[COLONIAL COURT OF ADMIRALTY.]

1941 *Present* : **Moseley S.P.J.**

IN PRIZE-GOODS *ex s.s.* "MARO Y".

In the matter of the claim of the Master and Owners of the Vessel dated August 15, 1940.

And

In the matter of the claim of the Shippers and of the Hongkong and Shanghai Bank dated May 21, 1941.

Restraint of Princes—Goods seized as contraband—Vessel bound from Saigon to Marseille—Chartered by French Company—Claim of owners to freight—Proceeds of sale claimed by shippers—Charter-party.

A vessel whose owners were of Greek nationality was chartered in London by a French Company to proceed to Saigon and load a cargo of rice and from there to proceed to Marseille *via* the Suez Canal and discharge the cargo there.

The vessel was accordingly loaded at Saigon and put to to sea on June 7, 1941. At that time, France was an ally, and the ship, claiming Greek nationality was neutral. The vessel arrived at Colombo on June 19, and on June 21 the Master applied to the naval authorities for clearance *via* Suez which was refused.

On July 5 the Master was informed by the naval authorities that if he proceeded on the intended voyage he would be required to proceed to a British port where his cargo would be taken as contraband.

The Master, thereupon, decided on the instructions of the owners to sell the cargo at Colombo ; but on the same day the cargo was seized by the lawful authority as contraband of war.

At the instance of the Crown a writ for the condemnation of the cargo as good and lawful prize was issued. The cargo was thereupon sold and realized a sum of Rs. 626,683 of which a sum of Rs. 70,000 was paid to the Master on account of freight. The balance was in Court.

The present proceedings were instituted by way of motions, firstly by the shippers and the Hongkong and Shanghai Bank for release to them of the proceeds of sale, and secondly by the owners and the Master opposing the release till the full freight had been paid.

Held, that the continuation of the voyage was rendered impossible through the restraint of princes.

Held. further, that the owners were not entitled to the full freight which would have been due to them had the vessel reached the port of destination.

Freight to the amount of the voyage completed could only be claimed upon an agreement, express or implied.

In the absence of such an agreement the only satisfaction which the owners and the Master may be granted is that which may be deemed proper by a rational application of fair and equitable considerations.

CASE heard before the Colonial Court of Admiralty. The facts appear from the head-note.

E. G. P. Jayetilleke, K.C., Attorney-General (with him *M. F. S. Pulle, C.C.*) instructed by *John Wilson*, Proctor, Agent for His Majesty's Attorney-General.

H. V. Perera, K.C. (with him *E. B. Wikremanayake*) instructed by *Messrs. D. L. & F. de Saram*, Proctors, for the Master and Owners.

N. Nadarajah (with him *E. F. N. Gratiaen*) instructed by *Messrs. Julius & Creasy*, Proctors, for the Shippers.

E. F. N. Gratiaen instructed by *Messrs. Julius & Creasy*, Proctors, for the Hongkong and Shanghai Banking Corporation. The Custodian of Enemy Property (*A. G. Ranasinha*) is also present on notice. *M. F. S. Pulle, C.C.*, watches his interests.

Cur. adv. vult.

October 29, 1941. MOSELEY S.P.J.—

For the facts of this case, I have had to depend upon the averments contained in an affidavit sworn by the master of the "Maro Y" for the purposes of another application and upon the documents put in by Counsel for the respective parties.

