[IN THE COLONIAL COURT OF ADMIRALTY.]

1944 *Present:* **Howard C.J. (President).**

In Prize *1939—No. 1*

WILHELMSON *et al. v.* THE ATTORNEY-GENERAL.

PART CARGO *ex* m.v. "TARN".

Prize—Contraband of war—Lawful seizure—Claim for freight—Landing charges and agency fees—Compensation.

A vessel of Norwegian ownership sailed from Hong Kong and arrived at Colombo on September 25, 1939. Two days later, by a notice in writing, the Master and the local agents of the vessel were required to unship certain goods mentioned in the said notice on the ground that such goods were contraband of war. The agents complied with this request under protest and at the same time reserved any rights and claims arising from the action of the detaining officer.

The goods mentioned in the notice have been subsequently condemned and sold or released on bail.

It was now admitted by the claimants that the goods were in enemy ownership were contraband, destined for an enemy port and that the seizure was lawful.

In the present application the owners and the agents of the vessel claim (1) a certain sum on account of freight for the said goods, (2) other sums in respect of expenses incurred by them in unloading the said goods and in respect of agency fees due to the agents in connection with such unloading and detention.

Held, that the claimants were entitled to freight from the port of embarkation to Colombo but that they were not entitled to full freight from the port of embarkation to the port of destination, viz., Hamburg.

The claim for freight was referred for assessment of compensation to the Registrar, who should be guided by the following rule:—

Such a sum is to be allowed for freight as is fair and reasonable in all the circumstances, regard being had to the rate of freight originally agreed (although this is not necessarily conclusive in all cases), to the extent to which the voyage has been made, to the labour and cost expended, or any special charges incurred in respect of the cargo seized before its seizure and unlivery and to the benefit accruing to the cargo from the carriage on the voyage up to seizure and unlivery; but no sum is to be allowed in respect of inconveniences or delay attributable to the state of War or to the consequent detention and seizure.

***Held, further*, that the claim for agency fees could not be sustained.**

***Held, also*, that claims for expenses which amount to damages incurred through the putting into force of the Order in Council could not be sustained.**

THIS was an application by the owners and agents of part cargo shipped *ex* m.v. " Tarn " for freight and landing charges.

N. K. Choksy (with him *R. A. Kannangara* instructed by Messrs. F. J. & G. de Saram, Proctors), for the owners and agents.

M. W. H. de Silva, K.C., A.-G. (with him *M. F. S. Pulle, C.C.*, instructed by John Wilson, Proctor), for the Crown.

Cur. adv. vult.

February 1, 1944. HOWARD C.J.—

The vessel " Tarn " of Norwegian ownership, sailed from Hong Kong and arrived on September 25, 1939, at Colombo. On September 27, 1939, by a notice in writing the Master and Messrs. Volkart Brothers, the local agents of the vessel, were required to unship certain goods mentioned in the said notice on the ground that such goods were contraband of war. Volkart Bros. complied with this request under protest and at the same time reserved any rights and claims arising from the action of the detaining officer. The goods mentioned in the notice have subsequently been condemned and either sold or released on bail. This application is made by the owners and agents of the vessel who claim (1) a sum of Rs. 35,866.24 on account of freight for the said goods, (2) a sum of Rs. 10,028.56 in respect of expenses incurred by the owners and agents in unloading the said goods and in respect of agency fees due to the agents in connection with such unloading and detention. The details of this expenditure are set out in a statement marked " B " attached to the application of the claimants. It is not denied by the claimants that the goods were in enemy ownership, were contraband by virtue of *Gazette* Notice of September 8, 1939, and destined for an enemy port or that the seizure was lawful.

With regard to (1) the Attorney-General on behalf of the Crown concedes that the claimants are entitled to freight from the port of embarkation to Colombo. Mr. Choksy on the other hand maintains that, as the vessel was at the time of seizure in neutral ownership the claimants are entitled to full freight from the ports of embarkation to Hamburg, the port

of destination. In support of the contention that there is a distinction between British and neutral ships Mr. Choksy has referred me to various authorities. In the case of *The Juno*[1] it was contended by the claimants who were the owners of a British vessel that because, as in the case of neutral ships in former days, capture was said to be regarded as delivery, and full freight was given to neutral shipowners, so it should be given to British ship owners. With regard to this contention the President (Sir Samuel Evans) stated on pages 173-174 as follows:—

