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## A Shipowner's Lien on Sub-Sub-Freight in England and the United States: New York Produce Exchange Time Charter Party Clause 18

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# A Shipowner's Lien on Sub-Sub-Freight in England and the United States: New York Produce Exchange Time Charter Party Clause 18

## I. INTRODUCTION

The chartering of ocean-going vessels has been taking place for hundreds of years.<sup>1</sup> Chartering presumably began with a merchant paying the owner of a small sailboat to deliver a variety of goods to a neighboring Mediterranean village.<sup>2</sup> Today, however, a charter party<sup>3</sup> might be entered into between multinational corporations for the carriage of millions of gallons of crude oil or thousands of automobiles aboard a vessel one thousand feet long to a port half-way around the world.

The contract form most frequently used in time charters<sup>4</sup> is the

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1. C. McDOWELL & H. GIBBS, OCEAN TRANSPORTATION 7 (1954). Although the Egyptians engaged in commercial shipping as early as 3000 B.C., it is difficult to determine whether they had a concept of ship chartering equivalent to chartering as we know it today. *Id.* It is known, however, that the term "charter party" derives from the medieval Latin phrase *carta partita*, meaning "divided deed or document," and that reference to this was made in the 14th century. Trowbridge, *The History, Development, and Characteristics of the Charter Concept*, 49 TUL. L. REV. 743, 743 n.1 (1975).

During the early days of commerce by sea, means of communication were no faster than the vessels carrying the goods. Thus, in order to ensure the authenticity of a document containing the terms of a charter agreement, the parties would tear the contract into halves or thirds and give each party a portion. The parties would subsequently match their portions of the document to establish its genuineness. C. McDOWELL & H. GIBBS, *supra* note 1, at 185-86.

2. See C. McDOWELL & H. GIBBS, *supra* note 1, at 7-8.

3. A charter party is a maritime contract subject to the basic requirements of contract law. *Id.* at 187. It is a contract "by which the charterer . . . obtains the use and service of all or some part of a ship for a period of time or a voyage or voyages." Trowbridge, *supra* note 1, at 745.

4. There are three basic types of charter parties: voyage charters, time charters and demise charters. A voyage charter is a contract for the carriage of cargo on a particular voyage or voyages between named ports at a specified rate per ton of cargo carried or in a lump sum based upon the ship's carrying capacity. The shipowner retains possession of and control over the vessel. In addition, the shipowner pays for bunkers (fuel) and port charges. The charterer under a voyage charter has, in essence, the status of a shipper only, as distinguished from a time charterer who has certain operational responsibilities. Trowbridge, *supra* note 1, at 753.

A time charter is a contract for the use of a vessel's cargo-carrying space for a specified period of time, sometimes several years. The shipowner under a time charter retains posses-

New York Produce Exchange (NYPE) form.<sup>5</sup> It has been in existence in form since 1913, and in substance since at least the early nineteenth century.<sup>6</sup> Various provisions of the form have been the subject of numerous arbitration proceedings<sup>7</sup> and much litigation in the courts of the United Kingdom and the United States. One provision of the NYPE form in which this is particularly true is the lien clause, Clause Eighteen.<sup>8</sup>

Clause Eighteen of the NYPE form provides in pertinent part "[t]hat the [shipowner] shall have a lien upon all cargoes, and all sub-freights for any amounts due under this Charter . . . ."<sup>9</sup>

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sion of the ship, employs the master and crew, and is responsible for the ship's navigation and operation. The ship is merely placed at the charterer's disposal. The charterer pays for bunkers and port charges at the places where he directs the vessel, as well as for any special fittings necessary for handling the cargo he chooses to ship. *Id.* at 749. Commonly, payments to the shipowner become due in advance on a semi-monthly or monthly basis.

Under a demise charter, also referred to as a "bareboat charter," the charterer takes *full possession and control* of the vessel for the agreed period of time. For all practical purposes, the charterer is substituted for the owner. The charterer is called the "owner *pro hac vice*" ("owner for this turn"). *Reed v. The Yaka*, 373 U.S. 410, 412 (1963); Trowbridge, *supra* note 1, at 748; C. McDOWELL & H. GIBBS, *supra* note 1, at 187.

The distinction between a voyage charter, a time charter and a demise charter can be loosely compared to the distinction between methods of land transportation: A voyage charter is similar to riding a bus; a time charter is similar to hiring a taxi; and a demise charter is similar to renting an automobile.

5. Trowbridge, *supra* note 1, at 750. New York Produce Exchange Form Time Charter (1946), *reprinted in* G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 1003-10 (2d ed. 1975) [hereinafter cited as 1946 NYPE]. The 1981 NYPE form is reprinted at 13 J. MAR. L. & COMM. 552 (1982). For a comparison of the 1946 form with the 1981 revised form, see generally Healy, *Commentary on 1981 Revision of the New York Produce Exchange Form Time Charter*, 13 J. MAR. L. & COMM. 521 (1982).