On April 13, 1940, Messrs. Yannoulatos Brothers, Ltd., the owners of the vessel, entered into a charter-party with the Services Economiques Francais de Londres, whereby the vessel was to proceed to Saigon and there load a cargo of rice of a quantity within certain limits and to

proceed, *via* the Suez Canal, to Marseille and there to discharge the cargo. The freight was agreed at 110 shillings per ton and was expressed, in the charter-party, to be paid in sterling in London on telegraphic advice that Bills of Lading had been signed. The vessel accordingly loaded at Saigon and put to sea on June 7. The Bills of Lading, twenty-three in number, had been signed on various dates between May 28 and June 5, and advice thereof was cabled to London on June 6. At that time France was an ally, and the ship, claiming Greek nationality, was neutral. The vessel arrived at Colombo on June 19, and on the 21st the Master applied to the naval authorities for clearance *via* Suez, which was refused. Cablegrams passed between the master and owners relative to the possibility of the vessel proceeding to Madagascar with a view to discharging the cargo there. By July 4. the owners appear to have changed their minds and cabled the Master that since the freight had not been paid in terms of the charter-party, he should apply to the naval authorities to obtain a clearance for Suez, or. failing that. he should apply to the "Colombo Tribunals" for permission to sell the cargo with a reserve sufficient to cover the full freight and detention charges. On July 5 the Master applied accordingly to the naval authorities and was handed a letter signed by the Naval Control Service Officer in which he was informed that, if he wished to proceed to Marseille he would be required to proceed into a British Port either at Aden or elsewhere, and that there the cargo of rice would be " taken as contraband." The Master thereupon decided to sell the cargo at Colombo, but on the same day the cargo was seized by the local authority as contraband of war. At the instance of the Crown a writ for the condemnation of the cargo as good and lawful prize was issued. The writ was subsequently amended by the addition of a prayer for an order for the "detention and/or sale" of the cargo. The cargo had, prior to the amendment, been sold and realized a sum of Rs. 626,583. Of this amount a sum of Rs. 70,000 has been paid out to the Master on account of freight. The balance is now in Court.

On September 6, 1941, the agent for the Attorney-General gave notice of discontinuance. This notice has now been withdrawn. The present proceedings are by way of two motions, firstly by the shippers and the Hongkong and Shanghai Banking Corporation for release to them of the proceeds of sale, and secondly by the owners and Master of the vessel, opposing the release to the above-mentioned claimants until freight has been paid, and asking for an order for payment of such freight. The position taken up by the Attorney-General is that he consents to the release of the proceeds of the sale to non-enemy claimants upon ownership being established, subject to the rights of the shipowners at the date of the seizure. It should be mentioned that the Hongkong and Shanghai Banking Corporation appear in the matter as the indorsees of Bills of Lading in respect of three out of the twenty-three lots of rice.

The owners and Master claim the full freight agreed to be paid in article 3 of the charter-party, that is to say, £35,392 10*s*. less the sum of Rs. 70,000 which has been received out of Court from the proceeds of the

sale of the rice. Their Counsel, in the first place, relied upon the terms of the charter-party and particularly upon article 10 thereof which exempts the owners from liability for loss and damage caused by the usually "excepted perils". He contends that the abandonment of the voyage by the Master was due to restraint of princes; and that, although the abandonment took place before the seizure of the cargo, it was impossible in the circumstances to continue the voyage. Counsel relied upon the case of *Nobel's Explosives Company v. Jenkins and Company*[1] where it was held that the risk of the cargo being seized, if attempted to be carried further, amounted to restraint of princes. In the case of *Becker, Gray and Company v. London Assurance Corporation*[2], cited by Counsel for the shippers. where the Master of a vessel had been advised by the Admiralty that she should be in peril of capture, had she proceeded on her voyage, and he had put into a neutral port to avoid that risk the Master's action was attributed by Lord Sumner to self-restraint and not to restraint of princes. No doubt it is true that in that case the Master was influenced by the opinion of the Admiralty, but it seems to me that in the present case the Master had been provided with something more than an opinion. He had been informed in no uncertain terms that if he proceeded on the intended voyage he would be required to proceed to a British Port where his cargo "will be taken as contraband". It seems to me that in this respect the Master of the "Maro Y" was in at least as strong a position as the Master of the vessel in *Nobel's Explosives Company v. Jenkins and Company* (*supra*). I hold therefore that the continuation of the voyage was rendered impossible owing to restrain of princes.