> " As to the second contention, a neutral vessel and a British vessel are not in the like case or condition. Even before the Declaration of Paris a neutral vessel had the full right to carry enemy goods into an enemy country subject to the risk of her detention by a belligerent for the purpose of seizing the goods, and this was the foundation of the principle which, generally speaking, secured to them their full freight.
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> It is needless to cite the many cases in which the doctrine was applied, or in which exceptions were made. But I will quote from two of the latest cases in which Lord Stowell dealt with the matter, and laid down the principle. In *The Fortuna*[2] ' The general principle has been stated very correctly, that where a neutral vessel is brought in, on account of the cargo, the ship is discharged with full freight, because 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 '. And in *The Prosper*[3] ' In this Court it is held, that where neutral and innocent masters of vessels are brought into the ports of this country; on account of their cargoes, and obliged to unliver them, they shall have their freight, upon the principle that the non-execution of the contract, arising from the incapacity of the cargo to proceed, ought not to operate to the disadvantage of the ship. 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 '.
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> Since the Declaration of Paris, and indeed before that, by the practice adopted in the Crimean War, neutral vessels laden with enemy goods could not be prevented from continuing their voyages and so earning their freight except where the goods were contraband, or where the pursuit of the voyage would amount to a breach of blockade; and in these cases no freights would be allowed.
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> With British vessels it is quite otherwise. They must not carry enemy goods, nor proceed on voyages for which such goods were shipped. In the present case there was accordingly an ' incapacity to proceed ' attributable not only to the cargo, but also to the ship."

It will be observed that in the case of *The Juno* the goods condemned were not contraband, but merely enemy goods and that in the passage I have cited from his judgment the President stated that " neutral vessels laden with enemy goods could not be prevented from continuing their voyages and so earning their freight *except where the goods were contraband* ". In the case of *The Fortuna*[4] the ship was seized but the goods were not contraband. No question of freight in connection with

1 *(1916) P.D. 169.*
2 *(1809) Edw. 56, 57 ; 2 Eng. P.C. 17, 18.*
3 *165 E.R. 1031.*
4 *(1809) Edw. 72, 76 ; 2 Eng. P.C. 25, 26*

contraband cargo arose also in the cases of *The Prosper*[1] and *The Bremen Flugge*[2] which were also cited by Mr. Choksy. In the case of *The Katwijk*[3] a Dutch vessel was carrying iron ore from Bilbao in the North of Spain destined for Krupps works at Essen under a Bill of Lading making the cargo deliverable at Rotterdam to the order of a Dutch firm, said to be agents of Krupps. On September 19, 1914, the vessel was stopped in the English Channel and sent to Portsmouth for examination and then to Middlesborough where she was released after discharging her cargo which, on October 4, had been siezed as prize. Iron ore was declared contraband on September 21, 1914. The President (Sir Samuel Evans) in his judgment held that he could see no reason for depriving the owners of this neutral vessel of such freight as ought, in all the circumstances of the case, to be given to them. He also held that the amount of freight would be decided upon reference to the Registrar and merchants, regard being had to all the circumstances, some of which he had pointed out in the case of *The Juno* (*supra*). It will be observed that the President did not hold that the owners were entitled to full freight. The following passage from the judgment of the President in *The Corsican Prince*[4] with regard to the principle to be applied is also in point:—

"The Prize Courts have constantly dealt with claims for freight and damages where ships or cargoes have been captured or seized, not only as between captors and owners, but also as between owners of ships and owners of cargo; and have adjudicated upon such claims whether the ship or cargo had been released, and when both ship and cargo had been released; and, apparently, no actions involving those questions in similar cases were brought in any common law Court, and this is obviously for grounds solid in justice and convenient in practice; because the two Courts administer two different codes or systems of law; the Prize Courts deal with claims in accordance with the law of nations, and upon equitable principles freed from contracts, which almost always cease to have effect upon capture or seizure, by reason of the non-performance or non-completion of the contract of affreightment; whereas common law Courts would only determine the consequences of the strictly legal contractual obligations of the parties. The King's Bench Courts would either give the claimants for freight the whole or nothing according to whether the contract of affreightment had been performed or not; but the Prize Court takes all the circumstances into consideration, and may award, as it has done in decided cases, the whole, or a moiety, of the freight, or a sum *pro rata itineris* or it may discard the contract rate altogether, even as a basis for assessment or calculation (see *The Twilling Riget*[5]); or it may withhold or diminish the sum by reason of misconduct, as *e.g.*, by resistance to search, or spoliation, or non-disclosure of papers."

The Prize Court is not, therefore, concerned with the contract of affreightment made between the parties.

Again in the case of *The Stigstad*[6] Lord Sumner approved of the principle laid down by the President in the case of *The Juno* (*supra*) that "fair

[1] *165 E.R. 1038.*
[2] *165 E.R. 546.*
[3] *(1916) P.D. 177.*
[4] *(1916) P.D. at p. 202.*
[5] *(1804) 5 C. Rob. 82.*
[6] *(1919) A.C. 279.*

freight must be paid to the claimants having regard to the work which they did ". In his judgment Lord Sumner at page 290 stated that " presumably that sum took into account the actual course and duration of the voyage and constituted a proper recompense alike for carrying and for discharging the cargo under the actual circumstances of that service ". In the case of *The Heim*[1] and *The Sorfareren*[2] the principle laid down by the President in *The Juno* and approved by the Privy Council in *The Stigstad* was followed. Both, *The Heim*, *The Stigstad* and *The Sorfareren* were cases of neutral shipowners.

