

a lien on the cargo for the charter freight, as against the charterer, his agents, and those who have notice of the charter party. 2 Pritch. Adm. Dig. p. 615, § 1229, and authorities therein cited.

This libel is filed to recover the charter hire of the ship. It is alleged in the libel that the bill of lading signed by the master contained the words, "Freight and all other conditions as per charter party." My opinion is that the words "all other conditions as per charter party," not only include such conditions as are connected with paying freight, strictly so called, but all that are referable to the subject-matter of the receipt, the carriage and the discharge of the cargo.

The libel also alleges knowledge of the charter party by the shippers, and shows that the charter party provides for a lien on cargo and freight in favor of the shipowner. The master's right was to insist on the bill of lading as signed by him, and the shipper had not the right to alter, by striking out the words, "Freight and all other conditions as per charter party," without the master's consent, as it is alleged it did.

The allegations of the libel are admitted to be true for the purposes of this hearing. If true, my opinion is that the libelant has made out a case which entitles him to recover for the hire or use of the ship. The exceptions must be overruled, and it is so ordered.

O'CONNELL v. ONE THOUSAND AND TWO BALES OF SISAL HEMP.

(District Court, S. D. Alabama. July 30, 1896.)

No. 743.

1. **BILLS OF LADING—ALTERATION BY SHIPPER—ACQUIESCENCE OF MASTER.**

Bills of lading signed after the cargo was all on board contained the words, "Freight and all conditions as per charter party." The shipper, who supposed the vessel to be under charter, but was ignorant of the terms of the charter party, refused to accept the bills in this form, and in the presence of the master, and with his acquiescence, struck out the words. *Held* that, notwithstanding a subsequent protest by the master, the contract of carriage was controlled by the bills of lading alone, independently of the terms of the charter party.

2. **SHIPPING—DISBURSEMENTS BY SHIPPER AS AGENT FOR CHARTERER.**

Where a shipper, acting also as agent for the charterers, disbursed the ship in a foreign port, *held*, that his consignees were not entitled to deduct the amount of such disbursements from the freight, when the freight was sued for by the shipowners in enforcement of their lien for the charter hire.

This was a libel in rem by William H. O'Connell, master of the steamship Ravensdale, against 1,002 bales of sisal hemp, claimed by Thebaud Bros., to enforce payment of freight. An opinion was heretofore filed on exceptions to the libel and motion to strike out. 75 Fed. 408. The cause has now been heard on the merits.

Clark & Clark and Converse & Kirilin, for libelant.
 Pillans, Torrey & Hanaw, for claimants.

TOULMIN, District Judge. When this case was before me on exceptions to the amended libel, I overruled the exceptions, holding, in effect, that, on the allegations of the libel, the libelant was entitled to recover the charter hire of the vessel, and had a lien on the cargo therefor. Material allegations in the libel, and on which this ruling was based, were that the shipper had knowledge of the charter (which I construed to mean knowledge of the terms or stipulations of the charter); that the bills of lading signed and delivered to the shipper contained the clause, "Freight and all conditions as per charter party;" and that, subsequent to such delivery, the bills of lading were altered by the shipper, by striking out of them said clause; and that this was done without the knowledge or consent of the master. If these allegations were sustained by the proof, I would still hold that the libelant was entitled to recover the charter hire of the vessel, and had a lien on the cargo for it. But, in my opinion, the proof does not sustain these allegations. The burden is on the libelant to make out his case,—that is, the case set forth in the amended libel, which is a substitute for the original libel; and this he has failed to do. The weight of the evidence is that the shipper presumed and believed that the vessel was operating under a charter party, but that he did not know its terms or conditions; that he was the agent of the charterer, and of the ship to procure cargo for her, to disburse her, and to get her clearance papers, etc.; that he frequently shipped cargoes on her on his own account; and that the cargo involved in this suit was furnished and shipped by him in the usual way. The evidence further shows that the customary rate of freight, and the rate authorized by the charterer, between Progresso and Mobile, was three-sixteenths gold and 5 per cent. added, and that sometimes this was put in the bill of lading, and sometimes it was not. The evidence also is that the shipper did not accept the bills of lading in the form and as signed by the master, and that the master was notified of that fact; and the decided weight of evidence is that the master was present when the clause inserted by him in the bills of lading, to wit, "Freight and all conditions as per charter party," was stricken out by the shipper, and that he assented thereto, and acquiesced in what was done by the shipper, saying that he had put that clause in the bills of lading because he was instructed by his owners to do so. The evidence further shows that the cargo was all on board the ship at the time the bills of lading were signed, and that at the time of the alleged controversy over the character of the bills of lading which the master had signed, and the shipper's refusal to accept them, the ship's clearance papers had already been made out.

