult subjects in the province of shipping law.[1] The difficulties arise in the first place from the use of two entirely different forms of contract, i.e., the charterparty and the bill of lading. The use of these two forms of contracts may give rise to a certain number of liens which are the subject or the aim of this study.

Thus, the express terms of the charterparty give to the shipowner a lien on the cargo for the guarantee of payment of freight due to him for the hire of the vessel or for the services rendered to the cargo. Usually, charterparties give a lien to the shipowners on the cargo for the payment of freight. For instance, The "Baltime 1939" Uniform Time Charter reads in clause 18, that: "The Owners to have a lien upon all cargoes and sub-freights belonging to the Time-Charterers and any bill of lading freight for all claims under this charter, ..." and the "Gencon" charter (as revised 1922 and 1976) provides in clause 8 that: "Owners shall have a lien on the cargo for freight, dead freight, demurrage and damages for detention. Charterers shall remain responsible for dead freight and demurrage (including damages for detention), incurred at the port of loading. Charterers shall also remain responsible for freight and demurrage, (including damages for detention), incurred at the port of discharge, but only to such extent as the Owners have been unable to obtain payment thereof by exercising the lien on the cargo", and lastly, the New York Produce Exchange form (NYPE) which provides in clause 18, that: "The Owners shall have a lien upon all cargoes and upon all sub-freight, for any amounts due to them under this charter; ...". Thus, all the different forms of charterparties gives the shipowners a lien upon all cargoes and sub-freights for all amounts due to them under the charterparty, i.e.,

1 Chorley & giles'. Shipping Law. 8 th Edition. at P. 165.

for the carriage of the goods to their destination under the terms of the charter. The French and the Algerian jurisdiction provide the shipowner with a lien on cargo for the payment of his freight or hire. Therefore, the French Code of Commerce provides in article 1, section 2, that:[2] "The shipowner has a lien upon all cargoes for the payment of his freight.",[3] and the Algerian Maritime Code,[4] provides in article 645 that: "The shipowner has a lien upon all cargoes for payment of his freight and other charges provided by the charterparty."[5] However, one might notice that the French Code of Commerce and the Algerian Maritime Code prescribe the same lien or right of priority or what is called in french "le privilége", and they give the same definition in their articles and this similar to the lien provided in the different forms of charterparty. However, some questions will arise concerning that lien, which is given to the shipowner upon the cargo of the charterer and upon the sub-freight which might be earned by the charterer.

Therefore, what is the nature of that lien? and how can it be performed or exercised? either against the charterer for the freight or hire or, against the sub-charterer for sub-freight. This is the most important point of this work.

The first question which arises is that of what is the nature of the owners' lien on cargo of the charterers? because the case is different from one form of charterparty to another. In a voyage or a time charterparty, the owners keep the vessel in their possession and all what the charterers have, is a space in the ship for their goods to be carried. Therefore, it seems clear that in a time charter or voyage charter or a bill of lading, this a contractual creation of a possessory

2 Loi No. 66-420 du 18 Juin 1966, sur les Contrats d'Affretement et de Transport Maritimes.

3 " My Own Translation ". The actual article 1/2 provides in french that: <<Le fréteur a un privilége sur les marchandises pour le paiement de son frét.>>

4 Ordonnance No. 76-80 du 23 Octobre 1976, portant Code Maritime.

5 " My Own Translation ". The actual article 645 in french provides that: <<Le fréteur a un privilége sur les marchandises pour le paiement de son frét et autres charges prévues au contrat d'affrétement.>>

lien on the goods, and that is because the cargo goes out of the charterers' possession and goes into the shipowners' possession. However, the situation would be different in the case of a demise charterparty, where the control and possession of the vessel are to pass from the shipowner to the charterer and is because of the nature of this kind of charter, and this kind of charterparty is a kind of lease of the vessel. Here, because the shipowner does not have possession of the vessel, and therefore, of the cargo, it is difficult to escape the conclusion that, if anything, it would be an equitable lien,[6] and not a possessory lien. This is because, the charterers have the possession and control of the ship, i.e., the cargo is under their control, in this way, the shipowner cannot exercise his lien on the cargo because, they have no power to prevent the charterers from delivering the cargo to the consignees.

The second question is how can the owners exercise their lien on sub-freights? where the charterers sub-charter the vessel to another charterer. Here, the charterparty was originally between the shipowner and the charterer and the second charterparty was between the first charterer and the second charterer or what is known as sub-charterer. Thus, the sub-charterer has not made any contractual agreement with the shipowner, and his contract or agreement was only with the first charterer, in this way, one can say that the sub-charterer cannot be bound towards the owner for payment of freight because of the lack of any agreement between them. On the other hand, the different forms of charterparty, give to the shipowners a lien on the sub-freight which the charterer might earn from his sub-chartering of the vessel. Here, the question is, what is the nature of this lien and how can it be exercised or performed?. From this, might arise another problem as to the lien on sub-sub-freight, as it happened in the case of The "Cebu",[7] where by a time charterparty in the New York Produce Exchange form, the shipowners' vessel was chartered to charterers, sub-chartered to sub-charterers and sub-sub-

6 Jackson. David, C., Enforcement of Maratime Claims. at P.

7 The "CEBU", [1983] Q.B. 1005.

chartered to sub-sub-charterers. Clause 18 of the charterparty provided that: "The Owners shall have a lien upon all cargoes, and all sub-freights for any amount due under this charter." After a dispute arose between the owners and the charterers regarding the hire payable, it was held that the owners had a lien over the hire payments by the sub-sub-charterers. This may give rise to difficulties, because the second charterparty was made between the second charterer, i.e., the sub-charterer and the sub-sub-charterer and neither the charterers nor the shipowners were part of it. So, what is the nature of the shipowners' lien in this case, and how can it be exercised?.

The charterers when they charter a vessel, they may have some space left in the vessel for additional cargoes, and some shippers might have a small quantity of cargo for shipment. So, these shippers do not need to charter a whole vessel for their small shipment, and therefore, they will ship their goods on the vessel under a bill of lading and they will pay freight to the charterers. So, their agreement or contract was made with the charterers and not with the owners. But, the shipowners might exercise their lien on the bill of lading freight.[8] So, because the shipper under the bill of lading is not concerned with the charterparty, how can the shipowners have a lien on what is due from the bill of lading holder to the charterers, i.e., how can this lien be defined, what is its' nature and how can the shipowners exercise it?

The charterparty gives liens to the shipowners on the cargo and sub-freight for the guarantee of payment of their freight, but in the same time it gives the charterers, liens on the vessel in the case of moneys paid in advance and not earned. Therefore, the (NYPE) charter form provides in clause 18, that: " ... Charterers to have a lien on the ship for all moneys paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once ...", and clause 18 of the Baltime Uniform Time charter reads: " ... and the charterers to have a lien on the vessel for for all money paid in advance and not earned."

8 See, The "CONSTANZA M", [1980] 1 Lloyd's Rep. 505.

However, the same problem which arose for the shipowner seems to arise here again with the charterers liens, because in the case of a voyage or time charterparty, the charterer is not in possession of the vessel, the vessel in this situation remains in the possession and under the control of the shipowner. Therefore, what is the nature of the charterers' lien on the ship? And how can they exercise it? On the other hand, in the case of a demise charterparty, because of the nature of this charter, the charterers have possession of the ship, and are even in charge of the control of the ship including its' master and crew, and therefore, they are in such a position as to be able to perform their lien on the vessel. Thus, in the context of a time or voyage charterparty, the charterers are not in possession, and their lien cannot be a possessory lien.

In The "Lancaster",[9] it was argued that in respect of a time charter, the lien was an equitable lien (charge) in the true sense that it gave the charterer the right to enforce it against rival claimants to the ship and, in that case, to insurance moneys representing the ship. Robert Goff. J., held that, the "lien", although not a possessory lien, had a similar effect. It conferred "On time charterers the right to postpone delivery of the ship to the owners" and not more. On the other hand, in the case of a demise charter it follows that the lien is a "true" possessory lien.

Because this work deals with liens of the shipowners for the guarantee of payment of their freight, either on the cargo under the charterparty or, on the sub-freight or, on bill of lading freight, therefore, it seems more appropriate to give a brief account about liens, charterparties and bills of lading. So, this work will first deal in this introduction with the definition and nature of lien, and then the definition of the charterparty and bill of lading and lastly with the relation between the charterparty and the bill of lading.

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9 The "LANCASTER", [1980] 2 Lloyd's Rep. 497.

1- Definition of Lien and its Nature:

The Word "Lien":

Before endeavoring to define "lien", it is interesting to consider the derivation of the word itself. It is of comparatively recent origin. The right of the lien existed in very early times, certainly as early as the reign of Edward IV, under the name of a right of retainer, but the right was not called that of "lien" until about the early part of the eighteenth century. The word is derived directly from the French "lien", and further back from the Latin "Ligamen", which signifies "a tie" or "something binding". As it will be seen, the right in its fullest and widest application, means a charge upon property, that is to say, something which is binding upon it.[10] Moreover, the term lien is frequently used in Scots law for one of the varieties of retention.[11]

Definition of "Lien":

Many attempts have been made to define satisfactorily the word "lien". Some have defined the term "lien" as, "the right of a person to retain another person's goods which are in his possession until certain conditions are fulfilled."[12] Some others have defined it as, "a form of real security, normally arising by operation of law ... and not by agreement for its creation, giving the party entitled to it, some right against property of the other party, to enable the former to make good some claim against the latter which may or may not be associated with that property."[13] Another author defined the term "lien" as, "the right to hold property against the satisfaction of a claim."[14] Thus, these definitions of the word "lien" seem to focus on the same point which is a kind of

10 [1980] 2 Lloyd's Rep. 497.

11 Walker. David. M. The Oxford Companion of Law. 1980. at P. 770.

12 Foster. Stephen. Business Law Terms. 1988. at P. 60.

13 Hudson. A. H. Dictionary of Commercial Law. 1983. at P. 166.

14 Stevens. Edward. F. Shipping Practice. at P. 56.

a claim, charge or security on the property until certain charges or demands have been satisfied. One of the earliest definitions is that laid down by Grose, J., in Hammonds v. Barclay,[15] in 1801, namely that the term "lien" means:

> "The right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied."

This definition has been adopted by Mr. Joshma Williams Q.C., in his "Law Of Personal Property".[16] Perhaps the widest, and most satisfactory definition, is that adopted by Withaker in his "Treatise of the Law of Lien",[17] published in 1812, namely, "Any charge of a payment of debt or duty upon either real or personal property." This is the lien in its most extensive sense. As it will be seen later in this thesis,[18] when the nature of equitable liens is considered, possession is not an essential element in the creation of lien, in the widest application of the term, and the definition is not enough, though satisfactory as the definition of a possessory or common law lien, for the term "lien" is also used to denote rights given by equity and maritime law to creditors to have certain specific property primarily applied to the satisfaction of their demands, irrespective of possession. The definition of Whiteley Stokes, in "Lien of Attorneys and Solicitors",[19] namely, "A right to charge property in another's possession with payment of a debt or the performance of a duty", is also unsatisfactory, as it excludes the most important section of possessory liens, in respect of which the right and the possession are vested in the same person. A lien, therefore, is "any charge of a payment of debt or duty upon either real or personal property." Both the French and the Algerian Civil Code, give a definition to the word "privilége" or

15 2 East, at P. 227.

16 Williams. Joshua. Q.C., Principles of the Law of Personal Property.

17 Whitaker. Richard. A Treatise on the Law Relative to the Right of Lien and Stoppage in Transitu.

18 See, Infra, Chapter One, Section Two, at P. 36.

19 Stokes. Whiteley. A Treatise of Liens of Attornies and Solicitors.

"lien", in article 2095 of the French Civil Code, which provides that: "The privilége or lien is a right which the nature of the claim gives to a creditor to be preferred to other creditors, even mortgagees.",[20] the Algerian Civil Code provides in article 982 that the "lien" or "privilége" is: "The lien or privilége is a right of preference given by the law for the benefit of a debt because of its quality or nature. No debt can be preferred, unless the law makes it as such."[21] One may notice that from reading these two articles that, both the French and the Algerian civil code give quite a similar definition and that is, may be because of the historical reasons of the two countries. Moreover, they both require that the debt must be preferred to the other debts by a text in the law. Moreover, one may notice that there is another common point between them, which is that neither of them require any possession for the existence of the lien.

The Nature and Characteristics of Lien:

When it come to the lien in English law, most of the definitions which have already been mentioned above, have stated that the lien is a claim, charge, right or real security. This claim, charge or right is for the satisfaction of a debt or the performance of a duty and no possession of the indebted property is required for the satisfaction of the claim, unlike what some lawyers required in their definitions of lien and for the satisfaction of this lien.[22] So, no possession is required for the satisfaction of the claim of lien, because there are some liens which do not require the holding of the indebted property or chattel, such as

20 " My Own Translation ". The actual article 2095 in french provides that: <<Le privilége est un droit que la qualité de la créance donne á un créancier d'étre préféré aux autres créanciers, meme hypotécaires.>>

21 " My Own Translation ". The actual article 982 in french provides that: <<Le privelége est un droit de Préférence concédé par la loi au profit d'une créance détérminé en considération de sa qualité - Aucune créance ne peut étre privilégiée qu'en vértue d'un téxte de loi.>>

22 Stevens. Edward. F. Shipping Practice. at P. 56; and the definition by Grose. J., in Hammonds V. Barclay (1801) 2 East, at P. 227.

equitable liens and maritime liens which arise by operation of the law. Moreover, neither the French nor the Algerian Civil Code require possession for the existence of lien. Some other characteristics may arise from the reading of article 2095 of the French civil code and article 982 of the Algerian civil code, these characteristics may be summurised as follows:

1- The "Privilége" or "Lien" is a Right of Priority Given by the Law:

This will lead to the point that the different "priviléges" or "liens" cannot exist unless formally or expressly given by the law, i.e., there is no lien without a text or article (Req. 18 mai 1831, Grands Arréts, No. 192 "French Law").[23] However, that is not the case in all situations, because when it comes to the case of the "privilége" of a pledgee of a thing which was given to him as a pledge (article 2102 / 2 of the French civil code) and (article 948 of the Algerian civil code, concerning the pledge of things). This "privilége" or lien is instituted by the law without any doubt, but it is a result of the will of the part of the agreement before being a "privilége" or a lien given by the law, because the constitution of a pledge is a voluntary act.

2- To Recognise a "Privilége" or a Lien, the Law Considers the Nature or Equity of the Claim or the Debt but not the Person of the Creditor:

When the law gives or creates a lien, it does not give a great importance to the one who is the creditor; but it is more concerned about the nature of the debt. However, this is not an essential characteristic or feature of the lien. Before, the French Decree of the 4 th of January 1955, a group of liens was instituted intuitu personae, these liens are those which were established by special laws for the benefit of the "Trésor Public" (the French Treasury) to insure the payment of their credits. The article 2098 of the French civil code states this

23 Léon Julliot de la Morandiére. Précis Dalloz. Droit Civil. Tome III. 1967. P. 312.

exception, and declares that these liens are regulated by special laws. Moreover, the pledge of chattels in the civil code, is not justified by the nature or quality of the debt; it is that lien of the creditor who is a pledgee of that given given to him for pledge (article 2102 / 2 of the French civil Code) and (article 948 of the Algerian civil code). In fact, a creditor can ask his debtor for a pledge, whatever is the reason of the debt.

3- The Preferred Debts are Paid Before all the Other Debts even the Mortgaged Debts from the Price of the Property Charged with the Debt:

This is the most important effect of the "privilége" or lien, it ensures to the debt a right of performance against the other creditors of the debtor, even mortgagees.

Thus, the lien or "privilége", may be described as a right or claim on an indebted property for the payment of a debt or duty upon a real or personal property and this lien or "privilége", gives to the holder of it a preferred right against the other creditors.

It is well known in the field of shipping law that a transport user will find the way to carry his cargo by the use of a contract of affreightment. This contract of affreightment, is a contract for the carriage of goods in a ship. In practice, such a contract is written and is most frequently expressed either in a bill of lading or in a charterparty.

Contract of Affreightment:

It is well known that a transport user may use different methods when utilising vessels in ocean transportation. He may choose to charter the whole or a part of a vessel for one voyage: this is what is called a voyage charter. When having only a parcel or a limited quantity of cargo he may directly or indirectly, through a forwarding agent, send his goods as general cargo with a liner

operator. If he has large quantities of cargo during a period, he may charter a whole vessel for a certain time, three months, six months or any period agreed: this is what is known as a time charter. Under special circumstances, he may also charter a vessel without a crew and for an agreed time: this is the bareboat charter. Therefore, there are four traditional types of freight or charter contracts.

Characteristics and Definition of the Contract of Affreightment:

The newest type of contract for the carriage of goods by sea is what is called a "contract of affreightment", shortened to "C.O.A.". The name does not tell you what it is about. The special feature is that the contract is not limited to any particular vessel.[24]

Typically, the C.O.A., is recognised as a contract covering a specified, homogeneous cargo; large quantities; long periods; certain ports, and several voyages. None of these features can, however, separately provide a basis for a definition of the C O A .[25] Then what are the characteristics and definition of the contract of affreightment?

One important characteristic is that such a contract is mainly linked to a cargo and an obligation on the owner to transport that cargo, rather than linked to a named vessel. It is thus a generic obligation. However, this characteristic is doubtful. The(C.O.A) may be so specific in its description of the vessel that only one or a few vessels may be used and then the contract is in fact linked to a certain or a few particular vessels. On the other hand, a voyage charterparty may include a very broad substitute clause which gives the owners a more or less unlimited right, and perhaps also an obligation, to choose a vessel for the transportation and to nominate another vessel when the intended one cannot take the cargo. The conclusion is that it is hard to give a precise and clear definition of the (C.O.A), nor is it important to have one. The important thing is

24 Per Gram. Chartering Documents. 1981. at P. 79.

25 Gorton Lars. A Practical Guide to Contracts of Affreightment and Hybrid Contracts. 1986. at P. 3.

that the contract clearly states how different costs, liabilities, risks, etc., are to be shared between the parties. As long as the contract is worded clearly it is thus less important whether it is defined as a (C.O.A) or a voyage or time charterparty or otherwise.[26]

Terminology:

A contract with the characteristics outlined in the above section is often referred to as a "contract of affreightment", a name which does not really say anything about its details.[27] Other terms have been introduced to replace the concept of (C.O.A), such as "Tonnage Contract", "Volume Contract", "Quantity Contract", "Cargo Contract" and "Transport Contract". Some of these concepts are more logical and in any way better describe the fact that the contract of affreightment is closer to the cargo and the obligation to transport than other contracts of carriage which are also connected to a certain vessel. The term contract of affreightment has been chosen to be used, or the short term C O A, and the understanding is that a C O A is a contract having at least some of the features and characteristics described above. The term "contract of carriage" is used to cover all kinds of contract for the carriage of goods by sea (charterparties, bills of lading and contracts of affreightment). So, the contract of affreightment broadly speaking is a contract for the carriage of goods in a ship. In practice, such a contract is written and is most frequently expressed either in a bill of lading or in a charterparty. Thus, both the bill of lading and charterparty will be explained in more details next.

The Charterparty:

Most of the definitions about the charterparty seem to focus on the same point, which is the hire of a ship for the carriage of goods by sea. Thus, some have defined the charterparty as an arrangement by which the owner of a ship

26 Ibid.

27 Ibid.

either lets his ship to a person, known as the charterer, for the purpose of carrying a cargo or undertakes that his ship shall carry a cargo for the charterer. If the ship is let, the charterer becomes, for the time being, the owner of the ship.[28] Some others have defined the charterparty as, a contract by which an entire ship or some principal part of it is let by her owner to a charterer.[29]

The word "charterparty" derives from, carta partita (derived document) which refers to the ancient practice of writing out the terms of the contract in duplicate on one piece of parchment and then dividing it down the middle along an indented line as a primitive protection against forgery -carta partita-, thus providing each party with a copy. It is therefore, not surprising to observe that to this day, despite the absence of a rule requiring the written form,[30] most negotiations by telephone or telex will eventually lead to the formal drawing up of a written charterparty, with standard terms. Whether or not the parties can be said to be contractually bound before they sign the charterparty, will depend in large part on the intentions of the parties and the circumstances of the case.[31] The actual terms of the contract contained in a charterparty are very varied and complicated, and some of them, though naturally couched in different language, are common to most charterparties. Others depend very much on the type of trade on which the vessel is engaged. Charterparties are usually made on common forms known by code names, e.g., "Gencon", "Exxonnvoy", but legislation does not impose requirements of content or form as the Carriage of Goods by Sea Act 1971 does for bills of lading. The civil law jurisdiction, such as the French Code Of Commerce (which includes the French Maritime Law) and the Algerian

28 Foster. Stephen. Business Law Terms. at P. 15.

29 Ivamy. Hardy. E.R. Dictionary of Shipping Law. at P. 19.

30 Cf. a dictum by Slesser. L.J., in Cory V. Dorman Long & Co Ltd (1936) 55 L1. L.R.I, 5. For instances of charterparties concluded orally, see Biddulph V. Bingham (1874) 2 Asp. M.L.C. 225; Colvin V. Newberry (1832) I Cl. & F. 283.

31 Sociedade Portuguesa de N.Tanques L. V. Hualfangerselskapet P A/S [1952] 1 Lloyd's Rep. 407.

Maritime Code, give specific definitions to the contract of affreightment in both its' forms, i.e., the charterparty and the bill of lading. Article 1 of the French Code of Commerce,[32] gives a definition of the contract of affreightment, thus : "The contract of affreightment is a contract by which the shipowner promises to put a ship at the disposal of a charterer who pays a remuneration to the shipowner."[33] The second paragraph of this article adds that the shipowner has a lien or "privilége" on the goods for the payment of freight. A similar definition of the contract of affreightment is found in the Algerian Maritime code,[34] in article 640 which defines the contract of affreightment as follows: "The contract of affreightment is a convention between the shipowner and the charterer, where the shipowner promises to put a ship at the disposal of the charterer and the charterer to pay a remuneration."[35] Moreover, this article adds that the contract of affreightment can be for a voyage or a period of time or a demise charterparty. One can notice that the Algerian Maritime Code and the French Code of Commerce have added some other dispositions to the definition of the contract of affreightment, these additional dispositions can be found in article 641 and 642 of the Algerian Maritime Code. Article 641 provides that: "The obligations, the conditions and the effects of the contract of affreightment are defined and agreed upon by the parties of the contract who are free to insert any clause in their contract. Nevertheless, they cannot insert any clause which might disagree with the present and actual law."[36]

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32 Loi No.66-420 du 18 Juin 1966, Sur les Contats d'Affretement et de transport Maritimes.

33 " My Own Translation ". The actual article 1 provides in french that: <<Par le contrat d'affrétement, le fréteur s'engage, moyennant rémunération, á méttre un navire á la disposition d'un affréteur ...>>.

34 Ordonnance No. 76-80 du 23 Octobre 1976 Portant Code Maritime.

35 " My Own Translation ". The actual article 640 provides that : <<Le contrat d'affrétement s'entend d'une convention par laquélle le fréteur s'engage moyénnant rémunération á méttre le navire á la disposition d'un affréteur.>>

36 " My Own Translation ". The actual article 641 provides that: <<Les obligations, les conditions et les éffets de l'affrétement sont définis par les parties au contrat librement négocié. Toutefois, les parties ne peuvent insérer au contrat d'affrétement des stipulations contraires aux principes généraux du droit en vigueur ...>>

Article 642 of the Algerian Maritime Code provides that: "The contract of affreightment must be written and that the charterparty is the act or the contract which states the obligations of the parties of the contract."[37]

These dispositions are provided in the French Code of Commerce in articles 1 and 2.[38] Article 1 provides that: "The conditions and the effects of the contract of affreightment are defined by the parties of the contract otherwise, they are also prescribed by Title 1 st, of the Law of the 18 th of June, 1966 and of the present title."[39] Moreover, article 2 provides that: "The contract of affreightment is proved in writing. The charterparty is the act or the contract which states the obligations of the parties."[40]

The articles of the Algerian maritime code and in the French code, are similar. This could be due to the historical link between these two countries, or to the fact that they both have a civil law system.

By looking at the French code of commerce and the Algerian maritime code, it might be noticed that neither of these two codes defines the charterparty, but they do define the contract of affreightment which is the general form of the contract of carriage of goods by sea, which can be expressed either in a charterparty or in a bill of lading.

The Different Types of Charterparty:

There are mainly three types of charterparties, a voyage charterparty, a time charterparty and a demise charterparty. If the charterer undertakes the management of the ship, appointing and being responsible for the master and crew, it is known as a charterparty by demise, but in a simple charterparty, the

37 " My Own Translation ". The actual article 642 provides that: <<L'affrétement doit étre prouvé par écrit. La charte-partie est l'acte qui énnonce les engagements des parties.>>

38 Décrét No. 66-1078 du 31 Décembre 1966, sur les contrats d'affrétement et de transport maritimes.

39 " My Own Translation ". The actual article 1 provides that: <<Les conditions et les éfféts de l'affrétement sont définis par les parties au contrat et, á défaut, par les dispositions du titre I ér de la loi susvisée du 18 juin 1966 et célles du présent titre.>>

40 " My Own Translation ". The actual article 2 provides that: <<L'affrétement est prouvé par écrit. La charte-partie est l'acte qui énonce les engagements des parties.>>

shipowner retains the management of the vessel and the crew. There may be a voyage charterparty to run for a voyage or voyages, a time charterparty to run for a fixed period or a mixed charterparty to run for a voyage or voyages within a fixed period.[41] However, beside these three types of charterparty, there are others like a charterparty for consecutive voyages or time-trip charterparty. A charterer and an owner may agree that the owner may put at the charterer's disposal one or several vessels employed for several voyages following consecutively upon each other. Such contracts for consecutive voyages are characterized both by time elements and voyage elements. The vessel or the vessels load the charterer's cargo, carry and discharge it at the port of discharge and thereafter return in ballast to the port of loading for a new cargo. Sometimes there is an understanding that the owner has the right to take return cargo, something which may affect the schedule, and which then has to be covered by the contract. The basic idea is that each particular voyage is performed under voyage charterparty terms with freight per voyage, time counting in ports, etc. The contract period is sometimes a result of the time the vessel needs to perform the agreed number of voyages. The parties can, however, also agree that the vessel shall perform as many voyages as possible during a certain fixed period. In the latter case the contract contains a typical time chartering element.

The time-chartered trip/voyage, is a charter made out on a time charterparty basis but in which some basic features are those of a voyage charter. Thus, the port of loading and the discharge and the voyage are described as the time it will take to perform the agreed voyage.[42]

Charterparty by Demise:

Because this kind of charterparty has a special importance in this work, it will be explained in more detail. Under such a charter, also known as 'net' or

41 Hudson. A.H. Dictionary of Commercial Law. at P. 57.

42 Lars Gorton and Rolf Ihre. A Practical Guide To Contracts Of Affreightment And Hybrid Contracts. Lloyd's Of London Press LTD. 1986. at P. 8.

'bare boat charter', the charterer undertakes full responsibility for control of the crew and the management of the vessel. The shipowner is not liable as carrier for goods and services supplied to the ship during the charter. It may be a difficult question of fact whether a charterparty is by demise or not. The shipowner's only rights are to payment of the charge freight and return of the vessel when the charter has expired. Though a charterparty by demise may be for a voyage or voyages, in practice it is always for a period of time. The difficulty arises because shipowners anxious about possible depreciation of a valuable and rather vulnerable type of property very often insist by the terms of the contract on retaining a certain control, for example, by the appointment of the senior officers. This may give rise to disputes as to whether the management has ever passed to the charterer. Thus, the importance of the distinction between a charter by demise and a charterparty proper, is that under the former the master is the agent of the charterer, not of the shipowner. Thus, in Sandeman v. Scurr,[43]: a ship was chartered to proceed to Oporto and there load a cargo. The charterparty gave the master power to sign bills of lading at any rate of freight without prejudice to the charter. Goods were shipped at Oporto by persons ignorant of the charterparty, under bills of lading signed by the master. It was held that, the charter did amount to a demise charterparty. Consequently, the master's signature to the bills of lading bound the shipowner. But in the case of, Baumwolll Manufacturer Von Carl Scheibler v. Furness,[44] the charterparty provided for the hire of ship for four months, the charterer to find the ship's stores and pay the master and crew, insurance and maintenance of the ship to be paid by the shipowner who reserved the power to appoint the chief engineer. It was held that, the charter amounted to a demise charter of the ship, because the possession and control of the ship was vested in the charterer. Hence the shipowner was not liable to shippers ignorant of the

43 (1866) L.R. 2 Q.B. 86. Chorley and Tucker's Leading Cases (4 th edn, 1962), at P. 290.

44 [1893] A.C. 8. Chorley and Tucker's Leading Cases (4 th edn, 1962), at P. 290.

charter for the loss of goods shipped under bills of lading signed by the master.

Moreover, in the Algerian maritime code, in the case of a demise charterparty, the shipowner keeps the nautical management of the ship, and therefore, the captain of the ship and the other members of the crew follow his instructions about anything concerning the nautical use of the vessel, and that is prescribed by article 700.[45] However, article 701 provides that the commercial or the business management of the ship is for the charterer and therefore, the captain must obey all the instructions given to him by the charterer in the limits of the charterparty.[46] However, in the French code of commerce, there is no indication as to who has the control or the management of the ship, but article 28/2 provides that,[47] the charterer chooses the crew for the ship and pay their wages and their food and all other expenses. He also pays for additional expenses for the exploitation and use of the ship and the insurance of the ship. Thus, this is clearly indicating that the charterer is the person in charge in the case of a charterparty by demise.

The demise charterer because of the nature of the demise charterparty, can limit his liability under the Carriage of Goods by Sea Act (limitation of liability clause).[48] Therefore, in cases to which the Act of 1971 applies, unless the nature and value of the goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods.

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45 " My Own Translation ". The actual article 700 provides that: <<Le fréteur consérve la géstion nautique du navire et á ce titre, le capitaine du navires et les autres membres de l'équipage demeurent les préposés du fréteur et sont tenus de se conformer á ses instructions.>>

46 " My Own Translation ". The actual art.701 provides that: <<La géstion commércial appartient á l'affréteur et dans ce domaine, le capitaine étant de plein droit le représentant de l'affréteur, doit se conformer aux instructions de celui-ci dans la limite des dispositions de la charte-partie.>>

47 Décrét No. 66-1078 du 31 décembre 1966, sur les contrats d'affrétements et de transport maritimes. Article 28/2 provides in french that: <<... L'afréteur recrute l'équipage, paie ses gages, sa nourriture et les dépenses annéxes. Il supporte tous les frais d'éxploitation. Il assure le navire.>>.

48 Carriage Of Goods By Sea Act 1971, Sch, Art IV, r 5 (a).

Bill of Lading:

The bill of lading as a document for the carriage of goods by sea was given a lot of definition, but most of these definitions appear to similar in their content. So, some have defined the bill of lading as a document signed by the shipowner or the his master or agent, which states that goods have been shipped on a particular ship or have been received for shipment. The bill of lading sets out the terms on which the goods have been delivered to and received by the shipowner.[49] Another definition was given to the bill of lading where it was considered that, the bill of lading is a document acknowledging the shipment of a consignor's goods for carriage by sea.[50] Moreover, it has been defined as, a receipt acknowledging that goods have been loaded on a ship or received for shipment.[51] The French code of commerce defines the bill of lading in article 33, as a document which is delivered after the goods have been received and it includes the necessary information to identify the parties of the contract, the goods to be carried, the elements of the voyage to be effected and the freight which has to be paid.[52] The Algerian maritime code in article 748 defines the bill of lading, as it is delivered after the goods have been received by the carrier at the demand of the shipper. This bill of lading will contain the information concerning the identification of the parties of the contract, the goods to be carried, the elements of the voyage to be effected and the freight to be paid.[53]

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49 Foster, Stephen. Business Law Terms, at P. 10.

50 The Concise Dictionary of Law. Oxford University. 1986. at P. 37.

51 Hudson. A.H. Dictionary of Commercial Law. at P. 38.

52 Décret No. 66-1078 du 31 Décembre 1966, sur les contrats d'affrétement et de transport maritimes. Article 33 of this décret provides in french that: <<Le connaissement est délivré aprés récéption des marchandises. Il porte les inscriptions propres á identifier les parties, les marchandises á transporter, les éléments du voyage a éffeçtuer et le frét á payer.>>

53 " My Own Translation ". The actual article 748 provides that: <<Aprés récéption des marchandises, le transporteur ou son représentant est tenu, sur la demande du chargeur, de lui délivrer un connaissement portant les inscriptions propres á identifier les parties, les marchandises á transporter, les éléments du voyage á éffectuer et le frét á payer.>>

Types of Bills of Lading:

The bill of lading may be (a) a 'shipped' bill of lading, i.e., one showing that the goods have actually been shipped on board; (b) a 'received for shipment' bill of lading, i.e., one showing that a carrier has taken the goods into his custody. Sometimes the bill of lading is a 'through' bill of lading, i.e., a bill of lading issued to a shipper or where the goods have to be carried for a portion of the journey by land on a conveyance belonging to some person other than the shipowner. A bill of lading may be a (a) 'clean' bill of lading, i.e., one which does not contain a clause qualifying the statement in the bill of lading as to the apparent good order and condition of the bill; or (b) a 'claused' bill of lading, i.e., a bill of lading which contains such a clause.[54] Bills of lading are often made out in triplicate, one copy being retained by the consignor, one going in the ship's papers and one being sent ahead to the consignee.

Relationship Between the Charterparty and the Bill Of Lading:

The relationship between these two contracts might bring some puzzle to the readers or the users of them, especially when both documents are in use at once. The co-existence of two apparent equally contractual documents has given rise to many technical difficulties. The principal question is, who is liable and who is entitled under the contract of carriage? In other words, who, can the shipper and the consignee hold responsible for the safe arrival of their goods? Is it the shipowner or the charterer? And who is entitled to the freight, is it the shipowner or the charterer? In order to answer these questions, it might be useful to set out the various possibilities. There might be about four and they follow naturally from what just has been said about the operation of the entire contract.[55]

(i)- The contract of carriage may be between the owner of a general ship and the shipper. A charterparty is not then used and the contract is evidenced

54 Ivamy. Hardy. E.R. Dictionary of Shipping Law. at P. 8, 9.

55 Chorley and Giles'. Shipping Law. 8 th Edition. at P. 179.

in the bill of lading. This happens in almost all cases where goods are shipped by a liner.

(ii)- The contract of carriage may be between the shipowner and the charterer under an ordinary form of charterparty. Here, a bill of lading will be issued when the cargo is loaded, but it will generally take effect as a receipt, not as a contract.

(iii)- The contract may be between the charterer by demise and a shipper. Here, there is a contract in the nature of a lease, not a contract of carriage, because the control and possession of the ship have passed to the charterer, unless and until one is entered into between the charterer and some other shipper, when it falls under (i) or (ii) above, depending on whether the charterer puts up the ship as a general ship or not. The contract of carriage is then, of course, between the charterer and the shipper.[56]

(iv)- Where the charterer under an ordinary charterparty does not ship goods himself, but transfers his right to do so to somebody else, there will normally be both a charterparty and a bill of lading issued both by the shipowner or by the charterer, or by agents for either to the shipper, and it is when that happens that the chief difficulties arise. The most fruitful cause of trouble lies in the differences between the terms of the two documents.

(v)- Finally, it may even happen in exceptional cases that in respect of the same voyage the contract of carriage in respect of one parcel of goods is made between shipper and charterer. Thus, one bill of lading might be issued by the owner and one by the charterer, the master signing them being the agent once of the owner and once of the charterer.[57] This case might bring some difficulty of understanding and that is because the master is either the agent of the shipowner or the agent of the charterer. However, the master as being the agent

56 Samuel & Co. V. West Hartepool Steam Navigation Co. (1966) II Com. Cas. 115.

57 Wilston S.S. Co. V. Weir & Co. (1925) 31 Com. Cas. III.; The Okehampton [1913] at P. 173, per Hamilton L.J. at P. 181.

of the shipowner might issue a bill of lading to the charterer for the parcel of goods shipped and on the other hand, he might issue a bill of lading to the charterer who gives it to the shipper because the charterer undertook to carry the shipper's parcel of goods and in this case the master acted as agent of the charterer.

The difficulties may arise in case (iv) and (v), for it may be uncertain whether the shipper contracted with the owner or with the charterer. This is a question of fact to be decided by looking at all the circumstances of the case. A common instance of such difficulties is, for example, where a charterer is only a broker who guarantees cargo for vessels which he undertakes to load.[58]

58 Chorley & Giles'. Shipping Law. 8 th Edition. at P. 180.

PART ONE

LIENS, POSSESSION AND THE POSSESSORY LIENS

CHAPTER ONE

THE CATEGORIES OF LIENS

Most of the legal systems have similar liens despite some differences, which can be that one has provided some other liens which the other system has not forgotten but included them in a different group. Liens in English law are of three kinds, the first being the Common Law or Possessory lien, then, the Equitable lien and thirdly the Maritime lien. On other hand, in the French and Algerian legal systems, the classification depends on the nature of the security or guarantee given, whether it depends on a person or on a property. This work is concerned with security guaranteed mainly on property and will focus on debts thus secured. Debts secured or chose in action will be considered later.

There are four major securities for debts, first the possessory lien which is a legal guarantee, secondly the pledge which is a contractual guarantee, i.e., a guarantee which depends on the words of the agreement between the parties to the agreement, thirdly, the "privilége" which is a legal security given by the different texts of the law, and lastly, the mortgage which is sometimes a legal security and sometimes a contractual security. Moreover, in the civil law system, the will of the parties is unable of creating other secured debts than those expressly given by the law or to modify or change the rules of these secured debts which were established by the legislator.

1-1- Common Law Liens or Possessory Liens:

A common law or possessory lien arises where a person is entitled to retain possession of property of another until claims concerning works done or services rendered to that property. First, will deal with possessory liens in English law

and secondly with possessory liens in the civil law jurisdictions, namely the French and the Algerian law.

One of the classic definitions of the possessory liens is that laid down by Grose.J., in Hammonds v. Barclay,[1] where he defined the possessory lien as: "a right in one man to retain that which is in his possession belonging to another till certain demands of him the person in possession are satisfied." Possessory liens have also been defined as, "a form of real security under which the person entitled to the lien may retain possession of goods until some debt due to him has been paid by the person whose chattels are subject to the lien"[2], and as "the right of a person in whose possession a ship or her appurtenances is or are to retain possession of her or them until payment or discharge of some debt or obligation due to that person in respect thereof. Such a right belongs to one who repairs, alters or otherwise bestows labour or skill upon a ship, and retains possession of her".[3] This last definition is more related to possessory liens in the maritime law which will be discussed later. Finally, one may quote the definition of Lancelot. Edey Hall in his work on possessory liens in English law,[4] here he defined possessory liens as "a right in one man to retain that which is in his own possession belonging to another, till certain demands of him, the person in possession are satisfied." Therefore, a possessory lien is the right of a person to retain another person's property which is in his possession until certain claims concerning works done or services rendered to that property are satisfied.

A common law lien is enforceable under common law and possession actual or constructive, is essential to a common law lien.[5] Thus, possession is an essential element for the existence of a possessory lien and the court cannot

1 (1802) 2 East 227 at P. 235, 102 E.R. 356, at P. 359.

2 Hudson. A.H. Dictionary of Commercial Law, 1983, at P. 209.

3 Halsbury's Laws of England. Fourth Edition. Vol 43, on Shipping and Navigation, para 1141, at P. 780.

4 Lancelot. Edey.Hall. "possessory Liens in English Law". LIB (London) 1916. at P. 14.

5 Stevens. Edward.F. Shipping Practice. 10 th Edition, at P. 56.

declare that the lien may continue even though possession ceases.[6] Moreover, there will be no lien if the possession is wrongful or the goods have been deposited for a particular purpose inconsistent with the lien or of mere storage or keeps.[7] Normally, a lien is merely a right to retain, not to sell or re-sell, but there are many exceptions to this rule under statute, e.g., an unpaid seller, and generally an application may be made to the court for an order to sell if the goods are perishable or if some other good reason can be shown.[8] This lien will only give the right to the lien holder to retain possession of the incumbranced property, and does not enable the holder of the lien to take realise the asset. Thus, by virtue of a possessory lien, a holder of goods may retain them until such a time as his charges are settled. He has no right to sell the goods, and except where the Merchant Shipping Act, 1894 (in section 492-501) allows them to be landed without loss, a shipowner has no right of lien once he has permitted the goods to be taken from the ship,[9] it is why possession is essential for the existence of a possessory lien. As this work is more concerned with the shipowner's lien on the goods, this will be cited here as an example for the explanation of the possessory lien. Because possession is an essential element for the preservation of a possessory lien, the shipowner must keep possession of the goods either in his own hands or in the hands of his agents. Under the common law, the possessory only gives the carrier the right to retain the goods until the freight is paid, without granting him the power to sell the goods so as to recover the amount owing. The shipowner must look after the goods and discharge them at destination into a safe place so that the vessel may proceed upon its business. On the other hand, giving up possession will lead to the loss of the common law possessory lien.[10] However, section 494 of the

6 See The Ally [1952] 2 Lloyd's Rep. 427.

7 Hudson. A.H. Dictionary of Commercial Law. at P. 209.

8 Ibid.

9 Stevens. Edward.F. Shipping Practice. 10 Ed. at P. 56.

10 Tetley. William. Maritime Liens and Claims. 1985, at P. 339.

Merchant Shipping Act 1894, brought a solution to the dilemma by enabling the shipowner to retain constructive possession over goods after discharge, thereby maintaining the shipowner's possessory lien for freight. This section provides that, where goods are delivered to a wharfinger accompanied by a written notice that the goods are subject to a lien even though they are no longer in the actual possession of the shipowner. As a general policy, the lien extends only to chattels retained.[11] Unless provided by contract or statute, the lien does not extend to any charge for or expenses in keeping the chattel.[12] Thus, the expenses incurred in preserving a lien (e.g., warehousing) are not themselves covered by the possessory lien at common law,[13] but they are covered by statute, i.e., section 498 (iii). However, there may be a contractual agreement, express or implied, whereby such expenses are subject to a lien.[14] In Harley v. Gardner,[15] the charterparty gave the shipowner a lien for "freight ... and all other charges whatsoever." The Court held that this clause entitled the shipowner to claim expenses reasonably incurred in discharging the goods and placing them in a warehouse until the freight was paid.

In reaching this conclusion, the Court quoted Anglo-Polish Steamship Line v. Vickers,[16] and it was said that the general law is that when a man is claiming a lien and holding goods because he has a lien upon them, he cannot charge the cost of holding these goods in order to maintain his lien.[17] Moreover, when it comes to the enforceability of the lien, the carrier's possessory lien at English

11 Jackson. D.C. Enforcement of Maritime Claims. 1985, at P. 261.

12 Somes V. British Empire Shippin Co. (1860)8 H.L.Cas.338; The Katinaki [1976] 2 Lloyd's Rep. 372. It was said in the latter case that there is no possessory lien for damages for breach of contract of repair but this must be read as referring to a lien unconnected with or incidental to the repair.

13 Ibid.

14 Tetley. William. Maritime Liens and Claims. 1985, at P. 340.

15 (1932) 43 Ll. Rep. 104 at P. 105. See also Young V. Möller (1855) 5 E. & B. 755, 25 L.J. Rep (Common Law) 94.

16 (1924) 19 Ll. L. Rep. 121 at P. 125.

17 Tetley. William. op cit, at P. 340.

common law only gives him the right to retain the goods until the freight is paid.[18] Giving up possession, actual or constructive, constitutes a waiver of the lien. A problem therefore, arises when the cargo is arrested.[19] Taking an action in rem puts the Admiralty marshal in possession of the res, i.e., the cargo.[20] In other words, the effect of arresting the cargo is to remove possession from the carrier thereby reducing the latter to the status of unsecured creditor. In certain situations, however, where the possessory lien holder has lost possession by court process (as, for example, when the court has ordered the arrest and sale of the res), the court "must hold the proceeds of sale subject to the same rights as the possessory lien holders had."[21] Thus, the carrier's lien over the arrested cargo will rank high in order of priorities.[22]

The common law divides the right of retention into two categories, general liens, and particular liens. The first category, i.e., the general lien, gives the claimant the right to any chattel of the person against whom the claim is made until the claim is met, there being no necessary connection between claim and chattel. On the other hand, the particular lien, can be defined as a right to retain a chattel until all claims made in respect of it are met and in this category of liens, there is a connection between the claim and the chattel. In the common law system, a little difference might be found as between common law possessory liens (applying to but not created primarily in maritime law) and maritime possessory liens. The only differences between these two, is that they are both the same liens but some of them arise in the maritime area. This

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18 Somes V. British Empire Shipping (1860) 8 H. L. C. 338, 11 E.R. 459, The Gaupen (1925) 22 Ll. L. Rep. 57, The Ally [1952] 2 Lloyd's Rep. 427, The St Merriel [1963] P. 247, [1963] 1 Lloyd's Rep. 63.

19 Tetley. William. op cit, at P. 341.

20 The Gaupen, supra cit, at P. 58.

21 The Ally, suprea cit, at P. 428.

22 The St Merriel [1963] P. 247 at P. 252, [1963] 1 Lloyd's Rep. 63 at P. 68, referring to The Tergeste [1903] P. 26 at P. 34; see also The Gustaf (1862) Lush. 506, 167 E.R. 230 and The Immacolata Concezione (1883) 9 P.D. 37.

difference between common law possessory liens and maritime possessory liens is described by Jackson, in terms, "it should be stressed again that all the liens established at common law are applicable, where appropriate, in the maritime area."[23] Thus, most of general liens and particular liens are relevant in the maritime field. Their principles do not depend on any particular maritime application but there is a danger if their application is considered apart from the basic common law framework of which they are part. Any study of liens in maritime law must be in the context of the general domestic law as well as the sometimes unique characteristics of maritime law.[24] Finally, one can say something about the termination of the lien, where the possessory lien might be brought to an end, either by the loss of possession, the taking of action inconsistent with a possessory lien, or the tender of amount due. As it has already been mentioned before in this work, possession is considered as an essential element for the existence of a possessory lien, and therefore, the loss of that possession will lead to the loss or the termination of that possessory lien.

This is most usually brought about by loss of possession and the most frequent cause of loss of possession is voluntary re-delivery. Once this has occurred, the possessory lien will cease to exist. Thus, where the possession has been fraudulently obtained to defeat the lien, the lien is extinguished on loss of possession.[25] As a general rule, regaining possession after surrender will not resurrect the lien unless the surrender was obtained by fraud.[26] However, in an early case, it was held that an insurance broker's lien on a policy did revive on regaining possession.[27]

The second case which might terminate the possessory lien is the taking of an action inconsistent with a possessory lien. In this case, a general lien will be

23 Jackson. D.C. The Enforcement of Maritime Claims. at P.

24 See, Jackson. D.C. in his work on The Enforcement of Maritime Claims, at P. 268.

25 Where there is judicial sale the lien holder's rights are transferred to the proceeds and subjected to priority rules. See, The Tergeste [1903]P.26.

26 Jackson. D.C. op cit, at P. 263.

27 Levy V. Barnard (1818) 8 Taunt, 149.

lost through assertion of a particular lien,[28] or the giving of credit terms or the taking of security for payment at a future date.[29] Any lien may be waived by contract or conduct. It will be a matter of construction as to whether waiver has occurred.[30] For instance, the shipowner's possessory lien may be lost, if the shipowner causes the goods to be taken in execution and sold at his own suit.[31] The shipowner with by this act has given up possession to the sheriff. Moreover, the possessory lien may be waived, and lost, by the shipowner claiming to retain the goods upon some different ground, and not under the lien.[32]

Finally, a common law lien may be lost by the tender of the amount due. Thus, if one goes back to the definition of a possessory lien, which is a right of a person to retain another's person's property which is in his possession until certain conditions are fulfilled, it will be seen that if the claims for which the lien holder is holding the incumbranced property are satisfied, the lien holder will have no reason to continue holding the incumbranced property. Therefore, the lien will be terminated on tender or payment of the amount due.

French and the Algerian law, merely consider the possessory lien under the terms "droit de retention", i.e., the right of retention.

The most suitable definition which can be given to this "right of retention", is that it is a right given by the law to a creditor to refuse to surrender a thing which belongs to the debtor as long as the debt has not been paid. This right will operate even though the creditor did not receive the thing by way of contract or pledge. From this definition arises the most important characteristic of the right of retention which is that this right gives only the right to keep or to preserve the thing. However, there is no particular text in the French civil code regulating

28 See, e.g., Morley V. Hay (1829) 7 L.J.K.B. (O.S.) 104.

29 See, Burston Finance V. Speirway [1974] 1 W.L.R. 1648.

30 Ibid. See, e.g., (re broker's lien) Fisher V. Smith (1878) 4 App.Cas. 1.

31 Jacobs V. Latour (1828) 5 Bing. 130; 2 M. & P. 2d.

32 Boardman V. Still (1809) 1 Camp. 410 n; Dirks V. Richards (1842) car. & M. 626; 4 Man. & G. 574. But see White V. Gainer (1824) 2 Bing. 23.

this guarantee of payment of a debt, but it may be considered in the following ways.

First, this means of guarantee appears to be a primitive means self help.[33] However, the right of retention is justified by a moral thought of justice and equity, but this can be dangerous in some ways that the creditor might abuse or misuse this right against the debtor. This might be the reason why the French civil code does not contain any regulation governing the right of retention, and it limits the application of this right to certain cases. This why the doctrine and the jurisprudence had to fill the gap which the French civil code left blank and that by precising the conditions for the use of this right and it's effects. On the other hand, the Algerian civil code learnt from the absence of regulation or the gap in the French civil code, and gave a definition of that right in article 200.[34]

The right of retention is similar to other securities, where the creditor holds and keeps the debtor's property until the debt is paid, such as the pledge. The right of retention (legal security) has with the pledge (contractual security) certain common aspects, because the pledge gives the creditor the right to detain the thing. On the other hand, the pledge differs in some important aspects from the right of retention, as the pledge allows the creditor to sell the thing and to be the first to be paid from the proceeds. This security comes from Roman law, many different civil law jurisdiction which founded the right of retention in it is given to different creditors, whether they have a lien (privilége) like the pledgor and the seller, or whether they have no right of priority. However, neither the French nor the Algerian civil code give precise and detailed regulations to this right. This gap creates problems within the jurisprudence, and is one of the

33 Marty. Gabriel, et, Raymond Pierre. Droit Civil: Les Suretés La Publicité Fonciére. Tome III Vol I, 1971. P. 13.

34 Article 200 of the Algerian civil code provides that: <<Celui qui est tenu á une préstation peut s'abstenir de l'exécuter, si le créancier n'offre pas d'exécuter une obligation lui incombant et ayant un rapport de causalité et de connéxité avec célle du debiteur ou si le créancier ne fournit pas ...>>

areas where the doctrine has achieved much to cover the gap left by the silence of the legislator.

This right of retention is regarded as an exemption or derogation to the principle of equality between all the creditors or the principle, "no lien without an article", i.e., "pas de privilége sans téxte", and this is why this exception must be limited to the cases cited in the civil code. Aubry and Rau supported this interpretation in the extracontractual field,[35] by considering the right of retention as an application of the exception *non adimpleti contractus*, and they proposed to widen its' application to the contractual area and the implied contracts. These views have been abandoned today but, the right of retention works indirectly as a lien (privilége); but does not constitute a real lien, otherwise it would give a right of priority. Thus, the legislator has sought to apply a general principle in a precise text and thus, any claimant must comply with the precise provisions of the text.[36] The right of retention in its wide conception, is a right which is based only in equity, and this is why the creditor, as long as he is not paid, may retain the property whatever the reason for which he is holding it, *ex dispari causa.* The most common opinion takes an intermediary position without giving the right of detention *ex dispari causa*, which will have the effect to make the creditors seize or take hold of the debtor's property, and the debtors to give their property to an imaginary creditor so as to make their property escape being seized. So, this right is given in all the cases where there is a connection either between the debt and the res, or between the debt and the detention of the res:[37]

The Connection Between the Debt and the Res:

There is a connection between the debt and the res. There is *debitum cum re juntum.* It is objective or material relationship. For instance, a possessor made expenditures for the conservation of the thing in his possession,

35 Mazeaud, Henri et Léon. Mazeaud, Jean. Par Juglart, M. Leçons de Droit Civil. Tome Troisiéme. Premier Vol. Suretés. Publicité Fonciére. P. 107.

36 Boulanger, J. Le Droit Privé au Milieu du XX^{é} Siécle. Étude en l'Honneur de George Ripert. Tome I, P. 51.

37 Mazeaud, Henri et Léon. Mazeaud, Jean. Par Juglart, M. at P. 108.

fir this reason he will claim that he is using the right of retention on the thing as long as he has not obtained remuneration for his expenditures.

Connection Between the Debt and the Detention of the res:

The holder received the res in the course of an obligation created between himself and the owner. It is the juridical or the mental connection, as in the case where a litigant gives to his solicitor the documents of his file and the solicitor, to enforce payment of his fees, will claim the right of retention on the documents of the file. Some lawyers,[38] refuse to accept the right of retention where there is only a juridical connection, and they accept the right of retention only where there is an objective connection. For them, the juridical or legal connection includes only the exception *non adimpleti contrctus*. However, in the case of a legal connection, the exception and the right of retention can coexist, but without being mixed up and confused.

The Situation Where There Is An Objective Or Material Connection:

The civil code gives the right of retention in situations where there is no juridical or legal relation between the creditor and the owner of that thing, the latter found himself debtor because of that thing. The jurisprudence admitted that the creditor must be allowed to use the right of retention in every case where there exists a material or objective connection between the thing and the debt and in every case where, "the debt was born at the occasion of the thing detained."[39] Thus, when the debt is about the remuneration for the expenses made for the conservation, improvement or the transformation of that thing, or for the reparation of the damage done by that thing to the holder of the right of retention, this narrow relation between the debt and the thing, which results from the fact that the debt was born from that thing, the *debitum cum*

38 Cassin, Réné, De l'Éxcéption Tirée de l'Inéxécution dans les Rapports Synallagmatiques. Leçons de Droit Civil, at P. 109.

39 Direct translation from, Civ. 1^{ér} civ. 22 mai 1962, Gaz. Pal. 1962. 2. 130.

rejectum, justifies the right of retention; the thing itself is in some way debtor. When the right of retention is founded on objective connection, the property incumbranced with the right of retention is limited to the thing about which the debt was born; only this thing can be held.

The Situation where there is a Legal or Mental Connection:

The right of retention exists even in the absence of a relation between the debt and the thing itself, when the thing is between the hands of a holder because of a pre-existing legal relation between the holder and the owner of the thing, and which gave birth to the debt of the holder. The right of retention can exist when the detention of the thing and the debt have their source in the same legal relation, i.e., where the holder received the thing because of the legal relation which made of him a creditor, so that connection exists between the debt and the detention. The form of the contract is not important, what is important is that the detention is linked to an agreement or to an implied contract which gave existence to the debt.[40] The legal relation gives to the right of relation a wide property to hold for guarantee of payment better than that given in the case of a simple material relation. In this case, the creditor can detain all the things which he holds because of the legal relation which is the origin of his debt, and not only that thing about which the debt exists.

The Existence of the Objective Relation with the Legal Relation in the Same Situation:

It has already been said that the right of retention can exist in different situations, regarding, whether it is in a situation where there is an objective relation or a legal relation. The objective relation does not require any connection between the debt and the thing itself. However, it does happen that the right of retention is founded on both the objective relation and the legal or juridical relation. This is the case where the creditor receives the thing according

40 Req. 26 Avril 1900. S. 1901.1.193 et note Ferron, D. 1901.1.455; civ. 25 janv. 1904, D. 1904.1.601 et note Guénée; cf. également la note du rapporteur de l'arrét précité de la Chambre Civile du 9 mai 1944 á la semaine juridique, précit ...

to an agreement with the owner of that thing (legal relation), so as to repair or improve that thing (objective relation), and that is found in article 1948 of the French civil code which provides that: " The bailee may retain the bailment until complete payment of what is due him by reason of the bailment",[41] and in the Algerian civil code it was provided in article 200/2 that: " This right also belongs to a possessor or a retainer of a res for which he made necessary or useful expenses. The res can then be retained until payment of what is due him, unless the obligation of reimbursement was born out of an unlawful act".[42]

The right of retention is always given by the law, and cannot be given by the will of the parties. If the right is out of the field of the right of retention which is assigned to it by the law and in the absence of the conditions required by the law the will is unable of creating it. Thus, some conditions must be present so that the holder of this right can pretend exercising it.

The Conditions Concerning the Guaranteed Debt:

(i)- The Necessity of a Debt:

The right of retention comes into existence of a debt, and this debt is always a debt of a sum of money.

(ii)- The Debt Must Be an Unquestionable Claim:

There is no question or doubt about this condition, the jurisprudence requires the certainty of the debt.[43] Moreover, the Criminal Chamber of the

41 Crabb. John H. The French Civil Code, as amended to July 1, 1976. at P. 353. Fred B. Rothman & Co. South Hackensack, New Jersey. The actual article 1948 of the French civil code provides that: "Le dépositaire peut retenir le dépot jusqu'á l'entier payement de ce qui lui est du á raison du dépot."

42 "My Own Translation". The actual article 200/2 of the Algerian civil code provides that: "Ce droit appartient nottamment au possesseur ou au detenteur d'une chose sur laquélle il a fait des dépenses nécéssaires ou utiles. La chose peut alors etre retenue jusqu'au remboursement de ce qui est dú, á moins que l'obligation de réstituer ne résulte d'un acte illicite."

43 Civ. 17 juin 1914, S., 1920.1.201, note Naquet; Crim., 30 déc. 1943, J.C.P., 1944.II. 2621, note Garraud. Rev trim de droit civil, 1944. 186, observ. Carbonier; civ. II, 28. Févr. 1957, D., 1957. 2. 166; Civ., 3 mai 1966, D., 1966, Somm. 98.

Supreme Court has considered guilty of the crime of breach of trust, those who use the right of retention for an uncertain debt.[44]

(iii)- The Debt Must be a Fixed Debt:

This condition (la créance doit être liquide) gives existence to some doubts, because it appears to be more adequate to compensation, because the right of retention is not a means of payment but only a means of pressure on the debtor to guarantee the payment of the debt. But the jurisprudence reduces the importance of this condition.[45]

(iv)- The Debt Must be a Due Debt or a Claimable Debt:

The right of retention being a means of obliging the debtor to pay the debt, cannot be worked out where the creditor claims a non-claimable debt.

Conditions Concerning the Detention:

The Necessity of a Detention:

There cannot be retention without detention; for retention there must be first holding, and for this reason the right of retention will be lost when the detention ceases. This condition must complied with according to the thing being held and to the detention itself.

(i)- The Subject or the Object of the Detention:

The detention cannot give rise to a retention unless the thing on which the detention is being exercised, presents some characteristics, and these can be listed as follows:

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44 Crim., 30 déc. 1943, précité. Cet arrêt dont la sévérité a étonné certains commentateurs s'explique peut être par l'hostilité des tribunaux des agents d'affaires, car il s'agissait en l'éspéce, d'un agent d'affaires qui prétendait retenir le dossier de son client."

45 Trib. Com. Lyon 21 Sept. 1951, D. 1951. 26.

(a)- <u>The Detention Must be that of a Corporeal Thing:</u>

It is of no importance whether this thing is a movable or an immovable property,[46] and the right of retention has been applied on different properties, such as titles of properties,[47] documents like the car licence,[48] and it can be even on a sum of money. However, only corporeal properties can be subject to a right of retention, because they are the only property which can be subject to detention. The rights cannot be subject of an efficient detention only if they are incorporated in a title.[49]

(b)- <u>The Property Detained Must be Able of Being Transferred and Seized</u>, and there is no need or obligation for an economic value.

(c)- <u>The Property Detained Must be the Debtor's Property</u>, but this condition appears to be dismissed by the jurisprudence. The Court of Cassation (Supreme Court) had to resolve the problem of a sequestrator for his right of retention of goods which had been deposited with him. It had been recognised to the sequestrator the right of retention against the one who was recognised as the owner of that property despite that he was not the debtor for the expenses incurred in keeping that property.[50]

(ii)- <u>The Detention Itself:</u>

The detention itself is not necessarily a real possession *animo domini*. The creditor who detains the debtor's property is supposed to surrender the property to the debtor, he is a precarious holder, and might be just a material holder. The holder must detain for himself, i.e., the right of retention cannot be used against whom he is keeping the thing for. In this case, the driver cannot

46 En ce sens que le droit de rétention peut s'éxércer sur un immeuble: civ., 25 janv 1904, D., 1904. 1. 601, S., 1910. 1. 142.

47 Req., 5 nov. 1923, D., 1924. 1. 11, S., 1924. 1. 215.

48 Com., 16 mars 1965, Bull. civ., 1965. III, No 200.

49 Gabriel Marty. Pierre Raymond. Droit Civil. Tome III, Vol 1er, Supra. at P. 20.

50 civ 1ere, 22 mai 1962; D., 1965. 58, note Rodiére.

use the right of detention against his employer.

Must the Holder of the Right of Retention be in Good Faith ?

The good faith is a condition required by the jurisprudence, so that the holder can use his right of detention and despite the silence of the drafters of the civil code. The courts rely on the Roman law and the old law, which refused the right of retention to the builders and possessors in bad faith. Here, we find the idea of equity which is the origin of the right of retention and which appears to be absent when the possessor is in bad faith. Moreover, the different courts refuse the right of retention to that who took possession of the thing with an unlawful means, by fraud or violence, more generally by an illegal act,[51] or to that who made the mistake in doing the works, improvements or reparations, on which he founds his debt.[52] Not recognising this restriction will be allowing the way to private justice.

1-2- Equitable Liens:

The second type of lien is the equitable lien. In English law this lien is more than a right to go against an asset for a claim and it creates an equitable interest in the asset and, therefore, security for the claim. This lien may be defined as an equitable right, conferred by law upon one man, to a charge upon the real or personal property of another, until certain specific claims have been satisfied.[53] It has alternatively been defined as a form of real security created by equity giving a right to have specific property allocated to the payment of specific liabilities.[54] It is founded on a principal of equity, that he who has obtained

51 Req., 25 mai 1852, D., 1852.1.279; civ., 14 mai 1833, D., 1883.1.338, S., 1883.1.204; civ.2e, 28 Fevr. 1957, D., 1957. 266.

52 Crim., 30 déc. 1943, J.C.P., 1944. II. 2621, Gaz.Pal., 1944.1.88; Civ. 1re, 3 mai 1966, D.S., 1966. 649, note Jean Mazeaud.

53 Lancelot. Edey. "Possessory Liens in English Law". Hall. Llb (London) 1916. at P. 15.

54 Hudson. A.H. Dictionary of Commercial Law. 1983. at P. 120.

possession of property under a contract for payment of its value will not be allowed to keep it without payment. In the case of the equitable lien, the claimant has a charge on the property of another, which is not in his possession. This charge attaches to the property and gives rise to equitable remedies. Moreover, it is similar to the common law lien, in that it may be created by contract or recognised as stemming from a legal relationship.[55] The term is normally used of rights arising by operation of law rather than by specific agreement, the latter being known as charges. A charge is simply an interest in an asset held as security for a claim - usually a monetary claim. A charge simply creates an interest in the charge commensurate with the claim in relation to which the charge exists and apart from land, in English law it is an equitable concept.[56] "Equitable Lien", is synonymous with "equitable charge" in respect of an expressly created security interest, but "lien" is perhaps more frequently used than "charge" to describe security interests imposed by law as, for example, on the basis of conduct.

As the description "equitable charge" may be used, even in this context, there is little difference in substance between the two concepts.[57]

For the civil law jurisdiction, namely the French and the Algerian jurisdictions with which this work is mostly concerned, there is a similar lien which is known as "privilége". The "privilége" is a legal security which gives a right of priority given by the law to some creditors. The French civil code in article 2095 defines the "privilége" as "a right which the nature or the quality of the debt gives to a creditor to be preferred on the other creditors even mortgagees.[58] The Algerian civil code defines it in article 928 as: " The privilége

55 Jackson. D.C. Enforcement of Maritime Claims, at P. 274.

56 Ibid.

57 Both a charging order made under the Charging Orders Act 1979 in favour of a judgment creditor and a writ of *fieri facias* (in execution of a judgment) take effect as an equitable charge. A floating charge over company assets is an equitable charge.

58 "My Own Translation". The actual article 2095 in french provides that: " un droit que la qualité de la créance donne á un créancier d'être préféré aux autres créanciers même hypothécaire".

is a right of priority given by the law to the benefit of a particular or specific debt and that by considering its' nature or quality. No debt can be preferred unless there is a text of law".[59] However, the definition of privilége in the French civil code, can be criticised,[60] as it is given on the ground of the equality of the creditors and it aims only for the right of priority, whereas some privileges also give the right to follow the res in whosoever hands it may come. It relies on the quality or the nature of the debt, but the privilége is not always given because of the quality of the debt. Moreover, it gives to the creditor holder of a privilége the right to be preferred to the mortgaged creditors, and this is not always the case. Lastly, it does not say on what property the privilége operates depending on whether it is on a special or general privilége. The Algerian civil code cannot be criticised to the same extent. All what can be said about the notion of privilége is that it cannot be expressed or explained precisely.

Creation of the Equitable Lien in English Law:

The equitable lien can be created by contract, from the relationship of the parties or it may arise from a course of conduct.[61]

(i)- By Contract:

The right to freely create a lien by contract means that parties can create security interests enforceable against third parties.[62] Whether a contractual

59 "My Own Translation". The actual article 928 provides in french that: "Le privilége est un droit de préférence concédé par la loi au profit d'une créance détérminée en considération de sa qualité. Aucune créance ne peut être privilégiée qu'en vértue d'un têxte de loi".

60 Georges Ripert. Jean Boulanger. Traité De Droit Civil D'aprés Le Traité DE Planiol. Tome III. Surretés Réelles. Contrats Civils. 1958. at P.34. para. 95.

61 Jackson. D.C. Enforcement of Maritime Claims. at P. 275-276.

62 A lien or other charge created by a public company on its own shares is void except for a charge (i) for any amount payable in respect of them, or (ii) arising in the ordinary course of business of a money-lending company, or (iii) in existence prior to a statutory registration period (the Companies Act 1980, S.38).

"lien" clause creates an equitable lien is a matter of construction. If construed as an equitable lien, its enforceability as a lien may be affected by registration requirements of either the Bills of Sale Acts 1878 and 1882, or more likely in maritime matters, the Companies Act 1948.

Bills of Sale Acts 1878 and 1882:

An instrument creating or evidencing an equitable lien created by contract by an individual (i.e., other than a company) is within the framework of the Bills of Sale Act 1882.[63] Security transactions fall within the Bills of Sale Act 1882 but many maritime documents are excluded from the operation of the Acts.[64]

Companies Act 1985, S.396:

An equitable lien created by a company is an "equitable charge" within the Companies Act 1985, S.396,[65] and if within the terms of the section will require registration, for enforceability against a liquidator or other creditors. Such charges include a charge on a ship or share in a ship, a charge on calls made but not paid, a charge on book debts and any charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale.[66]

(ii)- Arising from the Relationship of the parties: [67]

Vendor's lien for unpaid purchase money. This is primarily relevant to the sale of land and arises on the contract , counter- balancing the purchaser's

63 As to the framework, see the Bills of Sale Act 1878, S4 (adopted by the Bills of Sale Acts 1882, S.3).

64 Including assignements and transfers of ships, bills of lading, wherehouskeeper's certificates and any documents used in the ordinary course of business or proof of possession or control of goods or documents of title thereto.

65 As amended by section of the Companies Act 1989.

66 See, the Companies Act 1985, S.396 (C). A "floating charge" is also within the provision, Section 396 (F). The new Act of 1989 will be discussed later on in this work.

67 An equitable lien is also created in favour of a partner over partnership assets, a trustee over trust property for expenditure, and beneficiaries over land purchased with trust moneys.

equitable interest. But, as with the purchaser's interest, it may be applicable to the sale of chattels (including a ship) if equity would decree specific performance of the sale of chattel.[68] However, its scope may be limited in that unless specifically provided otherwise a transaction within the Sale of Goods Act 1979 may create only the rights (including the liens),[69] specified in that Act.[70] If, however, the Act does not provide an exclusive framework, the equitable lien would have a role to play alongside or constructive to the possessory lien conferred on the vendor by the Act.

(iii)- Arising from a Course of Conduct:

No equitable lien is created solely by expenditure on another's land, chattel, or intangible,[71] but if such expenditure is made in reliance on a representation a lien based on estoppel in regard to the occupation and improvement of land, a lien may be claimed as the principle of "proprietary estoppel". So, it could be a transfer of title,[72] occupation for a specified period,[73] or a lien for any amount spent.[74] The Court of Appeal, while conceding that proprietary estoppel exists in regard to land and could extend to forms of property other than land (such as goods), has held that it should not be extended further.[75] Even accepting such a limitation, an equitable lien could be created in relation to a ship or cargo. While therefore, the principle appears most frequently in context of land it may be applicable commercially[76] and, therefore, to maritime transactions.

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68 See, e.g., Langen V. Bell (Shares) [1972] 1 All E.R. 296.

69 See, S. 41.

70 See, e.g., Re Wait [1927] 1 Ch. 606.

71 As a consequence there is no lien for salvage outside the maritime concept.

72 Pascoe V. Turner [1979] 1 W.L.R. 131.

73 See, e.g., Inwards V. Baker (life interest) [1965] 2 Q.B. 29.

74 See, e.g., Chalmers V. Pardoe [1963] 3 All E.R. 552.

75 Western Fish Products V. Pentworth D.C. [1981] 2 All E.R. 204, at P.218.

76 See, Moorgate Merchantile Co. V. Twitchings [1976] Q.B. 225 (reversed [1977] A.C. 870) and, it is arguable, the Sale of Goods Act 1979, S.21.

1- Characteristics of the "privilége" in the French and Algerian Civil Code:

The privilége is a right of priority on a specified part of the property or on all the property of the debtor, and it is a right given to the creditor by the law because of the nature of the debt. The classification of the priviléges, as it is in the civil code, is as follows:

(a)- General Priviléges on Movables and Immovables; these are concerned with the movables and immovables of the debtor without the need for registration by the creditors, especially for the immovables. There are three types of privilége: the privilége for court costs, the privilége for wages, and the privilége for copyright.

(b)- General Priviléges on Movables.

(c)- special priviléges on Movables.

(d)- Special Priviléges on Immovables, which are preferred mortgages, i.e., which come before simple privileges, but which must be registered as any other mortgage.

2- The Effects of the Priviléges:

It is the aim of the privilége to give a right of priority to its' holder, to be paid in preference of the other creditors: the right of priority or of preference. But, does the privilége give the right to follow the res? The question is asked or arise when the privilége does not constitute a mortgage.

The Right of Priority of the Chargee:

The chargee cannot be opposed to the sale of the debtor's property by the other creditors, but if he leads the other creditors to the sale, he must follow all the steps and formalities which an ordinary creditor follows, i.e., to levy a distress and to sell. He is not exempted from seizing the debtor's property to sell it, because he has not possession of that property. However, when the sell has

been done by the other creditors or the chargee, the privilége gives to its' holder the right of preference or priority on the price.

Does the Privilége Give a Right to Follow the Res?

The doctrine and the jurisprudence are divided on this point. It is certain that in Rome the privilége was on a kind of priority given to the creditor at the time of the distribution of the price of the property of the debtor, *un privilegium inter personales actiones*; the privilége in this way reinforced a debt, without giving a particular right on a particular property or properties of the debtor, and therefore, the creditor could not pretend to be paid on the property which went out of the debtor's property, i.e., he did not have the right to trace the res which went out of the debtor's property.

However, the priviléges have had an evolution which made them become like mortgages. The creation of special priviléges, not on the debtor's property, but on certain of it, movable or immovable, and the affecting of a particular thing to the payment of the debt which was the result of that has made the privilége close in similarity to the mortgage. Today, it is certain that the special liens on immovables, which constitute preferred mortgages, have given rise to the right to follow the asset of the debtor in whosoever hands it may come. The question does not arise anymore about the legal mortgages which affect on immovables; i.e., it is about mortgages, which like any mortgage, give the right to trace the immovable assets in whosoever hands they may come.

However, the question arises about general liens on movables and immovables and special liens on movables, because neither the tradition nor the different articles brought a final decision. Nevertheless, it can be said that the chattel incumbranced by a privilége, is affected to the debt of the creditor, and then he can follow it if it goes out of the debtor's hands, even if it was without fraud. The Court Of Cassation (Supreme Court), which had only to look at the special liens on movables, refused the right to follow the assets to the creditor.[77]

77 Leçons De Droit Civil., Supra, at P. 125.

Enforceability of the Equitable Lien in English Law:

(i)- Against Third Party:

Once created, an equitable lien protects the claim to which it attaches by enabling the claimant to assert an equitable interest in a particular asset. It does not give any right to pre-trial attachment but it confers enforceability against all interests created subsequently if required with notice of it and against any equitable interest acquired subsequently whether with or without notice. To that extent it gives priority against purchasers and other creditors. But it is not enforceable against those who hold interests created prior in time to the "lien". The requirement of registration of interests has in some fields affected the general equitable rule that purchasers without notice take free of an equitable interest. Registration provides the "notice" and where it is available failure to register an interest may render the interest void as against later purchasers. In English law registration is relevant to liens other than in land only under the Bills of Sale Acts 1878 and 1882 or the Companies Act 1948 and as regard other registrable interests vying for priority with a lien.[78]

(ii)- Tracing into other Assets:

Through the beneficial interest created by it the equitable lien provides a foundation for tracing in equity.[79] Tracing is available in relation to assets substituted for that in which the lien existed by any party against whom the lien is enforceable. It is a remedy which overcomes the problem inherent in the concept of "lien" of continued existence of a thing to which the security interest is attached;[80] but it does not increase the scope of enforceability (i.e., the number

78 Jackson. D.C. Enforcememt of Maritime Liens. at P. 277.

79 For general principals, see Re Diplock [1948] Ch. 465 (C.A.) (affd [1951] A.C. 251). The court will assist through ancillary orders in discovering the whereabouts of the assets, (see, Av.C [1980] 2 Lloyd's Rep. 200).