What, then, are the rights of the Master and owners in these circumstances? Under article 3 of the charter-party the full freight was to be paid in sterling in London on telegraphic advice that Bills of Lading had been signed. The advice was telegraphed on June 6. Is the position of the parties to be regulated by the terms of the charter-party, or of the Bills of Lading, or of the former read with the latter. The charter-party was entered into between the owners and the charterers; the Bills of Lading are signed by the Master on the one side and the individual shippers on the other. In the charter-party the charterers are described as "agents for Merchants" and while that description is extremely vague, it will be observed that the freight agreed to be paid per ton is the same in the Bills of Lading as in the charter-party which, it is argued, indicates that the charterers were acting as agents for the shippers. Moreover, it would appear that the charterers had in mind the quantity of rice that was subsequently shipped. Even so, it does not seem to me that there is any satisfactory evidence which would lead me to the conclusion that the charterers were in fact the agents of the individual shippers whose names appear as signatories to the Bills of Lading in consequence of which position the shippers would be bound by the terms of the charter-party. There is no reference to the charter-party in the Bills of Lading. Nor has it been shown that the shippers were aware of the existence of the charter-party.

[1] *(1896) 2 Q. B. D. 326.*

[2] *(1918) A. C. 101.*

Carver's Carriage by Sea (7th edition), section 160, page 245, deals with such a position as follows :—

"When the bills of lading are in the hands of strangers to the charter-party, either as original shippers or as indorsees to whom the property has passed, they show the contract under which the goods are being carried; and the shipowner's claims, exemptions, and liens on the cargo, given by the charter-party, are not preserved as against such shippers or indorsees, except so far as those terms of the charter are expressly incorporated in the bill of lading."

In the circumstances of the present case it follows that article 3 of the charter-party merely provides, as between the charterers and owners, for the time and manner at and in, which freight shall be payable. Counsel for the owners, however, contends that the same result is reached if one applies the terms of the Bill of Lading. The relevant articles of the latter are as follows :—

"*Article 10.*—Freight payable in advance or at destination is earned by the Company whatever may be the fate of the ship or the goods.

Article 11.—By mutual agreement, the captain has liberty to discharge the goods at the nearest port, at his opinion, where the voyage shall be ended and freight earned, shippers having no right to claim for compensation for delay, in the event of there being any impossibility to deliver them at port of destination by reason of blocus, bad weather, restraints of princes, strikes and/or lock-out, epidemic diseases, exposing the steamer to the delivery of a foul bill of health, or yet by cause of postal necessities, obligations of the Company services, governmental requisitions or any other case of force majeure.

In case of quarantine or sanitary orders, all expenses therefrom relative to goods will be reimbursed to the captain."

To the printed form of the Bills of Lading there is an addendum dated September 2, 1939, as follows :—

"By extension, as necessary, of the liberties already expressed or implicitly included in the present Bill of Lading, the ship is entitled, on consideration of the international events, to alter the customary and proposed routes, the ports of call, transhipment, discharge or destination.

Everything done by reason of what is specified herebefore, or in order to satisfy same, not to be regarded as constituting a deviation and neither the Master nor Owners are to be held responsible for loss, damage, or expenses which may result therefrom, directly or indirectly."

It is contended against the owners and Master that the latter is not entitled to seek the protection of the terms of the Bills of Lading inasmuch as it does not appear from his affidavit that he directed his mind thereto. Moreover, it would appear, it is said, that the only contract considered by the owners and Master was that contained in the charter-party. The cabled instructions of the owners to the Master dated July 4 were on the footing that freight had not been paid as provided by the charter-party. It is conceivable that circumstances might exist in which it

would be possible for the Master of a ship to show that, although he in fact followed a procedure authorized by a charter-party, such procedure was also within the terms of the Bill of Lading. In the present case, however, the Bills of Lading do not confer upon the owners a lien for freight, such as it was the Master's intention to exercise by virtue of article 10 of the charter-party. It was not therefore the Master's intention, in the contemplated selling of the cargo to recover freight, to exercise any power conferred upon him by the Bills of Lading.

