

In the matter of part cargo ex steamship "Prins der Nederlanden."

His Majesty's Procurator-General - - - - - Appellant

v.

Koninklijke West Indische Maildienst - - - - - Respondents.

FROM

THE HIGH COURT OF JUSTICE (ENGLAND), PROBATE, DIVORCE AND
ADMIRALTY DIVISION (IN PRIZE)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 16TH MARCH, 1921.

Present at the Hearing :

LORD SUMNER.

LORD PARMOOR.

SIR ARTHUR CHANNELL.

[Delivered by LORD SUMNER.]

In this case the Procurator-General, having obtained a decree for the condemnation of cargo as contraband, appeals against the President's allowance of freight on it to the Koninklijke West Indische Maildienst, the owners of the carrying vessel the "Prins der Nederlanden."

The allowance of freight for the carriage of contraband is undoubtedly very rare. Two reported cases only have been found in which it has been ordered, the *Brita Cæcilia* (Hay and Marriott, 234) and the *Neptunus* (3 C. Rob. 108). Other cases in Hay and Marriott, in which freight was in fact given, appear to have been cases where the cargo was the produce of the ship-owners' own country or cases of pre-emption of ship's stores for the use of the Crown. In the first case nothing is recorded but the bare fact, in the other the allowance was made, though in argument the captors had contested its competence. It is, therefore, a decision in favour of the jurisdiction and the circumstance that the contraband articles were but "in a small quantity amongst a variety of other articles" may have influenced the learned Judge, but more probably as the ground on which he exercised his discretionary jurisdiction in favour of the ship, than as the test for deciding in which cases such a jurisdiction is exercisable at all. Certainly the *Neptunus* is not, as the appellant argued, a mere instance of *de minimis non curat lex*. During the present war Sir Samuel Evans recognised the existence of such a discretionary jurisdiction in the *Jeanne* (1917, P. 8), but he did

not exercise it. The cases of condemnation of contraband goods, where the reports expressly state that the ship lost her freight, are very numerous, and as long ago as the *Sarah Christina* (1 C. Rob., 237) in 1799,

“ I shall content myself,” Sir William Scott says, “ with the restitution of the ship, withholding as usual on the carriage of contraband the allowance of freight and expenses ”

a mode of expression which seems to suggest the exercise of a discretion to withhold what he had jurisdiction to allow (see, too, the *Ringende Jacob*, 1 C. Rob., 89 ; and the *Neutralitet*, 3 C. Rob., 294), and Mr. Wheaton’s note to the *Commercen* (1 Wheaton, 382) observes that on the carriage of contraband “ freight is almost always refused ” in British Courts. This is stated, too, as the standing rule in works of authority such as Pratt’s Story (pp. 92 and 93), Hall (ch. xxvi, § 4), and Holland’s Prize Law (§ 83). The first even states that the shipowner “ is never allowed freight . . . upon the carriage of contraband goods, nor where there has been a spoliation of papers,” which is probably a mere statement of the practice, not a proposition as to jurisdiction. Of course, if goods have only been made contraband during the voyage, the shipowner may be in a different position.

In the present case the Procurator-General’s argument denies such a jurisdiction altogether and contends that in the case of contraband any allowance of freight is incompetent ; if so, the *Neptunus* was wrongly decided and in the *Sarah Christina* Sir William Scott understated the law. No authority in support of the point is forthcoming.

The theory on which, in any case, a Court of Prize allows to carriers a freight on cargo condemned is not very consistent or logical. It is plain that when it does so at the expense of captors, it is not on the footing of any prior obligation legally binding upon them. They have entered into no contract : they have made no request for services to be rendered : there is, so far as they are concerned, no promise to pay, express or implied. When they bring in the ship and claim condemnation of the goods carried they act wholly *ex adverso* towards the carrier, and solely in the exercise of superior belligerent rights. By placing the goods in the marshal’s hands they determine the carrier’s lien, and the issue of a decree of condemnation, at any rate, involves the frustration of the voyage. On the other hand, the carrier’s personal contract with the shippers or other parties, who are liable to pay freight, either subsists and may be enforced or is determined by the inability of the carrier to bring the goods to the agreed port of discharge and there deliver them, an inability in respect of which he has no legal rights or grievance against the successful captor. Whether his inability to sue for freight arises because his contract, or the law applicable to it, provides for payment of freight only on the completion of the voyage and right delivery of the cargo, and does not provide for freight *pro rata itineris*, or whether his inability to obtain it is

caused by his having lost his lien and so having no possessory right to enforce or to release against good consideration, it arises at any rate from acts, which, so far as the captors are concerned, give him no right to damages, when they are followed by a decree of condemnation.

