The Eddy

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Appellant : The Eddy

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The Eddy - 72 U.S. 481 (1866)
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72 U.S. (5 Wall.) 481

ERROR TO THE CIRCUIT COURT FOR

THE DISTRICT OF SOUTH CAROLINA

SYLLABUS

1. Contracts of affreightment are maritime contracts over which the courts of admiralty have jurisdiction. Either party may enforce his lien by a proceeding *in rem* in the district court.

2. In the absence of an agreement to the contrary, the shipowner has a lien upon the cargo for the freight, and may retain the goods after the arrival of the ship at the port of destination until the payment is made. The master cannot, however, detain the goods on board the vessel. He must deliver them.

3. An actual discharge of the goods at the warehouse of the consignee is not required to constitute delivery. It is enough that the master discharge the goods upon the wharf, giving due and reasonable notice to the consignee of the fact.

4. Where the goods, after being so discharged and separated into their different consignments, are not accepted by the consignee or owner, the carrier discharges himself from liability on his contract of affreightments by storing them in a place of safety and notifying to the consignee or owner that they are so stored, subject to the lien of the ship for the freight and charges.

5. A frequent and even general but not at all universal practice in a particular port of shipowners to allow goods brought on their vessels to be transported to the warehouse of the consignee and there inspected before freight is paid is not such a "custom" as will displace the ordinary maritime right to demand freight on the delivery of the goods on the wharf.

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6. On a libel by the consignee of goods against a vessel for nondelivery of the same -- the defense being that the goods were subject to the lien of the vessel for freight and that the libellants improperly refused to pay it -- any supposed misconduct of a bailee of the goods, not before the court, with whom the goods had been stored on the refusal of the consignee to pay freight and take them away is a question not involved in the pleadings. And if on such a state of pleadings the defendants prove their defense, they are entitled to a decree in their favor irrespective of any such supposed misconduct of the bailee.

On the 25th March, 1854, the master of the schooner *Mary Eddy,* then at New Orleans, received on board his vessel 102 hogsheads of sugar and 21 of syrup, to

be carried by sea to Charleston, South Carolina and there delivered to Mordecai & Co., merchants of that place. The bill of lading contained the usual clause as to the payment of freight. The vessel reached Charleston safely on the 31st of March, and the master gave notice to Mordecai & Co. of her arrival and of the sugar and syrup on board for them, offering to deliver them on the payment of the freight.

Owing to some misunderstanding between the parties on the occasion of a former shipment where, after payment of the freight, a part of the cargo had been discovered to be damaged, Mordecai & Co. were not willing to pay the freight unless the sugars and syrups were all delivered and *in their store,* and after inspection by them there, were found not to have suffered injury in the voyage. They alleged that by the usage of the port of Charleston they had a right to have them so stored and so to examine them before they could be called on to pay the freight. The master did not agree with them in this view of their rights, conceiving that he had a right to be paid his freight *"on the wharf"* when the sugars were put there and to retain possession until he was paid. Conference and some partial understandings were had between the parties, and under these all the syrup, with three hogsheads of the sugar, were taken to the storehouse of Mordecai & Co. They declining, however, to pay freight on the parts as thus distributively in

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their possession, but insisting upon having the whole in their storehouse first, the master, who was now unlading the sugars and had a large part of it on the wharf -- after 2 o'clock on the afternoon of the 4th of April -- gave them notice that the sugars (some of the hogsheads containing which had been more or less compressed or staved in on the voyage and needed to be coopered) were now in good order, but that to avoid difficulty in collecting the freight he requested them to pay the amount as by the bill of lading, adding that the sugars "will not be delivered without settling the amount due." He concluded:

"Should you not accede to the above, and settle the matter, the sugars will remain *on the wharf* until sunset, and then be stored at your expense and risk."

Mordecai & Co. replied:

"We are prepared to give you satisfactory security for your freight money, to be paid to you *in accordance with the usages of this port* and upon your delivery of our property in compliance with your contract. If you refuse to do so, we shall hold you responsible for all damages. We would add that we are informed that there are a large number of hogsheads of sugar on the wharf. A notice of their being landed at this late hour will not give us time to dray them away and store them, and therefore we hold you responsible for any damage to those that are landed."