80 With the exception of the found created through judicial sale in an action in rem. As with every other lien if the asset to which it is attached is destroyed or incorporated into another, the lien is extinguished (see, Borden (U.K.) V. Scottish Timber Products [1981] Ch. 25).

of persons against which it can be enforced). The assets into which the lien may be traced must be seen as representing the original asset but equity will allow tracing into a bank account of other fund to which money paid for the asset has been credited.[81]

Termination:

In English law the equitable lien would fall with the claim to which it is attached, and to that extent is subject to statutory limitation of action provisions. It is also subject to the equitable principle of laches _ delay will destroy the lien. And, naturally, it is subject to the general principles of waiver and loss by consent. Most of the reasons which terminate the equitable lien seem to be in both the French and Algerian civil code.[82] The Algerian Civil Code in article 988 refers to the means of termination of pledges and hypothecs as being the same as for the extinction of the privilége (i.e., lien). These ways of termination are mostly similar to those in the French civil code, such as the termination of the debt, or when the creditor gives up his lien or by the loss of the asset incumbranced with the lien or by the extinction of the right of lien (i.e., by prescription).

The English, French and the Algerian law, seem to have some similar ways for the extinction of the equitable lien, such as the termination of the claim when it is not claimed after a certain time, or waiver when the holder of the lien gives up his lien and this is the best way to terminate the claim and the lien in the same time because the holder of the privilége (lien) is the most appropriate

81 Jackson. D.C. Enforcement of Maritime Claims. at P. 278.

82 The french civ. code in article 2180 prescribes that:

"Les priviléges et hypothéques s'éteignent:

1- Par l'extinction de l'obligation principale;

2- Par la renonciation du créancier á l'hypothéque;

3- Par l'accomplissement des formalités et conditions préscrites aux tiers détenteurs pour purger les biens par eux acquis;

4- Par la préscription ... ."

person to terminate it. So, if he gives up his claim his lien is automatically terminated.

The Equitable Lien in Admiralty:

An equitable lien or equitable charge may be created in relation to ship, cargo or freight in the same way as it may be in relation to chattels or choses in action generally. A claim based on an equitable charge or lien on a ship is within Admiralty jurisdiction as being a claim "in respect of a mortgage or a charge on a ship or share therein". It may be enforced by an action in rem against the ship.[83] There is no provision for a claim in Admiralty jurisdiction based on an equitable lien on cargo or freight (unless it can be argued that such jurisdiction follows from jurisdiction in relation to a ship).[84] The French and the Algerian jurisdictions recognise liens of a maritime type. The French law of the 3rd of January 1967, concerning the regulation for ships and other marine vessels, enumerates the preferred debts on the ship and its' accessories, and on the freight (article 31). The Algerian Maritime Code,[85] in article 72 prescribes that the lien is a preferred right of priority on all the other creditors, and that is because of the nature of the debt.

1-3- Maritime Liens:

No express definition of the maritime liens is provided neither by the domestic legislation of the United Kingdom nor by any other source of the international law.[86] Whereas maritime liens are on occasions expressly or impliedly created by municipal statute,[87] or otherwise recognised by statute,[88]

83 Supreme Court Act 1981, S. 20 (2) (c), S. 20 (7) (c), S. 21 (2).

84 Jackson. D.C. Enforcement of Maritime Claims. at P. 275.

85 The Enactment or Law No- 76-80 of the 23rd of October 1976 concerning "The Algerian Maritime Code".

86 Thomas. Maritime Liens. at P. 11, para. 11.

87 See, e.g., Merchant Shipping Act 1970, 18.

88 See, e.g., Administration of Justice Act 1956, S. 3 (3).

no further attempt to define a maritime lien has been made. In the opinion of Sheen. J., this absence of any statutory definition is not surprising for a maritime lien is "more easily recognised than defined".[89] The same is true of the International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, 1926. Beyond specifying certain claims to be in the nature of maritime liens, and the recognition that "claims secured by a lien follow the vessel into whatever hands it may pass",[90] there is no further attempt at a distinct and a comprehensive definition.[91]

Definition of Maritime Liens:

However, some authors have attempted to give a simple definition to maritime liens in their writings about maritime liens. Therefore, they have been defined by some authors,[92] as a right which attaches to property, usually a ship, as a result of some liability incurred in connection with a maritime adventure, some others defined it as,[93] a claim or privilege on a maritime res in respect of service done to it or injury caused by it, such a lien does not import or require possession of the res, for it is a claim or privilege on the res to be carried into effect by process. Some others defined it as,[94] a claim or privilege on a maritime "res", that is to say, a ship, freight or cargo, and it arises either "ex contractu", for services rendered to the "res", such for example, as salvage; or "ex delictu", as for compensation for damage by collision. This claim is enforced by an admiralty action "in rem" (i.e., against the "res") by arrest. The basis of a maritime lien is the liability of the owner of the "res", when the lien attaches, to person who have rendered services to it or received injury by it. It is a right

89 The Father Thames [1979] 2 Lloyd's Rep. 364, 368.

90 Art. 8. See also, Art. 7 of the 1967 Convention.

91 It is nevertheless the case that when the 1926 convention is read in its entirety a fairly complete "descriptive definition" of what is meant by a maritime lien under the Convention emerges. The same is also the case under the 1967 Convention.

92 Hudson. A.H. Dictionary of Commercial Law. 1983. at P. 170.

93 Halsbury's Laws of England. Fourth Edition. Vol: 43. at P. 774, para. 1131.

94 "Possessory Liens in English Law" , Supra. at P. 16.

acquired over a thing belonging to another, a "*jus in realiena*", and is a substraction from the absolute property of the owner of the thing.[95] This lien arises in cases of damage by collision, in respect of the ship causing the damage; for salvage, in respect of the ship saved by means of the assistance rendered, and also for the wages and victualling allowance of seamen and the wages and disbursements of the master.[96] In Scots law maritime liens have been treated as hypothecs,[97] but this classification is not entirely accurate, since the holder does not acquire a right of property or possession in the subject, but only a right to a preferential ranking on its proceeds after it has been brought to a judicial sale in the event of non-payment of the claim in respect of which the lien arises.

It has been observed,[98] that a maritime lien "is not a right to take possession or to hold possession of the ship. It is confined to a right to take proceedings in a court of law to have the ship seized and if necessary sold. . . The right of maritime liens appears, therefore, to be essentially different from a right of property, pledge, or hypothec".

In French and Algerian law, no definition is necessary because the "privilége" is a term of the civil code. Besides, the civil code and the civil style of drafting traditionally avoid definitions, looking instead to ordinary dictionary meanings. Only when the civil wishes to depart from the normal meaning is a term defined.[99] "Maritime lien" is usually translated to "privilége" and, for example, neither Rodiére,[100] nor Du Pontavice,[101] provide a definition, but refer to it variously as a "privilége maritime". Nevertheless, the Algerian maritime code brought a definition to it in article 72.[102] However, this definition seems to

95 The Ripon City [1897] P. 226 per Barnes J.

96 "Possessory Liens in English Law" , Supra. at P. 17.

97 M'Millan. A.R.G. Scottish. Maritime Practice. 1926. at P. 46.

98 Ibid.

99 Tetley. William. Maritime Liens and Claims. at P. 40.

100 Rodiére. Droit Maritime. Précis, 1979, at para.118.

101 du Pontavice. Emmanuel. Le Statut Des Navires. 1976, at para. 134 et seq.

102 Article 72 provides that: "Le privilége est une sureté réelle légal qui confére au créancier un droit de préférence sur les autres créanciers, á raison de la nature de sa créance".

be the same definition as the one given by the Algerian civil code in article 982 and that by defining the "privilége" as a chattels real which confers to the creditor a right of priority on the other creditors, because of the nature of this debt.[103] The Supreme Court Act 1891 does not define the maritime lien. It does specify the claims which attract it and, apart from limiting its force to the asset to which it may attach, ignores its characteristics. There is no specific indication of the "property" apart from ships to which it may attach, nor of the conditions of its attachment and there is no reference to any link with liability in personam. To discover the effect of S. 21 (3), therefore, recourse must be had judicial definition and development.[104]

Judicial Definition of Maritime Lien:

The concept of a maritime lien has been the subject of frequent consideration by the judiciary and although, inevitably, differences of formulation and emphasis exists, there has been unanimous agreement as to the essential characteristics of a maritime lien.[105]

In The "Bold Buccleugh", Sir John Jervis provided the first comprehensive and authoritative definition of a maritime lien. In the learned judge's opinion:

> ". . . a maritime lien is well defined . . . to mean a claim or privilege upon a thing to be carried into effect by legal process . . . that process to be a proceeding in rem . . . This claim or privilege travels with the thing into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached.[106]

Mellish L.J., in The Two Ellens adopted the following formulation in his

103 "My Own Translation".

104 Jackson. D.C. Enforcement of Maritime Claims. at P. 82.

105 Thomas. Maritime Liens. 1980. at P. 10. para. 10.

106 (1851) 7 Moo.P.C. 267, 284. The definition has been cited with approval on numerous subsequent occasions. See, for example, The Halley (1867) L.R. 2 P.C. 193; The Feronia (1868) L.R. 2. A. & E.65; The Charles Amelia (1868) L.R. 2 A. & E. 330; The Beldis [1936] P. 51; The Tolten [1946] P. 135.

explanation of a maritime lien:

> "A maritime lien must be something which adheres to the ship from the time that the fact happens which gave the Maritime lien, and then continues binding the ship until it is discharged, either by being satisfied or from the laches of the owner, or in any other way by which, by law, it may be discharged. It commences and there it continues binding on the ship until it comes to an end".[107]

Gorell Barnes J., in The Ripon City, after the review of the history of the law, defined a maritime lien in the following terms:

> ". . . a lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another - *a jus in re aliena.* It is, so to speak, a substraction from the absolute property of the owner in the thing".[108]

Atkin L.J., in The Tervaete, defined a maritime lien as consisting:

> ". . . of the right by legal proceedings in an appropriate form to have the ship seized by the officers of the court and made available by sale if not released on bail".[109]

In The Tolten, Scott L.J., in drawing a correlation between the English maritime lien and its continental counterpart, observed:

> "The essence of the 'privilege' was and still is, whether in continental or English law, that it comes into existence automatically without any antecedent formality, and simultaneously with the cause of action, and confers a true charge on the ship and freight of a proprietary

107 (1872) L.R. 4 P.C. 161, 169. Cited with approval by Lord Macnaghten in The Sara (1889) 14 App. Cas. 209, 225.

108 [1897] P. 226, 242. Cited with approval in The Tervaete [1922] P. 259 (C.A.); The Tolten [1946] P. 135 (C.A.); The Acrux [1965] p. 391.

109 [1922] P.259, 273. This is a highly proceduralistic kind of definition and suffers from the defect that if it fails to distinguish clearly a maritime lien and a statutory right of action in rem.

kind in favour of the privileged creditor. The charge goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take precedence over mortgages".[110]

Nature of the Maritime Liens:

The precise nature of the right is uncertain.[111] The lien is derived from the owner of the ship, and must have its root in his personal liability.[112] It need not, however, arise directly through him, but may arise through some person deriving temporary ownership or possession from him.[113] Thus, it may arise while the vessel is in the control of a charterer by demise or of a mortgagee in possession, in which case the owner may have his interests subjected to a maritime lien, although he is not personally liable for the claim out of which the lien arises.[114] For similar reasons an innocent purchaser may be subjected to a lien existing prior to the date of his purchase.[115] It does not, however, arise when the vessel is under requisition by the government, since the transfer to the Government is involuntary.[116] The claim or privilege travels with the thing into whosoever possession it may come, but it does not follow that it is indelible, and may not be lost by negligence or delay or bad faith. It is incohate from the moment of attachment, and when carried into effect by legal process it dates back to the period of its first attachment."[117] The lien covers both the freight which is due and the cargo in so far as it is liable for the freight, but in both cases it is subsidiary to that on the ship, and cannot exist independently of it.[118] It

110 [1946] P. 135, 150. The word "privilege" as used here is synonymous with "maritime lien".

111 M'Millan. A.R.G. Scottish Maritime Practice. 1926. at P.46.

112 The "Castelgate", 1893 A.C. 38, Lord Watson, at 52.

113 The "Taevaete",1922, P. (C.A.), Scrutton, L.J., at 270.

114 The "ripon City", 1897, P. 226, Gorell Barnes, J., at 244.

115 The "Bold Buccleugh", 1851, 7 Moo.P.C.C. 267.

116 The "Sylvan Arrow (No.2)", 1923, P.220.

117 The "Bold Buccleugh", Supra, Sir John Jervis, at 284.

118 The "Castelgate", Supra.

covers also the expenses of enforcing it, which may be of importance in undefended actions where there are competing claims against the ship.[119] From the nature of the right, maritime liens are not transferable, except in the case of instruments of bottomry or respondentia. In Scotland, however, it has been held that the lien for seamen's wages transmits to the payer of the wages without formal assignation if the payment is made on the credit of the ship and not on that of the owner;[120] and in England a similar decision has been reached on the ground that the claim of the person who pays the wages is itself in the nature of a wages claim.[121] When it comes to the civil law jurisdiction, namely the French and the Algerian law, the maritime lien seems to have the same nature as the one in the civil law. However, it is different because it arises in the maritime area and is incorporated in a different than that of the civil code. The French law includes the maritime liens in the Code of Commerce (this code includes the French Maritime Code),[122] and the Algerian law gives it a separate code proper to the maritime law called the Maritime Code.[123] The maritime lien in the French and Algerian law arises for services done to the ship such as the wages and money due to the captain and the other members of the crew (article 73, (a)) of the Algerian Maritime Code and article 31 (3) of the French Code of Commerce, and for salvage and assistance services rendered to the ship (article73 (e), of the Algerian..Martime Code) and article31 (4) of the French Code of Com. These maritime liens trace the ship into whosoever hands it may pass, and that is prescribed by the French Code of Commerce, in article39,[124] and

119 The "Margaret", 1835, 3 Hagg. Adm. 238.

120 Clark V. Bowring, 1908 S.C. 1168.

121 The "William S. Safford", 1860, Lush. 69.

122 Loi No. 67-5 du 3 Janvier 1967 portant statut des navires et bâtiments de mer. Chapitre V- Priviléges sur les navires. et Décret No. 67-967 du 27 Octobre 1967 portant statut des navires et autres bâtiments de mer.

123 Ordonnance No. 76-80 du 23 Octobre 1976 portant Code Maritime.

124 Art.39 provides in French that:

Les priviléges prévus á l'article 31 suivent le navire en quelques mains qu'il passe . . . ".

the Algerian Maritime Code in article82.[125]

What can be added to what has been said about the nature of maritime lien, is that the lien is enforceable by means of process of the court.[126] "Having its origin in this rule of the civil law, a maritime lien is well defined by Lord Tenderden to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr.Justice Story,[127] explains that process to be a proceeding in rem, and adds, that whenever a lien or claim is given upon a thing, then the Admiralty enforces it by proceeding in rem, and, indeed, is the only court competent to enforce it. A maritime lien is the foundation of a proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches; and, whilst it must be admitted that where such a lien exists, it may found in rem is equally true that in all cases where a proceeding in rem is the proper course, there a maritime lien exists which is a privilege or claim upon the thing, to be carried into effect by legal process. This claim or privilege travels with the thing into whatsoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached": The Bold Buccleugh", (1851).[128]

Maritime Liens not Generally Enforced by Statutes Giving Remedy "in rem":

Since the judgement in The Bold Buccleugh,[129] was delivered the remedy in rem has been extended to a number of new cases; and, as is now well

125 Art. 82 of the Alg.Mart.Code provides in french that: "Sous résérve des dispositions de l'article 87 ci-aprés, les priviléges maritimes énumérés á l'article 73 suivent le navire, nonobstant tout changement de propriété ou d'immatriculation."

126 Carver. Carriage By Sea. Vol.II. para 2080. at P. 1439.

127 The Brig Nestor. (1831) 1 Summer 73.

128 7 Moo.P.C. 267, 284. See now as to the nature of a maritime lien France Fenwick V. Procurator General [1924] A.C. 667, 682, 683.

129 Ibid.

established, it is not a necessary inference from the fact that these statutes have given the remedy in rem for a particular class of claims, that it was intended to confer a maritime lien, for those claims.[130]

Thus, in The Pieve Superieure,[131] it was decided by the Privy Council that the Admiralty Court Act 1861 did not give a maritime lien for claims for damage to the cargo, or breach of duty, or breach of contract, within Section 6 of that Act.[132] The view taken was that the jurisdiction given to the court by the section depended not on the state of things at the time when the claim arose but upon the state of things when the suit was instituted, namely, whether there was at that time an owner of the ship domiciled in England; whereas, a maritime lien must attach and be enforced from the time the claim arises.[133] In later cases the more comprehensive view has been taken, that words conferring the remedy in rem do not suffice to create a maritime lien. In The Heinrich Bjorn,[134] the question was whether a maritime lien given by the Admiralty Court Act 1840 for necessaries supplied to a foreign ship. The jurisdiction under that Act was not conditional. The House of Lords, affirming the Court of Appeal, held that, though that jurisdiction was exercisable by proceeding in rem, no maritime lien for the claim was conferred. And in The Sara,[135] the House of Lords took the

130 Carver. Carriage By Sea. op cit. at P. 1439.

131 The Pacific (1864) Br. & L. 243; The Troubador (1866) L.R. 1 A.& E. 302; The Two Ellens (1872) L.R. 4 P.C. 161; The Pieve Superieure (1874) L.R. 5 P.C. 482; The Heinrich Bjorn (1866) 11 App. Cas. 270; 10 P.D. 44; The Sara (1889) 14 App. Cas. 209; 12 P.D. 158. And see The Rio Tinto (1884) 9 App.Cas. 356.

132 Admiralty Court Act 1861, S.6, now replaced by the Supreme Court Act 1981, S.20(2) (g) and (h) (formerly Administration of Justice Act 1956, S.1 (1) (g) and (h)), gave the high Court of Admiralty jurisdiction over claims under Bills of lading in respect of damage to goods carried into a home port "unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner is domiciled in England or Wales". S.35 of the Act of 1861 (now replaced by the provisions of the Act of 1981) provided that the jurisdiction might be exercised either by proceeding in rem or in personam.

133 Cf. The Two Ellens (1872) L.R. 4 P.C. 161, 169.

134 (1866) 11 A.C. 270; 10 P.D. 44.

135 (1889) 14 A.C. 209; reversing 12 P.D. 158. See now Merchant Shipping Act 1970, S.18. replacing 1894 Act, S.18. cf. The Castelgate [1893] A.C. 38.

same view with regard to the claim of a maritime lien for a master's disbursements, under the Admiralty Court Act 1861, S.10. The Supreme Court Act 1981 makes it clear by section 21 (4) that no maritime lien is given by it in the case of a large class of actions in rem ((e) to (r) listed in section 20 (2)). By section 3 (3): "In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action in rem may be brought in the High Court against that ship, aircraft or property". The words "any case in which there is a maritime lien" must refer to the law apart from this statute, for it confers none.[136]

Fundamental Legal Characteristics of a Maritime Lien:

The broad legal characteristics of a maritime lien are today reasonably well understood and may be presented in the form of the following structured propositions.[137] A maritime lien may be described as:

(i)- Privileged Claim or Charge:

A maritime lien may be considered as a privileged claim in many regards but "privilege" in the sense used here expressly refers to the high priority enjoyed by a maritime lien. The same can be said about the French and the Algerian law. The French Code of Com., which the contains the French Maritime Law, does not give a definition to the maritime lien or maritime privilege, but left it to the civil law which describes it according to its nature and priority over the other liens even mortgages (article2095 of the French civil code). However, the Algerian Maritime Code, gave a definition to the maritime lien, which considers it as a preferred right, which has a right of priority over the other privileges because of its nature (article72 of the Algerian Maritime Code). For reasons of general public policy, a maritime lien enjoys a priority in ranking over mortgages, possessory liens and statutory right of action in rem.[138]

136 Carver. Carriage By Sea. Vol 2. para 2083. at P. 1440.

137 Thomas. Maritime Liens. para 12. at P. 11.

138 Ibid. para 12. at P. 12.

(ii)- Maritime Property:

A maritime lien is an encumbrance on maritime property. Traditionally, maritime property is a phrase which refers, irrespective of nationality, to a ship, cargo and freight. Beyond these categories of property, and in the absence of further statutory developments, no maritime lien is capable of arising even though the property in question may, in a general sense, be regarded as maritime property. Thus, no maritime lien is capable of encumbrancing a dock, wharf, lighthouse, off-shore oil rig or other similar structure, even though the owner or possessor of such a structure may be under a personal legal liability.

(iii)- For Services Rendered to it or Damage Caused by it:

Maritime liens represent a small cluster of claims which arise either out of services rendered to a maritime res or from damage done by such a res.[139] The claim currently recognised as giving rise to maritime liens are:

(a)- Damage done by a ship.[140]
(b)- Salvage.[141]
(c)- Seamen's wages.[142]
(d)- Master's wages and disbursements.[143]
(e)- Bottomry and respondentia.

The categories of maritime liens identified above represent the "principal" or "proper" maritime liens.

(iv)- Accruing From The Moment Of The Events Out Of Which The Maritime Lien Arises:

A maritime lien attaches to a res from the moment of the circumstances out of which the maritime lien arises. In the words of Dr. Lushington, a maritime

139 See, generally, The Ripon City [1897] P. 226; The Tolten [1946] P. 135, per Scott L.J. at P. 146.

140 (Art. 73 (d) of the Alg.Mart.Code and art. 31 (5) of the Fr.Code of Com).

141 Art. 31 (4) of the Fr.Code of Com., and the art. 73 (e) of the Alg.Mart.Code.

142 Art. 73 (a) of the Alg.Mart.Code and art. 31 (4) of the Fr.Code of Com.

143 Art 73 (g) of the Alg.Mart.Code and art. 31 (6) of the Fr.Code of Com.

lien "springs into existence the moment the circumstances give birth to it".[144] Thus, for example, in the case of damage and salvage a maritime lien arises from the moment damage or injury is caused by the offending ship, or from the time beneficial services are rendered to a distressed vessel.[145] The Algerian Maritime Code considers that these debts are considered as born from the moment of the date of the accident in the case of injury to a person or a property and the day the services have been rendered for the operations of salvage (article81,(a), (c)).[146] The French Code of Com., provides in article 10 of the Decree of October the 27 th of 1967, a similar provision than that one provided in his counterpart Algerian one. It considers that the time of prescription cited in article39 of the Law of January, the 3 rd of 1967, is to start from the day the services of salvage has been rendered for the operation of salvage (S.(2) art 10) and from the day when the damages have been caused for damage (article10, S.(2)).[147]

(v)- Traveling With The Property Secretively And Unconditionally:

A maritime lien is invariably described as representing an indivisible, secret, indelible or inalienable encumbrance. Such epithets, both individually

144 The Mary Ann (1865) L.R. 1 A. & E. 8. See also The Bold Buccleugh (1851) 7 Moo. P. C. 267; The Two Ellens (1872) L. R. 4 P.C. 161; The Sara (1889) 14 App. Cas. 209, per Lord Watson at P. 218; The tervaete [1922] P. 259 (C.A.) per Scrutton L. J. at P. 270.

145 See, The Longford (1889) 14 P. D. 34, per Butt J. at P. 36. See also, The Tolten [1946] P. 135, 152; The Father Thames [1979] 2 Lloyd's Rep. 364, per Sheen J. at P. 368.

146 "My Own Translation". The actual art.81 of the Alg.Mart.Code provides in french that: " Est considéré comme date de naissance des créances garanties par un privilége maritime:

(a)- á titre de lésion corporélle á une pérsonne ou de pérte ou dommage á un bien, le jour oú ils ont eu lieu; . . .

(c)- á titre d'assistance, de sauvetage ou de relévement d'épave, le jour auquel ces opérations ont été achevées; . . . ".

147 "My Own Translation". The actual art.10 provides in French that:

"Les délais prévus á l'article 39 de la loi No. 67-5 du 3 janvier 1967 portant statut des navires et autres bâtiment courent:

(i)- Pour les priviléges garantissant les rémunérations d'assistance et de sauvetage, á partir du jour oú les opérations sont términées;

(ii)- Pour les priviléges garantissant les indemnités d'abordage et autres accidents et pour lésions corporélles, du jour oú le dommage a été causé; . . . "

and correctively, are utilised so as to convey what may be regarded as the most striking feature of a maritime lien. Once it attaches to a res a maritime lien thereafter "travels with the thing into whosoever's possession it may come."[148] The maritime lien "gives" a right against the ship, which continues notwithstanding a change of ownership."[149] The same provision is provided in the Algerian (article82 of the Algerian Maritime Code) and French law (article39 of the Law of January the 3 rd of 1967).[150] In these two articles, i.e., the Algerian and the French articles, it is prescribed that the maritime liens travel with the property into whosoever hands it may come.

(vi)- **Enforced By An Action *In Rem*:**

The inchoate maritime lien is perfected or crystallised by an action in rem. Under such a proceeding a maritime lienee may cause the incumbranced res to be arrested by an officer of the Admiralty Court and thereafter sold, and with the claim satisfied out of the proceeds of sale.[151]

The right of a maritime lienee to proceed in rem is confirmed in Administration of justice Act, 1956, S. 3 (3). This right is also confirmed in the Supreme Court Act 1981, sect 21(3).

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148 The Bold Buccleugh, Supra, per Sir John Jervis, at P. 284.

149 The Colorado [1923] P. 102, per Atkin L. J. at P. 110.

150 Art.82 of the Alg.Mart.Code provides that: "Sous résérve des dispositions de l'article 87 ci-aprés, les priviléges maritimes énumérés á l'article 73 suivent le navire, nonobstant tout changement de propriété ou d'immatriculation."

Art. 39 of the Fr.Code of Com., provides that:"Les priviléges á l'article 31 suivent le navire en quélque mains qu'il passe . . . ".

151 See, The Cella (1888) 13 P.D. 82, per Lord Esher M.R. at P. 86.

CHAPTER TWO

POSSESSION, INCLUDING THE RELATION BETWEEN ACTUAL AND LEGAL POSSESSION

Definition Of Possession:

This work is concerned with the different liens which arise under the contract of carriage of goods by sea, but this view of the subject will bring all the different liens into consideration. More accurately, this work is concerned with the liens which arise under the charterparty and the bill of lading and this will narrow the scope of the study. These nature of liens arising under charterparties and bills of lading are the subject of argument, but the general opinion is that they are possessory liens. This being so, the first step will be to consider the meaning of possession. At first sight the subject of possession does not appear to create much difficulty, but closer examination will disclose that few theoretical concepts are less easy of exact statement. In the whole range of legal theory, there is no concept more difficult than that of possession. The Roman lawyers sought to analyse it, and since their day the problem has formed the subject of voluminous literature, and it still continues to tax the ingenuity of jurists. It is a matter of immense practical, as well as academic importance. The legal consequences which flow from the acquisition and loss of possession are many and serious. For instance, possession is considered as evidence of ownership; the possessor of a thing is presumed to be the owner of it, and may put all other claimants to proof of their title. Long possession is a sufficient title even to property to which originally belonged to another. The transfer of possession is one of the chief methods of transferring ownership. The first possession of thing which as yet to no one is a good title of right. Even in respect of property already owned, the wrongful possession of it is a good title for the

wrongdoer, as against all the world except the true owner. These are some, though only some, of the results which the law attributes to possession, rightful of wrongful. They are sufficient to show the importance of this conception, and the necessity of an adequate analysis of its essential nature. To look for a definition that will summarise the meanings given to the term "possession" in ordinary language, in all areas of law and in all legal systems, is to seek the impossible. We may be tempted, therefore, to inquire instead into the sorts of factual criteria according to which each area of a system of law ascribes possessory rights to people and investigate the nature of these rights. In other words, we may prefer to ask "what are the facts on which legal possession is based, and what are the legal consequences?". In short, we might feel that the term "possession" itself could just as well be omitted: there are facts and there are rights, but possession itself is merely a useful but unnecessary stepping _ stone from one to the other.

In French law, possession is the external manifestation of the exercise of power as a question of fact over a thing. This exercise of a power of fact must be accompanied by the intention of the possessor to use that right. Thus, under article 2228 of the French civil code : "Possession is the detention or the enjoyment of a thing or of a right either personally or through another who detains the thing or exercises the right in his name".[1] The Algerian civil code does not give any clear definition to the term possession. So, according to the definition given above by the article 2228 of the French civil code , possession is a relation of fact between one thing and one person, and that relation allows that person to exercise over that thing acts which in their external manifestation will correspond to the exercise of a right, whether that person exercises that right by himself or through a third person, and also, whether that person is or is not the

1 "My Own Translation". The actual art.2228 provides in French that:

"La possession est la détention ou la jouissance d'une chose ou d'un droit que nous tenons ou que nous exerçons par nous meme, ou par un autre qui la tient ou qui l'exércice en notre nom".

regular holder of that right. However, this definition seems to be inadequate in two points:[2]

First, the use of the term detention, which has a technical meaning, and which designates a closer situation to that of real possession, is confusing.

Secondly, it is inaccurate to say that possession is the enjoyment of a right, because there is no necessary connection between possession and the existence of a right. Possession, is the exercise of a right, when the right exists; however, we might have possession without having any right to exercise it. For instance, a thief has possession; possession is then a mere fact, it consists in having a relation with the thing as a holder of right. It exists and give its effects, whether the possessor has or has not the right to act as he does.

So, to find out, who is the possessor of a thing, we must look at the situation of fact, without trying to understand if this situation of fact corresponds to a situation of right.[3]

If we go back to the common law, we find that the word "possession" is used in relation to movable things in three different senses.[4]

Firstly, it is used to signify mere physical possession, which is rather a state of facts than a legal notion. The law does not define modes of events in which it may commence or cease. It may perhaps be generally described by stating that when a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and so far as regards other persons, the thing is under the protection of his personal presence, or in a house or on a land occupied by him, or in some receptacle belonging to him and under his control, he is in physical possession of the thing.

Secondly, it is used to signify possession in a legal sense, and in this sense, it

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2 Ripert.Georges. Jean Boulanger. Traité De Droit Civil. D'Aprés Le Traité De Planiol. Tome II. Obligations Droits Réels. at P.799.

3 Henri Et Léon Mazeaud Et Jean Mazeaud. Leçons De Droit Civil. Tome Deuxiéme. Vol.2. 4 é Édition par Michel de Juglart. at P. 114.

4 Pollock And Wright. Possession In The Common Law. at P. 118.

describes a legal relation of a person to a thing with respect to other persons. It may exist without physical possession as for instance, when a man is away from his home, his household effects do not cease to be in his possession.

Thirdly, it is used, especially in the year-books and by ancient writers, to signify right to possession, which may be either of that general kind which is synonymous with ownership or of a temporary or otherwise special character.

Thus, the most fruitful approach is first to examine the ordinary or extra-legal meaning of possession, and then to discuss the ways in which a legal concept of possession may diverge from this on account of the factors which the law may take into consideration, remembering that while the factual concept underlies the legal concept, the latter, may in turn affect our use of the former. The way that lawyers use "possession" may well have repercussions on its extra legal use.

2-1- The Different Types Of Possession:

2-1-1- Possession In Fact And Possession In Law:

One must make a distinction between possession and detention, whether it is in the common law or in the civil law. So, in the common law we might make a difference between possession in fact and possession in law, because possession in fact is the same as detention which is known in the civil law, which is just a physical relation between a person and a thing. Whereas, possession in the real meaning of the word, i.e., possession in law, is the relation between the person and the thing, no matter that the person has any physical control over the thing. So, the first difficulty with which the student will be assailed is the distinction between possession in law and possession in fact or detention. So, it is necessary to bear in mind from the outset the distinction between the two kinds of possession. Possession, in the popular sense, denotes a state of fact of

exclusive physical control, which state of fact is not always ascertainable with any degree of certainty, and does not always produce the normal legal effect. Not everything which is recognised as possession by law needs be such in truth and in fact. And on the other hand, the law, by reasons good or bad, may be moved to exclude from the limits of the conception facts which rightly fall within them.

(i)- Possession In Fact And Detention:

One may define possession, as a relationship between a person and a thing. For example, I possess, roughly speaking, those things which I have under my control, such as, the things which I hold in my hand, the clothes which I wear, and the objects which I have by me. For instance, if I capture a wild animal, I get possession of it; if it escapes from my control, then I lose possession of it. Now to say that something is under my control is not to assert that I continuously exercise control over it, because, I can have a thing in my control without actually holding or using it at every given moment of time. In the ordinary sense of the word, I retain possession of my jacket even if I take it off and put down beside me; and I continue in possession of it even though I fall asleep. All is necessary to exercise a physical control over the thing, is that I should be in such a position as to be able, in the normal course of events, to resume actual control if I want. At this point we may observe the influence of law and of the legal concept of possession on the idea of possession in fact. In a wholly primitive society utterly devoid of law, and of legal protection for possession, there might well be little hope of resuming actual control over the thing once you had momentarily relinquished it. In such a society, men could only be said to possess those objects over which they were actually exercising control. On the other hand, in a society where possession is respected generally and is protected by law, we may expect that temporary relinquishement of actual control will not result in complete loss of the ability loss of the ability to

resume it at will. Thus, by providing protection to possession in a kind of remedies against dispossession, the law enlarges the number of cases where a man may be said to have possession.

According to the analysis contained in Harris's Concept of Possession, whether I can be said to have sufficient control (whether actual or potential) to be in possession of an object, will depend on a variety of factors.[5]

First, there is the extent of my power over the object itself. It is obvious that complete absence of power will lead to a complete lack of possession, but having possession does not involve having absolute power over the subject matter; the amount of power that is necessary varies according to the nature of the object. The more amenable it is to control, the less likely am I to qualify as possessing it without being able to exercise a high degree of control. So, possession of small objects may involve holding them or just having them near to hand; a large or immovable object, such as a ship or a house, could be considered as remaining in my possession even though I am miles away and able to exercise very little control, if any.

Another factor relevant to the assessment of control is the power of excluding other people. Once actual control is abandoned the possibility of resumption may well depend on the lack of outside interference; to his having kept secret the object's existence or whereabouts; to his neighbour's unwillingness to interfere if the exercise of control has been interrupted; and finally to the law itself which may penalise any such interruption. Indeed, so important is the exclusion of others to the notion of possession that is sometimes regarded as an essential part of the concept of possession. To possess anything, it

5 Harris. D.R, in, "The Concept Of Possession In English Law". In Oxford Essays In Jurisprudence (ed.Guest), isolates no less than nine factors which have been held relevant to a conclusion that a plaintiff has acquired possession of a chattel for the purposes of a particular rule of law. It is suggested that the reason for the relevance in law of the first seven of the factors listed by Harris is partly their relevance to a conclusion that a person has possesion in fact.

is said, entails being able or intending to exclude others from it.[6]

This is not always true, and that can be seen from the fact that "possession" is a term apt to describe a situation involving only one person. For instance, if the sole inhabitant of a desert island catches a fish, he can quite correctly be described as being in possession of it, while keeping it in his possession, or as losing possession of it if it escapes. Thus, actual possession differs from ownership, which consists of rights and which therefore automatically involves the existence of persons against whom the owner can have those rights. If I possess something, then it is true that if my possession is challenged or attacked I shall probably display an intention of excluding such interference. So, the test for determining whether a man is in possession of anything is whether he is in general control of it. Unless he is actually holding or using it, in which event he clearly has possession. We have to ask whether the facts are such that we can expect him to be able to enjoy the use of it without any external interference. When it comes to the detention, we find that the possessor of a thing acts as a master over the thing, but others may exercise this power without being neither owners, nor holders of another chattels real; these are those who have the detention of the thing. Detention which is sometimes called possession précaire in French, i.e., precarious possession, must be distinguished from possession. The tenant of a flat, uses the flat he rented, the bailee or carrier, preserves the thing which has been entrusted to him. They have the control over that thing. However, whether that thing is hired, entrusted or carried, these cases can never make these holders possessors, because possession is in the true owner of the thing. Detention is always considered as a result of a juridical situation; it is supposed to have a juridical title as its origin. That title, might be, conventional (a tenant of a flat, bailee, etc), legal or judicial (sequestration). Thus, the one who

6 The view that possession in some way involves an exclisive element was held by Salmond, Jurisprudence (7 th ed.), § 97; Pollock, Jurisprudence And Legal Essays, (ed. Goodhart), 98 et Seq; Holmes, The Common Law, 220 et Seq.

has detention recognises the right of the owner, and will detain the thing for the latter, even if he has a personal interest in that detention. On the other hand, the possessor considers himself as the owner or the holder of another's property, whether he is or he is not the holder of that right. If he is not, he repudiates the rights of the owner or the holder of the chattels real; it is in defiance of the owner's prerogatives that a thief exercises his detention or mastership over the stolen thing. The power of the holder, being born from a judicial situation, is a power of right: the tenant or bailee, . . . etc, have a right of debt against the lessor who must put the thing under their control or for their use.

The possessor, as such, has neither a property nor a right of debt. Possession and detention are also differentiated on two points:[7]

First, the possessor can be holder of the right which corresponds to the power he exercises; he is in most of the occasions like this, because it is an exceptional situation that a thing escapes the control of the person who has a chattels real. Conversely, the two qualities of holder and owner can never be in the same person: for instance, I cannot be said to be the tenant of my own farm.

Secondly, when an owner ceases to have possession of a thing as when someone takes control of that thing, the presence of the holder will not make the owner cease to be the possessor of that thing. So, the owner who hired his house to a tenant will keep his possession; he will possess through the tenant.

(ii)- Possession In Law:

In any society, providing some protection to possession is essential. This being so, the law must provide such protection, which can be done in two different ways.

First, the possessor can be given certain legal rights, such as the right to continue in possession free from any external interference. This primary right in

7 Mazeaud. Henri Et Léon. Et Mazeaud. Jean. Leçons De Droit Civil. Tome Deuxiéme. Vol.2. 4 é édition, par Michel de Juglart. at P. 114.

rem can then be supported by various sanctioning rights in personam against those who violate the possessor's primary right: he then can be given a right to recover compensation for interference and for dispossession, he can also be given a right to have his possession restored to him.

Secondly, the law can protect possession with criminal sanctions, and that by prescribing criminal penalties for wrongful interference and wrongful dispossession. By such civil and criminal remedies the law can safeguard a man's *de facto* possession

Now, it is obvious that whenever such remedies are invoked, it will be important to ascertain whether a person invoking them actually has any possession to be protected. Therefore, there will be a need for legal criteria to determine whether a person is in possession of an object. A legal system could of course content itself with providing that in law the existence of possession should depend solely on the criteria of common sense. Thus, possession in law would be the same as possession in fact; a man would in law possess only those things which in ordinary language he would be said to possess. Such system of law then, would concern itself only with actual possession. The two concepts could quite easily coincide. Such coincidence does not need to restrict legal protection to cases of actual possession. For instance, if A wrongfully takes possession of B's book, the law can still consider B as the true one who must have possession, and therefore, affords all its possessory remedies to B, on the ground that B did originally have possession, and therefore ought to have possession. Thus, the fact that the law regards as possessors only those who are actually in possession, does not prevent it from protecting those who are not in possession, but who in the general view of society ought to be. For this reason, the protection of possession would be pointless if legal protection ceased he moment possession was lost, because the protection of possession entails supporting the dispossessed against the dispossessor. Thus, what is meant by possession in law is the legal character which is given to possession by law, because one might not

be said to be in possession (actual possession) of an object, but in the eyes of the law he can be considered as possessor of that object. For instance, if a carrier put goods in a warehouse, here actual possession has passed to the warehouseman, because he has the goods in his custody, but the law considers the carrier as the true possessor of the goods, because it is him who originally had possession and who put the warehouseman in possession of the goods. Moreover, possession in law comes to protect the real possessor, because this possessor might lose his possession, as if the thing was stolen from him or as if he lost it, here the thief or the finder has actual possession of the thing, but the original possessor is still considered as the true and only possessor of the thing. So, possession in law is more likely a means of protection of the possession, than a definition of possession. Thus, when a system of law provides possessory rights and remedies to persons who are not in actual possession, and that can be done not by considering them simply as entitled to possession and its attendant rights, but by regarding them as being for legal purposes in possession. In this case, we may find that one who has not the actual possession is nevertheless the actual possessor in the eyes of the law; and on the other hand, one who has the actual possession may be considered by law as a non-possessor. For the crime of theft, the common law provides numerous examples of this tendency. This offense penalises the wrongful taking of possession, and in order to qualify as wrongful, such taking must be, firstly, without the true possessor's consent, and secondly, accompanied by an intent to deprive the true possessor of the object stolen. The same is applied by the French and Algerian civil code ; the French civil code prescribes in article 2279 / 2 and the Algerian civil code in article 835, that, the person from whom the thing was stolen can claim it back in a period of three years, because the possessor was dispossessed against his will, i.e., theft is considered as a dispossession against the possessor's will.[8]

However, there are many cases, where the wrongdoer gets possession with the consent of an unsuspecting owner and where accordingly dishonesty would

8 Crim. 18 nov. 1837, S. 1838. 1. 366. (French).

go scot-free. For instance, where a man asks his companion to hold his luggage, or a shopkeeper allows a customer to examine his goods; in all these cases, possession might well be said to have been given to the second party by the first one, and with his consent. Consequently, if the companion, the customer in the shop, absconded with the goods, they would not in ordinary language take possession against the rightful possessor's consent, since they would have already obtained it earlier with consent. The law, however, provides that in such cases possession remains in the first party and does not pass to the second, but the second party is said to obtain mere custody of the article. Conversely, the French and the Algerian law, consider the possessor still in possession and give the right to recover the thing only if it was disposed against his will. But if he is dispossessed with his consent, such as if he gives the custody of the thing into the hands of an unfaithful holder, and the latter disposes of the thing, here the original possessor should be blamed for his bad choice by which he put his choice in an unfaithful holder. For instance, if the owner of a bicycle entrusted it to a mechanic to repair it but who sells it, there is no theft and the owner has been dispossessed with his consent. There is however a breach of trust. Thus, the one who brought this bicycle has a good title and will be protected, by the article 2279 of the French civil code and 835 of the Algerian civil code, which provides that, as regards movables possession is a good title.

It should be noted that there was nothing logically inevitable in this sort of development: in order to catch dishonesty which is outside the strict meaning of the definition of larceny, the law has extended the meaning of certain terms in the definition, it could equally well have extended the definition itself. This indeed has been done to cope with case of the dishonest bailee. The bailee is a person who acquires possession of the goods in law as well as in fact. So, what would happen, if he misappropriates them? having already got possession, he cannot, it would seem, be guilty of larceny. First, the courts created a peculiar

rule that the bailee only got possession of the container and not of its content; if he subsequently "broke bulk" by opening the container and misappropriating the contents, he was now deemed to take possession of the content for the first time, and because such taking was against the original possessor's consent, he became guilty of larceny.[9] Later, however, legislation provided another rule for the case of the bailee who frodulently misappropriated the goods bailed to him, which that he would be guilty of stealing, thus providing that a bailee who has lawful possession can nevertheless commit larceny of the goods he possesses. Here, then the definition of larceny was extended by extending the terms in the definition.

The same can be said about the French and the Algerian civil code, which provide in their articles (article 1599 of the French civil code and article 397 of the Algerian civilcode), which consider that the contract of sale of things which do not belong to the seller but to a third person, as a relatively void contract in favour of the real owner.[10] Another similar case which similar to the problem of the bailee, is that posed by the delivery of an object to another, an object which, unknown to either of them, contains inside it certain valuable items of property. According to common law, however, unless the deliverer intends the deliveree to obtain possession of the contents, the latter does not acquire legal possession of them until he discovers them and that if at this stage he decides dishonestly to misappropriate them, he accordingly becomes guilty of larceny.[11]

According to the cases cited above, the physical possession of the accused is regarded as less than legal possession, because the accused is unaware that he has the object. However, yet in common law possession does not always involve knowledge of the presence or existence of the subject matter. If for instance, A

9 This curious rule of law orginated from the carrier's case (1473) Y.B.13 Edw. iv fo. 9 pasch. pl. 5.

10 Gazete Du Palais. 93 e Année. No-6 bis. 2 e seméstre 1973. cass. 3 e civ. 16 avril 1973. Somm., p. 132, Bull. cass. 1973. 3. 218.

11 Merry v. Green (1847) M. & W. 623.

unknowingly takes something which is in B's possession, he nevertheless takes possession and commits trespass against B.

So, in the famous case of R. v. Riley;[12] the accused was held to have taken possession of a sheep which belonged to the prosecutor and which he unknowingly drove with his own flock to the market.

Normally, lost articles are deemed in law to remain in possession of the loser. So, if I lose my wallet, in law I retain possession of it, even though in fact I might well be said to have lost possession. This view is accepted by the French and Algerian law. The French civil code in article 2279 / 2 and the Algerian civilcode in article 836, provide that the one who lost a movable has the right to claim it back from the finder in a period of time of three years starting from the day of the loss.

Finally, outside the law, possession is used in an absolute sense whereas within the law it is employed in a relative sense. Outside the law, we do not speak of a person having possession as against someone else; we say that he either has or has not got possession. In law on the other hand, we talk rather of possession of something which one person has against another.

2-1-2- Corporeal And Incorporeal Possession:

Corporeal possession is the possession of a material object, a house, a farm, a piece of money. Incorporeal possession is the possession of anything other than a material object- for example, a way over another man's land, the access of light to the windows of a house, a title of rank, an office of profit, and such like.

Corporeal possession is termed in Roman law *possessio corporis.* Incorporeal possession is distinguished as *possessio juris*, the possession of a right, just as incorporeal ownership is the ownership of a right.

It is a question much debated whether incorporeal is in reality true possession at all. Some are of opinion that all genuine possession is corporeal,

12 (1853) Dears. C.C. 149.

and that the other is related to it by way of analogy merely. The Roman lawyers speak with hesitation and even inconsistency on the point. They sometimes include both forms under the title of *possessio*, while at other times they are careful to qualify incorporeal possession as *quasi possessio*-something which is not true possession, but is analogous to it. The question is one of no little difficulty, but the opinion here accepted is that the two forms do in truth belong to a single genus. The true idea of possession is wider than that of corporeal possession. For purpose of this work, we are not concerned with incorporeal possession, for liens can only exist in respect of a material object. Possession for our purpose is therefore, corporeal possession, which is a continuing relation between a person and some material object. Nevertheless, we will try to give a brief account about incorporeal possession.

(i)- Corporeal Possession:

Corporeal possession can clearly be defined as some form of continuing relation between a person and a material object. It is equally clear that it is a relation of fact and not one of right. It may be, and commonly is, a title of right; but it is not right itself. A man may possess a thing in defiance of the law, no less than in accordance with it. For instance, a thief has possession in law, although he has acquired it contrary to the law. The law condemns his possession as wrongful, but at the same time recognises that it exists, and attributes to it most, if not all, of the ordinary consequences of possession. What, then, is the exact nature of that continuing de facto relation between a person and a thing, which is known as a possession? The answer is apparently this: the possession of a material object is the continuing exercise of a claim to the exclusive use of it. It involves, therefore, two distinct elements, one of which is mental or subjective, the other physical or objective. The one consists in the intention of the possessor with respect to the thing possessed, while the other consists in the external facts

in which this intention has realised, embodied, or fulfilled itself. These two constituent elements of possession were distinguished by the roman lawyers as *animus* and *corpus*, and the expressions are conveniently retained by modern writers. Neither of these is sufficient by itself. Possession begins only with their union, and lasts only until one or other of them disappears. No claim or animus, however strenuous or however rightful, will enable a man to acquire or retain possession, unless it is effectually realised or exercised in fact. Conversely, the corpus without the animus is equally ineffective.

(ii)- Incorporeal Possession:

Incorporeal possession is the possession of anything other than a material object. For example, I may possess not the land itself, but a way over it, or the access of light from it, or the support afforded by it to my land which adjoins it. So, also I may possess powers, privileges, immunities, liberties, offices, dignities, services, monopolies. All these things may be possessed as well as owned. They may be possessed by one man, and owned by another. They may owned and not possessed, or possessed and not owned. Corporeal possession as we have already seen above, is the exercise of a claim to the exclusive use of a material object. Incorporeal possession, is on the other hand, the continuing exercise of a claim to anything else. The thing so claimed, may be either the non-exclusive use of a material object (for example, a way or other servitude over a piece of land) or some interest os advantage unconnected with the use of material objects (for example, a trade mark, a patent, or an office of profit). In each kind of possession there are the same two elements required, namely the animus and the corpus.

In the case of incorporeal possession, actual continuous use and enjoyment is essential, as being the only possible mode of exercise. I can acquire and retain possession of a right of way only through actual and repeated use of it. In the case of incorporeal things continuing non-use is inconsistent with possession,

though in the case of corporeal things it is consistent with it.

Incorporeal possession is commonly called the possession of a right, and corporeal possession is distinguished from it as the possession of a thing. The Roman lawyers distinguished between *possessio juris* and *possessio corpis*. Adopting this nomenclature, we may define incorporeal possession as the continuing exercise of a right, rather than as the continuing exercise *de facto*. Thus, the French civil code defines possession in article 2228, in the following way, "possession is the detention or the enjoyment of a thing or of a right either personally or through another who detains the thing or exercises the right in his name".[13] We shall deal with possession in the French law later on in this chapter, in more detail.

To exercise a *de facto* possession means to exercise the claim to possess, as if it were a right . There may be no right in reality; and where there is a right it may be vested in some other person, and not in the *de facto* claimant.

2-1-3- Immediate And Mediate Possession:

If one person possesses a thing, it does not necessarily mean that he possesses it for himself, but that person may possess a thing for and on account of someone else. In such a case the latter is in possession by the agency of him who so holds the thing on his behalf. Thus, the possession held by one man through another may be termed mediate, while that which is acquired or retained directly or personally may be distinguished as immediate or direct. Of mediate possession there are three kinds:

The first is that which I acquire through an agent or a servant; that is to say, through someone who holds solely on my account and claims no interest of his

13 "My Own Translation". The actual art.2228 provides in french that:

"La possession est la détention ou la jouissance d'une chose ou d'un droit que nous tenons ou que nous exerçons par nous meme, ou par un autre qui la tient ou qui l'exércice en notre nom".

own. In such a case I undoubtedly acquire or retain possession; as, for example, when I deposit goods with a warehouseman who holds them on my account. In such a case, though the immediate possession is in the warehouseman, the mediate possession is in me; for the immediate possession is held on my account, an my *animus domini* is therefore sufficiently realised in the facts.

The second kind of mediate possession is that in which the direct possession is in one who holds both on my account and on his own, but who recognises my superior right to obtain from him the direct possession whenever I choose to demand it. That is to say, it is the case of a borrower or tenant at will. I do not lose possession of a thing because I have lent it to someone who acknowledges my title to it and is prepared to return it to me on demand, and who in the mean time holds it and looks after it on my behalf. There is no difference in this respect between entrusting a thing to a servant or agent and entrusting it to a borrower. In Ancona v. Rogers,[14] it is said in the judgment of the Exchequer Chamber that:

> "There is no doubt that a bailor, may still treat the goods as being in his own possession, and can maintain trespass against a wrongdoer who interfers with them. It was argued, however, that this was a mere legal or constructive possession of the goods . . . ".

Salmond in his book on jurisprudence,[15] does not seem to agree with this argument. It seems to him that goods which have been delivered to a bailee to keep for the bailor, such as a gentleman's plate delivered to his banker, or his furniture warehoused at the Pantechnicon, would in a popular sense as well as in a legal sense be said to be still in his possession. There is yet a third form of mediate possession, in respect of which more doubt may exist, but theoretically which must be recognised as true possession. It is the case in which the immediate possession is vested in a person who claims it for himself until some time has elapsed or some condition has been fulfilled, but who acknowledges the

14 (1876), 1 EX. D at P. 292.

15 Salmond On Jurisprudence., 1957. at P. 333.

title of another for whom he holds the res, and to whom he is prepared to deliver it when his own temporary claim has come to an end: as for example when I lend a chattel to another for a fixed time, or deliver it as a pledge to be returned on the payment of a debt. Even in such a case I retain possession of the thing, so far as third persons are concerned. In all these cases, I get the benefit of the immediate possession of another person, who, subject to his own claim, if any, holds and guards the thing on my account.

The extent to which the above ideas are recognised in English law may be briefly considered. An instance of mediate legal possession is to be found in the law of prescription. Title by prescription is based on long and continuous possession. But he who desires to acquire ownership in this way need not retain the immediate possession of the thing. For all the purposes of the law of prescription mediate possession in all its forms is as good as immediate.

In Haig v. West,[16] it is said by Lindley, L.J., that:

> "The vestry by their tenants occupied and enjoyed the lanes as land belonging to the parish. . . . That parish have in our opinion gained a title to those parish lanes by the statute of limitations. The vestry have by their tenants occupied and enjoyed the lanes for more than a century".

In the case of chattels a further test of the legal recognition of mediate possession in all its forms is to be found in the law as to delivery by attornment. In Elmore v. Stone,[17] A bought a horse from B, a livery stable keeper, and at the same time agreed that it should remain at livery with B. It was held that by this agreement the horse had been effectually delivered by B to A, though it had remained continuously in the physical custody of B. That is to say, A had acquired mediate possession through the direct possession which B held on his behalf.

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16 [1893] 2. Q.B. 30, 31.

17 (1809), 1 Taunt. 458; 10 R.R. 578.

In larceny, where a chattel is stolen from a bailee, the "property", i.e., the possession that has been violated, may be laid either in the bailor or in the bailee, at any rate where the bailment is recoverable by the bailor at his pleasure either unconditionally or upon a condition that he may satisfy at will.

In all cases of mediate possession, two persons are in possession of the same thing at the same time. Every mediate possessor stands in relation to a direct possessor through who he holds. There is, however, an important distinction to be noticed. For some purposes, mediate possession exists as against third persons only, and not as against the immediate possessor. Immediate possession, on the other hand, is valid as against all the world, including the mediate possessor himself. Thus, if I deposit goods with a warehouseman, I retain possession as against all the other persons, because as against them I have the benefit of the warehouseman's custody. But as between the warehouseman and myself, he is in possession and not me. For as against him, I have in no way realised my *animus possidendi* no in any way obtained a security of use and enjoyment.

2-1-4- Concurrent Possession:

One might ask himself, if two persons could possess the same thing? It was a maxim in civil law that two persons could not be in possession of the same thing at the same time. *Plures eandem rem in solidum possidere non possunt.*[18] As a general proposition this is true; for exclusiveness is of the essence of possession. Two adverse claim of exclusive use cannot both be effectually realised at the same time. Claims, however, which are not adverse, and which are not therefore, mutually destructive, admit of concurrent realisation. Hence, there are several possible cases of duplicate possession.

(i)- Mediate and immediate possession coexist in respect of the same thing as already explained before.

18 D. 41. 2. 3. 5; cf. for English Law Holdsworth, H. E. L., III. p. 96.

(ii)- Two or more persons may possess the same thing in common, just as they may own it in common. This is called "compossessio" by the civilians.

(iii)- Corporeal and incorporeal possession may coexist in respect of the same material object. Thus, A may possess the land, while B possesses a right of way over it. For it is necessary, that A's claim of exclusive use should be absolute; it is sufficient that it is general.

2-2- THE ELEMENTS OF POSSESSION:

According to a traditional doctrine which we inherited from the Roman law, possession involves two distinct elements, one which is mental or subjective, the other physical or objective. The one of these two elements, consists in the intention of the possessor with respect to the thing possessed, while the other consists in the external facts in which this intention has realised, embodied or fulfilled itself. These two constituent elements of possession were distinguished by the roman lawyers as animus and corpus, and the expressions are conveniently retained by modern writers. Now, we shall consider these two elements separately.

2-2-1- The "Animus Possidendi":

The "animus possidendi" is the intent to appropriate the exclusive use of the thing possessed, that is to say, whilst intending to use it personally, to exclude all other persons whatsoever. So, the intent necessary to constitute possession is the intent to exclude others from interfering with a material object. Whether or not the possessor intends to use the thing himself, he must intend to exclude the interference of other persons. As to this necessary mental attitude of the possessor, there are the following observations to be made:

(i)- The animus sibi habendi, is not necessarily a claim of right. It may be consciously wrongful. The thief has a possession no less real than that of a true

owner. The possessor of a thing is not he who has, or believes that he has, a right to it, but he who intends to act as if he had such a right.

(ii)- The claim of the possessor must be exclusive. Possession involves an intent to exclude other persons from the use of the thing possessed. A mere intent or claim of unexclusive use cannot amount to possession of the material thing itself, though it may and often does amount to some form of incorporeal possession.

The exclusion however, need not be absolute. I may possess my land, but in the mean time someone else, or the public at large may have or more accurately possesses a right of way over it. For, subject to this right of way, my animus possidendi is still a claim of exclusive use.

(iii)- The animus possidendi does not need to be a claim or intent to use the thing as owner. Any degree or form of intended use, however limited in extent or in duration, may, if exclusive for the time being, be sufficient to constitute possession. Indeed, the animus possidendi need not to be a claim to use the thing at all. Thus, a pledgee, or a bailee with a lien, has possession, though he means merely to obtain the thing until he is paid.

(iv)- The animus possidendi need not to be a claim on one's own behalf. Thus, I may possess a thing either on my account or on account of another. A servant, agent or trustee may have true possession, though he claims the exclusive use of the thing on behalf of another than him.

(v)- The animus possidendi need not be specific, but may be merely a general intent with reference to a class of things, and this is sufficient. That is to say, it does not necessarily involve any continuous or present knowledge of the particular thing possessed or of the possessor's relation to it. A general intent with respect to a class of things is sufficient (if coupled with the necessary physical relation) to confer possession of the individual objects belonging to that class, even though their individual existence is unknown. Thus, I possess all the

books in my library, even though I may have forgotten the existence of many of them.

During the second half of the XIX century, Ihering had strongly criticised the position adopted by the german doctrine after Savigny. The controversy is famous,[19] and the account of the two thesis will help in precising the notions of animus and of possession. After that, we look at the critical valuation of this controversy.

The Theory Of Savigny:

Savigny in his publication, Treaty Of Possession in 1803, maintained the idea that the intention animating the possessor must be the animus domini, in other words, the intention of acting as an owner. So, we not confuse between the animus domini and the good faith, because a possessor of bad faith, such as a thief, has the animus domini, because he intends to act as a master of the thing. So, who has the animus domini? All the other persons who have the corpus for another person do not have the animus domini. In fact, they recognise, the rights of the owner; they do not have the intention of acting as owners, so they are not possessors. In this way, Savigny refuses to consider the holders who have detention as being possessors; they cannot profit by the effects of possession. It is the lessor, bailor, ... etc, who is the possessor (he possesses *corpore alieno*); and not the holder (tenant, bailee . . . etc). Because the element of intention is an important part of this work, we will give it the name of subjective theory.

The Theory Of Ihering:

Ihering strongly attacked the subjective theory in his book, "Le Fondement Des Interdits Possessoires", which appeared in 1867. He pretended that no distinction can be or should be made between the possessors and the holders, on the basis of their animus, because the ones and the others have the same

19 Mazeaud. Henri Et Léon. Leçons De Droit Civil. Tome II. Volume 2. at P. 122.

intention: to hold, and to retain the thing, the animus tenendi. Even if it is possible to make a distinction, it is not on the real will of the occupant or holder that the law must be grounded on so as to give effects to possession. Besides the questions of contracts and judicial acts, the will of a person is unable of creating any judicial effects: it cannot bind the legislator. It is objective that a distinction between the two categories of occupants must be drawn: possessors and non-possessors. In principle, the law gives the effects of possession to every occupant; it refuses to do so only on the basis of an exceptional title for the reason of a *causa detentionis*, i.e., for the reason taken from the contract which binds the holder to the owner. The legislator, in order to give the effects of possession, will not be grounded on the intention of the possessor, but on the interests which appear to him that they must be protected. The problem is to know who of the two, the holder and the person from whom he detains his right, must profit from the effects of possession; we must decide according to the interests which appear more important to protect than the others.

<u>The Critical Valuation Of This Controversy:</u>

The way with which Ihering justified his theory, made everyone think that there is a great controversy between the two theories of the two german lawyers. However, the appearance of this controversy is more apparent than real. Ihering, as Savigny, recognises that we cannot give all the advantages of possession to a simple holder; the latter, for example a tenant or trustee, cannot pretend to have any presumption of ownership, nor acquisition of ownership by mere long occupation. In practice, the controversy is limited to refusing the possessory remedies to the holder for theoretical reasons taken from the nature of possession which was found in Rome, makes of the animus domini, a condition, Ihering asks that this protection (possessory remedies) must be extended to the simple holders. In theory, this controversy is no more than

being radical. It is certain that no conciliation can be reached if the animus, as it is required by Savigny, in concreto is indeed a pre-condition to recovery, in other words, according to the real will of the holder, by analysis of his state of mind.

Finally, the French civil code was not influenced by these two theories, because in article 2229 it is required that the possessor possesses as an owner, so that he acquires ownership of the thing by prescription. So, the "*animus domini*" is a condition so as to obtain possession of the thing. Moreover, the draftsman of the French civil code did not give any effect to mere detention nor the possessory remedies. Conversely, the Algerian civil code in article 827, does not require from the possessor to possess as an owner to obtain ownership by prescription. So, the Algerian civil code does require the "*animus domini*" to benefit from the prescription. Moreover, the Algerian civil code gives to the one who has possession of a thing the right for possessory remedies, which is not the case for the French civil code.

2-2-2- The Corpus Of Possession:

To constitute possession, the physical and mental element is not by itself sufficient to give possession, but it must embodied in a corpus. The corpus is the physical control over the thing we claim its' possession. The Tubantia,[20] is an instructive case on the corpus of possession. The corpus consists in acting as the owner of the thing, i.e., to use what the right of the ownership gives: usus, fructus, abusus. The corpus in then considered as the material element of possession, the corpus is a condition in the acquisition of possession.

The corpus can be acquired by the material acquisition of the thing, whether with or without the consent of the former possessor.

Possession can be acquired "corpore alieno". In the classical time, the possibility of possessing through the intermediary of another person, was accepted, and this rule was then taken by the French law. The possessor is then

20 [1924] P. 78.

not obliged to exercise the corpus by himself. We therefore, say that he possesses corpore alieno. For instance, a person who gives a thing for a lease, this person possesses through the intermediary of its tenant. This tenant is considered as having mere detention of the thing, it does have the corpus itself, but for the lessor. As the possessor can acquire possession corpore alieno, he can also acquire the corpus by the intermediary of another person. For instance, if we give mandate to a person in order to take possession of a thing, we acquire the corpus by the intermediary of the mandator. Also, the purchaser, before he takes possession himself, this purchaser possesses by the intermediary of the vendor who keeps the thing until the delivery. So, mere intention to possess, as stated before, without corpus, i.e., effectual realisation by power to use and exclude others, is insufficient.

The claim involved in the animus must be actually and continuously exercised. So, what does the corpus involve? One might say that: "it must amount to the actual exclusion of all alien interference with the thing possessed, together with a reasonably sufficient security for the exclusive use of it in future". Since the corpus includes the power to exclude others and power to use, it involves a relationship of the possessor to other persons and a relationship to the thing possessed. Thus, we shall consider the corpus of possession under two headings:

(i)- The relation of the possessor to other persons, and,
(ii)- The relation of the possessor to the thing possessed.

(1) - The Relation Of The Possessor To Other Persons:

So far as other persons are concerned, I am in possession of a thing when the facts of the case are such as to create a reasonable expectation that I will not be interfered with in the use of it. I must have some sort of security for their acquiescence and non-interference. A thing is possessed, when it stands with respect to other persons in such a position that the possessor, having a

reasonable confidence that his claim to it will be respected, is content to leave it where it is. Such a measure of security may be derived from many sources. of which the following are the most important.[21]

(i)- The Physical Power Of The Possessor:

The physical power to exclude all alien interference (accompanied of course by the needful intent) certainly confers possession; for it constitutes an effective guarantee of enjoyment. If I own a purse of money, and lock it up in a burglar proof safe in my house, I certainly have possession of it. Possession, thus based on physical power may be looked on as the physical and perfect form. Many writers, however, go so far as to consider it the only form, defining possession as the intention, coupled with the physical power, of excluding all other persons from the use of a material object.[22] This is far too narrow a view of matter. What physical power of preventing trespass does a man acquire by making an entry upon an estate which may be some square miles in extent? Is it not clear that he may have full possession of land that is absolutely unfenced and unprotected, lying open to every trespasser? There is to prevent even a child from acquiring effective possession as against strong men, nor is possession impossible on the part of him who lies in his bed at the point of death. If I set traps in the forest, I possess the animals which I catch in them, though there is neither physical presence nor physical power. In all such cases, the assumption of physical power to exclude alien interference is no better than a fiction. The true test is not the physical power of preventing interference, but the improbability of any interference, from whatever source this improbability arises.

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21 Pollock and Wright. Possession In The Common Law, 13: " that possession is effective which is sufficient as a rule and for practical purposes to exclude strangers from interfering with the occupier's use and enjoyment".

22 The theory here considered is that which has been made familiar by Savigny's celebrated treatise on possession (Recht des Besitzes, 1803).

(ii)- The Personal Presence Of The Possessor:

This source of security must be distinguished from that which has just been mentioned, the two sources of security may coincide, indeed, but not necessarily, because in the security of personal presence, the possessor may be personally present without any real power of exclusion. Such is the case of a little child who has no physical power to retain possession against a strong man. Also, a dying man, may retain or acquire possession by his personal presence, but certainly not by any physical power left in him. The respect which is shown to a man's person will commonly extend to all things, claimed by him that are in his immediate presence.

(iii)- Secrecy:

A man can keep a thing safe from others, and that by hiding it; and consequently, he will gain a reasonable guarantee of enjoyment and is just as effectively in possession of the thing, as is the strong man armed who keeps his goods in peace.

(iv)- Custom:

Here, we have an important source of de facto security and possession, and this is the tendency of mankind to acquiesce in established usage. If I plough and sow and reap the harvest of a field continuously, I am considered as in possession of that field.

(v)- Respect For Rightful Claims:

Possession is a matter of fact and not a matter of right. A claim may realise itself in the facts whether it is rightful or wrongful. Yet its rightfulness, or rather a public conviction of its rightfulness, is an important element in the acquisition of possession. A rightful claim will readily obtain that general acquiescence which is essential to de facto security, but a wrongful claim will have to make itself good without any assistance from the law abiding spirit of the

community.[23]

(vi)- The Manifestation Of The Animus Domini:

The visibility of the claim is an important element in the de facto security of a claim. The realisation of the animus is more important for possession than the manifestation of the animus. Nevertheless, a manifested intent is much more likely to obtain the security of general acquiescence than one which has never assumed a visible form.

(vii)- The Protection Afforded By The Possession Of Other Things:

The possession of a thing tends to confer possession of any other thing that is connected with the first or accessory to it. The possession of land confers a measure of security, which may amount to possession, upon all chattels situated upon it. The possession of a box or a packet may bring with it the possession of its content. However, whether the possession of one thing will bring with it the possession of another that is thus connected with it, depends upon the circumstances of the particular case. A chattel may be upon my land, and yet I shall have no possession of it unless the animus and corpus possessionis both exist.

(2) - Relation Of The Possessor To The Thing Possessed:

The second element which constitutes the corpus possessionis, i.e., the physical control over the thing, is the relation of the possessor to the thing possessed, the first being the relation of the possessor to other persons, which we have just considered above. To constitute possession, the animus domini must

23 Pollock and Wright. Possession In The Common law. at P. 14.15:

"Occupation or control is a matter of fact, and cannot of itself be dependent on matter of law. But it may depend on the opinion of certain persons for the time being, or the current opinion of a multitude or neighbourhood, concerning that which is ultimately matter of law. Though law cannot alter facts, or directly confer physical power, the reputation of legal right may make a great difference to the extent of a man's power in fact".

realise itself in both of those relations. The necessary relation between the possessor and the thing possessed is such as to admit of his making such use of it as accords with the nature of the thing and of his claim to it. There must be no barrier between him and it, inconsistent with the nature of the claim he makes to it. If I desire to catch fish, I have no possession of them till I have them securely in my net or on my line. Till then, my animus domini has not been effectively embodied in the facts.

The case of an article irrevocably lost should, however, be distinguished from a temporary loss of the thing, in a place where it can more or less easily be found. The loss of my watch in a public place, which also involves loss of possession, differs from the loss of my book temporarily mislaid in my own house.

2-3- THE COMMENCEMENT AND CONTINUANCE OF POSSESSION:

2-3-1- Modes Of Commencement Or Acquisition Of Possession:

In every acquisition of possession there is a physical act (corpus), accompanied by an act of the will (animus). The corpus must be such as to place the person who desires to obtain possession in a position which shall enable him, and him only, to deal with the subject at pleasure; that is to exercise ownership over it. The act of the will must contemplate a dealing with the subject as one's own property: though if the possession, by operation of law, is derived from the previous possession of another, it is sufficient for the will to have in view this transference, so that in this way possession may be acquired, although the property is recognised in another. The acquisition of possession can be in two ways, either voluntary or involuntary on the part of the former who had possession. Voluntary dispossession in favour of another is commonly regarded from the side of the former possessor, and called delivery. Involuntary change of possession is commonly regarded from the side of the new possessor, and

spoken of as occupation or taking. Thus, the the modes of acquisition are two in number, namely "taking" and "delivery".

First, "Taking" is the acquisition of possession without the consent of previous possessor. The thing taken may or may not have been already in the possession of someone else, and in either case the taking of it may be either rightful or wrongful, and this might be either by occupation, theft or taking of something lost.

Secondly, "Delivery". Delivery on the other hand, is the acquisition of possession with the consent and co-operation of the previous possessor. It is of two kinds, distinguished by English lawyers as actual and constructive and the same can be said about the French and Algerian lawyers as to their view on delivery, and that what we will explain in more details later on.

Actual delivery is the transfer of immediate possession; it is such a physical dealing with the thing as transfers it from the hands of one person to those of another. It is of two kinds, according as the mediate possession is or is not retained by the transferor. The delivery of a chattel by way of sale is an example of delivery without any reservation of mediate possession. The French civil code cited the actual delivery in contract of sale in article 1582, where it was provided that: "The sale is an agreement, by which, one agrees to deliver something and the other to pay for it.[24] The same idea is found in the Algerian civil code in article 351 which provides that, "The sale is a contract by which the seller is obliged to transfer the ownership of a thing . . . to the buyer who must pay him the price".[25]

The delivery of a chattel by ways of loan or deposit is an instance of reservation of mediate possession on the transfer of immediate possession. For

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24 The actual article 1582 of the French civil code provides in french that:

"La vente est une convention par laquélle l'un s'oblige á livrer une chose, et l'autre á la payer . . . ".

25 The actual art.351 of the Algerian civil code provides that:

"La vente est un contrat par lequéle le vendeur s'oblige á transferer la propriété d'une chose . . . á l'acheteur qui doit lui en payer le prix".

instance, the Algerian civil code in article 502 about hire prescribes that the one who hires something must give the possession back to the owner when the time of hire comes to its end. Moreover, in the case of loan, the Algerian civil code in article 538 provides that, the contract of loan, the owner lent his thing to the borrower for a fixed period of time on the condition that the borrower will give the possession of the thing back to the owner. The French civil code provides the same idea in article 1875. So, in both the Algerian and the French civil code, the case of hire and loan provide good examples of the reservation of mediate possession on the transfer of immediate, because in both cases the possession will be handed back to the owner.

Actual delivery may be either to the deliveree himself or to a servant or agent for him,[26] the same can be said about the Algerian civil code in article 571 or the French civil code in art 1984, which provides the same solution, where a person can mandate another person to do things for him as if he acts from the mandated person were the acts of the original person who mandated that person. Moreover, the delivery of the key of a warehouse is regarded in law as actual delivery of the goods in the warehouse, because it gives access to the goods.[27] In the Algerian law, there is another situation where the seller in the contract of sale is considered as having delivered the thing to the purchaser. This situation, is that after the contract of sale is made the seller put the thing sold at the puchaser's disposal and that is provided by article 367/1, which provides that, "The delivery consists in putting the thing sold at the purchaser's disposal, in a way that he can take possession of it and enjoys it without any obstacle, even if he has not taken any effective delivery. This will be done

26 By the Sale of Goods Act, 1893, S.32 (1), delivery to a carrier is prima facie deemed to be delivery to the buyer.

27 It seems that the only circumstance in which the English lawyers admits that symbolic delivery is sufficient in the endorsement and delivery of a bill of lading, which is regarded as a delivery of the cargo represented by it: per brown, L.J., in Sanders v. Maclean (1883), 11 Q.B.D. 327, at P. 341.

according to the nature of the thing sold ... ".[28] On the other hand, the French civil law, in article 1604 of the civil code provides that, "The delivery is the carrying of the thing sold into the power and possession of the buyer".[29] So, possession must really fall between the hands of the buyer, putting the thing at his disposal is not enough.