It is said that the carrier has enhanced the value of the goods captured by bringing them to the place of capture, and that the captor should not be allowed to appropriate this enhanced value without payment. This, however, leads to no clear principle. It would be equally true and so it ought to be equally applicable, whatever the grounds for condemning the goods, whether the freight is prepaid or not, and whether or not the carrier has an available legal remedy against strangers. In fairness he might be deemed to receive it to the use of the party who has prepaid, or in satisfaction of the liability of the party who is still liable to pay, but these considerations merely go to the person to whom the compensation ought ultimately to be paid, and not to the propriety of saddling the captor with freight on the prize condemned in his favour. In all cases, if the prize was condemned freight free, the captor would be getting something for nothing, and if so, on this view, he ought to pay in all cases, even in cases of contraband or of prepaid freight, and the measure of his payment would be the increased value of the goods, if any, and not, or not merely, a fair return to the shipowner for the carriage performed. If the allowance of freight on goods condemned rests on the view that the captor is getting something of value from the carrier, what distinction is there between cases of contraband cargo where freight is refused and cases of capture of enemy property, not contraband, where it is allowed? (The *Emanuel*, 1 C. Rob., 296; the *Commercen*, 1 Wheaton, 387.) In each case the value added to the goods by the carriage is added by conduct on the carrier's part, which is not wrongful in itself, though the belligerent has the right to interrupt and prevent it.

On the other hand, ignorance (a term perhaps more appropriate than innocence, both to the occupation of shipowning and the carrier's actual relation to the carriage of contraband) would become a highly material consideration, if disallowance of freight on contraband rests truly on the theory of its being a penalty. Nevertheless the contrary has been held (the *Oster Risoer*, 4 C. Rob., 195). If the penalty is inflicted for the commission of an offence, proof of *bona fide* ignorance of the facts constituting the offence surely merits an acquittal. It is suggested that in this connection the present respondents were put on inquiry, because a German steamer had brought the cocoa to Las Palmas and a German agent looked after the transshipment there, and because the original voyage, on which the cocoa was shipped before the outbreak of war, was to Germany, though owing to the war it had been discontinued. — It seems to their Lordships that these circumstances would, if anything, rather lull than excite suspicion in the respondents of a substituted transit to Germany to be effected by getting the cocoa taken in the "Prins der Nederlanden" to a Dutch port, and there consigned to the Netherlands Overseas Trust.

The term penalty, however, though often mentioned (*e.g.*, in the *Commercen* at page 394), is not in this connection really one, which implies that the carriage of contraband is attended with the usual incidents of the commission of an offence. Neutrals who carry contraband do not break the law of nations ; they run a risk for adequate gain and, if they are caught, they take the consequences. If they know what they are doing, those consequences may be very serious ; if they do not, they may get off merely with some inconvenience or delay. This must suffice them. Having done their best to aid one belligerent by carrying contraband for him, they cannot ask that the other shall pay the penalty for his own success in defeating the attempt by rewarding the neutral carrier as if his venture had succeeded. That would be to encourage the carrying of contraband, whereas it is a thing to be deterred. Nor should ignorance of what he is doing be a safeguard to the carrier. If he is to be deterred, it must be made worth his while to know, in order that he may prefer to abstain.

It seems, therefore, to follow that, when freight is allowed, it is from the Court's view of fair dealing towards parties whose conduct is not open to blame, and it is refused in order to protect the effectual exercise of belligerent rights. Reasons of this kind seem founded rather in policy and discretion than in legal rule and legal right. There are many passages to be found in the reported decisions, which point in this direction. Thus if a neutral vessel is captured with enemy cargo she is discharged with full freight ; " no blame attaches to her ; she is ready and able to proceed to the completion of the voyage, and is only stopped by the incapacity of the cargo " (the *Fortuna*, Edw., 56, 57). " This rule was introduced for the benefit of the shipowners and to prevent the rights of war from pressing with too much severity upon neutral navigation " (the *Prosper*, Edw., 72, 76). On the other hand, Sir William Scott speaks of the whole law of contraband as a matter of the practice of the Court (*Jonge Tobias*, 1 C. Rob., 329), and implies that although the Court can relax, and has relaxed its practice in other directions in this respect, it will introduce no alteration (*Sarah Christina*, 1 C. Rob., 237), or only in very special circumstances (the *America*, 3 C. Rob., 36). Some difficulty, it is true, may be felt on the other side. The allowance of freight may be very fair to the neutral shipowner, and yet quite the reverse for the captors, at whose expense the freight will be found, whether charged on the proceeds of the prize or directly decreed against them. If captors have the right to prevent the cargo from reaching its destination, why must they pay for the exercise of that right ; why is not capture and condemnation to the neutral carrier what perils of the sea are, a risk of the adventure ? For practical purposes it is enough to say that such is the law of nations, as administered in Courts of Prize ; but the theory of it must be that the Court, endeavouring to hold an even balance between belligerent rights and the rights of neutral trade, requires that the captors' windfall shall suffer

some abatement under circumstances of legitimate carriage and will only adjudge the *res* in its hands to those who, in placing it there, have submitted to its jurisdiction, after fair consideration for those who lose by mere misfortune and without fault. Now a jurisdiction to do what is fair in the circumstances of a given case is essentially a jurisdiction, which is discretionary in its exercise. Long practice now forbids that discretion to be exercised so as to deprive shipowners of freight which has long been regularly allowed to them; but it is still open to the Court to make a discretionary allowance when circumstances are wholly exceptional.