The master did not refuse to carry the cargo except according to the terms of the charter party (as expressed by him in the bills of lading) on the refusal of the shipper to accept such bills, and the shipper did not demand the return of the cargo because of the master's claim of right to issue such unusual bills of lading, as the shipper considered them. The Peer of the Realm, 19 Fed. 216; Peek v. Larsen, L. R. 12 Eq. 378. If the bills of lading retained by the shipper were so retained in their altered form (as altered by him)

with the consent or acquiescence of the master, they must be considered as the true and only evidence of the contract. If they were altered and retained without the master's consent, express or implied, certain it is from the evidence that they were not agreed to and accepted by the shipper in the form in which the master had signed them. In the latter case there was no express contract made. There was no agreement between the parties, and the ship in that event would be entitled to the customary rate of freight, which is shown to be three-sixteenths gold and 5 per cent. added. From the weight of the evidence, I am bound to find that the master assented to and acquiesced in, if he did not expressly consent to, the change made by the shipper in the bills of lading at the time it was made, whatever he may have thought or done about it afterwards, in the way of protests, etc. I can well see why he should have protested in view of the instructions from his owners.

My opinion is that the libelant is not entitled to recover the charter hire and other charges provided for in the charter party, but that he is entitled to recover the freight at the rate named, and that without any deduction for what is called "advances on freight." It appears from the evidence that the shipper in this case (Agentia Commercial) was the charterer's agent, and disbursed the vessel for and on account of the charterer; that it kept no account with the charterer, but that it was usual to collect such disbursements from the freights, and, as some of the officers of the Agentia Commercial say, from the consignees. As long as the freights belonged and were going to the charterer, any disbursements made on his account or on account of the ship by his agent should properly and justly be deducted from or paid out of the freight. But when the charterer is not entitled to receive the freight over the shipowner, as in this case, it seems to me that the advances for disbursements could not properly or reasonably be deducted from the freight as against the shipowner. Were these advances for the ship made on the credit of the ship? Was there any contract, express or implied, by which the agent, who happened to be the shipper in this instance, was to be reimbursed these advances as against the shipowner? The contract between the shipper and the ship is contained in the bill of lading, and there is nothing therein about port charges, etc., or any deduction being made from the freight on that account. It seems to me that the claimants are not entitled to deduct from the freight for any such advances as are claimed. It is not a set-off against the freight. It should be treated rather as a loan than as prepayment of freight, or a claim against the charterer. At least, it is a matter with which the consignees, Thebaud Bros., have nothing to do.

The libelant may have a decree for the freight, and, if the amount is not agreed on, there must be a reference to ascertain the amount. The libelant will also be decreed costs, except the costs for filing the amended libel and the amendment to the libel, which was offered on the trial, and which the court allows to be filed; also, the costs for the first writ of seizure and other costs growing out of the same, such as the costs of publication and watchman's fees, if any, up to the time of the second seizure. All other costs are to be taxed

against the claimants. Had there been any demand for the goods and tender of freight, all costs subsequent thereto would be taxed to the libellant.