Constructive delivery, on the other hand, is all which is not actual, and it is of three kinds. The first is that which the Roman lawyers termed traditio brevi manu, but which has no recognised name in the language of English law. It consists in the surrender of the mediate possession of a thing to him who is already in immediate possession of it. If, for example, I lend a book to someone, and afterwards, while he still retains it, I agree with him to sell it to him, or make him a present of it, I can effectually deliver it to him in fulfillment of this sale or gift, by telling him that he may keep it. It is not necessary for him to go through the form of handing it back to me and receiving it a second time from my hands. This traditio brevi manu can be found in the Algerian law, where article 367/2 of the civil code, provides that, "The delivery can be done by a mere agreement between the contracting parties, if the thing sold was before the sale hold by the buyer or the seller continued to hold the thing sold under another title than that of an owner".[30] A similar section is provided in article 1606/3 of the French civil code.

The second form of constructive delivery is that which the commentators

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28 "My Own TRanslation".The actual art.367/1 provides that:

"La délivrance consiste dans la mise de la chose vendu á la disposition de l'acheteur de façon á ce qu'il puisse en prendre possession et en jouir sans obstacle alors meme q'il n'en a pas pris livraison effective, pourvu que le vendeur lui fait connaitre que l'object est á sa disposition. Elle s'opére de la maniére á laquélle se prete la nature de l'object vendu . . . ".

29 "My Own TRanslation".The actual art.1604 in french provides that:

"La délivrance est le transport de la chose vendue en la puissance et posséssion de l'acheteur".

30 "My Own Translation".The actual art.367/2 provides that:

"La délivrance peut avoir lieu par le simple consentement des contractants si l'object vendu était, dés avant la vente, détenu par l'acheteur ou si le vendeur avait continué á garder l'object vendu á un autre titre que celui de propriétaire".

of the civil law have termed constitutum possessorium (that is to say an agreement touching possession). It is the transfer of mediate possession, while the immediate possession remains in the transferor. Anything may be effectually delivered by means of an agreement that the possessor of it shall for the future hold it no longer on his own account but on the account of someone else, and no physical dealing with the thing is requisite. Therefore, if I buy goods from a warehouseman, they are delivered to me as soon as he has agreed with me that he will hold them as warehouseman on my account. This kind of constructive delivery can be found in the Algerian civil law and this was provided by the article 367 sub-s.2 which provides that the seller continuous to have possession of the thing not as an owner but under another title other than that of owner.

The third form of constructive delivery is that which is known to English lawyers as attornment. This is the transfer of mediate possession, while the immediate possession remains outstanding in some third person. The mediate possessor of a thing may deliver it by procuring the immediate possessor to agree with the transferee to hold it for the future on his account, instead of on account of the transferor. Thus, if I have goods in the warehouse of A and sell them to B, I have effectually delivered them to B so soon as A has agreed with B to hold them for him, and no longer for me.[31]

2-3-2- The Continuance Of Possession:

The rules hitherto have been principally concerned with the commencement of possession. We have seen that the acquisition of legal possession normally involves the occurrence of some event whereby the subject-matter falls under the control of the possessor. This can consist in the

31 Delivery by attornment is providd by the Sale of Goods Act, 1893, S.29 (3):

"Where the goods at the time of sale are in the possession of a third peson, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf".

possessor's taking the thing or having it delivered to him. Such acquisition will also normally involve some intention on the part of the possessor to exercise control over the subject-matter and to exclude others from it.

It is now to be noticed that the continuance of possession, at any rate as a matter of English law, does not seem to be governed by the same strict rules as its commencement. Assuming that English law requires both animus and corpus in order to initiate possession, the possession once acquired may continue even though animus or corpus, or even both, disappear. For example the furniture in my house remain in my legal possession even during the my absence from my house. even though such absence may prevent me from exercising control over the furniture. Or again, if I lose my wallet in the street, I have now lost control over it together with my actual likelihood that other will not interfere with the wallet. Nevertheless, unless I have actually abandoned possession, the legal possession of the wallet remains in me.[32]

The continuance of legal possession does not depend on the continuance of the intention on the part of the possessor. For even if I forget that I have the object, and so have no specific intention of still possessing it. I may have forgotten that I even had the wallet, which I lost in the street, but in law this need not prevent me from still being in possession. But if I lose control of the subject-matter and give up all intention of resuming control, then I shall lose possession of it in law. For example, in Tickner v. Hearn,[33] a statutory tenant of a protected dwelling under the Rent Acts left the premises on temporary visit, became insane and remained continuously in hospital. In order to retain possession within the Acts, the court found it necessary that she should be able to show the existence of an intention to return. On the evidence the court held that the existence of this intention has just about been proved.

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32 R v. Thurborn (1849) 1 Den. 387.

33 [1961] 1 All E.R. 65.

2-4- THE TRANSFER AND LOSS OF POSSESSION:

2-4-1- The Transfer Of Possession:

One may say that there is no fundamental division of the ways in which an existing possession can be changed. As the new comer gains possession, the outgoing possessor must lose it, and this loss must be either with or without his own will. Voluntary dispossession in favour of another is commonly regarded from the side of the former possessor, and called delivery. In the case of a person quitting possession without any specific intention of putting another person in his place, it is called abandonment. Involuntary change of possession is commonly regarded from the side of the new possessor, and spoken of as occupation or taking. In adopting this division, we must say that there is a great difference in the legal treatment of the facts, and it will be natural and just that the difference should be made. The lawful intention of the parties is favored, and moreover the consent of the outgoing possessor is, a real element in the incomer's de facto power of enjoyment and control. Hence, the voluntary transfer of possession is made easy in many ways. Indeed it constantly takes place without any physical transfer at all, or by means of physical acts which in themselves would be manifestly not enough. When possession is changed without consent, the presumption is reserved. Not only must the newcomer have at least as much actual control as would be evidence of possession if there were nothing to the contrary, but he must effectually exclude the former possessor. There are great differences of detail, as might be expected, in the application of these principles to immovable and movable property. With regard to land the doctrine of possession has been exceedingly perplexed by the peculiar history of the common law. Possession as to land, does not need a great deal of explanation, because this work has to give a great deal of explanation to possession as regard goods.

Delivery As To Goods:

One way of transferring possession, as we have already seen, is delivery which is a voluntary dispossession. Possession of goods may be delivered in several ways according to the circumstances. Delivery may be made either to the person who is to acquire possession, or to a servant on his behalf. And it may be made in either case, either by an actual and apparent change in the custody of the goods, or by a change in the character of a continuing custody, i.e., the transferor will have custody of the thing for the new transferee. The simplest case is the handing over of a movable object with intent to transfer ownership or a more limited right, including the right to use or have control of that object. Such a delivery, whether the transaction be gift, sale, or bailment, always transfers possession to the deliveree. Conversely, a question may be asked, how far the ownership and right to possession of personal chattels can in the absence of valuable consideration pass by parol declarations of intention without delivery. Except in the case where the donee is already in possession, the law cannot be said to be clear. On the other hand, a servant in charge of his master's property, or a person having the use of anything by the mere licence of the owner, as a guest has the use of the furniture and plate at an inn, generally has not possession. There may be cases of handing over for a limited purpose which are on the face them not obviously within either of these classes. It must then depend on the true intent of the transaction, as ascertained from all the circumstances, whether there is a bailment or a mere authority or licence to deal with the thing in a certain way.

(i)- Partial Delivery And So-Called Symbolic Delivery:

The transfer of bulky goods or collection of goods cannot be made obvious to the senses with the same readiness as in the case of a simple object which can be passed from hand to hand. But it may be effected without physical

translation of the whole of the goods, or without any physical translation at all. There may be an indirect dealing with the custody of the goods through some instruments of access to them; or a part may be delivered on account and in the name of the whole; or there may, without any change of custody, be a holding on behalf of a new possessor.

First, we will deal with the symbolical delivery, as it is sometimes called, but, Pollock and Wright in their work, possession in the common law, do not agree with terminology.[34] There is some show of authority for saying that goods under lock and key, for example, may be delivered by delivering the key as a symbol of possession. This key may indeed be called symbolic in another sense, for it is not understood that Englishmen of business commonly deliver a key in the name of goods contained in the warehouse which it opens. Dealing with bills of lading and other documents of title are much more common, and these cases differ from that of the key in the material fact that the custody of the goods is with a skipper, wharfinger, or other third person. It is a question, in the first instance, of transferring right to possess.

The key is not a symbol in the sense of representing the goods, but the delivery of the key gives the transferee a power over the goods which he had not before, and at the same time is an emphatic declaration (which being by normal act, instead of word, may be called symbolic) that the transferor intends no longer to meddle with the goods.

(ii)- Delivery Of Goods By Attornment:

The transfer of possession in goods, as distinguished from property, is an incident in the performance of the contract of sale which is of special importance in two ways; by reasons of the Statute of Frauds, as regards the proof of the contract in certain cases; and under the rules of the common law derived from the law merchant as regards an unpaid vendor's rights. By the Statute of Frauds,

34 Pollock and Wright. Possession In The Common Law. op cit. at P. 61.

one of the alternative conditions on which a contract for sale of goods is allowed to be good is the acceptance and actual receipt of some part of the goods. Some decisions have settled that there is acceptance as well as receipt when the buyer begins to possess the part of the goods in question with reference to the contract of sale and as part of the goods designated by or appropriated to it, whether he intends to accept them absolutely or to reserve whatever rights the contract may give him of rejecting them according to sample, or the like.[35]

This is at first sight anomalous. The courts have looked more at the seller's parting with possession than to the buyer's acquisition of it. In fact the test is whether he has lost his lien.[36] Thus, under the contract of sale, acceptance and actual receipt mean a delivery of possession, not necessarily, however, delivery to the buyer or his servant. Moreover, an unpaid vendor's lien is a right to possess founded on the possessio which he has not yet parted with, while the kindred but distinct right of stoppage in transitu can be exercised 'only whilst the goods are in an intermediate state _ out of the possession of the vendor, and not yet in that of the purchaser'. So, the necessary condition for the vendor's lien is that the goods have not ceased to be in his possession; that of stoppage in transitu is that the goods are in the possession of someone who holds them neither at the will of the vendor nor at the will of the purchaser, but has possession for the purpose of transmitting them from the vendor to the purchaser. It is therefore of capital importance to establish whether possession has been delivered, and if so in what character it has been received.

The authorities on acceptance and actual receipt both within the Statute of Frauds and on the rights of unpaid vendors show that in several ways there may be a change of possession without any change of the actual custody. Such a change of possession is commonly spoken of a constructive delivery.

(i)- A seller in possession may assent to hold the thing sold on account of

35 Page v. Morgan (1885), 15 Q.B.Div. 228.

36 Cusack v. Robinson, 1861, 1 B. & S. 229, 30 L.J.Q.B. 261.

the buyer. When he begins so to hold it, this has the same effect as a physical delivery to the buyer, or his servant and is an actual receipt by the buyer.[37]

(ii)- When goods are in the custody of a third party, goods or more accurately, possession may be delivered, and that can be done by the agreement of the seller and buyer, with the assent of that person, that they shall be held in the name or on account of the buyer. This is described by the modern authorities as an "agreement of attornment".[38] When goods are in the hands of a warehouse- keeper for the seller, the mere giving of a transfer order by the seller is not sufficient to change the possession, but when the delivery order is lodged with the warehouse-keeper and accepted by him, he then, holds in future for the buyer.

(iii)- Even if the last case is not very common, however, it can be possible, here the buyer is in possession of the goods as the seller's bailee. Therefore, there may be, upon an oral contract of sale, a sufficient acceptance and receipt of the goods by the attribution of the continuing custody to the holder's new character of owner.[39] It is a question of fact whether such was the effect of the acts of the parties. Here there is no change of possession, only a change in the character of the possession.

2-4-2- Loss Of Possession:

The acquisition of possession depends on two facts or two elements as we have already seen above. One physical, called the "corpus", and the other mental. called "animus". These two elements are essential for the continuance of possession and their loss will lead to the loss of possession. So, the termination of possession is evidently the same question as the continuance of it, because possession can only continue up to the time of it being lost.

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37 Elmore v. Stone, 1808, I Taunt. 458.

38 Godts v. Rose, 1855, 17 C.B. 229,25 L.J.C.P. 61.

39 Edan v. Dudfield, 1841, I Q.B. 302. Benjamin On Sale, § 173.

For, as possession has been seen to consist in physical power, associated with consciousness, it follows that in every case of acquisition two things are necessary, a corporeal relation, and animus. The same must also concur for continuance; and this, therefore, must depend upon the same association as the acquisition of possession; should such association cease ; i.e., should either the corporeal act alone, or the animus alone, or both together terminate, the continuance of possession also ceases. What is stated here, may be expressed in the following propositions:

(i)- For the continuance of possession, two element must be present, namely, the corpus, i.e., a corporeal relation and animus.

(ii)- If either one or the other, or both together, cease, the possession is lost.

(iii)- This rule stands in immediate logical connection with the rule which defines the acquisition of possession.

The loss is evidently compared with acquisition; now for acquisition, both a physical act and animus must be present, so also, it would appear, for loss. "Corpus and animus" together are required for possession, and that means that possession is founded on the conjunction of "corpus and animus", and therefore, the acquisition can only be compared to loss, when the loss results from his conjunction ceasing. But this conjunction not only ceases when both the elements of it fail, but also when either one of them ceases to exist.

It has therefore, now been proved,[40] by interpretation also, that the continuance of possession, as well as its acquisition, depends upon corpus and animus together, or (which is the same thing) that possession can only be lost either by corpus or by animus.

In this work, it will be dealt mostly with movable things and not with the loss of immovable things, such as land.

1- Loss Of Possession By The Loss Of The "Corpus":

The continuance of possession has a strong connection with the loss of possession, because if the possession stops to continue the possession will cease

40 Savigny. Treatise On Possession. at P. 253.

to exist. Therefore, the first condition for the continuance of possession is a physical relation to the thing possessed which enables us to deal with it. This power however, need not be, as in the acquisition of possession, a present immediate power, but it is sufficient if the relation of immediate dominion over the thing can be reproduced at will, and the possession is only then lost, when the power to deal with it at will is altogether gone. Such a rule should now be applied both to movables and immoveables. But several examples of it are so clear in themselves, that they do not require further elucidation. To such cases belong the death of the possessor, or the annihilation of the thing possessed, and this can be either physical or juridical (where the thing becomes extra commercium). Some further examples on this point must be examined in more detail. For instance, the possession of a movable becomes lost, when another person makes himself master of it, either secretly or by force; and here the exclusion of the original possessor over the subject is very decided. Whether the other party actually acquires the possession is altogether immaterial; because the physical power of disposing of the subject is nevertheless, withdrawn from the other, although no one else may have the right of possession. His power may also be excluded without the interference of any other party, namely, when the spot where the subject is kept is either inapprochable by him or unknown. When it comes to the loss of possession of immoveables, the rule is exactly the same. Here also possession is lost whenever the power of dealing with the subject ceases; it is continued, so long as this power lasts, except that the notion of this power must be somewhat differently expressed in degree as to continuance, than as to acquisition.[41]

41 The French civil code gives the definition of possession in art.2228 which provides that possession is the detention or the enjoyment of a thing. So, it is necessary to have the "corpus" for possessing, and that means that the loss of the "corpus" will lead to the loss of possession. However, the loss of the "corpus" will not lead to the loss of possession in all the cases, because the situation can be different from one situation to another. So, we can possess without having the "corpus" and that what is called possessing solo animo, i.e., through another person.

2- Loss Of Possession By Loss of "Animus":

We have already seen that there is a strong connection between the continuance and the loss of possession, because if possession stops to continue than possession will cease to exist or will be lost. Possession continues to exist, only if the two elements of possession namely the "corpus" and "animus" continue to exist. So, if either the animus or corpus or both of them cease to exist, that will bring an end to possession. Therefore, the second condition for the continuance of possession, is the will of the possessor (i.e., the animus); and the same relation exists in this case as with the physical condition, which has been already pointed out as the first condition. Thus, to the continuance of possession, it is only necessary for the animus, just as for the corporeal relation, that the power to reproduce the original volition should always be at hand: it is neither necessary, not indeed possible, that the consciousness of possession should exist at every moment. It follows, therefore, that possession is not lost by the possessor not calling to mind the subject matter, or consequently, his possession for any period long or short; indeed, the same way be affirmed if the possessor falls into a condition in which no exertion of will is possible: for instance, if he becomes a lunatic. In this case, the impossibility to exercise any distinct volition as to the position, is coincidental, so, in relation to the thing possessed, there is no essential difference, whether this possession should have been forgotten for a long period, or whether the possessor himself should have become lunatic.

Therefore, possession is lost by mere *animus*, whenever the possessor at any moment intends to give it up; for, at that moment, the reproduction of the original intention is rendered impossible by the contrary determination of the will, and it is upon this impossibility, as upon the physical impossibility, that the loss of possession arises. It is clear that whoever is incapable of exercising a will cannot lose in this way, any more than he could acquire possession. Thus, the possession may be lost by a simple act of volition, it still remains to add something as to its application. Now it is just as clear, that an application of the

rule arises beyond all doubt on the express declaration of the possessor, as that such declaration can very seldom decide the point, because, in every case in which it usually occurs- for instance, in delivery, the loss of possession is generally terminated in another manner, namely, corpore. We must, therefore, in this case, as in many others, examine what is the proper construction of the whole conduct of the possessor, from which his intention may be inferred: several proofs of such construction have come down to us in the writings of the Roman Jurists, and they tend to throw much light upon the whole subject. The first case of this sort, lies at the bottom of the so-called constitutum. If somebody sells a subject, and, at the same time, hires it, does not in the least alter his physical relation in regard to it; but, as he nevertheless ceases to possess, the ground of this loss can only be sought for in an act of his will.

A second construction of this sort lies in the rei vindication, which is an established rule that this action lies against the possessor. If then, the possessor himself vindicates the subject, he appears by this to disclaim the possession, so that the interdictum uti possidetis must be refused to him, if he should subsequently desire to resort to it. For, whoever vindicates a subject, shows by the very act that he wishes to have it, and there is no doubt that he would desire to have the possession immediately, which the form of action is to secure to him for ever, if such possession were compatible with his character of plaintiff in a vindication - suit. Now it is true this compatibility is impossible, but still it is not necessary to assume a voluntary disclaimer of possession because the possessor may be either unaware of his possession, or of the legal principle, upon which this incompatibility is founded. As now, is these two possible cases, the possessor undoubtedly had not the intention of giving up his possession, so, generally, nothing has taken place from which this intention can be ascertained with certainty, consequently the possession is not lost, and consequently the *interdictum uti possidetis* still lies.

The third case, in which a similar construction is made use of, occurs with negligence. So, the intention to give up possession may be inferred from mere negligence. With land, the user of it generally occurs at definite periods of the year, if then, for instance, a possessor allows his land to be unused for a series of years, we may fairly assume that he intended to give up possession; for it is highly improbable that this should be a mere act of forgetfulness, and whether his intention was generally not to keep it, or that he gave it up from mere negligence. or that a journey elsewhere was of more importance to him, is altogether immaterial here, as all this only applies to the motive of his determination itself; not to the determination itself; but as in all these cases, the determination, was freely, and with full consciousness, directed on something which made the exercise of possession wholly impossible, a disclaimer of possession is necessarily involved in it.

Thus, the loss of one of the two elements which constitute possession will make it cease to exist. If for instance, the possessor loses the physical element, "corpus", as if the thief steals the thing possessed. Here, possession will pass to the new possessor, although, the act with which he acquired possession was an lawful act, nevertheless, he has the physical power over the thing. Also, if the possessor loses the mental element, "animus", he will lose possession, although he still keep the physical element, i.e., he still have the custody of the thing. As for instance, if the possessor agrees to give up the ownership of the thing possessed to somebody else, but in the meantime agrees to keep that thing in his custody on behalf of the new owner. There are some other cases, where the possessor loses the physical element, "corpus", but does not lose possession, this is the case where the custody of the goods is transferred to a warehouseman. Here, the warehouseman detains the goods for the true possessor who put him in control of the goods. Here, the true possessor did not lose possession, although he gave the custody of the goods to the warehouseman, i.e., he lost the "corpus",

but he did not lose the mental element, the "animus", which is the intention to possess the goods through the warehouseman. Thus, the warehouseman acquires the physical element, but he does not acquire the mental element, which is to possess for himself, because he knows that he has the mere custody of the goods, and that the true possession is in the true possessor for whom he holds those goods in his custody.

2-5- POSSESSORY REMEDIES:

Possession being considered a good title of right, has a special consideration by law for its protection and so that no rightful possessor uses violence to preserve and protect his possession. So, we shall examine those possessory remedies through their nature, their objects and their exclusion from English law and the possessory actions in the French and Algerian law.

2-5-1- The Nature, The Object Of Possessory Remedies And Their Exclusion From English Law:

(i)- The Nature Of Possessory Remedies:

In English law possession is considered as a good title of right against anyone who cannot show a better title. Thus, a wrongful possessor has the rights of an owner with respect to all persons except earlier possessors and except the true owner himself,[42] as long as that wrongful possessor still detain possession of the article. Some other legal systems go much further than this, and consider possession as a provisional or temporary title even against the true owner himself.[43]

So, if a wrongdoer is deprived of his possession, can recover it from any person whatever, simply on the ground of his possession, and the true owner

42 Armony v. Delamirie (1722) 1 Strange 505; Asher v. Withlock (1865) L.R. 1 Q.B. 1.

43 See, for example, the German Civ.code, Sects.858,861,864, and the Italian civil code, Sects. 694-697.

who takes his own, may be forced in this way to restore it to the wrongdoer, and will not be permitted to set up his own superior title to it, unless he sets up the fact that he was previously dispossessed of the property.

Legal remedies thus appointed for the protection of possession even against ownership are called possessory, while those available for the protection of ownership itself may be distinguished as proprietary. In the modern and medieval civil law, the distinction is expressed by the contrasted terms petitorium (a proprietary suit) and possessorium (a possessory suit). The beginnings of this duplication of remedies, with the resulting provisional protection of possession, may be found in Roman law. It was taken up into the cannon law, where it received, considerable extensions, and through the cannon law it became a prominent feature of medieval jurisprudence. It is still received in modern continental systems; but although well known to the earlier English law, it has long been rejected by us as incumbrous and unnecessary.

(ii)- The Objects Of Possessory Remedies:

One may ask the question as to the reasons on which this provisional protection of possession is based. It would seem probable that the considerations of greatest weight are the three following.

(a)- To avoid and prevent the evils of violent self help, its advantages which derives from it and that will discourage the use of violence for self-help. He who helps himself by force even to that which is his own, must restore it even to a thief. The law gives him a remedy, and with it he must be content. It has been found abundantly sufficient to punish violence in the ordinary way as a criminal offense, without compelling a rightful owner to deliver up to a trespasser property to which he has no manner of right, and which can be forthwith recovered from him by due course of law. In the case of chattels, indeed, English law has not found it needful to protect possession even to this

extent. It seems that an owner who retakes a chattel by force acts within his legal rights. Forcible entry upon land, however, is a criminal offense.

(b)- One may find a second reason for the institution of possessory remedies, is to be found in the serious imperfections of the early proprietary remedies. The procedure by which an owner recovered his property was cumbrous, dilatory, and inefficient. No man, could be suffered to procure for himself by violence the advantageous position of defendant, and to force his adversary by such means to assume the dangerous and difficult post of plaintiff. The original position of affairs must first be restored; possession must first be given to him who had it first; then, and not till then, would the law consent to discuss the titles of disputants to the property in question.[44]

(c)- A third reason for possessory remedies, closely connected with the second, is the difficulty of the proof of ownership. In the absence of any system of registration of title, it is easy to prove that one has been in possession of a thing, but difficult to prove that one is the owner of it. For this reason, it was considered unjust that a man should be allowed by violence to transfer the heavy burden of proof from his own shoulders to those of his opponent. Every man should bear his own burden. He who takes a thing by force must restore it to him from whom he has taken it; let him then prove, if he can, that he is the owner of it; and the law will then give to him what it will not suffer him to take for himself.

(iii)- Their Exclusion From English Law:

The English law, since it has discovered that it was possible to look after the right of possession in a better way than that we have seen before. It adjusts the burden of proof of ownership with perfect equity,[45] without recourse to any such anomaly as the protection of the possessor against the owner. This it does by the operation of the three following rules:

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44 Salmond On Jurisprudence. At P. 346. (Eleventh Edition, 1957).

45 Ibid, at P. 347.

(a)- Prior possession is prima facie proof of title. Even in the ordinary proprietary action all what a claimant need to do is nothing more than prove that he had an older possession than that of the defendant, and the law will presume from this prior possession a better title. *Qui prior est tempore potior est jure.*

(b)- On the part of the defendant, he can always rebut this presumption by proving that the better title is in himself.

(c)- A defendant who has violated the possession of the plaintiff is not allowed to set up the defense of *jus tertii*, as it is called; that is to say, he will not be heard to allege, as against the plaintiff's claim, that neither the plaintiff nor he himself, but some third person, is the true owner. Let every man come and defend his own title. As between A and B the right of C is irrelevant. The only exceptions are, firstly, when the defendant defends the action on behalf and by the authority of the true owner; secondly, when he committed the act complained of by the authority of the true owner; and thirdly, when he has already made satisfaction to the true owner by returning the property to him.

If we join these rules, i.e., the three rules shown above, the same purpose is effected as was sought in more cumbrous fashion by the early duplication of proprietary and possessory remedies.

2-5-2- The Possessory Actions In The French And Algerian Law:

The foundation of the possessory protection is complex. Possession is in most cases in the hands of the real owner; the protection of possession is useful to the owner himself, because it allows him to defend himself against any trespass or any usurpation in a quick and simple manner, and also exempts him from bringing the proof of his right of ownership which can be difficult. So, the possessory action provides the owner with a means of defense without being obliged to use any act of violence. These reasons are so strong that they justify

the use of the possessory action even against the real holder of the right.

(1)- The Common Rules To The Three Possessory Actions:

(i)- The Aim And The Field Of The Possessory Actions:

The possessor whether he is in good or bad faith, is protected by the possessory actions against any disturbance against his possession. The only aim of these actions is to protect possession; they do not protect the right itself; they provide the possessor with an order from the judge to suspend all disturbances and the judge is not obliged to search if the plaintiff is the owner or not. As in the ancient law, the possessory actions protect only the possession of immovables. But, according to article 2279 of the French civil code and 835 Algerian civil code, the possessor in good faith of a movable becomes instantaneously owner, whereas the owner is protected enough by the action for declaration of title (l'action en revendication) which allows to take the movable back. Moreover, the criminal law, protects the possession of movables by giving heavy sanctions to the crimes of theft, receiving and concealing of stolen goods, swindle or the breach of trust, and other crimes concerning movables.

(ii)- Effect Of The Possessory Actions:

When the judge notices that the possessor has met all the necessary conditions, he must order the ceasing of the disturbance to possession and that the things go back to the state in which the were before the trouble. The aim of these actions is only to allow the possessor, either to recover or to maintain a former state.

(2)- Particular Rules To Each Possessory Action:

(i)- "la Complainte":

This means a possessory action which may be instituted by a person after one year of adverse possession of real estate or rights. So, "la complainte", the

general possessory action which is open in all the cases of present trouble. Any act which involve contradiction to possession. There can be action under pretence of having rights on someone's property, or taking the law in one's own hands. The former results from any pretending against possession which can be involved in any declaration or any juridical act. The latter consists in all material aggression against possession.

(ii)- "La Dénonciation De Nouvél Oeuvre":

This is the action for disturbance of possession, especially, against erecting structures forbidden by law (easement, etc.). This action became a kind of action called "la complainte". Moreover, this action follows all the rules of "la complainte", and is different from that latter just by the two following differences:

Firstly, whereas "la complainte" supposes that a trouble has already happened, the "dénonciation de nouvél oeuvre", is open for future trouble, such as works which if they are finished might harm the possession.

Secondly, the effect of the action of "la dénonciation de nouvél oeuvre" can only be stopped or suspended but not the suppression of these works.

(iii)- "L'action En Reintégrande":

Action for reinstatement, or restoration. The fact or the act which will give rise to the action for restoration must involve the general features of the possessory trouble, it must be a voluntary act which involves contradiction to possession. It must involve particular characteristics which make it different from the simple trouble. The action for restoration is given against any dispossession obtained by the means of violence or an act of violence which can be on the possessor himself or the thing possessed. This possession involves two elements, a dispossession and a violence or an act of violence.

(3)- Persons Protected By The Possessory Actions:

As regards the persons protected by the possessory actions, there is an opposition between possessors and precarious holders. Normally, it is the possessors whose possession presents certain qualities who are protected by the possessory actions; in principle, these actions are refused to the precarious holders.

(i)- Possessors:

Even if the article 23 of the Fr.code.civil procedure seems to require only a quiet and non-precarious possession, the jurisprudence and the doctrine agree that the required possession for the exercise of the action of "la complainte" and of "la dénonciation de nouvél oeuvre" must prevent all the features of a real possession. This also required by article 413 of the Alg.code.civil procedure. Moreover, the possessor must prove that he possesses the thing for at least a year. These conditions do not apply on the action for restoration, this action requires only one condition, which is that the possession must be quiet and continuous. This is required by article 414 of the Alg.code.civil procedure.

(ii)- Precarious Holders:

In general the possessory protection is refused to them, but as regards applying this rule, a distinction must be drawn as between, the relationship of the holder with the person from whom he detains the thing and the relationship between the holder and third persons.

(i)- The relationship between the holder and the person from whom he detains the thing: here as to the relationship of the tenant or farmer with the lessor, it has been already settled that the holder does not use the possessory actions.

(ii)- The relationship between the holder and third persons: here the

situation is different from the first one. If the holder, especially the tenant or farmer, is perturbed in his enjoyment by third persons, he has to report this trouble to the lessor, and this required by article 497 of the Algerian civil code. The lessor, will have the quality and the ability to take action and use a possessory action in order to bring an end to the trouble, and this is provided article 1726 of the Fr.code.civil procedure.

CHAPTER THREE
POSSESSORY LIENS

3-1- The Nature, The Characteristics And Effects Of Possessory Liens And The Comparison Of Possessory Liens With The Other Kinds Of Liens:

3-1-1- The Nature, The Characteristics And Effects Of The Possessory Liens:

The nature, characteristics and effects of a possessory lien may be summarised in the following way:

(i)- Nature Of A Possessory Lien:

It is a common law right conferring by contract, usage or statute a right of retention of a chattel already in the lien holder's possession.[1] The possession must be lawfully acquired, and apart from surrender for a particular limited purpose (e.g., deposit) be continuous. Because of the requirement of rightful acquisition possession transferred by a person who has a right to do so cannot found a lien. But a person obliged to receive goods (such as a common carrier) is not affected by the defect in transfer unless he knows of it.[2] There is no ability to acquire possession to create it and no right to enforce the right through action unless the possession is wrongly terminated, i.e., there is no right of sale (see, e.g., Mulliner v. Florence (1878) 3 Q.B.D. 484). But such a right may be provided by contract or statute, see, e.g., the Sale of Goods Act 1979, ss.39 and 48; and the Torts (Interference with Goods) Act 1977, ss.12 and 13. The Sale of Goods Act 1977 provides in S.39:

"(i)- Subject to this and any other Act, notwithstanding that the property in

1 Jackson. D.C. Enforcement Of Maritime Claims. at P. 261.

2 See, e.g., Johnson v. Hill (1822) 3 Stark. 172.

the goods may have passed to the buyer, the unpaid seller of the goods, as such, has by implication of law : . . .

(c)- a right of re-sale as limited by this Act and in section 48 (3)- Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

Moreover, it is provided in section 13 of the Torts (Interference With Goods) Act 1977:

13 (1)- If a bailee of the goods to which section 12 applies satisfies the court that he is entitled to sell the goods under section 12, or that he would be so entitled if he had given any notice required in accordance with schedule 1 to this Act, the court: _

(a)- may authorise the sale of the goods subject to such terms and conditions, if any, as may be specified in the order, and...

Moreover, the possession is an essential element for the exercise of the lien and without it the creditor cannot pretend having any possessory lien as long as he does not have possession and the holder of a possessory lien cannot enfeorce it by sale, but may only continue to hold the property until his claims are satisfied. Thus, the possessory lien may be described as a negative lien, because it is only a means of pressure on the owner of the thing held to oblige him to pay his debts.

(ii)- Characteristics Of A Possessory Lien:

According to the diferent definitions given to the possessory lien, one may find that the possessory lien has the following chararcteristics:

(a)- Possession is an essential element for the constitution of a possessory lien and without possession of the incumbranced thing, the creditor cannot claim having any lien on the res. Thus, the absence of possession or the loss of it for whatever reason (except wrongful despossession) the lien holder loses his lien.

(b)- There will be no lien if the possession is wrongful, or the goods have been deposited for a particular purpose inconsistent with the lien or for mere storage or keep.[3] So, possession must be a rightful one and consistent with the right exercised.

(c)- Liens may arise by contract, by statute or by custom.[4] Examples are those of the innkeeper (Hotel Proprietors" Act 1956), the carrier, the repairer of goods and the unpaid seller of goods. The law does not favour general liens but some professions have established customs entailing such liens. They include bankers, solicitors and stockbrokers. A lien arising from custom may be excluded by contract.

(d)- The holder of a possessory lien cannot enforce it by sale, but may only continue to hold the property until his claims are paid.

(e)- A lien is lost by surrender or abandonment of possession (but not by re-delivery for a limited purpose to the owner), on payment or tender of the debt, by the making of an excessive demand by the holder and by the taking of some other security inconsistent with the lien.

(iii)- Effects Of Possessory Liens:

Ther is only one important effect to the possessory lien which is that it only gives a mere right to retain, not to sell or re-sell, but there are many exceptions by statute, e.g., the unpaid seller, and generally an application may be made to the court for an order to sell if the goods are perishable or if some other god reason can be shown. Thus, a possessory lien is a quite and negative right

3 Ibid.

4 Hudson. A.H. Dictionary Of Commercial Law. 1983. at P. 209.

because it only gives to the lien holder the right to retain the thing until his claims are paid even though to do so entails expense.[5] Moreover, it can also be said that if the lien holder is dispossessed by a court having Admiralty jurisdiction, then out of the proceeds of the ship he will paid his claim according to the rules as to priorities.[6] The other effect which may result from the possessory lien is that the possessory lien is lost by the loss of possession.

In the field of carriage by sea, many claims may arise against the ship as against the cargo carried in that ship. Those claims, might be maritime liens, sttutory liens, possessory liens or some other charges, such as equitable liens and mortgages, but each of these categories can be different from the other categories. Thus, all these categories can be different in point view legal characteristics or legal nature. Because this work is more concerned with possessory liens, this kind of liens will be compared with each of these categories.

3-1-2- Comparison Of Possessory And Maritime Liens:

Before coming to the distinction between the possessory liens and maritime liens, it would better to give a brief definition to both of those categories. Therefore, a possessory lien is a right to detain possession of a res which had been rendered services to, until those services are paid for and it confers a right of retention of a chattel already in the lien holder's possession. When it comes to maritime liens, Sir John Jervis provided the first comprehensive and authoritative definition of a maritime lien in The Bold Buccleugh.[7]

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5 Thames Iron Works Co v. Patent Derrick Co (1860) 1 John & H 93; Somes v. British Empire Shipping Co (1860) 8 HL Cas 338; Mulliner v. Florence (1878) 3 Q.B.D. 484, C A; The Guaupen (1925) 22 LIL. Rep 57; The Ally [1952] 2 Lloyd's Rep 427; Smith's Dock Ltd v. St Meriel (Owners), The St Merriel [1963] P 247, [1963] 1 All E R 537, [1963] 1 Lloyd's Rep. 63.

6 The Gustaf (1862) Lush 506; The Immacolata Concezione (1883) 9 PD 37, 5 A. S P. MLC 208; The Tergeste [1903] P 26, 9 Asp MLC 356.

7 The Bold Buccleugh (1851) 7 MOO. P.C. 267, 284. For more details about maritime liens, see Thomas on Maritime Liens, British Shipping Laws, Vol 14.

From these definitions, one may find the disctinction between these two kinds of liens. First, a possessory lien depends on possession of the res, i.e., possession is very essential for the existence of a possessory lien, whilst a maritime lien does not depend on that possession. Therefore, in The "Tarveate",[8] Lord Justice Bankes stated that:

> "the so called maritime lien has nothing to do with possession, but is a priority in claim over the proceeds of sale of the ship in preference to other claimants . . . ."

The possessory lien is lost by loss or surrender of possession of the res.[9] So, if an incumbranced res by a possessory lien, falls into the hands of the owner of the res or the hands of a third party by a lawful surrender, the possessory lienee will lose his lien upon the res. Secondly, the right of a maritime lienee is to be carried ionto effect by a legal process, that process is to be a proceeding in rem. So, the right of a maritime lienee is perfected or crystallised by an action in rem. Under such a proceeding, a maritime lienee may cause the incumbranced res to be arrested and sold, and the maritime lienee will satisfy his claim from the proceeds of sale.[10]

In contrast with that, a possessory lien takes effect by the fact of taking possession of the res not by taking any legal action, all what a possessory lienee needs to do is to confirm his lien upon the res, and that by taking possession of the incumbranced res. So, all what a possessory lienee can do is to retain the res until all his claims are satisfied.

Moreover, the right of a possessory lienee is just to detain or hold possession of the res without having authority or right to sell the incumbranced res, his right is confined just by detaining possession, whereas the maritime lienee after taking an action in rem and causing the arrest of the incumbranced

8 The Tarveate . Lloyd's Law Reports. Vol 12. 1922. at P. 252.

9 Trustee Of The Property Of F. Lord v. Great Eastern Railway Co (1908) K.B.54.

10 The Cella (1888) 13. P.D. 82. per Lord Esher M.R. at P. 86.

res, the res is sold, and the claim will be satisfied out of the proceeds of sale.[11]

The other difference which can be found between a maritime lien and a possessory lien, is that a maritime lien may categorised as voluntary or involuntary lien. So, the maritime liens for services rendered to the res, are considered to be voluntary liens, whereas, the maritime liens for damages are seen as all involuntary in character. On the other hand, most of or all of the possessory liens are voluntary liens for services rendered to the res. Moreover, a maritime lien follows the res into whosoever hands it may come, even if it is a bona fide purchaser. In The Bold Buccleugh, Sir John Jervis said that:

> " . . . a maritime lien . . . This claim or privilege travels with the thing into whosoever possession it may come . . . ".[12]

Thus, the maritime lien is a lien which travels with the property secrtively and unconditionally, i.e., there is exists neither a system of registration and public notice by which charges in the nature of maritime liens may be rendered overt and visible, nor does the maritime lienee detain possession of the res. So, a purchaser of a res will find the res he bought incumbranced with a maritime lien.[13] However, there are situations where the "droit de suite" does not operate, e.g., where the incumbranced ship is purchased or requisitioned by the Crown or in certain cases by a foreign sovereign, thereby making the seizure impossible and the lien inoperable; see Five Steel Barges (1880) 15 P.D. 142. Judicial sale too expunges the maritime lien. On the contrary, this cannot happen in the case of a possessory lien, because a possessory lienee must detain the possession, otherwise, his lien will be terminated.

After having brought the differences between possessory liens and maritime liens, one can say that there is a point of similarity between these two categories of lien. That similarity is that both of the maritime and possessory

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11 Ibid.

12 The Bold Buccleugh (1851) 7 MOO . P.C. 287, 284.

13 Ibid, per Sir John Jervis, at P. 284.

liens, include some liens which are maritime and possessory liens in the same time. For instance, in salvage, the salvor has a possessory lien as well as a maritime lien, but this right may not be abused.[14]

3-1-3- Comparison Of Possessory And Equitable Liens:

A possessory lien is essentially a right to detain possession of a chattel pending the discharge of an outstanding obligation incurred in respect of services rendered to the chattel.[15] This right to retain is firmly founded on possession, and the loss or surrender of that possession, will make the possessory lienee lose his right of lien. So, the principal difference between possessory and equitable liens lies in the fact that, to enable anyone, to claim the former, he must be in actual possession of the thing in respect of which the claim arises, whilst the latter arises quite independently of possession. So, an equitable lien is a species of equitable charge, which arises by implication of law, and by virtue of which a right in equity may be arrested against property.

The French and the Algerian law, consider the lien as given by law, and therefore, the French civil code defines it in art.2095, that the privilége is a right which the quality of the debt gives to the creditor to be preferred on the other creditors, even mortgagees. But some criticism was brought to this definition.[16] However, The Algerian civil code seems to have learnt from the French civil code and brought a definition about the privilége in art.982 which considers the privilége as a right of priority given by law for a specific debt because of its quality, and it adds that no debt can be preferred without a text of law. Furthermore, an equitable lien differs from a possessory lien in that, an equitable lien does depend upon the possession of the chattel, whereas, a possessory lien does. This is because an equitable lien is given by law and

14 Tetley. William. Maritime Liens and Claims. op-cit, at P. 147.

15 Thomas. Maritime Liens. op cit. at P. 3. para 2.

16 Remarks made about that article in Sect.!, Sub-S (2) about Equitable Liens.

whether there is possession or not is of no importance for the equitable lien, whereas possession is an essential element for the existence of a possessory lien. There are some other important differences, as for example, the common law or possessory lien is a merely passive one,[17] and gives the person entitled no other remedy but mere detention until payment, and, in the ordinary way, a right of sale accrues even by leave of the court. In respect of an equitable lien, however, the only remedy is the right to enforce it by a judicial sale.

Moreover, since a possessory lien is, in its nature, a right of defence only, and not a right of action, there is nothing to prevent its being claimed in respect of a statute barred debt,[18] but no assistance can be given for the enforcement of an equitable lien when the remedy has benn barred by lapse of time under the Statutes of Limitation.[19]

Lastly, an equitable lien may be lost by sale to a bona fide purchaser, but a possessory lien which incumbrances a res is also lost by sale, because the possessory lien holder will possession of it, and if the thing goes outb of his possession whether by sale or any other lawful way, that will terminate his lien.

3-1-4- Possessory Liens And Mortgages:

Before looking at the differences and similarities between these two categories, it is worthwile giving a definition to mortgages. A mortgage is a form of real security where the borrower (mortgagor) normally retains possession of the property mortgaged but grants a proprietary interest to the lender (mortgagee).[20] Where the mortgage is granted by a company formalities and rules prescribed by the Companies Acts must be observed, especially in regard to registration, in addition to whatever precedures are necessary for the type of property being mortgaged. A mortgage may make his ownership absolute by

17 Lancelot. Edey. Hull. Possessory Liens In English Law. at P. 16.

18 Higgins v. Scot. 2 B. and Ad. 413. 414; Spears v. Hartley (1800) 3 ESP. 81.

19 Lancelot. op cit. at P. 16.

20 Hudson. A.H. Dictionary Of Commercial Law. 1983. at P. 180-181.

foreclosure, by bringing an action for foreclosure under which a further date is appointed for payment and, if the money is not then paid, the property belongs to the mortgage absolutely. Alternatively, a sale may be rendered to enable the mortgagee to be paid out of the proceeds.[21] Moreover, the French and Algerian civil code brought a definition to the mortgage, and that was by art.2114 of the French civil code, which defines it as, a chattels real on the immovables which are transmitted for the discharge of an obligation. It is because of its nature existing on the whole of the immovables transmitted. It traces them in whosoever hands they may come.[22]

The Algerian civil code defined it in art.882, which defines it as, "the contract of mortgage is acontract which makes the creditor get chattels real on the immovable transmitted for payment of the debt, which makes him preferred to get his refunding against the other creditors who are lower than him in priority, on the price of the immovable in whosoever hands it may come".[23]

So, from these definitions, a comparison can be drawn between between the possessory liens and the mortgages.

The concept ofa possessory lien and a mortgage are quite different, in that the possessory lien arises when there there is possession of the res for services rendered to it. On the other hand, a mortgage arises according to the mortgage

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21 Walker. David. M. The Oxford Companion To Law. 1980. at P. 857.

22 "My Own Translation". The actual article in french provides that:

"L'hpothéque est un droit réel sur les immeubles affféctés á l'acquittement d'une obligation. Elle est, de sa nature, indivisible, et subsiste en entier sur tous les immeubles affféctés, sur chacun et sur chaque portion de ces immeubles. Elles les suit dans quelques mains qu'ils passent".

23 "My Own Translation". The actual art.882 of the Algerian civil Code provides in french that:

"Le contrat d'hypothéque est le contrat par lequel le créancier acquiert sur un immeuble affécté au paiement de sa créance, un droit réel qui lui pérmét de se faire rembourser par préférence aux créanciers inférieurs en rang, sur le prix de cet immeuble en quélque main qu'il passe".

agreement between the mortgagee and the mortgagor as it was described in the Algerian civil code, in art.882, as a contract between the two parties. Moreover, a possessory lien does not require any form of agreement between the parties, but a mortgage agreement must be in a form prescribed by statute.[24] The right of a mortgagee to pursue his security in the hands of a third party is founded on notice which is secured by a public sheme of registration.[25] In contrast, a possessory lien does not need any form of registration, because the right of a possessory lienee depends on the possession of the res. Another difference can be found, which is that the mortgage does not depend on possession, as long as there is an agreement and registration, whereas, the possession is an important and vital element for the possessory lien. Lastly, if the mortgagor does not pay his debt at the agreed time, the mortgagee might take legal action so that the res be sold and so that he gets paid from the proceeds of sale. On the other hand, a possessory lien cannot be enforced by sale, the only remedy of it is to retain the chattel as a means of obligation against the debtor.

3-1-5- Possessory Liens And Statutory Liens:

Possessory liens which arise in a contract of carriage of goods by sea, namely in a charteparty between the carriers and the charterer, depend on the wording of the charterparty. Whereas, statutory liens are expressed and recognised by statutes, such as, seamen's and master's lien for wages, in the Administration of Justice Act 1956 Sect. 1 (1) (e), and the Supreme Court Act 1981, sect 20(2), their lien is expressly recognised. In the French and Algerian law, some liens are recognised by statutes, such as, the French code of commerce, (which includes the French Maritime Law) or the Algerian Maritime code. The French code of commerce, gives a list of liens which incumbrance the ship and the freight in art. 31 of the Law of January the 3 rd of 1967, these liens are

24 Merchant Shipping Act 1894. S. 31, and art. 883 of the Algerian civil Code and art. 2127 of the French civil Code.

25 Merchant Shipping Act, Ibid.

statutory liens. The Algarian Martime code has in the same way given a list of liens in art. 73,[26] and these liens are also considered as statutory liens. Another question may arise as to statutory possessory liens.[27] If the decision of the Court of Appeal in The "Emilie Millon", continuous to represent an accurate statement of the English Law on the nature of the statutory right to detain and sell then it appears that the law draws a distinction between a statutory possessory lien,[28] and a common law possessory lien,[29] which is difficult to support.[30] Moreover, it represent unbusinesslike approach which is full of difficulties.[31] For instance, unlike a sale by order of the Admiralty Court, a statutory claimant cannot sell free from liens or charges.[32] In many instances therefore, to effect a sale will either be impossible or at least difficult, and even if possible the sale is unlikely to realise the true value of the res. The impracticalities are avoided if, as in The Sierra Nevada, the the statutory claimant is treated in the same manner as a possessory lienee.

3-2- The Possessory Liens And The Essentials For Their Existence:

As was stated before, the definition of Grose J.,[33] of possessory liens seems to be he most satisfactory definition, namely, "the right in one man to retain that which is in his possession belonging to another till certain demands of him, the person in possession, are satisfied".

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26 Ordonnance No- 76-80 du 23 Octobre 1976, portant Code Maritime Algérien.

27 Thomas. Maritime Liens. At P. 233, para 416.

28 The statutory to detain and sell was considered as a "statutory possessory lien" in The Countess [1923] A.C. 345. See, in particular the judgment of Lord Burkenhead at P. 349 et seq.

29 A common law posessory lienee is required to surrender his possessory right to the Admiralty Marshall and the withe Court undertaking to protect his claim and priority against the proceds of sale or alternative security.

30 Thomas. Maritime Liens. at P. 223, para 416.

31 The Spermina [1923] 17 Ll.L.R. 17, and the comments of Hill J.

32 [1968] P. 449, per Brandon J. at P. 457 et seq., The Spermina [1923] 17 Ll.L.R. 17, per Hii J., at P. 18.

33 Hammonds v. Barclay, supra.

3-2-1- Definition OF General And Particular Liens:

The possessory liens may be devided into two categories, namely, a general lien or a particular lien, differentiated by the extent of the demands in respect of which the liens arises. A general lien gives a claimant the right to retain any chattel of the person against whom the claim is made until that claim is satisfied, there being no necessary connection between claim and chattel, i.e., where an individual is permitted to retain the goods of another, which are in his possession, until all claims against the owner of the chattels in respect of a general balance of account are satisfied, whether such claims arise in respect of the particular goods detained or not, the person in possession is said to have a general lien.[34]

On the contrary, a particular lien is a right to retain a chattel until all claims made in respect of it are met, i.e., a particular lien, is a right to retain a specific property as security for demands which have arisen in respect of such property only. The examples of particular liens are those of the unpaid price for work done, or materials furnished in repairing or constructing a specific chattel.[35] Thus, a solicitor is entitled to retain the papers of a lient, whether they became due in respect of the matters to which the papers relate or not, and his lien is a general lien. On the other hand, the unpaid vendor of goods, has a right to detain the goods sold until the purchase price is paid, and this lien is given by statutes (the Sale of Goods Act 1979, SS. 39 and 48), but he has only a particular lien and could not retain the goods in respect of the unpaid purchase parice of other goods sold at another time.

3-2-2- The Essentials For A Valid Possessory Lien, Whether Of A General Or Particular Nature:

So that the possessory lien holder has a valid one, his lien must present some conditions which are necessary to make it valid. Those conditions are, namely:[36]

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34 Lancelot. E.H. op cit. at P. 18.

35 Ibid.

36 Lancelot. E.H. op cit. at P. 19.

(i)- Actual possession of the goods in respect of which the lien is claimed.

(ii)- Lawful possession.

(iii)- That the goods must be the goods of the debtor.

(i)- Actual Possession:

Possession is an essential element for a possessory lien and without possession, the lien holder cannot pretend to have any possessory lien. The property must be in the actual possession of the party claiming the lien,[37] and if possession is lost, the right of detention is also lost. Even in the civil law jurisdiction, such as the French and the Algerian civil code, possession is vital, because there cannot be any retention, if there is no detention; for keeping there must be first holding. The possession must be actual, and for example, a mere equitable right to possession is insufficient to give rise to the right.[38] Thus, if a consignemt of cargo is made to "A", with a direction to pay "B" a sum out of the proceeds, no lien will thereby be created in favour of "B". Moreover, not only must the possession be actual, but it must also be of a continuous and uninterrupted nature. In general a bailee can have no lien where, by the essence of te contract, he has no right to the uninterrupted possession of the property.[39]

In Hatton v. Car Maintenance Co. Ltd.,[40] it was held that party who takes care of a car, and agrees to maintain and keep it in order, has no lien for repairs. The main reason for this is, that in repairing the car he does not improve it, but quite apart from this he would have no lien if the owner was entitled to take the car out whenever he pleased, for the possession would not be for a continuous nature; query, indeed,[41] whether there is possession at all in such a case.[42]

Moreover, a livery stable keeper, who merely feeds an animal, has, for

37 Shaw v. Neale 6 H. L. Cas. 581.

38 Heywood v. Waring 4 Camp. 291.

39 Jackson v. Cummins. 5. M. & W. 342.

40 110 L.T.R. 765.

41 Lancelot. E.H. op cit. at P. 20.

42 See, Judson v. Etheridge (1833) 1 C. & M. 743;
Orchard v. Rackstraw (1850) 9 C.B. at P. 98.

much the same reason, no lien, for he has not possession, but a mere custody. However, it should be noted that if possession must be actual, it needs not to be direct, and therefore, the possession of an agent, servant or warehouse-keeper of the creditor, acting under his authority, is sufficient. Thus, in respect of possessory lien for the payment of freight due to the shipowner, he latter can land and warehouse the goods without losing possession and that by possessing through the warehouseman. The Merchant Shipping Act, 1894,[43] resolves the dilemma by enabling the shipowners to retain constructive possession over goods after discharge, thereby maintaining the shipowner's possessory lien for freight. Section 494 of the Merchant Shipping Act, provides that goods delivered to a wharfinger accompanied by written notice that the goods are subject to a lien for freioght will continue to be subject to that lien even though they no longer in the actual possession of the shipowner. When it comes to the French and the Algerian civil code, they require that an actual possession must be present. So, the French jurisprudence requires that the debtor loses his possession and that the creditor acquires it, because to detain you must hold (pour <<retenir>> il faut <<tenir>>). The right of detention means taking possession of the thing by the one who is exercising the right of retention and therefore the thing becomes detained.

Moreover, the creditor or the possessory lien holder is not obliged to exercise the detention himself but can confer it to someone else, who holds it for the lien holder himself, or if the court gives the thing to a sequestrator.[44] However, the possessory lien holder loses possession, if he voluntarily surrender possession to the debtor. The Algerian civil code considers the right of retention as existing if there is possession of te debtor's property by the possessory lien holder. So, in art.201/2 it is provided that, the one who exercises the right of retention must keep the thing in the same manner and according to the same

43 (1894) 57 & 58 Vict. c. 60.

44 Req. 19 juill. 1904, D. 1906.1.9 et note Glasson; Req. 5 nov. 1923, D. 1924.1.11.

rules provided to the pledge,[45] and in art.201/1 it is provided that, the right of retention is extinguished by the loss of the possession or the detention.[46] Thus, in both the French and the Algerian law, possession is essential for the existence of a possessory lien whether a general or a particular lien.

(ii)- Lawful Possession:

Even actual possession is insufficient unless it was lawfully acquired in due course of business. Mere possession of a debtor's goods will not alone give the creditor a right of lien over them. A lien cannot be acquired by a wrongful act, and possession obtained by misrepresentation, fraud, or violence, will never give rise to the right, even though every other essential element is present. In this case, we find that the civil law jurisdiction (i.e., the French and the Algerian law), it requires that the possessory lien holder or the one who exercises the right of retention must be in good faith, and the good faith here means that there was no fraud in exercising the right retention and this condition is required by the jurisprudence. Moreover, the German Civil Code in its' art. 273/2, provides that there is no retention where the creditor used fraud or where the despossession of the debtor was by an illegal act and the articles 895 and 896/2 of the Swiss Civil Code refuse the right of detention when the possession was acquired without the consent of the debtor.

In Lempriere v. Pasley,[47] a lien claimed for certain freight duty paid in respect of goods, possession of which had been wrongfully obtained, but it was held that the wrongfull acquisition of possession was fatal to any such claim.

45 "My Own Translation". The art.201/2 of the Algerian civil Code provides in french that:

"Celui qui exerce le droit de rétention doit concerver la chose , conformément aux régles établis en matiére de gage . . . ".

46 The actual art.201/1 provides in french that:

"Le droit de rétention s'éteint par la pérte de la possession ou de la détention".

47 (1788) 2 Term. Per. 485.

Furthermore, possession obtained for some particular purpose only, will not give rise to a general lien.[48] In Kinloch v. Craig,[49] a factor received goods for the purpose of sale and under an agreement to apply the proceeds in an agreed manner. As possession was acquired for this particular purpose only, it was held that there was no lien. Also in Humphries v. Wilson,[50] a bill for £100 was given to a creditor of £47 to be discounted, the creditor being promised payment out of the proceeds. Before the bill was discounted the creditor became bankrupt, and a claim of lien was negatived for this reason. The reason for these cases is that there was a failure of the special purposes for which the goods were deposited with creditor, and the property in the goods reverted to the debtor, the possession of the creditor ceassing to be lawful. If goods are, however, left in the possession of a creditor for a considerable time after the failure of the particular purpose for which they were originally deposited, a deposit for general puroses will be presumed and a lien will attach.

(iii)- The Goods Must Be The Goods Of The Debtor:

In the general way, a creditor cannot obtain a lien over goods of a third party, and no right will attach unless the goods actually belong to the debtor because the debt arose between the debtor and the creditor and not between the creditor and the third party, and therefore, the creditor can only obtain a lien over goods of his debtor. Thus, it was held in The Ex Parte Nesbitt,[51] that a valid lien cannot attach as against a remainderman for a debt due from the tenent for life, and in Hartop v. Hoare,[52] where a person with whom jewels were lodged for safe custody in a sealed box, broke the seals and lodged the jewels as security with his bankers, it was held no lien was created. In the more

48 See, Walker v. Birch (1795) 6 Term. Rep. 258.

49 3 Term. Rep. 119.

50 2 Stark. Rep. 566.

51 (1865) 2 Sch. & Lef. 279.

52 3 Atkyns 43.

recent case of The "In Re Llewellyn",[53] a mortgagee's solicitor, after payment off of the mortgage, principal, interest, and coasts, unsuccessfully endeavoured to retain the mortgage deeds in respect of coasts for work done, relating to the mortgaged property, during the continuance of the mortgage. In the civil law jurisdiction, as a general rule, the creditor can only detain the property of his debtor or the person against whom he is claiming payment of his debt, but,[54] the creditor can use the right of detention against the property of a third party when the latter has agreed to garantee the payment of the debt from the debtor or where the debtor has transferred ownership of the property to a third party.

The Exceptions:

There are exceptions to the above rule, which may be grouped under the following main headings:

(i):- Where The Person Receiving The Goods Is By Law Compelled To Receive Them:

In the case of carriers who are under a legal obligation to carry goods, they acquire a lien over the goods delivered to them for carriage, until the charge for carriage is paid, whether the ggods are the property of the property of the persons delivering them for carriage or not. Inn-keepers who are under legal obligation to receive anyone who offers himself or herself as a guest, and to keep the goods of the guest safely, in the same way will acquire a lien over the goods of the guest until charges for food and lodging have been paid.[55] To enable a lien to be claimed on goods not the property of the debtor, they must, however, have been received in good faith, for a lien will not arise where the person receiving knew the person from whom he received was a wrongdoer.[56]

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53 1891. 3 Ch. 145.

54 Dalloz. Encyclopédie Juridique. 2é Édition. Répértoire De Droit Civil. Tome VII. Rétention. at P. 3. S. 25.

55 Yorke v. Crenaugh (1702) Ld. Ray 866. Robins & Co. v. Gray (1895) 2 Q.B. 501 (C.A.).

56 See, Johnson v. Hill (1822) 3 Stark 172.

(ii)- Where The Debtor Is Invested By The Owner With The Right Or Authority Of Disposing Of The Property In That Way:

If a person delivers the goods of another, with the owner's authority, to a trdesman for the execution of the purposes of his trade upon it, the tradesman shall have a lien upon it, to the same extent as if the goods were actually the property of the person who delivered them to him.[57] Moreover, in the French and the Algerian civil codes, where the agent is representing the principal, the above provisions provided for the case of representation are applied. Thus, the French civil code provides in art.1998 regarding the obligations of the mandator, that: "the mandator is obliged to execute all the agreements which his agent has made with the party, and that according to the limits of the contract between the mandator and his agent".[58] The Alg civil code provides in art.74 that: "The contract made by the representative or the agent in the limits of his power, will include the rights and obligations for the benefit of the mandator and against him".[59] So, according to these provisions, if the agent acted in good faith and in the limits of the power conferred to him, the obligations of his act will bind the mandator, and the contract or the deal between the agent and the third party will have the same effect as if the contract was made between the mandator and the party.

(iii)- Where Monies Or Negociable Securities Are Deposited With A Person Who Takes Them In Good Faith:

Under these circumstances the depositee will acquire the same right of lien as if the depositor were the true owner, but it is essential that, at the time of

57 See, Hussey v. Christie 9 East 433.

Richardson v. Goss. 3 Bos. & Pul. 119.

58 "My Own Translation". The actual article in french provides that

"Le mandant est tenu d'éxécuter les engagements contractés par le mandataire, conformément au pouvoir qui lui a été donné".

59 "My Own Translation". The actual article in french provides that:

"Le contrat conclu par le représentant dans les limites de ses pouvoirs au nom du représenté, engendre les droits et obligations directement au profit du représenté et contre lui".

receipt, he should have no notice of any defect in the title of the person sepositing the goods.[60]

(iv)- Under the Sale of Goods Act, 1979:

The 1893 Sale of Goods Act in its section 25, provides that:

> "Where a person having sold goods, the delivery or transfer by that person, or by a merchantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof, to any person receiving the same in good faith without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same". ,

Moreover, the 1979 Act provides an identical provision in sect.24:

> "Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a merchantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to ay person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same."

Moreover, the Sale of the Goods Act 1979, at sect.25 gives a title, where it provides that:

> "Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a merchantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposiotion thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a merchantile agent in possession of the goods or documents of title with the consent of the owner".

60 See, Jones v. Peppercorne (1858) John 430. Brandao v. Barnett (1846) 12 Cl & Fin. 787.

Thus, Section 25 of the 1893 Sale of Goods Act and Section 25 of the 1979 Act provide the same provisions. Thus, liens arising under any such dispositions within the provisions of this section will be effectual, although the goods are not the property of the debtor.

(v)- Under The Factors Act, 1889:

Dealings by a mercantile agent, in the ordinary course of business, in respect of goods of which he is in possession with consent of the owner, are valid as if expressly authorised by the owner of the goods, providing the person taking under the disposition acts in good faith, and this is provided by section 2 (1) of the Factors Act 1889, which provides that:

> "Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him even when acting in the ordinary course of business of a merchantile agent, shall, subject to the provisions of this act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same".

Pledge includes any contract pledging or giving a lien or security on goods, whether in consideration of an original advance, or of any further or continuing advance, or of any pecuniary liability.[61] A pledge of the documents of title to goods is deemed to be a pledge of the goods. The Act thus applies to pledges for antecedent debts: but where the goods are pledged,[62] without authority, for an antecedent debt or liability of the pledgor, the pledgee acquires no further right to the goods than could have been enforced by the pledgor at the time of the pledge. Where the goods are pledged without authority in consideration of the

61 S.1 (5).

62 Bowstead on Agency. 15 th Ed, By Reynolds. F.M.B. London Sweet & Maxwell, 1985. At P. 369.

delivery or transfer of the goods or documents of title to goods, or of a negotiable security, the pledgee acquires no right or interest in the goods so pledged in excess of the value of the goods, documents or security when so delivered or transferred in exchange.[63]

The French and the Algerian civil code provide the same provisions. The French civil code in art.2280 and the Algerian civil code in art.836/2, they both provide that if the person in possession of the thing stolen or lost, has bought that thing from a faire or a market, or from a public sale, or a public auction or from a person who deals in the same kind of things, than that sale is considered as valid, because the real owner cannot get it back unless he pays its' price to the one who is possession of it and who bought it in good faith.

(vi)- Where An Agent With Limited Authority Deposits Goods With A Trades man For Execution Of Purposes Of His Trade, The Tradesman Not Knowing He Is Not The True Owner:

In Weldon v. Gould,[64] it was decided by Lord Kenyon. C. J., that were goods were entrusted by the owner to another person in order to have them printed, and that person delivered them to a calico printer as his own for that purpose, the calico printer might retain them aginst the owner for a general balance due from the person who delivered them, but knowledge that the goods do not belong to the depositor will prevent any general lien from arising.[65] The

63 S.5. which provides:

"The consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a merchantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange."

64 3 Esp. R. 268.

65 See, Maans v. Henderson 1 East 335 & Snook v. Davidson 1809 Camp. 218.

basic idea of this exception is that, where a third party, obtains goods from the agent for the purpose of his trade, but not knowing that the one who delivered them was just an agent, that third party will acquire a general lien on the goods against the true owner for any services rendered or work done to those goods, and that because the act of the agent in the limits of his authority will bind the true owner. This provision is provided in the French and the Algerian civil code, where art.1998 of the French civil code and art.74 of the Algerian civil code provide that, the mandator is bound by all the acts which the agent did in the limits of his mandate.

3-2-3- General Liens, And How They Arise:

The general lien may be defined as, the lien which gives a claimant the right of retention or the right to retain any chattel of the person against whom the claim is made, there being no necessary connection between claim and chattel. Unless, created by express or necessarily implied contract, general liens can be established by custom only.

(i)- Liens Created By "Contract":

A general lien can be created by contract. The contract can provide for the assets to which the lien is to attach, for the claims for which it is to exist and for its enforceability against third parties. Thus, liens arising by contract are really agreements for pledges, and are governed strictly by the terms of the agreement giving rise to them. Such liens may arise between individuals by express agreement, or by application from usage or the course of dealing between the parties. In the case of Aspinal v. Pickford,[66] a carrier, who has not, in the ordinary way, a general lien, was held to have such a lien in the particular facts of that case from the course of dealing. However, it is possible for a creditor to reserve a general lien by notice. When contractors give notice that they will

66 3 Bos. & Pul. 44 n.

only do work upon terms of having a general lien, persons dealing with them will be held to have contracted with reference to this notice.[67] Such notice will always be construed most unfavourably to the person claiming the lien.[68] Mere notice is, in the ordinary way, sufficient without actual proof of assent by the customer, but where the person claiming a lien is compelled to accept employment under legal liability, mere notice without assent will be insufficient to give rise to a general lien.[69]

This is mainly applicable in the case of carriers and innkeepers.[70] It should be noted that where a merchantile transaction which might involve a general lien by custom, is created by a written contract, and security is given for the result of the dealings in that relation, the express stipulations and agreements of the party for security excludes lien and limits rights of the parties by the extent of the express contract that they have made.[71] Thus, whether a contractual provision creates a general or particular lien is a matter of construction. A contractual term simply creating "a general lien" without more will import the general uncertainty as to its enforceability against present owners. The term ought to include specific provision for enforceability of the lien against the holder of a prior interest. In Chellaram v. Butlers Warehousing And Distribution Ltd,[72] it was held that a general lien created by a contract between a corporation "consolidating" goods into containers and an air transport undertaking could be enforced against the owner of the goods in respect of a claim against the undertaking provided certain criteria were met. It had to be proved that the owner knew that the goods would be handled by the "consolidating" company on the contractual terms (including the lien) under

67 See, Kirkman v. Shawcross (1794) 6 T. R. 14.

68 See, Cumpston v. Haigh . 2 Scott 684.

69 Oppenheim v. Russell. 1802. 3 BOS. & Pul. 42.

70 Lancelot. E.H. op cit. at P. 25.26.

71 In Re Leith, Chambers v. Davidson (1866) L.R. 1 P.C. 305, 36 L.J., P.C. 17.

72 [1978] 2 Lloyd's Rep. 412.

which it acted in regard to the transport undertaking.[73]

(ii)- Liens Created By "Custom":

General liens have been established by "usage" or "custom", but a general lien by custom can only be established by strict proof by ancient, numerous, and important instances.[74] It must be shown as a matter of law:[75]

(a)- That the usage for a general lien was certain.

(b)- That it was a reasonable usage not inconsistent with the law.

(c)- That as a matter of evidence, the custom was universally acquiesced in, that everybody in the trade knew it, or that it could have been ascertained if he had taken pains to enquire.

It will not be sufficient to give evidence of members of the trade that it exists or a few isolated cases of a general lien being claimed. The question of whether there is a lien is a question of fact.[76] When it comes to reasonableness, the decision in the case of Leuckhart v. Cooper,[77] must be examined. In this case, warehousemen wished to establish a general lien on all goods put by a merchant in his name into the hands of the warehouseman whether the goods were the property of the merchant or not. This was held to be unreasonable, and thereofer, could not be upheld. The general principal as laid down in Rex v. Humphrey,[78] is that the usage of trade constitutes a recognised principal of law, and the law adapts it upon this plain understanding. The usage is presumed to have been founded on contracts repeated so frequently, and which are so notorious, that everybody must be considered as bound to take notice of it.[79] When once established, the right of lien becomes part of the common law, and is

73 The court followed Cassils And Sassoon v. Holdenwood Bleaching Co. Ltd. (1914) 84 L. J. K. B. 834, a case concerning the bleaching of calico on the instructions of the printers not expressly authorised by the owners to act as they did.

74 Lancelot. E.H. op cit. 1916. at P. 26. 27

75 See, In Re Spotten, Ex Parte Provincial Bank II. In Rep. Eq. 412.

76 Bleaden v. Hancock (1829). 4 C. & P. 152.

77 (1836) 3 Bing (N.C.) 99.

78 1 Mc Clel. & Y. 191.

79 Per Rooke J., in Oppenheim v. Russell 3 Bos. & Pul. 50.

accepted by the courts without further evidence.[80] The Courts have laways discouraged claims for general liens, and the very srictest proof has always been required. The reasons for this are given by Le Blanc J., in Rushforth v. Hadfield,[81] as "That general liens are a great inconvenience to the bulk of the generality of traders, because they give a particular advantage to certain undividuals who claim to themselves a special privilege against the body of the creditors at large, instead of coming in with them for an equal share of the insolvent estate". Lord Ellenborough C.J., in the same case stated that growing liens were an encroachment upon the common law, and Rooke J., in Richardson v. Goss,[82] said, "I think the doctrine of general liens is not to be favoured, because all persons who claim under them must have been guilty of neglect in suffering goods upon which the law has given them a special lien to go out of their hands wihout indemnifying themselves by setting up a claim for general lien". For these reasons a general lien, can only be claimed as arising from dealings in a particular trade or line of business, such as wharfingers, factors and bankers, in which the existence of a general lien has been judicially aknowledged, or in other trades where there is express evidence of custom.[83] It has always been held that no claim to a general lien can be maintained where it would contravene or interfere with the prior common law right of another, not claiming under the debtor.

Thus, general liens have been established "by usage" in favour of bankers, factors, insurance brokers (by city of London custom), stockbrokers and solicitors.[84] There are examples of such liens being upheld for other trades, the

80 See, Naylor v. Mangles 1 Esp. 109 and Spears v. Hartley, 3 Esp. 81, in reference to a wharfinger's general lien.

81 (1805) 6 East. 519 at P. 528.

82 3 Bos. & Pul. 126.

83 Bock v. Gorrissen. 30. L. J. Ch. 39. Leuckhart v. Cooper. 3 Bing (N.C.) 29. 6 L.J.C.P. 131.

84 Normally a solicitor must hand over papers on which he has a lien to a person other than the debtor if they are required for an action provided suitable undertakings are given; he does not thereby lose his lien (see, Hughes v. Hughes [1958] P. 221). However, it is a matter of balancing the hardship to be suffered and a court may refuse to order that the papers be handed over. See A.v.B [1984] 1 All. E. R. 265.

most relevant to maritime law being packers and wharfingers.[85] It appears that wharfingers would have to rely on local usage. There is no general lien by usage in favour of warehousekeepers.[86] It is not necessary to consider undividally the various classes of persons who have been held to possess a general lien, and that is mainly because this work deos not deal with all these liens holders.

In the civil law jurisdiction, a right of detention arises everytime there an objective or material relationship between the debt and the thing detained or everytime that there is a legal relationship between the creditor and the debtor and whenere the thing was in the hands of the creditor before the debt was born. However, the legal relationship gives a right of retention of a wider assets of the debtor than the material relationship. In fact, when the creditor claims the legal relationship between the debt and the detention of the thing , the lien holder can detain all the assets in his hands in regard to the legal relationship whih gave birth to his debt, and not only that one which gave rise to that debt but the previous and original legal relationship is the one which gives him the right to detain all the assets which are in his possession and not only that which was given to him for that specific debt.

However, this solution about giving a general lien on most of the debtor's property to be detained for the purpose of satisfying a possessory lien, is positive if it is just for the possessory lien holder, but if there are other creditors, they might suffer from that general lien, because although they might have a better or a more privileged lien, they cannot exercise it because the possessory lien holder is detaining the thing and he has the right to do so. Therefore, the possessory lien holder should be lmited to exercise his lien just on th asset which mainly and directly concerned with that lien or debt and should not be expanded to the other assets of the debtor, so that, all the other creditors can

85 Others being calico printers and dyers.

86 Chellaram & Sons (London) Ltd. v. Butlers Warehousing & Distribution Ltd. [1978] 2 Lloyd's Rep. 412 (C.A.).

claim and exercise their lien and be easily satisfied from the other assets of the debtor. The courts have always discouraged claims for general liens, and the very stirctest proof have always been required. The reasons for this are given by Le Blanc J., in Rushforth v. Hadfield,[87] as "That general lens are a great inconvinience to the bulk of the generality of traders, because they give a particular advantage to certain individuals who calim to themselves a special privilege against the body of the creditors at large, instead of coming in with them for an equal share of the insolvent estate".

3-2-4- Particular Liens And How They Arise:

A particular lien is a right to retain a chattel until all claims made in respect of it are met. Thus, the particular or specific lien, that is to say, the right to retain possession of specific chattels until claims arising solely in respect of those chattels have been satisfied, has always been favourably regarded by the law as consonant with every principle of equity and justice. Chief Justice Best said, in the case of Jacobs v. Latour,[88] that, "As between debtor and creditor, the doctrine of lien is so equitable that it cannot be favoured too much". This type of lien may arise,[89] either by an express contract between the parties, by contract implied from the circumstances of any particular case, or the general course of dealing between the debtor and creditor,or by operation of law.

(i)- Express Contract:

The creation of a particular lien by contract raises the same issues as the creation of a general lien by contract. Any contractual creation of a "lien", simply by the use of the term, it may be argued, adapts the rules discussed under "usage". It would follow that for enforceability against an owner it is enough if surrender of possession to the lien holder by a hirer can be seen as fitting with the nature of the transaction between owner and hirer. Actual knowledge by

87 (1805) 6 East. 519 at P. 528.

88 5 Bing. 130.

89 See, Kirchner v. Venus. 12 Moore P.C. 361. 5 Jur. (N.S.) 395.

the owner of the terms of the arrangement under which possession is given up is not necessary.[90] The right of lien is created in any case where the parties of the contract choose expressly to stipulate for it.[91] Therefore, to constitute a lien in this way, however, there must be a clear agreement for the specific appropriation of the particular property.[92] Most of the cases where particular liens are expressly stipulated usually resolve themeselves under one or other of two main headings.