The larger part of the 99 hogsheads of sugar remained on the wharf until sundown, and were then stored by the master in the storehouse of one Brown. A few yet in the ship were landed and stored on the next day. No agreement as to the rate of storage was made. On the evening of this same day (4 April), Messrs. Brown & Porter, the attorneys-at-law of Mordecai & Co., sent a note as follows to the master:

"We are instructed by Messrs. Mordecai & Co. to inform you that they consider their whole consignment of sugar -- that on

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the wharf as well as that in the ship -- at the risk of the schooner *Mary Eddy* and her owners, and that they are ready to pay you the freight upon your delivery to them of the entire consignment in accordance with the bill of lading; that from your own admission and conduct, they have reason to believe that part of the consignment is not in the condition you received it, and they have further reason to believe that this damage is not included within the dangers and accidents of the seas and navigation; that they are willing to give any security for the freight, but will not consent to pay the freight as you have demanded in your letter when a larger portion of the consignment is in your possession under circumstances which authorize them to believe that they may sustain considerable damage. We are also instructed to inform you that unless this matter is adjusted to their satisfaction by 10 o'clock tomorrow, they will proceed to libel the vessel."

The master did nothing more in the way of delivery of the hogsheads. He himself averred, in an answer subsequently made in the case, "that the sugars were examined next day in store and on the wharf by the agents of Mordecai & Co., but that no demand was made nor any freight tendered."

At the time the sugars were thus stored -- 4th of April, 1854 -- they were worth $6,901. The claim for freight was $641. On the 21st November, 1855, Brown, the storehouse-keeper, without the assent of Mordecai & Co., sold, to satisfy his account of storage, 51 hogsheads of the 99 stored. From the proceeds, $2,314, he deducted his claim, $1,919, for storage at the rate of 25 cents a hogshead per week, and paid the balance to the schooner's agent. The remaining hogsheads were detained till January, 1856, when they likewise were sold by order of the schooner's agent, who paid $204 out of the proceeds for storage at the former rate, reserved $759 for freight and interest, and tendered $2,400 for the consignment of the sugars.

When Brown, in whose stores the sugars had been placed, was about to sell to pay his storage, Mordecai & Co. applied to him to permit them, with some two gentlemen, to examine

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into their condition. Brown acceded to their wish, but subsequently informed Mordecai & Co. that the agents of the schooner objected to an *ex parte* survey and directed him to refer Mordecai & Co. to them or their counsel. Mordecai & Co. then addressed, through their proctors, the same request to the proctor of the master of the vessel, and reply was made that before it could be consented to, it was but fair that they should be advised of its purpose and of the use that might be intended to be made of it hereafter. The terms were not acceded to, and the inspection was not allowed.

Soon after the sugars were stored, Mordecai & Co. informed the agents of the master that storage could be procured by them at the rate of 25 cents per hogshead per month, and they replied that the owner of the store in which it was

would make the rate agreeable to Mordecai & Co. Subsequently, when the owner of the store demanded storage at the rate of 25 cents per week for each hogshead, instead of 25 cents per month, there was no objection on the part of the agents. Witnesses testified that 25 cents per week was an excessive charge, though the "wharf rates" allowed 23 cents where there was no agreement.

A libel having been filed on the 5th of March, testimony was taken as to the custom of the port of Charleston as to place of payment of the freight.

Two witnesses were examined in behalf of Mordecai & Co.. One of them, a merchant in the habit of receiving consignments, stated that with his house it had always been customary to deliver the goods on the wharf and then to call for the payment of the freight at a reasonable time after; that this was the general practice with merchants; that Mordecai & Co. were merchants of very good reputation; that he himself had never paid freight on the wharf, and if any man were to ask him to do so he would take it as an insult. On cross-examination he added that he thought that by commercial law the master would have a right to demand freight on the wharf if the party were doubtful as regarded their ability to pay or if he expected to receive any trouble in the collection of the freight; that as to the right to demand

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freight on the wharf, he thought it a question of law; that as to the fact, he had never heard of a case in which it was done. The other witness stated that he thought it was the prevailing practice to discharge and collect freight afterwards, but that though such was his practice, he would, if he ever anticipated difficulty in the collection of freight, have stored the cargo in the name of the consignee, subject to his order and the payment of freight. In opposition to this testimony, four witnesses were examined in behalf of the shipowners. One stated that he had known instances where refusals were made to deliver the cargo without payment of freight. Another, that he knew of instances where consignments were not delivered without payment of freight on the wharf; that it was his custom so to collect it if he doubted the solvency of the house or feared difficulty in the

collection of it. A third that in the case of small bills, to save the trouble of collecting the freight, he had ordered it to be paid on the wharf before delivering the cargo, and the fourth that in one instance, he was refused a consignment unless he paid freight on the wharf, but that the general usage was otherwise -- the practice being to call for the freight at any time before the vessel was ready for sea.