On this reasoning their Lordships find it impossible to accede to the contention that there is never any jurisdiction to allow freight on contraband goods condemned. Not only would this overrule the *Neptunus* and falsify sundry passages which describe the disallowance of freight as usual, not as inevitable, but it would be inconsistent with the theory that the claim for freight rests rather on an appeal to the Court's duty of protecting neutrals than on a liability in the captors. Their Lordships are not minded to disclaim a jurisdiction, which may enable a Court of Prize to secure to neutrals in suitable cases a return for work done in the way of their trade and without circumstances of disregard of neutral obligations in the course of it.

At the trial the Procurator-General did not prove that the shipowners had any knowledge of the destination of the cargo, though there is some difference of opinion whether he admitted that they had none. The President was evidently satisfied that they were ignorant of it, and upon this and upon the advantage derived by the captors from the carriage of the goods, he decided to exercise his discretion in favour of allowing freight. Before their Lordships the claim put forward by the shipowners was a far-reaching one, for they claimed a right to freight, unless it could be shown against them that they knew they were carrying contraband. If so the owner of a general ship would rarely lose his freight, for captors could seldom hope to bring such knowledge home to him, considering how numerous and often how small are the separate parcels shipped, and in what haste they are often taken on board. In cases of continuous voyage a similar difficulty would arise even for entire cargoes, and such a rule would in the case of cargoes wholly or mainly contraband leave no middle term between forfeiture of the ship and release of it with an allowance of freight. It is not too much to require that shipowners should know both the contents of belligerents' proclamations as to contraband and the descriptions of the goods entered in their own manifests. How it might be, if contraband articles were fraudulently concealed in seemingly innocent packages or disguised by the shippers under a plausible misdescription, need not now be decided. The shipowner always has the remedy in his own hands, if he requires his freight to be prepaid, and the general practice in the late war to do so shows how available such a remedy is. Their Lordships, therefore, think that the exercise of

a discretion to allow freight on contraband ought not to turn merely on the question whether the shipowner knew or did not know the character of his cargo, still less that proof of his ignorance should be treated as a title to a decree for freight.

In the present case the shipowners rely, in addition to their ignorance, upon the candour with which they facilitated the task of the detaining officers, by giving early and regular notice of the parcels they were bringing forward from their different ports of call. Certainly their Lordships would not wish to belittle the assistance which such practices, if widely adopted, would give to the capturing power; but it would be idle not to observe that these timely intimations principally served to minimise delay to the line of steamers concerned, and to promote good relations between their owners and the British Government. Their Lordships are unable to find, either in this course or in the respondents' ignorance, or in their meritorious service in carrying the cargo to the place where it was captured, or in the combination of these circumstances, a sufficient foundation upon which, in accordance with the current of decisions, a discretion in favour of allowing freight could properly be exercised, and they therefore think that the learned President's decision was wrong. Having come to this conclusion, their Lordships think it undesirable to endeavour to indicate what circumstances would have justified an allowance of freight. As the question is essentially one of discretion, this ought to be decided in each case in the first instance by the judge of the Prize Court on the circumstances as they arise before him. It also makes it unnecessary to examine at length the two subsidiary points as to the freight on the return voyage by the "Lapwing" or the argument derived from the alleged continuing liability of Onnes and Son. As to the first, they think that the "Lapwing" brought back the goods to England as part of an arrangement to avoid delay to the "Prins der Nederlanden," and therefore for the benefit of the respondents. The overcarriage and return of the cargo could not benefit the captors. In no case, therefore, would they allow the "Lapwing's" freight. As to the second, even if Onnes and Son are still under a liability for freight, the circumstance seems to be irrelevant. If the captors ought to pay, it does not release them from liability that discharge of their obligation may prove an advantage to these very undeserving persons. On the other hand, viewing the refusal of freight as a matter of penalty, no one can regret it, if the shipowners prove to be able to mitigate the effect of it by enforcing a liability on Onnes.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed with costs, and that the decree made by the learned President should be set aside.



In the Privy Council.

*In the matter of part cargo ex steamship "Prins der
Nederlanden,"*

HIS MAJESTY'S PROCURATOR-GENERAL

vs.

KONINKLIJKE WEST INDISCHE MAILDIENST.

DELIVERED BY LORD SUMNER.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.
1921.