

The Merrimack

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Appellant : The Merrimack

Judgement :

The Merrimack - 12 U.S. 317 (1814)

U.S. Supreme Court The Merrimack, 12 U.S. 8 Cranch 317 317 (1814)

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12 U.S. (8 Cranch) 317

APPEAL FROM THE CIRCUIT COURT

FOR THE DISTRICT OF MARYLAND

SYLLABUS

Goods purchased by British merchants before the war between the United States and Great Britain in pursuance of orders from American citizens, shipped to the agent of the British merchants in the United States, also an American citizen, "on account and risk of an American citizen," and no circumstances of fraud or unfairness appearing in the transaction, were vested in the American citizens at

the time of the shipment, and are not liable to condemnation, although the vessel sailed from England after the declaration of war was known there. Restitution.

But if goods be purchased as above, though the accompanying invoices, bills of lading and letters be addressed by the British consignors to the American citizens for whom the purchase was made, and all concur to show the property to be in them, yet if these documents are enclosed in a letter from the consignors to their agent in the United States, though an American citizen, directing him not to deliver the goods in case of the existence of certain circumstances, nor until he should have received payment from the consignees in cash, the property in the said goods continued in the British consignors at the time of capture. Condemnation.

Goods by the same ship, so purchased and consigned to the agent of the consignors, being an American citizen, in whose name also the bill of lading is made out, but the bill of parcels and invoice in the name of the American merchants for whom the purchase was made, the shipment also being expressed to be on the account, though goods are spoken of in the letter of the consignee as British property, vested in the American merchants at the time of shipment.

The circumstance that the goods continue during the whole voyage at the risk of the shippers is immaterial.

The following are the material facts of the case:

The ship *Merrimack*, owned by citizens of the United States, sailed from Liverpool for Baltimore a few days after the declaration of war by the United States against Great Britain was known in that country, having on board a cargo of goods shipped by British subjects and consigned to citizens of the United States. On 25 October, 1812, she was captured in the Chesapeake Bay between Annapolis and Baltimore by the private armed vessel *Rossie*, Joshua Barney, commander.

The goods, being libeled as prize in the District

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Court of Maryland, were severally claimed by sundry citizens of the United States.

The claimants were:

1. William and Joseph Wilkins, merchants of Baltimore, claimed the goods contained in eleven cases and one bale marked "W.J.W."

These goods were made up for them, in pursuance of their orders, before the war was known in Great Britain, by a manufacturing company, one member of which, Thomas Leich, resided in Leicester in Great Britain, and the other, Edward Harris was an American citizen residing in the United States.

The bill of parcels was in the name of Messrs. William and Joseph Wilkins. This paper also served for an invoice, and there was no other on board for these goods.

The bill of lading was in the name of Edward Harris, who was the consignee.

The goods were accompanied by a letter from Thomas Leich to Edward Harris dated Leicester, 29 July, 1812, in which he says

"With this you will receive bill of lading of 11 cases of worsted and cotton hosiery for Messrs. W. & J. Wilkins, Baltimore, and with insurance to 892. 5. It is a large sum, but, from what I can learn, they are very respectable. Indeed, Mr. Brown of the house of Chancellor & Co. came with him, and seemed almost offended that did not send the cotton hose he ordered before, and said he would guarantee the amount of the worsted goods, therefore must have offended him if did not comply. Have not sent but about half the cotton goods they ordered, . . . informed them that we thought it necessary to secure our property to ship all to you, as you could prove that they were American property by making affidavit they are *bona fide* your property. As our orders in council are repealed, hope your government will be amicably inclined as well, and

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that trade will be on regular footing again, but for fear there should be some other points in dispute, I shall send you and our friends through your hands all the goods prepared for your market which you'll perceive is very large. . . . Hope you will

approve of my sending all, and as there may have been some alterations in some of your friends, shipping them to you gives the power of keeping back to you."