Upon this case, the District Judge in whose court the libel was filed -- considering that no sufficient custom had been proved -- concluded his opinion as follows:

"It is evident that on both sides there was a proclivity to an extreme estimate of their rights from the occurrence previously of some matter between them which was unpleasant. In the detention of the cargo to secure the lien of his freight the master exercised a lawful right. In continuing the exercise of that detention upon property's undergoing deterioration, without submitting the property to such control as could rightfully dispose of it, if he was not satisfied that under the circumstances he could not do so himself, he acted wrongfully, and is liable to the consequences. And all the evidence which is before me in relation to the conduct of the master while detaining the property supports me in the conclusion that the respondent should be made liable. I pass over the fact that with property capable

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of division, and of which he had the right to retain a part for the freight of the whole, he insisted on retaining the whole, and that in so doing he retained an amount ten times greater than his claim, and subjected the owner to ten times the expense that was necessary. I pass this over because in speaking of the power to retain, the language is general. But when the master in the exercise of his right did detain, it was nevertheless the property of another which he had in his possession. That possession he transfers to another -- the owner of the store in which he placed the property. And it was there placed subject to the order of the master or his agent. There was no recognition of any other owner, nor discretion allowed the storekeeper to deliver the property to any person but the master of his agent. Now it is quite clear that the right which the carrier was entitled to was simply that of

detention until freight was paid. And the importance of the mode in which the goods were stored is only made to appear from subsequent events."

"It is obvious that it was forgotten that when the master retains the control of the cargo to secure his lien for freight, he is regarded as the agent of the owners of the cargo. And the conduct of the master in the management of the property in this case was inconsistent with the duties which the law in such cases devolves upon him."

"Let a report set out the value of the property at the port of delivery; from this amount let the freight be deducted and let a farther deduction he made for the storage of the goods for sixty days, which, under the circumstances of the case, I consider a reasonable time for the master to make application for the aid of the court in making his lien available; the balance then remaining, with interest from that date, will be the amount due the libellants. As to the costs, I will divide them in the following manner. I do not sustain the libellants in what they did previous to the storage of the goods and the filing of their libel. I do not sustain what the respondents have subsequently done."

A decree, after a report made by a master on this basis, was entered accordingly.

On appeal to the circuit court, this decree was reversed and it was ordered that there be allowed to Brown, for the storage of the merchandise, compensation according to a report

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of a master, which had been made under a reference of the circuit court, and which allowed 40 cents a hogshead per *month.* That the residue of the fund in the hands of Brown should be paid into court. That the libellants should be at liberty at any time to apply to take it out, and that, subject to such leave, after the fund was paid into court, the libel should be dismissed with costs.

It appearing afterwards, however, on a return to this rule that the sugars never were in the custody of the circuit court, the decree of the district court was in all

things reversed and the libel dismissed with costs.

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MR. JUSTICE CLIFFORD delivered the opinion of the Court.

Substance of the allegations of the libel setting forth the cause of action was that certain merchants at New Orleans, on the 25th day of March, 1854, shipped on board the schooner *Mary Eddy,* then lying in that port, one hundred and two hogsheads of sugars, for which the master gave a bill of lading to the shippers, and that he contracted to transport the sugars from that port to the port of Charleston, and there to deliver the same to the appellants in good order and condition saving and excepting only the dangers and accidents of the seas and navigation, and the libellants averred that the vessel departed on the voyage and that the master had neglected and refused to deliver the sugars.

Answer of the respondents admitted the reception of the sugars, the contract of affreightment as set forth in the bill of lading, and the arrival of the schooner at the port of destination with the sugars on board in good order and condition.

Principal defense set up in the answer was that the contract to deliver the sugars was subject to the lien of the respondents for the payment of the freight, as stipulated in the bill of lading, and they averred that the vessel proceeded on her voyage, and arrived safely at the port of destination with the sugars on board in good order and condition, and that the master gave immediate notice of those facts to the consignees,

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and offered to deliver the sugars to them according to the bill of lading, but they utterly neglected and refused to pay the freight.

First appeal of the libellants to this Court was dismissed, it appearing that neither this Court nor the circuit court had jurisdiction of the case, as no final decree had been entered in the district court where the libel was filed. [Footnote 1] Such

being the fact, this Court dismissed the appeal and remanded the cause to the district court in the same condition in which it was before the appeal was taken to the circuit court in order that the district court might proceed with the case to a final decree. Pursuant to the mandate of this Court, the district court completed the hearing, and still being of the opinion that the claim of the libellants was well founded, entered a final decree in their favor; but the circuit court reversed the decree on the appeal of the respondents, and the libellants appealed to this Court.