(a)- Execution Of Particular Purpose:

This first headings comprises cases where goods are placed in the hands of a person for the execution of some particular purpose, with an express contract that they shall be considered as a pledge for the labour or the expense which such execution may occasion.

(b)- In The Second Group Of Cases, The Property Is Merely Pawned Or Pledged To Another For Bare Security:

For the sole purpose of being a security for a loan made to the owner on the cerdit of it. In such cases, the right of lien is governed strictly by the contract under which it arises. This latter group comprises cases of pawn, under which the pawnee acquires a special property in the thing pledged to detain for his security until it is redeemed, the general property remaining in the pawnor. In this way a pawn differs from an ordinary case of lien, where the creditor has only a right of detention, and not a special property, and it also differs from a mortgage, as, in the case of the latter, the property is actually conveyed or transferred to the mortgagee. It should be stressed that a pawn of goods, without authority of the owner, will note create a lien,[93] and a lien of a pawnee

90 Jackson. D.C. Enforcement Of Maritime Claims. op cit. at P. 268.

91 Chaoman v. Allen. Cro. Car. 271.

92 Jones v. Starkey. 16 Jur. 510.

93 Means v. Henderson. 1 East 337.

differs from a lien arising by custom, in that it is transferable,[94] but it appears that a pawnee cannot create a greater interest in it than he himself had. In the French and Algerian civil code, there is case similar to the pawn, where the debtor gives the possession of his property to the creditor as a garantee for the payment of the debt, this case is known as "Le Nantissement". The French civil code provides in art.2071, that, the pawn is a contract by which a debtor gives something to his creditor for security of the debt.[95] The Algerian civil code provides in art.948, that, the pawn is a contract by which a person pbliges himself for the garantee of his debt or of someone else debt, to give to the creditor or to a third party chosen by the parties, a thing for the benefit of the creditor which gives him a chattels real with which he can retain the thing until the debt is paid and he can get paid from the price of the thing in whosoever hands it may pass, and by preferencing him over the other simple contract creditor and the other inferior creditors in the rank.[96] So, the Algerian civil code seems to have given a wider definition and that by including a lot of provisions, such as, that the debtor might create a pawn to garantee the payment of a third party and that the cerditor is preferred over the other creditors and that he has the right to trace the incumbranced estate into whatever hands it may pass, and finally, that he can get paid from the price or the proceed of sale.[97] Moreover, one can notice that the French and Algerian civil code provide that the thing

94 Demainbray v. Metcalf. 2 Vern. 691, 698. (S.C.).

95 "My Own Translation". The actual article in french provides that:

"Le nantissement est un contrat par lequél un débiteur remét une chose á son créancier pur sureté de la détte".

96 "My Own Translation". The actual article in french provides that:

"Le nantissement est un contrat par lequél une pesonne s'oblige, pour la garantee de sa d'te ou de célle d'untiers, á reméttre au créancier, ou á une tiérce pérsonne choisi par les parties, un objet sur lequel élle constitue au profit du créancier, un droit réel en vértu duquel celui-ci peut retenir l'objet jusqu'au paiement de sa créance et peut se faire payer sur le prix de cét objet, en quelque main qu'il passe, par préférence aux créanciers chirographaires et aux créanciers inférieurs en rang".

97 The French civil code provides some of these provisions when it gets to the pawn in the case of movable and immovable property, in art.2071 and 2073.

pawned passes to the possession of the creditor until the debt is paid as a garantee of payment of that debt.

(ii)- Implied Contract:

Secondly, a lien may be created by implied contract. Such a contract may implied from the conduct of the parties in their dealings with one another, or from custom or usage. As a particular lien is favoured by the law, it is much more readily implied than a general lien. In Simond v. Hibbert,[98] a particular lien was implied from the general course of dealing, against produce of the West Indian Estates. It should be noted that a lien will not be implied solely from the existence of an equitable right, and that a mere distinction of "B" to whom goods are consigned to pay "C" a sum of money out of the proceeds, will not give "C" a lien on those proceeds.[99]

(iii)- Operation Of Law:

The operation of law is the remaining way in which a particular lien may be created. Many of the cases under this heading might be referred to implied contract, as, very often, the lien has arisen by custom, and the right exists because parties who do not expressly agree to the contrary must be held to contract with reference to such custom, it would be best, however, as a matter of convenience, to group them together under this description:

(a)- When Creditor Is Legally Liable To Perform Services To Owners Of Goods:

The first category under which this right arises is where the creditor is compellable by law to receive goods or to perform certain services to the owners of such goods. The law imposes the duty, and, as a sort of compensation, it gives a particular lien or power of retaining the goods for the indemnity of the party

98 Russ. & M. 719.

99 Ex Parte Heywood. 2 Rose 355.

receiving.[100] This is probably the earliest form of lien, which was known as the right of retainer in early English law. The principal cases coming under this heading are the liens of carriers and inn-keepers.[101] It has little relevance in the maritime area even as regards carriers. A common carrier is a person who holds himself out as a carrier of goods for hire and does not reserve the rigfht to deal only with those who he chooses - "he will carry for hire so long as he has room the goods of all persons indifferently who send goods to be carried".[102] This rarely applies to sea carriers. Apart from Acts of God or the Queen's Enemies, inherent vice or fault of the consignor, a common carrier is responsible for the loss of or damage to the goods. Because of his inability to refuse to act as a carrier he is given a lien on the goods carried for the payment of the hire. It has been held that in general a private carrier has no such lien,[103] but, conversely, it well established that a shipowner has a possessory lien for freight and contributions to general average. The carries' lien only extends to the charges for carriage apart from express or implied contract.[104] Thus, the lien arising under this heading is peculiar, in that it attaches to property although not belonging to the debtor, and it is in fact immaterial to who the property belongs.[105] The lien will even arise in respect of the goods delivered to a carrier against the owner's will, as, for example, by a thief.[106] The person receiving must however, receive in good faith, and if he knows that the person from whom he receives is a wrongdoer, the lien will not attach.[107] The civil law jurisdiction prescribe a lien on the cargo for the garantee of payment of freight

100 See, Yorke v. Grenaugh. Ld. Ray 866 & Naylor v. Mangles (Esp. R.109).

101 The innkeeper's lien does not extend to motor vehicles or live animals (the Hotel Proprietors Act 1956, S.2).

102 Nugent v. Smith (1875) 1 C.P.D. 19, at P. 27; decision reversed (1876) 1 C.P.D. 423.

103 Electrice Supply Stores v. Gaywood [1909] 100 L.T. 855.

104 See, Robins & Co. v. Gray (1895) 22 Q.B. 501. C.A. orke v. Grenaugh. Ld. Ray 866, and Exeter Carriers' Case cited by Holt C.J., in the latter case.

105 Ibid.

106 Mulliner v. Florence (1878) 32 Q.B.D. 484 C.A.

107 See, Johnson v. Hill (1822) 3 Stark 172.

and that is provided in art.1/2 of the Law of June the 18 th of 1966 of the French code of commerce, and in art.645 of the Algarian maritime code. Art. 1/2 of the French code of commerce, provides that,"the shipowner has a privilége or lien on the cargo for the payment of his freight".[108] The Algerian maritime code provides almost the same provision as the one in the French code of commerce[109] Here, it is presumed that the shipowner has a kind of possessory lien over the cargo which he can only detain until the freight is paid and this lien is a particular lien because of a material relationship between the cargo and the debt and because the shipowner rendered services to that specific cargo. In this case the shipowner has a kind of particular lien over the cargo as a garantee for the payment of the freight.

(b)- Where Creditor Claims Lien On The Property In Respect Of Which He Had Spent Money, Skill Or Labour:

This is an extension of the first rule, under which persons compellable by law to receive goods obtain a particular lien on them, like where goods are delivered to a tradesman for the execution of purposes of his trade upon them he is entitled to a particular lien.[110] However, there is here no liability on the creditor to receive the goods, yet it is legally recognised that it would be unfair on him, after he has expended his money, or skill, on the property, to allow the debtor to take the goods away without recompensing him. The rule is, therefore, the expenditure of money, skill or labour, and where such expenditure exists, a lien follows, and without it the creditor is left to his usual remedy by action. However, the owner must authorise the expenditure to give rise to a lien, and therefore, the work in respect of which the charges arose giving rise to the lien must have been done by the order or at the request of the owner or of some

108 "My Own Translation". The actual art.1/2 provides in french that:

"Le fréteur a un privilége sur les marchandises pour le paiement de son frét".

109 The actual art.645 of the Algerian Maritime Code provides in french that:

"Le fréteur a un privilége sur les marchandises pour le paiement de son frét et autres charges prévues au contrat d'affrétement".

110 Ex Parte Deeze, 1 Ath. 228. Ex Parte Ockenden, 1 Atk. 236.

person authorised by him. A voluntary unauthorised payment by the person in possession is unsufficient. By looking at art.645 of the Algarian maritime code, one can notice that the Algerian legislator has added another provision which provides that the shipowner will have a lien for other charges or expenditures provided in the contract of affreightment. Therefore, one can say that the shipowner has a kind of particular lien on the cargo for payment of the costs or expenditures concerning that particular cargo.

(c)- Particular Lien In Respect Of Money Due For Sale Of Goods:

Statute can create a particular lien, in favour of an unpaid vendor of goods in respect of purchase money. This is now governed by the Sale of Goods Act, 1979, but many years before this statute, it was decided in the case of Mills v. Gorton,[111] that where there is a sale of goods, and nothing is specified as to delivery or payment, although everything may have been done to transfer property from the seller to the buyer, the seller retains the original contract a right to retain the goods until the payment of the price. Under the Sale of Goods Act 1979, an unpaid vendor of goods has a right of retention of those goods.[112] Thus, section 39 of the Sale of Goods Act 1979 provides that:

> " (1) Subject to this and any other Act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law_
> (a) a lien on the goods or right to retain them for the price while he is in possession of them; . . . "

(d)- Salvage:

While ther is no lien for salvage in general at common law, common law will recognise a possessory lien of a salvor in Admiralty.[113] There is little authority presumably because of the maritime lien conferred on salvors. Once

111 3 C. and M. 504. 571.

112 See, ss. 39 and 48. The lien originated at common law. See, e.g., Swan v. Barber (1879) 5 Ex. D. 130.

113 Hartfort v. Jones (1698) 1 Ld. Ray. 393 recognised in e.g., The Fulham [1899] P. 251 (C.A.); Hingston v. Wendt (1876) 1. Q.B.D. 367, at P. 373.

Admiralty and common law jurisdictions ceased to be in opposition to each other the inherently more powerful lien took over. It is uncertain to what extent, if at all, the Lloyd's Open Form has, by providing for security inconsistent with a possessory lien, superseded that lien in respect of salvage. Nevertheless, salvage is another case of lien by operation of law, in respect of which a lien was extended by common law to persons who, at the risk of personal safety, effected recovery of property on ships at sea.[114] The essentials for the lien appears to be as follows:

(i)- That there should be risk of personal safety.

(ii)- That, as a result of the services, the property should be recovered.

(iii)- That property should be saved. There is no salvage of saving of life only.

(iv)- That the property should be saved at sea.

The subject of salvage is now dealt with under the provisions of the Merchant Shippin Acts, and it gives rise to a maritime lien which does not include or require possession. Thus, the maritime lien for salvage in the United Kingdom is to be found in the general maritime law. The maritime lien is reinforced by Sect.20 (2) (J) of the Supreme Court Act 1981,[115] which gives jurisdiction to the Admiralty Court over "any claim in the nature of salvage . . . ". Section 21 (3) confirms the right against ship, aircraft or property:[116]

> "In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action in rem may be brought in the High Court against that ship, aircraft or property."

It is noteworthy that the Salvor has a possessory lien as well, under certain

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114 Hartfort v. Jones (1698) 1 Ld. Ray. 393, and Baring And Another v. Day. 8 East 57.

115 1981 U.K. c. 54. See also, The Eshersheim [1976] 2 Lloyd's Rep. 1, at P. 8, Where the House of Lords held that Sect. 1 of the Administration of Justice Act, 1956, "any claim arising out of any agreement relating . . . to the use or the hire of a ship" covered a salvage agreement.

116 Ibid.

circumstances, which dates from the earliest times but which is rarely invoked.[117] A lien is created for the benefit of the salvor and that is may be because of the theory of agency of necessity.[118] Therefore, the salvor whose services had been completed in respect of the goods in question is under a duty to their owner to care for them, and has a correlative right to charge the owner of the goods with the expenses reasonably incurred.[119] Therefore, the salvor acted as an agent for the woner to save the ship and the cargo and that was necessary to save the property of the owner. This situation is what is called the case of agency of necessity. This is a relationship created by operation of law where there is in existence an emergency making it necessary for the agent to act in a particular way in relation to the principal's property, and where it is impossible to receive instructions from the principal.[120] The holder may then, as agent of necessity, sell, raise money on the security of the property or incur expenses of preservation on behalf of the owner.[121] The possesory lien is used frequently because the salvor is protected by a maritime lien which permits the ship to proceed on its way, enabling the ship to earn the freight and hire necessary to paying the salvor's claim. Possessory liens, on other hand, are often counter productive, hence the need for the maritime lien. In France, the law of january the 3 rd of 1967,[122] at art.31-4 gives salvage the status of maritime lien ranking after, (i)- the costs of justice, (ii)- custodia legis, and (iii)- the wages of the master and crew. The Algerian maritime code provides in art.73 almost the same provisions as his French conterpart in art.31-4. The Algarian maritime

117 Hartford v. Jones. (1698), 1 Ld. Raym. 393, 91 E.R. 1161.

118 Bowstead on Agency. 15 th Ed, By Reynolds. F.M.B. London Sweet & Maxwell, 1985. At P. 88.

119 China Pacific S.A. v. Food Corp Of India, (The Winson) [1982] A.C. 939, 960, per Lord Diplock.

120 Foster. Stephen. Business Law Terms. W & R Chambers Ltd, Edinburgh, 1988. at P. 3.

121 Hudson. A.H. op cit. at P.11.

122 Law No-67-5 of Janary 3, 1967, Portant Statut Des Navires Et Autres Bâtiments De Mer (J.O. 4 Janvier 1967).

code gives salvage the status of maritime lien ranking after, (i)- the sums due to the master and seamen, (ii)- harbour and shipping dues, (iii)- remunerations to accidents which give rise to injuries or death, (iv)- remuneration for damage done to another property for *ex delicto* debts and quasi *ex delictu* debts and, (v)- remuneration for help and salvage... .

PART TWO

The Guarantee of Payment of the Freight

In all kinds of transports,the carrier undertakes to carry goods and the cargo owner agrees to pay a remuneration to the carrier and in the field of carriage of goods by sea,the shipowner carries goods of the charterer or shipper depending on the case if the carriage is undertaken under a charterparty or a bill of lading, and in this case the shipowner receives what is called freight or hire.

But how can the shipowner guarantee that the remuneration will be paid? The goods or the cargo constitute the guarantee which the shipowner has for the payment of the freight .

Thus, saying that there is a carriage of goods by sea without remuneration for the services rendered is denying an evidence, because the freight is the essential element in the contracts of carriage of goods by sea and it is the principal obligation of the charterers and shippers.

Therefore, the guarantee of its payment is very important for the maritime trade, because the slowness of the carriage, the perils of the sea and the international context in which this trade in performed, some means of credit has developped in a way proper to this law, and by taking into consideration the particular ways of garanty of the debts in relation to the use of ships. In this manner the ship and the cargo became a guarantee for the execution of the reciprocal obligations of the parties of the contract, and this is confirmed by the old maritime saying : " De par la coutume le bastél est obligé a la marchandise et la marchandise au bastél" , i.e., "By the custum the ship is bound towards the cargo and the cargo towards the ship."

The purpose of the present study is to define the nature of the guarantee

for the debt of freight according to the proper traditions of the sea, and the exclusion of the mechanisms of the general commercial law.

Until now, the different attempts to unify the rules which governs the rights of the creditors of the freight on the cargo, when unifying most of the rules which concern the international conventions for the maritime liens and mortgages, have all failed. This failure is due to the existence of two fondamental and opposed systems, namely the system of the "privilége" which is found in the French law , and the system of lien which is found in the English and American system .

It is therefore, very important to study the ways of guarantees of the carriers according to these two different legislations, so as to have a general view of the institution.

CHAPTER ONE

Freight , Hire and the Distinction between the Two

GENERAL: This chapter will examine those aspects of freight or voyage-freight and hire or time-freight under both the common law and the civil law, namely the French and Algerian law. This examination will include, the different definitions which have been given to freight and hire, when do they become payable? and the distinction between the two .

1-1- The "Freight"and "Hire" or Voyage-Freight and Time Freight

1- Meaning of Freight and Hire: Freight is the money which is paid to the shipowner for the carriage of goods by sea, or in the ordinary merchantile sense, it is the payment made to the carrier for the carriage of goods ready to be delivered in a merchantable condition. Some,[1] have defined freight as the consideration payable to the carrier for the safe carriage and delivery of goods in a merchantable condition, or is the remuneration payable to the carrier for the carriage of goods by sea.[2] Sometimes a shipowner or charterer may use the ship as a general ship to carry goods of a number of persons under different bills of lading. Then, it is necessary to distinguish between bills of lading freight and charter-party freight. The former is normally due on safe carriage and delivery of the goods. However, it is also very common to find it made due and payable "in exchange for bills of lading", "on shipment of the goods" or depending on the happening of certain events, such as "sailing" or "final sailing of the vessel".

In the French law, the freight is considered as the price for the hire of the

1 Stevens. Edward F . Shipping Practice . 10 th edition . p 51 .

2 Payne & Ivamy . Carriage of Goods by Sea . 12 th Edition . p243.

ship or the price for the carriage of goods by sea.[3] However, according to the Decree of 1966, there is no specific definition of the freight, but it is an obligation to mention the freight in the contract of affreightment.[4] The Algerian Maritime Code,[5] has not given a specific definition to the term "freight", but like the French Code of Commerce, the Algerian legislator requires that the remuneration or "freight" must be mentioned in the contract of affreightment, and that is provided by the article 643/c.

Moreover, it is not every sum which is paid to the shipowner is called freight, because other sums which perhaps are paid to the shipowner usually in advance for fulfilment of his contract, such as loans, but they are not remuneration for the carriage of goods; they are not freight, though often called freight. For this reason the lien which is given for the freight on the goods does not apply to those sums. There was a custom in the olden days, that the shipper of the cargo should pay a special sum to the master of the ship for the care and attention of his goods.[6] This sum was called "primage" and it was not contained in the meaning of freight. At the present time, usally by agreement between master and shipowner, "primage"belongs to the latter. It is a percentage on the freight which is paid to the shipowner by the shipper and it is covered by the use in the term freight .

After giving a good deal to the meaning of freight, it is worth-while to give an explanation about the term"Hire", which is sometimes used to mean the freight but only when the contract of carriage is a species of contract of hire. Thus, when the contractual obligation of the shipowner is only to give to the charterer the mere use of the vessel, without keeping the control of the ship, the

3 Dalloz . Encyclopédie . Juridique . Répértoire de Droit Commercial et des Sociétes. Tomel. p 59 .

4 Dalloz . Encyclopédie Juridique . 2ém Édition . Répértoire de Droit Commercial . Tome 1 . p2. ss 18.

5 Ordonnance N 76-80du 23 Octobre 1976 . portant Code Maritime Algérien .

6 Mavromatis (D). Freight in English Law with Comparison of the Greek Law. Thesis . Diploma in Law .1963 . p 23.

master and the crew are in the charterer's service, as it happens in charterparties by demise. The money which is paid, in this case, to the shipowner for the mere use of the ship is called "hire". In this case, "Time-Freight"or"Hire"is the money paid to the shipowner in those cases where the vessel is chartered for a period of time, rather than on a voyage basis. Here the freight is in the nature of a payment for the use and hire of the ship, and the question when it is payable depends entirely upon the intention of the parties according to the contract. A contract of hire of the ship, is a contract by which an entire ship or some principal part of her is let to a merchant, called "the charterer", until the expiration of a specified period. Such a contract may operate as a demise of the ship herself, to which the services of the master and crew may or may not be added, and this is called "a demise charterparty", or it may confer on the charterer nothing more than the right to his goods conveyed by a particular ship,and,as subsidiary to it,to have the use of the ship and the services of the master and crew, and this is called "a time chaterparty".

Usually, hire is paid at regular intervals during the currency of the charterparty, and it is normal to find stipulations providing for the payment to be made monthly or semi-monthly in advance. There is also provision in most of the charters giving the shipowner the right to withdraw the vessel in event of non payment or late payment of hire. This right must be exercised in a way leading to a final withdrawal of the vessel, and it cannot be exercised temporarily. Today if the charterer is late in paying the hire, then unless the shipowner is demeed to have waived the breach, the shipowner may exercise the right to withdraw upon notifying the charterer. After having seen the meaning of the term "hire", it appears that it is a little difficult now to say how can the payment to the shipowner be called under time charterparties?.

In theory, this payment is called hire, but in fact the terms are often confused and the term "freight" is used as well. Indeed it is thought [7] that it is

7 Ibid. at P. 2.

better to call this payment "freight" and not "hire", because in the case of time charterparty the shipowner undertakes the whole task of carrying the goods in good condition and safe to the port of destination and also keeps the whole control of his ship. He gives to the time charterer not only the mere use of his ship, but also his services which are necessary for the carriage of the goods. On the other hand, the Algerian Maritime Code, in its definition of the contract of affreightment in article 640, prescribes that the contract of affreightment is a contract by which the shipowner puts a ship at the disposal of the charterer and that the charterer pays a remuneration; the remuneration in this case means both freight and hire. However, the French Code of Commerce in the Decree n.66-1078 of December 31 st 1966 did not give a specific definition of the contract of affreightment. But in its definitions about the voyage charterparty (art 5) and time charterparty(art 18) the remuneration is called freight, and so did the Algerian legislator in defining the voyage charterparty (art 650) and time charterparty (art 695), and this means that neither the French nor the Algerian legislator did make a difference between the term "freight" and the term "hire". However, both the Algerian Maritime Code (article 724) which defines the demise charterparty and the French Code of Commerce (articles 26,30) about the charterparty by demise, they both used the term "hire" to identify the remuneration of the shipowner.

Thus, the remuneration payable for the carriage of goods in a ship is usually called freight. Also, the same word is often used to denote a payment made for the use of a ship.[8] It is applied in both senses, though objection has frequently been made to its use in the latter sense.[9] When a ship has been chartered to go on a specific voyage for a lump sum, or to be at the disposal of

8 Carver's . Carriage by Sea. Vol 2. 13 th edition,by Raoul Colnvaux.para 1661.

9 See per Lord Denning M.R. in Federal Commerce v. Molena. (The Nanfri). [1978] Q.B.927, 973, who there sought to justify rigid distinction: "The change of language corresponds, I believe, to a recognition that the two things are different."

the charterer at so much a month, it is perhaps more accurate to call the payment the hire of the ship; but sometimes the "freight" is used, and the hire of a chartered ship is very commonly paid by freight in proportion to the goods carried under the charterparty, it would be difficult to say distincly whenthe one word should be used, and when the other.

However, it is important to bear in mind that the word "freight" does not always relate to the same sort of payment. For propositions of law relating to freight in one sense does not always apply to it in the other. The remuneration for carriying the goods may be made payable either in advance, or upon delivery of the goods; and another objection used frequently to be raised,that the word "freight" ought only to be applied to the remunertion when it is payable for the safe carriage of the goods,upon their delivery.[10] Thus, because of the confusion between the terms, a distinction must be drawn between the two concepts of the remeneration for the carriage of goods by sea, and that what will be dealt with in the next sub-section.

2- Origin of the Term Freight :

The word freight has its origin from the Dutch and it was called "vrecht" and that means originally the burden or cargo of a ship. Hence it came to mean the rate paid for the carriage of goods by sea, it is now used in this sense. Freight, therefore, is the payment to a shipowner for the carriage of cargo.[11] It is used in the United States of America for the carriage of goods by land and railway freight is a common expression while a freight train is the equivalent of the goods train of Great Britain.[12]

3- The Different Types of Freight:

Charterparty freight is fixed normally at an agreed rate for so much per ton, and there used to be no stipulation for weight or measurement of the cargo.

10 Kirchner v. Venus (1859). 12 Moo.P.C.361; Blakey v. Dixon (1800) 2 B. & P. 321.

11 Hudson. A.H. Dictionary Of Commercial Law. at P. 141.

12 Hornby. A.S. Oxford Advanced Learner's Dictionary of Current English. Oxford University Press. 1974. at P. 344.

When there is no special agreement,or where the special agreement has been abrogated by a deviation, or where the bill of lading is silent as to the moment for payment of the freight, the common law implies that it is to be paid on delivery of the goods at the port of discharge. Then no freight is due if the goods are not carried to the port of discharge, but once they have arrived, even though they may be in a damaged condition, full freight is payable, irrespective of the separate action for damages that the cargo-owner may have against the carrier in those cases where the loss was due to the negligence of the carrier or a non excepted peril.

However, sometimes freight is to be payable at some time other than the time of delivery as it may be provided in the bill of lading or charterparty. Then if the parties agree that freight is to be paid in advance, once the set time for payment has passed, the loss of the goods or the fact that it has become impossible to deliver them does not alter the position in relation to it. The right to such freight vests at the moment when it becomes due. If it has not been paid, the shipowner may claim it in action;if it has been paid, then the cargo-owner may recover only damages from the shipowner in those cases where the loss was due to the fault of the shipowner, and it was not covered by an excepted peril.

The freight can also be stipulated to be paid in a lump sum. This means that the charterer of a ship binds himself to pay a fixed sum for the whole voyage or series of voyages covered by the chaterparty, irrespective of the amount of goods carried. Generally, this type of freight is payable in full,even though the whole of the cargo is not delivered,provided that some of it is.

Here the cargo-owner's right to claim damages will depend on the charterparty and the the nature of the clauses.

Pro-rata freight, is the freight which may become payable proportionately to the part of the voyage accomplished or of the cargo delivered. In order to

claim it, there must be an express agreement or one that can be clearly implied from the circumstances of each case.

When the voyage has been completed and the cargo cannot be discharged owing to the failure of the consignee to take delivery or to some other circumstance beyond the control of the master, the master must deal with cargo in the manner most beneficial for the cargo-owners. This may involve warehousing of the goods, transhipping to another vessel or even to take them back to the port of lading. The shipowner may in those cases charge the cargo-owners with back freight to cover the expenses thus incurred in their interest.

Dead freight is the name given to the damages payable in certain circumstances when the charterer is in breach of his contract by failing to load a full and complete cargo.

4- By Whom Freight is Payable: The shipowner can make his claim for payment of his freight from the following persons:[13]

1- the shipper of the goods;
2- the consignee or indorsee of the bill of lading;
3- a seller who stops the goods in transit ;
4- the charterer;

1- The shipper of the goods: The liability to pay freight reserved in a bill of lading is primarily on the shipper of the goods, unless he was merely acting as agent and made this clear at the time. By shipping goods, the shipper impliedly agrees to pay the freight on them. He can be relieved of this obligation:

(1)- by the shipowner giving credit to the consignee. Thus, if the master for his own convenience takes a bill of exchange from a consignee who was willing to pay cash,the shipper is discharged;[14] or

(2)- by delivery of a bill of lading indorsed with a clause freeing the

13 Payne and Ivamy's. Carriage of Goods by Sea . 12 th edition. p 253.

14 Strong v Hart (1827) 6 B&C 160.

shipper from liability,the shipowner or his agent knowing,at the time,of the existence of such a clause.[15] The Bills of Lading Act 1855, s2, expressly preserves the shipowner's right to claim freight from the original shipper, so that the shipowner can elect to sue the holder of the bill of lading or the shipper.

(2) The consignee or indorsee of the bill of lading: The bill of lading usually contains a clause making delivery conditional on the consignee or his assigns paying freight. The master of the ship is entitled to refuse delivery unless the freight is paid. The mere delivery of the goods does not give rise to a legal liability to pay the freight on them,[16] but is an evidence of an implied promise to do so..[17] A custom of the trade,and even former transactions of the same parties are admissible as evidence of an implied contract. Moreover, the Bills of Lading Act 1855, s1, imposes on all consignees or indorsees of a bill of lading,to whom property in goods passes,the liability to pay freight.

(3) A seller who stops goods in transit: An unpaid seller has the right of stoppage in transit,this right is provided in sect 44 of the Sale of Goods Act 1979 which provides that :

> "Subject to this act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit, that is to say,he may resume possession of the goods as long as they are in course of transit,and may retain them untill payment or tender of the price."

However, this seller becomes liable to pay freight on the cargo being delivered to the buyer; if the seller refuses, he is liable in damages to the shipowner for the amount of the freight..[18] But he does not, by stopping in

15 See, Watkins v Rymill (1883) 10 QBD 178.

16 Sanders v Vanzeller (1843) 4 QB 260.

17 Cock v Talor (1811) 13 East 399; see alsoper Parke B, in Moller v Young (1855) 25 LJQB 94 at 96 .

18 Booth SS Co Ltd v Cargo Fleet Iron Co Ltd. [1961] 2 KB 570 .

transit, become a party to the contract of affreightment.

(4) The charterer: In the case of a charterparty, the charterer is the first person to be liable for payment of the freight to the shipowner,[19] and the fact that he has sublet the servises of the ship to persons who have put goods on board under bills of lading reserving the freight does not release him. Even if the shipowner delivers goods to such shippers without insisting on payment of freight, he can still recover it from the charterer..[20] Where the charterer is merely an agent or broker to fill the ship with the goods of other persons, his liability is made to cease when the goods are shipped. This is effected by means of a "cesser clause" inserted in the charterparty and giving the shipowner a lien on the cargo for freight and other claims under the charterparty. It seems, however, that a "cesser clause" in the charterparty will not free a charterer, who is also the shipper and is sued as such, from liability to pay freight arising on the bill of lading.

5- To Whom Freight is Payable: To whom freight is payable depends upon the terms of the contract of affreightment, subject to any subsequent dealings, e g, the assignement of the freight or the mortgage of the ship. Thus, freight may be payable to :

(1)-The Shipowner: In the case of an ordinary charterparty the shipowner is the first person to be entitled to the freight. Thus, under an ordinary charterparty or bill of lading the shipowner is prima facie entitled to the freight.

(2)-The Master: The master being the agent of the shipowner, in charge of the management of the ship is entitled to the freight for the benefit of the

19 For a case where the shipowners were unable to recover freight from the charterers and alleged that the brokers had negligently mis-stated the financial standing and reliability of the charterers and shipowners claimed damages from the brokers, See Markappa Inc v N W Spratt & Son Ltd, The Arta [1983]2 Lloyd's Rep 405, QBD (Commercial Court).

20 Shepard v De Bernales (1811) 13 East 565.

shipowner. Thus, even when the contract was not made between the master and the consignee, "it has been held that [the master] may maintain an action against the consignee upon an implied promise to pay the freight, in consideration of his letting the goods out of his hands before payment."[21] The master cannot, however, sue for freight where he signed the bill of lading merely as the shipowner's agent.[22]

(3)-The Broker: A chartering broker may be described as an intermediary between the shipowner and the merchant or the cargo-owner. He acts between a shipowner who has tonnage idle, and a cargo-owner who has a cargo which he wishes to be transported. He engages space for the cargo and arranges the whole of the business details between the principals, receiving for his services the commission agreed under such arrangement. Because he deals for the benefit of the shipowner and the charterer or shipper, against a commission paid to him, he is entitled to claim freight from the shipper or the charterer because his commission is paid from the freight which the shipowner earns.[23]

(4)-A Third Person: It may be that under the contract,freight was made payable to a third person. Payment of freight to such a person will protect the shipper from an action for freight.

(5)-The Charterer: Where the charterparty is a demise charterparty, the charterer can sue for freight, for the shipowner was not a party to the contract evidenced by the bill of lading,because in a demise charterparty the control of the ship passes to the charterer. However, it is otherwise if the charterparty is only one of hiring,and the bills of lading covering goods shipped by third persons are signed by the master.[24]

21 Per Lord Mansfield C J, in Brouncker v Scott (1811) 4 Taunt 1 at 4 .

22 Repetto v Millar's Karri and Jarrah Forests Ltd. [1901] 2 KB 306.

23 See, Dunlop v. Murietta (1886) 3 T.L.R. 166 (C.A.).

24 A Coker & Co Ltd v. Limerick SS Co Ltd. (1918) 34 TLR 296.

(6)-An Assignee of the freight (or the ship): The right to freight is incidental to the ownership of the ship which earns it, and therefore, a transfer of a share in a ship passes the corresponding share in the freight, under an existing charterparty, without the mention of the word "freight". Further, in equity an assignement of freight to be earned is valid.[25]

(7)-A Mortgagee of the ship: A mortgagee does not acquire a right to the freight unless he has taken actual or constructive possession of the ship. He then becomes entitled to all the freight which the ship is in the course of earning, and which she proceeds to earn after such possession comes into being..[26] This position is to be contrasted with that resulting from the sale of the ship or a share in her; for "the purchaser of a ship takes a right to all accruing freight, to all profits of the ship,from the time of the assignement to him and the transfer of the ship to him".[27]

1-2- Distiction Between Freight and Hire :

It has been mentioned before, that freight is generally understood to mean the money paid to the shipowner for the carriage of goods by sea,and it also can be seen that the same word is used to denote a payment for the use of the ship, what then is the difference between "freight" and "hire"? and therefore, it is worth-while to find a distinction between the two.

Until recent times, no rigid distinction was established between "freight" and "hire". The word freight was normally used at the time of discussing an issue arising out of a time charter.[28] However today, and in view of the

25 Lindsay v Gibbs (1856) 22 Beav 522 .

26 See, however, Shillito v Biggart [1903] 1 KB 683 .

27 Per Mellish L J , Burrows (1877) 46 L J Q B 452 at 457 .

28 See, Inman v. Bischoff. (1882) 7 App Cas. 670 where it was held that "freight" may cover monthly hire under a time charter .

growing importance of time charters, it seems that the principles applying to one cannot be automatically applied to the other.

Donaldson, J., stated some of the basic differences between freight and hire in reserved judgment in "The Berge Tasta",when he said:[29]

> "... typical voyage and time charterparties have certain basic features. Thus under a voyage charterparty, the shipowner undertakes to carry cargo from A to B in consideration of the receipt of freight. If the vessel is not ready at A, his is the obligation and the expense of getting her there. Similarly, his is the obligation of getting her from A to B. Ships of course, are expensive to run and delay mens substantial loss for someone. Delay in getting to the loading port and on passage is for account of the shipowner or charterer in accordance with the lay-time provisions. Once the voyage has been completed and the cargo discharged, the vessel is once again at the disposal of the s/o. Under a time charterparty, not being a charter by way of demise, the s/o undertakes to make the vessel available to the chaterer for the purposes of undertaking ballast and loaded voyages as required by the charterer within a specified area over a stated period. The shipowner's remuneration known as "time chartered freight" or "hire" at a fixed rate for unit of time regardless of how the vessel is used by the charterer. The shipowner meets the cost of maintaining the vessel and paying the crew's wages, but the cost of fuel and port charges fall on the charterer."

However, the above description of what each concept is understood to mean, seems to be insufficient because because there is no mention of those time charters of which the duration is measured by the time occupied by a particular voyage or voyages.

Perhaps the law relating to freight and hire can be better understood if one takes into consideration that sometimes a charterparty may have been construed as to have some features usually reffered to voyage charters. This happens in the so called "round voyage charters", where the method of employment of the ship is comparable with both voyage chartering (in that a ship represents a single voyage or a round trip) and with time chartering, since

29 (1975) 1 Ll.Rep.422.

the contracting parties assume the usual obligations and responsabilities associated with period of employment. In these cases the rate of hire applicable is generally related to current "spot market" voyage freight-rates levels and not the somewhat lower freight rate levels that are normally associated with period time-charters,which lower rates result from the security obtained by owners and their reduction of risk expectancy provided by such longer period of employment. An example of this kind of charter can be found in"The Eugenia",[30] where the charter was for a "trip" from Genoa out of "India via Black Sea" in a time charter form, clause 6 providing (inter alia), "charterers to pay owner's hire...per calendar month from the time of vessel's delivery untill her redelivery." During the currency of it, the vessel was trapped by military operations on the Suez Canal. The charterers argued that although the charterparty was on a Baltime form, the "paramount feature" of it was voyage, and they contended that the vessel entered the channel by reason of the contract and not by reason of any orders from the chareterers.

Lord Denning, M.R., in the Court of Appeal, said:

> "I cannot accept this argument. This is a time charterparty, the essence of which is that the shipowner place the ship at the disposal of the charterers for a time-the charterers paying hire for that time. In some time-charters the time is fixed before-hand,such as six months or twelve months. In other time-charters the time is uncertain,and is to be measured by the time occupied by a particular voyage. But in either case the charterparty is a time charterparty and the ship is under the charterer's oeders throughout."

However, there is a charterparty which may look like a voyage charterparty without being a voyage charterparty itself. This is the case when a vessel is chartered for a whole series of voyages, such voyage being considered a separate venture with its own freight settlement and individual establishement

30 Ocean Tramp Tankers Corporation v. v/o Sovfracht. (The Eugenia)[1964] 2 Q.B. 226.

of laytime used. These type of chaters are known as consecutive voyage charterparties. Earlier forms were made by just attaching a clause to a single voyage charterparty; later the major oil companies made a complete new form for such contracts,as for example, the "Interconsel.76". It is usually provided in them that the rate will be calculated according to a standard scale determined by a 3rd party, such as "the international tanker nominal freight scale" and then care has to be taken because the parties will bound by the changes.

In Agenor Shipping v. Miroline,[31] a vessel was chartered by a consecutive voyage chaterparty under which freight was payable in London in dollars at intascale rate plus 10%. In the published schedule of intascale rate, rate was given in sterling and, in the right-hand column, in dollars (at rate of $2.80 to £). One day after the charterparty was entered into,sterling was devalued to $2.40 to £. The shipowner claimed that freight was payable as expressed in scale in dollars. The charterer claimed tha sterling was the accounting currency. It was held that freight was payable as expressed in the scale in U.S. dollars, and also that if a charterparty incorporates a scale determined by a third party, the charterer and the shipowner will be bound by the changes. Donaldson, J., said:

> "Where parties to a charterparty incorporate a scale which is determined by a third party,as these parties have done, it is entirely open to the third party to publish a quite different scale or scales from time to time and the charterers and the owners in those circumstances have agreed to abide by the new published scale."

Therefore, from the exposition cited above, one may see that sometimes problems may arise when determining whether a vessel has been chartered on a voyage or a time basis because of the existence of some of these "hybrid" charterparties.[32] However,it is also clear that once the nature of the contract has been determined, the tendency is to use the term "hire" or "time freight" when the vessel is chartered under a time charterparty form,and freight when the

31 Agenor Shipping Company Ltd.v. Societe des Petroles Miroline, [1968]2 Ll.R. 359.

32 See also, The Democritos [1975] 2 Ll.R. 149.

vessel is chartered on a voyage basis.

However, apart from the judicial opinion about making a difference between freight and hire,the doctrine has some opinion about the convenience of establishing or not a more rigid distinction between the two concepts. Therefore, Carver,may be quoted when he said: [33]

> "It would be unfortunate were a rigid distinction-such as that (unjustifiable etymologically, or logically) between "demurrage" and damages for detention to be drawn between "freight" and "hire".

He is also of the opinion that when a ship has been chartered to go on a specific voyage for a lump sum,or to be at the disposal of the charterer at so much a month: it is perhaps more accurate to call the payment the hire of the ship; but sometimes the word freight is used,and as the hire of a chartered ship is very commonly paid in proportion to the goods carried under the charterparty, it would be difficult to say distinctly when the one word should be used and when the other.[34]

However, Lord Denning was of a different opinion which he expressed in "The Nanfri", when he said:[35]

> "At one time it was common to describe the sums payable under a time charterparty as "freight". Such description is to be found used by judges and text-book writers of great distinction,but in modern times a change has come about. The payments due under a time-charter are usually now described as "hire" and those under voyage charter as "freight". This change of language corresponds, I believe to a recognition that the two things are different. "Freight"is payable for carrying a quantity of cargo from one place to another. "Hire is payable for the right to use a vessel for a specified period of time, irrespective of whether the charterer chooses to use it for carrying a cargo or lays it up, out of use. Everytime charter contains clauses which are quite innapropriate to a voyage charter, such as the off hire clause and the withdrawal clause. So different are the two concepts that I do not think the law as to freight can be applied

33 Carver, Carriage by Sea. 13 th Edition, at para.1661,footnote 2.

34 Ibid. at para.1661.

35 Federal Commerce v. Molena. (The Nanfri)[1978] 2 Ll.R.132.

indiscriminately to hire."

The convenience of making such distinction arose mainly in relation to the question of whether deductions from hire and freight should be permissible, while the law in respect of ordinary freight was clear;the question arose whether such principles should be applicable to time freight or hire.

Thus, under voyage charterparty, it is not possible for the charterer to set-off any claim he has versus the shipowner against the freight, i.e., .full freight is always payable.[36] There has always been a doubt whether this rule applies to a time charterparty regarding hire. However, there are still some doubts about applying the same rule to "hire"or "time freight".

Thus, in "The Nanfri".[37] Lord Denning stated that :

> "I do not think the law as to freight can be applied indiscriminately to "hire" in particular, the special rule of English law whereby "freight" must be paid in full (without deductions for short delivery or cargo damage) cannot be applied automatically to time charter "hire". Nor is there any authority which says that it must ...".

However, the case was treated differently, in "The Lutetian",[38] where it was held that the charterers were entitled to deduct from expected off-hire, and in "The Chrysovalandou Dyo" ,[39] a breach of the charter speed warranty has been held to do so;as has the failure by the owners to load a full cargo, "The Teno".[40]

In the French and Algerian law, the situation is quite settled, the difference has been made between "freight" and "hire" only in the case of demise charter where the remuneration is called "loyer" , i.e., "hire", to distinguish it from freight

36 See, Daxin v. Oxley.(1864) 10 L.T.268; and "The Aries" (1977)1 Ll.R. at page 341.

37 Federal Commerce v. Molena. (The Nanfri) [1978] 2 Ll.R. 132.

38 (1982) 2 Ll.R. 140.

39 Santiren Shipping Ltd. v. Unimarine S A, The "Chrysovalandou-Dyo". (1981) 1 Ll.R. 159.

40 (1977) 2 Ll.R. 289.

in the voyage and time charterparty. The French Code of Commerce in article 10,[41] defines the charterparty by demise as "Par affretement<coque nue, le freteur s'engage, contre paiement d'un loyer, á méttre, pour un temps défini." i.e., "By a demise chaterparty,the shipowner is obliged to present a ship...against the payment of hire ...", and the Algerian Maritime Code in article 724 defines the contract of demise charterparty as: "Par le cotrat d'affretement coque nue, le fréteur s'engage a méttre un navire sans armement ni équipement á la disposition de l'affréteur pour un temps defini et l'affréteur á en payer le loyer." i.e., "By a demise charterperty, the shipowner is obliged to provide a ship without shipowning or equipment at the disposal of the charterer for a definite time and the charterer is obliged to pay the hire.[42]

Thus, it would have been suitable, if the common law had adopted the same solution about freight and hire, because in the case of voyage or time charterperty, the remuneration which the shipowner receives is freight and not hire. Although, the charterer hires the services of the shipowner, it would be preferable if it is called freight, and moreover, in the case of time charterparty the charterer hires the ship for a certain time, this case is not a case of hire but it is still freight, because the charterer still hires the services of the shipowner and not the ship in itself. However,in the case of a demise charterparty, it should be called hire and not freight because the charterer hires the ship without the services of the shipowner. Here the charterer has to choose the crew,the master and has to look after the management of the ship as it was his own, and therefore, the remuneration given to the shipowner in this case ought to be called hire. So, the remuneration of the shipowner should be called "freight" in all the other kinds of charterparty, exept in the case of demise charterparty and that what the French and Algerian legislators did.

41 Loi n 66-420 du 18 juin 1966.

42 "My Own Translation".

CHAPTER TWO

The Charterers' Lien On The Vessel

2-1- The Nature of the Charterers's Lien on the Vessel:

In most of the charterparties, liens are given to both, the shipowners and the charterers, but many problems arise because of these liens as to the nature and ways in which they can be enforced.

Thus, the shipowners have a lien on the cargo for garantee of payment of the freight and hire and the charterers have a lien on the vessel for all money paid in avance and not earned because of the failure of the ship, i.e., the shipowner's failure to perform his uties under the charterparty.

Thus, the "Baltime 1939" Uniform Time-Charter in its' clause 18 gives a lien to the charterer, where it provides that: " ... and the charterers to have a lien on the vessel for all moneys paid an not earned".

Moreover, the New York Produce Exchange time charterparty in its clause 18 provides that: "charterers to have a lien on the ship for all monies paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once ...".

So, when a shipowner undertakes to carry goods for a charterer under a charterparty, he undertakes to carry these goods for a cetain sum of money depending on the type of the charterparty and on the agreement with the charterers. But in the same time, the shipowner undertakes to give the charterers a lien on his ship, in the case where the money has been paid in advance and where he fails to perfom his duty, which is to carry the goods to their destination. Here, the charterers have a lien on the vessel given to them by the charterparty, but what is the nature of this lien and how can it be performed? Because the nature of this lien can be different, dipending on the

nature of the charterparty, and even the performance of this lien can be different, depending on the nature of each lien and each charterparty.

So, how can this lien be defined? Can it be defineed as a true possessory lien or as an equitable lien? Because where the charterparty is a demise charterparty, the charterer by the nature of this charter has possession of the ship, and hee can exercise his lien against the owner of the ship by detaining the ship, but in the case of a voyage or time charterparty, the possession of the ship does not pass to the charterer, and the latter has only the right to have his goods carried from one place to another and, the possession and the control of the ship stay in the hands of the shipowner.

Thus, in the former situation, the charterer has some kind of a possessory lien against the shipowner, but in the latter situation, the lien of the charterer appears to be a kind of equitable lien, because the only thing the charterer can do, is to postpone the redelivery of the ship to the owner and nothing more.

Thus, in order to understand the nature of the charterers' liens on the ship, it would be best to examine some cases in details. In, The "Lancaster",[1] by a time charter, the first defendants let their vessel Lancaster to the plaintiffs, for one round voyage. Payment of hire by clause 4 was to commence on and from the date of delivery and continue until the hour of redelivery, and by clause 5 was to paid monthly in advance. The charter, which was in the (NYPE), i.e., the New York Produce Exchange form, further provided, by cl.18:

> "That Owners shall have a lien upon all cargoes and all sub-freights for any amounts due under this charter, including general average contributions, and the Charterers to have a lien on the ship for all monies paid in advance and not earned ... Charterers will not suffer nor permit to be continued any lien or encumbrance incurred by them ... which might have priority over the title and interest of the owners in the vessel."

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1 Ellerman Lines LTD. v. Lancaster Maritime Co. LTD. And Others. (The "Lancaster") Q.B.D (Commercial Court) May 22 and June 16, 1980.

The second and third defendants were banks which had let substancial sums to the first defendants, such sums being secured by mortgages and assignments and notices of the assignments in all three cases were duly given. Following, a collision, the vessel a constructive total loss and the brokers began collecting the insurance moneys and paying it to the second defendants as first mortgagees of the vessel. The plaintiffs halted this procedure by obtaining a Mareva injuction restraining the distribution of the assets on the ground that they were entitled to recover a certain sum in respect of hire which had been paid in advance but had not been earned at the time of the collision. Moreover, the plaitiffs claimed that they had by virtue of cl.18 of the charterparty an equitable lien on the vessel in respect of their claim which enured against the insurance proceeds and took priority over the claims of the second and third defendants.

It was held, that the expression "lien" in cl.18 was not being used consistently and that the effect of the charterers' lien on the vessel under cl.18 of the charter, was that it simply conferred on the charterers the right to postpone delivery of the vessel to the owners.

Moreover, it was held that the charterers' lien could not have priority over the assignments to either defendants and that there was no grounds upon which the plaintiffs here could trace into the proceeds of the insurance policy.

Here, some questions arise as about, what is the meaning of the term "lien" in cl.18 of the charterparty? and what is the extent of this lien? and what is the object or the assets of the lien and what is the priority between the different claims?

Firstly, the cl.18 of the charterparty gives the charterers a lien on the ship for all moneys paid in advance and not earned and Mr. Justice Robert Goff, hel that the expression "lien" in cl.18 was not being use consistently in that clause an that clause an that the charterers's lien on the ship cannot be a possessory lien. So, a lien generally means a charge upon a res, but here the nature of this charge

is not clear, it is why the nature of this lien arises.

Councel for the charterers submitted that it must be an equitable lien and in the case of Tonnelier v. Smith,[2] Lord Justice Rigby, in delivering the judgment of himself and Lord Esher, M.R., said that:[3]

> "The owners were to have a lien upon all cargoes and all sub-freights for any amounts due to them under the charter, and the charterer was to have a lien on the ship for all moneys pai in advance and not earned.
> The last provision, that the charterer was to have a lien on the ship for all moneys paid in advance an not earned, makes it plain, if it were otherwise doubtful, that the payments in advance were to be provisional only and not final, and would entitle the charterer to postpone delivery of the ship until the unearned payments were repaid - a right which effectually secure prompt repayment of those amounts."

Thus, Lord Justice Rigby recognized that the charterers' lien on the ship could not be a possessory lien; but he gave it a very similar effect, simply by conferring on the time charterers the right to postpone delivery of the ship to the owners.

Moreover, the charterers' lien on the vessel was considered as an equitable charge in the case of The "Panglobal Frienship".[4]

This case was an appeal by the plaintiffs, Citibank N.A. (formerly First National City Bank) from the decision of Mr. Justice Donaldson granting the application of the charterers, A/S seaheron to intervene in the action between the plaintiffs and the defendants, Hobbs Savill & Co Ltd., insurance brokers, and Dray Shipping Co. Ltd., the owners of the vessel Panglobal Frienship. The vessel, which had been chartered to the charterers an mortgaged to the plaitiffs, had sunk and the plaintiffs had claimed the insurance moneys which had been paid

2 (1897) 2 Com. Cas. 258.

3 Ibid, at P. 265.

4 [1978] 1 Lloyd's Rep. 368.

to the insurance brokers. The charterers also claimed an equitable charge on the moneys by virtue of cl.14 which provided that:

> "the charterers were to have a lien on the vessel for all moneys paid in advance and not earned and for the value of fuel in bankers and for all claims for damages arising from any breach by the owners of the charter."

and they applied to intervene, so, it was held by Donaldson, J., that the charterers would be allowed to do so.

Thus, the charter contained an important clause, which gave the charterers a lien on the vessel for all moneys paid in advance an not earned and for the value of fuel in bankers and for all claims for damages arising from any breach by the owners of the charter. The basis of the charterers' claim was that they had a lien under cl.14 of the charter and this gave them an equitable charge on the moneys. Therefore, Lord Denning, M.R., said:[5]

> "Then another argument was raised. It was said that cl.14 gives what is called an equitable charge to the time charterers. Clause 14 provides:
> ... The charterers shall have a lien on the vessel for ... the value of fuel in bankers, and for all claims for damages arising from any breach by Owner of this Charter.
> The word "lien" is obviously not used accurately there. Mr. Hobhouse in effect tol us that that clause ha no meaning, it is an oldd clause, and so forth. But I must say, having heard all the arguments, that it seems to me it is obvious that this does give something in the nature of an equitable charge to the time charterers in respect of the amages which they claim. Otherwise it is very difficult to see what meaning the clause has at all. So it seems to me, to give it any meaning at all, it must give something in the nature of an equitable charge."

Moreover, Lord Justice Roskill, gave the charterers an equitable charge when he said, that:[6]

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5 Ibid, at P. 371.

6 Ibid, at P. 372.

> "So far as cl.14 argument is concerned, it has never yet been suggested, so far as I am aware, that, whatever the true effect of that clause, it can in the case of the purported lien given to the time charterer create in him any right to the possession of the time chartered ship. It is however sought to say that some sort of equitable charge arises in his favour."

Thus, according to most charterparties, the charterers have a lien on the vessel for the money paid andd not earned. However, this lien cannot be considered as a possessory lien, because a possessory lien requires the possession of the chattel, and in those cases which were cited above, the charters are time charterparties and therefore, the shipowner keeps the possession and the management of his ship.

Thus, in those cases cited above, the charterers did not have a possessory lien and Mr. Justice Robert Goff stated that:[7]

> "But it is obvious that neither the owners' lien for sub-freights, nor the charterers' lien on the ship, can be a possessory lien. Of course, if the same clause had appeared in a demise charter, the charterers' lien on the ship could be construed as a possessory lien, but the owners' lien on cargo could not."

In Tonnelier v. Smith,[8] Lord Justice Rigby recognised that the charterers' lien on the ship could not be a possessory lien. Moreover, in The Panglobal Friendship, Lord Justice Ruskill[9] took the same point of view about the charterers' lien, that their lien is not a possessory lien, where he stated, that:

> "So far as cl.14 (the clause which gave the charterers a lien on the ship for all moneys paid in advance and not earned) argument is concerned, it has never yet been suggested, so far as I am aware, that, whatever the true effect of that clause, it can in the case of the purported lien given to the time charterer create in him any right to the possession of the time chartered ship."

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7 The "Lancaster", op cit, at P. 501.

8 (1897) 2 Com. Cas. 258. at P. 265.

9 [1978] 1 Lloyd's. Rep. 308, at P. 372.

Thus, in most of the cases where the lien of the charterers has been considered, that lien has never been considered a possessory lien, apart from the case where the charterparty is a demise charterparty, and in this case the charterer has possession of the ship, and therefore, can exercise his lien as a true possessory lien and that by detainning the possession of the ship. However, if the charterers' lien on the ship cannot be defined as a possessory lien, then what is the true nature of the charterers' lien on the ship for the freight or hire which was paid but not earned by the shipowner?

Most of the opinions deny the nature of possessory lien to the charterers' lien, but they recognise that the true nature of that lien is that it is an equitable charge on the ship, Lord Denning, M.R., shared this opinion, when he said that:[10]

> "The word "lien" is obviously not used accurately there. Mr. Hobhouse in effect told us that that clause had no meaning, it is an old clause, and so forth. But I must say, having heard all the arguments, that it seems to me it is obvious that this does give something in the nature of an equitable charge to the time charterers in respect of the damages which they claim. Otherwise it is very difficult to see what meaning the clause has at all."

However, if this lien has the nature of an equitable charge, i.e., an equitable lien, what protection or garaantee does it give to the charterer to have his money paid back to him, i.e., the money he paid for freight, and which was not earned for a reason or another?

Thus, it was considered in some cases, that the charterers are entitled to postpone delivery of the ship to the owners.

It was held in The "Lancaster",[11] that:

> "the effect of the charterers' lien on the vessel under cl.18 of the charter was that it simply conferred on the charterers the right to postpone delivery of the vessel to the owners."

10 [1980] 2 Lloyd's. Rep. 497. by Mr. Justice Robert Goff. at P. 499, 497.

11 [1980] 2 Lloyd's. Rep. 497. by Mr. Justice Robert Goff. at P. 499, 497.

Moreover, the most relevant case is probably, Tonnelier v. Smith,[12] where Lord Justice Rigby, in delivering the judgment of himself and Lord Esher, M.R.,[13] said that:

> " ..., and the charterer was to have a lien on the ship for all moneys paid in advance and not earned. ... , and would entitle the charterer to postpone delivery of the ship until the unearned payments were repaid ... ."

In that passage, therefore, Lord Justice Rigby recognised that the charterers' lien on the ship could not be a possessory lien; but he gave it a very similar effect, simply by conferring on the charterers the right to postpone delivery of the ship to the owners.

The nature of the lien given by cl.18 was next considered by the House of Lords in French Marine v. Compagnie Napolitaine,[14] where viscount Finley cited the decision with approval,[15] quoting in full a section of the judgment of Lord Justice Rigby,[16] where he recognised that the charterers' lien on the ship could not be a possessory lien; but he gave it a very similar effect, simply the right to postpone delivery of the ship to the owners.

However, if most of the opinions cited above give the charterer a charge in the nature of an equitable lien, this lien cannot make the charterers able to stop or postpone the redelivery of the ship back to the shipowner, because the ship has never been out of the shipowners' possession, who were always in possession of the ship, through their master and crew. Mr. Justice Robert Goff held,[17] that:

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12 (1897) 2 Com. Cas. 258.

13 Ibid, at P. 265.

14 (1921) 8 Ll. L. Rep. 345; [1921] 2 A.C. 494.

15 Ibid, at P. 350 and 507-509.

16 Tonnelier v. Smith, (1897) T.L.R. at P. 560. Lord Justice Rigby, at P. 561.

17 The "Lancaster". [1980] 2 Lloyd's. Rep. at P. 497.

> "the effect of charterers' lien on the vessel under cl.18 of the charter was that it simply conferred on the charterers the right to postpone delivery of the vessel to the owners but since the charterers had not got possession of the vessel this mean no more than that they could prevent the owners from resuming the use and the control of the vessel for their own purposes."

Thus, in the different cases cited above, the charterers' lien could not confer to them the right to retain the ship and prevent the owners from the use of their ship, because the owners are always in possession of the chattel through their servants. However, the case would have been different, if the charter was a demise charterparty, where the charterers choose their own crew, and therefore, the ship would be in their possession, and then, the exercise of their lien would be possible.

When it comes to the asset on which the charterers would exercise their lien, this is another situation, because in the cases cited above, the charterers try to exercise their lien in a situation where the ship is lost or destroyed. However, most of the opinions agreed that the lien can only be exercised on the ship and nothing else which might replace the ship. Thus, Mr. Justice Robert Goff, held that:[18]

> "the proceeds of insurance upon a chattel neither represented the chattel nor constituted the product or fruits of that chattel for the purpose of tracing." And he added : "even if the lien clause could have created an equitable lien and assuming that such a lien would create a sufficient interest to enable the lien holder to trace at all, there was no grounds upon which the plaintiffs here could trace into the proceeds of the insurance policy."

Lord Denning, M.R., added that:[19]

> "Then it is said it is only a lien on the vessel: it is not a lien on the policy moneys. There again it seems to me it is arguable that the moneys take the place of the vessel." Moreover, Lord Justice Roskill,

18 The "Lancaster", op cit, at P. 497.

19 The "Panglobal Friendship". [1978] 1 Lloyd's Rep. at P. 371.

added at P.372, that: "Without pre-judging the determination of this issue at the trial, it seems to me as at present advised that even if the clauses could be construed as creating some form of equitable charge in favour of the time charterer it was never suggested in Tagart Beaton & Co. v. James Fisher & Sons,[20] that a comparable clause created an equitable charge in favour of the owners of the vessel- it can at the most only be a charge upon the vessel. For my part I am at present unable to see how the clause can create any equitable charge upon the insurance policies."

Thus, the nature of this lien given by most clauses of the different charterparties, is that it is an equitable charge and which can at the most only be a charge upon the vessel and nothig else which might replace the vessel.

However, one might find a different interpretaion to the nature of the charterers' lien on the ship, in the French and the Algerian Civil Code.

Thus, there is a legal nature which can be applied on the charterers' lien on the ship for all moneys paid in advance and not earned, and therefore, it would best to examine it and to find out if it is appropriate to this case. This situation is namely "le paiement de l'indu" or "the payment not due", which is defined in both the French and the Algerian Civil Code. The French Civil Code defines it in its' articles 1235 and 1376 where it provides in article 1235 that, "Every payment supposes a debt: that which has been paid without being due, is subject to recovery ...",[21] and article 1376 provides that: "That who receives by mistake or knowingly what is not due to him, is obliged to hand it back to that one from whom he received that what was not due."[22] The Algerian Civil Code

20 [1903] 1 K.B. 391.

21 " My Own Translation ", the actual article 1235 of the French civil law provides in French that: <<Tout payment suppose une détte: ce qui a été payé sans etre due , est sujet á répétition ...>>

22 " My Own Translation ", the actual aricle 1376 in French provides that: <<Celui qui reçoit par erreur ou sciemment ce qui ne lui est pas du s'oblige á le restituer á celui de qui il l'a indument reçu.>>

in its' articles 143 and 144 gives almost the same provisions, where it defines the payment not due in article 143, by providing that:

"The one, who received, as payment, an allowance which was not due to him, is obliged to hand it back ...",[23] and it is further provided in article 144 that: "There is a recovery of the not due, when the payment was made in execution of an obligation which the cause of it was not realised or which cause stopped to exist."[24]

Thus, in both the French and the Algerian civil law, when moneys are paid but not earned, the one who received that money without being due to him, is obliged to hand it back. Therefore, it would be worthwhile to examine this legal situation in more details and see if it can be applied on the charterers' lien on the ship for moneys paid in advance and not earned. So, what is this "payement de l'indu", i.e., the payment not due? What are its' conditions and what action might be brought by the one who paid something which was not due or, which he was not bound to pay, i.e., which was not due?

The French civil code, provides that the payment not due exists, if there is not debt. So, the ground on which this theory stands in the French civil law is the debt,[25] and with the absence of a debt, the payment is not due and allows that one who paid something which was not due to recover it.

However, proving the payment is not enough, it must also be proved why the payment was made,[26] and therefore, one is obliged to make a distinction

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23 " My Own Translation ", the actual article 143 of the Algerian civil code provides in french, that: <<Celui qui a reçu, á titre de paiement, une prestation qui ne lui était pas due, est obligé de la restituer.>>

24 " My Own Translation ", the actual article 144 orf the Algerian civil code provides that: <<Il y'a lien á la restitution de l'indu, lorsque le paiement a été fait en éxécution d'une obligation dont la cause ne s'est pas realisée ou d'une obligation dont la cause a cessée d'éxister.>>

25 Encyclopédie DALLOZ, CIVIL VI. 2é édition, 1978. Répétition de l'indu. P.1.

26 RIPERT, George et BOULANGER, Jean. Traité de Droit Civil, D'Aprés le Traité de Planiol. Tome II. 1957. P. 475.

between two theories. The first one, is the case where is no obligation between the one who paid and the one who received and the second one is, the case where an obligation exists but it is either invalid or canceled.

This work is more interested with the second theory, where the payment was made and there was an obligation but it stopped to exist. Thus, the cases of the invalidity or cancelation of the obligation are the case where the roman law gave the *condoctio sine cause* or *la condictio causa data, causa non secuta.* The obligation has existed and the payment could have been done before, but the debt disappeared after the invalidity or the cancelationof the obligation. The payment which was made was not due. The condition for this theory to be applied is that, the one who claims the recovery of what was not due must prove that this debt has already been invalid or canceled, or that the future debt has been formed. Moreover, thare is another fact than that of payment, a fact which might be the cancelation, the resolution or a defaulting condition, which will change the situation to the state where it was before the convention or the contract.

In the Algerian civil law, it is required that the payment is not due where the payment has been made for the execution of an obligation which cause has not been performed or for an obligation which has stopped to exist (article 144 of the Algerian civil code).

The action for the recovery of what has been paid and not earned, is vested in the one who made the payment, and the one who received what was not due is obliged to hand it back. So, if the subject of the claim is money, the one who received is obliged to hand back the same amount and if it was something else, he is obliged to hand back the same quantity and quality of the thing or of what he received. What about the interests?

The law makes a distinction between two situations according to the good faith of the one who received what was not due. The first situation is the one

where the one who received was in good faith, in this case he is only obliged to hand back what he received without any interests (article 1378 of the French civil code and article 147 of the Algerian civil code), but if the one who received was of a bad faith, he is obliged to hand back the profits or interests of what he received, starting from the day he received or the day he became of bad faith in the Algerian civil law.

Thus, after having examined this situation or more accurately this theory, on ecan say that the charterers' lien for moneys paid in advance and not earned can be resolved according to this theory, i.e., the theory of the "payement de l'indu", because the charterers paid a sum of money called the freight to the shipowner, so that the latter performs his part of the duty, which was to carry the cargo to its final destination, but if the ship is lost, that will make the shipowner's obligation impossible like in the case of The "Lancaster".[27] This will make the payment of the freight paid by the charterers in advance not due, because they paid for the performance a future obligation which will not exist in the future and that because of the disappearance of the shipowner's obligation. Therefore, this entitles them to recover all the money they paid for the part of the obligation which has not been performed (article 1235 and 1376 of the French civil code, and article 143 and 144 of the Algerian civil code). One must point out the benefit of the civil law jurisdiction, that which is that every time that the private law like the maritime law does not have a provision about a certain situation, it has to return to the general law which is the civil code as being the origine, to find the solution required for that particular situation.

2-2- Deductions from Freight and Hire:

The claim of the charterers for the execrise of lien for freight paid in advance and not earned is founded on the idea that once the obligation of the shipowners cannot be performed any-more, the shipowners are not entitled to that freight any longer. Therefore, the impossibility of the shipowners to

27 [1980] 2 Lloyd's Rep. 497.

perform their obligation can be either for the loss of the ship or for the damage or loss of the cargo, because that will make the payment of the freight worthless or without reason, because the purpose of paying freight is for the carriage of goods to their destination in the quantity and quality, and their damage will make them worthless, and therefore, the charterers will have no reason to pay the freight. However, there have been different opinions as to whether the charterers are allowed to deduct sums from freight or hire and in what circumstances.

1- Deductions from Freight:

The contract of carriage of goods by sea may provide that freight calculated to its terms is payable in full without deductions. However, it may be stipulated that it clearly permit one or more deductions to be made in specified circumstances from freight as calculated and earned under the contract. For instance, an example of an agreed deduction was cited in the case of The Olympic Brilliance,[28] where the charterparty contained the following clause: "If there is a difference of more than 0.50% between the bill of lading figures and the cargo delivered ... charterers have the right to deduct from freight." It was held that this was a plain clause, with a simple straight forward meaning that once the charterer had established the difference between the bill of lading figures and the customs authorities ascertained figures and had proved the C.I.F value for the short delivered cargo, he was entitled to deduct that value from the freight finally and completely and the umpires award would be upheld. But otherwise, the person from whom the freight is due, is not entitled to deduct from the amount of freight which is in fact earned, any amount which he alleges is owed to him by the carrier as damages for loss which, not through expected perils or inherent vice, he has suffered because of damage to the cargo, loss of part of the cargo shipped or in the case of lump sum freight failure to load a full

28 The Olympic Brilliance (1982) 2 Ll. R. 205.

cargo, or for alleged failure to prosecute the voyage with reasonable dispatch.[29]

An attempt was made to prove that a general custom among merchants to make some deduction in paying the freight exists, but the court held that such a custom was inconsistent with the settled rule of law. Thus, in Meyer v. Dresser,[30] Willes, J., stated, that:

> "With respect to the evidence or alleged usage in this case, it appears to me nothing more than that, in ordinary cases, as between the shipowner and the consignee of the goods, where the shipowner has an admitted claim against the owner for loss or of damage to goods actually put on board, it is usual to agree to set off the one claim against the other.
> It does not deal with cases of dispute, or cases in which it is necessary to have recourse to the law to settle the rights of either of the parties: it is a mere mode of payment or adjustment of an admitted claim, which is often resorted to because it is convenient mode of arranging such a claim."

Moreover, even the case cited above, in Dixin v. Oxley,[31] it was settled rule forbidding deduction of damages. The same principle has been recently affirmed by the House of Lords in the case of The "Aries",[32] where a cargo of gasoline was short delivered under a voyage charterparty subject to the Hague Rules, and the charterers made a deduction from freight. It was held that they were not entitled to do so. Lord Salmon stated the principle of English law applicable in clear terms:

> "This rule of law which was fathered by such masters of the law as Parke,B., Alderson,B., Erle,C.J., Willes and Byles,J.J., has been generally accepted for well over 10 years and never judicially questioned. It has been confirmed in the original and every succeeding edition of Scrutton on Charterparties and Carver, Carriage of Goods by Sea. It

29 Rose, F.D., Deductions from Freight and Hire Under English Law, Lloyd's Maritime and Commercial Law Quarterly, February 1982, Part 1.

30 (1864) 16 C.B. (N.S.) 646.

31 (1864) 10 L.T. 268.

32 (1977) 1 Ll. R. at P. 341.

was adopted in Lord Atkinson's speech, with which Lord Macnaghten and Earl Loreburn,L.C., concured in Kish v. Taylor,[33] and recently by the Court of Appeal in The "Brede".[34] A rule of law, particularly a rule of commercial law which has stood so long and upon the faith of which many thousands of contracts of carriage have been made and are daily being made containing a provision that the contract shall be governed by the law of England, cannot now be succesfully challenged in our courts."

On the contrary, where the freight rule is not clearly applicable, the Courts have shown a preference to adhere to the general principle in favour of equitable set-off. Thus, in The Ionian Skipper,[35] charterers could have deducted from dead-freight benefits accruing to shipowners by way of increased demurrage and saving in despatch money occasioned by the diminution of laytime allowed to the charterers, there being less cargo to load. The charterers were entitled to set-off against the owner's claim fr demurrage the overpayment under mistake of law.

2- Deductions from Hire:

Conversly t what it had been seen abve as t full freight is always payable. There has always been a doubt whether this rule applies to a time charteparty regarding hire. Michael Wilford says that the balance f authrity is nw in favour of the view that the charterer may deduct frm hire a claim for damages in respect of a period during which the owners have in breach of the charter deprived the charterers of the use of the ship, but it is not yet clear exactly which types of claim fall within concept.[36]

The following cases give more explanation to the situation; in the case of

33 (1912) A.C. 604, H.L.

34 (1973) 2 Ll. R. 333; (1974) 1 Q.B. 233. C.A.

35 Bedford S.S. Co. Ltd. v. Navico A.C.. The "Ionian Skipper". (1977) 2 Ll. R. 273.

36 Wilfrod, Cohlin, Healy, Kimbal, "Time Charters", II Ed., Llyd's of London Press Ltd., 1982.

Naxos Shipping v. Thegra Shipping (The Corfu Island),[37] it was held that the charterers were entitled to deduct from hire a claim for damages in respect of an alleged breach of speed warranty. However, in the Seven Seas Transportation Ltd. v. Atlantic Shipping Co.,[38] it was decided that there was no right of set-off in respect of claims for damages, there being no reason to treat hire differently from freight. Therefore, Donaldson,J., said that:

> "I have come to the cobclusion that hire must be treated in the same way as freight and that to do so is not an extension of the established exception."

In The "Theno",[39] it was held that there was a right to set-off against hire under a charter on the Baltime form, but only for damages in respect of a period when the use of the ship was wholly or partially withheld. In this case the vessel while loading bulk cargo of soya beans suffered a breakage in its ballast pipe system. The charterers raised a claim against the owners for hire, arising out of the failure of the ship to load a full cargo. It was left undecided whether the right of set-off extended to other claims. Parker, J., after having examined some of the cases cited above, said:

> "The foregoing cases show a continuous recognition since 1941 of a right to set-off against a claim for time charter hire damages for breach of contract where, at any rate, the breach consists in wrongful withdrawal of the vessel for a certain time."

He also considered the nature of the equitable right of set-off, and concluded that it should cover not only total but also partial withdrawal of the use of the ship:[40]

> "The next question is whether the equitable set-off is limited to cases where there is a total withdrawal for a specified time. I can see no

37 (1973) unreported, cited in The "Theno" (1977) 2 Lloyd's Rep. 289-293.

38 (1975) 2 Lloyd's Rep. 188.

39 (1977) 2 Ll. R. 289.

40 Ibid, at P. 297.

reason in principle why it should be so limited ..."

Recently the question was considered again in The "Nanfri",[41] at first instance under Justice Kerr. He said that it was not possible to deduct from hire unless there were special provisions in the charter. He said:

> "If a claim or cross-claim did not fall within them [the special provisions], then the general view was that hire was payable continuously and in full; it could only be raised by way of a separate cross-claim in debt or damages."

In the Court of Appeal, 1 dissented, 2 affirmed, Kerr, J., view. The House of Lords did not consider this point. Then it was held by a mojority that deductions could be made where the shipowners had wrongly deprived the charterers of the use of the vessel or had prejudiced them in the use of her. Such a right could not be extended to other breaches or default of the shipowners, e.g., damage to cargo arising from the negligence of the crew.

Lord Denning concluded from his review of authorities that:[42]

> "The line of cases is so convincing that I would hold that, when the shipowner is guilty of a breach of contract which deprives the time charterer of part of the consideration for which hire has been paid in advance, the charterer can deduct an equivalent amount out of the hire falling due for the next month.
> I would as at present advised limit the right to deduct to cases when the shipowner has wrongfully deprived the charterer of the use of the vessel or has prejudiced him in the use of it. I would not extend it to other breaches or default of the shipowner, even as damage to the cargo arising from the negligence of the crew."

As an overall conclusion about this point, one finds that the views from Carver and Scrutton as opposed to Lord Denning are quite different. Lord

41 Federal Commerce and Navigation Ltd. v. Molena Alpha Inc. The "Nanfri" (1978) 2 Lloyd's Rep. 132.

42 Ibid, at P. 139.

Denning's basis is that the law as to freight cannot be applied indiscriminately to "hire" in a time charter:[43]

> "I do not think the law as to freight can be applied indiscriminately to "hire". In particular, the special rule of English law whereby "freight" must be paid in full (without deductions for short delivery or cargo damage) cannot be applied automatically to time charter "hire". Nor is there any authority which says that it must . ... Many of us, I know, in the past have assumed that the rule as to "freight" does apply: and some Judges have said so. But now, after full argument, I am satisfied that the "freight" rule does not apply automatically to "time charter" hire.