The NYPE form, also known as the Government form, is primarily used for dry cargoes such as grain, scrap steel, fish meal, ore and fertilizer. Trowbridge, *supra* note 1, at 750, 753-57.

6. Healy, *supra* note 5, at 521.

7. Clause 17 of the 1946 NYPE form provides that any dispute arising out of the charter shall be referred to arbitration. 1946 NYPE, *supra* note 5, cl. 17, at 1007.

8. W. POOR, *AMERICAN LAW OF CHARTER PARTIES AND OCEAN BILLS OF LADING* § 16, at 48-49 (5th ed. 1968).

9. 1946 NYPE, *supra* note 5, cl. 18, at 1007. Clause 18 of the 1946 NYPE form provides in full:

That the 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, and any overpaid hire or excess deposit to be returned at once. Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the owners in the vessel.

*Id.*

It is important to recognize that there is a difference between a lien on cargo *for* freight

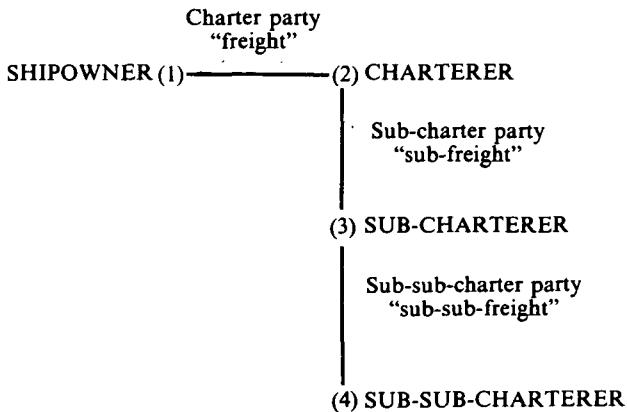
Although the origin of this clause is not clear,<sup>10</sup> it is generally agreed that in order for a shipowner to have a lien on sub-freight<sup>11</sup>—a lien which has been consistently recognized by English and United States courts<sup>12</sup>—the lien must have been expressly reserved in the charter party.<sup>13</sup> The clause does not create the lien, however, but

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or sub-freight and a lien *on* freight or sub-freight, although under some circumstances they have the same practical effect. *Cf.* American Steel Barge Co. v. Chesapeake & O. Coal Agency, 115 F. 669, 670 (1st Cir. 1902), *rev'g* American Steel-Barge Co. v. Cargo of Coal *ex* City of Everett, 107 F. 964 (D. Mass. 1901) (The trial court decided the case as an admiralty in rem action against the cargo and denied the shipowner a lien, 107 F. at 970-73, while the circuit court of appeals reversed, holding that the shipowner had a lien *on* the sub-freight due the charterer from the shipper of the coal. 115 F. at 673-74). *See also* Note, *Shipowner Denied Lien Against Third Party's Cargo for Charterer's Unpaid Hire*, 26 LOY. L. REV. 416 (1980) (discussing a recent Fifth Circuit case in which a shipowner was denied a lien for freight against cargo belonging to a party other than the charterer).

10. American Steel Barge Co. v. Chesapeake & O. Coal Agency, 115 F. 669, 671-72 (1st Cir. 1902), *rev'g* American Steel-Barge Co. v. Cargo of Coal *ex* City of Everett, 107 F. 964 (D. Mass. 1901); *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).

11. In this Comment, "freight" will mean money payable by a charterer to a shipowner for the charter of a ship; "sub-freight" will mean money payable by a sub-charterer to a charterer for the sub-charter of the ship; and, "sub-sub-freight" will mean money payable by a sub-sub-charterer to a sub-charterer for the sub-sub-charter of the vessel.



12. For examples of United States and English authorities recognizing a shipowner's lien on sub-freight, and for a discussion of these authorities, see *infra* notes 30-99 and accompanying text.

13. Hall Corp. of Can. v. Cargo *ex* Steamer Mont Louis, 62 F.2d 603, 605 (2d Cir. 1933); *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). *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 charter party); Raymond v. Tyson, 58 U.S. (17 How.) 53, 63 (1854) (a shipowner has a lien for freight unless the terms of the charter party are inconsistent with the exercise of the lien).

simply provides the requisite notice to shippers that the shipowner has preserved his lien.<sup>14</sup>

The legal basis for the lien on sub-freight, or the manner in which the lien operates, is the subject of dispute among the courts.<sup>15</sup> As a result, the limits of the shipowner's lien are not clear. This Comment will examine the limits of the lien, including the theoretical basis of the lien's recent extension. Specifically, this Comment will focus on whether a shipowner may exercise a lien on sub-sub-freight.<sup>16</sup> To answer this question, the issue will first be looked at in the factual context of a recent English case, *Care Shipping Corp. v. Latin American Shipping Corp.*,<sup>17</sup> where the Queen's Bench Division addressed the issue as one of first impression.<sup>18</sup> Next, the legal basis for the lien on sub-freight will be examined and then analyzed to determine whether that basis applies to a lien on sub-sub-freight as well. Finally, with the legal basis for the lien on sub-sub-freight determined, policy considerations concerning the lien will be discussed.