There was also on board a letter dated Leicester, 22 July, 1812, signed Harris Leich & Co. and addressed to Messrs. Wm. & Joseph Wilkins, merchants of Baltimore, in which they say,

"The repeal of the orders in council having been agreed on by our government, we have availed ourselves of the opportunity of sending the greater part of your spring and fall orders. . . . As we are not certain that your government will protect British property, we have thought it right to ship all ours under cover to Mr. Harris who can claim as his own *bona fide* property, and he, being a citizen of the United States, thought proper to use every precaution, having received some unpleasant accounts about your government's having agreed on war with this country, which we hope will not be the case."

2. McKean & Woodland, citizens of the United States, claim sundry parcels of goods, part of the same cargo, as their property.

These goods were purchased by Baily, Eaton & Brown, merchants of Sheffield, in pursuance of orders from the claimants. They were shipped to Robert Holladay, also an American citizen. The bill of lading was to Robert Holladay "on account and risk of an American citizen." The invoice was also headed to Robert Holladay.

A letter from Baily, Eaton & Brown to Samuel McKean, dated 11 July, 1812, says

"A few days ago we received a letter from Mr. Rogerson, of New York, informing us that the partnership of Messrs. McKean & Woodland was dissolved, but he does not say whether you or Mr. Woodland continue the business, or whether both of you decline it. We have purchased about 3,000 sterling of goods by order of

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the late firm, and on their account, most of which have been purchased and paid for by us from fifteen to eighteen months ago, and have been on our hands waiting for shipment. We have this day given orders to our shipper at Liverpool to put

them on board a good American vessel sailing for your port with a British license, but from the uncertainty we are in respecting the particulars of your dissolution of partnership, and in fact not knowing whether to consign them to you or Mr. Woodland, we have finally concluded to consign them to Mr. Holladay, with whom you will be pleased to make the necessary arrangements respecting them. . . . We have addressed the invoice to Mr. Holladay to your care, and directly on receiving it, if he should not be in Baltimore, you will please advise him of its arrival."

The residue of the letter contains their reasons for hoping that Mr. McKean will not insist on the usual credit, but will remit immediately on receiving the goods. This request is founded on their having been so long in advance for the purchase of them.

Messrs. Baily, Eaton & Brown addressed a letter to Mr. Holladay, dated 10 July, 1812, in which they say, "Enclosed you will receive invoices of sundry goods for Messrs. McKean & Woodland, which complete their orders." They then assign the same reason for shipping the goods to Mr. Holladay that is given in their letter to Mr. McKean, and after directing him to arrange with Mr. McKean, add

"We cannot view this consignment at all in the light of an intercepted shipment coming within the meaning of the articles of agreement between you and us."

This letter also contained a proposition for immediate remittance founded on the time which had elapsed since the goods were purchased. This proposition, they say, is made to all their friends in the United States, and they hope none will refuse to accede to it. "But," they add, "in thus acting, we have left the matter to the free and unbiased will of our friends, and they are certainly upon honor."

3. Messrs. Kimmel & Albert, merchants of Baltimore, claimed seven packages of goods on board the

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Merrimack, which were purchased in pursuance of their orders by Baily, Eaton & Baily. The invoice, bill of lading, and letters, addressed (one by the consignors and

the other by the shipper, who was their agent) to Messrs. Kimmel & Albert, concur in showing property in the claimants. But all these documents and letters are enclosed in a letter of 5 August, 1812, written by Baily, Eaton & Baily to Samuel McKean. In this letter, the writers refer to a former letter of 3 July, in which they informed Mr. McKean that they should, on the recommendation of their general agent, Mr. Hollaway, enclose their invoices and bills of lading for the adjacent country to him, and requested him to make inquiries into the circumstances of their correspondents, and be regulated, as to putting the letters, &c.;, into the post office so as to reach the persons to whom they might be addressed, by the result of those inquiries. Messrs. Baily, Eaton & Baily indulge the hope that the repeal of the British orders in council will restore peace between the two countries, in which event McKean is still to be governed by their letter of the 3d of July. "But," they add,

"if, when you receive our invoices and bills of lading, a state of war should really continue, it will be proper not to deliver these goods until you have received the amount of the invoices from the consignees, in cash."

4. John H. Browning & Co. was also claimant of part of the cargo.

This claim stood on precisely the same principles with that of Kimmel & Albert. The documents given in evidence were in effect the same, and were enclosed in the same letter from Baily, Eaton & Baily to Samuel McKean.