THE RAVENSDALE.

THEBAUD et al. v. THE RAVENSDALE.

(District Court, S. D. Alabama. July 30, 1896.)

No. 745.

SHIPPING—DELIVERY OF CARGO—LIBEL FOR FREIGHT.

A master, having a cargo under a bill of lading for delivery to order, was ignorant as to who were the indorsees, and was therefore unable to notify them of his arrival. The day after arrival he libeled the cargo for freight, but on the third day he received a letter from the attorneys of the indorsees of the bill of lading, who, after naming the principals, said, "We have for them to offer to pay the freight, * * * and to demand delivery, as per bill of lading, on paying freight." The freight was not, however, paid or tendered, and five days later the master discharged the cargo upon the wharf, and caused another writ of seizure to be executed upon it. *Held* that, as the letter showed that the consignees had knowledge of the arrival, no further notice was necessary; that while the first seizure was premature, because made while the cargo was still on board, yet the proceedings taken by the master did not amount to a conversion, for which the consignees could claim even nominal damages against the ship.

This was a libel in rem by Thebaud Bros. against the steamship Ravensdale to recover damages for alleged conversion of cargo by the master. For cases in which the master libeled the cargo to enforce a lien for charter hire, see 75 Fed. 408, 410.

Pillans, Torrey & Hanaw, for libellants.

Clark & Clark and Converse & Kirlin, for claimants.

TOULMIN, District Judge. "The owner of a vessel has a lien on 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. He cannot, however, detain the goods on board the ship until the freight is paid, as the consignee or owner of the cargo would have no opportunity to examine their condition." *The Eddy*, 5 Wall. 493. "The shipowner may deliver the goods 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 and reasonable opportunity to remove the goods, or put them under proper care and custody. If the goods are not accepted and the freight paid by the consignee, 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." *The Eddy*, supra. But want of notice is excused when a consignee is unknown, or is absent, or cannot be found after diligent search. If the consignee or the indorsee of the bill of lading for delivery to order cannot be found, the duty of the carrier is to retain the goods until they are claimed, or to store them. *The Thames*, 14 Wall. 98.

The bill of lading in this case was for delivery to order. The consignees or indorsees of the bill of lading were unknown to the master, at least up to December 12, 1895. On that day, the attorneys representing said indorsee, Messrs. Thebaud Bros., addressed a letter to the master, advising him that Messrs. Thebaud Bros., of New York, were the holders of the bill of lading issued by his ship for 1,002 bales of Sisal hemp, and in the letter say: "Representing Messrs. Thebaud Brothers, * * * we have for them to offer to pay the freight on same, stipulated in the bill of lading, and to demand delivery, as per bill of lading, on paying freight." There is no proof of any payment or tender of freight, or of any offer to pay freight, or of any demand for delivery of the goods, other than is contained in the said letter. The letter seems to be more of a notice to the master as to who were the holders of the bill of lading, and who were nonresidents, and that the writers, representing said holders, have to offer to pay freight for them, and to demand delivery of goods on paying freight. As I have said, the proof shows no freight was paid or tendered; no presentation of the bill of lading and no demand for delivery made, other than as above stated. Up to the receipt of this letter, it appears from the proof that the holders of the bill of lading were unknown to the master, which excused want of notice by the master. The letter indicated that said holders were absent from this port, but it also indicated that they had notice of the arrival of the ship with their cargo. Hence no further notice to them, it seems to me, was necessary. On December 9, 1895, the vessel arrived in Mobile. On December 10, 1895, the master sued out a writ of seizure on a libel filed claiming a lien on the cargo for charter hire, etc., and the writ was executed by a seizure of the cargo on board the ship. The ground alleged for this proceeding was the insolvency of the charterer of the vessel, and apprehended loss of the charter hire provided for in the contract. I think this proceeding was premature.