1. The record shows that the controversy in this case, in its origin, grew out of a difference of opinion between the parties as to the respective rights and duties of the master of the schooner, as a carrier by water, and the shipper of the cargo in respect to the delivery of the goods, or rather of the shipowners and the consignees and owners of the cargo, under the usual bill of lading stipulating for the delivery of the goods upon payment of the freight. Appellants, as the consignees and owners of the cargo, conceded that the owners of the schooner had a lien for the freight, but insisted that they, as consignees and owners of the cargo, had a right to inspect the sugars before paying the freight, as stipulated in the bill of lading, and that it was the duty of the master under the usages of the port to discharge the entire consignment before exacting the payment of freight and to allow them, as the consignees, to take possession of the sugars and transport the same to their store in order that they might be enabled satisfactorily to make such examination and inspection.

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Acting for the owners of the vessel, the master admitted that it was his duty to discharge the entire consignment and to permit the same to be inspected by the consignees, but he denied that it was his duty to allow the sugars to be transported to the warehouse of the consignees until the freight was paid. On the contrary, he insisted that it was his right to retain possession of the sugars as the means of preserving the lien of the vessel to which the sugars were subject for the payment of the freight. When the agent of the libellants first went to the vessel shortly after her arrival and asked for the sugars, he was duly notified by the

master that the lien of the vessel for the payment of the freight would not be waived. Subsequently one of the libellants went on board and had some conversation with the master in respect to the payment of the freight and the delivery of the consignment. They came to an understanding that all the sugars which were in good order should be sent to the store of the libellants, but that the freight on all so sent should be paid on the wharf.

The whole consignment consisted of one hundred and two hogsheads of sugars and twenty-one barrels of syrup. Libellants' clerk sent the twenty-one barrels of syrup and three hogsheads of the sugar to their store under that arrangement, but the libellants refused to furnish the money to pay the freight, and the master declined to permit any more to be sent except upon payment of the freight as it had been understood in that arrangement. Finding that they were unable to agree, the master notified the libellants that he should exact the payment of freight on the wharf, and they, in reply, notified the master that they should hold him responsible for any injury the sugars should receive on the wharf. Correspondence took place between the parties in respect to the delivery of the sugars and the payment of the freight which is exhibited in the record, together with the testimony of various witnesses who were examined upon the subject.

The vessel arrived at Charleston on the last day of March, 1854, and the cargo was discharged on the third and fourth

days of April following. Notice was given to the libellants early in the afternoon of the latter day to the effect that the consignment was ready to be delivered in good order and condition on payment of freight, but that if they refused to pay freight as stipulated in the bill of lading, the sugars would remain on the wharf until sunset and would then be stored at their expense and risk. Their response was that they would give security for the freight to be paid, in accordance with the usages of the port, upon the delivery of the consignment. They also objected to the notice as too late in the day to enable them to transport the sugars from the wharf and store them in their warehouse.

Throughout the correspondence it is obvious that the libellants denied all obligation to pay the freight until the entire consignment was discharged and delivered without qualification, so that they could store the goods and inspect them in their own warehouse. Refusing to accede to those terms, the master discharged the sugars, and after waiting a reasonable time stored them, and notified the libellants that they were stored at their risk and cost, to be delivered to them upon payment of freight and charges. Proofs also show that the libellants examined the sugars the next day -- both those on the wharf and those in store -- but no demand was made nor was any freight tendered.

2. Undoubtedly the shipowner has a lien upon the cargo for the freight, and consequently may retain the goods after the arrival of the ship at the port of destination until the payment is made unless there is some stipulation in the charter party or bill of lading inconsistent with such right to retention and which displaces the lien. [Footnote 2] Text writers usually state the rule as follows: *Le batel est oblige a la marchandise et la marchandise au batel.* [Footnote 3]

Unquestionably the general rule of law is well expressed in that maxim, but it is subject to an important exception

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as applied to the cargo, that the lien may be displaced by an inconsistent and irreconcilable provision in the charter party or hill of lading, making it the duty of the master to deliver the goods unconditionally before the consignee is required to pay the freight. Saving that exception, the rule is universal that the ship and freight are bound to the merchandise and the merchandise to the ship. Shipowner contracts for the safe custody, due transport, and right delivery of the merchandise, and the shipper, consignee, or owner of the cargo contracts to pay the freight and charges. These are reciprocal duties, and the law creates reciprocal liens for their enforcement, but the lien of the shipowner may be displaced, as before explained, or it may be waived.