It was contended by the captors in the district court that from the papers and letters on board, it appeared that the goods were not sold and delivered in England, so as to vest the property in the claimants, but were sent to the agents of the shippers in the United States, to be delivered or not according to their discretion. Consequently that the property was not changed, and the goods therefore were liable to capture as British property.

Restitution was decreed in the district court, and the decree was affirmed in the circuit court. An appeal was taken to this Court, where the captors pray condemnation on the same grounds as in the courts below.

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MR. CHIEF JUSTICE MARSHALL, after stating the facts relating to the several claims in this case, delivered the following opinion of the court as to the claims of McKean & Woodland, Kimmel & Albert, and John H. Browning & Co.

1. As to the claim of McKean & Woodland.

The question of property in this case depends on certain letters written by Baily, Eaton & Brown which were found on board the captured vessel. A letter of 11 July, 1812, addressed to Samuel McKean, shows in the clearest manner that the property in dispute was purchased and shipped for McKean & Woodland in pursuance of their orders, and accounts for assigning it to Mr. Holladay.

There is nothing in the cause which can throw the slightest suspicion on the fairness of this transaction. It unquestionably is what, on the face of these letters, it purports to be -- a purchase for McKean & Woodland, made in pursuance of their orders and shipped for them to Robert Holladay because, in the moment of shipment, information was received that their partnership was dissolved, and the shipper had no instructions in what manner to direct to them. In this situation, he considered himself as acting most certainly for their advantage by addressing the goods to an agent residing in the same town with McKean & Woodland, who should receive them to their use. In such a case, the Court is of opinion that the property was vested in McKean & Woodland, and is consequently not liable to condemnation as enemy property.

The sentence is affirmed.

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2. As to the claim of Kimmel & Albert.

From their letter it is apparent that in the event of war, Baily, Eaton & Baily, reserved to themselves that power which ownership gives over goods, and instructed their agent, McKean, in what manner that power was to be exercised. There being no letter addressed to Kimmel & Albert but under cover to McKean, it is apparent that they were to know nothing of the shipment unless, in the opinion of McKean, it should be prudent to make the communication, and even then the property was to become theirs not under the original contract, but under a new contract to be made with McKean. The delivery on board the ship was a delivery to McKean, not absolutely for Kimmel & Albert, but for them provided they acceded to new and distinct propositions made by Baily, Eaton & Baily. In such a case, no change of property could take place till Kimmel & Albert should accede to these new propositions, and the capture having taken place before the contract was complete, the goods must be considered as enemy property.

The sentence is reversed and the claim dismissed.

3. The claim of John H. Browning & Co.

This claim stands on precisely the same principles with that of Kimmel & Albert. The documentary evidence is in effect the same, and was enclosed in the same letter from Baily, Eaton & Baily to Samuel McKean. The claim therefore must be dismissed.

The sentence is reversed and the claim dismissed.

JOHNSON, J. delivered the opinion of the majority of the Court as to the claim of W. & J. Wilkins, as follows:

The points of distinction between this case and that of McKean & Woodland, unfavorable to these claimants, are the following:

1. That Harris the direct consignee, had a control given him over the goods, which authorized him, had

he thought proper, to refuse to deliver them over to the Wilkins'.

2. That Harris had also a power, under certain circumstances, to make them his own.

3. That in the letters both to the Wilkins' and Harris, the consignor alleges as his reason for making the shipment through Harris his fears that this government would not protect British property, thereby, as is contended, acknowledging this property to be British.

On the other hand, it is a circumstance favorable to this claim that the original bills of parcels were made directly to the claimants, and were sent along with the shipment, as a substitute for an invoice.

It is assumed as a postulate that a direct consignment on account of the consignee, made in pursuance of his orders, is not subject to condemnation as prize of war, and that it is immaterial whether it be purchased for cash or credit or insured in the enemy's country or elsewhere.

It will then be enough to show that every beneficial interest which such a shipment would vest in the consignee was vested in the claimants in this case.

The first difficulty arises from the circumstance that the bill of lading was made out to Harris and not to the Wilkins', whereby the captain of the ship became bound to deliver them to Harris or his assigns.