As a conclusion to this chapter, one might say that the charterer has some sort of a lien on the ship for all moneys paid in advance and not earned. However, this lien cannot be a possessory lien in the case of voyage or time charterparty, because in these two situations the shiowners keeps the ship in his possession, but the situation is different in the case of a demise charterparty, where the control of the ship and the crew pass to the charterer. This lien has been defined as an equitable charge,[44] which gives to the charterer no more than the right to postpone redelivery of the ship to the owner. In the French and Algerian civil law, the charterer might use the rule applying to the "payement de l'indu", i.e., the "payment not due, to recover the freight he paid in advance and which was not earned by the shipowner. Moreover, there is a difference of opinion in the case of deductions from freight and hire, where the general opinion agreed that the full freight must be paid in the case of voyage freight and the opinions have not agrred about, if the charterers are entitled to deduct from hire in the case of damage to cargo or for any other reason.

However, one might say that the charterer should be allowed to deduct from hire or freight, in the case when the voyage is not completed or in the case where the cargo is damaged, because the reason for paying freight or hire is to

43 Ibid.

44 See, Sect. 1 of this chapter, Supra.

have the cargo carried to its' destination in the same quantity and the same quality when it left the port of loading. Therefore, if the shipowner fails to perform his obligation, which is to carry the goods to their destination in the manner it was supposed to be, here, there is no reason why the charterer should not be allowed to refuse to perform his duty or to perform part of, as long as the other part of the contract has failed to perform his obligation or part of it.

CHAPTER THREE

THE NATURE OF THE GUARANTEE FOR PAYMENT OF FREIGHT AND THE DEBTS GUARANTEED .

3-1- The Nature of the Guarantee for Payment of Freight.

Freight is the payment under the terms of the contract of affreightment for the carriage of goods and therefore the person who makes the contract is liable for this payment.

In the English law, the shipowner has what is called a "lien" on the cargo for the garantee of payment of his freight, and this "lien" is given either by the express terms of the charterparty or in the absence of any stipulation in the charterparty, this "lien" is given by the common law to the shipowner.

However, in the civil law jurisdictions, namely the French and Algerian law, these last jurisdictions give to the shipowner a "privilege" on the cargo for garantee of payment of freight. Therefore, it would be best to consider the nature of these two charges on the cargo, separatly, so that they will be better explained and understood.

3-1-1- The Nature of the "Lien" on the Cargo for Payment of Freight in the English Law:

Charterparties and bills of lading usally contain a clause giving the shipowner a right to retain the cargo for payment of any freight or other charges due to him. In the absence of such a clause, the common law, under certain circumstances, entitle the shipowner to withhold delivery of the cargo until the money due for the carriage of the cargo is discharged. Thus, the right of lien arises either:

1- At Common Law,or by

2- Express terms of chaterparty.

1- At Common Law :

Thus, where there is a charterparty the charterer is liable for freight. But, where is not a charterparty the shipper of the goods has an implied obligation to pay the freight.[1] Therefore, at common law the shipowner has a lien on cargo for freight. This lien exists independently of the contract and gives to the shipowner the right to keep the goods against payment of freight. It is a possessory lien depending entirely on the possession of the goods. This lien can be defined as, "A claim by the person in possession of the property of another who has the right to keep possession until the owner pays the debt in respect of which the possessor is entitled to the lien."[2] It is not in strictness, "either a jus in re, or jus ad rem, but simply a right to possess and retain property, until some charges attaching to it are paid or discharged."[3]

As security for payment of freight, every shipowner or master, as his agent, being in possession of the goods, has the right to keep them until the freight due in respect of their carriage is paid according to the terms of the contract of affreightment. This right is in the nature of a mere passive lien. It is not founded upon any stipulation in the contract but arises simply from the usage of trade.[4] However, if the shipowner or the master as his agent, have the right to keep the possession of the goods, until the freight in respect of their carraige is paid, this right does not give the shipowner any absolute right in the property,[5] nor does it authorise him to sell the goods in order to realise the freight in respect of their carriage,[6] although the retaining of the goods may

1 See Domett v. Beckford (1833) 5B . & Ad . 521; and also Shepard v. Bernaless (1811) 13 East 565.

2 See per Greer,J. in Molthes Rederi Akt. v. Ellerman,Wilson Line (1927) 1 K.B.710-716; and per Bramwell,L.J. in Mulliner v. Florence (1878) 3 Q.B.D.484-489.

3 Cross. (J.), The Law of Lien & Stopage in Transitu, (1840) P. 2.

4 Thames Iron Works Co. v. Patent Derrick (1860) 1J. & H.93,per Sir W. Page Wood at P. 97.

5 Oppenheim v. Russell (1802) 3B. & P.42-45.

6 As to the shipowner's statutory right of sale, See Merchant Shipping Act,1894,SS.492-501.

involve a considerable expense.[7] However, the right being dependent upon possession, it is, therefore destroyed by loss of possession of the goods.

Origin and Basis of the Lien:

The shipowner's lien on the goods carried, for his freight, is well established and has never been disputed either by the courts or the text book writers. As early as 1701 Chief Justice Holt, in The Anonymous Case,[8] ruled that:

> "Every master of a ship may detain goods till he be paid for them, that is for their freight."

The ruling has been followed ever since.[9] Among the text book writers the same unanimity has always existed. Wyndham Beawes in his Lex Mercatoria, states:[10]

> "The freight must be paid in preference to all depts for whose payment the goods stand engaged, but as those goods are responsible to the ship for her hire, so is the ship to the owner of the goods..."[11]

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7 Mulliner v. Florence(1878) 3 Q.B.D.484; Thames Iron Works Co.v. Patent Derrick (1866)1J.&h.93,where Sir W.Page Wood decided that the right of sale could not be raised on the mere ground of the expense of retaining the chattel which is subject of the lien. He added that,"a person who chooses to insist on the right of retainer which the law gives,and is willing to put up with any inconvenience which may be the consequence,is at liberty to do so,but has no further right. Even though such an arrangement should be most inconvenient for both parties,it does not follow that this is not the law." At P.98.

8 (1701)12 Mod.447; See also Rex v. Sims (1701)12 Mod. 511; Skinner v. Upshaw (1701)2Ld. Raym.752, in which Chief Justice Holt gave judgment to the same effect.

9 Artaze v. Smallpiece (1793) 1 Esp.23; Sodergreen v. Flight (1796) cited in 6East 622; Wilson v. Kymer (1813) 1 M.& S. 157; Mitchell v. Scaife (1815) 4 Camp. 298; Faith v. The East India CO.(1821) 4 B.& Ald. 630; Christie v. Lewis (1821)2 Br. & B. 410.

10 Beawes, Wyndham. Lex Mercatoria. (1792) 5th ed, at P.133. The fifth edition was considerably enlarged and improved, by Mortimer, thomas. London, Printed for R. Baldwin.

11 See also Maude & Pollock,(1881)4th ed., P. 389; Lees, Laws of British Shipping & Mar. Ins., (1896) 11th ed.,P. 277; Maclachlan,(1932) 7th ed., P. 426; Abbott, (1901) 14th ed .,P. 346; Parsons, Law of Shipping, (1869) vol. 1 P.174n.; Foard, Law of Merchant Shipping And Freight , (1880) P. 313.

As to the origin of the lien no such definite view has been expressed. In the English courts the subject does not seem to have been a matter for judicial comment and from the early English text book writers no final conclusion is advanced. It has been suggested,[12] however, that the rule of common law has been derived from a rule of the general maritime law,[13] as was pointed out in an American case:[14]

> "The general right of the master and owner to retain merchandise for the freight due upon it, has not been denied. It is too weel established to admit of doubt. It is a principle of the general maritime law, the common law of the commercial world, sanctioned by all the maritime codes, ancient and modern, and confined by numerous decisions of the highest courts both in this country and England. Nor does there appear to be any difference in principle, nor an any recognized in law, whether the merchant takes the whole vessel by a charterparty, or sends his goods in a general ship. The lien of the owners is as perfect for the hire of the vessel stipulated in the charter party, as it is for the freight stipulated in the bill of lading. In both cases the claim is privileged in the same degree and to the same extent."

Whether it is, in fact, derived from the maritime law or not, it is indeed not in the nature of a maritime lien, properly so called. That is to say, it is not a privileged claim upon the goods following them wherever they go and in the hands of whoever they may be. It is only a right to detain goods until payment of freight, and the right is lost the moment the owner or the master, as his agent,

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12 Parsons, (1869) vol 1 pp. 174-177 n.

13 The Laws of Wisbuy, Art.LV11 provides that : "The merchandise being put aboard lighters,in order to be landed,if the master had any jealousy of the merchant's ability of honesty to pay him,he may stop it at his ship's side,and refuse to let it go,till the merchant has paid him in full for his freight and charges."

"Cleriac, in his comentary on the laws of Oleron, says that, the same power is given by the ordinance of Phillips the second and by the Consolato del Mare,and that the latter allows him to detain goods equal in value to four times the amount of the freight. The Ordinance of Rotterdam allows the master to detain the goods for his freight,but requires him to unload and take care of them,they may not be diminished or spoiled." Abbott,14th ed., pp.563-564; see also Parsons,(1869)P . 176 n.

14 Drinkwater v. The Brig Spartan, cited in Parsons,(1869) vol.1, pp.174-177n.

parts with the possession of the goods.

The shipowner's lien may be justified upon application of the general principal that, "where a bailee has expanded his labour and skill in the improvement of a chattel delivered to him, he has a lien for his charge in that respect."[15] Thus, as goods are improved in value by their carriage, therefore, the carrier may detain them for the charge of such carriage. This is also the ground suggested in the United States, by Mr.Justice Jhonson in the case of Gracie v. Palmer,[16] where he says:

> "On what principle rests the general lien of the ship on the 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 care of transportation. As the bailee of the shipper, the goods are in the custody and possession of the master and the shipowner, and the law will not suffer that possession to be violated until the labourer had received his hire."

Conditions Required to Constitute a Right of Lien:

The shipowner's lien on cargo for payment of his freight in the common law, is a possessory lien and therefore, possession is the essensial element for the existence of this lien. Therefore, to constitue a right of lien at common law it is necessary:

A- To have possession of the ship and therefore, possession of the cargo.
B- For freight to be due on delivery of the cargo.

A- Possession:

A lien given by the common law to a carrier being a possessory lien is exclusively associated with the possession and is dependent upon it. To have possession of the cargo and consequently a lien upon it, the carrier must have, at

15 Scarfe v. Morgan (1838) 4 M. & W. 270-283.
16 (1823) 8 Wheat . 605-635.

the time of the exercise of it, the possession of the ship, and therefore, the possession of the cargo. Therefore, the shipowner can have no possession of the cargo without first having possession of the ship.

(i)-Possession of the ship:

Where a ship is employed under a charterparty, the principal question to be considered is the effect of the chaterparty in divesting or continuing the owner's possession of the ship. It should be first to determine whether it was the intention of the parties that the charterer should part with the possession of the ship for a certain period of time or that the charterparty was one under which the constructive possession of the vessel remained with the shipowner. If the possession of the ship is transferred to the charterer, the shipowner having no possession, actual or constructive, can have no right of lien over the cargo for freight.[17] But if the charterparty is one for the carriage of goods only and does not amount to demise of the ship, then the shipowner having actual possession of the ship and the goods may retain them until the freight for their carriage is paid.[18] The terms and clauses of each charterpaty, therefore, must be examined carefully in order to determine the exact nature of the contract. For the right of lien follows the nature of the contract between the shipowner and the charterer.

The shipowner right of lien being both legal and equitable, the courts have been very reluctant to put a consturction upon the contract which would deprive the shipowner of his lien, unless the intention of the parties to the contrary appears from the terms of the charterparty.[19]

In Hutton v. Bragg,[20] the Court of Common Pleas laid down the above

17 Hutton v. Bragg (1816) 7 Taunt. 14; Belcher v. Capper (1842) 4 Man. & G. 502.

18 Tate v. Meek (1818) 8 Taunt.280; Yate v. Railston (1818) 8 Taunt.293; Yates v. Meynell (1818) 8 Taunt.302; Savill v. Campion (1819) 2 B. & Ald. 503; Campion v. Colvin (1836) 3 Bing . N.C.17.

19 See Holt, (1842) 2nd ed ., pp.461-470; Maude & Pollock, (1881) 4th ed., p. 391.

20 (1816) 7 Taunt. 14 .

mentioned pricinple on the subject, correctness of which has not been doubted,[21] but its application caused a great deal of confusion and controversy where it was assumed by the Court that the terms of the charterparty amounted to an absolute demise of the ship, and therefore the possession of the ship having been passed to the charterer, the shipowner had no lien for his charterparty freight. The facts of the case were as follows:

The defendant, shipowner, chartered his ship for a voyage from London to the Cape of Good Hope, and back to London. The charterparty expressed that the ship was let out to freight for the above mentioned voyage, that the master should reserve the cabin for his sole use, and the usual accomodation for his crew and ship's store; and that the freight being a specific sum was to be paid by bills during the vayage, or upon the return of the vessel home. The return cargo consisted of goods shipped on the charterer's account and goods of various persons for which the master signed the bills of lading, making the goods deliverable to them on paying freight to the chartere's order. The ship performed the voyage but upon her arrival in London, several of the bills drawn during the voyage had been dishonoured. The shipowners landed the charterer's goods and entered them in his own name in the London dock, claiming a lien upon them for his freight. The charterer having become bankrupt, his assignee brought an action to recover the goods, alleging that the ship was let for the whole voyage, and was under the control of the charterer and that the shipowner not having the possession of the cargo, could not exercise a lien.

The court held that under the charterparty, the charterer was the owner of the ship for the voyage, and therefore the original owner not having the possession of the ship or goods could have no lien. Gibbs, C. J. commented that the charterer :

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21 See per Richardson,J. in Christie v. Lewis (1821) 2 B.& B. 410 at P. 443.

"was to have the whole use of the ship for the voyage out to go to Cape of the Good Hope,and home to London. It is clear that he might have put this ship as a general ship, have filled her with the goods of other persons, and when they came home, the defendant could not have touched those goods by way of detaining them till his freight was paid by the charterer. But here, it is contended, in as much as these are the goods of the charterer put on board by himself, the defendant might detain these goods till those dishonoured bills were paid by the charterer. He could not have had a lien on the goods unless he had in some sort of possession of the goods: here, he had no possession of the goods whatever."[22]

Thus, the lien of the shipowner on the cargo is dependent on the contract between him and the charterer, i.e, the nature of the charterparty.

The decision in this case turned on the assumption that the shipowner, by the terms of the charterparty, had parted with the possession of his vessel, the Court relying on the words of demise in the charterparty. But in the later cases the shipowner's lien has been supporetd notwithstanding the terms of express demise, if other stipulation is found, sufficient to rebut the inference that the shipowner meant to part with the possession of the ship.[23]

In Saville v. Campion,[24] the shipowner was to receive on board, the goods of the charterer in London, and proceed to Madras, and there after delivery of her outward cargo, to receive from the charterer's agent a homeward cargo, and deliver it in London, and that all the cabin but one, which was reserved for the use of the master, were to be at the disposal of the charterer, who was to appoint a super cargo, to superintend the stowage of the goods. Freight was to be paid at so much per ton on the register tonnage of the ship. The charterer having become bankrupt and the freight not being paid upon the return of the ship, the shipowner detained the cargo claiming a lien upon it for his freight.

22 Ibid. at P. 25, see also per Dallas and Parke,JJ. at P. 27.

23 See Tate v. Meek (1818) 8 Taun. 280; Yates v. Railston (1818) 8 Taun. 293; Yates v. Meynell (1818) 8 Taun. 302; Christie v. Lewis (1821) 2 B. & B. 419; Faith v. East India Co. (1821) 4 B. & Ald. 630.

24 (1819) 2 B. & Ald. 503.

In an action by the assignees of the charterer, it was contended that the charterer was to be considered as the owner for the voyage, and consequently, being the person in possession of the ship, was also the person in possession of the goods on board the ship; the shipowner who had parted with the possession of the ship, could not by law have a lien upon the goods, of which he never in law had the possession. The court held that the charterparty did not amount to a demise of the ship. The shipowner had the possession of the ship and goods for the voyage, and a lien on the goods for the stipulated hire of the ship.

Again in Campion v. Colvin,[25] the Court was of the opinion that this was the ordinary case of an owner in possession of the ship, who contracted to carry the goods to their destination, and to bring a cargo home, and was the case in which the shipowner had a lien for the hire of his ship. The delivery of the bills for payment of the hire of the ship, being held to precede the delivery of the goods, the shipowner was entitled to exercise a lien against the defendants who were the charterer's agents and stood in his place.

The courts will not hold a shipowner as having parted with the possession of his ship unless such intention is clear from the whole contents of the charterparty. In Belcher v. Capper,[26] by a charterparty, the ship was chartered for six months, to the charterer who was to have the entire and exclusive use and disposal of the whole vessel. The chaterparty gave the charterer the power of appointing his own master and requiring him to be responsible for his conduct. The freight on the goods was to be paid, according to bill of lading, to the master appointed by the charterer for his use, without any stipulation that it should be applied in payment of the hire of the vessel. The charterer becoming bankrupt, the shipowner detained the cargo for the hire due to him under the charterparty. In such circumstances, the Court held that possession of the vessel was given up to the charterer and the master was in possession of the cargo as

25 (1836) 3 Bing. N.C. 17.

26 (1842) 4 Man. & G. 502.

agent of the charterer and that no lien was intended to be reserved to the shipowner as security for the payment of the charterparty hire.

Although a shipowner can have at common law no right of lien upon the cargo without actual possession of the ship, he may expressly stipulate in the charterparty for a lien, in his favour, upon the cargo loaded on board the ship. Such an express contract renders it unnecessary to require as to relationship in which the parties place themselves by the other provisions of the charterparty. It amounts to an undertaking on the part of the charterer that whatever may be the legal operation of the charterparty, as between themselves, the charterer's possession of the ship shall be the possession of the shipowner, as far as the right of the latter to a lien on the cargo is concerned.[27]

However, if the charterparty is in the nature of Time or Voyage charterparty, the possession of the ship remains in the hands of the shipowner, and consequently it is immaterial to try to find out if the shipowner has a lien on the cargo, because he already has the possession of his ship and consequently has possession of the cargo. Therfore, it would be easier to the shipowner to exercise a lien on the cargo for his freight in the of a time or voyage charterparty.

(ii)- Possession of the Cargo:

The shipowner having the possession of the ship should also be in possession of the cargo, but it must be an authorised and continued possession, in order to require a legal right to a lien over the cargo.

a- Authorised Possession:

Unauthorised possession does not give rise to a right of lien, since no lien can be aquired by the wrongful act of the person claiming it. The doctrine of possessory lien being governed by equitable principles, the law will not construe any act to vest possession which in itself amounts to fraud.[28] There must be a

27 Small v. Moates (1833) 5 Bing. 579, see per Tindal,C.J. at P. 590.

28 See Cross, The Law of Lien & Stoppage in Transitu, (1840) P. 32.

bona fide and rightful possession and carriage of the cargo, if the shipowner is to rely on a right of lien.[29] It therefore, follows that a shipowner can have no right of lien for freight against the owner of the goods, if he, knowingly, receives them from a wrongdoer, and carries them for him.[30] In such a case the shipowner would make himself a party to the wrongful act and may not claim to have the advantage of the rule.[31]

b- Continuance of Possession:

Continuance of possession is indispensable to the exercise of the right of lien. Giving up the custody of the goods over which the right extends, necessarily frustrates any power to retain them, and operates as an absolute waiver of the lien. Therefore, the relinquishement of possession may be as follows:

1- Actual: such as the delivery of the cargo to the consignees before receiving the freight, or voluntary abandonment of the vessel and the cargo on the voyage.[32]

2- Constructive: where a party having a lien on goods, caused them to be taken in execution, it was held that the lien was destroyed although the goods were sold to himself and never removed off his premises, for possession must have been vested in the Sheriff in order to enable him to sell the goods.[33]

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29 Bernal v. Pim (1835) 1 Gale. 17.

30 Paesons, Law of Shipping, (1869) Vol. 1, P. 180; and see per Pigot,C.J. in Waugh v. Denham (1865) 16 Ir.C.L.R. 405-410; Johnson v. Hill (1822) 3 Stark. 172. But see Exeter Carrier cited by Mr. Justice Holt in Yorke v. Greenaugh (1701) 2 Ld. Raym. 866-867..

31 Johnson v. Hill (1822) 3 Stark. 172.

32 Nelson v. Association for Protection of Commercial Interests (1874) 43 L.J.C.P. 218.

33 Jacobs v. Latour (1828) 5 Bing. 130, per Best,C.J. at P. 132: "A lien is destroyed if the party entitled to it gives up his right to the possession of the goods. If another person had sued out execution,the defendant might have insisted on his lien. But Messer himself called on the sheriff to sell;ha set up no lien against that sale;on the contrary,he thought his best title was by virtue of sale. Now,in order to sell,the sheriff must have had possession;but after he had possession from Messer,and with his assent,Messer's subsequent possession must have been aquired under the sale,and not by virtue of his lien."

A lien, however, is not lost if the shipowner agrees to hold the goods on behalf of the consignee by depositing them in his own warehouse for the convenience of the consignee, to be delivered out as he should want them.[34]

B- Freight to be Due on Delivery:

It is an established rule that the common law lien for freight only arises if the agreed time for payment of freight is contemporaneous with the time of delivery of the cargo.[35] Freight being treated, at common law, as the reward for the carriage and delivery of the goods, it only became due and payable if the goods were carried to the place of destination according to the terms of the contract, and for recovery of such freight a shipowner was entitled to detain the cargo, even though the contract between the parties contained no express stipulation as to the time and the manner of the payment.[36]

Where a charterparty provides that the whole or part of the freight is to be paid in advance and before the goods have been carried, or independently of delivery, "ship lost or not lost", the question which arises is that if such a freight, becoming due, remains unpaid, then can a shipowner having carried the goods to the port of destination detain them until the freight for their carriage is paid?

The law on the subject is now considered to have been laid down by Privy Coucil in the cases of How v. Kirchner[37] and Kirchner v. Venus,[38] which dissented from the decision in Gilkison v. Middleton[39] and Neish v. Graham,[40] on this point.

The facts of the cases of How v. Kirchner and Kirchner v. Venus are almost

34 Allan v. Gripper (1832) 2 C. & J. 218.

35 See per Brett,J. in Allison v. Bristol Mar. Ins. (1876) 1 A.C. 209-225; Kirchner v. Venus (1857) 12 Moor. P.C. 361; How v. Kirchner (1856) 11 Moore. P. C. 21.

36 Black v. Rose (1864) 2 Moo. P. C. (N.S.) 277.

37 (1856) 11 Moore. P. C. 21.

38 (1857) 12 Moore . P. C. 361.

39 (1857) 2 C. B. (N.S.) 134.

40 (1857) 8 E. & B. 505.

identical. In both cases the goods being shipped under bills of lading, the freight was to be paid at the port of loading "one mounth after sailing, ship lost or not lost." The only distinction was that in How v. Kirchner, the freight was to be paid by "the shipper" while in Kirchner v. Venus the bill of lading did not so expressly provide, but it was stipulated that it should be paid to a third person at the port of loading. The freight not having been paid, the shipowners refused to deliver the goods to the assignees of the bill of lading claiming a lien on the goods for the unpaid freight.

In both cases the Privy Council held that the shipowners had no lien on the goods, as the sum claimed was not freight properly so called. The payment having been stipulated, by the contract, to be made at a fixed period having no preference to the delivery of the goods, the word "freight" was held not to have been used in the sense that would give a right of lien.[41] Lord Kingsdown, in delivering the judgement of Privy Council in Kirchner v. Venus, and adhering to the opinion of Lord Wensleydale in How v. Kirchner, said:[42]

> "A sum of money payable before the arrival of the ship at her port of discharge, and payable by the shippers of the goods at the port of shipment, does not aquire the legal character of freight, because it is described under that name in a bill of lading, nor does it aquire the legal incidents of freight. It is in effect money to be paid for taking goods on board and undertaking to carry, and not for carrying them."

He finally came to the conclusion that: "where parties, instead of trusting to the general rule of law with respect to freight, have made a special contract for themselves for a payment which is not freight, it must depend upon the terms of that contract whether a lien does or does not exist, and that when the contract made no lien the law will not supply one by implication."[43]

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41 See per Lord Wensleydale in How v. Kirchmer (1856) 11 Moore. P. C. 21-35.

42 (1857) 12 Moore. P. C. 361, at P. 390.

43 Ibid. at P. 398.

No lien , therefore, was recognised for the money which was to be paid in advance and independently of the delivery of the cargo, the sum not being treated as freight in strict sense.

In Nelson v. The Association For The Protection of Commercial Interests,[44] the freight by the bill of lading was to be paid at the port of discharge, "ship lost or not lost" . The vessel being totally wrecked on the voyage, the shipowner abandoned the adventure and took no step to save either ship or cargo. The defendants, employed by the underwriters, saved a portion of the goods and forwarded it to the port of destination. It was held that the shipowners were not entitled to a lien for the freight mentioned in the bill of lading. In the view of Brett, J. :

> "If the shippers were bound to pay the freight, whether the ship was lost or not lost, there was no lien at all, for the right to lien does not arise unless the payment of the freight is to be on delivery of the cargo; if the freight is payable without delivery of the cargo lien does not accrue."[45]

Even an express lien clause in a charterparty was thaught not to give the shipowner a right of lien in respect of the freight which was payable in advance. In Ex Parte Nyholm: Re Child,[46] a portion of the freight being made payable on signing the bill of lading gave the shipowner an absolute lien for "all freight, dead freight, and demurrage and other charges." Lord Justice James held that the money not being freight did not come within the express lien clause:

> "It was contended that the lien was created by the express clause of lien. The express clause is, however, for freight, dead freight, demurrage and other charges. It is not dead freight nor demurrage nor other charges, and it is not freight in the ordinary sense of the word. But the contention was that the word "freight" here was not to be read in the ordinary sense, but that the clause was to be read

44 (1874) 34 L.J.C.P. 218.

45 Ibid. at P. 221.

46 (1873) 29 L. T. 634.

in connection with previous clause as to the payment of freight. The £250, it is said, is there expressly stated to be payable as part of freight. Thre is some ingenuity, but, in our judgment, no substance, in this connection. It would be an unwarranted thing to lay hold of a particular form of expression in one part of a charterparty or other instrument, in order to give to plain unequivocal language in another part of the instrument a meaning different from its ordinary meaning."[47]

Before the decision of Kirchner v. Venus, however, the cases of Gilkison v. Middleton,[48] and Neish v. Graham,[49] were decided, bt the Courts of Common Pleas and Queen's Bench respectively, apparently upon a different principle.

In Gilkinson v. Middleton the ship being chartered for a round voyage, the freight was to be paid partly in advance by a bill for £900. The charterparty provided that the master should sign bills of lading at any rate of freight without prejudice to the charterparty, and that the shipowners should have an absolute lien upon the cargo for the recovery of all freight, dead freight, demurage due under the charterparty. The ship was loaded at Liverpool by the charterers as a general ship, but they themselves shipped on their own account goods for which the master signed three bills of lading at acertain rate of freight amounting altoghether to £196, being made payable in Liverpool one mouth after sailing of the vessel, "lost or not lost". The bills of lading were indorsed over, for an advance of money, to the defendants. On the arrival of the vessel at the port of destination (Singapore), the bill of lading freight not being paid and the charterer's bill given for £900 being dishonoured, the master claimed a lien on the goods for the amount. The Court of Common Pleas decided that the shipowner had, as against the consignees, a lien upon the goods shipped by the charterer for the amount of the bill of lading freight but not for £900.

47 Ibid. at P. 635.

48 (1857) 2 C.B. (N.S.) 134.

49 (1857) 8 E. & B. 505.

Cockburn, C.J. said:

> "The cargo being expressly made liable for all freight due under the charterparty, it follows, that, on the arrival of the ship at Singapore, there was £900 due for freight, for which the cargo was liable. If matters had so remained, the owners clearly would have had a lien for that £900. But they have by their master become parties to the bills of lading making the goods deliverable to the cosignees on payment of certain specified freight; and the defendants have made advances upon the faith of those bills of lading. The owners, therefore, have, by their own act, placed third parties in a situation in which they would sustain prejudice by their insisting on the full right to which they would otherwise have been entitled. That being so, it seems to me that the utmost the plaintiffs can be entitled to recover as against the consignees, is the freight mentioned in the three bills of lading; and for that sum, and that sum only, they are entitled to the judgment of the court."[50]

Crowder, J. also was of the opinion that as between the shipowners and the charterer, the former would be entitled to a lien for the unpaid advance freight. It formed, he said, a portion of the freight for which by express agreement the lien was to attach.[51]

The case of Neish v. Graham,[52] proceeded entirely upon this authority, while there was no express clause giving the shiponer a lien. The goods being shipped at Glasgow, under the bill of lading, were consigned to the defendants abroad. Freight for the goods was to be paid by the "shipper" , one mounth after sailing, "ship lost or not lost" . The bill of lading was handed over to the defendants at Glasgow, who made an advance to the shipper. The shipper not paying the freight, the master refused to deliver the cargo without payment of the freight. The Court of Queen's Bench considered the case of Gilkinson v. Middleton to be exactly in point. Lord Campbell, C.J. said:

> "It might have been argued that though there is always a lien where it is not waived, yet there is such a waiver when the freight is to be paid at the port of shipment within a mounth from the sailing of the

50 (1857) 2 C.B. (N.S.) 134-153.

51 Ibid., see P. 154, see also perCresswell and Willes,JJ. at P. 154.

52 (1857) 8 E. & B. 505.

ship. But we find that the Court of Common Pleas, in a case quite in point, has decided otherwise: and I am not at all prepared to disagree with them."[53]

The cases of Gilkinson v. Middleton and Neish v. Graham, have not been overruled by any English case, but they have not been regarded as authority.[54] On the other hand, the principle laid down by the Privy Coucil has been supported by both text book writers,[55] and by subsequent cases.[56]

The rule as to lien, laid down by the Privy Coucil in Kirchner v. Venus, may have been correct at the time, when it was thought that the freight and advance freight were different.

But there are a number of cases disapproving the dicta of Lord Kingsdown in that case, as to the meaning put upon the term "freight". It is now clear that the view was incorrect and that the "freight" whether used in respect of advance freight or otherwise, always has the same meaning.[57] As freight payable in advance is still a remuneration for the carrige of the goods and not, as was thought, for taking the goods on board and undertaking to carry them, therefore the mere fact that by an express agreement of the parties it was to be paid in advance should not deprive the shipowner from his security for its payment. It is a freight due and unpaid atthe time delivery of the cargo, and it seems most unfair for the shipowner who has fulfilled his obligation under the contract by carrying the goods to the port of destination, not to be allowed to have the

53 Ibid.at P.511, Coleridge and Wightman and Erle,JJJ. agreed with him.

54 See Abbott,(1901) 14th ed., P. 345; Maclachlan,(1932) 7th ed., P. 426; Scrutton,(1974) 8th ed., P. 381.

55 See Maclachlan,7th ed., P. 426; Maude &Pollock, (1881) 4th ed., P. 394; Stephens, The Law Relating To Freight ,(1907) P. 188; Scrutton,18th ed., P. 381;Abbott,14th ed., P. 356,where it states that "Kirchner v. Venus may be regarded as a decision of unquestionable authority so far as it deals with lien for freight." But see Carver,12th ed., P. 1335,where he doubts the correctness of the rule.

56 See Ex P. Nyholm, re Child (1873) 29 L.T.634; Nelson v.Association for Protection of Commercial Interests (1874) 43 L.J.C.P.218; Tamvaco v. Simpson (1866) L.R. 1C.P. 363; Gardner v. Trechmann (1884) 15 Q.B.D. 154.

57 See Allison v. Bristol Mar. Ins. (1876) 1 A.C.209; Weir v. Girvin (1900) 1 Q.B. 45-52.

advantage of the common law lien for remuneration for their carriage; considering the principle that such a lie always exists in favour of the shipowner unless it waived either expressly, or impliedly, by entering into an agreement inconsistent with the right of lien.

The question remains as to whether the cases of Gilkison v. Middleton and Neish v. Graham may be treated, at the present, as authoroties? The former case may be supported, since as between the charterer and the shipowner, the charterparty expressly gave a lien for all freight due under the charterparty. As against the charterer, the shipowner would have been entitled to a lien for unpaid freight. It seeme that it was upon this distinction that in Tamvaco v. Simpson,[58] Mr Justice Willes, who was the member of the Court which decided Gilkinson v. Middelton, said that although in Kirchner v. Venus, the Privy Coucil thought that they were acting in opposition to Gilkinson v. Middelton, in truth they were not.[59]

As against the bill of lading holders, the lien could be enforced, since they were also the consignees named in the bill of lading who were, by the terms of the bill of lading, to take delivery of the goods paying freight for them "one mounth after sailing of the vessel". There seem to be no inconsistency in exercising a lien against a person who was to the freight in advance but has failed to do so.

As regards the case of Neish v. Graham,[60] the case does not seem to be supportable as an authority on the subject. The freight by the bill of lading being made payable by the shipper, one month after saling, the bills of lading were indorsed to the defendants, abroad who made advances to the shipper, upon the faith of the statement in the bill of lading. The arrangements as to the payment of freight and the dealing with the bills of lading do not seem to be consistent

58 (1865) 19 C.B. (N.S.) 453.

59 Ibid., see P. 466.

60 (1858) 8 E. & B. 505.

with the right to exercise a lien against such indorsees.

Extent of Lien at Common Law:

The right of lien which arises from the common law is cinfined to the shipowner's charges payable for the carriage of the particular cargo.[61] That is to say the lien recognised in favour of the shipowner by common law is a particular or specific lien, as opposed to general lien, which is a right to detain the goods, not only for the freight of the particular cargo,but for other freights due upon other transactions.[62] The latter, as pointed out by Lord Ellenborough, C.J. in Rushforth v. Hadfield,[63] being an encroachment upon the common law right of the subject, and therefore not encouraged by the courts.

In the absence of an express contract between the parties, or some usage of trade, or evidence showing that such was their common mode of previous dealings, the courts dicourage further extension of such general privilege and any right beyond the specific lien to which parties are entitled at common law.[64]

The specific lien of a shipowner extends to all goods of a particular shipment, consigned to same person on the same voyage, for the freight due on some or all of them. It is immaterial that the goods are carried under different bills of lading, as long as they have not been indorsed to different persons.

The principle was established as far back as 1796 by the unreported case of Sodergren v. Flight, which was cited in the argument in Hanson v. Meyer.[65] There a cargo of tar and iron was loaded on the plaintiff's ship and was consigned to H, who held two bills of lading for it. The defendants, before arrival

61 See per Lord Buckmaster,L.C. in U.S. Steel Products Co. v. Great Western Ry. (1916) A.C. 189-196.

62 Ibid., see P. 196.

63 (1805) 6 East 519-526.

64 See Cross (J.), The Law of Lien, P.15; Rushforth v. Hadfield (1805) 6 East 519.

65 (1805) 6 East 622.

of the ship, purchased all the tar from H, and gave him their acceptance for the value, including freight which was to be paid by H., who indorsed the two bills of lading to the defendants or their order, one of which was for tar alone, and the other for certain barrels of tar and a quantity of iron. H, sold the iron to C, and for this purpose obtained from the defendants the possession of the bill of lading which included the iron, and delivered it to C. Upon the arrival of the ship and after delivery of part of the cargo of tar ,H, stopped payment; the master refused to deliver the remaining tar to the defendants unless the would pay the freight not only for what remained but of what have been already delivered.

Lord Kenyon decided that the master was entitled to recover the whole amount of the freight for the tar. His Lordship being of the opinion that the master had a lien on the tar remaining on board for the whole freight, as well as the freight of the goods delivered as of those remaining on board, belonging all to the same person and under one consignment. But he pointed out that if H, had sold the tar to different persons, the master could not have made one pay for the freight of what have been delivered to another.

Threfore, as delivery of part of the cargo will not defeat the lien the remainder for the whole freight, then a shipowner will not be bound to retain the whole cargo until he is paid for its carriage, but if he delivers part of the goods without receiving the freight in respect of them, then he will still be entitled to retain the remaining cargo until he is paid for the whole freight,[66] unless the bills of lading in respect of such goods are in the hands of different persons, or the goods have different destinations.[67]

As a conclusion to the lien of the shipowner in the common law, one might that the common law does recognise a lien for the carrier on the cargo for the

66 See Black v. Rose (1864) 11 More. N.S. 277, see also Perez v. Alsop (1862) 3 F.&F. 188,where it was held that the lien of a shipownerfor freight,being entire,is not lost or waived by allowing part of the cargo to be taken away on payment of a portion only of the freight,without some contract with the authority of the shipowner.

67 Bernal v. Pim (1835) 1 Gale. 17.

payment of his freight. This lien is in the nature of a possessory lien. Thus, Blackburn, J. held in, Hingston v. Wendt:[68]

> "... The case is very analogous to general average and to salvage, in both of which there is a lien. It is just and convenient that there should be such a lien, and what scanty authority we can find all points in the direction of there being a lien, and we think that we must hold that there is one ... ."

Therefore, where the shipowner performs his obligation by carrying the cargo, he is entiled to a lien because he rendered a service to the cargo and which increased its value by carrying it to its destination. Moreover, Lord Kingsdom, in Kirchner v. Venus,[69] stated that :

> "... The right of lien may arise either by implication of law, or by express contract between the parties. Freight is the reward payable to the carrier for the safe carriage and delivery of the goods; it is only payable on the safe carriage and delivery; if the goods are lost on the voyage, nothing is payable. On the other hand, if the goods are safely carried, the Master of ship has a lien on the goods for the amount of the freight due for such carriage,and cannot be compelled to part with the goods till such freight be paid. These incidents to freight exist by rule of law, without reference to any bill of lading, or other written contract between the parties."

2- Express Terms of Charterparty:

Where there is an express agreement between the parties, the shipowner has a lien on the cargo, given to him by the express contract for the carriage of goods. Thus, the right of lien, by express contract of the parties, may be extended so as to apply to claims which are not covered by the common law lien.[70] So there is no lien at common law for any charges than those mentioned previously. The shipowner has therefore at common law no lien for freight not

68 (1876) 1 Q.B.D. 367. at P. 373.

69 (1859) 12 M 10 PC 361. at P. 959.

70 Clauses are frequently inserted in charters which expressly give a lien on the cargo for freight, and also for dead freight, and for demurrage.

payable on delivery, for deadfreight, for demurrage or damages for detention, for pilotage or any other charges which the shipper has agreed to pay, for freight due on previous voyages or for any other debts due to the shipowner. Any such lien must be created by special contract,[71] and is then valid and enforceable. Thus, there may be a lien by agreement for advance freight, dead freight or demurrage at the port of loading or discharge, including unpaid freight due in respect of previous voyages and strike expenses.[72] Therefore, most of the charterparties give to the shipowners a lien on the cargo for the garantee of payment of freight. For instance, the New York Produce Exchange (NYPE) form of time charterparty, provides in its' clause 18, that:

> "That the owners shall have a lien upon all cargoes and sub-freights for amounts due under this charter...,"

and the Baltime Uniform Time Charter reads in its clause 18 as follows:

> " 18. Lien .
> The owners to have a lien upon all cargoes and sub-freights belonging to the Time-Charterers and any Bill of Lading freight for all claims under this charter, ..."

For the nature of this lien, it depends on the situation of every case. Thus, it seems clear that in a time or voyage charterparty or bill of lading, this is a contractual creation of a possessory lien. In the case of a demise charter it is difficult to escape the conclusion that, if anything, it would be an equitable lien. It would not be a lien amounting to a possessory lien as the owner would have no power to prevent delivery and it is only as an equitable lien that such a clause makes sense in the context of a demise charterparty. However, to better understand the nature of the shipowner's lien on the cargo for guarrantee of payment of freight, it would be best to have a look at most of the cases which

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71 Birly v. Gladstone (1814) 3 M & S 205 ; Gladstone v. Birly (1817) 2 Mer 401.

72 See, Halsbury's Laws of England. 4 th ed, vol 43; para 691 at p. 479; also Scrotton on Charterparties , 17 th ed , at p. 376, and Carver on Carriage by Sea. 13 th ed, at para 2010.

were laid down about this point.

Thus, in English law liens may be granted by the common law, by equity, by statute or by contract. The liens of the owners over the cargoes, given by cl. 18 of the New York Produce Exchange form in line 110 or line 126 of the Baltime form cl. 18 as well, is a contractual lien only. It has not independent root in common law, equity or statute.[73] Consequently, it creates a right only as between the parties to the contract in which it is contained.

By looking at the different contracts which are drawn between charterers and shipowners in the form of charterparties, and by looking at the different clauses which give a lien to the shipowners on the charterers' cargoes, one might say that the lien given by clause 18 of the New York Produce Exchange form and cl. 18 of the Baltime form is a possessory lien, the owners' right being to retain possession of the cargo until monies owed to them by the charterers have been paid. In Hammonds v. Barclay,[74] Grose, J., said:

> " A lien is a right in one man to retain that which is in his possession belonging to another, till certain demands of him the person in possession are satisfied."

This accurately describes the nature of the owners' lien upon cargo, which is in their possession by being on their ship. However, one must notice that the situation is different in the case of demise charterparty, which is the only exception where the cargo is not in the owners' possession. Therefore, in the case of voyage or time charterparty the shipowner has possession of the ship and therefore, of the cargo and he can exercise his lien by detainaing the cargo until his claims are satisfied, which are mainly and in most of the cases the payment of his freight.

In the "Cebu",[75] it was held that the owners had a lien for their freight,

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73 Michael Wilford. Terence Coghlin. Nicholas J. Healy, Jr. John Kimball. Time Charters. 2 nd edition. 1982. at p. 332.

74 (1802) 2 East 227.

75 [1983] Q.B. 1005.

where by a time charterparty in the form of the " NYPE " form, the shipowners' vessel was chartered to charterers, sub-chartered to sub-charterers, and sub-sub-chartered to sub-sub-charterers. Clause 18 of the charterparty provided that: "the Owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this charter."

After a dispute arose between the owners and the charterers regarding the hire payable, the owners sent a telex to the sub-sub-charterers purporting to exercise their right to a lien and requiring the sub-sub-charterers to pay to the owners direct any hire payable by them to the sub-charterers under the sub-sub-charter. The sub-sub-charterer issued a summon seeking the court's determination of the question whether the hire due from them should be paid to the owners or to the sub-charterers. The sub-charterers contended (i) that cl.18 was only intended to give a lien on sub-freights earned by a voyage charter and did not apply to sub-hire earned under a time charter...

It was held by Lloyd. J. , that the owners had a lien for their remuneration for the use of their vessel, for the following reason that:

> "On its true construction cl.18 of the charterparty gave the owners a lien on any remuneration earned by the charterers from their employment of the vessel, whether by way of voyage freight or time charter."

Thus, in the common law the shipowner has a lien for the carriage of goods on his ship, then at common law a lien for freight if payable contemporaneously with the delivery of the goods. However, the parties to the contract of carriage of goods by sea which is usally mentioned in a charterparty, the parties agree that the shipowner will have a lien on the goods for the payment of his freight.

Thus, in the "Aegnoussiotis"[76], the owners let their vessel Aegnoussiotis to the charterers for a St.Lawrence round voyage, and that agreement was by a time charter in the " NYPE " form, where by cl.5. , the payment of the said hire

76 [1977] 1 Lloyd's Rep. 268.

was to be made in London in cash ... monthly in advance, and for the last month or part of the same the approximate amount of hire, and should the same not cover the actual time, hire is to be paid for the balance day by day as it becomes due, if so required by Owners... otherwise failing the punctual and regular payment of hire ... or any breach of this charter-party the Owners shall be at liberty to withdraw the vessel from the service of the charterers... .

Moreover, the charter provided in clause 18, that ' the owners shall have a lien upon all cargoes and all sub-freights for any amounts due under this charter...'

While the vessel was discharging, a dispute arose as to whether any if so how much hire was due. Hire had been paid until a certain period but not after. So, the owners told the charterers that the master would be instructed to stop discharging unless the hire was paid in full. Hire was not paid and consequently discharging stopped. The owners contended that they were entitled to take this course since they were (a) cancelling the charter or (b) temporarily withdrawing the vessel or (c) exercising a lien on the cargo in accordance with the provision of the charter.

It was held by Donaldson, J. , that: the owners had a lien upon all cargoes and hire continued to be payable during the discharging period. Moreover, he said about cl.18: that :

> " I have come to a different conclusion. In my judgement, cl.18 is to be construed as meaning what it says, namely, that the time charterers agree that the owners shall have a lien upon all cargoes."[77]

So, every time that a charterparty cleary gives the shipowner a lien on the cargo for the garantee of payment of his freight, the shipowner has a lien, i.e., the right to detain the cargo until the freight is paid, and the freight does not have to

77 The " Aegnoussiotis "[1977] 1 Lloyd's Rep. 268 at p. 276.

be contemporaneously with the delivery of the goods like the common law lien for freight. However, if the parties agree that the payment of freight has to be made after delivery of the cargo to the consignee, here, the shipowners lose their lien on the cargo for freight because, the cargo is no more in their possession, and because the only way to exercise that lien is by detaining the cargo in their possession. Nevertheless, everytime that the parties agree to give the shipowner a lien on the cargo, the latter is entitled to retain the cargo until his freight is paid.

Therefore, in the Nanfri,[78] Lord Russell of Killowen,[79] defines the nature of this lien as:

> "The lien operates as an equitable charge on what is due from the shippers to the charterers, and in order to be effective requires an abilitiy to intercept the sub-freight (by notice of claim) before it is paid by shipper to charterer" ...

Moreover, in the "Miramar",[80] it was held that the shipowners were entitled to exercise a lien on the cargo for the sums they were claiming.

By a charterparty dated May 19, 1980, the plaintiffs let their vessel Miramar to the charterers, S.E.A. Petrochem Pte. Ltd. (Petrochem) for a voyage from Singapore to one safe berth, Haldia or Calcuta. The charter was on the Exxonvoy form. The charter was subsequently amended so as to give the charterers the options of discharging at one safe port in Sri Lanka. Among the different clauses of the charterparty, there was cl.21 which gave the owners a lien on the cargo by providing that:

> "The owners shall have an absolute lien on the cargo for all freight, dead freight, demmurage and costs, including attorney fees, of recovering the same, which lien shall continue after delivery of the cargo into the possession of the charterer or of holders of any bills of lading covering the same or of any storageman."

78 Federal Commerce and Navigation Ltd v. Molena Alpha Inc and Others. The Nanfri, The Benfri, The Lorfri. [1979] 1 All E R 307.

79 Ibid, at p. 318.

80 The "Miramar" [1983] 2 Lloyd's Rep. 319.

The vessel arrived at Trincomalee but was kept wating for a time and was then diverted to Madras in consideration of additional freight. The vessel was however kept waiting at Madras and was then sent back to Trincomalee. On the second occasion the vessel entered Trincomalee and began to discharge, and then a substantial sum was due by way of demurrage under the charter. The plaintiff made repeated demands that this should be paid by Petrochem or by the defendants. The defendants denied liability, and therefore, the plaitiffs purported to exercise a lien by witholding d elivery to shore tanks. The deadlock was ultimately resolved by an agreement between the plaitiffs and the defendants recorded in a letter dated July 11, 1980, and upon the execution of the agreement the lien was lifted and discharge was completed. Among the different issues which arose for decision are the following: ... (b) - if the plaitiffs had no contractual claim against the defendants, were they nevertheless entitled to exercise a lien on the cargo in respect of the demmurage under the charter? (c)- were the plaitiffs entitled to recover either by virtue of a direct contractual right or through the medium of cl.21 (the lien clause) and the agreement of July 11, in respect of certain expenses incurred during the second call at Trincomalee?

It was held by Mustill, J. , that, the plaitiffs were entitled to exercise a lien against the defendants in respects of sums accrued due by way of demurrage, and he said:

> "Here, at least, there is in my view no room for doubt. Looking first at the presumed intention of the draftsman, one sees that the clause is designed to create a lien over the 'cargo' ."[81]

Thus, in most of the cases the shipowner who had the cargo in his possession was allowed to detain the cargo until his claim is satisfied. Therefore, it seems clear that in a time or voyage charterparty or bill of lading this is a contractual creation of a possessory lien. In the case of a demise charter it is

81 Ibid, at p. 324.

difficult to escape the conclusion that, if anything, it would be an equitable lien akin to a possessory lien (as held in the case of a time charterer's lien on the chartered ship) as the owner would have no power to prevent delivery because the possession of the vessel and therefore the possession of the cargo passed to the charterer's possession. So, it is only an equitable lien that such a clause makes sense in the context of a demise charterparty.

However, one might ask himself about the basis of the nature of this lien, and therefore, one might say that this lien can be described as an equitable lien given to the shipowner for the services he rendered to the cargo, because these services have increased the value of the cargo and that by carrying it from one place to another, therefore, its's merchantable value has increased. Here, the case is treated in the French and Algerian Civil Codes,[82] under the heading of the unlawful enrichment. However, English law does not consider the theory of unlawful enrichment to justify the case of recompense and therefore the lien, but, on the contrary, Scots law does recognise that theory.

The theory of "unjustified enrichment":

In 1951 Lord Porter observed in an English appeal:[83]

> "The exact status of the law of unjust enrichment is not yet assured. It holds a predominant place in the law of Scotland and, I think of the United States, but I am content ... to accept the view that it forms no part of the law of England."[84]

The priciple of recompense is defined in Bell's Principle,[85] as follows:

> "Where one has gained by the lawful act of another, done without any intention of donation, he is bound to recompense or indemnify that other to the extent of the gain."

82 French Civil Code, Article 1375, and the Algerian Civil Code, Article 141.

83 Reading v. Att. Gen. [1951] A.C. 507. at pp. 513-514.

84 Smith.T.B. A Short Commentary on the Law of Scotland.(1962). p. 623.

85 § 588;

This is, however, not an adequate definition, as has been pointed out by Lord President Dunedin in Edinburgh Tramways v. Courtney.[86] Not every consequential benefit which accrues to A by reason of B's efforts or misfortunes will entitle B to a claim against A in recompense.[87] For instance, if a proprietor or tenant heats his house in such a way that his neighbour enjoys the benefit, the fact that he does will not found a claim for recompense.[88] Moreover, Erskine describes recompense as an obligation " by which a person who is made richer through the occasion, or by the act of another, without any purpose of donation, is bound to indemnify that other."[89] The case of unlawful enrichment or recompense is a question of circumstances according to the circumstances of each case as to whether equity does or does not found the claim. The obligation is "founded on the consideration that the party making the demand has been put to some expense or some disadvantage there has been a benefit created to the party from whom he makes demand of such a kind that it cannot be undone."[90]

The opinion has been expressed,[91] that the expense or disadvantage to the claimant is one which must have been incurred under or in consequence of some misconception as to his legal position or rights. "The second rule is that where a party in error but in bona fide has expended money, and another steps in and takes the benefit, equity requires not that he shall be reinbursed, but that the other shall pay him in quantum lucratus."[92]

So, in most of the cases, where a person has rendered services or expended money without any intention of donation and then another person gets the benefit. The one who benefitted from the act of the person who expended

86 1909 S.C. 99 at p. 105.

87 Kames, Equity, 4 th ed., p. 101 et seq.

88 Edinburgh and District Tramways Co v. Courtney, per Lord Pre Dun (supra 86).

89 Encyclopedia of the Laws of Scotland . vol. 12. 1931. p. 342.

90 Per Lord Pres. Inglis in Stewart v. Stewart, 1878, 6R. 145.

91 Encyclopedia of the Laws of Scotland . vol. 12. 1931. at p. 343.

92 Buchanan v. Stewart, 1874, 2R. 78, per Lord Neaves at p. 81.

money or rendered services, must reimburse the latter to the extent of the expense or service which the claimant has made and, this theory is supported by the principles of justice and equity.

However, the application of this principle to this case is quite difficult and the different lawyers and authors might not agree with the application of this theory in this case, that is because, it is general principle that where parties' relations are regulated by contract a claim founded on recompense is incompetent,[93] unless the contract has been frustrated, reduced, or so completely departed from as to make it inapplicable as the basis of remuneration.[94]

However, if one looks back to the case of the shipowner whose ship was used to carry goods under a contract of carriage of goods by sea in the form of a demise charterparty, in this case the shipowner has not got the possession of his ship, and therefore not the possession of the cargo. Therefore, it is very difficult or almost impossible for him to exercise his lien, in this case, it would best for the interest of the shipping trade to give the shipowner an equitable lien on the basis of unlawful or unjust enrichment.

In Hingston v. Wendt,[95] a "lien" was given for work done affecting goods by a person lawfully in possession of them.

A vessel having gone ashore with a cargo on board, the plaintiff, a ship agent, was put in possession of the ship and cargo by the captain, with authority from the captain to do, as his agent, what was for the benefit of all concerned. The plaintiff did work and expended money in discharging the cargo, and brought it to a place of safety, where he took possession of it. The hull broke up,

93 Walker. David M. The Law of Contracts, and related obligations in Scotland., London Butterworths 1979. at p. 544.

94 Small v. Potts (1847) 9 D 1043; A/S Heimdale v. Noble 1907 SC 249;
Mackenzie v. Baird's Trustees 1907 SC 838; Mackay v. Lord Advocate 1914 1 SLT 33;
Boyd and Forrest v. Glasgow and South Western Rly Co. 1915 SC (HL) 20.

95 Hingston v. Wendt. (1876). 1. Q. B. D. p. 367. see per .

and became a wreck.

It was held, that the plaintiff had a lien on the cargo for his charges as against the owner, though such charges were incurred without authority from the owner, the claim being analogous to that for general average or salvage.

This case was not a case of general average nor of salvage, but the ship agent was given a lien on the cargo for the expenses he made to save the cargo, because saving the cargo means saving its' value and, because the ship's agent saved the value of that cargo he must be entitled to a lien for his own expenses, and that because according to the principles of justice and equity, no one is entitled to benefit from the work of another without compensating the latter. This is what is called the "unlawful enrichment" .

Therefore, where there is general average or salvage, there is always a lien for saving the cargo. So, on the basis of this argument, everytime that work has been done affecting goods by a person lawfully in possession of them, he is entitled to a lien, and it is immaterial whether it is for general average or salvage.[96]

However, the case of the shipowner in the case of a demise charterparty is different from that of the one who rendered services to the cargo like in the case of salvage or general average, bechause the shipowner in the first case did not render any services, he has merely offered his ship to be used against the payment of a remuneration. Moreover, even if he is given a lien on the cargo it is quite difficult or almost impossible for this shipowner to exercise his lien on the cargo, because it is a well known fact that the possession and control of the vessel and therefore of the cargo pass altogether to the possession of the demise charterer. Therefore, the shipowner stays without any garantee for the payment of his freight and, this is not accepted neither by the principles of justice nor those of equity. Thus, it would be in the interest of the shipping trade

96 See, Nicholson v. Chapman. 2 H. Bl. 254. and, Castellain v. Thompson. 13 C.B. (N.S.) 105 ; 32 L.J. (C.P.) 79.

and in the interest of the shipowner, to give the shipowner whose vessel has been demise chartered a prefered claim or right over the goods of the charterer, and that by enabling him to have the cargo arrested into a third party's hands until his freight is paid, and a right to trace the goods into whosever hands they might fall, and that in the case where the charterer tries to defraud the shipowner by passing the goods into a third party's possession. However, this right must not be absolute, otherwise the shipowner might abuse of his right and that will cause an inconvenience to the demise charterer. This can be possible if the right of the shipowner is only exercised by the court everytime that the shipowner claims the payment of his freight.

3-1-2- The Nature of the "Privilege" on the Cargo for Payment of Freight in Civil Law Jurisdictions.

After having discussed the nature of the shipowner's lien on the cargo for the guarantee of payment of his freight, it is worthwhile looking at the opinion of the civil law jurisdictions, namely the French and the Algerian law, so that we can compare the common law opinion with that of the civil law jurisdictions.

In the common law the nature of the shipowner's lien on the cargo, is considered as a type of possessory lien, because the shipowner can retain the possession of the goods while they are in his possession or in the possession of the captain who acts as an agent of the shipowner in the case of a voyage or time charterparty. However, the situation is different in the case of a demise charterparty, where by the nature of this charter the possession and control of the ship have passed to the charterer.

Therefore, the shipowner cannot retain the goods, that is because they are not in his possession, but are in the possession of the charterer who has the possession of the ship. In this case, one might say that the shipowner has an equitable lien, because equity does not allow anyone to benefit from the loss of

another without compensating that one who rendered services or whose thing has been used without any intention of donation.

Because this work is intended to be comparative, we shall compare the view of the common law with that of the civil law. First, we must look at the nature which the civil law accords to the shipowner's lien or "privilege" on the cargo for the guarantee of payment of freight.

The civil law jurisdictions know what is known as "privilege" and the common law jurisdictions know what is called "lien", and therefore, it would be worth to define the "privilege" of the civil law jurisdictions before trying to define its' nature.

Definition and Content:

In the French and Algerian maritime law, the guarantee for payment of freight is guaranteed by a privilege. This privilege or lien, or right of priority is accompanied by a right of consignation and a right of sale; these last two rights guarantee the first. It is therefore, this privilege or right of priority which characterises the civil law system. What the French legislator means by "privilége" is defined in article 2095 of the civil code as follows : "Le privilége est un droit que la qualité de la créance donne a un créancier d'être préféré aux autres créanciers, même hpothécaires.æ , i.e., " The right of priority is a right given by the quality of the debt to a creditor to preferred to the other creditors, even mortgagees."

The Algerian civil code gives to the term "pivilege" quite a similar definition, where it defines it in its' article 982 as : " Le privilége est un droit de préférence concédé par la loi au profit d'une créance détérminée en considération de sa qualité. " , i.e., " The right of priority is a right to be preferred given by the law to the benefit of a well determined debt and that in consideration of its' quality." . This general definition which aims all the right of priority in the French and Algerian law, cannot be applied to the maritime law. In fact, Ripert said that: " it

is not the quality of the debt which gives to the creditor a right to be preferred, but the relationship between the debt and the maritime venture".[97]

Since then, if one wants to apply the definition of the article 2095 of the French civil code and 982 of the Algerian civil code to the maritime law, it must be precised that: "The maritime right of priority is a right that the relationship between the debt and the maritime venture gives to the creditor to be preferred on the other creditors."[98]

This is a wide and very general definition. The legislator in giving the conditions of exercise of the "privilege" or the right of priority on the goods, forgot to define this institution. Even the enactment or order of Colbert, the code of commerce and the French law of 1966 were all silent about this point. This is however, not astonishing, if we consider that the legislator only uses this term to define a group of rights which are very different in their nature and existing, either on the vessel, or the cargo, or even on the freight.

Therefore, we will not be surprised by the use of the term "privilege" which in itself is not enough to define a particular legal institution, and which aim and meaning are different from one case to another. We must therefore, focus on the "privilege" of the shipowner and the carrier, as being in principle and in a general way, the right to be preferred for the payment of his freight on the goods. Therefore, from this principle comes the right of depositing the goods and therefore, their sale. The jurisprudence uses very often the terms <<droit de sequestration>>, i.e., " the right of sequestration ".[99] Thus, it is a matter of a

97 Ripert Georges, Droit Maritime, 4em ed. , Vol. Paris, 1952, p. 67.

<< ce n'est pas la qualite de la creance qui lui donne (au creancier) un droit preferentiel, mais bien plutot le rapport entre la creance et l'expedition maritime >>.

98 << Le privilége maritime est un droit que le rapport entre la créance et l'expedition maritime donne a un creancier d'etre prefere aux autres.>>. It is this "relatioship"that Cleirac was stating in the old saying : << le bastel est affecte a la marchandise et la marchandise au bastel. >> , i.e., " the ship is obliged or bound towards the cargo and the cargo towards the ship. " Francis Schertenleib. Le Fret, la Garantie de son Paiement. Geneve 1971. at p. 60.

99 See, the judgment or the decision of the court of appeal of Rouen, 3 novembre 1950, Le Droit Maritime Francais, Paris, 1951, . 124.

special <<procedure>> which has for aim to insure the exercise of the privilege. Here, it is very interesting to state the observation of Ripért,[100] who writes the commentary:

"quand on déclare que le droit français refuse au capitaine le droit de rétention, il faut bien préciser le sens de la disposition légale. Le capitaine n'est pas obligé de se fier a la promésse du déstinataire; il peut, s'il le veut, demander la consignation; or, la consignation n'est pas autre chose que la rétention exércée par l'intermédiaire d'un tiers", i.e., " when we declare that the French law refuses to the captain the right of retention, we must precise the meaning of the legal provision. The captain is not obliged to trust the promise of the consignee; he can, if he wants to, order for the consignation or the deposit; because, the consignation or the deposit is nothing else that the retention which exercised through a third party. "

However, the right to deposit the goods has for consequence the right to ask for the sale of the goods by authority of the law. This right however, has never been absolute. The sale cannot take place, unless it is judged necessary, and the presiding judge will have to consider the interests of both parties of the litigation.[101] Therefore, just as the deposit or the consignation, the right to ask for the sale is considered as a special means for the recovery of the freight.[102]

However, we must consider that these two means from which the "privilége" or right of priority of the shipowner is born, have essentially a procedural character.

The Legal Nature of this " Privilége ":

Many writers tried to define the legal definition of this "privilége", i.e., the right of priority which guarantee the payment of the freight. It is necessary to remember that the French amendment of 1966 makes a distinction between

100 Ripert G. , op. cit. , note 1, p. 554.

101 Bleinc Pierre, De la consignation en main tierces des marchandises arrivant par mer, Marseille, 1933, p. 19.

102 Denisse Leon, Du fret considere avec ses rapports avec l'abandon, l'affretement, la contribution aux avaries communes et les assurances maritimes, Paris, 1891, p. 308.

contracts of affreightment and contracts of carriage. However, the institution which guarantees the payment of freight has remained the same in its' principles, whether it is concerned with the guarantee of the dept of the shipowner or the dept of the carrier. Therefore, the different comments made by the commentators of the code of commerce keep all their value under the new law. The guarantee for payment of freight under a charterparty is defined in article 2 of the code of commerce (which includes the maritime law),[103] : "Le fréteur a un privilége sur les marchandises pour le paiement de son frét", i.e., " The shipowner has a right of priority over the goods for the payment of his freight " , and we must remember that this provision concerns all the different types of affreightment including the hire of the ship.[104]

On the other hand, the Algerian Maritime Code,[105] defines it in its' article 645 as follows : "Le fréteur a un privilége sur les marchandises pour le paiement de son frét et autres charges prévues au contrat d'affrétement", i.e., " The shipowner has a right of priority over the goods for the payment of his freigh and other charges provided by the contract of affreightment ". However, one might notice that the Algerian legislator brought quite a similar definition to that one of the French legislator, and that may be because of historical reasons. When it comes to the carrier, his right of priority is defined by article 23 of the same French law,[106] which provides that : "Le capitaine est préféré, pour son frét sur les marchandises de son chargement, pendant la quinzaine aprés leur délivrance si élles n'ont passé en mains tiérces", i.e., " The captain is preferred for his freight on the goods of his cargo, during the fifteen days after their delivery, unless they have passed to the hands of a third party." Moreover, his right of priority is stated in article 24 which provides that : "En cas de faillite ou

103 Loi No 66-420 du 18 juin 1966, sur les contrats d'affretement et de transport maritimes.

104 Francis Schertenleib. Le Frét, La Garantie de son Paiement, Geneve, 1971, at p. 62.

105 Ordonnance No 76-80 du 23 Octobre 1976 , Portant Code Maritime.

106 See . Supra, n 103.

d'admission au réglement judiciaire des chargeurs ou réclamateurs, avant l'éxpiration de la quinzaine, le capitaine est privilégie sur tous les créanciers pour le paiement de son frét et des avaries qui lui sont dues" i.e., " In the case of bankruptcy or the admission into liquidation of the shippers or claimants and before the expiration of the fifteen days, the captain is preferred over all the creditors for the payment of his freight and the damages which are due to him."

When it comes to the Algerian Maritime Code,[107] the Algerian legislator like the French legislator gave to the carrier a "privilege" or a right of priority, and that might be the result of some historical reasons. Thus, the Algerian Maritime Code in its' article 792 in the section for the execution of the contract of transport of goods, provides that : "Le transporteur peut refuser de livrer les marchandises et les faire consigner jusqu'a ce que le déstinataire ait payé ou qu'il ait fourni caution de tout ce qui est due pour le transport de ces marchandises ainsi qu'a titre de contribution d'avarie communes et de rémuneration d'assistance" i.e., " The carrier can refuse to deliver the goods and to have them deposited until the consignee has paid or given a security or a deposit for all what is due for the carriage of these goods, for general average and for the remuneration of salvage."

However, as unfortunate as it might appear, the legislator who makes a distinction between the " the chartering of the ship " (art 1 to 14 inclus of the French law) and "the carriage of goods" (art 15 to 32 inclus), does not apply to the first category of contracts certain rules which he applies to the second category; and the drafters of the decree of december 31 st 1966, did not correct this mistake.[108] Therefore, it is very important to distinguish here, two kinds of preferred creditors, [109] preferred creditors for what is called " the hire of the

107 See, Supra, n 105.

108 Michel de Juglart. Le Privilége du Transporteur Maritime. Droit Maritime Francais. 1975. p. 579,580.

109 Ibid, at p. 580.

ship " and, for what is called "the price of transport ."[110]

Here, it is worthwhile taking the French code of commerce first and then, the Algerian maritime code, because although they provide a quite similar " privilége " or right of priority for the guarantee of payment of freight, they differ about some provisions.

Therefore, the carrier in the French law, cannot keep his right of priority over the goods of his cargo, unless, he exercises it " in fifteen days after their delivery, and providing they have not passed to the hands of a third party " (article 23) , or in the case of bankruptcy or liquidation, the carrier is preferred for his freight and the damages which are due to him (article 24) . Therefore, this right of priority which is conferred to the maritime carrier must be distinguished from that which is given to the carrier by land. In fact, when the article 2102/6 of the civil code made a notice about the right of priority over certain moveable, "the expenses of the transport of the thing" , the code civil here did nothing but to aim a precise situation, which that of a creditor who has in his possession something which belongs to his debtor, something which he can hold its' possession and about which, he is not obliged to give up its' possession, and that is because it constitutes the object or the subject of his pledge, in its' classical definition. Moreover, after some hesitation about the nature of the carrier's right of priority, the different authors finally agreed on the idea of implied pledge (nantissement tacite),[111] rather than the idea of betterment (plus-valus).[112]

When it comes to the carrier by sea, this idea about an implicit pledge must be forgotten, although it was adopted by several learned authors in the field.[113]

110 Conversely, du Pontavice. Transports maritimes et affretements , ed. Delmas 1970, 56. This author notices however, that the code of commerce applied more << judiciously >> all these provisions to the contract by charterparty and to the contract of transport.

111 Planiol, Ripert et Becque, Traité Pratique de Droit Civil Francais, tome XII, Suretes Reeles, 2e Ed., 1955, No 171.

112 Mazeaud et de Jugart, Lecons de Droit Civil, t. III, Vol. 1, 4e Ed., 1974, No 179.

113 G. Rippert, Traite de Droit Maritime, 4e Ed. , t. II, No 1675; Chauveau, Traite de Droit Maritime, No 650; Rodiere, Traite General de Droit Maritime, T. II, No 563.

In fact, in following the opinion of Cleirac, the drafters of the enactment of 1681 have precised that, the master can never retain the goods inboard his vessel for non payment of freight, "le maitre ne pourra retenir la marchandise dans son vésseau faute de paiement de son frét", (Livre III, titre III, article 23.). Moreover, an author pointed out that if the notion of implicit pledge is applied here, the right of priority will not survive in the case of delivery of the goods,[114] and this is certainly true. Once again, we notice that the shipowner and the carrier by sea are not in the situation of the carrier by land. Here, it is not possible for the shipowner or the carrier to have an implied pledge which the general law gives to the creditors to be preferred on the things of their debtor, i.e., neither the shipowner nor the carrier have in the reach of their hands, in any way, the "moveable" or the "chattels" of their debtor, because they have to give up its' possession once the ship arrives, and because they cannot retain the possession of the goods on the ship (article 3). Moreover, if we examine the legal situation of the creditors of the civil code very carefully, we might find that the carrier by land is far to be considered the same as the shipowner or the carrier by sea, because the right of priority of the carrier by land is really based on the notion of pledge, and even the debtor gives up the possession of the thing to the creditor and that is according to the rules of pledge. Therefore, the right of priority of the carrier by land will not survive the voluntary dispossession.[115]

If the carrier by sea keeps his security, at least during a certain time, in the absence of any dispossession of the debtor whether, real or implied, that is because his right of priority has a very particular character. The idea expressed in this context applies, both to the shipowner and carrier, which is that the creditor who has a right of priority is not an ordinary pledgee; because he really has a pledge whether real or implied, i.e., if he could in a way or another, keep or retain the goods on his ship, he would naturally benefit from a right to follow or

114 Rodiere, Op. Cit. , No 567.

115 Planiol, Ripert et Becque, op. cit., No 239.

trace the chattel against any "third party ", and that is like any pledgee.[116] However, this is not the case, because, according to the rule which is confirmed by article 23 of the law of June 18 th 1866, the right of priority would disappear when the goods " have passed to third party's hands."[117] In fact, the right of the carrier by sea to maintain his right of priority over the goods between the hands of the consignee, despite of the voluntary dispossession of the creditor, gives to this security a very particular character. The goods will be at the disposal of the creditor of the freight, though for a limited period, and in the possession of the consignee, for the payment of his dept, independently of any direct or indirect ascendancy of the creditor. Therefore, the creditor's right unlike the right of the carrier by land, does not disappear when the thing is in the debtor's hands or on the way to be in the debtor's hands.

Moreover, he has not only, as would a simple contract creditor, a right on an estate subject to fluctuation. He keeps his prerogatives on the goods which are affected by the settlement of what is due to him.[118] In this way, his right is of the same nature as the one given by the decree-law of the 30 th of september 1953 to the buyer or the lender, to deny or to refuse to a buyer of a car on credit; here it is really a title of security : this security is a pledge, and this pledge is given without dispossession of the debtor, with a certain right to follow or to trace the thing and of preference which goes with it. However, and this another determining rule in resolving the problem raised by the nature of the right of priority of the carrier by sea; the right to trace therefore given for a limited time, does not go in principle beyond the estate of the deptor. This is stated in article 23, which provides that the right of priority cannot be exercised where the

116 Mazeaud et de Juglart, op. cit. , No 80.

117 But the lessor of an immovable and particularly a carrier by land can, with different titles, use this right.

118 The nature of the right of priority is therefore, on this point, is particular : the carrier by sea, because he has the right to follow, has therefore, a chattels real. (cf. on this point, Mazeaud et de Juglart, Lecons, t. III, vol. 1, 1974, No 141).

goods have passed to a third party's hands, and that means, that the carrier has no right, even though for a limited time, to act against the third party who acquired in good faith. The reason for that is simple, it is because the lessor of a real, who seizes moveable which were moved without his consent is exercising an action by which he is claiming his detention. Conversely, the carrier by sea, cannot, act like this, because he is not, at this stage of the performance of the contract, in a position to exercise a right of retention, because he cannot retain the goods aboard his vessel, which subject of delivery. The maritime carrier's right of tracing, very original in this context, cannot have any effect on third parties. As a consequence, the drafters of the code of commerce and the law of 1966, have taken in this context a position which is quite similar to that taken by the Supreme Court of Appeals about the seller of moveable who has not been paid : the right of priority given to the creditor gives to this one the right to be paid by preference on the price of the chattel when he can seize it " in the possession of his debtor or to stop the price in the hands of the party ", but does not authorize him to pursue the settlement of his dept against the party who acquired this chattel.[119] The creditor of the freight exercises the right to trace only against his debtor. This right to trace is then reinforced with the right of preference. Exceptionally, the right of preference survives the right to trace when the goods have been delivered to their owner who is still creditor of the price which is owed to him by the purchaser to whom he sold them.

This comparison between the carrier by sea and the seller of moveable is very instructive on other points. In fact, as it has been said, the action which the preferred creditor has can be exercised against the estate of the debtor after delivery of the goods, i.e., after voluntary dispossession (which would not be the case, if the right of priority was founded on the classical notion of pledge). This action, will therefore, have two aspects; first of all, the aspect of ascendancy

119 Cass. civ. 19 fev. 1894, Rec. Sir. 1895, 1, 457, D. 1894, 1, 413;

Mazeaud et de Juglart, Lecons de Droit Civil, t. III, Vol. 1, Lectures de la 8^{e} lecon.

exercised in the form of a seizure of the goods themselves, because they are still in the debtor's estate and, whether sold or not. This ascendancy by being exercised on a chattel considered as moveable, must be brought closer to the one which is given to the unpaid seller of moveable, from which the qualification of a special moveable privilege, which is most convenient to give to the carrier by sea. Conversely, when the goods have disappeared after they have been given to the consignee, the creditor of freight loses his right of priority, except if the thing was lost by the mistake of someone of if it was insured, here the situation would be different.

Always by reference to the substitution of things which is well known to the seller of moveable, the creditor of freight can exercise his right on the price which can still be owed by the third party to the one who took delivery of the goods and sold them; i.e., the debt of the price on which the creditor will have an attachment, will replace in the estate the goods which used to be since the delivery was made : it is substituted to these goods, and which represents the value in exchange,[120] this is because of the impossibility of the maritime carrier to trace the goods, because they have passed to the hands of a third party.