Such a lien -- that is, the lien of the shipowner -- is not "the privileged claim" of the civil law, but it arises merely from the right of the shipowner to retain the possession of the goods until the freight is paid, and therefore it is lost by an unconditional delivery of the goods to the consignee. Subject to this explanation, the maxim that the ship is bound to the merchandise and the merchandise to the ship for the performance of all the obligations created by the contract of affreightment is the settled rule in all the federal courts. [Footnote 4]

3. Contracts of affreightment, notwithstanding it is held that the lien of the shipowner is nothing more than the right to withhold the goods and is inseparably associated with his possession, are regarded by the courts of the United States as maritime contracts over which the courts of admiralty have jurisdiction, and consequently that either party in a proper case may enforce his lien by a proceeding *in rem* in the district court. Where the ship is in fault, the usual remedy of the consignee is by the proceeding *in rem;* but where the shipper, owner, or consignee of the cargo is in fault, the shipowner usually finds an adequate remedy by retaining the goods until the freight and charges are paid. His right to do so is beyond doubt, but he cannot detain the goods on board the ship until the freight is paid, as the consignee

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or owner of the cargo would then have no opportunity of examining their condition. Practice in England is to send such goods as are not required to be landed at any particular dock to a public wharf, and order the wharfinger not to part with them till the freight and other charges are paid, and it is held that in such cases the lien of the master continues, as the goods remain in his constructive possession. [Footnote 5]

4. Delivery on the wharf in the case of goods transported by ships is sufficient under our law, if due notice be given to the consignees and the different consignments be properly separated, so as to be open to inspection and conveniently accessible to their respective owners. [Footnote 6] Where the contract is to carry by water from port to port, an actual delivery of the goods into

the possession of the owner or consignee or at his warehouse is not required in order to discharge the carrier from his liability. He may deliver them on the wharf, but to constitute a valid delivery there the master should give due and reasonable notice to the consignee, so as to afford him a fair opportunity to remove the goods or put them under proper care and custody. When the goods, after being so discharged and the different consignments properly separated, are not accepted by the consignee or owner of the cargo, the carrier should not leave them exposed on the wharf, but should store them in a place of safety, notifying the consignee or owner that they are so stored, subject to the lien of the ship for the freight and charges, and when he has done so. he is no longer liable on his contract of affreightment. [Footnote 7]

5. Parties may agree that the goods shall be deposited in the warehouse of the consignee or owner and that the

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transfer and deposit shall not be regarded as a waiver of the lien, and where they so agree, the courts of admiralty will uphold the agreement and support the lien; but there was no agreement in this case. The appellants refused to pay the freight, and the master declined to part with the possession of the goods. He discharged the cargo upon the wharf, gave due notice to the consignees, and they refused to pay the freight, claiming that they had a right, by the usages of the port, to remove the goods to their store for inspection without paying freight. They examined witnesses upon that subject, but it is sufficient to say that they failed to prove any such usage. Relying on proof of such a usage, they refused to accept the goods, and the master stored them in a place of safety and gave due notice to the libellants.

6. Misinterpreting the mandate of this Court, the district judge came to the conclusion that the interlocutory decree entered in the cause before the former appeal could be supported by proof of the subsequent misconduct of the bailee of the goods, who sold certain portions of them to pay the charges for storage. All we think it necessary to say upon the subject is that none of those questions is

involved in the pleadings in this record. Present libel was *in rem* against the vessel for the nondelivery of the consignment of the libellants. Respondents appeared and set up the defense that the goods were subject to the lien of the vessel for the freight, and that the libellants, without just cause or excuse, refused to pay the freight, and they fully proved their defense. Having proved their defense, they were entitled to a decree in their favor wholly irrespective of any subsequent misconduct of the bailee of the goods, who was not before the court.

The decree of the Circuit is therefore

Affirmed with costs.

[Footnote 1]

Mordecai v. Lindsay, 19 How. 199.

[Footnote 2]

Bags of Linseed, 1 Black 112.

[Footnote 3]

Cleirac, p. 597; Abbott on Shipping 8th ed., p. 248; Maude & Pollock on Shipping 254.

[Footnote 4]

Dupont v. Vance, 19 How. 168.

[Footnote 5]

Chitty & Temple on Carriers 222; *Ward v. Felton,* 1 East 512; Machlachlan on Shipping 369.

[Footnote 6]

2 Parson on Contracts 5th ed. 195; *Ship Middlesex,* 21 Law Rep. 14.

[Footnote 7]

Richardson v. Goddard, 23 How. 39; 1 Parsons' Maritime Law 153; Machlachlan on Shipping 367; *Hyde v. T. & M. Nav. Co.,* 5 Term 389; 2 Parsons on Contracts, 5th ed., 191; *Brittan v. Barnaby,* 21 How. 532.