## II. *CARE SHIPPING CORP. V. LATIN AMERICAN SHIPPING CORP.*

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.<sup>19</sup> The charterer had an express right to sublet the vessel.<sup>20</sup> On March 3, 1980, Naviera Tolteca sub-chartered the *Cebu*

14. *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 lien provision in the charter party).

15. Various theories for the operation of the lien include privity of contract, equitable assignment, equitable charge and subrogation. These theories are discussed below.

16. In this Comment, "sub-sub-freight" will refer to money payable by a shipper or sub-sub-charterer to a sub-charterer for the sub-sub-charter of a ship. For a further explanation of "sub-sub-freight," see *supra* note 11.

17. [1983] 2 W.L.R. 829, [1983] 1 All. E.R. 1121, [1983] 1 Lloyd's L.R. 302 (Q.B. 1982).

18. *Id.* at 836, [1983] 1 All E.R. at 1127, [1983] 1 Lloyd's L.R. at 307-08.

19. *Id.* at 831, [1983] 1 All E.R. at 1123, [1983] 1 Lloyd's L.R. at 304.

20. *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 Charter Party." 1946 NYPE, *supra* note 5, at 1003. See also *The Ely*, 110 F. 563, 570 (S.D.N.Y. 1901) (sub-chartering is permissible unless there is an express provision in the charter party to the contrary), *aff'd*, 122 F. 447 (2d Cir.), *cert. denied*, 189 U.S. 514 (1903).

on an NYPE form to Latin American Shipping Corporation (Lamsco).<sup>21</sup> The terms of the sub-charter party were essentially the same as those of the head-charter.<sup>22</sup> Finally, on July 3, 1981, Lamsco sub-sub-chartered the ship to Itex 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.<sup>23</sup> This charter party was also executed on an NYPE form.<sup>24</sup>

After a dispute arose under the head-charter with hire<sup>25</sup> 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-charter party both on hire due Naviera Tolteca from Lamsco under the sub-charter party and on hire due Lamsco from Itex under the sub-sub-charter party.<sup>26</sup> Faced with demands for hire by both Care Shipping and Lamsco, Itex interpleaded.<sup>27</sup>

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-charterer, from Itex, the sub-sub-charterer, when hire was owed Care Shipping under the head-charter party.<sup>28</sup>

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 assignment, not only sub-freights due it as charterers, but also any

21. [1983] 2 W.L.R. at 831, [1983] 1 All E.R. at 1123, [1983] 1 Lloyd's L.R. at 304.

22. *Id.*

23. *Id.*

24. *Id.*

25. In this Comment, "hire" and "freight" will be treated as having synonymous meanings. Technically speaking, however, the words denote different things. 3 T. CARVER, BRITISH SHIPPING LAWS 922 (11th 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 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 by freight in proportion to the goods carried under the charterparty, it would be difficult to say distinctly when one word should be used, and when the other.

*Id.* (footnote omitted, emphasis in original).

26. [1983] 2 W.L.R. at 831-32, [1983] 1 All E.R. at 1123, [1983] 1 Lloyd's L.R. at 304.

27. *Id.* at 832, [1983] 1 All E.R. at 1123, [1983] 1 Lloyd's L.R. at 304.

28. *Id.* at 838, [1983] 1 All E.R. at 1129, [1983] 1 Lloyd's L.R. at 309.

[sub-] sub-freights due under any sub-sub-charter of which it is equitable assignee.<sup>29</sup>

To determine whether the extension of the lien on sub-freight to include a lien on sub-sub-freight was correct, cases from England and the United States concerning a shipowner's lien on sub-freight will be examined in an attempt to ascertain the legal basis of the lien.