Despite, the similarities and the common points made between the right of priority of the seller of moveable and the maritime carrier -(in point of view of the nature of the right of priority)- the two must be differentiated, in particular, the carrier,[121] has the vitally important right to trace which affects the legal settlement and the liquidation of chattels of the consignee of the goods, debtor of the price of transport. The article 24 of the law of June the 18 th 1966 points out about this subject, that : "en cas de faillite ou d'amission au réglement judiciaire des chargeurs ou réclamateurs avant l'expiration de la quinzaine, le capitaine est privilégie sur tous les créanciers pour le paiement de son frét et les avaries qui lui sont dues." , i.e., "In the case of bankruptcy or admission to the legal settlement or liquidation of the shippers or claimers, before the fifteen days

120 Lauriol, op.cit. , No 190 et S.

121 For the shipowner, the legislator of 1966 did not give, any precision about this point.

have expired, the captain is preferred on all the creditors for the payment of his freight and the damages which are due to him. " When we think that when the goods have been seized by the general body of the creditors, we can notice the long distance which separates the seller of moveable form the carrier during the fifteen days. The first one, i.e., the seller of moveable loses all his securities and and becomes a simple contract creditor (law of the 13 th of july 1967, article 62), and the second one , i.e., the carrier, will preserve his right to trace and his right of preference. Moreover, the severity with which the jurisprudence insures the protection of the group of creditors against the seller of the moveable, reinforce the distinction between the two categories of privileges or rights of priority.[122] A very important distinction can be found which is, that the " moveable " are goods exactly as those which are subject of the carriage.

Moreover, one of the aspects which characterises this right of priority in the French law, is that of the interdiction of retaining the goods aboard the ship by the captain, and that has been provided since the Order of 1681 and by the articles 3 and 48 of the decree, "Neither the captain nor the parties which represent him, have the right to retain the goods on his vessel."[123]

In the French maritime law, the interdiction of retaining the cargo inboard the ship, is synonymous to the suppression of the right of retention. For the jurisdictions which know the general theory of the right of retention, a similar assimilation reveales a confusion quite clear between the right of retention and, on the other hand its' exercise. This might be, because the French legislator has neither regulated nor defined the right of retention.[124] It must be admitted that, if in itself, the interdiction of retaining the goods on the vessel does not exclude

122 From the moment the goods become an appearent element of solvency of the buyer, the right of priority of the seller does exist anymore. It is this like this, for example, when the boxes have been unloaded and appear with a label with the name of the buyer, because then they are supposed to have entered the stores of the latter (cf. , about these points, de Juglart et Ippolito, Traite precit. ; t III, No 1241.) .

123 Schertenleib Francis, op. cit, p. 63.

124 Popesco Georges, Le droit de retention en droit anglais, francais, allemend et suisse, Paris, 1930, p. 79.

the existence of a right of retention, as it is known by the legislation which consider it as a chattel real; it is reasonably not possible to have any doubt about the French legislator. The right of retention has been excluded, without asking the question whether an intermediary solution was conceivable. An intermediary solution here, instead of, the right of retention, would have been accepted, provided the interdiction to retain the goods inboard the ship remains. The choice of the legislator is not argued by the doctrine, even if it does not approve the grounds, because according to Rippert:

> "la consignation, ce n'est pas autre chose que la rétention exércée par l'intermédiaire d'un tiers.", i.e., " the deposit of the goods, is nothing but the retention, exercised by the intermediary of a third party."[125]

The institution of the right of priority cannot be confused with the notion of the right of retention. Some authors have asked themselves, if these provisions were not applications to the maritime field of the general principles of the right concerning the creditors who detain pledges.[126] Therefore, one will be brought to consider this right of priority as a type of chattels real. However, this right of priority, as it has been previously considered, does not give to its' holder any chattels real.

Thus, it must be concluded, that the right of priority which insures the payment of freight, is of the same nature as a simple personal right of preference (droit pérsonnél de préférence).[127] This right of preference or priority, is not only a right to have the goods deposited and sold, but, it gives to its' holder the right to be paid, in the case of bankruptcy or admission into the legal liquidation of the shippers or claimants, and that before the other creditors. However, despite that the law does not expressly admit this deduction, it must

125 Rippert. G. , op. cit. , note 1, p. 554.

126 Le Clere Julien, Du droit de retention de la cargaison et de la << lien clause >> dans les chartes-parties, le Droit Maritime Francais, Paris, 1966, p. 644.

127 Chauveau Paul, Traite de Droit Maritime, Paris, 1958, p. 136.

be considered that the solution is identical in the case of the bankruptcy of the charterers.

After having considered the nature of the right of priority over the goods in the French law, it is as important to consider the nature of this right of priority or " privilege ", in the Algerian Maritime Code. The Algerian maritime code,[128] gives to the shipowner a " privilége ", i.e., a right of priority over the goods for the guarantee of payment of his freight and other charges provided by the contract of affreightment, "Le fréteur a un privilége sur les marchandises pour le paiement de son frét et autres charges prévues au contrat d'affrétement." This article, as it has been mentioned before, is quite similar to the French one about the same matter, and that is because of the historical reasons which link the two jurisdictions to each other. Moreover, the Algerian maritime code adapted the same distinction which the French law made between the shipowner and the carrier by sea. So, the Algerian maritime code in article 792 about the performance of the contract of carriage of goods by sea, that : "Le transporteur peut refuser de livrer les marchandises et les faire consigner jusqu'a ce que le déstinataire ait payé ou qu'il ait fourni caution de tout ce qui est due pour le transport de ses marchandises ainsi qu'a titre de contribution d'avarie commune et de rémunération d'assistance.", i.e., "The carrier can refuse to deliver the goods, and can have them deposited until the consignee has paid or given, a security for all what is due for the carriage of these goods, for general average and for the remuneration of salvage." Here, one might notice the Algerian legislator does not forbid, as the French does, (article 3), the shipowner to keep the goods aboard his ship, and ask for the payment of the freight. It is provided in article 680 of the Algerian maritime code that: "Le fréteur peut refuser le dechargement de la cargaison si le frét et la rémuneration á titre de suréstaries ou d'autres retards ne lui ont pas été payés par l'affréteur.", i.e., "The shipowner can refuse to unload the cargo if the freight and the remuneration for demurrage or other delays

128 See Supra, article 645, p. 428.

have not been paid to him by the charterer." Here, it is quite clear that the shipowner in the Algerian maritime code, is given a right of retention, i.e., to retain the goods aboard the vessel until the freight has been paid, or to deposit them in a third party's hands after unloading them (article 792).

Thus, what is the nature of the guarantee for payment of freight in the Algerian law? One might consider this guarantee as an implied pledge ; in the French law, it was not possible to consider it as an implied pledge because, the captain was not allowed to retain the goods on the ship, but in the Algerian law the captain is not forbidden from retaining the goods inboard his vessel, and this what might draw our attention to the idea of pledge, because, the shipowner can refuse to deliver the goods of his cargo to the consignee, unless the latter pays the freight and all the other charges due to the shipowner. Like the guarantee of the lessor (art.501 of the Algerian civil code), which provides that the lessor has a right of retention on all the goods in the premises, for the guarantee of his depts. However, the difference is that in the pledge, the voluntary dispossession will lead to the loss of the pledge (art. 964 of the Algerian civil code), because, so that the pledge can be opposed to the third party, the thing object of the pledge must be between the hands of the creditor, or a third party which both parties of the pledge agree about. However, the shipowner can maintain his guarantee and in the same time not having the direct possession of the goods and that, is by depositing them into a third party's hands he chooses.

Moreover, when the contract of affreightment has been made, it was not intended to give to the shipowner a pledge on the goods, whereas in the pledge it is agreed that the creditor has a pledge on the thing of the deptor. Thus, the nature of the shipowner's right of priority, might be considered as a right of retention, because the shipowner is expressly given the right to refuse to deliver the goods to the consignee unless the remuneration for freight has been paid to him (art. 680 and 792 of the Algerian maritime code.) This is what makes the

Algerian maritime code different from the French law, which does not allow the captain to retain the goods on the ship.

However, this might appear clear in the case of voyage and time charterparty but, the situation is not quite clear in the situation of demise charterparty, where the ship and therefore the cargo are in the possession of the charterer then, how can the shipowner exercise his lien given to him by the express articles in the maritime law (art. 2 of the French law and 645 of the Algerian maritime code) ?

Here, one can say that, the shipowner finds himself without any protection or guarantee for the payment of his freight, because both the ship and the cargo are in the charterer's possession, and therefore, there is no means for detaining the cargo like in the case of time or voyage charterparty, where the possession of the ship and the goods remain in the shipowner's hands. However, we might be able to say that, the shipowner in a demise charterparty, has an equitable lien, because no one is allowed to benefit from the loss of another without the intention of donation and, this is the case of the unlawful or unjust enrichment, as it has been mentioned before in the Scots law.[129]

The French civil code does not give a specific text for the case where someone benefit from the act of another, but on the contrary the Algerian civil code does. The French civil code, talks about the unjust or unlawful enrichment in the case where someone looks after the business of another (gestion d'affaires) in article 1375, the case where someone receives something which is not due to him (art. 1376), and the case where someone thinks he is undepted to someone , and then, the former pays to the latter the alleged debt (art. 1377). However, the jurisprudence has widened the application of this principle, and that, was when it gave the application of this theory in the cases where the claimant has made a loss and the defender a profit, without the intention of donation. That was, when the Supreme Court (cour de cassation) has decided

129 See, p. 30, Supra.

that this principle of equity should be applied, in all cases where someone makes profit from the loss of another without the intention of donation.[130] This decision which we find in the judgements of 1914 and 1915,[131] which give the action in rem verso which is founded on equity, everytime that there is an enrichment of the defender accompanied by a loss of the claimant. However, this action might not be applied where the claimant has another means of regaining his right, and that is, in the cases where there is a contract, or an implied contract and in the case where there is an offense or a technical offense.

Therefore, the theory of unjust enrichment might not be of much help to the shipowner in the case of a demise charterparty, because here he has a contract in the form of a charterparty. Moreover, the Algerian civil code in art. 141 defines the unlawful enrichment as: "The one who in good faith gets a benefit from the work or the thing of someone else, without a cause which justifies this benefit, he is bound (the one who got a benefit) to indemnify the one whose work or thing was the source of this benefit to the extent of this benefit."[132]..Thus, the Algerian civil law obliges the one who receives a benefit from the work or the thing of someone else without a cause which justifies this benefit to indemnify the one who made the work or to whom the thing belongs to in the extent of the benefit. Here, the shipowner in the case of a demise charterparty made a contract in the form of a charterparty by which he hired his vessel to the charterer to use it for carrying goods; here, the charterer had a reason which justifies his benefit which is that he had a contract with the shipowner for the use of this vessel. Therefore, this article too as its' predecessor the French civil code article, cannot be of much protection to the shipowner,

130 See (not. : Civ. 15 juin 1892, D.P. 92. 1. 596; 12 mai 1914, s. 1918. 1. 41; 2 mars 1915, D.P. 1920. 1. 102).

131 Civ. 12 mai 1914, S. 1918. 1. 41; Civ. 2 mars 1915, D.P. 1920. 1. 102.

132 << Celui qui de bonne foi, a retire un profit du travail ou de la chose d'autrui sans une cause qui justifie ce profit, est tenu d'indemniser celui aux depens duquel il s'est enrichi dans la mesure ou il a profite de son fait ou de sa chose. >>

because he cannot rely on it.

However, we cannot leave the shipowner without any protection for the recovery of his freight, but we can consider this theory, i.e., the unjust enrichment, and allow the shipowner to rely on it to recover his freight. So, by way of analogy, we must consider that the shipowner has made a loss where his ship was being used to carry the goods of the demise charterer who made profit or benefited from the use of the ship, without paying any freight to the shipowner, which is a remuneration which is deserved by the shipowner who performed his part of the contract. Thus, he deserves to be protected and to be allowed to recover his remuneration from the demise charterer, and that because neither justice nor equity allow that, someone benefits from the work or the use of something which belongs to someone else, who made a loss by the work he rendered or by his thing being used, without any intention of donation, and because, the case of the claim of the shipowner in the case of demise charterparty, it is quite difficult for the shipowner to recover his freight from the charterer who has the possession of the ship and therefore, the cargo. Then, we should allow the shipowner to recover his freight and that, by relying on the theory of unlawful enrichment, because this contract, i.e., the charterparty, is not of much protection to him. Although, it gives him a lien on the cargo for guarantee of payment of freight, this lien has no effect, because how can we expect the shipowner to exercise his lien while the cargo is in the hands of the charterer who has the possession of the vessel too. Moreover, in the French civil code (art. 2102),[133] and the article 995 of the Algerian civil code, gives a right of priority to the lessor of an immovable on all the moveable which are on the rented immovable for his rent. This right of priority gives to the lessor, a right to be preferred; a right which is quite similar to the right of retention and a real right to trace the moveable into whosoever hands they are.[134] Therefore, the lessor who rented his immovable, is given a right which is quite similar to that of retention and that because he is given the right to be preferred and a right to

133 The rights of priority which concern some moveables.

134 Mazeaud. Henri et Leon. Mazeaud. Jean Lecons de Droit Civil. Tome Troisieme. Troisieme Edition. par, Michel de Juglart.

trace the moveable into whosoever hands they might be.

Moreover, to preserve his right over the moveable which are occupying his immovable and which constitute the object of his right of priority, he can prevent them to be removed and that by (une saisie gagerie), i.e., a writ of execution on tenant's furniture and chattels (art. 819 of the French code of civil procedure and art. 435 of the Algerian code of civil procedure).

However, if the lessor of an immovable is given this guarantee to protect him, this guarantee has been recognised by the legislator in the civil code, and the situation of the shipowner who chartered his ship under a demise charterparty is quite similar to that situation of the lessor of the immovable, but it is not simple and easy to apply this principle to the shipowner of a ship under a demise charterparty, because there is no text which prescribes that.

However, by a way of analogy it would fair and logical to give the shipowner in a demise charterparty a right of priority which makes him able enough to recover his freight, as in the case of unjust enrichment or the case of a lessor of an immovable, because the logic of the situation and the justice and equity, will require some guarantee or right of priority to be given to the shipowner, because most unfair to let the demise charterer away, without paying the freight owed by him to the shipowner. Moreover, the stability and continuance of the shipping trade will cease to exist, if the shipowner in the demise charterparty does not get his share of the venture, and moreover, because the trade in general and the shipping business in particular are founded on trust and, the different transactions are very fast to be concluded, and therefore, it requires a lot of guarantees.

Therefore, after having dealt with the English jurisdiction and the civil law jurisdictions, it would be best to try to compare the two jurisdictions to find out the similarities and the differences between the two about, the nature of the guarantee of the shipowner to recover his freight.

The nature of this lien whether, under the common law or by the express

terms of the charterparty or in the civil law jurisdictions (namely the French and the Algerian jurisdictions), depends on the case in the different situations.

For the case where there is a time or a voyage charterparty, the ship and therefore, the cargo remain in the possession of the shipowner, and therefore it is a possessory lien because, the shipowner can retain the cargo on his ship until the freight is paid. Although, the French does not allow the captain to retain the goods inboard the ship but to warehouse them or deposit them with a third party who will retain them for the shipowner, this might be considered as no more than, another way to retain possession of the goods until freight is paid.

However, the situation is different in the case of a demise charterparty, where by the nature of this charter, the ship goes to the possession of the charterer and therefore, the goods will also pass to the possession of the charterer altogether with the possession of the ship. Here, although the charterparties might give a lien to the shipowner over the cargo for the guarantee of payment of freight, it is very difficult to consider the nature of this lien in these circumstances. However, we find ourselves obliged but to consider that this lien is an equitable lien, because equity and justice require that the shipowner gets paid what is due to him, i.e., his remuneration for the hire of his ship, otherwise, there might not be any other nature which can be given to this lien every time that there is a demise charterparty.

3-2-Lien on "Sub-Freight":

It is generally agreed,[135] that in order for a shipowner to have a lien on sub freight,[136] a lien which has been consistently recognised by English and United States courts and by the civil law jurisdictions, the lien must have been expressly reserved in the charterparty.[137] The clause does not create the lien, however,

135 O'Rourke, Kenneth R. A Shipowner's Lien on Sub-Sub-Freight in England and United States : New York Produce Exchange Time Charterparty Clause 18. Loyola Of Los Angeles International And Comparative J L. Year, 1984 __ Volume, 7 __ Part, 1 __ p, 73-91.

136 "Sub-Freight" means money payable by a sub-charterer to a charterer for the sub-charter of the ship; and "sub-sub-freight" means money payable by a sub-sub-charterer to a sub-charterer for the sub-sub-charter of the vessel.

137 Hall Corp. of Can. v. Cargo ex Steamer Mont Louis, 62 F. 2d 603, 605 (2d Cir. 1933); In re

but simply provides the requisite notice to shippers that the shipowner has preserved his lien.[138] Therefore, a lien upon "sub-freight" for charter freight, or hire, is often expressly given. This entitles the shipowner to require payment to himself of freights which may be due to the charterer. Therefore, the lien clause in the charterparty is needed in order to give the shipowner a lien in those cases where the sub-freight is due to the charterer and not to the shipowner, and where the goods are carried on a sub-charter without any bill of lading. In such a csae the shipowner could only become entitled to the sub-freight by virtue of the lien clause,[139] and therefore, most of the charterparties contain the following provision :

> "The owners shall have a lien upon all cargoes and all sub-freights for any amount due under this charter. ..."

The different time charterparties, usually contain the above clause, giving the shipowner a right to detain the cargo and sub-freight for the freight due to him which has remained unpaid. The clause gives the shipowner a lien upon all cargoes and upon all sub-freights; but the question is whether the words "all cargoes" in the clause mean all cargoes belonging to the charterer or all cargoes put on board the vessel whether by the charterers or other persons not parties to the charterparty.

In The "Agios Giogis",[140] by the clause 18 of the New York Produce Exchange form of time charterparty, "the owners were to have lien upon all

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North Atl. & Gulf S.S. Co., 204 F. Supp. 899, 904 (S.D.N.Y. 1962), aff'd sub nom. Schilling v. A/S D/S Dannebrog, 320 F.2d 628 (2d Cir. 1963). See also The Bird of Paradise, 72 U.S. (5 Wall.)545, 554 (1866) (in the simple two party case, a shipowner can exercise a lien on cargo belonging to the charterer in order to recover hire owed under the charterparty); Raymond v. Tyson, 58 U.S. (17 How.)53,63 (1854) (a shipowner has a lien for freight unless the terms of the charterparty are inconsistent with the exercise of the lien).

138 N.H. Shipping Corp. v. Freights of the S.S. Jackie Hause, 181 F. Supp. 165, 169 (S.D.N.Y. 1960). Cf. In re North Atl. & Gulf S.S. Co., 204 F. Supp. at 904, 906 (the shipowner's lien on sub-freight arises out of the provision in the charterparty).

139 See Molthes Rederi Akt. v. Ellerman's Wilson Line (1927) 1 K. B 710, per Greer, J. at P. 717.

140 [1976] 2 Lloyd's Rep. 192.

cargoes and all sub-freights for any amount due under the charter". The charterer in making monthly payment deducted a sum in respect of breach of speed warranty. The cargo, upon the instructions of the shipowners, was detained against the cargo owners who were not parties to the time charter. Mocatta, J. decided that the shipowners could not rely upon the clause 18 because the cargo was not that of the charterer:

> "The difficulty as I see it in the way of the owners is that they are relying upon a contractual lien, not given at common law, as aginst the cargo owners, who were not parties to the time charter. I was reminded that in the Baltime form of time charter there is a qualification in relation to the lien to the effect that the shipowner is only vested with it on cargo belonging to the time charterer. Notwithstanding the omission of the qualification here, I am unable to see how clause 18 can give the owners the right to detain the cargo not belonging to the charterers and on which no freight was owing to the owners. There is no finding that the bills of lading contained any clause rendering the cargo shipped under them subject to this charterparty lien."[141]

However, in The "Aegnoussiotis",[142] Mr Justice Donaldson came to a different conclusion, stating that:

> "the clause 18 is to be construed as meaning what it says, namely, that the time charterers agree that the owners shall have a lien upon all cargoes. In so far as such cargoes are owned by third parties, the time charterers accept an obligation to procure the creation of a contractual lien in favours of the owners. If they do not do so and the owners assert a lien over such cargo, the third parties have a cuase of action against the owners. But the time charterers themselves are in a different position, they cannot assert and take advantage of their own breach of contract. As against them, the purported exercise of the lien is valid."

However, in The "Nanfri",[143] the appeal of the owners to exercise their lien

141 Ibid. at P. 204.

142 [1977] 1 Lloyd's Rep. 268.

143 Federal Commerce and Navigation Ltd v. Molena Alpha Inc and Others, The Nanfri, The Benfri, The Lorfri. [1979] 1 All ER 307.

over the goods of third party for sub-freight was dismissed. In this case, by three time charterparties, in identical form, the respective owners of three vessels let them to charterers for a period of six years. The shippers would therefore pay the freight for the carriage in advance and receive bills of lading marked 'freight pre-paid'. The charterparties provided: (i) by cl.9 that the master was to be under the orders of the charterers as regards employment, agency or other arrangements and that the charterers were to indemnify the owners against all consequences or liability arising from the master signing the bills of lading; (ii) by cl. 11 that the charterers were entitled to make deductions from the hire, where time being lost or expenses incurred by slow steaming; and by (iii) cl. 18 that the owners to have a lien upon all cargoes and sub-freight belonging to the time-charterers and any bill of lading freight.

for all claims under this charter. The charterers informed the owners that they intended to make a deduction from the hire of the vessel and the owners informed the charterers by telex that they will instruct the three masters of the vessels to withdraw all authority of the charterers and their agents to sign bills of lading, to refuse to sign any bill of lading endorsed by all the terms, conditions and exceptions of charterparties including the lien under cl. 18 on bill of lading freight as well as sub-freight belonging to the charterers.

The Court of Appeal held that, the charterers were entitled to make such deduction without the owners' consent. The owners appealed to the House of Lords, contending, inter alia, that cl. 18 entitled them to instruct the masters to refuse to sign bills of lading freight pre-paid and to clause them by a reference to the time charterers. The appeal was dismissed.

Lord Fraser denied the owners' right to have a lien over the sub-charterers cargo:

> "Clause 18 does not give the owners any right to require that the charterers shall procure that cargoes (not belonging to the charterers) shall be carried on terms that give the owners a lien over them or that there shall be in existence sub-freights over which the owners can exercise their lien. The effect of clause 18 was simply

> that, if and when there were cargoes belonging to the charterers or sub-freights due to them, the owners were to have a lien over them, whatever the exact meaning of a 'lien' on sub-freights may be".[144]

Lord Russell of Killowen, describes this lien as an equitable charge on what is due from the shippers to the charterers:

> "The fact that cl 18 refers expressly to bills of lading freightsappears to me to add nothing to the lien coferred by that clause on sub-freights belonging to the charterers, and serves only to distract the mind from the true scope of the lien. The lien operates as equitable charge on what is due form the shippers to the charterers, and in order to be effective requires an ability to intercept the sub-freight (by notice of claim) before it is paid by shipper to charterer."[145]

Moreover, the owners' lien is denied by Mr. Justice Robert Goff in The "Lancaster",[146] where the charterers were claiming to exercise their lien given to them by clause 18 of the charterparty in the New York Produce Exchange form, wher he held that:

> "Now it is at once clear that the expression "lien" is not being used consistently in this clause. ... But it is obvious that neither the owners' lien for sub-freights, nor the charterers' lien on the ship, can be a possessory lien."

But in The "Cebu",[147] the decision came to a different conclusion, where it was held that, the owners had a lien over the hire payments payable by the sub-sub-charterers for the following reasons:

(1) On its tue construction cl 18 of the charterparty gave the owners a lien on any remuneration earned by the charterers from their employment of the vessel, whether by way of voyage freight or time-charter hire and entitled the owners to intercept all sub-freight, whether or not due directly to the charterers,

144 Ibid. at P. 316.

145 Ibid. at P. 318.

146 The Lancaster [1980] 2 Lloyd's Rep. 497.

147 The Cebu [1983] Q B 1005.

including sub-freights due under any sub-sub-charter.

(2) The absence of privity between the owners and the sub-charterers did not prevent the owners having a lien on payments due from the sub-sub-charterers to the sub-charterers since the owners could claim as equitable assignees not only hire due under the sub-charterparty, but also the rights which the charterers themselves held as equitable assignees of hire due under the sub-sub-charterparty.

Here in this case,[148] the sub-charterers argued that in the present case, what was due from Itex (the sub-sub-charterers) to Lamsco (sub-charterer) was not freight, but hire.

However, Lloyd J., did not quite agree with the argument,[149], when he said:

> "But it would be an odd consequence of the charterers opting to enter into a sub-time charter trip that the owners should inadvretently be deprived of their security on sub freights. I would hold following Lord Blackburn in Inman Steamship Co Ltd v. Bischoff, that the lien on sub-freights conferred by cl 18 includes a lien on any remuneration earned by the charterers from their employment of the vessel, whether by way of voyage freight or time-chartered hire.",

and he added, that:

> "As I have already said, I can see no sense in a construction which would make the owners' security depend on whether the sub-charter is a voyage charter or a time charter trip. In my view the parties must be taken to have used the word 'sub-freight' in cl 18 to cover both. This the view expressed tentatively by the authors of Wilford on Time Charters (1978) p 222. I accept and adopt that view. I would therefore reject the first argument of counsel LAMSCO."

For the counsel's second main argument for LAMSCO is that, there was no privity of contract between the owners and LAMSCO, the answer was that, the meaning of sub-freights, includes all sub-freights, whether or not due to the

148 Supra, at (147).

149 Ibid. at P. 1124.

head charterers direct. This view was supported by Donaldson J., in the Aegnoussiotis,[150] who held that "all cargoes' in cl 18 'means what it says', i.e., all cargoes whether or not belonging to the charterers. Moreover, it is more in accordance with the law as stated by Lord Hardwicke L C as long ago as 1743 in Paul v. Birch,[151] where a vessel was chartered at the rate of £48 a month. The charterers arranged for certain merchants ship goods at the rate of £9 per ton. The charterers then went banrupt. It was held that the plaintiff had a specific lien on the goods even though they did not belong to the charterers.

First to be examined, is the factual context of a recent English case, which is the case of Care Shipping Corp. v. Latin American Shipping Corp.,[152] where the Queen's Bench Division addressed the issue as one of first impression.[153]

CARE SHIPPING CORP. v. LATIN AMERICAN SHIPPIONG CORP. The facts of the case are as follows:

On October 18, 1979, Care Shipping Corporation time chartered its vessel Cebu on an NYPE form to Naviera Tolteca, Inc., for a period of seventeen to twenty months followed by a second period of twenty to twenty four months, exercisable at the charterer's option.[154] The charterer had an express right to sublet the vessel.[155] On March 3, 1980, Naviera Tolteca sub-chartered the Cebu on an NYPE form to Latin American Shippig Corporation (LAMSCO).[156] The terms of the sub-charterparty were essentially the same as those of the head-charter.[157] Finally, On July 3, 1981, Lamsco sub-sub-chartered the ship to Itex

150 [1977] 1 Lloyd's Rep 268.

151 2 Atk 621, 26 ER 771.

152 [1983] 2 W.L.R. 829, [1983] 1 All.E.R. 1121, [1983] 1 Lloyd's L.R. 302 (Q.B. 1982).

153 Id. at 836, [1983] 1 All E.R. at 1127, [1983] 1 Lloyd's L.R. at 307-08.

154 Id. at 831, [1983] 1 All E.R. at 1123, [1983] 1 Lloyd's L.R. at 304.

155 Id. The provision of the 1946 NYPE form concerning the right to sub-charter the vessel provides that the "[c]harterers . . . have [the] liberty to sublet the vessel for all or any part of the time covered by this Charter, but [c]harterers remain [] responsible for the fulfillment of this Charterparty."

156 [1983] 2 W.L.R. at 831, [1983] 1 All E.R. at 1123, [1983] 1 Lloyd's L.R. at 304.

157 Id.

Itagrani Export S.A. (Itex) for the period of one time-chartered trip from Portland, Oregon, to Bandar Abbas, Iran, with a cargo of grain.[158] This charterparty was also executed on an NYPE form.[159] After a dispute arose under the head charter with hire,[160] allegedly due Care Shipping, the shipowner, from Naviera Tolteca, the original charterer, Care Shipping purported to exercise a lien under Clause Eighteen of the head charterparty both on hire due Naviera Tolteca from Lamsco under the sub-charterparty and on hire due Lamsco from Itex under the sub-sub-charterparty.[161] Faced with demands for hire by both Care Shipping and Lamsco, Itex interpleaded.[162]

The specific issue presented to the court was whether Care Shipping, the shipowner, was entitled to exercise a lien on the sub-sub-freight due Lamsco, the sub-charter, from Itex, the sub-sub-charterer, when hire was owed Care Shipping under the head charterparty.[163] Holding that Care Shipping was entitled to the lien, Mr. Justice Lloyd stated:

> On the true construction of clause 18 I would hold that Naviera Tolteca has assigned to the owners by way of equitable assignement, not only sub-freights due it as charterers, but also any [sub-] sub-freights due under any sub-sub-charter of which it is equitable assignee.[164]

158 Id.

159 Id.

160 In this comment, "hire" and "freight" will be treated as having synonymous meanings. Technically speaking, however, denote different things. 3 T. Carver, British Shipping Laws 922 (11 th ed. 1963).

The remuneration payable for the carriage of goods in a ship is called freight. Also, the same word is often used to denote a payment made for the use of a ship. It is applied in both senses, though objection has frequently been made to its use in the latter sense. When a ship has been chartered to go on a spesific voyage for a lump sum, or to be at the disposal of the charterer at so much a month, it is perhaps more accurate to call the payment the *hire* of the ship; but sometimes the word "freight" is used. And as the hire of the chartered shipis very commonly paid by freight in proportion to the goods carried under the charterparty, it would be difficult to say distincly when one word should be used, and when the other.

161 [1983] 2 W.L.R. at 831-32, [1983] 1 All E.R. at 1123, [1983] 1 Lloyd's L.R. at 304.

162 Id. at 832, [1983] 1 All E.R. at 1123, [1983] 1 Lloyd's L.R. at 304.

163 Id. at 838, [1983] 1 All E.R. at 1129, [1983] 1Lloyd's L.R. at 309.

164 Id., [1983] 1 All E.R. at 1128, [1983] 1 Lloyd's L.R. at 308-09. Mr Justice Lloyd did caution,

First, it would be best to examine the issue in the English jurisdiction before the civil law jurisdictions, namely the French and Algerian law, so as to give a better explanation to this lien. Thus, as early as 1743, in Paul v. Birch,[165] a court held that a shipowner could exercise a specific lien on goods belonging to a third party shipped aboard the owner's vessel.[166] In that case, Paul, the shipowner, chartered his vessel to two persons at the rate of £48 per month.[167] The charterparty provided that goods put on board were liable to Paul to secure the charter hire.[168] The charterers then contracted with merchants in the West Indies for the carriage of goods at £9 per ton.[169] Paul brought suit to recover from the merchants after the charterers went bankrupt with charter hire owed to Paul. The Chancery Division held that the merchants were liable to Paul to the extent that they were liable to the bankrupt charterers; that is, the merchants were liable for £9 per ton for cargo carried, not for the charterparty rate of £48 per month.[170]

A question left unanswered in Paul, however, was the legal basis for the shipowner's lien.[171] In an attempt to resolve this issue, one hypothesis was set forh in Wehner v. Dene Steam Shipping Co.,[172] a case factually similar to Care Shipping,[173] but which was decided on a different issue.[174]

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however, that "[t]he legal analysis might be different if the true nature of the lien on sub-freight were that it takes effect as an equitable charge only . . . and not as equitable assignement." Id., [1983] 1 Lloyd's L.R. at 309. This was an issue that the court did not have to decide since the parties stipulated that the legal basis for the shipowner's lien on sub-freight in a three party case is an equitable assignement. Id.

165 26 Eng. Rep. 771, 2 Atk. 621 (Ch. 1743).

166 Id. at 771-72, 2 Atk. at 622-23.

167 Id. at 771, 2 Atk. at 621.

168 Id.

169 Id.

170 Id. at 771-72, 2 Atk. at 622-23.

171 O'ROURKE, Kenneth R. A Shipowner's Lien on Sub-Sub-freight in England and U.S.A. New York Produce Exchange Time Charterparty clause 18. Loyola of Los Angeles International and Comparative Law Journal. 1984. Vol 7. Part n.1. at p. 78.

172 [1905] 2 K.B. 92, 21 T.L.R. at 339.

173 [1983] 2 W.L.R. 829, [1983] 1 Lloyd's L.R. 302 (Q.B. 1982).

174 [1905] 2 K.B.at 101, 21 T.L.R. at 340. The dis positive issue was whether hire was actually due Dene Shipping when it purported to exercise a lien on the bill of lading freight.

In Wehner, Dene Steam Shipping Company (Dene Shipping) time chartered its vessel Ferndene to William Brauer Steamship Company for twelve months.[175] The charterparty contained a clause almost identical to Clause Eighteen of the NYPE. William Brauer Steamship Company sub-chartered the vessel to Wehner for one transatlantic voyage.[176] Wehner then arranged with a Mr. Gleichmann to carry a cargo of phosphate aboard the Ferndene from New York to Hamburg, Germany.[177] The bill of lading,[178] was signed by the master of the vessel, given to Wehner, and indorsed by Gleichmann.[179] By the time Ferndene reached Hamburg, William Brauer Steramshipping Company was virtually insolvent and owed hire to Dene Shipping under the original charterparty.[180] To recover what was allegedly due it, Dene Shipping purported to exercise a lien on the bill of lading freight due Wehner from Gleichmann for the carriage of his cargo of phosphate.[181] After Dene Shipping collected this sum, Wehner, claiming that only he was entitled to receive the freight, brought suit to recover the bill of lading freight from Dene Shipping.[182] The King's Bench Division addressed the question of "with whom in law was the contract that was made by the bill of lading to carry Gleichmann's phosphate."[183] Mr. Justice

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The court held no hire was due when Dene Shipping purported to exercise the lien; thus, Dene Shipping was not entitled to a lien. Id.

175 Id. at 92-93, 21 T.L.R. at 340.

176 [1905] 2 K.B. at 97, 21 T.L.R. at 340.

177 Id.

178 A bill of alding is a contract for the carriage of goods aboard a vessel. In this way, it is similar to a charterparty. Ordinarily, though, a bill of lading covers a smaller and indeterminate portion of the ship's carrying capacity, while a charterparty is for the whole or a large or specific part of the vessel. Drinkwater v. The Spartan, 7 F. Cas. 1085, 1088 (D. Me. 1828) (No. 4085). In addition, a bill of lading is a receipt for, and sometimes denotes title to, the goods shipped.

See, Ibid at (171), at p. 79.

179 [1905] 2 K.B. at 97, 21 T.L.R. at 340.

180 Id at 98, 21 T.L.R. at 340.

181 Id at 95, 21 T.L.R. at 340.

182 Id.

183 Id. at 98, 21 T.L.R. at 340. (Because the Times Law Reports (T.L.R.) only summarizes

Channell stated:

> In ordinary cases, where the charterparty does not amount to a demise of the ship, and where possession of the ship is not given up to the charterer, the rule is that the contract contained in the bill of lading is made, not with the charterer, but with the owner, and that will, I think, explain away and account[] for all the difficulties which would otherwise arise as to the existence of the shipowner's lien. When there is a sub-charterparty there is no direct contract between the sub-charterer and the owner, and if the contract in the bill of lading were made, not with the owner, but with the sub-charterer, how is the shipowner's lien to be accounted for as against the holder of the bill of lading? It would be very difficult to deal with the question upon any logical or intelligible footing unless one starts with the proposition that the bill of lading contract is made, as it appears upon its face to be made, with the shipowner.[184]

Although the case was decided on other grounds, it appears that, according to Justice Channell, the shipowner's ability to collect bill of lading freight directly from the shipper is based upon a contractual relationship.[185] In Wehner, therefore, Dene Shipping, the shipowner, would have been entitled to the bill of lading freight due Wehner, the sub-charterer, from Gleichmann, the bill of lading holder, because Dene Shipping was in privity of contract with Gleichmann.[186]

The rule announced in Wehner, that the shipowner can collect freight directly from the shipper based upon a contractual relationship[187], was modified a year later in Samuel, Samuel & Co. v. West Hartlepool Steam Navigation Co.[188]

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opinions, the quotation is from Law Reports (K.B.) at the page cited; the passage is merely paraphrased in T.L.R. at the page indicated.)

184 Id.

185 [1905] 2 K.B. at 98, 21 T.L.R. at 340.

186 Id.

187 Id.

188 11 Com. Cas. 115 (1906), modified, 12 Com. Cas. 203 (1907). In Samuel, a three-party case, the court held that based upon the charterparty, bill of lading, and other documents, no contractual relationship existed West Hartlepool, the shipowner, and Standard Oil, the shipper and holder of the bill of lading. Instead, the court found that the bill of lading was a contract between Standard Oil and Edward Perry & Co., the charterer. 11 Com. Cas. at 126. Nevertheless,

The Samuel court stated that whether privity exists between the shipowner and the shipper is "a question of fact depending upon the documents and circumstances in each case ..."[189]

The Wehner rule was further questioned, and even criticized, by the King's Bench Division in Molthes Rederi Aktieselskabet v. Ellerman's Wilson Line, Ltd.[190] There, Mothes Rederi time-chartered its ship Sproit to Maurice Ellif & Company. The charterparty was for twelve months and contained a clause similar to Clause Eighteen of the NYPE. The clause provided that the shipowner was to have a lien on all cargoes and all sub-freights for hire due under the charter.[191] Maurice Elliff & Company then sub-chartered the vessel to carry a cargo of wood to Hull, England.[192] Ellerman's Wilson Line was the charterer's agent to collect the sub-freight from the sub-charterer.[193] When the agent, after collecting the sub-freight from the sub-charterer, refused to pay the shipowner as obligated under the original charterparty, Molthes Rederi, the shipowner, brought suit.[194]

Mr. Justice Geer held that the shipowner was entitled to collect the sub-freight on the basis of the express lien in the charterparty, not on the contractual relationship with the sub-charterer:[195]

> Though Channell J bases his judgment in Wehner v. Dene Steam Shipping Co. on the fact that the bill of lading contract is with the owner, and therefore the owner in claiming the freight was only claiming what was legally his, he still speaks of the owner's rights as

even without a contractual relationship, the court concluded that West Hartlepool, the shipowner, had a lien on the bill of lading freight due Edward Perry & Co., the charterer, from Standard Oil, the shipper, since the lien was expressly reserved in the charterparty. Id. at 129.

189 11 Com. Cas. at 125.

190 [1927] 1 K.B. 710, 136 T.L.R. (n.s.) 767 (1926).

191 [1927] 1 K.B. at 712, 136 L.T.R. (n.s.) at 767.

192 Id.

193 Id. at 714, 136 L.T.R. (n.s.) at 768.

194 Id.

195 Id. at 716, 136 L.T.R. (n.s.) at 768-69.

> arising out of his lien. It is difficult to understand how a shipowner can be said to have a lien on that which, ex hypothesi, is his own property, and which he is entitled to because it is his own. . . . It seems a misuse of words to say that a shipowner has a lien on the debt due to him under the contract made with him by the bill of lading. The lien clause in the charterparty is needed to give the owner a lien in those cases where the sub-freight is due to the charterer and not to the owner, as where goods are carried on a sub-charter without any bill of lading. In such a case the owner could only become entitled to the sub-freight by virtue of the lien clause. ... [196]

Molthes suggests, therefore, that although the lien must be expressly reserved in the charterparty, the shipowner's lien on sub-freight is not based upon a contractual relationship.[197]

Altertnatively, the Queen's Bench Division in Federal Commerce & Navigation Co. v. Molena Alpha, Inc,[198] explained that the basis for the shipowner's lien on sub-freight is an equitable assignment.[199] Mr. Justice Kerr, construing a clause in the Baltime charterparty form that is somewhat similar to Clause Eighteen of the NYPE form, stated that:

> "[a]s between the owners and charterers [the lien] operates as something in the nature of an equitable assignment which can be perfected by giving the proper notices if and when the charterers are in default in the payment of some sum due to the owners."[200]

196 Id at 716-17, 136 L.T.R. (n.s.) at 769.

197 Id. at 716, 136 L.T.R. (n.s.) at 769.

198 [1978] 1 Q.B. 927, [1978] 3 W.L.R. 309, rev'd on other grounds, 1979 A.C. 757, [1978] 3 W.L.R. 991, [1979] 1 All E.R. 307 (1978).

199 [1978] 1 Q.B. at 942, [1978] 3 W.L.R. at 323 (kerr, J.).

200 Id. The Baltime charterparty is one of the more popular time charterparty forms. It has a reputation for being more favorable to shipowners in its wording than the NYPE form. The 1939 Baltime charterparty is reprinted in 2B Benedict on Admiralty 7-9 to 7-14 (7th ed. 1983).

Clause 18 of 1939 Baltime form provides in full:

The owners to have a lien upon all cargoes and sub-freights belonging to the Time

According to this view, the shipowner receives as equitable assignee the charterer's contractual right to the sub freight.

When Molene Alpha reached the House of Lords, however, Lord Russell stated that:

> "[t]he lien operates as an equitable charge upon what is due from the shipper to the charterer, and in order to be effective requires an ability to intercept the sub-freight (by notice of claim) before it is paid by shipper to charterer."[201]

Nevertheless, Lord Russell did not explain the difference between basing the lien on an equitable charge or an equitable assignment theory.[202]

As discussed above, the court in Care Shipping,[203] based the lien on sub-freight on an equitable assignment theory.[204] Mr. Justice Lloyd explained that, if the shipowner's lien operates by way of a chain of equitable assignments, the lien could be extended to include a lien on sub-sub-freight as well.

Moreover, the lien of shipowner on sub-feights was considered to be an equitable assignment in a recent case, The "Attika Hope" case,[205] where Mr. Justice Syteyn considered that this lien is an equitable assignment. Here, by a time charterparty on the New York Produce Exchange form the owners of the

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Charterers and any Bill of Lading freight for all claims under this Charter, and the Charterers to have a lien on the Vessel for all moneys paid in advance and not earned.

201 1979 A.C. at 784, [1978] 3 W.L.R. at 1004, [1979] 1 All E.R. at 318 (Russell, L.J.).

202 Molena Alpha involved the alleged breach of three charterparties pertaining to three different vessels. The central issue in the case was whether certain actions by the shipowner amounted to repudiation of the cahrterparties. An argument advanced by the shipowner in justification for its actions was that it merely exercising the lien that had been reserved in the charterparties. The lower court held that the owner's actions did not amount to a proper exercise of the lien, [1978] 1 Q.B. at 942-43, [1978] 3 W.L.R. at 323, and the House of Lords agreed on this issue. 1979 A.C. at 779, [1978] 3 W.L.R. at 999, [1979] 1 All E.R. at 314 (Wilberforce, L.J.).

203 [1983] 2 W.L.R. 829, [1983] 1 All E.R. 1121, [1983] 1 Lloyd's L.R. 302 (Q.B. 1982).

204 Id. at 838, [1983] 1 All E.R. at 1128, [1983] 1 Lloyd's L.R. at 309.

205 G. & N. Angelakis Shipping Co.S.A. v. Compagnie National Algerienne De Navigation. (The "Attika" Hope). [1988] 1 Lloyd's Law Reports. at 439.

vessel Attika Hope chartered their vessel to Ideomar. The charter provided inter alia: "18. That the owners shall have a lien upon all cargoes and sub-freights for amounts due under this charter." Ideomar was in difficulty in discharging debts to the plaitiffs and negotiations ensued to attempt to reduce Ideomar's total indebtedness to the plaintiffs. Telex exchanges took place with the plaintiffs alleged amounted to an assignment by Ideomar to them of freight under a voyage charter of Attike Hope. That charter was between Ideomar as disponent owners and the defendeants. The plaintiffs alleged that they informed the defendants of the assignment, and the owners informed the defendants that they were exercising their lien on sub-freights. The plaintiffs requested the defendants to pay the freight to them, and the freight was in fact paid by the defendants to the owners of the vessel and the issue was whether the plaintiffs were entitled to recover against the defendants.

It was held by Q.B. (Com.Ct.) (Steyn J.), that: " the owners' claim was based on an equitable assignment."[206]

A fourth theory for the lien, subrogation, has been suggested by some American courts. The leading United States case concerning a shipowner's lien on sub-freight is American Steel Barge Co. v. Chesapeake & O.Coal Agency.[207] In American Steel Barge, the plaintiff time-chartered its vessel City of Everett to Atlantic Transportation Company (Atlantic) for one year.[208] Atlantic than arranged to carry coal for Chesapeake & O. Coal Agency from Newport News to Boston aboard City of Everett.[209] American Steel Barge Company (american) grought suit when Atlantic became insolvent with hire due American under their charterparty.[210]

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206 Id. at P. 439.

207 115 F. 669 (1st Cir. 1902), rev'g American Steel Barge Co. v. Cargo of Coal ex City of Everett, 107 F. 964 (D Mass. 1901).

208 115 F. at 670.

209 American Steel Barge Co. v. Cargo of Coal ex City of Everett, 107 F. 964, 966 (D Mass. 1901), rev'd sub nom. American Steel Barge Co. v. Chesapeake & O. Coal Agency, 115 F. 669 (1st Cir. 1902).

210 115 F. at 670.

The First Circuit Court of Appeals reversed the district court, holding that American had a lien on the sub-freight due Atlantic from Chesapeake & O. Coal Agency but not on the cargo of coal itself.[211] Discussing the way in which the lien operates, Judge Putnam declared that a shipowner "holding a lien on sub-freight becomes subrogated to all the remedies of the charterer ... ."[212] Therefore, American, standing in the place of the charterer, could prceed in personam against Chesapeake & O.Coal Agency, the bill of lading holder, but was limited in its recovery to the amount owed under the bill of lading contract.[213] If no bill of lading freight was due, then, like the charterer, American could not recover.[214]

Although Judge Putnam stated that the shipowner was entitled to the lien because it was expressly reserved in the charterparty,[215] he did not discuss whether any contractual relationship existed between the vessel owner and the shipper. This issue was resolved a few years later, however, when the Second Circuit held that even when a sub-charter contains the same terms as the original charterparty, no privity of contract exists between the shipowner and sub-charterer.[216] Therefore, the subrogation theory postulates that, when any

211 Id. at 674. The first sentence of the opinion explains that the case does not concern a lien on the cargo but a lien on the freight therefrom. Id. at 670. Subsequently, the court explained that:

The proper proceeding would have been to file a libel against the sub-freight alone, naming the party charged with the possession thereof, who in this case was the holder of the bill of ladind, or the owner of the cargo, and asking process requiring him to bring into court what would be due from him on discharge of the vessel . . . . Then, if the freight according to the bill of lading had not been brought into court . . . summary process would have issued on a supplemental libel or petition against the holder of the bill of lading, or against the cargo if the lien for freight had not been lost.

Id. at 674.

212 Id. at 674 (emphasis added).

213 Id. at 672.

214 Id. at 674.

215 Id. at 671-72.

216 The Banes, 221 F. 416, 418 (2d Cir. 1915). Cf. J.M. Guffey Petroleum Co. v. Coastwise Transp. Co., 180 F. 677 (2d Cir. 1910) (charterer assigned its charterparty to a third party, who then assigned it to a fourth party, who was treated as though it was the original charterer).

sums become due and unpaid under the charterparty, the shipowner is immediately subrogated to the rights and remedies of the charterer.[217] However, this explanation is difficult to sustain in English law,[218] where, apart from in the case of indemnity contracts, subrogation is a narrow concept limited to a few isolated situations.[219]

A further opinion was expressed in the case of The "Nanfri".[220] Here, the shipowner under clause 18, is considered as having something in the nature of an equitable assignment. This view was expressed by Kerr J,[221] when he stated:

> "As between the owners and the charterers it still operates as something in the nature of an equitable assignment which can be perfected by giving the proper notices if and when the charterers are in default in the payment of some sum due to the owners."

This lien was considered as an equitable charge on what is due from the shippers to the charterers, and that was supported by Lord Russell when the case reached the House of Lords:[222]

> "The lien operates as an equitable charge on what is due from the shippers to the charterers, and in order to be effective requires an ability to intercept the sub-freight (by notice of claim) before it paid by shipper to charterer."

In addition there is the passage in Roskill L L's judgment in Mareva Compania Naviera SA. v. International SA,[223] where he refers to the 'legal or perhaps equitable right which the shipowners may be entitled to have protected by the court.' Here Lloyd J.,[224] considered that, although, authority is slender, it

217 See the American case of American Steel Barge Co. v. Chesapeak & O. Coal Agency Co. (1903) 115 F. 669, 674.

218 Oditah, Fidelis. "The Juridical Nature of a Lien on Sub-Freights." Lloyd's Maritime and Commercial Law Quarterly. 1989. at P. 192.

219 See, Orakpo v. Manson Investments Ltd. [1978] A.C. 95.

220 [1978] Q.B. 927 at 942.

221 Id.

222 [1979] 1 All E.R. 307 at 318, [1979] A.C. 757 at 784.

223 [1980] 1 All E.R. 213 at 216.

224 The "Cebu", Supra, at P. 1128.

was, as he said, common ground that in a three-party case the so called lien on sub-freights gives the owners the right to claim to be paid sub-freights as equitable assignees. It would seem to me to follow (though this was not conceded) that the owners can, if necessary, enforce that claim by exercising a lien on the cargo itself.

A question which has always been asked is, whether in this case in particular, or in any other case involving the shipowner's lien on sub-freight, is that, the shipowners always claim the benefit of a contractual lien agaist the sub-charterer with whom they have no contract. This is a difficulty which was foreseen by Channel J.,in wehner v. Dene Steam Shipping Co,[225] where he said:

> "In ordinary cases, where the charterparty does amount to a demise of the ship, and where possession of the ship is not given up to the charterer, the rule is that the contract contained in the bill of lading is made, not with the charterer, but with the owner,and that will, I think, explain away and accounts for all the difficulties which would otherwise arise as to the existence of the shipowner's lien. When there a sub-charterparty there is no direct contract between the sub-charterer and the owner, and if the contract in the bill of lading were made, not with the owner, but with the sub-charterer, how is the shipowner's lien to be accounted for as against the holder of the bill of lading? It would be very difficult to deal with the question upon any logical or intelligible footing unless one starts with the proposition that the bill of lading contract is made, with the shipowner."

Thus, from the different theories and judgments which have been laid down above, one can conclude that, the lien of the shipowners which is given to them by the different charterparties, is in the nature of an equitable assignment, by which or which entitles the shipowner to intercept the sub-freight before it is paid to the charterer, because according to the nature of this charge, the cahrterer has assigned the sub-freight which he is supposed to receive from the sub-charterers, to the shipowner, and that by inserting a clause in the

225 [1905] 2 K.B. 92 at P. 98

charterparty giving the shipowner, a lien on the sub-freight. To be sure, English courts are not in agreement as to the legal basis for the shipowner's lien on sub-freight. Theories for the lien posited by English courts,[226] include privity of contract,[227] equitable charge [228] and equitable assignment.[229]

However, if these are the views expressed in English law, it would be worthwile comparing it with the views expressed in the Civil Law jutisdictions, namely the French and the Algerian law.

The French Maritime Law (which is included in the French Code of Commerce), clearly gives to the shipowner a lien or what is called "privilege", on the sub-freight. The French Code of Commerce provides in its article 14,[230] that: "Le fréteur, dans la mesure de ce qui lui du par l'affréteur, peut agir contre le sous-affréteur en paiement du frét encore du par celui-ci. Le sous-affrétement n'établit pas d'autres relations diréctes entre le fréteur et le sous-affréteur.", i.e., " The shipowner, in the limits of what is owed to him, can act against the sub-charterer for the payment of freight which is still owed by this one. The sub-charterparty does not create any other relationship between the shipowner and the sub-charterer."[231] Thus, the French law allows the charterer to sub-charter the ship or to use it under bills of lading (Article 12 Of the French Code of Commerce), but in the same it protects the shipowner by allowing him to act against the sub-charterer for the freight which is still owed by him, and therefore, this is the case in the French law. According to the wording of the Act of 1966, the shipowner has a "directe action" or (droit direct) against the charterer or the shipper, for the payment of the sub-freight. The article 14,

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226 See, infra at P.

227 Wehner v. DeSteam Shipping Co., [1905] 2 K.B. 92. 21 T.L.R. 339.

228 Federal Commerce & Navigation Co. v. Molena Alpha, Inc., 1979 A.C. 757, [1978] 3 W.L.R. 991, [1979] 1 All E.R. 307 (1978).

229 Care Shipping Corp. v. Latin Am. Shipping Corp., [1983] 2 W.L.R. 829, [1983] 1 All E.R. 1121, [1983] 1 Lloyd's L.R. 302 (Q.B.1982).

230 Loi No. 66-420 du 18 Juin 1966, Sur les Contrats d'Affretement et de Transport Maritimes.

231 " My own translation. "

section-1, gives the principle of a directe action for the payment of freight which is due to the shipowner, for the benefit of the latter against the sub-charterer. The purpose of direct action, is to give the shipowner a lien on the debt of freight of the charterer against the sub-charterer, this lien or "privilege" makes the shipowner be the first to be satisfied against the other creditors of the charterer on the assets of this security.[232] This disposition has a great importance, because it allows the shipowner to claim for the payment of the sub-freight in execution of a contract to which he is a complete stranger. Article 12 allows the charterer to sub-charter the ship or to use it for carriage under bills of lading, the shipowner has also a directe action against the shippers, in the case of a contract of transport on a chartered ship. However, this action is subject to two limitations; the first one is that the shipowner cannot claim more what is due to him, and the second is that he cannot claim from the shipper more that what the shipper owes to the carrier.[233] The present solution was recomanded by Rippert,[234] who saw in the system of the direct action the solution which is most qualified to guarantee the rights of the shipowner. Before, this solution was a little bit confused, because of the lack of legal texts, but the jurisprudence, very early, had to admit this direct action,[235] as well as the doctrine.[236] However, there was adifference of opinion about the nature of this action. Some agreed with the analogy with article 1753 of the Civil Code, which gives to the lessor a

232 Rodiere, Réné. Traité Général de Droit Maritime, Tome I, Paris, 1967, at P.328.

233 See, arrét de la Court d'appel de Paris, 13 Decembre 1961, Le Droit Maritime Français, Paris, 1960, P.215 et ss., ainsi que la note de RODIERE., Le Droit Maritime Français, Paris, 1960, P.218 et ss.

234 RIPERT, Georges, Droit Maritime, 4-ém éd., Vol.2, Paris, 1952, P.546.

235 Marseille, 15 Novembre 1854, Journal de Jurisprudence Commercial et Maritime, Marseilles 1854, P. 1321, droit du freteur contre le sous-affreteur, et arret de la Court d'appel de Rouen du 6 Juillet 1899, Revue International du Droit Maritime, 15 eme année, 1899-1900, P.17, Paris, droit du freteur contre les chargeurs.

236 Léon. Denisse. Du frét considéré dans ses rapport avec l'abandon, l'affretement, la cotribution aux avaries communes et les assurances maritimes, Paris, 1891, P. 313. Bouvier, Paul, Études sur l'obligation de payer le fret en droit Français, Paris, 1904, P. 172 et P. 173.

direct action against the sub-tenant for the payment of the rent which the latter owes to the one he had a contract with (the original tenant), or, i.e., the tenant sub-lessor. The others like Ripert, have always in denying this application of analogy, went for the same practical solution. Therefore, the French law, gives the shipowner a direct action against the sub-charterer for the payment of freight which is still due from the sub-charterer to the charterer, whereby the shipowner can act against the sub-charterer by all the means which are given to an ordinary creditor, because in this case the shipowner is considered as being the creditor of the sub-charterer for the sub-freight which puts him in a stronger position than that of being a mere creditor of the charterer as the creditor of the sub-charterer. Here, the shipowner has a better position and a better guarantee and that is only for the case of payment of sub-freight.

In the Algerian Maritime Code, the legislator did not give a specific lien or "privilégé" to the shipowner against the sub-charterer. However, when the legislator was giving the general rules of the contract of affreightment, he gave the charterer the

right to sub-charter the ship with the condition that he (the charterer) remains responsible towards the shipowner for the obligations born out of the contract of affreightment. Article 644 of the Algerian Maritime Code reads as follows: "Sauf convention contraire des parties, l'affréteur peut sous-fréter le navire, mais il demeure tenu envers le fréteur des obligations résultant du contrat d'affrétement.", i.e., "Except if there is a contrary agreement of the parties, the charterer can sub-charter the ship, but he remains responsible towards the shipowner for the obligations born out of the contract of affreightment."[237] Thus, the Algerian Maritime Code clearly gives to the charterer the right to sub-charter the ship, but the Algerian legislator added in the following article (art.645), that the shipowner has a lien on the goods for the payment of his freight and other charges provided in the contract of affreightment. Therefore, although art.644 of the Algerian Maritime Code makes the charterer the one to

237 " My own translation. "

be responsible for all the calims and charges which arise under the contract of affreightment, one might conclude that, art.645 gives the shipowner a lien or "privilégé" on the goods which are on his ship whether they belong to the charterer or not, because the text of article 645 is general and does not specify on which goods can the shipowner exercise his lien, and because the Algerian legislator did not give a section regulating the sub-charterparty in the Maritime Code, it might be concluded that the intention of the legislator was to give the shipowner a lien on the sub-freight. The argument of this conclusion is that the Algerian legislator gave the charterer the right to sub-charter in article 644 in the first chapter of the contract of affreightment and that chapter is concerned with the general rules concerning all the contracts of affreightment and, he followed in the same chapter by an article (art.645) giving the shipowner a lien on all the goods for his freight and this article was just after the article which allowed the charterer to sub-charter. Therefore, this article (645) did not come as a coincidence, but it might have been the intention of the legislator to allow the shipowner to exercise a lien for sub-freight.

3-3- The Probelms of Charges:

The problem of charges under Section 95 of the Companies Act 1948, does not constitute a problem for registration any more with the new Act of 1989. Although under the 1948 Act (Sect.95) and 1985 Act (Sect.395) a charge on book debts requires registration, the lien on sub-freights was considered a charge on book debts in The Ugland Trailer, and therefore, required registration under the above acts. Thus, the characterization of a lien on sub-freights as a charge on book debts had far reaching consequences.[238]

Under the new Companies Act 1989, Sect.93 (2) (g), a shipowner's lien on sub-freights is not considered to be a charge on book debts nor a floating charge.[239]

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238 M.T.W. Lloyd's Maritime and Commercial Law Quarterly. 1986. . at P. 1. on "Lien on Sub-Freights Registrable as a Charge".

239 Oditah. Fidelis. "The Juridical Nature of a Lien on Sub-Freights." Lloyd's Maritime and Commercial Law Quarterly. 1989. at P. 196.

However, it would be worthwhile considering how the problem of charges arose and how this affected the legal nature of the lien. The question can only be answered by looking at the different cases which were concerned with this problem. The first case, was The "Ugland Trailer",[240] where it was held that such a lien was equitable and had the characteristics of a charge. The substance of the decision is unchanged by the 1989 Act, leaving the disponent owner with two alternatives to justify the enforcement of the lien, namely charge and assignement.

Welsh Irish Ferries chartered the Ugland Trailer form Norwegian owners on the New York Produce Exchange form for a period for about six months. The charter contained the usual cl. 18 giving the owners a lien upon all sub-freights for any amounts due under the charter. During the currency of the charter, Welsh Irish Ferries executed a debenture in favour of a bank, under which, inter alia, "all book debts both present and future due or owing to the company and the benefit of all rights relating thereto..." were charged. The debenture, which further provided that the charge created should be a fixed first charge, was duly registered under s.95 of the Companies Act 1948. Section 95(1) of the 1948 Act (now s.395 of the 1985 Act) renders void against the liquidator and any creditor of a company to which the section applies, any charge created by the company unless it is registered within 21 days. By s.95(2) (now s.396 of the 1985 Act) the section applies, inter alia, to "a charge on book debts of the company". Cargo was carried during the period of the time charter under the terms of the consignment notes issued to shippers by the time charterers. No bills of lading were issued and hence there were no contracts to which the owners were a party under which freight was payable. The only rights the owners of the Ugland Trailer had in regard to freights were those given by the lien on sub-freights under cl.18 of the time charter. Following defaults in the payment of

240 Re Welsh Irish Ferries Ltd. (The Ugland Trailer). [1985] 2 Lloyd's Rep. 372.

hire by the time charterers, the owners terminated the charter and gave notice to shippers requiring them to pay all outstanding sums due in respect of freight to them. Subsequently, the bank in exercise of its rights under the debenture appointed receivers who, after an order was made for the winding-up of the time charterers, applied to the court for directions whether to pay the freight collected from the shippers to the owners or to the bank.

It was held by Nourse, J.,[241] that the lien on sub-freights operated to create an equitable charge on Welsh Irish Ferries' book debts, including the sub-freights; that on the clear wording of s.95, the lien was registrable as a charge; and that, since the lien had not been registered, the bank's fixed charge took priority over the claim of the owners of the "Ugland Trailer."

It was argued on behalf of the owners that although the New York Produce Exchange form of time charter had been in use since before 1913, the rights under cl.18 had always been described as liens and it has never been suggested until recently that they took effect as equitable charges. Registration under s.95 of the Companies Act 1948, it was said, it would be quite impracticable since charters were negotiated by commercial people, the 21-day period under s.95(1) would normally expire before the charter came to an end. It was therefore suggested that registration would have to be effected in almost all cases which would give rise to "profound inconvenience". The judge held, however, that these considerations, powerful though they were, could not outweigh the clear wording of the statute.

Thus, in reaching this decision Nourse J noted that it never been the practice to register a lien on sub-freight under section 95. It was stated that the court was most reluctant to disturb settled commercial practices needlessly, although such had happened in the case of Re Bound Worth Ltd [1980] Ch 228, where Slade J had decided that a retention of title clause created a floating charge on the property of the company within the meaning of section 95(2)(f)

241 [1985] 2 Lloyd's Rep. 372.

(Companies Act 1985, Section 396(1)(f).[242]

The Welsh Irish Ferries case was to some extent a special case in that cargo was carried throughout the time charter under consignment notes and not under bills of lading, the contracts of carriage evidenced by the bills will usually be contracts to which the shipowners themselves are party by virtue of the bills being signed by or on behalf of the master. Where the owners are parties to the bills of lading in this manner, the right to claim sub-freights from consignees and endorsees of the bills will arise not by virtue of the owners' contractual rights of lien, but by virtue of their right under the bills to require that sub-freights be paid to them (see the remarks of Greer, J., In Molthes R/A v. Ellerman's Wilson Line Ltd.)[243] In those circumstances the question of registration will not be relevant.

Nevertheless, there are many other cases, apart from the rather special circumstances of the Welsh Irish Ferries case, where the right to lien sub-freights is a valuable remedy available to the shipowner: for example, where charterers' bills of lading are issued or where the ship is sub-chartered and sub-charter freight or sub-time charter hire is payable to the time charterers. Registration of the time charter under s.395 of the 1985 Act would therefore be a wise precaution to take, if practicable, where are any doubts about the time charterers' present or future solvency and the company is one to which s.395 applies. By virtue of s.409 of the 1985 Act (derived from s.106 of the Companies Act 1948) s.395 applies not only to companies incorporated in England and Wales, but also to overseas companies with an established place of business here. It was held in N.V. Slavenburg's Bank v. Intercontinental Natural Resources Ltd.,[244] that a charge governed by foreign law which was created by a

242 Company Law Digest. Re Welsh Irrish Ferries Ltd [1985] BCLC 327. Whether a Charge Lien of Sub-Freights is Registrable Under Section 95, Companies Act 1948. at P. 51-52. Year, 1986. Volume.4, Part.(2).

243 [1927] 1. K.B. 710,717.

244 [1980] 1 W.L.R. 1076.

foreign company with a place of business in England, in favour of a foreign bank, was void in this country for want of registration under s.95 of the 1948 Act, even though the company which created the charge had not registered as an overseas company. It was held further that registration under s.95 would be required in the case of property not in England at the time the charge was created, but which subsequently came to England; and also that the section would continue to apply even if the company ceased to have a place of business in England after creation of the charge.

As a result of the decision in Slavenburg's case, it has become common for lenders in the shipping sector to register charges under s.395 of the 1985 Act where there is any possibility at all that the company creating the charge may have a place of business in England and Wales or might do so in the future or that assets subject to the charge might at some stage come within the jurisdiction.

Moreover, there has been other cases were this issue was considered and decided, and that was the case of the "Annangel Glory",[245] where by a time charter in the New York Produce Exchange form dated Oct. 25, 1985 the plaintiff owners let their vessel Annangel Glory the the charterers (second defendants) who in turn by a voyage charter on the Sugar Charterparty 1969 form dated Nov. 7, 1985 sub-let the vessel to the first defendant sub-charterers. The head charter provided inter alia:

> "18 ... That the Owners shall have a lien upon all cargoes, and all sub-freights for any amount due under this Charter . . . ".

The owners claimed to be entitled to recover from the sub-charterers sums due from the latter to the charterers on the ground that these sums represented sub-freights which the owners could claim under cl.18 because the charterers

245 Annangel Glory Compania Naviera S.A. v. M. Golodetz Ltd., Middle East Marketing Corporation (UK) Ltd and Clive Robert Hammond. (The "Annangel Glory"). [1988] 1 Lloyd's L.R. 45.

owed money to the owners under the head charter.

The charterers were now in liquidation and the issue for decision was whether by agreeing to cl.18 the charterers created a charge registrable under s.395 of the Companies Act, 1985. If such a charge was created then it was common ground that any rights of the owners to the sums due from the sub-charterers were void as against the third defendant, the liquidator of the charterers because the charge was not duly registered within 21 days of the date of the charter.

It was held by Mr. Justice Saville that,[246] the relevant words of cl.18 constituted an agreement by the charterers to assign to the owners by way of floating security the right to payment of sub-freights falling due under contracts to be made by the charterers in respect of the vessel the subject of the head charter. He added that,[247] whatever the true nature of the "lien", it seems to me to be obvious that the parties intended to give the owners a right which the owners could exercise on their own behalf-not on behalf of the charterers-if amounts became due under the charterparty. I can find nothing in the words of cl.18 which could be read as giving the owners a right to act merely as agents for the charterers. Moreover, he agreed with Mr. Justice Nourse, in The Ugland Trailer,[248] that the only way in which that right can be vested in the owners is by way of assignment, i.e., by transfer of that right (that chose in action) from the charterers to the owners. Of course it is not intended that the owners should exercise that right unless sums are outstanding under the head charter; and until that state of affairs arises it is clearly implicit that the charterers are empowered to deal with the sub-freights as their own. He added, later on in the passage that, "In my view, therefore, the relevant words of cl.18 do constitute an agreement by the charterers to assign (i.e., to transfer) to the owners by way of floating security the right to payment of sub-freights falling due under contracts to be

246 Id. at P. 45.

247 Id. at P. 47.

248 [1985] 2 Lloyd's Rep. 372.

made by the charterers in respect of the vessel the subject of the head charter.[249] Mr. Justice Saville,J., concluded his judgment by stating that:

> "In my judgment, therefore, cl.18 of the head charter does not contain a charge created by the charterers within the meaning of s.395(1) of the Companies Act, 1985, namely a floating charge on a specified part of that company's property (namely sub-freights to become due to the charterers in respect of the vessel) within the meaning of s.396(1)(f) of that Act. Since neither the prescribed particulars of that charge nor the instrument (the head charter) creating that charge were registered within the period allowed, the security on that property conferred by that charge is void as against the liquidator of the charterers. Therefore, where the time charterer is a company registered in this country or has or may have a place of business in this country, non-registration of the time charter under s.395 may render a lien on sub-freights innefective. The position in other countries having legislation similar to the Companies Acts 1948 and 1985 may well be the same.[250]

If this is the situation under s.395 of the Companies Act, i.e., that charge should be registered within the period allowed, the case may differ with the new Companies Act of 1989.

This new Act has brought a lot of changes and that by considering the shipowner's lien on sub-freight as a charge which does not require registration. Section 93 of the Companies Act of 1989 which brought an amendment to section 395 and 396 of the previous act (the Companies Act 1985), provides in the paragraph which concerns the registration in the companies charges register, that the charges which require registration do not include the shipowner's lien on sub-freight. Therefore, sect.396 of the new act provides a that:

> Section 396. 2. (g):
> a shipowner's lien on subfreights shall not be treated as a charge on

249 The Annangel Glory. [1988] 1 Lloyd's L.R. at P. 49.

250 Company Law Digest. Re Welsh Irrish Ferries Ltd [1985] BCLC 327. Whether a Charge Lien of Sub-Freights is Registrable Under Section 95, Companies Act 1948. at P. 51-52. Year, 1986. Volume.4, Part.(2)

book debts for the purposes of paragraph (c) (iii) or as a floating charge for the purposes of paragraph (e).

3-4- The Nature of the Shipowner's Lien on Sub-Sub-Freight:

As it has been stated above, the shipowner has an express lien for sub-freight by the clauses of the charterparty, i.e., clause 18. However, if cl.18 gives to the shipowner a lien on all sub-freights, a question arises, as to what freight is meant by this clause; is it the sub-freight or does it include the sub-sub-freight? In this context many theories have been laid down as to the nature of this lien on the sub-sub-freight, some of them rely on the the subrogation, some others on the theory of equitable charge and some of them on the theory of equitable assignment and some others on other theories which will be examined in this comment.

A- Privity of Contract as the Basis for the Lien:

Authorities in both England and the United States agree that although the lien on sub-freight must be expressly reserved in the charterparty,[251] the legal basis for the shipowner's lien is not based upon a contractual relationship between the shipowner and the sub-charterer.[252] Therefore, a fortiori, no contractual relationship exists between a shipowner and a sub-sub-charterer, and a lien on sub-sub-freight does not require privity of contract.

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251 O'Rourke, Kenneth R. A shipowner's Lien on Sub-Sub-Freight in England and the United States: New York Produce Exchange Time Charterparty Clause 18. Loyola of Los Angeles International and Comparative Law Journal. 1984. Vol.7. Part.N 1. at P.73.

252 Molthes Rederi Aktieselskabet v. Ellerman's Wilson Line, Ltd., [1927] 1 K.B. 710, 716, 136 L.T.R. (n.s.) 767,769 (1926); accord The Banes, 221 F. 416, 418 (2d Cir. 1915). Cf. Wehner v. Dene Shipping Co., [1905] 2 K.B. 92, 98, 21 T.L.R. 339, 340; accord In re North Atl. & Gulf S.S. Co., 204 F. Supp. 899, 904 (S.D.N.Y. 1962), aff'd sub nom. Schilling v. A/S D/S Dannebrog, 320 F. 2d 628 (2d Cir. 1963).

B- Subrogation as the Basis for the Lien:

United States courts base the shipowner's lien on sub-freight on a theory of subrogation.[253] Ordinarily, subrogation refers to a doctrine of (marine) insurance whereby the insurer indemnifies the insured for his loss and then succeeds the insured to all rights that the insured may have had against a third party.[254] In the context of a shipowner's lien on sub-freight, the doctrine operates in much the same way. According to the case of American Steel Barge Co. v. Chesapeake & Ohio Coal Agency Co,[255] subrogation operates as follows: If the charterer defaults under his charterparty with the shipowner, the shipowner steps into the place of the charterer with respects to any rights the charterer has to collect sub-freight from the sub-charterer.[256] If freight is also due to the sub-charterer from a sub-sub-charterer, the shipowner could be subrogated to the sub-charterer's right to collect that freight as well. As long as each charterer in the chain owes freight to the party from whom it chartered the vessel, the shipowner can proceed against the freight that is owed. The shipowner's recovery from the various charterers, however, is limited to the amount that each of the charterers owe under their respective charterparties.[257] Moreover, the shipowner cannot successfully proceed against a charterer who has fulfilled its freight obligation, as long as the freight was paid before notice was received that the shipowner was exercising its lien.[258] Thus, it appears if one of the charterers along the chain has fulfilled its freight obligation before the shipowner

253 See, e.g., American Steel Barge Co. v. Chesapeak & Coal Agency, 115 F. 669 (1St Cir. 1902), rev'g American Steel Barge Co. v. Cargo of Coal ex City of Everett, 107 F. 964 (D. Mass. 1901); MCT Shipping Corp. v. Sabet, 497 F. Supp. 1078, 1085 (S.D.N.Y. 1980); Larsen v. 150 Bales of Sisal Grass, 147 F. 783, 785 (S.D. Ala. 1906).

254 G. Gilmore & C. Black, The Law of Admiralty 91 (2d ed. 1975).

255 American Steel Barge Co. v. Chesapeake & Ohio Coal Agency Co, 115 F. 669 (1st Cir. 1902), rev'g American Steel Brge v. Cargo of Coal ex City of Everett, 107 F. 964 (D. Mass. 1901).

256 115 F. at 674.

257 Id. at 672; accord Paul v. Birch, 26 Eng. Rep. 771, 771-72, 2 Atk. 621, 622-623 (Ch.1743).

258 Cf. The Solhaug, 2 F. Supp. 294 (S.D.N.Y. 1931) (sub-charterer forced to pay sub-freight twice because it had at least constructive knowledge that the shipowner had exercised a lien when it paid the charterer the first time).

exercises a lien, as was the case in Jebsen v. Cargo of Hemp,[259] the chain would be effectively broken since there is no remedy against that charterer to which the shipowner could be subrogated.[260]

The subrogation line of reasoning, therefore, creates the potential for inconsistent results: If the sub-charterer owes sub-freight at the time the shipowner exercises its lien, the shipowner could collect any sub-sub-freight owed to the sub-charterer. If the sub-charterer has fulfilled its sub-freight obligations, however, the shipowner would not be entitled to collect sub-sub-freight owed to the sub-charterer since no remedy would exist against the sub-charterer. The charterer, in whose place the shipowner stands, cannot successfully proceed against a sub-charterer who does not owe freight. No reason is apparent for these differing results.[261] Thus, subrogation should not be the proper basis for the shipowner's lien; if it was, the potential for inconsistent results would exist.

