

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Anderson, Anderson and Co. v. The Owners
of the Ship or Vessel "San Roman" (The
"San Roman") from the High Court of
Admiralty of England; delivered 4th
February 1873.*

Present:

LORD JUSTICE JAMES.

SIR BARNES PEACOCK.

LORD JUSTICE MELLISH.

SIR MONTAGUE E. SMITH.

THE only question which their Lordships have to determine in this case is whether a German vessel called the "San Roman" was justified in staying at Valparaiso from the 23rd of September 1870 up to the 23rd of December in the same year, on account of the alleged risk of capture in consequence of the war which then existed between France and Germany; this being a claim of the English charterers to recover compensation on account of what they allege to be an unreasonable delay. The learned Judge in the Court below has laid down that "an apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience, would justify delay;" and their Lordships are of opinion that that is a correct statement of the law of England. It has been admitted in the argument of the Appellants that it is unnecessary to determine whether this case ought to be decided according to the law of England, or according to the law of Germany, because there is no practical distinction on the subject in the law of the two countries.

Therefore, the question their Lordships have to determine is entirely a question of fact, namely, whether the German master had during that time such an apprehension of capture founded on circumstances calculated to affect his mind, he being a man of ordinary courage, judgment, and experience, as would justify delay; and their Lordships agree with the learned Judge in the Court below, that there was a sufficient risk of capture to justify this delay.

This is not a case where the master has refused to perform the contract at all. No doubt if the voyage had been abandoned, then it would have been necessary to show that he had been actually prevented from performing it; but this is merely a question whether there was a reasonable cause for delay.

The evidence on the subject really is that it was reported at Valparaiso and generally known that French vessels of war were continually, during the months, at any rate, of September and October, and for a part of November, sailing in and out of the harbour of Valparaiso, Valparaiso being the great harbour on that coast, and if French vessels intended to capture German vessels, they were more likely to find prizes coming out of Valparaiso than from any other harbour on the coast. There is one particular ship that seems to have come in and gone out, and in ten days more to have come in again. It appears to their Lordships that the German captain in Valparaiso could come to no other reasonable conclusion than that the principal object of these French war vessels, of which at one time there were as many as five in Valparaiso, must have been to capture German vessels.

Besides that, it appears that the newspapers at Valparaiso published reports, correct or incorrect, of captures that had actually taken place, and in addition to that it appears that the master went and consulted the consul of his own nation, and the consul advised him in the strongest language, in fact almost ordered him, not to

go, and told him that if he would go, he must give him a certificate that he had received due warning against leaving Valparaiso. There were other German ships in that harbour, some loaded and some unloaded, and the captains of all of them came to the conclusion that it would be improper and unsafe to leave Valparaiso at that time.

It also appears that the master was far from being a person who waited to the last to leave when the French vessels had for a time departed, but that he was among the first who went to the consul and required his papers for the purpose of leaving. Therefore, there is nothing to show that he was at all neglecting or wishing to violate his duty towards the owners of the cargo. Their Lordships agree with what was said before in the judgment in the case of the "Teutonia," that the owner of an English cargo on board a foreign ship cannot expect that the foreign master of the foreign ship will take greater precautions with respect to his goods, or will run greater risk in their defence, than he would with respect to goods of his own nation. If their Lordships were to look upon this case as a case in which the cargo was German as well as the ship, or a case in which both ship and cargo belonged to the same person, and then were to ask the question, Would a man of reasonable prudence, under such circumstances, have set sail or waited? it appears to their Lordships most clearly that a man of reasonable prudence would have waited.

Then, when it is remembered that the owner of the cargo is an Englishman, it must be a matter of mere guess whether the cargo would have arrived in England sooner than it did if it had started before; because, in the first place, there would be great risk of capture, and secondly, whether the vessel were captured or not, the German ship during the whole of that voyage from Valparaiso to Cork or Falmouth, and then from Cork or Falmouth to its port of discharge, would

have been justified in taking reasonable precautions to avoid French vessels. Then, if the ship were captured, nobody could tell how long it would have been kept before it was sent to France for the purpose of being condemned, or how long it would have taken before the cargo arrived. Therefore it is by no means certain that if the master had gone to sea before he did the cargo would have arrived any sooner.

Then, with regard to the last part of the delay, that after the 13th of November, nobody could tell for a time whether the last French vessel would come back or whether it was cruising about. The delay between the 11th and the 23rd of December is too short a delay to be a matter of any importance, yet that appears to be accounted for by his being engaged in procuring money to pay his expenses.

On the whole, their Lordships are of opinion that the judgment of the Court below is perfectly right, and they will humbly advise Her Majesty that this Appeal ought to be dismissed with costs.