### III. A SHIPOWNER'S LIEN ON SUB-FREIGHT IN ENGLAND

As early as 1743, in *Paul v. Birch*,<sup>30</sup> a court held that a shipowner could exercise a specific lien on goods belonging to a third party shipped aboard the owner's vessel.<sup>31</sup> In that case, Paul, the shipowner, chartered his vessel to two persons at the rate of £48 per month.<sup>32</sup> The charter party provided that goods put on board were liable to Paul to secure the charter hire.<sup>33</sup> The charterers then contracted with merchants in the West Indies for the carriage of goods at £9 per ton.<sup>34</sup> Paul brought suit to recover from the merchants after the charterers went bankrupt with charter hire owed to Paul.<sup>35</sup> 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 of cargo carried, not for the charter party rate of £48 per month.<sup>36</sup>

A question left unanswered in *Paul*, however, was the legal basis for the shipowner's lien. In an attempt to resolve this issue, one hypothesis was set forth in *Wehner v. Dene Steam Shipping Co.*,<sup>37</sup> a case factually similar to *Care Shipping*<sup>38</sup> but which was decided on a different issue.<sup>39</sup>

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29. *Id.*, [1983] 1 All E.R. at 1128, [1983] 1 Lloyd's L.R. at 308-09. Mr. Justice Lloyd did caution, however, that "[t]he legal analysis might be different if the true nature of the lien on sub-freights were that it takes effect as an equitable charge only . . . and not as an equitable assignment." *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 assignment. *Id.*

30. 26 Eng. Rep. 771, 2 Atk. 621 (Ch. 1743).

31. *Id.* at 771-72, 2 Atk. at 622-23.

32. *Id.* at 771, 2 Atk. at 621.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 771-72, 2 Atk. at 622-23.

37. [1905] 2 K.B. 92, 21 T.L.R. 339.

38. [1983] 2 W.L.R. 829, [1983] 1 All E.R. 1121, [1983] 1 Lloyd's L.R. 302 (Q.B. 1982).

39. [1905] 2 K.B. at 101, 21 T.L.R. at 340. The dispositive issue was whether hire was

In *Wehner*, Dene Steam Shipping Company (Dene Shipping) time-chartered its vessel *Ferndene* to William Brauer Steamship Company for twelve months.<sup>40</sup> The charter party contained a clause almost identical to Clause Eighteen of the NYPE.<sup>41</sup> William Brauer Steamship Company sub-chartered the vessel to Wehner for one transatlantic voyage.<sup>42</sup> Wehner then arranged with a Mr. Gleichmann to carry a cargo of phosphate aboard the *Ferndene* from New York to Hamburg, Germany.<sup>43</sup> The bill of lading<sup>44</sup> was signed by the master of the vessel, given to Wehner, and indorsed by Gleichmann.<sup>45</sup>

By the time the *Ferndene* reached Hamburg, William Brauer Steamship Company was virtually insolvent and owed hire to Dene Shipping under the original charter party.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup>

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."<sup>49</sup> Mr. Justice 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

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*actually due* Dene Shipping when it purported to exercise the lien on the bill of lading freight. The court held that no hire was due when Dene Shipping purported to exercise the lien; thus, Dene Shipping was not entitled to a lien. *Id.*

40. *Id.* at 92-93, 21 T.L.R. at 340.

41. Compare *id.* at 93, 21 T.L.R. at 340, with 1946 NYPE, *supra* note 5, cl. 18, at 1007.

42. [1905] 2 K.B. at 97, 21 T.L.R. at 340.

43. *Id.*

44. A bill of lading is a contract for the carriage of goods aboard a vessel. In this way, it is similar to a charter party. Ordinarily, though, a bill of lading covers a smaller and indeterminate portion of the ship's carrying capacity, while a charter party is for the whole or a large or specified 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.

45. [1905] 2 K.B. at 97, 21 T.L.R. at 340.

46. *Id.* at 98, 21 T.L.R. at 340.

47. *Id.* at 95, 21 T.L.R. at 340.

48. *Id.*

49. *Id.* at 98, 21 T.L.R. at 340. (Because the *Times Law Reports* (T.L.R.) only summarizes 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.)



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.<sup>50</sup>

Although the case was decided on other grounds,<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup>

The rule announced in *Wehner*—that the shipowner can collect freight directly from the shipper based upon a contractual relationship<sup>54</sup>—was modified a year later in *Samuel, Samuel & Co. v. West Hartlepool Steam Navigation Co.*<sup>55</sup> 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 . . . .”<sup>56</sup>

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50. *Id.*

51. For a discussion of the dispositive issue and the holding of the case, see *supra* note 39.

52. [1905] 2 K.B. at 98, 21 T.L.R. at 340.

53. *Id.*

54. *Id.*

55. 11 Com. Cas. 115 (1906), *modified*, 12 Com. Cas. 203 (1907). In *Samuel*, a three-party case, the court held that based upon the charter party, bill of lading, and other documents, no contractual relationship existed between 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, 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 charter party. *Id.* at 129.

56. 11 Com. Cas. at 125.