The cargo remained on board of the ship until December 17, 1895, when it was discharged on the wharf, and another writ of seizure was executed on it. The holders of the bill of lading, having at least five days' notice of the arrival of the ship with their goods, failed to come forward when the cargo was discharged, and demand delivery to them on payment or tender of freight, as they had given notice they would do. Without such payment or tender and demand, I think they have no just ground for complaint; and I do not consider that the proceedings taken by the ship master were, under the circumstances of the case, a conversion, for which Thebaud Bros. can recover even nominal damages. Their libel must therefore be dismissed.

WOODWARD, WIGHT & CO., Limited, v. DILLWORTH.¹

(Circuit Court of Appeals, Fifth Circuit. April 28, 1896.)

No. 442.

SHIPPING—LIENS—LOUISIANA CODE—FORCED SALE.

The stockholders of the C. Packet Co., a Louisiana corporation, passed a resolution that the company should be dissolved and liquidated, and that certain persons should act as liquidators, who should be confirmed by the court. Thereupon, on petition of creditors, this resolution and the appointment of the liquidators were confirmed by the court. An order was made two days later that the liquidators should be authorized to run a steamer owned by the company, and that such steamer should be sold at auction, after advertisement by the sheriff. Thereafter the steamer, after due advertisement, was sold as directed. *Held* that, these proceedings being unknown to the law of Louisiana, and only recognized by the courts by virtue of the consent of the corporation, the sale so effected was, in legal effect, purely voluntary, and not being a forced sale, within the meaning of articles 3239 and 3240 of the Louisiana Code, did not divest the lien upon the steamer given by virtue of article 3237 of the same Code to one who had furnished her with supplies.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Woodward, Wight & Company, Limited, brought this suit against the steamboat *Stella Wilds* to recover the sum of \$560.60, rent of 1,360 life preservers. They allege: That the *Stella Wilds* belonged to the Comeaux-Aiken Packet Company, which was carrying on the business of common carrier, and needed, at the least, 1,500 life preservers to complete its necessary equipment, under the laws of the United States, to carry a certain number of passengers. That on the 27th of May, 1893, libelants agreed with the Comeaux-Aiken Packet Company to provide and furnish 3,000 life preservers, to be delivered to and used upon the steamboats belonging to the Comeaux-Aiken Packet Company, the same to be rented at the rate of 37½ cents for each life preserver, which were to be returned to libelants: provided that, if the life preservers should be used for any time less than three months, the full sum of 37½ cents for each should be due and payable to libelants; reserving, however, to the Comeaux-Aiken Packet Company the right to purchase them by paying libelants for the same at the rate of 75 cents for each life preserver. That, in pursuance of said agreement, libelants delivered to the steamboat *Stella Wilds* a large number of life preservers, to wit, on June 10, 1893, 500 life preservers; June 17, 1893, 860 life preservers; making in all 1,360 life preservers, to be used on the *Stella Wilds* as part of her equipment. That the same were received by the master and officers of the steamboat for said purposes, and the said Comeaux-Aiken Packet Company became bound to pay libelants the sum of \$510 as rent for the same; and, by the force and effect of the statutes of the state of Louisiana, the said sum of money, together with the sum of \$50.60 expended and paid out by libelants for carrying said life preservers to and from said steamboat, became and was, and still is, a lien upon the *Stella Wilds*. The defense is that the libelants have no cause of action or claim against the *Stella Wilds*; that said steamboat was formerly the property of the Comeaux-Aiken Packet Company, a corporation created under the laws of Louisiana; that said Comeaux-Aiken Packet Company had been dissolved, and proceedings for the liquidation thereof had been taken, as provided by the laws of Louisiana, in the civil district court for the parish of Orleans, under the number 40,081 of the docket of said civil district court, in the suit entitled *M. D. Lagan et al. v. The Comeaux-Aiken Packet Company*; that under the proceedings had in said suit, and by the order of the civil district court, the *Stella Wilds* was sold

¹ Rehearing denied June 9, 1896.