Having regard to the various decisions to which I have referred I hold that the whole freight claimed by the claimants ought not to be allowed. What part should be allowed I refer to the Registrar who should in making his assessment be guided by the following rule:—

> Such a sum is to be allowed for freight as is fair and reasonable in all the circumstances, regard being had to the rate of freight originally agreed (although this is not necessarily conclusive in all cases), to the extent to which the voyage has been made, to the labour and cost expended, or any special charges incurred in respect of the cargo seized before its seizure and unlivery, and to the benefit accruing to the cargo from the carriage on the voyage up to the seizure and unlivery; but no sum is to be allowed in respect of any inconveniences or delay attributable to the state of war or to the consequent detention and seizure.

With regard to the claims made in statement " B ", Item (1) " Customs over-hour dues " is not pressed by Mr. Choksy. Item (6) " Landing into Warehouse German Cargo " is conceded by the Attorney-General to be due to the claimants. Mr. Choksy has stated that item (5) refers to the charge paid for the hire of lighters to convey the goods from the ship's side to the wharf. In these circumstances this item is also conceded by the Attorney-General. Item (2) " Discharging German Cargo ", item (3) " Shifting and restowing in hatch " and item (4) " Shifting into lighters and reloading " all refer to expenses which have been incurred in separating the contraband goods from the rest of the cargo and unloading it at Colombo in accordance with the directions of the detaining authority. The question of the reimbursement of expenses that have been thrown upon the shipowner has been considered in some of the cases that I have already cited in this judgment. In his judgment in *The Heim* (*supra*) at page 241 the President stated as follows:—

> " And if there have been thrown upon the shipowner expenses, for instance, which would otherwise have been thrown upon the cargo owner, they must be paid by the cargo owner when he gets his cargo, because he is getting relieved of expenses which he would otherwise have had to pay. Any expenses which the shipowner has incurred, as it says in the passage I have read, ' for carrying and discharging the cargo under the actual circumstances of that service ' must be taken into account in arriving at the proper recompense for carrying and discharging it under those circumstances. To those I think he is clearly entitled."

[1] *(1919) P.D.237.*

[2] *British and Colonial Prize Cases, Vol. 1, p. 589*

In the case of *The Stigstad* (*supra*) the vessel was ordered to Leith and then to Middlesborough for discharge. A claim was put forward for expenses consequent upon this seizure and the discharge at Middlesborough afterwards. These expenses included special agency fees at Middlesborough. With regard to the claim for such expenses Lord Sumner at pages 283-284 stated as follows:—

> "That part of the claim which relates to the ship's being ordered to call at Leith and the claim for expenses incurred there are claims for damages for putting in force the above-named Order in Council, for it is not suggested that the Order to call at Leith, and thence to proceed to Middlesborough, was in itself an unreasonable way of exercising the powers given by the Order. The small claim for fees at Middlesborough seems to relate to an outlay incident to the earning of the freight which has been paid, and was covered by it; but, if it is anything else, it also is a claim for damages of the same kind. 'Damages' is the word used by the President in his judgment; and although it was avoided and deprecated in argument before their Lordships, there can be no doubt that it, and no other, is the right word to describe the nature of the claims under appeal."

Again at page 290 His Lordship, before deciding that such a claim cannot be sustained, stated as follows:—

> "The further claims are in the nature of claims for damages for unlawful interference with the performance of the Rotterdam charter-party. They can be maintained only by supposing that a wrong was done to the claimants, because they were prevented from performing it, for in their nature these claims assume that the shipowners are to be put in the same position as if they had completed the voyage under that contract, and are not merely to be remunerated on proper terms for the performance of the voyage, which was in fact accomplished. In other words, they are a claim for damages, as for wrong done by the mere fact of putting in force the Order in Council."

Claims to items (2), (3) and (4) in statement "B" amount to a claim for damages incurred through the putting into force the Order in Council declaring the goods that were seized and hence cannot be sustained. The same principle was also formulated in *The Tredegar Hall*[1] the headnote of which is as follows:—

> "As indicated in the judgment in *The Juno*, British shipowners, in war time, are not permitted to claim for any delay or inconvenience incurred by reason of the diversion or detention of their vessel for the purpose of seizure and making unlivery of confiscable enemy property. The loss (if any) to the shipowner results from the war and must be submitted to, just as he is not entitled to bring into the estimation of the freight any alleged excess in the cost of discharging at the port at which the vessel actually delivered the cargo, and the cost at the port to which she was originally destined."

Items (7), (10), (11) and (12) refer to out-of-pocket expenses incurred by the agents and item (9) refers to agency fees. None of these expenses would be incurred by the owner of the cargo if it had been discharged at the

[1] *(1916) P.D. 217.*

port of destination. The items refer to expenses incurred as the result of the war and cannot therefore be sustained. In *The Stigstad* (*supra*) Lord Sumner has expressly held that agency fees cannot be recovered.

There remains only the question of costs. This question I reserve pending the report of the Registrar on the amount due to the claimants in respect of (*a*) freight and (*b*) items (5) and (6) in statement " B ".