Upon a fair view of the whole transaction, this distinction will be found rather to be formal than real, and that it produces no difference in the state of right between these parties.

The interest vested in the consignee by the delivery to the captain is not absolute to all purposes. So far as relates to the right of stoppage *in transitu*, it continues subject to the control of the consignor, and may be reduced by him into possession before actual delivery, or the authority of the captain to deliver them

according to the original bills of lading may be countermanded and another destination given them.

Upon comparing all the circumstances of this case, it will be found that the transaction was so arranged as to produce no other change in the rights of the parties than to put it in Harris' power to exercise this right of stoppage *in transitu*, in case of the insolvency of the Wilkins'.

The bill of lading is made out to Harris, which gave him the right to demand the goods of the captain.

But the invoice, which has the additional strength of a bill of parcels, is made out to the claimants, which gave them the right to demand the goods of Harris.

Both in the letter to Harris and to the Wilkins', the shipment is declared to be on account of the latter, and, in the letter to the former, the shipper goes into a detail of his reasons for giving the claimants so large a credit.

Thus these papers, taken together, place the interest of the claimants on the same footing as if the bill of lading had been made out to Harris for the use of the Wilkins', and in that case there could have been little doubt that the claim must be sustained.

If the invoice, although made out to the claimants, had been enclosed to the direct consignee, it would have furnished a strong argument in favor of the captor. But here, the evidence of right is placed in the claimants' own hands, thereby acknowledging their right in the goods shipped and furnishing them with the means of asserting it. Thus the shipper could never have denied the rights of the claimants in this case, for he had furnished the most direct and conclusive evidence against himself.

But it is asserted that Harris had it in his power to make these goods his own in defiance of the will of the claimants.

If this were the fact, it would only show that, in

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either view of the alternative, it was a shipment on American account, and that the shipper had parted with all his interest.

But the fact is not so, and in answering this argument we answer the remaining one also.

The shipper knew what he was about. War was already probably declared, and he was aware of the crash of mercantile credit which generally follows on such an event. He also knew that in case of asserting his right of stoppage *in transitu*, the property reverted and became British, in which case, as he expresses himself, the property might be subjected to seizure as enemy's property.

With these considerations on his mind, he makes out the bill of lading to Harris and informs him that his object is to enable him to keep the goods back in case of an alteration in the circumstances of the claimants, and in this case only is the hint given him that he may claim them as his own. It is contended that he acknowledges in his letter to the claimants that the property is British. But this is an error in fact. It was necessary to assign some reason or some excuse for not having the bills of lading made out to the claimants themselves. And for this reason he urges an apprehension that our government would not protect British property. But this reason could only be applicable in the event of a stoppage *in transitu*, as a direct shipment to the claimants would have left no room for such an apprehension. In the letter also to Harris it is said is contained an acknowledgment that the property is British. This also is founded in mistake, for the letter to Harris only communicates the reason which had been assigned in the other letter for having the bill of lading made out as it was. But suppose the passage in the letter to the claimants on this subject had been full and explicit to the declaration of an opinion that the property continued British, although shipped on American account; yet this would have been but an expression of an erroneous opinion, and certainly ought not, as far as the interests of the claimants are concerned, to have an

influence on the decision of this Court. But it is asserted that the goods continued on the whole voyage at the risk of

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this shippers. This may be true and yet it does not prove enough. Had the shipment been direct to the claimants and insurance omitted contrary to order or custom, the shippers would have been equally liable, and yet the property would not have been subject to capture. It is enough for the purposes of the claimants that the property in the goods had been transferred to them independently of the control of the shipper or his agent, except so far as the right to stop *in transitu* interfered. And such was the situation of the rights of the parties in this case. The goods ordered by the claimants were shipped to an agent for their use, subject only to a right which unquestionably, under any circumstances, existed in the shippers. In their letter to the claimants, they enclose a bill of parcels, by way of invoice, containing a positive acknowledgment of the sale to them, and the letter itself as well as that to Harris, speaks of the goods expressly as their goods. The immediate consignee could therefore only be considered as the bailee of the claimants. Nor does it appear that a tender of the money would have been necessary to entitle them to receive the goods of Harris as, in the letter of Harris it is acknowledged to be a sale on credit, and particular discounts offered as an inducement for an early payment.