C- Equitable Charge as the Basis for the Lien:

Although the court in Care Shipping,[262] cautioned that a shipowner may not be entitled to a lien on sub-sub-freight if the legal basis for the lien is that it operates as an equitable charge.[263]

Here by a time charterparty in the New York Produce Exchange form the

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259 228 F. 143 (D. Mass. 1915).

260 In Jebsen, the sub-charterer had fulfilled its sub-freight obligations to the charterers before the shipowner exercised its lien. Since the charterer could not succesfully proceed against the sub-charterer, the chain was effectively broken.

261 The effect to the sub-charterer is the same regardless of whether the sub-charterer has fulfilled its sub-freight obligations when the shipowner exercises its lien on the sub-sub-freight. In both situations, the shipowner, not the charterer, would be able to collect the sub-sub-freight, while the sub-charterer would still have to fulfill its sub-freight obligations either to the charterer before the lien is exercised, or to the shipowner after the lien is exercised.

262 Care Shipping Corp v. Latin American Corp. The "Cebu". [1983] 2 W.L.R. 829, [1983] 1 All E.R. 1121, [1983] 1 Lloyd's L.R. 302 (Q.B. 1982).

263 Id. at 838, [1983] 1 All E.R. at 1128, [1983] 1 Lloyd's L.R. at 309.

shipowners' vessel was chartered to charterers, sub-chartered to sub-charterers, and sub-sub-chartered to sub-sub-charterers. Clause 18 of the charterparty provided that 'the Owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this charter.' After a dispute arose between the owners and the charterers regarding the hire payable the owners sent a telex to the sub-sub-charterers purporting to exercise their right to a lien and requiring the sub-sub-charterers to pay to the owners direct any hire payable by them to the sub-charterers under the sub-sub-charter. The sub-sub-charterers issued a summons seeking the court's determination of the question whether the hire due from them should be paid to the owners or to the sub-charterers. the sub-charterers contended (i) that cl.18 was only intended to give a lien on sub-freights earned by a voyage charter and did not apply to sub-hire under a time charter, (ii) that cl.18 only created a lien over sub-freights and not over sub-sub-freights and (iii) that in any event the lien could not be enforced by the owners against the sub-charterers since it was a contractual lien and there was no privity of contract between the owners and the sub-charterers.

It was held by Lloyd J., that:

> "(1) On its true construction cl 18 gave the owners a lien on any remuneration earned by the charterers from their employment of the vessel, whether by way of voyage freight or time-charter hire and entitled the owners to intercept all sub-freight, whether or not due directly to the charterers, including sub-freights due under any sub-sub-charter.
> (2) The absence of privity between the owners and the sub-charterers did not prevent the owners having a lien on payments due from the sub-sub-charterers to the sub-charterers since the owners could claim as equitable assignees not only hire due under the sub-charterparty, but also the rights which the charterers themselves held as equitable assignees of hire due under the sub-sub-charterparty. It was added that, if it is agreed for the purpose of these proceedings that, if anything is due from Naviera Tolteca (i.e., the charterers) to the owners, then an equivalent sum is due from LAMSCO (i.e., the sub-charterers) to Naviera Tolteca, and since

it is conceded (subject to counsel for LAMSCO's first point) that the owners can intercept hire between LAMSCO and Naviera Tolteca, it may be thought pointless to investigate whether hire can be intercepted higher up the chain."[264]

Lloyd J., answered the sub-charterers when they contended that the cl.18 intended to give a lien on sub-freights earned by a voyage charter and did not apply to sub-hire earned under a time charter by stating that:

"I would hold, following Lord Blackburn in Inman Steamship Co Ltd v. Bischoff, that the lien on sub-freights conferred by cl 18 includes a lien on any remuneration earned by the charterers from their employment of the vessel, whether by way of voyage freight or time-chartered hire."[265]

and he added

"I can see no sense in a construction which would make the owners' security depend on whether the sub-charter is a voyage charter or a time-charter trip. In my view the parties must be taken to have used the word 'sub-freight' in cl 18 to cover both,"[266] and that "as for the meaning of sub-freights, I would hold that it includes all sub-freights, whether or not due to the head charterers direct. In Aegnoussiotis Shipping Corp of Monrovia v. A/S Kristian Jebsens Rederi of Bergen, The "Agenoussiotis",[267] Donaldson J., held that 'all cargoes' in cl 18 'means what it says', i.e., all cargoes whether or not belonging to the charterers. True, he did not have in mind cargo carried under a sub-sub-charter. But if 'all cargoes means what it says' it seems to me that it must also, as a matter of language, include such cargoes. By the same token all sub-freights must include sub-freights due not only under the sub-charter, but also the sub-sub-charter.[268] Moreover, counsel were agreed that in a simple three party case, where owners are given a lien on sub-freights, the

264 Id. at P. 1124.

265 Care Shipping Corp v. Latin American Corp. The "Cebu". [1983] 2 W.L.R. 829, [1983] 1 All E.R. 1121, [1983] 1 Lloyd's L.R. 302 (Q.B. 1982). at P. 1124.

266 Id. at P. 1125.

267 [1977] 1 Lloyd's Rep 268.

268 ICare Shipping Corp v. Latin American Corp. The "Cebu". [1983] 2 W.L.R. 829, [1983] 1 All E.R. 1121, [1983] 1 Lloyd's L.R. 302 (Q.B. 1982). at P. 1126.

> owners can give notice to the sub-charterers, thereby compelling the sub-charterers to pay freight to the owners, and not to the charterers. It was common ground that the mechanism which produces this result is an equitable assignment of freight due under the sub-charter.[269]

There appears to be very little authority in the maritime cases suggesting that the lien operates in this manner. Existing authority, including Lord Russell's statement in Federal Commerce & Navigation Co. v. Molena Alpha, Inc.,[270] that:

> "[t]he lien operates as an equitable charge,"[271] is either dictum or not applicable to the present situation. For example, maritime cases concerning a lien that operates as an equitable charge and not as equitable assignment refer only to a charterer's lien on a ship.[272]

The equitable charge is also discussed extensively in some non-maritime cases,[273] but these cases are not easily adapted to the maritime context. This relative lack of authority appears to indicate that the shipowner's lien on sub-freight is not based upon an equitable charge theory. On the other hand, there is a basic conflict between the characterization of a lien on sub-freights as a charge and the proposition that the right is lost once paid. Moreover, it is submitted that the charge theory is misconceived.[274]

> "First, the argument that, since the lien was intended as a non-possessory security it necessarily took effect as an equitable charge,

269 Care Shipping Corp v. Latin American Corp. The "Cebu". [1983] 2 W.L.R. 829, [1983] 1 All E.R. 1121, [1983] 1 Lloyd's L.R. 302 (Q.B. 1982). at P. 1127.

270 1979 A.C. 757, [1978] 3 W.L.R. 991, [1979] 1 All E.R. 307 (1978).

271 Id. at 784, [1978] 3 W.L.R. at 1004, [1979] 1 All E.R. at 318 (Russell, L.J.).

272 E.g., Citibank N.A. v. Hobbs Savill & Co., [1978] 1 Lloyd's L.R. 368, 371-72 (C.A. 1977) (Denning, M.R. & Roskill, L.J.); Ellerman Lines, Ltd. v. Lancaster Maritime Co., [1980] 2 Q.B. 497, 499-502 (whether a charterer's lien on a ship is based upon an equitable charge theory or an equitable assignment theory effects the charterer's ability to recover from the shipowner's hull insurance policy for damages incurred by the charterer from the loss of the ship).

273 E.g., Aluminium Industrie Vaasseen B.v. v. Romalpa Aluminium Ltd., [1976] 1 W.L.R. 676, [1976] 2 All E.R. 552, [1976] 1 Lloyd's L.R. 443 (C.A.); In re Bond Worth Ltd., [1980] 1 Ch. 228, [1979] 3 W.L.R. 629, [1979] 3 All E.R. 919 (1979).

274 Oditah. Fidelis. "The Juridical Nature of a Lien on Sub-Freights." Lloyd's Maritime and Commercial Law Quarterly. 1989. at P. 194.

is unsound.[275] Not every agreement intended to operate as a security creates a security interest in law. The retention of the title clause in a simple sale of goods contract is a good example. The motive of the parties is irrelevant.[276] English law recognizes a host of self-help remedies which behave like security but which, in truth, are not security interests at all. They are quasi-securities, so to speak, because, by guaranteeing priority, they produce some of the effects of real security. But they differ from real securities in that the priority which they guarantee is not an incident of an underlying property right--an attribute of every true security interest. The contractual set-off is an example of a right which behaves like a security, but which is not. The right of an unpaid seller of goods to stop them in transit is another.[277] Therefore, to argue that a lien on sub-freights is a charge because the motive is to secure the charterer's accrued obligations under the time charterer is not to the point.

A second argument often advanced in favour of the charge heresy is that the lien on sub-freights can only vest by an assignement and, since such an assignement is merely for security, it must necessarily be an equitable charge.[278] This argument, however, misses its target by a wide margin. For one thing, the right conferred by a lien on sub-freights does not need the mechanisn of an assignment to vest in the shipowner. The right, like all other contractual rights, is vested once the contract of hire is made.[279] It may not be immediatly exercisable because the obligations secured have not accrued (contingent libilities are not due and all liens on sub-freights speak of "moneys due") or because, though they have accrued, there is in existence no sub-freights against which the lien could operate.

A more serious objection to the charge theory is that a lien on sub-freights is a right to intecept the freights before they are paid. There is no tracing remedy for the lienee. In this respect the lien is a

275 Ibid.

276 See, Clough Mill Ltd. v. Martin [1984] 1 W.L.R. 111, esp. at P. 125. See, Re George Inglefield Ltd. [1933] Ch 1; Olds Discount Co. Ltd v. John Playfair Ltd. [1938] 3 All E.R.275; Olds Discount Co. Ltd v. Cohen [1938] 3 All E.R. 281n.

277 See, the Sale of Goods Act 1979, S.44.

278 The Ugland Trailer, [1986] Ch.471, at P. 478; The Annangel Glory, [1988] 1 Lloyd's Rep.45, at P.49.

279 Colonial Bank Ltd. v. European Grain & Shipping Ltd.(The Dominique) [1988] 3 W.L.R. 60, 67-68. Difficulty may arise on account of privity of contract, but the trust will offer a solution.

charge of a kind unknown to equity jurisprudence because it lacks most of the ordinary incidents of a true charge."[280]

D- Equitable Assignment as the Basis for the Lien:

According to the Care Shipping,[281] court, the manner in which the lien on sub-freight operates under the equitable assignment theory is as follows: If the sub-charterer owes sub-freight to the charterer and the charterer has defaulted on charter hire owed the shipowner, the charterer assigns its right to collect the sub-freight to the shipowner. Likewise, in a four party case, if the sub-sub-charterer owes freight to the sub-charterer, the sub-charterer assigns its right to collect that freight to the charterer, who assigns that right to the shipowner. The court in Care Shipping referred to this as "a chain of equitable assignments."[282] It appears that this theory would apply to a situation with more than four parties as well.

The major difference between the equitable assignment theory and the subrogation theory is that the equitable assignment theory avoids the potentially conflicting results inherent in the subrogation line of reasoning. The equitable assignment rationale works equally as well in the situation where the sub-charterer owes sub-freight, as it does in the situation where the sub-charterer has fulfilled its sub-freight obligations to the charterer. Under the subrogation theory, the two situations produce differing results. Therefore, the shipowner's lien on sub-freight should be based upon an equitable assignment theory.[283] Not only will this rationale entitle a shipowner to exercise a lien on sub-sub-freight, but it will produce consistent results in the exercise of the lien as well.

As a conclusion, one might conclude that the extension of the shipowner's lien on sub-freight to include a lien on sub-sub-freight is a benefit to shipowners

280 Oditah. Fidelis. op cit. at P. 194-195.

281 [1983] 2 W.L.R. 829, [1983] 1 All E.R. 1121, [1983] 1 Lloyd's L.R. 302 (Q.B. 1982).

282 Id. at 839, [1983] 1 All E.R. at 1130, [1983] 1 Lloyd's L.R. at 310.

283 See. Supra at note 239, at P. 89.

is clear.[284] In an industry where risk management and allocation is of primary concern, the risk to the shipowner as a result of a defaulting charterer is lessened if the shipowner is entitled to collect freight directly from the shipper-whether sub-charterer, sub-sub-charterer or bill of lading holder. In addition, the shipowner is protected from the unscrupulous charterer who could otherwise set up a fictional sub-charter before sub-sub-chartering to a third party in order to avoid the possibility of the shipowner intercepting the sub-sub-freight.[285] Additional support for extending the lien the sub-freight to include a lien on sub-sub-freight is the fact that the sub-charterer who desires to sub-sub-charter the vessel or ship goods belonging to others can protect itself by requiring the sub-sub-charterer or shipper to pre-pay freight. Freight paid before notice is received that the shipowner has exercised a lien cannot be followed "into the pockets of the person receiving it simply because that money has been received in respect of a debt which was due for freight",[286] only freight due but unpaid is the proper subject of the shipowner's lien.[287]

Further justification for the lien on sub-sub-freight is the fact that the shipper paying freight is not burdened by it. The shipper does not care whether he pays freight to the sub-charterer or the shipowner.[288] As long as the shipper has not received notice that the shipowner has exercised a lien, the shipper

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284 The lien on sub-sub-freight provides additional security to the shipowner in case the charterer defaults under the original charterparty. See Note, Shipowner Dinied Lien Against Third Party's Cargo for Unpaid Hire, 26 Loy. L. Rev. 416, 422 (1980).

285 Cf. R. Annin, Ocean Shipping 307-08 (1920) (discussing a charterparty form similar to the NYPE form and warning shippers that without a particular clause unscrupulous charterers could collect freight money and then default on the charter hire due under the head-charterparty).

286 Tagart, Beaton & Co. v. James Fisher & Sons, [1903] 1 K.B. 391, 395, 88 L.T.R. (n.s.) 451, 455 (Lord Alverstone, C.J.); accord Actieselskabet Dampsk. Thorbjorn v. Harrison & Co., 260 F. 287, 289-90 (S.D.N.Y. 1918). Cf. In re Interocean Transp. Co. of Am., 232 F. 408 (S.D.N.Y. 1916).

287 Union Industrielle et Maritime v. Nimpex Int'l, Inc., 459 F.2d 926, 929 (7th Cir. 1972); Actieselskabet Dampsk. Thorbjorn v. Harrison & Co., 260 F. 287, 291 (S.D.N.Y. 1916); accord Wehner v. Dene Steam Shipping Co., [1905] 2 K.B. 92, 101, 21 T.L.R. 339, 340.

288 Faith v. East India Co., 106 Eng. Rep. 1067, 1071, 4 B. & Ald. 630, 641 (K.B. 1821).

cannot be forced to pay twice, and in the situation where the shipowner has exercised his lien, the shipper is obliged to pay more than he owes under its charter agreement or bill of lading. As a conclusion one might say that, it appears that extending the shipowner's lien to include a lien on sub-sub-freight is warranted. It appears that the lien operates most effectively and judiciously when based on an equitable assignment rationale.[289] This rationale not only allows a shipowner to exercise a lien on sub-freight, but it would allow a shipowner to exercise a lien when more than four parties are involved as well.

3-5- The Charterparty Lien Against Bill of Lading Holder:

The general principle is that, where a ship is employed under a charterparty which gives the shipowner an absolute lien for recovery of his freight, then as long as the charterer himself is the holder of the bill of lading the lien for the charterparty freight will attach to the goods carried irrespective of the terms of the bill of lading. The charterparty governs the relationship between the charterer and the shipowner. The bill of lading is only considered as a receipt for the cargo, and cannot alter the charterer's obligation under the charterparty.[290] If the ship, being under a charterparty, is sub-chartered or put up, by the charterer, as a general ship, carrying the goods of a third person; or if the charterer, having loaded the goods transfers the property and the bills of lading to the third persons for value, then the question of the extent of the shipowner's lien against such bill of lading arises. Therefore, the general principle, is that while the charterparty is the contract between the charterer and the shipowner, that contract is not to be read into the obligation of a receiver of goods under the bill of lading who is not the charterer, except in so far as the terms of the charterparty are incorporated in the bill of lading.[291] The bill of

289 O'Rourke, Kenneth R. A shipowner's Lien on Sub-Sub-Freight in England and the United States: New York Produce Exchange Time Charterparty Clause 18. Loyola of Los Angeles International and Comparative Law Journal. 1984. Vol.7. Part.N 1. at P. 91.

290 President of India v. Metcalfe (1970) 1 Q.B. 289.

291 See per Kennedy, L.J. in The Draupner (1909) P. 219-230.

lading being the only evidence of contract between the shipowner and such holder of bill of lading, the former is bound by the terms of bill of lading as to freight, and his lien, therefore, is limited to the amount of the freight specified in the bill of lading.

The rule can be traced as far back as 1743, where in Paul v. Birch[292] Lord Hardwick that a cargo owner, who had shipped goods under a contract with the charterer, not to be liable to satisfy the shipowner's charterparty freight. He said:

> "The bankrupts, (the charterers) made an agreement with the master on their own account, and not on the part of the merchants, and therefore the merchants are not liable. Otherwise they would be in the hardest case imaginable, for they would be liable to any private agreement between the occupier of a ship, and the original owners of it."[293]

Pollock, C.B., in Foster v. Colby,[294] laid down that:

> "A bona fide indorsee for value of the bill of lading, having no knowledge or notice of the charterparty or that the cargo was subject to lien for any freight except that mentioned in the bill of lading, not acting collusively, is entitled to the goods on payment of the freight stipulated for in the bill of lading, and is affected by the greater liability of the indorser, supposing such liability to exist."

The Incorporation of Charteparty Terms into the Bill of Lading:

The terms of a charterparty may be introduced into the bills of lading by using the words of incorporation such as "paying freight for the said goods as per charterparty", or "paying freight and all other condition as per charterparty", and etc. The question to determine is how much of the terms of the charterparty, as regards payment of freight, is introduced into the bill of lading by such clauses?

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292 (1743) 2 Atk. 621.

293 Ibid. at P. 623.

294 (1858) 3 H.N. 705-715; see also Gilkison v. Middleton (1857) 2 C.B. (N.S.) 134; Shand v. Sanderson (1859) 4 H. & N. 381; Chappell v. Comfort ((1861) 10 C.B. 802-810; Fry v. The Mercantile Bank (1866) L.R. 1 C.P. 689; Gardner v. Trechmann (1885) 15 Q.B.D. 154.

Whether the shipowner's lien under the charterparty for all freight is brought into the bill of lading so as to make the bill of lading holder liable for the charterparty freight. The question is not material where the goods are shipped under one bill of lading, at the charterparty rate of freight but it becomes very important where the cargo is shipped at a different rate of freight to that in the charterparty, or in the case where the cargo is shipped under different bills of lading in the hands of different persons. Whether a particular clause in the charterparty is incorporated in the bill of lading depends upon the wordings of the incorporation clause in the bill of lading. Therefore, there are two cases of incorporation clauses, which will be examined in the follwing situations:

(i)- Where the Bill of Lading Contains Stipulation as to Rate of Freight:

It is well established that a general reference to the charterparty does not introduce into the bill of lading from the charterparty those terms which are inconsistent with the express terms of the bill of lading. In a case where there was a clause "all other conditions as per charterparty", Lord Esher, M.R. said that:[295]

> "the condition of the charterparty must be read verbatim into the bill of lading as though they were printed in extenso. Then if it was found that any of the conditions of the charterparty on being so read were inconsistent with the bill of lading they were insensible and must be disregarded."

Where the bill of lading expressly provides that the delivery of the goods is to be made on payment of certain specific rate of freight, then incorporating the terms of the charterparty as to the shipowner's right to detain the cargo for payment of a different rate of freight, seems to be inconsistent with the express provision of the bill of lading.

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295 Hamilton v. Mackie (1889) 5 T.L.R. 677; see also Serraino v. Campbell (1891) 1 Q.B. 238, per Lord Esher, M.R. at pp. 289-290 Gullischen v. Stewart (1884) 13 Q.B.D. 317-319; Fidelitas Shipping Co. v. V/O Exportchleb (1963) 2 Lloyd's Rep. 113, see per Pearson, L.J. at pp. 124-125.

In Gardner v. Trechmann,[296] the charterparty provided for the payment of certain rate of freight and contained a clause giving the shipowner "an absolute lien on the cargo for freight, dead freight, and demmurage". By a further clause, the master was to sign bills of lading at any rate of freight, but in case of the bill of lading freight being less then the amount estimated to be earned by the charterparty, the master was to demand any difference in advance. Certain goods were put on board, and the bill of lading signed by the master made them deliverable to the plaintiffs (who were not the charterers) on paying freight at a rate lower than that stipulated by the charterparty, and a reference was made to the charterparty by using the phrase "other conditions as per charterparty". The difference not being paid in advance, the shipowner detained part of the cargo, against the plaintiffs, claiming freight mentioned in the charterparty. The plaintiffs, having paid freight at charterparty rate under protest, brought an action to recover the difference.

The Court of Appeal held that they were entitled to recover, on the ground that the charterparty gave no right of lien for that difference, the stipulation was a mere reservation of a right which the shipowner could not enforce by lien.[297] Secondly even if the right of lien did exist, it was inconsistent with the terms of the bill of lading, and therefore not incorporated into the bill of lading. Lindley, L.J. observed that:

> "The bill of lading is a contract for conveyance of goods. It has been contended that the consignees of the cargo under the bill of lading must pay the whole of the freight due by the charterparty; is that a term inconsistent with the bill of lading? Certainly I am of opinion that it is not consistent: The two clauses as to payment of freight can not stand together. It is no answer to say that the bill of lading incorporates the conditions of the charterparty: only those conditions are incorporated which are consistent with the bill of lading."[298]

Even if the words of the incorporation clause are wide enough to produce a prima facie incorporation, they nevertheless have the effect of introducing in the

296 (1884) 15 Q.B.D. 154.

297 See per Brett, M.R. at P. 157.

298 Ibid. at pp. 158-159.

bill of lading the terms which would be applicable to the bill of lading and consistent with the express terms of the bill of lading.[299] Very wide clauses used in the bills of lading such as: "all terms, conditions, clauses and exception as per charterparty", or "all the terms, conditions, liabilities, and exceptions of the charterparty are herewith incorporated", seem to incorporate into the bill of lading every term of the charterparty, provided that the term makes sense if read into the bill of lading, and is consistent with its express provisions.[300]

Where the bill of lading contains express stipulation as payment of freight then it seems that even a very wide incorporation clause in the bill of lading would bring into the bill of lading the term of the charterparty giving the shipowner a lien for freight stipulated by the charterparty.

Moreover, it was held in a recent case that the incorporation of the charterparty terms into the bill of lading gives the shipowner the right to hold the cargo belonging to third party than the charterer. This case is namely The Constanza M,[301] the facts of this case are as follows:[302]

On Jan. 18, 1979, the owners let their vessel Constanza M to Oceantrans for the carriage of wheat from the river Plate to China. The charter provided for the freight at the rate of $32 per tonne and, by cl.42, that *inter alia*:

> "... 100% of the freight to be prepaid within 6 days of signing each bill of lading ... Owners to release a non-negotiable Bill of Lading only and original Bills of Lading to be given upon Owners having received funds. ..."

Almost a month before the head charter was concluded, Oceantrans had entered into a sub-charter with the respondents. The sub-charter was similar in

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299 See Aktieselskabet Ocean v. Harding (1928) 2 K.B. 371, per Scrutton, J. at P. 384; Red "R" SS Co. v. Allatini (1909) 15 Com. Cas. 290.

300 See Phonizien (1966) 1 Lloyd's Rep. 150; The Merak (1964) 2 Lloyd's Rep. 527.

301 Compania Comercial Y Naviera San Martin S.A. v. China Trade Transportation Corporation. (THE CONSTANZA M). [1980] 1 Lloyd's Rep. 505.

302 Lloyd's Maritime and Commercial Law Quarterly. 1980. at P. 484.

all respect to the head charter except that the freight was at the rate of $28 per tonne, and 90% of the freight was to be pre-paid within seven working days of signing bills of lading.

In February, 1979, a quantity of wheat was shipped on board the vessel, and the shippers demanded bills of lading. The owners refused as they had not been paid any freight, but eventually issued bills of lading containing the following typed clause:

> "Freight payable according to Terms/Conditions and Exceptions of C/P dated 18-1-79. All Terms and Conditions and Provisions of which are expressly incorporated herewith".

Meanwhile on Feb.9 or 10, the respondents paid U.S.$637,003.50 to a bank in Hong Kong for the credit of Oceantrans, being 90% of the freight due under the sub-charter. However, Oceantrans did not pay any freight to the owners, and on Feb.16 the owners threatened to exercise a lien on the cargo if they did not receive payment of their freight. Eventually by agreement, which was reduced to writing in a document dated Apr.6,1979, and made between the owners and the respondents who were described as consignees, it was agreed that the respondents would pay a further U.S.$462,000 into a joint account to be released in full to the owners upon the arrival of the vessel, that the respondents would responsible for the coast of discharge, and that all disputes arising out of the bills of lading were to be referred to arbitration.

The owners claimed that balance of the sum due under the head charter. The respondents claimed back the sum which they had paid under protest. It was held by Lloyd.J., that:

> In the light of the agreement of Apr.6, 1979, it would be the plainest injustice if the respondents were allowed to contend that they were not the proper parties to be sued. In entering into an agreement which ... , the respondents clearly represented to the owners that although they were not accepting liability under the bills of lading,

they were nevertheless the parties to be sued. The owners having acted on this representation, the respondents ought not to be allowed to assert that they never became parties to the bill of lading contract.[303]

The words in the typed clause in the bill of lading, on the face of it, were clear enough and wide enough to incorporate cl.42 of the head charter. The language of cl.42 was perfectly general, and although cl.42 provided for freight to be paid in advance, and this would normally have been paid by the shipper or the charterer, there was no reason for implying that such freight had to be paid by them and nobody else. Clause 42 made sense in the context of the bill of lading, and made equally good sense whether applied to the shipper or the consignee, and there was no ground for distinguishing between its application to the shipper and the consignee without reading words into cl.42.[304]

There were no findings in the award that Oceantrans were ever appointed the owners' agents to receive the bill of lading freight. There was nothing in the authorities relied upon by the respondents which decided or even suggested that it ought to be inferred as a fact or to be decided or held as a matter of law that Oceantrans were agents to collect bill of lading freight on behalf of the owners or that they had been held out in any way as having ostensible authority to do so.[305]

(ii)- Where No Rate of Freight is Specified in the Bill of Lading:

Now, suppose that there is no provisions in the bill of lading as to the rate of freight, but instead a reference is made to the charterparty as to payment of freight. Just how much of the charterparty terms can be brought into the bill of lading by the usual incorporation clauses? There being no specific rate of freight in the bill of lading, could it be said that a reference to the charterparty as to payment of freight incorporates into the bill of lading all clauses of the charterparty relating to payment of freight including a lien clause, that is a right to detain the cargo until payment of charterparty freight? Could it be said that in

303 Ibid. at P. 513.

304 Ibid. at P. 514.

305 Ibid. at P. 414. 517.

such a case there could be nothing inconsistent in introducing the charterparty lien into the bill of lading?

In Fry v. Chartered Mercantile Bank[306] the bill of lading instead of stating the freight payable in respect of the goods simply provided "freight for the said goods payable as per charterparty". The court held that the clause in the bill of lading reffered to the charterparty for the purpose of determining the rate of freight to be paid upon those only, and it did not introduce into the bill of lading, the shipowner's lien for charterparty freight, as against the bill of lading holder. The shipowners only had a lien for freight due for the goods included in the bill of lading at the rate specified in the charterparty.

"The true construction of the words", said Erle, C.J., "is that they refer to the charterparty for the purpose of determining what the rate of freight is, and that it is to be that which is mentioned in the charterparty." He added that "if it is wished to include more of the terms of the charterparty, words ought to be introduced into the bill of lading which would show that intention more plainly."[307] Montague Smith,J. said that the "condition means that the amount of freight payable for those packages shall be that which is mentioned in the charterparty payable for them, and for them only ... and it would require very strong words to render the defendants liable for freight payable under the charterparty, for the whole cargo."[308]

Even when no rate of freight is stipulated in the bill of lading, and the bill of lading contains a wide clause incorporating "all terms, conditions, clauses and exceptions" of the charterparty, still in such a case introducing the charterparty lien into the bill of lading does not seem to be consistent with the character of the bill of lading. Suppose there are several bills of lading in the hands of different persons and each provides for delivery of that portion of the cargo to the

306 (1866) L.R. 1 C.P. 689.

307 Ibid. at P. 692.

308 Ibid. at P. 692; see also Smith v. Sieveking (1855) 24 L.J.Q.B. 257, (1856) 5 E. & B. 589.

consignee on payment of freight for it, then it would destroy the bill of lading to introduce into it a condition that the consignee must pay freight on the whole cargo under the charterparty lien of the shipowner.[309]

Carver states that if "the bill of lading incorporates the terms of the charterparty, as by using comprehensive words as 'paying freight for the same goods and all other conditions as per charterparty', the owner's lien on the goods for the charterparty is preserved."[310] The statement is made without any distinction being drawn between the case in which the bills of lading contain provisions as to the rate of freight and those which do not so provide.

In Lamb v. Kaselack,[311] which is a Scottish case, the shipowner having "an absolute lien on the cargo for all freight" under the charterparty, the master signed bills of lading for certain parts of the cargo shipped by the charterer, and transferred to different consignees, which provided that freight for the goods to be paid at certain specific rate, and "all conditions as per charterparty".

It was held that the shipowner was entitled as against the consignees to a lien over their portion of the cargo for the freight due on another portion for which no consignee appeared at the port of discharge, since the obligation of the charterer imported into the bill of lading was that every part of the cargo should be liable for the whole freight. It was contended, on behalf of the consignees, that the effect of the clause was that if the cargo belongs only to one person, all parts of it would be under lien for full freight; but if to several, the portion belonging to each should be liable only for its proper share of freight. Lord Craighill rejected the view because "the clause", he said, "so far as freight is concerned, would be rendered insensible by that interpretation, and a reading which issues in such a result can seldom, if ever, be taken to be the true construction. The purpose of the clause is obvious enough."

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309 See Keogh (G.D.), "The Shipowner's Lien For Freight", The Law Quarterley Review, (1898) Vol. LIV, P. 148.

310 12 th ed., P. 1350. and the 13 th edition. para.2022, at P. 1401.

311 (1882) 19 Sc.L.R.336.

The case of Lamb v. Kaselack,[312] has never been regarded by English courts as having stated the rule on the subject, on the contrary they have been very strict in interpreting such clause, and as we have seen even widest incorporation clause has not been construed in such a way as to put upon a bona fide indorsee of bill of lading for value or a shipper who is stranger to the charterparty which is inapplicable to the bill of lading.

The conclusion, therefore, seems to be that mere general reference to the charterparty will not bring into the bill of lading terms of the charterparty which are inconsistent with the express terms or the nature and concept of the bill of lading. Unless the bill of lading clearly and by plain words incorporates the clause of the charterparty giving lien to the shipowner for the charter freight, which would bind the bill of lading holder.

The Effect of Notice of a Charteparty:

The general rule being that no third person can be bound by a contract or an agreement to which he is not a party, then it seems that mere notice of the existence of such contract or even knowledge of its exact terms would make no difference. It was, however, thought, for some time, that a holder of a bill of lading who had notice of the charterparty, might be bound by the terms of the charterparty as to the shipowner's lien. In Kern v. Deslands,[313] the charterer being the owner and the shipper of the goods consigned them to his agents, who had executed the charterparty on his behalf and to whom he was indebted, and indorsed to them a bill of lading at a rate below the chartered freight. The Court of Common Pleas held that they were liable to the shipowner for the charterparty freight. As they were "not only the agents of the charterer, but took the bill of lading with full notice of the terms of the chartereparty. They, therefore, stood on the charterer's title, both because they were charterer's

312 Ibid.

313 (1861) 10 C.B. (N.S.) 205.

agents and because they had notice of the terms of the charterparty."

The decision was disapproved of in Gray v. Carr,[314] where Brett, J. said:

> "Great stress was laid by the Court in that case on the fact that the consignees claiming under the bill of lading, were mere agents of the charterer. Unless the decision can be supported on that ground, I think it can not be supported at all."

The principle is now established that a bona fide indorsee of the bill of lading for value or a shipper who is not a party to the charterparty is entitled to have the goods delivered to him upon his fulfilling the terms mentioned in the bill of lading, and is not ordinarily bound to refer to the charterparty, even if he had notice of the terms of the charterparty.[315]

In Fry v. The Chartered Merchantile Bank,[316] a bona fide indorsee of the bill of lading for value who knew of existence of the charterparty, though not of its contents, was allowed to have the goods delivered to him on payment of freight for the goods included in the bill of lading and not for the whole charterparty freight, and knowledge of the existence of the charterparty did not affect his right under the bill of lading.

In Shand v.Sanderson,[317] the charterer's agents, who had notice of the charterparty, purchased goods and shipped on board the vessel on account of the charterer, but detained the bill of lading as security for the price of the goods, upon the charterer's failure to pay for the goods. They were held to be entitled to have the goods on payment of the bill of lading freight which was a nominal freight, since in such circumstances they were held to stand in the position of third parties.

The fact that the holder of the bill of lading is also sub-charterer of the vessel, seem to be immaterial, for hisonly contractual relationship with the

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314 (1871) L.R. 6 Q.B. 522-540.

315 See per Willes,J. in Chappel v. Comfort (1861) 10 C.B. (N.S.) 802; and per Lidsey,J. in Manchester Trust v. Furness (1895) 2 Q.B. 545.

316 (1866) L.R.1 C.P. 689.

317 (1859) 4 H. & N. 381.

shipowner is through the bill of lading. In Turner v. Haji Goolam,[318] where the shipper and holder of the bill of lading was also the sub-charterer of the ship from the time charterer, who had notice of the terms of the head charterparty, was held not to stand in the position of the charterer and therefore not bound by the shipowner's lien under the head charterparty for freight payable under it. The facts of the case were as follows:

By a time charterparty the master was to sign bills of lading at any rate of freight the charterers or their agents might direct without prejudice to the charterparty. The charterers were to have the option of sub-chartering the vessel, and the shipowners were to have a lien upon all cargoes for freight or charter money due under the charter. The vessel being under sub-charter arrived at the port of destination having a quantity of sugar put on board by the sub-charterer, for which he had received bill of lading at certain rate of freight which was prepaid by the sub-charterer. so, when she arrived there was nothing due in respect of the bill of lading freight. Hire being due to the shipowners under the head charterparty, they claimed to exercise a lien on sub-charterer's cargo for the sum.

The Privy Council came to the conclusion that the bills of lading granted by the master to the sub-charterer, not being mere receipt for goods, but contracts which bound the shipowners, Lord Lindley stated that unless 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 he considered to have been decided in Fry v. Chartered Merchant Bank which was followed in Gardner v. Trechmann:

> "In both of these cases the bill of lading expressly referred to the charterparty, 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 charterparty has not the effect of incorporation into the bill of lading

318 (1904) A.C. 826.

any term which are inconsistent with it and which the captain was not bound to embody in the bill of lading."[319]

After considering the shipowner's lien on the bill of lading holders for the payment of his freight in the common law jurisdiction, it is now necessary to consider this lien or what is called "privilége" in the civil law jurisdictions (namely the French and Algerian law which are mainly concerned in this work). The legislator recognised the right of the shipowner for his lien or "privilége" for the payment of his freight. Therefore, one finds that the French legislator in article 23 and 24 of the Code of Commerce (this code include the French Maritime Code),[320] prefers or gives a right of preference to the captain for the payment of his freight on all the goods of his cargo during the fifteen days which follow their delivery if they did not pass to a third party's hands. This is provided in article 23 which states that: "Le capitaine est prefere, pour son fret, sur les marchandises de son chargement, pendant la quinzaine apres leur delivrance si elles n'ont passe en mains tierces.", and the French legislator added in art.24 that even in the case of bankruptcy or admission to the judicial settlement of the shippers or the claimants of the goods before the expiration of the fifteen days, the captain is preferred or he has a "privilége" against all the other creditors for the payment of his freight and damages which are due to him.[321]

The Algerian legislator, however, gives a wider lien or "privilége" to the carrier by allowing him to retain or to refuse to deliver the cargo until the consignee has paid the freight or has given a sufficient guarantee for all what is due for the carriage of the goods, and this has been provided in article 792,[322] of

319 Per Lindley,J. at P. 836.

320 Loi No. 66-420 du 18 Juin 1966. Affretement et Transport Maritimes. Under the title of "Execution du Contrat de Transport de Marchandises", at P. 215.

321 The article in french provides that: <<En cas de failite ou d'dmission au reglément judiciaire des chargeurs ou réclamateurs avant l'expiration de la quinzaine, le capitaine est privilégié sur tous les créanciérs pour le paiement de son fret et des avaries qui lui son dues>>.

322 <<Le transporteur peut refuser de livrer les marchandises et les faire consigner

the Algerian maritime Code.[323] Moreover, he recognises that the shipper has to pay the freight or the price for the carriage which methods of payment are stated or included in the agreement of the parties.

Before dealing with the nature of this lien in the civil law jurisdictions, it would be best to say that the master in the French and the Algerian maritime law has a great authority because he is the representative of the shipowner, and therefore, he has the representative capacity to act as the shipowner in the limits of the representation, because he can personnally be liable for any breach of the representation. Therefore, the French and the Algerian laws allow the master of the ship as being the representative of the shipowner to retain the cargo until the freight is paid, because he is the one responsible for the commercial use of the ship, and therefore, the carrying on the business of carrying cargoes to their destination and earning freights. Thus, he is the one responsible for looking after the ship the cargo and making profit out of that by receiving freights.

To establish the nature of this lien or "privilége", it is worth going to the civil code where one might find a similar situation, because this situation is quite similar to that of the lessor who has a "privilége" against the tenant on all the movables which are in the or on the rented property. In the French Civil Code the tenant is obliged to furnish the immovable he rented, and that with enough furniture to guarantee or which is enough to guarantee the sum of the rent. This "privilége" or lien is prescribed in article 1752 of the French Civil Code, which provides that: "The tenant who does not furnish the house with enough furniture , can be evicted , unless he gives enough guarantees able to meet the rent".[324] This article of the French civil law, although, it gives to the lessor an

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jusqu'a ce que le destinataire ait payé ou qu'il ait fourni cuation de tout ce qui est dû pour le transport de ces marchandises ainsi qu'a titre de contribution d'avarie commune et de rémunération d'assistance.>>.

323 ORDONNANCE No. 76-80 Du 23 Octobre 1976, Portant "CODE MARITIME".

324 " My Own Translation ". The article in french provides:

<<Le locataire qui ne garnit pas la maison de meubles suffisants, peut être expulsé, á moins qu'il ne donne des sûretés capables de repondre du loyer.>>.

indirect privilege on the movables which are present on his property he rented, this article should have been more specific by giving to the lessor a direct "privilége" on all the movables present on his property which he rented out to the tenant. The Algerian Civil Code, however, learnt from the mistake or absence of the French civil law in this context, and gave a more specific lien or "privilége" to the lessor on all the movables which are on his property which he rented out, and without making any difference. It was provided in article 501 of the Algerian Civil Code that: "The lessor has to guarantee all his claims from the rent, a right of retention on all the movables which can be seized, which are furnishing the rented place, as long as they are under the privilege of the lessor, even if they do not belong to the tenant ...".[325]

Therefore, the nature of the privilége of the lessor in the Algerian civil law is quite similar to that given to the shipowner on the goods on the bill of lading holders, because in both situations the goods are not the goods of the party to the contract with the shipowner. Thus, the nature of the shipowner's lien on the goods belonging the bills of lading holders in the civil law jurisdictions can be compared to that of the lessor who rented out his property to the tenant who furnished that property, and whose lien gives him a privilége on that furniture. However, the Algerian Civil Code was more specific and more beneficial to the shipowner in the case of the exercise of the lien against the bills of lading holders, than the French Civil Code, and that is because the Algerian Civil Code allows the lessor to exercise a right of retention on the furniture or movables, all which are still on the property rented, whether they belong to the tenant or to somebody else.

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325 " My Own Translation ". The article in french provides:

<<Le bailleur a pour garantir toutes ses créances découlant du bail, un droit de rétention sur tous les meubles saisissables garnissant les lieux loués, tant qu'ils sont grevés du privilége du bailleur, alors même qu'ils n'appartiennent pas au preneur. ...>>.

CHAPTER FOUR

The Exercise and the Termination of the Shipowner's Lien for the Payment of his Freight.

4-1- The Exercise Of the Shipowner's Lien:

The main means of exercising and preserving the shipowner's lien on the goods for the guarantee of payment of his freight, is by retaining the possession of the goods, therefore, possession is a very important element for the exercise of this lien. Because the civil law jurisdiction, gives the shipowner a way to exercise his lien on the goods for the garantee of payment of his freight, and that by the different articles which are provided in the French Code of Commerce and the Algerian Maritime Code. Therefore, it would be best to explain, the English law point of view and the Civil law apart, so that they will be better understood.

A- The Exercise of the Lien in the English Law Jurisdiction:

It has been shown that the shipowner at common law, generally has a right to retain the goods in his possession until the freight upon them, and sometimes other charges also, have been paid.[1] It does not give the shipowner any property in the goods; nor does it enable him to sell them; even though the retention of them may be attended with expense.[2] This right simply gives the shipowner, the right to keep possession, and to resist all claims to take them away, and it avails against the true owner of the goods, although he may not be the person liable to pay freight.

However, if this right gives the shipowner to keep possession of the goods on board his ship, this right must not be performed on the goods wrongfully

1 Carver. Carriage by Sea. Thirteen Edition. para 1991. at P. 1380.

2 Mulliner v. Florence (1878) 3 Q.B.D. 484; Thames Ironworks Co. V. Patent Derrick Co. (1860) 1 J. & H. 93.

shipped on board his ship. Therefore, if the goods have been shipped without the authority of the owner, and has not in any way ratified the contract, it seems that the shipowner cannot as against him enforce the lien which the law, or the agreement, would otherwise have given, because it would be unfair and unjust on the behalf of that owner to hold him responsible for the consequences of a contract which he was not part of and where the goods where shipped without his authority.[3] And if the goods were shipped in fraud of their owner, it seems that the shipowner although innocent of the fraud, cannot refuse to give them up.[4] Therefore, if the shipowner's lien is a mere possessory lien, where the only means of preserving his lien is to retain the possession of the goods until his freight is paid, therefore, possession is a very important element in the exercise of this lien. Thus, in order to maintain his lien the shipowner must keep possession of the goods, either in his own hands or in the hands of his agents.[5]

Therefore, to maintain his lien, the shipowner might do what is reasonable to maintain that lien, e.g., he may bring the goods back from their destination, if the lien is not discharged there.[6] Therefore, if the master is forbidden to land the goods by the port authorities, or cannot obtain warehouse accommodation, he may, and must, at their owner's expense,[7] deal with them in the manner both most reasonable to preserve his lien.[8]

However, he will not lose his lien by consenting to hold as agent for the consignee, and Lord Blackburn, held in the case of Kemp v. Falk,[9] that:

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3 Waugh & Denham (1865) 16 Ir. C.L.R. 405. AS to the right to the exercise lien against a receiver, See Moss SS. Co. V. Whinney [1912] A.C. 254.

4 Story, Bail, S. 588, citing Robinson V. Baker (1849) 5 Cush. 137; Parsons, Shipping, Vol.I, p.180. But cf. the case of The Exeter Carrier (1701), cited in Yorke V. Greenaugh (1701) 2 Ld. Raym. 866; Johnson V. Hill (1822) 3 Stark. 172.

5 Carver. Carriage By Sea. Thirteenth Edition. Para. 2033. at P. 1408.

6 Scrutton On Charterparties And Bills Of Lading. Seventeenth Edition. at P. 375.

7 Edwards V. Southgate (1862) 10 W.R. 528; Cargo ex Argos (1873) L.R. 5. P.C. 134.

8 Scrutton On Charterparties And Bills Of Lading. at P. 300.

9 Kemp V. Falk (1882) 7 App. Cas. 573; Allan V. Gripper (1832) 2 C. & J. 218.

" ... the shipowner in whose physical possession, in the hold of whose vessel, the goods lay, being changed from holding the goods as shipowner, not having delivered the goods, into a warehouseman who was very inconveniently holding those goods in his ship as a warehouse. I think that that is an arrangement which might be made although it is not a very convenient one. The freight was not paid; I think it is possible to make an arrangement by which, though the freight is not paid, the shipowner changes himself completely into a warehouseman instead of being a carrier or a shipowner; he alters his responsibilities altogether; and yet by arrangement or agreement retains a lien over the goods until the freight is paid. I think such a contract might made. ..."[10]

Moreover, the shipowner will not lose his lien by warehousing the goods ashore, in his own warehouse, or in a hired warehouse.[11]

However, if he parts with them to another who acts on his instructions, but in such a way as to give the right of possession to that other, as against himself, the lien will be terminated. Thus, it is competent to the master to land the goods, and preserve the lien, by placing them in warehouse over which he, or the agent of the ship, has exclusive control. But if he puts them in a warehouse of an independent person, who thereby acquires an independent lien for warehousing charges, it seems that the shipowner's lien is lost; even though the warehouseman undertakes not to deliver to the consignee without being paid the freight.[12] In such a case, however, if the consignee demands delivery of the goods, the shipowner may be entitled to withhold delivery, notwithstanding that he has lost his lien, on the ground that delivery is conditional on the freight being paid concurrently with it.[13]

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10 Ibid, at P. 584.

11 The Energie (1875) L.R. 6 P.C. 306; Mors Le Blanch V. Wilson (1873) L.R. 8 C.P. 227. See also per Willes. J., Meyerstein V. Barber (1866) L.R. 2 C.P. 38 at P. 54. In the latter case he will be able to recover warehouse charges as well as the priciple sum in dispute: Anglo-Polish S.S. Line V. Vickers (1924) 19 Ll.L. Rep. 121 at P. 125.

12 See Mors-le-Blanch V. Wilson (1873) L.R. 8 C.P. 227. But quaere. See per Rowlatt.J. in Kokusai Kisen V. Cook (1922) 13 Ll.L.R. 343, 345.

13 See Dennis V. Cork SS. Co. [1913] 2 K.B. 393,397,399. There freight was to be paid before delivery; therefore the shipowner was entitled to withhold delivery of anything until all the freight has been paid.

Therefore, the possession or the retention of goods being the main way by which the shipowner can exercise his lien to force the charterer or the cargo owner to pay the freight, the shipowner in the course of the exercise of his lien, might either warehouse the goods at the port of destination or, use other means to preserve his lien after the release of the goods or, he might withdraw the vessel from the service of the charterer.

(1)-Preservation of the Lien by Landing and Warehousing the Goods:

The possession of the goods need not to be necessarily be the direct and actual possession of the shipowner.[14] Possession of his agents or servants may also be regarded as his own for the purpose of preserving the lien. It is, however, submitted that the possession must not be given to another person in such a way as to entitle him to an independent lien against the shipowner. It has been held by the Court of Appeal in New York that, where the shipowner warehouses the goods in the warehouse of a stranger,[15] contrary to the contract, he thereby puts an end to his lien for freight. But that, where the consignee is in default in not receiving the goods, the shipowner may store them, either in his own warehouse or in his own name in the warehouse of a stranger, without losing his lien. The creation of a further lien for warehouse charges, made necessary in such case by the default of the owner of the goods, was held not to affect the shipowner's lien.[16] However, where the shipowner is required by law to land and warehouse the goods in a particular place, the lien will continue while they are so deposited. As they are taken out of his hands by operation of law, the law preserves the charge for him.[17]

14 See Cross, The Law of Lien, (1840) P. 39; Western Transportation Co. V. Baber (1874) 56 N.Y. 544.

15 Carver, Carriage By Sea. Thirteenth Edition. Para 2033. at P. 1409.

16 Western Transp.Co. V. Barber (1874) 56 N.Y. 544.

17 Wilson V. Kymer (1813) 1 M. & S. 157, 163.

Moreover, the lien may be lost if the goods are deposited at a public warehouse, though under an order to the warehouseman not to part with their possession until the freight on them has been paid. As Brett, J., in Morse-Le-Blanch v. Wilson,[18] pointed out:

> "The difficulty which presents itself against the master's retaining his lien in such a case seems to be this, that then another and independent lien would exist; I very doubt whether, if the master were so to deposit the goods on shore as to give another person a lien upon them, he would not as a matter of course lose his lien, even though such other person should undertake to the master not to deliver the goods to the consignee without being paid the master's claim for freight."

This view, however, was criticised by Mr. Justice Rowlatt in Kokusai Kisen v. Cook Co.[19] on the ground that, in such a case, the warehouseman becomes the agent of the master and therefore the goods remain in his own constructive possession.[20] "The captain", he said, "put these goods into lighters whose owners received them as the captain's agent for the purpose of preserving the lien of the ship. It is said that by doing that, the lien of the ship was lost because, as I understand it, that would involve that the owners of the lighters would have a lien: and therefore an interest in the goods, subsequent to the ship's interest, attached: and therefore the goods were taken to have gone on shore out of the exclusive possession of the ship. I suppose that is the theory: but it strikes me as very unfortunate if that is so. Apparently apart from proceedings under The Merchant Shipping Act, a shipowner would have to have his own warehouse at every port to which his ship might go, or keep the goods on board his vessel all the time, or lose his own lien; and business could not be carried on if that were so." He added that if the shipowner had his own warehouse, he might have

18 (1873) L.R. 8 C.P. 227-239; See also Meyerstein V. Barber (1866) L.R. 2 C.P. 38-54; Carver, 12th ed., P. 1361.

19 (1922) 12 Ll.L.Rep. 343-345.

20 See Cross, (1840) P. 290.

acquired a lien as a warehouseman behind his lien for freight which would put him in the same position as an independent warehouseman if he had hired one.

The provisions of The Merchant Shipping Act, 1894 which replaced the one of 1862, removed the difficulty in respect of the goods which are imported into the U.K. Independently of the Act, the shipowners, usually, protect themselves by their express contract, by introducing into the charterparties or the bills of lading, clauses such as the following:

> "... the master or agent of the said ship is hereby authorized to enter the said goods at the custom house, and land, warehouse, or place them in lighters, at the risk and expense of the consignee after they leave the deck of the said ship; and the owners of the said ship are to have a lien on the said goods until the payment of all costs and charges so incurred."

Without reference to any lien, the shipowner may withhold delivery of the goods to the consignee, where the freight is to be paid on delivery of cargo. Payment of freight and delivery of the cargo being concurrent acts, delivery can be refused until the consignee is ready to pay the freight.[21]

(a)-Power to Land the Goods:

The Act empowers the shipowner to enter and land the goods upon the cargo owner's failure to do so, after the expiration of the agreed time for delivery of the goods stipulated by the bill of lading or charterparty, or after the expiration of seventy two hours, from the time of the report of the ship, if no time for delivery is expressly agreed.[22] Therefore, Section 493 of the Merchant Shipping Act provides that:

> "Where the owner of any goods imported in any ship from foreign parts into the United Kingdom fails to make entry thereof, or, having made entry thereof, to land the same or take delivery thereof, and

21 Dennis V. Cork (1913) 2 K.B. 393-399.

22 See S. 493 of The Merchant Shipping Act, 1894.

to proceed therewith with all convenient speed, by the times severally herein-after mentioned, the shipowner may make entry of and land or unship the goods at the following times:-
(a.) If a time for delivery of the goods is expressed in the charterparty, bill of lading, or agreement, then at any time after the time so expressed:
(b.) If no time for the delivery is expressed in the charterparty, bill of lading, or agreement, then at any time after the expiration of seventy-two hours, exclusive of a Sunday or holiday, from the time of the report of the ship."

This procedure has the advantage of simplicity, but also has two drawbacks. First, the carrier becomes personally liable to pay the storage charges; this may conceivably become important if the goods are destroyed while in the warehouseman's possession so that the latter can no longer use his own lien to recoup himself. Secondly, warehousemen taking and storing on behalf of the carriers goods that they know belong to third parties are well advised to take indemnities from the carriers to cover their own possible liability to the true owners for failing to give up the goods. (Such liability is by no means impossible. It would arise, for instance, if the shipowner claimed a lien that did not in fact exist and, acting on his instructions, the warehouseman refused to give up the goods until the amount in question was paid. If for some reason the warehouseman failed to interplead, he would find himself liable in damages to the consignee).[23] The prospect of having to give that sort of indemnity would clearly be unattractive to most carriers.

(b)-Lien Preserved After Landing:

When the goods are landed and deposited with a warehouseman or wharfinger, the shipowner gives him a notice in writing that the goods are to remain subject to a lien for freight or other charges payable to the shipowner to an amount to be mentioned in the notice. The goods in the hands of the

23 Since, in such a case, the consignee would have an immediate right to possession.

warehouseman will continue subject to the same lien as they were before being landed, and are to be retained until the lien is discharged. If the warehouseman fails to do so, he will be liable to make good any loss so caused by him.[24]

Unfortunately, s.494 too has its problems. The carriers presumably remains liable for warehousing charges. Moreover, there is some doubt as to precisely when carriers can invoke the section. Channell, J., in 1906,[25] and Scrutton, J., in 1913,[26] thought they could do so only in the circumstances provided for in section 393 of the same Act. Since these circumstances are limited to where (a) the goods are imported from abroad, and (b) the consignee is, at the time of landing, in default in failing to collect the goods and pay freight on them, it follows that, if s.494 is so limited, it does not really provide a complete enough pritection for carriers.

2-Preservation of the Shipowner's Lien After Release of the Goods:

One might think, seeing that a shipowner has a lien for freight, demurrage and other charges over the goods he carries, that he had little to worry about if such charges were not paid. All he has to do is to put pressure on the goods owner by refusing to release the goods, and in the last resort by threatening to sell them to recoup himself.[27]

This however provides a misleading view of the situation. Ships are expensive; their owners' time is money; using them as floating warehouses for

24 Ibid. S. 494.

25 Smailes V. Dessen (1906) 11 Com. Cas. 74, 79 et seq (varied on appeal on other grounds, (1906) 12 Com. Cas. 117).

26 Dennis & Sons. V. Cork SS. Co. [1913] 2 K.B. 393, 400. Carver, Carriage of Goods by Sea, 13 th edn., s.1567 note 43, seems to accept this point of view. Scrutton on Charterparties, 19th edn., 302, leaves it open.

27 Section 497 (1) of the Merchant Shipping Act 1894, provides that after the expiration of ninety days and if the lien is not discharged and no deposit is made, the wharfinger or warehouseman may, and, if required by the shipowner, or if the goods are of a perishable nature, sell by public auction, either for home use or for exportation, the goods or so much thereof as may be necessary to satisfy the charges for which the goods are retained.

goods the carrier is exercising a lien over, rather than for profitable carriage of other cargoes, simply does not make economic sense.[28]

Small wonder, then, that shipping lawyers have always been interested in finding ways of extending the carrier's lien so as to to cover goods even after they have been unloaded and the carrier's vessel thus freed for the use it was intended for.

The chief obstacle to be overcome by carriers in this situation is, of course, the well established doctrine that the carrier's lien over the goods he is carrying is merely possessory. Like any other common law lien-or, for that matter, common law pleadge- it depends on the person seeking to exercise it remaining in the possession of the goods concerned; *prima facie*, once possession is voluntarily given up, the lien automatically disappears.

(a)-Attempt to Extend the Lien by the Contract of Carriage:

This is perhaps the most bare-faced and unsophisticated ploy by shipowners anxious to extend their rights. To take as a staightforward example cl.21 of the common Exxonvoy 1969 form of charter. This provides:

> "The owners shall have an absolute lien on the cargo for all freight, deadfreight, demurrage and costs ..., *which lien shall continue after delivery of the cargo into the possession of the Charterer, or of the holders of any Bill of Lading covering the same or of any storageman*".
> (Italics supplied.)

The Exxononvoy form of charter, is American drafted, but what effect, if any, do the italisized words have in England? How justified, for instance, are the sceptical comments of Lord Scarman in a recent case [29] that such clauses ought perhaps to be looked at long and hard by the House of Lords?

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28 Tettenborn, A.M., Shipowner's Lien - Preservation After Release of Goods. Lloyd's Maritime and Commercial Law Quarterly, (1985), at P. 376.

29 In The Miramar [1984] 2 Lloyd's Rep. 129, 134.

Perhaps one matter can be got out of the way fairly quickly; that is, where delivery is not to a consignee including a bill of lading holder) but to a storageman. Here, if the storageman agrees to hold the goods to the order of the carrier, the lien is preserved. If, by contrast, the goods were delivered to the storageman on terms that the consignee could take them away whenever he wanted, this would, it is suggested, amount to an implicit by the carrier of any lien he might have. There is one exception to this, where s.494 of the Merchant Shipping Act applies.

What, however, where the goods are released to the consignee himself? Can a term such as that appearing in the Exxonvoy charter effectively preserve the lien? One's first reaction is to say that it clearly cannot. If carrier's liens are as a matter of law possessory, how can any contract give a lien when there is no longer possession?[30] Unfortunately this answer is inadequate,[31] since it forgets that possession is a flexible concept and that the question whether someone possesses something in law often depends not so much on physical factors as on other, more intangible, arrangements; including, significantly, arrangements entered into *inter partes*. In particular, two cases suggest it may be possible for a shipowner to hand over custody of goods to a consignee and nevertheless retain possession, and thus his lien, in himself.

First there is in Re Hamilton Young & Co.[32] Exporters of cloth addressed a document to their bank to their bank agreeing that, while their finished cloth was in the hands of third parties being bleached, the bank should have what was referred to as a "lien" over it to cover advances. The bank never obtained physical possession of the cloth at all. When the exporters went bankrupt, their trustee claimed the cloth in the bleachers' hands, alleging that since the bank had never obtained possession of it they could not claim a valid lien over it. At best

30 Tettenborn, A.M., Shipowner's Lien - Preservation After Release of Goods. Lloyd's Maritime and Commercial Law Quarterly, (1985), at P. 377.

31 Ibid.

32 [1905] 2 K.B. 381.

they had a non-possessory security that was void for non-registration under the Bills of Sale Acts. Bigham, J., however, found for the bank. On the possession point he had this to say:

> "No doubt the physical possession of the goods is in the bleachers, but for whom do they hold them? I think that by the intention of all parties they hold them for the bank ... The document is, therefore, one which is accompanied by a transfer of the goods and thus outside the Bills of Sale Acts".[33]

His decision was affirmed on appeal.[34]

Agreement may thus apparently fix possession, as between lienor and lienee, in the lienee even though the latter have not physical control-at least where the goods are in the custody of third parties. But what if the lienor himself is in possession, as he would be where the carrier released the goods to the consignee? The House of Lords' decision in North Western Bank Ltd. v. Poynter[35] suggests that agreement may be effective to shift legal possession even here. Importers of ore pleadged a bill of lading relating to a cargo with the bank. Later the bank returned the bill of lading to the pledgor to enable the latter to sell the cargo, but did so on the terms of a "trust receipt". This provided that the pledgor was to hold the returned bill of lading as agent for the bank, the bank's interest as pledgee was to subsist, and all proceeds were to be paid over to the bank. The pledgors having sold having sold the cargo on credit to a third party, a creditor of theirs tried to attach their right to sue the sub-buyer for the price. The creditor failed. Physical control of the bill of lading might not have been in the bank; but the limitations on the pledgor's right to deal with it left the bank with sufficient control to retain its status as pledgee. Admittedly, possession was not mentioned as such in that case; however, the Privy Council

33 Ibid., at 389.

34 Ibid., at 772.

35 [1895] A.C. 56. Cf. Re David Allester Ltd. [1922] 2 Ch. 211.

40 years later in a similar decision not only followed Poynter's case but correctly explained its basis; where goods (or documents) were handed back by a pledgee under the terms of a trust receipt, the pledgee retained his interest because he remained in possession through the pledgor as agent.[36]

Can these authorities be used to give effect to contractual provisions, such as that in the Exxonvoy form already mentioned, extending the carrier's lien to cover goods in the consignee's hands; can it be argued, in other words, that the carrier in such a case remains in legal possession of the goods even though he has lost custody of them?[37]

It is submitted that, as at present drafted, the answer is almost certainly not. This is for three reasons.[38]

First, a simple contractual clause purporting to extend the lien is not explicit enough. Unlike the situation in Re Hamilton Young & Co.,[39] it does not say expressly that the consignee holds the goods as agent for, or on behalf of, the carrier. Nor, it is submitted, would the court be prepared to read in any such provision in order to give it effect; their dislike of secret charges adversley affecting creditors in such that they are disinclined to give their aid, in matters of construction, to creating them.

Secondly, the consigneen's right to deal with the goods, having got them, is too unrestricted. The trust receipt cases, including in particular North Western Bank Ltd. v. Poynter,[40] concern goods given back to pledgors for stictly limited purposes: in that case, sale to a particular third party. Contrast the terms of the Exxonvoy form, where apparently the consignee can do what he likes with the goods once he has got them-provided he recognises that the carrier still has a

36 Official Assignee of Madras V. Mercantile Bank of India Ltd. [1935] A.C. 53, 63-64, per Lord Wright.

37 Tettenborn, A.M., Shipowner's Lien - Preservation After Release of Goods. Lloyd's Maritime and Commercial Law Quarterly, (1985), at P. 378.

38 Ibid.

39 [1905] 2 K.B. 381, 772.

40 [1895] A.C. 56.

lien over them. It is submitted that such freedom is likely to be held incompatible with any contention that the consignee only possesses the goods as agent for the real possessor, the carrier. (If one may take again the analogy of retention of title clauses, compare staughton, J.'s recent decision in Hendy Lennox (Industrial Engines) Ltd. v. Grahame Puttick Ltd.,[41] that freedom in the buyer to deal as he liked with the goods sold, and to mix them with his own, was inconsistent with the bailment or fiduciary relationship necessary to found a claim in equity to the proceeds of resale.).

Thirdly, there is the rule encapsulated in cases such as British Eagle v. Compagnie Air France[42] that one cannot contract out of the insolvency laws. A contractual provision, that if the consignee became insolvent, the carrier was to be a preferred creditor would clearly fall foul of that rule; but it is difficult to sees much difference between such a clause and the clause under discussion, that the carrier should have a lien over goods in the hands of the consignee, that the latter was otherwise free to do as he liked with. For these reasons, it is suggested that a simple contract to that effect is not enough to give a carrier a lien over goods once he has given them up to the consignee.[43]

(b)-Other Means of Extending the Lien by Arrangement with the Consignee:

Is there any other way for the shipowner to achieve his objective by suitably drafted terms agreed between him and the consignee? It is suggested that there is.[44] The key to the problem is to take advantage of the "trust receipt" cases and to find a formula that will persuade a sceptical commercial judge that, while custody may have been transferred to the consignee,

41 [1984] 1 W.L.R. 485.

42[1975] 1 W.L.R. 758.

43 Tettenborn, A.M., Shipowner's Lien - Preservation After Release of Goods. Lloyd's Maritime and Commercial Law Quarterly, (1985), at P. 379.

44 Ibid.

nevertheless the carrier retains possession so as to preserve his lien. This can be done, it seems, by making two things clear.

First, it should be agreed that not only the carrier is to preserve his lien over the goods, but also that the consignee, if allowed to take them, is to do so only as bailee for, and on behalf of, the carrier.

Secondly, in order to deal with suggestions that an attempt is being made by private arrangement to oust the insolvency laws, contiuing control by the carrier over the goods should be emphasized by the imposition of perceptible restrictions on the right of the consignee to deal with the goods as he thinks fit. An obligation to store them separately from his own property is one possibility; another is a provision that the carrier should have a right to have possession of the goods re-transferred to him on demand.

If these two things, that is, that the consignee is to hold the goods on behalf of the carrier, and that he is not free to deal with them as he likes, are made clear in some document signed by the consignee at or before the time when the goods are released to him, then it is suggested that the carrier will have little difficulty in establishing his extended lien. It would not seem to matter in this connection, incidentally, which particular document the requisite terms were contained in: it could be either the contract of carriage,[45] or a document subsequently presented for signature at the time of collection or, of course, both.

If established, this lien would be exercisable against the creditors of the consignee in respect of goods still in the consignee's hands. It should be remembered, however, that it would not have effect against third parties buying the goods (or documents of title to them) in good faith. This rule is clearly established in the "trust receipt" cases concerning pledgees[46] (the reasoning being that the pledgee giving goods back under a "trust receipt" is stopped from

45 Assuming it was binding on the consignee, either because the latter was a charterer under a charterparty, or because he was a holder of a bill of lading incorporating the terms of a charterparty including such a clause.

46 See, Babcock V. Lawson (1880) 5 Q.B.D. 284.

denying, as against third parties, the power of the pledgor to deal with the goods); and there is no reason not to extend that principle to other possessory securities, such as liens.[47]

The Power of Transshipment of the Cargo:

If one suppose that upon the vessel being unable to complete her voyage, the shipowner, or the master, employs another ship and tranship the cargo to the port of destination, then the question which will arise in this case, is that, whether the shipowner, when he parts with the possession of the goods, can also tranship his right of lien to the substituted shipowner. It may be that the same rule of law which empowers the original shipowner, under circumstances of necessity, to tranship the goods, and by sending them to the place of delivery in another ship, to retain his right to recover the freight as against the owner of the goods, gives also, at the same time, as incidental to this right, that of transferring also the lien which he would have had upon the goods for the freight, if he had himself conveyed them to their destination.[48] The original shipowner can transfer to the other no greater right of lien than he himself possessed.

3- The Exercise of the Lien by the Withdrawal of the Vessel:

The right of withdrawal is usually determined by an express clause in most time charterparties.[49] It provides that if the charterer fails to make a punctual payment of an instalment of hire, the shipowner will be entitled to withdraw the vessel from the service of the charterer. However, if there is no express right of withdrawal, the shipowner does not automatically have the said right, unless the late payment amounts to a repudiation of the charterparty.

Lord Denning, in his speech in "The Afovos", gives us an interesting

47 Tettenborn, A.M., Shipowner's Lien - Preservation After Release of Goods. Lloyd's Maritime and Commercial Law Quarterly, (1985), at P. 380.

48 See per Cockburn, C.J. in Mattews V. Gibbs (1860) 3 E. & E. 282 at P. 304.

49 See. e.g. "Baltime 1939" Form, clause 6.

introduction commenting upon the interplay of interests between shipowners and charterers, helping us to understand this right of withdrawal:[50]

> "In time charterparties there is very often a clause giving the shipowners the right to withdraw the vessel from service in case the charterer fails to make regular and punctual payment of hire. This is called a "withdrawal clause". When market rates are raising shipowners look at the time of payment very keenly. If the charterer falls behind, even by a second or two by the slightest mischance, the shipowner will seize the opportunity and issue a notice of withdrawal.
> As a rule, there is no actual withdrawal because of the difficulties which would arise for the cargo-owners, with the bills of lading, and the like. After the notice of withdrawal is given in nine cases out of ten the parties agree to go on just as before. If it turns out that notice of withdrawal was rightly given, the charterer will pay the increased market rate. If it was wrongly given, then the rate remains the same."

The right of withdrawal in the Baltime and the N.Y.P.E. forms at first were interpreted in a different way because of their wording, and this brought some confusion.

The confusion began with The Georgios C.[51] In this case the charterparty, under the Baltime form, provided for the right of withdrawal, "in default of payment". In the Court of Appeal Lord Denning M.R. held that these words meant "in default of payment and so long as default continues", so, the owners kept the option to withdraw the vessel so long as the charterers were in default. Once default had been remedied and provided notice of withdrawal had not been given, payment or tendering of hire, makes the owners lose the right of withdrawal.

Later in The Brimmes,[52] it was left open, whether acceptance of hire paid late but before notice of withdrawal had been served, constitutes an irreparable breach.

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50 The Afovos (1983) 1 All. E. R.

51 Empresa Cubana de Fletes V. Lagomisi Co. (The Giorgios C) (1971) 1 Ll.R. 7.

52 (1974) 2 Ll. R. 241.

The case that clarified all this confusion was The Laconia.[53] The House of Lords here were concerned with a charterparty on the N.Y.P.E. form. They held that the distinction which had earlier been drawn between the Baltime and the N.Y.P.E. forms was a literal and rigid interpretation, and that the words "in default of payment" in the Baltime form must be interpreted as in default of contractual payment, that is, within the time provided. Lord Wilberforce explained the decision in The Giorgios C,[54] saying:[55]

> "...The Court of Appeal have in effect construed the words in "default of payment", not as a meaning in default of payment in advance, but as meaning "in default of payment whether in advance or later, so long as the vessel has not been withdrawn". This is a reconstruction not a construction of the clause ... I think a provision requiring "punctual payment" must be strictly complied with (see The Brimmes) so also must a clause using the words "in advance". A payment one day late is not a payment in advance and I cannot see no difference in effect between the two phrases. ..."

As it has been pointed out before, today both provision have been clarified in the case of "The Laconia",[56] and there is no difference between them if effect. If the charterer is late in paying the hire, then unless the shipowner is deemed to have waived the breach, the shipowner may exercise the right to withdraw upon notifying the charterer.

In this case Lord Salmon said:[57]

> "In the Brimmes, the Georgios C, was distinguished since it could not be overruled. It is no doubt distinguishable in the sense that the clause dealing with the charterer's obligation to pay hire and the owner's right to withdraw the vessel in default of punctual payment was differently worded in the two cases. But in my view the difference in the wording makes no difference to the effect of the

53 (1977) 1 Ll. R. 315.

54 (1971) 1 Ll. R. 7.

55 Ibid. at P. 318.

56 (1977) 1 All E.R. 545.

57 The Laconia (1977) 1 All E.R. at p. 556.

two clauses. I am afraid, that I am driven to the conclusion that the Georgios C was wrongly decided and should be overruled."

Thus, the decision held in The Georgios C[58] was over-ruled by this, and some uniformity was brought between the N.Y.P.E. and the Baltime forms.

There are some condition to exercise the right of withdrawal of the vessel. Threfore, the right of withdrawal must be exercised in a way leading to a final withdrawal of the vessel. This means that it cannot be exercised temporarily. Thus, in The Mihalios Xilas,[59] it was decided by Mr. Justice Donaldson that the right of withdrawal must be final and not temporarily in the case where it it not provided in the charter that this right can be exercised temporarily. The facts of the case were as follows: The owners let their vessel *Mihalios xilas* to the charterers for a period of three months, up to 15 days more at the charterers' option. The charter which was in the Baltime form provided inter alia for the payment of hire monthly in advance, with a right of withdrawal in default of payment. It also provided for the charterers to deposit a further 30 days hire referred to in the charter as "the escrow hire payment" which the owners would be entitled to collect if hire was due and unpaid for seven days. The charter further provided that:

> 13. The Owners only to be responsible for delay in delivery of the Vessel or for delay during the currency of the Charter ... if such delay ... has been caused by want of due diligence on the part of the Owners ... in making the vessel seaworthy ... or any other personal act or omission or default of the Owners ...
>
> 18. The Owners to have a lien upon all cargoes and sub-freights belonging to the Time Charterers and any Bill of Lading freight for all claims under this charter ...

The vessel was delivered on May 5 at Marseilles. Neither the advance hire nor the escrow which became payable were paid but the vessel was ordered to

58.(1971) 1 Ll. R. 7.

59 International Bulk Carriers (Beirut) S.A.R.L. V. Evlogia Shipping Co. S.A., And Marathon Shipping Co. Ltd. (THE "MIHALIOS XILAS"). [1978] 2 Lloyd's Rep. 186.

Casablanca to load there arriving on May 7. On instructions from the Owners the master refused to load until hire had been paid. The charterers paid hire on May 11, by which time the vessel had missed her turn and loading was posponed from May 12 to May 18. The vessel then called at Augusta for bunkers but as the escrow hire payment was still unpaid the owners insturcted the master not sail until receipt of further instructions thus delaying the vessel from May 23 to May 26. Eventually the vessel sailed from Augusta and the cargo was discharged at Constantza, Sulina and Braila. At Braila the vessel remained from June 28 to July 13, when she was withdrawn by the owners for non-payment of July hire which was due on July 4. On July 11, the instalment being unpaid for seven days, the owners obtained payment to them of the escrow hire payment.

The dispute between the parties regarding the hire payments was referred to arbitration, the charterers claiming repayment of hire in respect of the delay to the vessel on May 12 to 18 and May 23 to may 26. The charterers conceded that the owners could retain part of the escrow payment equal to hire from July 4 to July 13 but claimed repayment of the balance. The umpire found in favour of the charterers but stated his opinion in the form of a special case for the opinion of the Court.

Mr.Justice Donaldson held that the withdrawal must be final and not temporary unless it is otherwise provided in the charter, therefore, he provided that:[60]

> "Temporary withdrawal of a vessel for non-payment of hire is a right which could only exist if specially conferred upon the owners by the terms of the time charter."

This condition for the exercise of the right of withdrawal, has also been cited in other cases, such as, The Agios Giorgis, and The Aegnoussiotis.

60 Ibid. at P. 191.

Therefore, Mr.Justice Mocatta, held in the case of The Agios Giorgis,[61] that:

> "...was that the owners were entitled, by reason of the withdrawal provisions in cl.5 of the charter, to withdraw the vessel; but were not entitled to effect a partial or temporary suspension or withdrawal,...".

This condition has also been repeated in the case of, The Aegnoussiotis,[62] where Mr.Justice Donaldson held that :

> " ...there was no right to temporarily withdraw the vessel since (a) the performance of the owners' obligation was not dependent upon payment of hire unless the contract so provided; (b) a failure to pay hire regularly and punctually was a breach of contract which could never be repaired; ..."