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.*<sup>57</sup> There, Molthes Rederi time-chartered its ship *Sproit* to Maurice Elliff & Company. The charter party was for twelve months and contained a clause similar to Clause Eighteen of the NYPE.<sup>58</sup> The clause provided that the shipowner was to have a lien on all cargoes and all sub-freights for hire due under the charter.<sup>59</sup> Maurice Elliff & Company then sub-chartered the vessel to carry a cargo of wood to Hull, England.<sup>60</sup> Ellerman's Wilson Line was the charterer's agent to collect the sub-freight from the sub-charterer.<sup>61</sup> When the agent, after collecting the sub-freight from the sub-charterer, refused to pay the shipowner as obligated under the original charter party, Molthes Rederi, the shipowner, brought suit.<sup>62</sup>

Mr. Justice Geer held that the shipowner was entitled to collect the sub-freight on the basis of the express lien in the charter party, not on a contractual relationship with the sub-charterer:<sup>63</sup>

Though [Justice Channell] 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 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 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 . . . .<sup>64</sup>

*Molthes* suggests, therefore, that although the lien must be expressly

57. [1927] 1 K.B. 710, 136 L.T.R. (n.s.) 767 (1926).

58. *Compare* [1927] 1 K.B. at 712, 136 L.T.R. (n.s.) at 767, with 1946 NYPE, *supra* note 5, cl. 18, at 1007.

59. [1927] 1 K.B. at 712, 136 L.T.R. (n.s.) at 767.

60. *Id.*

61. *Id.* at 714, 136 L.T.R. (n.s.) at 768.

62. *Id.*

63. *Id.* at 716, 136 L.T.R. (n.s.) at 768-69.

64. *Id.* at 716-17, 136 L.T.R. (n.s.) at 769 (footnote omitted).

reserved in the charter party, the shipowner's lien on sub-freight is not based upon a contractual relationship.<sup>65</sup>

Alternatively, the Queen's Bench Division in *Federal Commerce & Navigation Co. v. Molena Alpha, Inc.*<sup>66</sup> explained that the basis for the shipowner's lien on sub-freight is an equitable assignment.<sup>67</sup> Mr. Justice Kerr, construing a clause in the Baltimore charter party 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."<sup>68</sup> According to this view, the shipowner receives as equitable assignee the *charterer's* contractual right to the sub-freight.

When *Molena 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."<sup>69</sup> Nevertheless, Lord Russell did not explain the difference between basing the lien on an equitable charge or an equitable assignment theory.<sup>70</sup>

65. *Id.* at 716, 136 L.T.R. (n.s.) at 769.

66. [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).

67. [1978] 1 Q.B. at 942, [1978] 3 W.L.R. at 323 (Kerr, J.).

68. *Id.* The Baltimore charter party form is one of the more popular time charter party forms. It has a reputation for being more favorable to shipowners in its wording than the NYPE form. The 1939 Baltimore charter party form is reprinted in 2B BENEDICT ON ADMIRALTY 7-9 to 7-14 (7th ed. 1983).

Clause 18 of the 1939 Baltimore form provides in full:

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 Charterers to have a lien on the Vessel for all moneys paid in advance and not earned.

*Id.* at 7-13.

It should be noted that this clause appears to limit the shipowner's lien to sub-freight belonging to the charterer. *Id.* Thus, it is possible that a shipowner that charters its vessel on the Baltimore form would not be able to exercise a lien on sub-sub-freight due a sub-charterer, because the lien was not reserved in the head-charter party. So construed, the NYPE form, in this instance, appears more favorable to shipowners than the Baltimore form.

69. 1979 A.C. at 784, [1978] 3 W.L.R. at 1004, [1979] 1 All E.R. at 318 (Russell, L.J.).

70. *Molena Alpha* involved the alleged breach of three charter parties pertaining to three different vessels. The central issue in the case was whether certain actions by the shipowner amounted to repudiation of the charter parties. An argument advanced by the shipowner in justification for its actions was that it was merely exercising the lien that had been reserved in the charter parties. The lower court held that the owner's actions did not amount

As discussed above, the court in *Care Shipping*<sup>71</sup> based the lien on sub-freight on an equitable assignment theory.<sup>72</sup> Mr. Justice Lloyd explained that, if the shipowner's lien on sub-freight operates by way of a chain of equitable assignments, the lien could be extended to include a lien on sub-sub-freight as well.<sup>73</sup>

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 include privity of contract,<sup>74</sup> equitable charge<sup>75</sup> and equitable assignment.<sup>76</sup> A fourth theory for the lien, subrogation, has been suggested by some American courts.<sup>77</sup> To examine this theory, United States cases concerning the shipowner's lien on sub-freight will be discussed.