Indeed there are words in the letter to the direct consignee which amount to a positive declaration that the shipments were not on his account nor on that of the shippers, but for the use and benefit of others. "I shall send you, and our friends through your hands, all the goods prepared for your market." By connecting these words with the bills of lading, the result is that although the direct consignee was entitled to demand the goods of the captain, yet it was not to his own use, but to the use of the several persons on whose account they were shipped.

Decree affirmed.

STORY, J. delivered the following separate opinion as to the claim of W. & J. Wilkins.

I cannot concur in the opinion of the Court just delivered as to the claim of the Messrs. Wilkins. It is true that the goods were purchased pursuant to the orders of Messrs. Wilkins, but I do not think that the

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property, by the mere purchase, became vested in them, and the usage and course of trade is generally otherwise. The purchase was made with the money of the shipper, and until a delivery, actual or constructive, to the Messrs. Wilkins, the propriety thereof remained completely in the shipper. The goods were also shipped as the property of the shipper, consigned to the agent of the shipper, and not to the agent of the Messrs. Wilkins, to be delivered only in case of the consignee's being satisfied of their perfect solvency. It is true that the bill of lading purports that the goods are shipped on account and risk of the consignee, but the confidential letters explain the transaction and show that the shipment was so made as a cover against belligerent risks and that the property was not intended to be changed from the British shipper in its transit. The delivery, then, of the goods on board of a general ship was no delivery to the Messrs. Wilkins. It was not even a delivery which vested the property of the goods in the consignee. The legal property and possession thereof still remained in the shippers, and if the goods had actually come to the hands of Mr. Harris, his possession would have been but a continuation of the possession of the shipper. In contemplation of law, the goods were as much under the control and possession of the shipper as if he had been on board the vessel during the voyage or had shipped them in his own name. If they had been lost during the voyage, the loss would have been his. He had not a mere right of stoppage *in transitu* in case of insolvency, for that can be exercised only where the property by the shipment is vested in the consignee for his own use; but he had a perfect right of countermand in all cases whatever. He might sell the property, give it a new direction, control its delivery, and indeed exercise all the rights of full dominion and propriety. It seems to me that if the Messrs. Wilkins had neither a *jus ad rem* nor a *jus in re*, and the latter only is recognized in prize

courts, they could not, by subsequent acts, overreach the legal rights of the captors. At the time of the shipment and capture, it was in my view enemy property liable to condemnation, having no neutral or American onus attached to it. It was subject to the legal claims of the creditors of the shipper, and nothing existed in the Messrs. Wilkins but a mere *spes occupandi* or, as the common law phrases it, a mere possibility, which attached

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neither to the substance nor the form of the thing. Upon what ground, then, if I am right as to the ownership of the goods, can the claim be maintained? The right of capture acts upon the proprietary interest of the thing captured at the time of capture. It is not affected by the secret liens or private engagements of the parties. It repudiates even the strong claim of a bottomry bond, because it is not a *jus in re*. Can, then, a mere possibility be of more consideration in a court of prize? The absence of all authority to this effect, and the strong and emphatic language of all the cases as to secret liens, speak as powerfully as the most direct and pointed decisions against it.

There is a case cited by the court in *The Aurora*, 4 Rob. 218, where property was shipped by a merchant in Holland to A. a person in America, by order of B. and per account of B., but with directions to A. not to deliver it unless satisfaction should be given for the payment, and it was held as good prize on the ground that the property still remained in the enemy shipper. This case I think strongly in point, and the manner in which Lawrence attempted to distinguish it from the case then on trial shows a full concurrence in its correctness. The reasoning of the court in the *Aurora* itself, and in the *Marianna*, 6 Rob. 22, are also illustrative of the general doctrine.

On the whole, I consider that, by the doctrine of the common and the prize law, these goods were, at the time of capture, enemy property and that the claim of the Messrs. Wilkins ought to be rejected, and in this opinion I have the concurrence of two of my brethren.