Moreover, in Langford (SS) Co. v. Canadian Forwarding Co.[63] an instalment of hire became due on September 11, on October 1, while the ship was at sea, the owners gave notice that they withdrew the ship after outward cargo had been discharged: the following day the ship arrived at the port of discharge, and on the same the hire was paid: the discharge was completed and preparations to load the homeward cargo had been commenced. When on October 4 the master claimed to withdraw the ship on the owners' instructions. It was held that up to the last-named date there had been no absolute withdrawal, and that withdrawal could not then be justified, there being no hire in arrear.

There is another essential requirement in order to give a valid notice of withdrawal is that the intention must be communicated to the charterers.

Therefore, in The "Georgios C",[64] it was held that notice to the ship's master was not sufficient. Lord Denning said of the owners:

> "They did not give notice to the charterers, they only give notice to

61 Steelwood Carriers INC. Of Monrovia, Liberia. V. Evimeria Compania Naviera S.A Of Panama. The "Agios Giorgis". [1976] 2 Lloyd's Rep.192. at P. 202.

62 Aegnoussiotis Shipping Corporation Of Monrovia. V. S Kristian Jebsens Rederi Of Bergen. The "Aegnoussiotis". [1977] 1 Lloyd's Rep. 268. at P.268.

63 (1907) 96. L.T. 559.

64 Empresa Cubana de Fletes. V. Lagomisi Co. (The Georgios C) (1971) 1 Ll. R. 7.

their own master. That was I think, insufficient. In order to exercise a right to withdraw a ship, the shipowners must give notice to the charterers. The withdrawal only operates from the time notice is received by the charterers."

In "The Aegnoussiotis", Donaldson, J., said that:[65]

"No particular form of words or notice is required, but the charterers must be informed that the owner is treating the non-payment of hire as having terminated the charter-party."

More it was also maintained that the charterers must be informed in the case of "The Mihalios Xilas", where it was held by Donaldson. J., that:[66]

"Withdrawal and reinstatement required some action on the part of the owners which would be sufficient to terminate the charter-party in the event of a repudiatory breach and since the owners had taken no such action, they could not justify the refusal to load by reference to the charterers' failure to pay the hire."

Also care has to be taken in order to avoid an unwanted manifestation from the charterers claiming that the shipowner has waived his right to withdraw.

In Wulfsberg v. Weardale [67] a month's hire, payable in advance, became due on August 8, 1914. On August 13, it being still unpaid, the owners gave notice to the charterers, under the terms of the charterparty, of withdrawal of the ship, and a few hours later issued a writ against them for the hire due on August 8. The notice reached the charterers a few hours before the issue of the writ. It was held that the issue of the writ did not constitute a waiver of the notice of withdrawal. Lush, J., said that the notice of August 13 having determined the contract, "No subsequent recognition can possibly revive it; in fact there is no evidence of any such recognition."

65 (1977) 1 Ll. R. 268.

66 [1978] 2 Lloyd's Rep. 186.

67 (1916) 85 L.J. K.B. 1717.

Sometimes the owners may accept a late tender of hire as if it had been paid punctually. If they are found to have done so, they will be held to have waived their right to withdraw. In The Brimmes, Cairns, L.J., said:[68]

> "I consider ... that if a month's hire in advance is tendered late, but before withdrawal, and is accepted without qualification, it must be taken to be accepted as hire for the month, which must amount to an election not to enforce the right of withdrawal, so constituting a waiver of that right."

Whether the owners have accepted a late tender in this way is a matter of fact and the Court will examine all the relevant circumstances to see which was the real intention of the owners.

In "The Laconia"[69] one of the installments fell due on a Sunday, but it was only at about 15'00 hours on the Monday following that the charterer's bank delivered to the owner's bank a "payment order" for the appropriate amount. On the same day at 18'55 hours, the owners gave the charterers notice that they were withdrawing the ship, and the next morning the payment order was returned to the charterer's bank.

The House of Lords held that the owners were entitled to withdraw and have done so effectively. The late tender of hire could only be relevant if the owners were held to have accepted it and thus waived their right to withdraw, but the receipt of the payment order by the owner's bank and the processing work that was began upon it did not amount to any such waiver. Lord Wilberforce said:

> "... All that is needed to establish waiver in this sense, of the committed breach of contract, is evidence clear and equivocal, that such acceptance has taken place, or, after the late payment has been tendered, such a delay in refusing it as might reasonably cause the charterers to believe that it has been accepted."

68 (1974) 2 Ll. R. 241.

69 (1977) 1 Ll. R. 315.

Moreover, in the case of "The Chraysovalandou Dyo",[70] the charterers contended for the exercise of the right of lien for hire due and not paid, that the owners should deny possession of the cargo to the charterers and that the vessel should be at a discharging point.

This is a case where by a time charter dated July 5, 1978, the owners let their vessel Chrysovalandou Dyo to the charterers for a "time charter trip" from the Philippines to the Persian Gulf. Hire was to be paid every 15 days in advance at the rate of $2,700 daily from the date of redelivery and failing the punctual and regular payment of the hire the owners were at liberty to withdraw the vessel from the service of the charterers.

The charter was in the New York Produce Exchange form, the material clauses of which provided *inter alia*:

"8... The captain... (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency ...

"18. That the Owners shall have a lien upon all cargoes and all sub-freights for any amounts due under this Charter...".

The charterers nominated Dubai as the port of discharge and arranged a remittance of hire with a reduction from that hire in respect of a speed claim. The owners protested at the deductions and warned that unless there were additional payments the vessel would not be ordered to Dubai. The charterers then ordered the vessel to Dubai and on the same day the owners advised the charterers that the vessel had been withdrawn and ordered the vessel to anchor off Dubai. The owners instructed the master to remain at the same anchorage since a lien was being exercised upon the cargo under cl.18. The dispute being referred to arbitration, the arbitrator found in favour of the owners.

However, the charterers contended that for a lien to be exercised there had to be a demand for possession and that the shipowner's lien could not be

70 Santiren Shipping LTD. V. Unimarine S.A. (THE CHRAYSOVALANDOU Dyo). [1981] 1 Lloyd's Rep. 159.

exercised unless the vessel was at a discharging spot whether wharf or buoy. For this requirement, it was held by Mocatta. J., that:

> "Whilst counsel for the charterers presented his argument very attractively, he failed to convince me that he was right on the facts of this case. The owners had been told go to Dubai to discharge, which differentiates the case from The Mihalios Xilas. No authority was cited for the proposition that a vessel had to be at a discharging spot in a port as a condition precedent to the exercise of the lien. To require this might involve unnecessary expense and in certain cases cause congestion in the port. I think counsel for the owners was right in his submission that the requirements for which counsel for the charterers argued before a lien could be exercised would seriously limit the commercial value of a lien on cargo granted by a clause in a charter. The argument that counsel for the charterers advanced that demand for possession was necessary before delivery could justifiably be refused on the basis of a lien was met by the fact that the master had been ordered to Dubai to discharge."

Moreover, the owners must give the notice of withdrawal within a reasonable time or they may find that an unreasonable delay may amount to a waiver of that right. In the case of "The Laconia", Lord Wilberforce said that:[71]

> "The owners must within a reasonable time after the default give notice of withdrawal to the charterers. What is a reasonable time - essentially a matter for arbitrators to find - depends on the circumstances. In some, indeed many cases, it will be a short time - viz the shortest time reasonably necessary to ensure the shipowner to hear of the default and issue instructions."

Further, no hire is payable in respect of the period after the ship is withdrawn, but the owner of the ship will be entitled to damages in respect of the charterers failure to pay hire, if the failure amounted to a repudiation of the charterparty.[72]

After, the means of exercising the shipowner's lien in the English law jurisdiction has been explained, it would be the turn of the view of the civil law

71 The Laconia (1977) 1 Lloyd's Rep. 315.

72 Leslie Shipping V. Welstead (1921) 3 K.B. 420.

jurisdiction (namely the French and Algerian law) to be explained.

B- The Exercise of the Lien in the Civil Law Jurisdiction:

After the exercise of the shipowner's lien on cargo for payment of his freight has been explained above, it would be preferable to look at the view of the civil law jurisdictions about the exercise of this lien.

Before looking at the different ways or means by which this lien or "privilége" is exercised, it would be worthwhile looking at the different situations where this lien or "privilége" is exercised.[73]

The first situation for the application of this lien is realised where at the port of destination no consignee or receiver of the goods comes to take delivery of the goods and pay the freight. In this situation the creditor of the freight will have possession of the goods which were carried to their destination, but which no-one came to take delivery. This is certainly, in point of view of the exercise of the guarantee, the most simple situation, but also the most unusual.

The second situation for the exercise of this guarantee, is where the consignee or the receiver of the goods accepts to take delivery of them, but refuses to pay the freight.

1- The Exercise of the Lien or "Privilége" Where the Goods Have Not Been Received:

This situation is more or less simple, because whether the consignee is unknown or whether he refuses to take delivery of the goods and pay freight, the goods are in the possession of the shipowner or the carrier, either on his ship or on the wharf or in the shipowner's warehouse. The important solution and which explains the uniformity of solutions in this case, is the fact that the creditor has possession of the goods.

This solution was provided in the French Code of Commerce, in article 305,

73 Schertenleib. Francis. Le Frét. (La Garantie De Son Paiement). at P.121.

before the Act of 1966, which brought a different provision. The new Code of Commerce (which includes the French Maritime Law) of 1966, provides in its' article 2 that, the shipowner has a lien or "privilége" on the goods. The methods for the application of this right of priority, are provided in Article 3 of the Decree of 1966.[74] This Decree in its' Article 3 provides that, "if the shipowner is not paid when discharging the goods, he cannot retain them on his ship, but he can deposit or warehouse them in the hands of a third party and to sell them, unless the charterer gives a security."[75]

However, article 53 of the same decree, although more precise, provides a different solution. Therefore, article 53 provides that:

> "when no-one claims the delivery of the goods or in the case of a claim contending the delivery or the payment of freight, the captain can by authority of justice:
> a- Sell some of the cargo for the payment of his freight, unless the consignee gives a security.
> b- Get an order for the deposit of the excess or the difference."[76]

If the rights of the shipowner and the carrier come clearly from these two dispositions, then it is regrettable that they had not been matched in their drafting to agree. In fact, we can have the impression that in a contract of affreightment, the shipowner must first deposit, before asking for the sale of the goods (article 3). However, in the case of a contract of transport, it would be a

74 Decrét No.66-1078 du 31 Decembre 1966, sur les contrats d'affretement et de transport maritimes.

75 "My Own Translation", the actual article in French provides that:

<<Si le fréteur n'est point payé lors du déchargement des marchandises, il ne peut les retenir dans son navire, mais il peut les consigner en mains tiérces et les faire vendre, sauf á l'affréteur á fournir caution".

76 "My Own Translation", the actual article in French provides that:

"A defaut de réclamation des marchandises ou en cas de contestation relative á la livraison ou au paiement du fret, le capitaine peut, par autorité de justice:

a) En faire vendre pour le paiement de son fret, si mieux n'aime le destinataire fournir caution;

b) Faire ordonner le dépot du surplus."

diffirent solution which would be applied to the situation (article 53).[77] As under the old Code of Commerce, the procedure is different whether we are asking for the deposit or the warehousing of the goods or whether we are asking for their sale.[78] In fact, if the right of the captain to ask for the deposit of the goods in the hands of a third party is absolute, it is not, however, to be necessary the same for the right to ask for the sale of them. It is therefore, not excluded that the consignee will appear to present his reasons during the procedure for obtaining the authorisation to sell.[79] In the present situation the shipowner or the carrier do nt risk to lose their lien on the goods not claimed or not withdrawn, and that is because as soon as the ship arrives at the port of unloading, they can act in front of the competent court to obtain execution.

2- The Exercise of the "Lien" or "Privilége" when there is Refusal to Payment of Freight:

In this case, where the freight has not been paid, the shipowner has a lien or a right of priority according to article 2 of the French law of the 18 th of June, 1966. However, he cannot keep these goods on board his ship, but he can still keep their possession by warehousing or depositing them in the hands of a third party and then ask for their sale. This solution is provided by article 3 of the Decree of December the 31 st, 1966, [80] where it is provided that:

> "If the shipowner is not paid when discharging the goods, he cannot retain them on his ship, but he can deposit them in the hands of a third party and to sell them, unless the charterer gives a security".[81]

77 Schertenleib Francis, op cit. at P. 122.

78 Rodiére Réné, Traité Général de Droit Maritime, Tome I, Paris, 1967, P. 195.

79 Bleinc Piérre, De la Consignation en Mains Tiérces des Marchandises Arrivant par Mér, Marseille, 1933, at P. 19.

80 Under the title of, "Affreightment of Ships", in Chapter I which includes the general rules of these kinds of contracts.

81 "My Own Translation". The actual article in french provides that:

<<Si le fréteur n'est point payé lors du déchargement des marchandises, il ne peut les retenir dans son navire, mais il peut les consigner en mains tierces et les faire vendre, sauf á l'affréteur á fournir caution>>.

Therefore, in the contract of affreightment, the shipowner is not allowed to retain the goods on board his ship, but he must unload it and deposit or warehouse it in the hands of a third party. Here, the legislator has always looked at the interests of the receiver of the goods, who has to obtain delivery before the payment of freight.[82] However, this is the old view of the old law which was influenced by the doctrine. Therefore, the legislator used to confuse between the right of the captain to retain the goods on board his ship and the right of retention in general. However, some authors think that this form of deposit is nothing but a retention; among these authors, we find Ripert,[83] who thinks that the way of depositing or warehousing the goods in the hands of a third party "is nothing but the retention exercised through a third party".[84] This measure keeps the interest of the captain who has the right to be paid before giving up his retention, and in the same time it also protects the interests of the consignee who, before paying the freight, has the right, to examine the state of the goods which are going to be delivered to him. Thus, a captain faced with a refusal of payment of his freight, will seek from the "tribunal de commerce", i.e., (the commercial court) the depositing of the goods in the hands of a third party's hands. As, he cannot keep the goods on board his ship, he must obtain the authorisation of the court to deposit the goods before the consignee has had the time to take them away. He must therefore, act very quickly according to the circumstances. The situation in a contract for the carriage of goods, is quite similar, because the captain cannot retain the goods on his ship if the freight has not been paid.[85]

Therefore, in both cases of the shipowner and the carrier in the French law, where their freight is not paid, the shipowner or the captain for the carrier

82 Schertenleib Francis, op cit, at P. 126.

83 Ripert Georges, Droit de Maritime,4 éme éd.,Vol.2, Paris,1952, P.554.

84 "My Own Translation". The actual article in french is:

<< ... n'est autre chose que la retention exercée par l'intermédiaire d'un tiers>>.

85 Article 48 of the Decree of December the 31 st, 1966, which provides that: <<Le capitaine neut peut retenir les marchandises dans son navire faute de paiement de son fret>>.

cannot retain the goods on board the ship, but they have to warehouse them or deposit them in the hands of a third party. This third party will have possession of the goods, and will be keeping these goods not in his name but he will be keeping possession for the shipowner or the carrier. Therefore, the possession of the goods by a third party is nothing else than the possession of the shipowner or the carrier, but exercised through the possession of someone else. This can be applied to the cases of affreightment where the charterparty is a voyage or a time charterparty, where the shipowner keeps possession of the ship (Article 7 and Article 20 of the Decree of December the 31 st of 1966). That is because, by keeping possession of the ship, he is keeping the possession of the goods. However, the situation is different in the case of a demise charterparty, where the possession of the ship is given up to the charterer, and therefore, the possession of the cargo. Here, how can the shipowner exercise his lien on the cargo, without having possession of it? Here, because the goods are not in the hands of the shipowner, he must then act by the means of an action for execution for the sale of the debtor's chattels, i.e., "saisie-éxécution mobiliére". M. Rodiere,[86] notices about this point, that there is a confusion about whether we apply the procedure of the action of sequester of property, "saisie-conservatoire" of the commercial law (Article 417 of the Code of Civil Procedure) or the general action of sequester of property, and that if we admit that the reform of Article 48 and follows of the Civil Code of Procedure of the 12 th of November 1955 has absorbed the first one.

Therefore, the goods being out of the possession of the shipowner in the case of a demise charterparty, is not a problem any more in the French law, and that is because the shipowner can ask the court to sequester the goods of the charterer, and that according to Article 48 of the Civil Code of Procedure. Therefore, the goods will be in the hands of the court, and then, the shipowner

86 Giverdon Claude, Saisie Consérvatoire Commérciale, dans Encyclopédie Dalloz, Rép. de droit commercial, No.1.

will not have to fear for his debt to be satisfied.

However, in the case of a voyage or time charterparty, the shipowner has a lien or right of priority over the goods for the payment of his freight (Article 2 of the law of June the 18 th, 1966), but he cannot keep them aboard his vessel, but on the contrary has to deposit them with a third party (Article 3 of the decree of December the 31 st, 1966). Here, after the deposit of the goods in the hands of a third party, and his freight being still unpaid, he can then sell the goods to satisfy his "lien" or "privilége" over the goods for the payment of his freight (Article 3).

However, because this measure is quite dangerous for the rights of the charterer, the legislator makes the sale of the goods go through a very detailed procedure, so that the rights of the charterer will be respected and so that the shipowner does not abuse of this right. Therefore, the legislator requires in paragraph 2 of Article 3, that the order for sale must be acquired by a summary order, "ordonnance de référé", in this way the charterer will have the opportunity to present his case. In the case of carriage of goods, the captain is preferred for the payment of his freight, over the goods during the fifteen days which follow their delivery, providing that they did not pass to a third party's hands, this is provided by Article 23 of the law of the 18 of June 1966.[87] The consequance of this, is that in many cases the goods will remain subject to the lien, and that is there has not been any exchange of bills of lading. Therefore, it is not important if the goods have not been unloaded, for example, on one part on the wharf which is under the control of the receiver of the goods or the consignee. In fact, an agent who is detaining the goods which he received from the carrier or his representative, cannot receive "delivery", in the legal or juridical meaning of the term. Because, in the absence of exchange of documents, and in waiting for this operation, he is only detaining on behalf of commissioning; this commissioning can therefore, still exercise the right of

87 Article 23 provides that:

<<Le capitaine est préféré, pour son fret, sur les marchandises de son chargement, pendant la quinzaine aprés leur délivrance si elles n'ont passé en mains tierces>>.

detention on the goods, or on the documents which represent them, or on both the goods and the documents in the same time. No changes will occure unless the bills of lading have been exchanged, and it is that day, and only that day, that delivery will be effected, and the fifteen days will start for the exrcise of the lien or the right of priority, and the right of retention will disapear after the exchange of the bills of lading.[88] However, it must be pointed out that the carrier cannot use his lien against the general body of the creditors, unless he has started the joint procedures against the body of the creditors which the consignee is the subject, before the fifteen days have expired. Here, the carrier will be preferred for his lien against all the other creditors of the shipper or the receiver, and this is provided in Article 24 of the law of the 18 th of June, 1966, which provides that, "In case of bankruptcy or admission into the juridical settlement of the shippers or receivers before the expiration of the fifteen days, the captain is preferred against all the other creditors for the payment of his freight and the charges which are due to him".[89] Therefore, the right of the carrier is preserved after the real delivery according to the legal meaning of the term, providing that the carrier takes action before the period of fifteen days is over.

When it comes to the Algerian Maritime Code, which for historical reasons has been influenced by the French Matime Law, however, in the case of the shipowner's lien on the cargo for the garantee of payment of his freight, he has provided a much better protection to the shipowner. The Algerian legislator like the French has made a difference between the shipowner and the carrier.

Therefore, he gave the shipowner a lien or a right of priority over the goods for the garantee of payment of his freight.

He therefore, provided in Article 645 of the Algerian Maritime Code that:

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88 Michél De Juglart. Le Privilége du Transporteur Maritime, Droit Martime Français. 1975. 27. 579-593. at P. 592.

89 Article 24 which provides that:

<<En cas de faillite ou d'admission au réglement judiciaire des chargeurs ou réclamateurs avant l'expiration de la quinzaine, le capitaine est privilégié sur tous les créanciers pour le paiement de son fret et des avaries qui lui sont dues>>.

"The shipowner has a lien on the goods for the payment of his freight and other charges provided in the contract of affreightment",[90] this is the same provision as that provided by the French law in Article 2.

However, the Algerian legislator went further, by providing that the shipowner can refuse to unload the cargo, if the freight and the remunerations for demmurage or other delay have not been paid by the charterer,[91] and he added that, in the case above, the shipowner can deposit the goods and after he has told the charterer sell the goods with the consent of the judicial authority, unless a security, which is secure enough to garantee the lien, has been deposited by the charterer.[92]

This is a much better protection to the shipowner than that given to him by the French legislator, where he cannot keep the goods on board his ship, but in the Algerian law it is up to the shipowner, whether he wants to retain the goods on board his ship or to deposit them into the hands of a third party, which is nothing else but retainaing the possession of the goods by the shipowner through the possession of a third party.

In the case of a carrier of goods by sea, the Algerian legislator gave him the right not to deliver the goods and to deposit them until the consignee has paid or given a security for all what is due for the carriage and other charges.[93]

Here, the Algerian legislator has made a difference between the shipowner

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90 "My Own Translation", article 645 povides that:

<<Le fréteur a un privilége sur les marchandises pour le paiement de son frêt et autres charges prévues au contrat d'affrétement>>.

91 Article 680 of the Algerian Maritime Code, which provides that:

<<Le frêteur peut refuser le déchargement de la cargaison si le frêt et la remunération á titre de surestaries ou d'autres retards ne lui ont pas été payés par l'affréteur>>.

92 Article 681 of the Algerian Maritime Code, which provides that:

<<Dans le cas visé á l'article précédent, le fréteur peut faire consigner les marchandises, et, aprés en avoir avisé préalablement l'affréteur, les faire vendre avec le consentement de l'autorité judiciaire, sauf si une caution suffisante a été fournie par l'affréteur>>.

93 Article 792 of the Algerian Maritime Code, which provides that:

<<Le transporteur peut refuser de livrer les marchandises et les faire consigner jusqu'á ce que le déstinataire ait payé ou qu'il ait fournit caution de tout ce qui est dû pour le transport de ses marchandises ainsi qu'á titre de contribution d'avarie commune et de remunération d'assistance>>.

and the carrier, because in this case the carrier cannot retain the goods on his ship, but has to deposit them. On the other hand, the shipowner can either keep the goods on his ship or can deposit them. Moreover, the Algerian legislator has given the same provision as that one given by the French legislator in the case of the carrier's lien.[94]

However, in the case of the cargo which has not been claimed or which not one came to take delivery of it, the carrier in this case will put the cargo in a warehouse, in a safe place at the risks and expenses of the consignee, and that with giving an immediate notice of the situation to the shipper and the consignee, if the latter is known.[95]

The Algerian legislator went further, and provided in Article 795 of the Maritime Code that:

> "If after two months, starting from the day of the arrival of the ship at the port of discharge, and if the goods which were warehoused have not been retired, and if all the sums for the carriage have not been paid, the carrier can then sell these goods with the consent of the competent authority, unless a security has been given by the one claiming the goods."[96]

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94 Article 48 of the French Decree of Dcember the 31 st, 1966, which provides that: <<Le capitaine neut peut retenir les marchandises dans son navire faute de paiement de son fret>>.

95 Article 793 of the Algerian Maritime Code, which provides that:

<<Si le destinataire ne se présente pas ou refuse de prendre livraison des marchandises ou s'il n'est pas connu, le transporteur mettra les marchandises en dêpot, en lieu sûr aux risques et frais du destinataire, en avisant de ces faits, immédiatement le chargeur et le destinateur, si ce dernier est connu>>.

96 This is provided by article 795 of the Algerian Maritime Code, which provides that:

<<Si, les dans les deux mois, á partir du jour de l'arrivée du navire au port de déchargement, les marchandises mises en dépôt n'ont pas été retirées, et si toute les sommes dues au transporteur par le destinataire en raison du transport n'ont pas été payées, le transporteur peut vendre les marchandises avec le consentement de l'autorité judiciaire compétente, sauf si une caution suffisante a été fournie par l'ayant droit aux marchandises.

Les marchandises n'ont réclamées peuvent être également vendues avant leur mise en dépôt et avant l'expiration d'un délai de deux mois si elles sont périssables ou si les frais de dépôt excédent leur valeur>>.

These goods which are not claimed, can also be sold, if these goods are by their nature perishable, or if the sum of their warehousing exceeds their value, but their sale sould be made before depositing them.[97]

Moreover, the Algerian legislator has given the carrier another protection in the case where the money of the sale of the goods not claimed, is not enough to pay the carrier for the remuneration of his carriage and the expenses for warehousing them, in this case the Algerian legislator has made of the shipper the one responsible for the payment of the difference.[98] This is the case of the garantee of payment of freight in the Algerian law, however, the case of a demise charterparty has not been discussed yet. So, the shipowner in the case of a demise charterparty, because he is deprived of the possession of the ship, and therefore, the cargo, in this case how can he exercise his lien? In this case, he has to use the protection given to the creditor in the civil code, which gives him some means of prevention to preserve his rights or his lien. That is like the French law, by giving the shipowner the right to have the goods stopped or seized and taken into the care of the court, so that the debtor cannot dispose of them before the freight is paid, and this means of protection will prevent them from passing into the hands of a third party who might acquire them in good faith (Article 2279 of the French Civil Code and Article 835 of the Algerian Civil Code), and then the shipowner's right will be lost, because he will not be able of exercising his lien over the goods which are no more the goods of the charterer but, of the third party who acquired them in good faith. The exercise of the lien in this situation, is by taking a measure of prevention, which will prevent the debtor from disposing of the goods to a third party. This measure is provided by Article 345 of the Algerian Code of Procedure,[99] which provides that, in the case of necessity, the creditor can obtain an order from the court to put the movable chattels of the debtor in the hands of justice and that is to prevent him from

97 Article 795, Section.2. Ibid.

98 Article, 796 of the Algerian Maritime Code.

99 Article 345 of "Le Code de Procedure Civil" Algerien. Ordonnance No.66-154 du 8 Juin 1966 portant Code de Procedure Civil.

disposing of them, to damage his creditor's rights. This article is quite similar in its' aim to that of the French law, as to the protection of the shipowner in the case of demise charterparty.

To summurise this section, one can say that, the shipowner or carrier, might have a better protection in the civil law jurisdiction. But, generelly, one might say that they provide almost the same means of protection, and that is, that they must keep possession of the goods and warehouse them, with the only difference that, in the Algerian Marime Code, the shipowner can either keep the goods himself by refusing to deliver them or, warehouse them. However, the difference between the english and the civil law jurisdiction, is that by warehousing the goods, the shipowner or the carrier in the civil law jurisdiction, can apply for an order for the sale of the goods. Moreover, the lien is not lost in the civil law jurisdiction, if the goods have passed to the hands of the consignee during a period of fifteen days after delivery of the cargo, provided that the cargo has not been disposed of to a third party who may acquire it in good faith, because in this case, the lien will be lost.

The Exercise of the Shipowner's Lien on Sub-Freights:

The shipowner must exercise his lien on sub-freight or sub-sub-freight, before this freight is paid to the charterer, either by the sub-charterer or the shipper. Therefore, it was held in the case of The "Ugland Trailer"[100] that: "a lien on sub-freight could only be enforced by the shipowner before the shipper had made payment to the charterer; it conferred no right to follow the money after it had been paid and the owner's right to payment of freight existed only under their lien."[101] Therefore, the shipowner's lien can be lost if the money has been paid to the charterer. Moreover, the decision in The Attika Hope,[102] exposes

100 Re Welsh Irish Ferries LTD. The "Ugland Trailer" [1985] 2 Lloyd's. L. Rep. 372.

101 Ibid. at P. 372.

102 G. & N. Angelakis Shipping Co. S.A. V. Compagnie Nationale Algérienne De Navigation. (The Attika Hope) 15 October 1987; Lloyd's List, 28 November 1987., [1988] 1 Lloyd's. L. R. 439.

another limitation on the owner's lien on sub-freights and show that a defaulting time charterer may defeat an owner's lien by assigning the sub-freights to another creditor. In fact, in the particular circumstances of the case, the sub-charterers from whom the sub-freights were due were persuaded to pay the freight to the owners but, as it turned out, it was held that they were under no legal obligation to do so. The assignment to the other creditors of the time charterers was held to have priority over the owners' lien and the sub-charterers had to pay the freight twice. Had the sub-charterers taken the usual course of interpleading, the owners' lien would have been ineffective.

On 16 November 1983, the owners of the Attika Hope entered into a time charter with Ideomar on the New York Produce Exchange Form. The charter provided, by cl.18, that "the owners shall have a lien upon all cargoes and all sub-freights for any amounts due under this charter ...". When the time charterers entered into that charter, they were having difficulties in discharging debts to a third party, Angelakis, the plaintiffs in the action. In order to reduce their indebtedness, the time charterers agreed to assign to Angelakis the freight which would become due to them under a sub-charter of the Attika Hope which they were negotiating. This sub-charter was eventually concluded on 15 December 1983 with the defendants in the action, Compagnie Nationale Algerienne. It provided that 95% of the freight was payable within 20 days after releasing bills of lading and that the freight was to be paid to Angelakis. Notice of the assignment of the sub-freights to Angelakis, so the court held, was given to the sub-charterers in telexes to them and to their brokers between 15 and 20 December 1983.

The report of this case does not disclose when the charterers defaulted in the payments that were due from them to the owners under the time charter but, on 13 January 1984, the owners notified the sub-charterers by telex that they were exercising their lien on sub-freights. Four days' later, Angelakis called on the sub-charterers to pay the assigned freight to them. The sub-charterers

were eventually persuaded to pay the freight to the owners. Angelakis consequently sued the sub-charterers, the issue being whether the assignment of freights to Angelakis had priority over the owners' claim based upon their lien on sub-freights.[103]

Steyn, J., adopted the characterization of the lien on sub-freights advanced by Lord Russell of Killowen in The Nanfri,[104] where he said:

> "The lien operates as an equitable charge upon what is due from the shipper to the charterer, and in order to be effective requires an ability to intercept the sub-freight (by notice of claim) before it is paid by the shipper to the charterer."

4-2- The Termination of the Shipowner's Lien:

The shipowner's lien for the garantee of payment of his freight is ended in different ways, depending whether the shipowner parts with the possession of the cargo, or waive his lien, or the lien may be discharged. These are the different ways by which the shipowner's lien might be ended, and which will be examined next. However, it would be best to examine the end of this lien in the English law jurisdiction, before examinig it in the civil law jurisdictions, namely the French and the Algerian law.

(A)- The Termination of the Shipowner's Lien in the English Law Jurisdiction:

The lien of the shipowner for the guarantee of payment of his freight, may end either, by the loss of possession, which is an essential element of this lien or, by the waiver of this lien or, by the discharge of this lien.

1- Parting with Possession Defeats the Lien:

The shipowner's lien for freight depends upon possession, and its

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103 Wilford, M.T., "Liens On Sub-Freights And Priorities", Lloyd's Maritime and Commercial Law Quarterly (1988), at P.148-151.

104 Federal Commerce and Navigation Co. Ltd. V. Molena Alpha Inc. (The Nanfri) [1979] A.C.757, 784.

preservation upon the continuance of possession.[105] Thus, the lien is destroyed if the shipowner gives up his right to the possession of the goods, either by final delivery of the cargo to the consignees,[106] or abandonment of the vessel and her cargo.[107]

In Crawshay v. Eades[108] the shipowner, after landing part of the cargo, found out that the consignee had stpped payment, and there reloaded it and took the whole cargo to his own premises. It was held that there was no delivery of any part of the cargo as to divest the shipowner's lien upon the whole cargo. The freight not not having been tendered or paid, and the shipowner not having intended to part with the possession, without payment of the freight, his lien still continued.[109]

If the possession of the goods is voluntarily given up, then the lien is lost and cannot be revived on regaining possession.[110] Thus, if the vessel, being wrecked on the voyage, is abandoned with her cargo then such abandonment of possession will put an end to the shipowner's lien,[111] and the subsequent recovery of the possession of the vessel and her cargo will not revive it.

Abandonment of possession is equivalent to abandonment of the lien. Where the ship being disabled on her voyage is abandoned with her cargo to the underwriters, they may not claim to be subrogated to the shipowner's lien for the freight upon the cargo, such lien being lost by abandonment of the cargo.[112]

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105 Portland Flouring Co. V. Portland SS. Co. (1906) 145 Fed.Rep. 687-691.

106 North V. Gurney (1861) 1 John.& H. 509-529.

107 Nelson V. The Association For The Protection Of Commercial Interests (1874) 43 L.J.C.P. 218.

108 (1823) 1 B. & C. 181.

109 See Ibid., Per Best, J. at P. 185.

110 Sweet V. Pym (1800) 1 East 4; Hartley V. Hitchcock (1816) 1 Stark.408.

111 Nelson V. The AssociatioN For The Protection Of Commercial Interests (1874) 43 L.J.C.P. 218. The lien will also be terminated if the contract will become impossible of performance, but mere fact that performance has been prevented will not put an end to the shipowner's lien: The Teutonia (1872) L.R. 4 P.C. 171, L.R. 3 A. & E. 394.

112 Portland Flouring Co V. Portland SS. Co. (1906) 145 Fed. Rep. 687.

Possession of the cargo must be given up voluntarily. If the possession is taken by fraud,[113] or if the master and crew are forced to give up the possession of the vessel and her cargo,[114] then the lien will revive upon resuming the possession.

In Ex Parte Cheesman, Welfitt[115] the master, being turned out of possession, upon the vessel being captured, was held not to be deprived of his lien for the freight in case of her recapture. Lord Ellenborough, however, said that "if he had voluntarily quited possession of the ship, that would, indeed, have made a difference."

Sale of Goods by Warehouseman:

If the lien is not discharged, and no deposit is made, the wharfinger or warehouseman may, and, if required by the shipowner must, at the expiration of ninty days from the time when the goods were placed in his custody, or, if the goods are pershable, at such earlier time as he might think proper, sell, by public auction, the goods or so much of them which may be necessary to satisfiy the charges. The auction must be advertised in two local newspapers, or in one daily newspaper published in London and in one local newspaper, and if the address of the cargo owners is known, a notice must be sent to them. But a bona fide puchaser of the goods shall not be effected by failure on the part of the warehouseman to give such notice.[116]

In Dennis v. Cork,[117] goods being shipped under a bill of lading which provided that upon the arrival of the vessel, the goods should be taken from alongside by the consignee as soon as the vessel was ready to discharge, otherwise they might be "landed, put into lighters, or stored by the steamer's agent ... at the expense of the consignee." The vessel arrived and was ready to

113 Wallace V. Woodgate (1824) R.M. 193, 1 C.P. 575.

114 Bradley V. Newsom (1919) A.C. 16.

115 Levy V.Barnard (1818) 8 Taun.149; Gunn V.Bolckow (1875) L.R.10 Ch.491.

116 The Merchant Shipping Act, 1894, at s.497.

117 (1913) 2 K.B. 393.

discharge, but the consignee did not take delivery or pay the freight. The shipowner landed the goods and stored them in a warehouse witha general notice to the warehouseman not to deliver them to any one without instruction accompanied by their release for freight.

The indorsees of the bills of lading sent them to the warehouseman with the amount due for the freight and asked for delivery of the goods, pursuant to S. 495 of the Merchant Shipping Act. The Court of King's Bench Division held that the goods had not been placed by the shipowner in the warehouse under the provision of sections 493-496 of the Merchant Shipping Act, 1894, and therefore, the cargo owners, were not entitled to delivery upon depositing the amount of the freight with the warehouseman under the provision of S.495. Scrutton,J., said that "S. 494 only applies to cases under S. 493; but, if that is not so, it only applies to cases where the goods are stored with a notice that they are to remain subject to a lien for freight to an amount mentioned in the notice. It appears to me not to apply to a case where they are stored with a warehouseman with a notice not to deliver to anybody without instructions, saying nothing about the amount of freight, but leaving the shipowner to settle all questions as to freight."[118]

2- Waiver of Lien:

The shipowner's lien on cargo for freight may be lost or waived in the following cases:

a- Taking Bill of Exchange:

If a security is taken for a debt for which the party has a lien upon the property of the debtor, such security being payable at a distant day, the lien is lost.[119] Thus, if a shipowner having a lien on the cargo for his freight accepts a bill of exchange, payable at a future time, he will be held to have waived his lien.

118 Ibid. at P. 400.

119 See Hewison V.Guthrie (1838) 2 Bing.(N.C.)755,per Tindal,C.J.at P.759.

In Horncastle v. Farran,[120] the shipowner, having a lien on the goods took a bill of exchange in payment, and though he objected to it at the time, afterwards negotiated it. It was held that such negociation amounted to an approval of the bill by him, and therefore, it was a relinquishment of his lien on the goods. Abbott,J., said that:

> "The negociation of the bill was to be taken as against the party negociating it, as an approbation of the bill by him; and that the owners of the ship having, by this act, declared their approbation of the bill in question, had lost their lien on the goods."[121]

b- Detention of Goods Upon Different Ground:

If a shipowner, when goods are demanded of him, rests his refusal upon grounds other than that of a lien, he can not afterwards resort to his lien as a justification for retaining them.[122] A lien must be taken to have been waived if the party claims to detain the goods until payment of the debt due from a third person,[123] or on the ground of a right of property in them.[124]

If the shipowner without mentioning to the charterer that he is exercising his lien on cargo, merely instructs the master not to discharge the cargo until payment of freight, this will not amount to waiver of the lien.[125]

3- Discharge of the Lien:

The lien for freight might be discharged by:

a- Payment:

Payment determines the lien, even if it is in the nature of a conditional payment, such as accepting a bill of exchange payable at a certain date which is

120 (1820) 3 B. & Ald. 497.

121 Ibid. at P. 500.

122 White V. Gainer (1824) 2 Bing. 23-24; Boardman V. Still (1809)Car.& M. 627 n.

123 Dirks V. Richards (1842) Car. & M. 626.

124 Boardman V. Sill (1842) Car. & M. 627 n.

125 The "Agios Giorgis" (1976) 2 Lloyd's Rep. 192-203.

as to lien a proper payment and has the effect of discharging the shipowner's lien. There will be no lien for freight while the bill is outstanding.

In Tamvaco v. Simpson,[126] by the charteparty, freight was to be paid "on unloading and right delivery of the cargo, less advances in cash", and "one half of the freight was to be advanced by the freighter's acceptance at three months, on signing bills of lading." Upon the arrival of the vessel at the port of destination, while the charterer's accpetance was still running, the master having received information that the charterer had become bankrupt, refused to deliver the goods unless the full freight was paid.

The Court of Exchequer Chamber held that the shipowner had no lien on the cargo for the half of the freight covered by the charterer's outstanding acceptance, the giving of the acceptance by the charterer being considered as prepayment of a moiety of the freight,[127] therefore, the bill of lading holder was entitled to the cargo on payment of the other half, and the probability of the acceptance being dishonoured by reason of the charterer's insolvency was held not to make any difference.

It was contended for the shipowner that the lien was only suspended during the currency of the bill and upon the charterer's insolvency the shipowner's lien immediately revived; and he was, therefore, placed in the same position as if the bill had been dishonoured. The Court, however, did decide the question as to whether the shipowner's lien would revive if the voyage had been prolonged, so that the vessel arrived at the port of destination after the maturity and dishonour of the bill. The shipowner's argument was based upon the common contract for the sale of goods, where the right of the vendor to stop them in transit is suspended during the currency of the bill given for the price of the goods, but revives upon the bill being dishonoured.[128] But Blackburn, J.,

126 (1866) L.R. 1 C.P. 363.

127 See per Pollock, C.J., at P. 371.

128 See also Gunn V. Bolckow (1875) L.R. 10 Ch. 491.

considered this to be an exceptional rule and said:

> "But if we extend the doctrine to such a case as this, we must also extend the exception in favour of the bona fide taker of a bill of lading. I think there is no foundation for the argument."[129]

It seems, however, where the bill has been dishonoured before the delivery of the goods to the consignee, Then there is no reason to deprive the shipowner from withholding the goods for his freight which has become due but not paid. To support the proposition, the case of Gilkison v. Middleton [130] may be relied on. The charterparty giving a lien to the shipowner for all freight due under the charterparty, a portion of the charterparty freight, £900, was to be paid by the charterer's acceptance at three months, on sailing of the ship. On arrival of the ship at the port of discharge, the master hearing that the bills given for the £900 had been dishonoured, claimed a lien on the cargo against the bill of lading holders. Cockburn, J., said:

> "The cargo being expressly made liable for all freight due under the charterparty, it follows, that on arrival of the ship at (the port of discharge) there was £900 due for freight, for which the cargo was liable. If the matters had so remained, the owners clearly would have a lien for that £900."[131]

As against the bona fide holders of the bill of lading they could have only a lien for the freight mentioned in the bill of lading which itself was to be paid in advance and had not been paid.[132]

b- Tender of Payment:

The consignee must tender the freight before the shipowner can be expected to give up the possession of the cargo unless the shipowner is held to

129 Tamvaco V. Simpson (1866) L.R. 1 C.P. 363-372.

130 (1857) 2 C.B. (N.S.) 134.

131 Ibid. at P. 153.

132 But see Krchner V. Venus (1859) 12 Moo. P.C. 361; How V. Kirchner (1856) 11 Moo. P.C. 21.

have dispensed with the tender of the amount due for freight. The mere fact that the shipowner demands a large sum in respect of freight, or wrongfully claims a lien for two different causes, does not amount to waiver of tender, therefore, the consignee is still bound to tender a reasonable sum, before he is entitled to the possession of the goods.[133]

In Lyle Shipping Co. v. Corporation of Cardiff,[134] after discharging a considerable part of the cargo, the shipowners exercised their lien for freight and loading port demmurage. The amount claimed being too large was not justified by the freight and demmurage actually due. Bigham, J., however, said that the shipowners were, "at the time they made this claim, entitled to exercise their lien; nor did they distroy that right by putting forward a claim larger than what was justified; for in putting it forward I do not think they seriously meant that they would not give up the remainder of the cargo at all, until the whole of that amount was paid to them. They only intended to claim was really due; I do not think that their conduct was such as to releive the defendants from the obligation to tender such a sum as would be in fact sufficient to discharge the lien."[135]

The mere refusal to deliver the goods does not amount to a waiver of tender unless the shipowner's conduct is such as to show that it will be useless to tender anything less than the wrongfully large amount insisted on.[136]

In Kerford v. Mondel,[137] the cargo owners, when they demanded the goods, they were prepared to pay the freight for their carriage. The bil of lading under which the delivery of the goods were demanded had made them deliverable on payment of "freight as agreed". But the shipowner refused to deliver the goods except on payment of the dead freight. It was held that freight

133 Jones V. Tarleton (1842) 9 M. & W. 675-678; Allen V. Smith (1862) 12 C.B. (N.S.) 638; Scarfe V. Morgan (1838) 4 M. & W. 270. But see Ashmole V. Wainwright (1842) 2 Q.B. 837.

134 (1899) 5 Com. Cas. 87.

135 Ibid. at P. 97.

136 The "Norway" (1865) 3 Moo. P. C. (N.S.) 245.

137 (1859) 28 L.J. Ex. 303.

for carriage alone was due, and that the refusal was a implied dispensation of tender of it. Bramwell, B., said:

> "we conclude that the defendant here, in effect, said, I claim these goods in respect of the lien for two different items; you need not trouble yourself to tender one of them, because if you do so I shall not deliver them up: I shall keep them for the other. If that is so, it is a reasonable thing to show that he dispenses with what he owned would be a nugatory tender of the sum he was entitled to receive."[138]

In The "Norway",[139] the master upon the arrival of the ship, at the port of destination, claimed lump sum freight, larger than was really due, as well as a sum for general average, and he insisted upon keeping in his possession a part of the cargo to cover his demand for freight he considered due. A tender was made by the assignee of the bill of lading of the amount considered by him due, and he undertook to give security for the remainder. This offer was refused by the master. It was held that the demand by the master of a larger sum than what was due, and the refusal by him to deliver the cargo was so made that it amounted to an announcement by him that it would be useless to tender any smaller sum, for if tendered it would be refused, and that such refusal constituted a constructive waiver of any tender.[140]

Expenses of Preserving the Lien:

The case of Somes v. British Empire Shipping Co.,[141] is regarded as having laid down a general principle that a person having a lien upon a chattel for a debt cannot, if he keeps it to enforce payment, add, to the amount for which the lien exists, a charge for keeping the chattel till the debt is paid. The charge for keeping it being for his own benefit, and not for the benefit of the person whose chattel is in his possession.[142]

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138 Ibid. at P. 306.

139 (1865) 3 Moo. P.C. (N.S.) 245.

140 (1860) 8 H.L.C. 338.

141 See per Lord

142 See per Lord Wensleydale at P. 345, and per Lord Cranworth at P. 343. In that case the

The rule, however, does not seem to be applicable to the cases where the goods are held in a place for the hire of which under the contract between the parties payment would have to be made, as for instance in a ship or a warehouse. The person who is exercising the lien is entitled to claim payment for the detention of his ship, if he holds the goods in the ship or, if less expensive, he clears them out of the ship and puts them into a warehouse, the expenses of keeping them in the warehouse.[143]

In Harley v. Gardner,[144] by a charterparty a lump sum freight was to be paid on completion of loading. The shipowners had a right of lien on the cargo for payment of "all freight, dead freight, demurrage and all other charges whatsoever." The charterer not having sufficient funds to pay the freight on completion of loading, an arrangement was made for payment on arrival of the ship at the port of destination. On arrival of the vessel as the charterer was still unable to perform the obligation to pay the freight, the shipowner could either hold the cargo in his ship, or could himself land the cargo provided he still kept it in his possession, which he was entitled to do by common law; and this course being one which would be more economical to the plaintiff he adopted it; and accordingly the cargo was unloaded remaining in his possession until the lien for the freight and expenses which he had necessarily to incur in the discharge of the cargo had been paid.[145]

Mr. Justice Macnaghten decided that the shipowner had a lien on the cargo for all charges necessarily and properly incurred by him in discharging and warehousing. The principle of the case of Somes v. British Empire Shipping Co., he said not to have any application to this case, where it was admitted that the

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claim was by a shipwright for the cost of the use of graving dock during the detention by him of the ship upon a lien for the cost of repair.

143 See per Mr. Justice Bailhache in Anglo Polish SS. V. Vickers (1924) 19 Ll. L. R 121-125; The King V. Hamphrey (1825) M'Clel & Y. 173.

144 (1932) 43 Ll. L. R. 104.

145 These facts are taken from the judgment of Mr. Justice Macnaghten, at P. 106.

shipowner was entitled to remove the goods from his ship and so stop all charges for demurrage. He was entitled to remove the goods from his ship and place them in a warehouse.

The Expenses May be Recovered as Damages:

Where the consignees fail to receive the goods within the time fixed by their contract, or a reasonable time, after the arrival of the vessel at the port of destination and satisfy the shipowner's claim for the freight, the shipowner may land and warehouse the goods subject to his lien, and maintain a claim for damages for their storage or other charges properly incurred in doing so.[146] The landing and warehousing the cargo being made necessary as a result of the cargo owner's default in taking delivery of the cargo or paying the freight according to their agreement, then they will be liable to indemnify the shipowner for the expenses so caused.

The bill of lading, however, generally contain a clause empowering the master or agent to land the cargo "at the risk and the expense of the owners of the goods", if the goods are not applied for within a certain time after arrival of the vessel at the port of destination; and "the master or agent to have a lien on the goods for freight and payments made (if any) or liabilities incurred in respect of any charges stipulated to be borne by the owners of the goods." It has been held that such a power is only in aid of the shipowner, and that the master is not bound to exercise it.[147]

Therefore, this clause is held by Lindley, L.J.,[148] to be inserted in the interest and for the benefit of the shipowner, so as to give him an additional remedy for the recovery of what is due to him, and not a remedy in substitution for any which he would have apart from these clauses.

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146 Houlder V. General S. N. Co. (1862) 3 F. & F. 170; Great Northern Co. V. Swaffield (1874) L.R. 9 Ex. 132; The Asiatic Prince (1900) 103 Fed. Rep. 676.

147 Per Lindley L.J. in Hick V. Rodocanachi [1891] 2 Q.B. 632.

148 Ibid.

After the end of the shipowner's lien in English law has been discussed, it would be necessary in the course of this study to explain how this lien ends in the civil law jurisdiction, and that will come next in this section.

(B)- The Termination of the Shipowner's Lien in the Civil Law Jurisdiction:

The "lien" or "privilége", as guarantees, have a secondary character; their aim is to protect the shipowner or the carrier, and they imply the existence of a debt of freight to which they are linked and to which they insure the execution. Therefore, it is obvious that if the main obligation, i.e., the debt of freight, disappears then, these garantees will follow as well.

1- The Loss of Possession:

In the French and Algerian law, possession has not the effect as in the legislation which knows the system of corporeal security (garantie réelle). In fact, the lien which is linked to that system has for main characteristic, not to end by the delivery of the goods.[149] However, possession is not neglected. It has a certain effect which is, that as long as the goods remain in the hands of the shipowner, i.e., until the end of their unloading, the creditor can ask for their warehouse or deposit and to put them in the warehouse designated by the judge. On the other hand, if the goods are not in his possession any more, he must have seized in the hands of his debtor. The difference is that, in the second case, the right to be preferred (le droit de préférence) can be at any time brought to an end, by a better right of a third party who is protected by Article 2279 of the French Civil Code and Article 835 of the Algerian Civil Code. It must be added that the lien disappears, if the goods pass to the hands of a third party, i.e., if the consignee or the receiver of the goods disposes of them.

149 Ripert. Georges, Droit Maritime, 4 éme éd, Vol.2, Paris, 1952, p.556. See, Schertenteib.Francis, Le Fret (La Garantie de son Paiement) at P.171.

Thus, the loss of possession, if it does not bring an end to the guarantee, it does not modify the rights of the shipowner. His lien (as long as he is in possession of the goods), can with reservation of informing the court, be compared to a right of retention or to a possessory lien.

2- The Waiver of the "Lien" or "Privilége" :

The waiver of the guarantee, after the loss of the possession, is its' usual cause of bringing it to an end. It is either express or implied. It is the implied waiver, which is evidently, difficult to establish. The agreements or conventions of the parties having force of the law, the express waiver is known as such in all the legislation and does not need any particular observation. It is real that the distinction between the express waiver and the implied waiver differs sometimes from one law to another. It is frequently[150] only a question of terminology.[151] The lien being given in the interest of the shipowner, then it was normal to give the shipowner the power to the waiver of his lien, either in advance or after.[152]

The lien can be said to have been waived, in the case of giving a security. In fact, Article 3, Sect.1 of the French Law of June 1966 and Article 681 of the Algerian Maritime Code, authorise the exercise of the lien, "unless the charterer gives a security". If today, the effect of giving a security (cautionnement) does not give any doubt, a question arises as to whether, the acceptance of other securities other than that, will imply an implied waiver of the lien. It seems that it is not the case. In fact, before the reform of the French law of 1966, it was considered that the security could not oblige the judge to end the deposit or the warehouse of the goods. It had to be the express stipulation of Article 3 of the

150 Schertenleib. F., Op Cit, at P. 173.

151 Ripert. G., Op Cit, at P. 557. Denisse Léon, Du fret Considéré dans ses Rapport avéc l'Abondan, l'Affrétement, la Contribution aux Avaries Communes et les Assurances Maritimes, Paris, 1891, At P. 5.

152 Rodiere R.,Traité Général de Droit Maritime, Paris, 1968, note 3, at P. 207.

Law of 1966 to bring it into effect. Moreover, will it be illogical to oblige the shipowner to accept other securities? First, we can, *a contrario,* maintain that the acceptance of other securities, either corporeal security or personal, does not necessarily imply a waiver of the lien. This kind of stipulations, do nothing but guarantee the shipowner against the insolvency of the debtor, and to insure him for the payment of his debt without ending it. Moreover, there is another way by which this lien or "privilége" can be ended, which is that of the prescription. In the case of affreightment, the action is prescribed after a year, and that is prescribed by Article 4 of the Law of June the 18 th, 1966 and Article 648 of the Algerian Maritime Code, starting from a certain date, depending on the different types of charterparties, Article 4 of the Decree of the 31 st of December, 1966. However, in the Algerian Maritime Code it is prescribed in Article 742, that the actions born out of the contract of carriage of goods are prescribed after two years, starting from the day the goods have been delivered or from the day they should have been delivered. On the other hand, in the contract of carriage of goods in the French law, the action is prescribed after one year, starting from the day of the delivery of the goods, and that is prescribed by Article 26 of the Law of the 18 th June, 1966. However, the lien is prescribed after fifteen days from the day of the delivery, after this period, i.e., (the fifteen days), this lien is not preferred on other creditors of the debtor.

This section can be summarised by saying that, the different ways for ending the shipowner's lien in the english law jurisdiction, are quite similar to those in the civil law jurisdiction. This lien can be ended in both jurisdiction either, by the loss of possession, because this latter is a very important element for preserving this lien, or, it might be ended by waiving this lien in different ways, like taking other means of security, such as taking a bill of exchange in the english law jurisdiction or, taking a security or deposit given by the charterer in the law jurisdiction. This last way of ending the shipowner's lien, is provided in both, the French and the Algerian maritime code. There is also, other means for

end this lien, and that by tender of payment of the freight or the sale of the goods after a certain period.

However, it should be pointed out, that the expenses for preserving the lien, are incurred by the shipowner in the english law jurisdiction, i.e., the one who wants to preseve the lien must take in charge the expenses, but it is a different situation in the civil law jurisdiction, because in this jurisdiction, the expenses are paid out of the proceeds of the sale of the goods.

CONCLUSION

The express terms of the charterparty give to the shipowner a lien on the cargo for the guarantee of payment of freight due to him for the hire of the vessel or for the services rendered to the cargo. Usually, charterparties give a lien to the shipowners on the cargo they are carrying for the payment of their freight. This lien given to the shipowner is considered as a possessory lien in the case of a voyage or a time charterparty and that is because possession of the goods remains with the shipowner who has possession of the ship. However, the situation would be different in the case of a demise charterparty where the control and possession of the ship along with the possession of the cargo has passed to the charterer by demise.

The shipowner's lien may be justified upon application of the general principal that, "where a bailee has expanded his labour and skill in the improvement of a chattel delivered to him, he has a lien for his charge in that respect."[1] Thus, as goods are improved in value by their carriage, therefore, the carrier may detain them for the charge of such carriage. This is also the ground suggested in the United States, by Mr.Justice Jhonson in the case of Gracie v. Palmer.[2]

The master is the agent of the shipowner to receive and transport; the goods are improved in value by the cost and care of transportation. As the bailee of the shipper, the goods are in the custody and possession of the master, and therefore, the shipowner, and the law will not suffer that possession to be violated until the labourer had received his hire.

The lien recognised in favour of the shipowner by common law is a particular or specific lien, as opposed to general lien. This specific lien of a shipowner extends to all goods of a particular shipment, consigned to same

1 Scarfe v. Morgan (1838) 4 M. & W. 270-283.

2 (1823) 8 Wheat . 605-635.

person on the same voyage, for the freight due on some or all of them.

The common law recognises a lien for the carrier on the cargo for the payment of his freight. This lien is in the nature of a possessory lien.

Therefore, where the shipowner performs his obligation by carrying the cargo, he is entiled to a lien because he rendered a service to the cargo and which increased its value by carrying it to its destination.

For the nature of this lien, it depends on the situation of every case. Thus, it seems clear that in a time or a voyage charterparty or bill of lading, this is a contractual creation of a possessory lien. In the case of a demise charter it is difficult to escape the conclusion that, if anything, it would be an equitable lien. It would not be a lien akin to a possessory lien, as the owner would have no power to prevent delivery and it is only as an equitable lien that such a clause makes sense in the context of a demise charterparty.[3] Thus, in English law liens may be granted by the common law, by equity, by statute or by contract.

In the case of voyage or time charterparty the shipowner has possession of the ship and therefore, of the cargo and he can exercise his lien by detainaing the cargo until his claims are satisfied, which are mainly and in most of the cases the payment of his freight. However, one might ask himself about the basis of the nature of this lien, and therefore, one might say that this lien can be described as an equitable lien given to the shipowner for the services he rendered to the cargo, because these services have increased the value of the cargo and that by carrying it from one place to another, therefore, its's merchantable value has increased. Here, the case is treated in the French and Algerian Civil Codes,[4] under the heading of the unlawful enrichment. However, English law does not consider the theory of unlawful enrichment to justify the case of recompense and therefore the lien, but, on the contrary, Scots law does recognise that theory.

3 Tetley, William. Enforcement Of Maritime Claims. at P. 280.

4 The French Civil Code, Article 1375, and Algerian Civil Code, Article 141.

Erskine describes recompense as an obligation " by which a person who is made richer through the occasion, or by the act of another, without any purpose of donation, is bound to indemnify that other."[5] The case of unlawful enrichment or recompense is a question of circumstances according to the circumstances of each case as to whether equity does or does not found the claim. The obligation is "founded on the consideration that the party making the demand has been put to some expense or some disadvantage there has been a benefit created to the party from whom he makes demand of such a kind that it cannot be undone."[6]

The one who benefitted from the act of the person who expended money or rendered services, must reimburse the latter to the extent of the expense or service which the claimant has made and, this theory is supported by the principles of justice and equity. However, if one looks back to the case of the shipowner whose ship was used to carry goods under a contract of carriage of goods by sea in the form of a demise charterparty, in this case the shipowner has not got the possession of his ship, and therefore not the possession of the cargo. Therefore, it is very difficult or almost impossible for him to exercise his lien, in this case, it would best for the interest of the shipping trade to give the shipowner an equitable lien on the basis of unlawful or unjust enrichment. Therefore, where there is general average or salvage, there is always a lien for saving the cargo. So, on the basis of this argument, everytime that work has been done affecting goods by a person lawfully in possession of them, he is entitled to a lien, and it is immaterial whether it is for general average or salvage.[7] However, the case of the shipowner in the case of a demise charterparty is different from that of the one who rendered services to the cargo like in the case of salvage or general average, bechause the shipowner in the first

5 Encyclopedia of the Laws of Scotland . vol. 12. 1931. p. 342.

6 Per Lord Pres. Inglis in Stewart V. Stewart, 1878, 6R. 145.

7 See, Nicholson V. Chapman. 2 H. Bl. 254. and, Castellain V. Thompson. 13 C.B. (N.S.) 105; 32 L.J. (C.P.) 79.

case did not render any services, he has merely offered his ship to be used against the payment of a remuneration. Moreover, even if he is given a lien on the cargo it is quite difficult or almost impossible for this shipowner to exercise his lien on the cargo, because it is a well known fact that the possession and control of the vessel and therefore, of the cargo pass altogether to the possession of the demise charterer. Therefore, the shipowner stays without any guarantee for the payment of his freight and, this is not accepted by the principles of justice nor by those of equity. Thus, it would be in the interest of the shipping trade and in the interest of the shipowner, to give the shipowner whose vessel has been demise chartered a preferred claim or right over the goods of the charterer, and that by enabling him to have the cargo arrested into a third party's hands until his freight is paid, and a right to trace the goods into whosever hands they might fall, and that in the case where the charterer tries to defraud the shipowner by passing the goods into a third party's possession. However, this right must not be absolute, otherwise the shipowner might abuse of his right and that will cause an inconvenience to the demise charterer. This can be possible if the right of the shipowner is only exercised by the court everytime that the shipowner claims the payment of his freight. In the civil law jurisdictions namely, the French and Algerian maritime laws, the guarantee for payment of freight is guaranteed by a "privilége", which can be defined as, the right to be preferred for the payment of his freight on the goods. Therefore, from this principle comes the right of depositing the goods and therefore, their sale. However, the right to deposit the goods has for consequence the right to ask for the sale of the goods by authority of the law. This right however, has never been absolute. The sale cannot take place, unless it is judged necessary, and the presiding judge will have to consider the interests of both parties of the litigation.[8] Therefore, just as the deposit or the consignation, the right to ask for

8 Bleinc Pierre, De la consignation en main tierces des marchandises arrivant par mer, Marseille, 1933, p. 19.

the sale is considered as a special means for the recovery of the freight.[9]

However, by a way of analogy it would fair and logical to give the shipowner in a demise charterparty a right of priority which makes him able enough to recover his freight, as in the case of unjust enrichment or the case of a lessor of an immovable, because the logic of the situation and the justice and equity, will require some guarantee or right of priority to be given to the shipowner, because it is most unfair to let the demise charterer away, without paying the freight owed by him to the shipowner. Moreover, the stability and continuance of the shipping trade will cease to exist, if the shipowner in the demise charterparty does not get his share of the venture, and moreover, because the trade in general and the shipping business in particular are founded on trust and, the different transactions are very fast to be concluded, and therefore, it requires a lot of guarantees.

It has been shown that the shipowner at common law, generally has a right to retain the goods in his possession until the freight upon them, and sometimes other charges also, have been paid.[10] It does not give the shipowner any property in the goods; nor does it enable him to sell them; even though the retention of them may be attended with expense.[11] This right simply gives the shipowner, the right to keep possession, and to resist all claims to take them away, and it avails against the true owner of the goods, although he may not be the person liable to pay freight.

Thus, in order to maintain his lien the shipowner must keep possession of the goods, either in his own hands or in the hands of his agents.[12] Therefore, the possession or the retention of goods being the main way by which the

9 Denisse Léon, Du frét considére avec ses rapports avec l'abandon, l'affrétement, la contribution aux avaries communes et les assurances maritimes, Paris, 1891, p. 308.

10 Carver. Carriage by Sea. Thirteen Edition. para 1991. at P. 1380.

11 Mulliner V. Florence (1878) 3 Q.B.D. 484; Thames Ironworks Co. V. Patent Derrick Co. (1860) 1 J. & H. 93.

12 Carver. Carriage By Sea. Thirteenth Edition. Para. 2033. at P. 1408.

shipowner can exercise his lien to force the charterer or the cargo-owner to pay the freight, the shipowner in the course of the exercise of his lien, might either warehouse the goods at the port of destination or, use other means to preserve his lien after the release of the goods or, he might withdraw the vessel from the service of the charterer.

The exercise of the shipowner's "privilége" in the civil law jurisdictions namely the French and the Algerian laws, this exercise might occure in two different situations. The first situation is more or less simple, because whether the consignee is unknown or whether he refuses to take delivery of the goods and pay freight, the goods are in the possession of the shipowner or the carrier, either on his ship or on the wharf or in the shipowner's warehouse. The important solution and which explains the uniformity of solutions in this case, is the fact that the creditor has possession of the goods.

This solution was provided in the French Code of Commerce, in article 3 of the Decree of 1966.[13] This Decree in its' article 3 provides that, "if the shipowner is not paid when discharging the goods, he cannot retain them on his ship, but he can deposit or warehouse them in the hands of a third party and to sell them, unless the charterer gives a security."[14] The second situation is where the shipowner is faced with a refusal of payment of the freight, in this case, where the freight has not been paid, the shipowner has a lien or a right of priority according to article 2 of the French law of the 18 th of June, 1966. However, he cannot keep these goods on board his ship, but he can still keep their possession by warehousing or depositing them in the hands of a third party and then ask for their sale. This solution is provided by article 3 of the Decree of December the 31 st, 1966.[15] This measure keeps the interest of the

13 Decrét No.66-1078 du 31 Decembre 1966, sur les contrats d'affretement et de transport maritimes.

14 "My Own Translation", the actual article in French provides that:

<<Si le fréteur n'est point payé lors du déchargement des marchandises, il ne peut les retenir dans son navire, mais il peut les consigner en mains tiérces et les faire vendre, sauf á l'affréteur á fournir caution".

15 Under the title of, "Affreightment of Ships", in Chapter I which includes the general rules of these kinds of contracts.

captain who has the right to be paid before giving up his retention, and in the same time it also protects the interests of the consignee who, before paying the freight, has the right, to examine the state of the goods which are going to be delivered to him.

However, the situation is different in the case of a demise charterparty, where the possession of the ship is given up to the charterer, and therefore, the possession of the cargo. Here, how can the shipowner exercise his lien on the cargo, without having possession of it? Here, because the goods are not in the hands of the shipowner, he must then act by the means of an action for execution for the sale of the debtor's chattels, i.e., "saisie-éxécution mobiliére".

Therefore, the goods being out of the possession of the shipowner in the case of a demise charterparty, is not a problem any more in the French law, and that is because the shipowner can ask the court to sequester the goods of the charterer, and that according to article 48 of the Civil Code of Procedure. Therefore, the goods will be in the hands of the court, and then, the shipowner will not have to fear for his debt to be satisfied.

When it comes to the Algerian Maritime Code, which for historical reasons has been influenced by the French Matime Law, however, in the case of the shipowner's lien on the cargo for the garantee of payment of his freight, he has provided a much better protection to the shipowner. The Algerian legislator like the French has made a difference between the shipowner and the carrier. Therefore, he gave the shipowner a lien or a right of priority over the goods for the garantee of payment of his freight.

He therefore, provided in article 645 of the Algerian Maritime Code that: "The shipowner has a lien on the goods for the payment of his freight and other charges provided in the contract of affreightment",[16] this is the same provision

16 "My Own Translation", article 645 povides that:

<<Le fréteur a un privilége sur les marchandises pour le paiement de son frêt et autres charges prévues au contrat d'affrétement>>.

as that provided by the French law in article 2.

However, the Algerian legislator went further, by providing that the shipowner can refuse to unload the cargo, if the freight and the remunerations for demmurage or other delay have not been paid by the charterer,[17] and he added that, in the case above, the shipowner can deposit the goods and after he has told the charterer sell them with the consent of the judicial authority, unless a security, which is secure enough to garantee the lien, has been deposited by the charterer.[18]

This is a much better protection to the shipowner than that given to him by the French legislator, where he cannot keep the goods on board his ship, but in the Algerian law it is up to the shipowner, whether he wants to retain the goods on board his ship or to deposit them into the hands of a third party, which is nothing else but retainaing the possession of the goods by the shipowner through the possession of a third party.

In the case of a carrier of goods by sea, the Algerian legislator gave him the right not to deliver the goods and to deposit them until the consignee has paid or given a security for all what is due for the carriage and other charges.[19]

Here, the Algerian legislator has made a difference between the shipowner and the carrier, because in this case the carrier cannot retain the goods on his ship, but has to deposit them. These goods which are not claimed, can also be sold, if these goods are by their nature perishable, or if the sum of their

17 Article 680 of the Algerian Maritime Code, which provides that:

<<Le frêteur peut refuser le déchargement de la cargaison si le frêt et la remunération á titre de surestaries ou d'autres retards ne lui ont pas été payés par l'affréteur>>.

18 Article 681 of the Algerian Maritime Code, which provides that:

<<Dans le cas visé á l'article précédent, le fréteur peut faire consigner les marchandises, et, aprés en avoir avisé préalablement l'affréteur, les faire vendre avec le consentement de l'autorité judiciaire, sauf si une caution suffisante a été fournie par l'affréteur>>.

19 Article 792 of the Algerian Maritime Code, which provides that:

<<Le transporteur peut refuser de livrer les marchandises et les faire consigner jusqu'á ce que le déstinataire ait payé ou qu'il ait fournit caution de tout ce qui est dû pour le transport de ses marchandises ainsi qu'á titre de contribution d'avarie commune et de remunération d'assistance>>.

warehousing exceeds their value, but their sale sould be made before depositing them.[20]

Moreover, the Algerian legislator has given the carrier another protection in the case where the money of the sale of the goods not claimed, is not enough to pay the carrier for the remuneration of his carriage and the expenses for warehousing them, in this case the Algerian legislator has made of the shipper the one responsible for the payment of the difference.[21] The shipowner in the case of a demise charterparty, because he is deprived of the possession of the ship, and therefore, the cargo, in this case how can he exercise his lien? In this case, he has to use the protection given to the creditor in the civil code, which gives him some means of prevention to preserve his rights or his lien. That is like the French law, by giving the shipowner the right to have the goods stopped or seized and taken into the care of the court, so that the debtor cannot dispose of them before the freight is paid, and this means of protection will prevent them from passing into the hands of a third party who might acquire them in good faith (article 2279 of the French civil code and article 835 of the Algerian civil code). The exercise of the lien in this situation, is by taking a measure of prevention, which will prevent the debtor from disposing of the goods to a third party. This measure is provided by article 345 of the Algerian Code of Procedure.[22] This article is quite similar in its' aim to that of the French law, as to the protection of the shipowner in the case of demise charterparty.

Moreover, a lien on sub-freight could only be enforced by the shipowner before the shipper had made payment to the charterer; it conferred no right to follow the money after it had been paid and the owner's right to payment of freight existed only under their lien."[23]

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20 Article 795, Section.2. Ibid.

21 Article, 796 of the Algerian Maritime Code.

22 Article 345 of "Le Code de Procedure Civil" Algerien. Ordonnance No.66-154 du 8 Juin 1966 portant Code de Procedure Civil.

23 Ibid. at P. 372.

The shipowner's lien for the garantee of payment of his freight is ended in different ways, depending whether the shipowner parts with the possession of the cargo, or waive his lien, or the lien may be discharged. The different ways for ending the shipowner's lien in the english law jurisdiction, are quite similar to those in the civil law jurisdiction.

After having discussed both jurisdictions, namely the English jurisdiction which is part of the common law and the civil law jurisdictions (the French and the Algerian laws), it would be best to point out that the civil law jurisdictions have provided the shipowner with a better protection for the guarantee of payment of his freight. The French maritime law (which is included in the code of commerce), allows the shipowner or the carrier, in the case of a voyage or time charterparty to unload the cargo and to warehouse it without losing possession of it and that it is because the shipowner or the carrier will give notice to the warehouseman to keep the cargo for the shipowner. In this case the shipowner or carrier will be retaining possession of the cargo through a third person being the warehouseman; this case is nothing more but another means of exercising a right of retention. Moreover, the shipowner or the carrier in this situation is allowed to sell the goods and to satisfy his debt from the proceeds of the sale of the cargo. The Algerian maritime code, although being a civil law jurisdiction, has followed the same steps as the French law but, learnt from it and brought a better solution, where it allowed the shipowner, either to keep the goods onboard the ship which an exercise of the right of retention or warehouse them and that is possessing through a third party as the French law did. Moreover, one might have noticed that the shipowner in the English jurisdiction, has to suffer the expenses of preserving the lien, i.e., the expenses of keeping the cargo in a warehouse, but in the civil law jurisdictions, the shipowner will not suffer such expenses. However, these expenses will be satisfied from the proceeds of sale of the cargo.

Moreover, the shipowner in the civil law jurisdictions has a right of priority or he is preferred for the guarrantee of payment of his freight, on the creditors of his debtor and that is in the case of bankruptcy or admission into the legal liquidation of the debtor of freight.

In the case of a demise charterparty, the shipowner in the civil law jurisdictions has only one means from the civil law, because the goods in this type of charterparty have gone out of his possession and are in fact in the charterer's possession. In this case, he can use the action for execution for the sale of the debtor's chattels, i.e., (saisie-éxécution mobiliére). In this case he can ask the court to sequester the goods of the charterer, and therefore, the goods will be in the hands of the court and the fear for the loss of the cargo and then the guarantee for payment of the freight will disappear.

These are basically, the main points which make of the civil law jurisdictions being more advantageous to the shipowner then the common law jurisdictions, and that might be because every time that the particular law has omitted to give a solution to a particular situation, the civil law which is the general law will be referred to for solutions, and therefore, the civil law jurisdictions have broader means to apply to the different situations.

The main purpose of this work was to try to define the nature of the shipowner's lien for freight, and therefore, it was concluded that this lien is a possessory lien in the case of voyage or time charterparty. However, the shipowner might face some difficulties in trying to exercise his lien especially in the case of demise charterparty or in the case of sub-freight or sub-sub-freight. Therefore, we would recommend that the shipowner should be given some legal means to preserve his right. This means would be, the right to have the goods warehoused and after a certain period of time to have the right to sell the goods and that by an order of the court after a certain time has elapsed so that the charterer would have enough time to settle the question of freight with the

shipowner and so that the shipowner will not find himself left with the burden of keeping mere possession of the cargo and then, he can proceed in the business of carriage which is the main aspect of that type of business, because the carriage of goods by sea relies mainly on time, the shorter time it takes the shipowner to finish carrying a cargo to its' destination the more chances he has to have another assignment.

Moreover, the rights of the charterer will not be affected because the shipowner cannot sell the goods unless he has the consent of the court after a certain time of retaining the cargo. This court will look at the circumstances of each case before allowing the shipowner to proceed with the sale of the goods if it thinks necessary.

In the case of a demise charterparty, the shipowner should be given the right to ask the court to sequester the goods of the charterer which still in the possession of the charterer because of the nature of this type of charter. This right will be based on the fact that the charterer by agreeing to give a lien to the shipowner has accepted to assign his right of freight against the sub-charterer to the shipowner who will take the place of the charterer, and the same will apply to the case of a sub-sub-charterparty. This right however, although it seems in favour of the shipowner more than the charterer, it protects the rights of the charterer, and that is because the goods pass to the hands of the court and not the hands of the shipowner. Moreover, the court will not order the sale of the goods unless it is convinced that the shipowner deserves to have his freight paid by the sale of those goods.

The expenses of preserving the goods should be at the expenses of the charterer because it is him who refused to pay the remuneration for the carriage of the cargo, namely the freight. However, this should not be an absolute rule otherwise, the charterer might suffer from the shipowners who might abuse of this right. In this case, the charterer should be allowed to claim those expenses back and this might not have to happen because, this measure should only be

applied by the consent of the court which will look at the case thoroughly and then, give the consent to either the shipowner to sell the goods or to the charterer to have his goods back.

Thus, with this kind of measures the shipowner will have his right of lien for the guarantee of payment of his freight protected no matter what type of charterparty he part of, and it protects the charterer as the shipowner cannot take any action without the consent of the court which will be independent and which will look at each case and decide what appropriate action is needed and whose rights should be protected.

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