#### IV. A SHIPOWNER'S LIEN ON SUB-FREIGHT IN THE UNITED STATES

The leading United States case concerning a shipowner's lien on sub-freight is *American Steel Barge Co. v. Chesapeake & O. Coal Agency*.<sup>78</sup> In *American Steel Barge*, the libellant time-chartered its vessel *City of Everett* to Atlantic Transportation Company (Atlantic) for one year.<sup>79</sup> Atlantic then arranged to carry coal for Chesapeake & O. Coal Agency from Newport News to Boston aboard *City of Everett*.<sup>80</sup> American Steel Barge Company (American) brought suit

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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.).

71. [1983] 2 W.L.R. 829, [1983] 1 All E.R. 1121, [1983] 1 Lloyd's L.R. 302 (Q.B. 1982).

72. *Id.* at 838, [1983] 1 All E.R. at 1128, [1983] 1 Lloyd's L.R. at 309.

73. *Id.*

74. *Wehner v. Dene Steam Shipping Co.*, [1905] 2 K.B. 92, 21 T.L.R. 339. *See supra* notes 37-53 and accompanying text.

75. *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). *See supra* notes 69-70 and accompanying text.

76. *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). *See supra* notes 19-29 and accompanying text.

77. *See infra* notes 78-99 and accompanying text. A fifth manner in which to analyze the lien is with a third party beneficiary contract analysis. Conversation with Professor George C. Garbesi, Loyola Law School (Apr. 1984). Because the analysis has not been addressed judicially in the present context, the theory is not further discussed in this Comment.

78. 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).

79. 115 F. at 670.

80. *American Steel-Barge Co. v. Cargo of Coal ex City of Everett*, 107 F. 964, 966 (D.

when Atlantic became insolvent with hire due American under their charter party.<sup>81</sup>

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.<sup>82</sup> Discussing the way in which the lien operates, Judge Putnam declared that a shipowner "holding a lien on subfreight becomes *subrogated* to all the remedies of the charterer . . . ."<sup>83</sup> Therefore, American, standing in the place of the charterer, could proceed 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.<sup>84</sup> If no bill of lading freight was due, then, like the charterer, American could not recover.<sup>85</sup>

Although Judge Putnam stated that the shipowner was entitled to the lien because it was expressly reserved in the charter party,<sup>86</sup> 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 charter party, no privity of contract exists between the shipowner and the sub-charterer.<sup>87</sup>

Thirteen years after *American Steel Barge*, the district court in

Mass. 1901), *rev'd sub nom.* *American Steel Barge Co. v. Chesapeake & O. Coal Agency*, 115 F. 669 (1st Cir. 1902).

81. 115 F. at 670.

82. *Id.* at 674. The first sentence of the opinion explains that the case does not concern a lien on 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 subfreight alone, naming the party charged with the possession thereof, who in this case was the holder of the bill of lading, 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.

83. *Id.* at 674 (emphasis added).

84. *Id.* at 672.

85. *Id.* at 674.

86. *Id.* at 671-72.

87. *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 charter party to a third party, who then assigned it to a fourth party, who was treated as though it was the original charterer).

*Jebsen v. Cargo of Hemp*<sup>88</sup> faced an issue quite similar to that confronted by the Queen's Bench Division in *Care Shipping*:<sup>89</sup> Whether a shipowner could exercise a lien on bill of lading freight due a sub-charterer who had paid all sub-freight due the charterer under the sub-charter party, when hire was due the shipowner under the head-charter party.<sup>90</sup>

In *Jebsen*, the libellant time-chartered his vessel *Symra* to Canadian-Venezuelan Ore Company for thirty-six months.<sup>91</sup> The charter party, which was drawn on a Government form,<sup>92</sup> provided that "the owner shall have a lien upon all cargoes for freight or charter money due under the charter."<sup>93</sup> Canadian-Venezuelan Ore Company sub-chartered the vessel, again on a Government form, to Munson Line, who then arranged to ship a cargo of hemp consigned to Henry W. Peabody & Company from Progresso, Mexico, to Plymouth, Massachusetts.<sup>94</sup> After Munson Line had fulfilled its obligation to pay sub-freight to the charterer under the sub-charter party, Jebsen brought suit to enforce its lien for the bill of lading freight due Munson Line from Henry W. Peabody & Company when the charterer defaulted under the head-charter party.<sup>95</sup> The district court held that the shipowner was entitled to a lien on the cargo for the bill of lading freight due the sub-charterer and that the lien gave the shipowner a superior right to the freight than the sub-charterer's contractual right.<sup>96</sup>

Although the *Jebsen* court relied on *American Steel Barge*<sup>97</sup> for portions of its holding, the court did not clearly indicate whether it was following the reasoning of *American Steel Barge*—that the ship-

88. 228 F. 143 (D. Mass. 1915).

The only other reported opinion involving a shipowner exercising a lien on sub-sub-freight or bill of lading freight due a sub-charterer is *A. Lusi, Ltd. v. Federal Commerce & Navigation Co.*, 1959 A.M.C. 1779 (N.Y. 1959), an arbitration decision. There, the arbitrator, citing *Jebsen*, permitted the shipowner to exercise a lien on the sub-sub-freight due the sub-charterer. Nevertheless, the arbitrator did not explain the manner in which the lien operates.

89. [1983] 2 W.L.R. 829, [1983] 1 All E.R. 1121, [1983] 1 Lloyd's L.R. 302 (Q.B. 1982).

90. 228 F. at 146.

91. 228 F. at 144.

92. The Government charter party form is the same as the NYPE form. *See supra* note 5.

93. 228 F. at 147.

94. *Id.* at 145.

95. *Id.* at 144-45.

96. *Id.* at 148.

97. 115 F. 669 (1st Cir. 1902).

owner is entitled to the sub-freight because the shipowner becomes subrogated to the remedies of the defaulting charterer.<sup>98</sup> One explanation for this uncertainty is that the subrogation line of reasoning does not confer a lien on behalf of the shipowner under *Jebsen's* facts. Since the sub-charterer did not owe the charterer any sub-freight at the time the shipowner purported to exercise his lien, the charterer had no remedy against the sub-charterer to which the shipowner could be subrogated. Thus, it appears that if the lien on sub-freight is based upon a subrogation theory, the lien does not necessarily include a lien on sub-sub-freight. Nevertheless, United States courts have frequently adopted this theory as the basis for the lien.<sup>99</sup>

## V. A SHIPOWNER'S LIEN ON SUB-SUB-FREIGHT: AN ANALYSIS

### 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 charter party, the legal basis for the shipowner's lien is not based upon a contractual relationship between the shipowner and the sub-charterer.<sup>100</sup> 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.

### B. Subrogation as the Basis for the Lien

United States courts base the shipowner's lien on sub-freight on a theory of subrogation.<sup>101</sup> 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.<sup>102</sup> In the context of a shipowner's lien on sub-freight, the doctrine operates in much the

98. *Id.* at 674.

99. *See, e.g.,* American Steel Barge Co. v. Chesapeake & O. 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).

100. 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 Baner, 221 F. 416, 418 (2d Cir. 1915). *Cf.* Wehner v. Dene Steam 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).

101. *See supra* note 99.

102. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 91 (2d ed. 1975).

same way. According to the First Circuit,<sup>103</sup> subrogation operates as follows: If the charterer defaults under his charter party with the shipowner, the shipowner steps into the place of the charterer with respect to any rights the charterer has to collect sub-freight from the sub-charterer.<sup>104</sup> If freight is also due 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 charter parties.<sup>105</sup> 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.<sup>106</sup> Thus, it appears that if one of the charterers along the chain has fulfilled its freight obligation before the shipowner exercises a lien, as was the case in *Jebesen v. Cargo of Hemp*,<sup>107</sup> the chain would be effectively broken since there is no remedy against that charterer to which the shipowner could be subrogated.<sup>108</sup>

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 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 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

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103. *American Steel Barge Co. v. Chesapeake & O. Coal Agency*, 115 F. 669 (1st Cir. 1902), *rev'g* *American Steel-Barge v. Cargo of Coal ex City of Everett*, 107 F. 964 (D. Mass. 1901).

104. 115 F. at 674.

105. *Id.* at 672; *accord* *Paul v. Birch*, 26 Eng. Rep. 771, 771-72, 2 Atk. 621, 622-23 (Ch. 1743).

106. *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).

107. 228 F. 143 (D. Mass. 1915).

108. In *Jebesen*, the sub-charterer had fulfilled its sub-freight obligations to the charterer before the shipowner exercised the lien. Since the charterer could not successfully proceed against the sub-charterer, the chain was effectively broken.



apparent for these differing results.<sup>109</sup> 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*<sup>110</sup> 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,<sup>111</sup> 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.*<sup>112</sup> that "[t]he lien operates as an equitable charge,"<sup>113</sup> 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 an equitable assignment refer only to a charterer's lien on a ship.<sup>114</sup>

The equitable charge is also discussed extensively in some non-maritime cases,<sup>115</sup> 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.

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109. 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.

This seemingly harsh result to the sub-charterer can be avoided by requiring that all sub-sub-freight or bill of lading freight be prepaid. See *infra* notes 121-22 and accompanying text.

110. [1983] 2 W.L.R. 829, [1983] 1 All E.R. 1121, [1983] 1 Lloyd's L.R. 302 (Q.B. 1982).

111. *Id.* at 838, [1983] 1 All E.R. at 1128, [1983] 1 Lloyd's L.R. at 309.

112. 1979 A.C. 757, [1978] 3 W.L.R. 991, [1979] 1 All E.R. 307 (1978).

113. *Id.* at 784, [1978] 3 W.L.R. at 1004, [1979] 1 All E.R. at 318 (Russell, L.J.).

114. *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).

115. *E.g.*, Aluminum Industrie Vaassen B.V. v. Romalpa Aluminum 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).

*D. Equitable Assignment as the Basis for the Lien*

According to the *Care Shipping*<sup>116</sup> 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 the right to the shipowner. The *Care Shipping* court referred to this as "a chain of equitable assignments."<sup>117</sup> 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.<sup>118</sup>

Therefore, the shipowner's lien on sub-freight should be based upon an equitable assignment theory. 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.

VI. POLICY CONSIDERATIONS CONCERNING A SHIPOWNER'S  
LIEN ON SUB-SUB-FREIGHT

That an extension of the shipowner's lien on sub-freight to include a lien on sub-sub-freight is a benefit to shipowners is clear.<sup>119</sup> 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

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116. [1983] 2 W.L.R. 829, [1983] 1 All E.R. 1121, [1983] 1 Lloyd's L.R. 302 (Q.B. 1982).

117. *Id.* at 839, [1983] 1 All E.R. at 1130, [1983] 1 Lloyd's L.R. at 310.

118. For a discussion of the potentially differing results inherent in the subrogation theory, see *supra* notes 105-09 and accompanying text.

119. The lien on sub-sub-freight provides additional security to the shipowner in case the charterer defaults under the original charter party. See Note, *Shipowner Denied Lien Against Third Party's Cargo for Unpaid Hire*, 26 LOY. L. REV. 416, 422 (1980).

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.<sup>120</sup>

Additional support for extending the lien on 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";<sup>121</sup> only freight due but unpaid is the proper subject of the shipowner's lien.<sup>122</sup>

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.<sup>123</sup> As long as the shipper has not received notice that the shipowner has exercised a lien, the shipper cannot be forced to pay twice.<sup>124</sup> Moreover, in the situation where the shipowner has exercised a lien, the shipper is not obligated to pay more than called for under its charter agreement or bill of lading contract.<sup>125</sup> If the shipper is faced with conflicting demands as to who is to receive the

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120. *Cf.* R. ANNIN, OCEAN SHIPPING 307-08 (1920) (discussing a charter party 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-charter party).

121. *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 Inter-ocean Transp. Co. of Am.*, 232 F. 408 (S.D.N.Y. 1916).

122. *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.

123. *Faith v. East India Co.*, 106 Eng. Rep. 1067, 1071, 4 B. & Ald. 630, 641 (K.B. 1821).

124. *See Marine Traders, Inc. v. Seasons Navigation Corp.*, 422 F.2d 804, 806 (2d Cir. 1970); *Tarstar Shipping Co. v. Century Shipline, Ltd.*, 451 F. Supp. 317, 324 (S.D.N.Y. 1978). *Cf. The Solhaug*, 2 F. Supp. 294, 300-01 (S.D.N.Y. 1931) (sub-charterer forced to pay twice because it had at least constructive knowledge that the shipowner had exercised a lien when it paid sub-freight to the charterer the first time).

125. *American Steel Barge Co. v. Chesapeake & O. Coal Agency*, 115 F. 669, 672 (1st Cir. 1902), *rev'g American Steel-Barge Co. v. Cargo of Coal ex City of Everett*, 107 F. 964 (D. Mass. 1901); *accord Paul v. Birch*, 26 Eng. Rep. 771, 771-72, 2 Atk. 621, 622-23 (Ch. 1743).

freight, the shipper need only interplead.<sup>126</sup>

## VII. CONCLUSION

Based upon case law in England and the United States, as well as on policy considerations, it appears that extending the shipowner's lien on sub-freight to include a lien on sub-sub-freight is warranted. It appears that the lien operates most effectively and judiciously when based upon an equitable assignment rationale. This rationale not only allows a shipowner to exercise a lien on sub-freight and sub-sub-freight, but it would allow a shipowner to exercise a lien when more than four parties are involved as well.

*Kenneth R. O'Rourke*

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126. *Federal Commerce & Navigation Co. v. Molena Alpha, Inc.*, 1979 A.C. 757, 785, [1978] 3 W.L.R. 991, 1004, [1979] 1 All E.R. 307, 318 (1978) (Russell, L.J.); *Care Shipping Corp. v. Latin Am. Shipping Corp.*, [1983] 2 W.L.R. 829, 832, [1983] 1 All E.R. 1121, 1123, [1983] 1 Lloyd's L.R. 302, 304 (Q.B. 1982).