The Bills of Lading provide that freight is payable at destination, which he expressed to be Marseille. Counsel for the owners argues that in accordance with the terms of the addendum to the Bill of Lading dated September 2, 1939, the ship was entitled "on consideration of the international events" to alter the port of destination, and that in fact the Master did so, and made Colombo the port of destination. This seems to be a necessary corollary to my finding that the continuance of the voyage was rendered impossible by restraint of princes.

It seems to me that the Master's conduct thereafter must be regulated by article 11 of the Bill of Lading. He was entitled to discharge the cargo at Colombo. Such action, with the object of placing the goods in safe custody, was approved in *Nobel's Explosives Company v. Jenkins and Company*[1]. That, however, was not the avowed object of the Master in the present case.

Counsel for the Bank was inclined to put the case against the Master even more strongly than was Counsel for the shippers. He viewed the action of the master as a voluntary abandonment of the voyage with the intention of performing an illegal act. In such circumstances, he argued, articles 10 and 11 of the Bills of Lading do not apply. I have already expressed my opinion that the discontinuance of the voyage was due to Restraint of Princes, and that articles 10 and 11 of the Bills of Lading apply. The point for immediate decision is, upon consideration of these articles, to what extent, if any, the Master and owners are entitled to recover freight from the fund in Court. The articles in question since they introduce conditions in favour of the owners and Master must be construed strictly against them. Under article 11 the Master, in certain circumstances, was entitled to discharge the cargo at the nearest port, say Colombo, where "the voyage shall be ended and freight earned". He did not, however, discharge the cargo at Colombo. He cannot therefore take advantage of the provisions of article 11. Article 10, however, seems at first glance to place the matter on a different footing. Counsel for the shippers argued that in the absence of compliance with article 11, the owners and Masters cannot set up article 10 in their favour. Under this article freight payable at destination, as I have held it to be here, is "earned", ship lost or not lost. In *The Great Indian Peninsula Railway Company v. Turnbull*[2] where the vessel was lost through negligence in navigation it was held that money paid in respect of freight advanced could be recovered. This decision is cited by Scrutton ((14th edition) page 395, footnote (*j*)) as authority for the proposition that the clause "ship lost or not lost" only refers to losses through "excepted perils". As Counsel for the

[1] (*1896*) *2 Q. B. D. 326.*

[2] *53 L. T. 325.*

shippers put it, the position has arisen, not from the circumstances which rendered impossible the continuation of the voyage, but from the Master's decision to carry out the instructions of the owners. This decision has been described by Counsel for the Bank as a decision to perform an illegal act. The alleged illegality is on the footing that no lien for freight was in existence at the time of the proposed sale. I have already indicated my view that the lien conferred by the charter-party is inoperative as against the shippers who were not parties thereto. What is the position in regard to the lien by common law? In *The Prins Der Nederlanden*[1] Lord Sumner held that the carrier's lien was determined when the goods came into the marshal's hands. That being so, it would seem that the Master's lien, if any, ceased at the time of seizure. Construing article 10 strictly against the owners and Master, as I feel I must do, I do not think that in the circumstances the freight can be said to have been earned.

Freight proportional to the amount of voyage completed can only be claimed if an express or implied agreement to that effect exists. In *St. Enoch Shipping Company, Limited v. Phosphate Mining Company*[2] where the completion of the voyage was impossible, it was held that the shipowners were not entitled to the freight, either in whole, since they had not completed the voyage, or in part, since no new contract to give and take delivery at a port short of the original destination could be inferred. I can find no circumstances, in the present case, from which such an agreement may be implied.

It seems therefore that the only satisfaction, which the owners and Master may be granted by this Court, is that which may be deemed proper "by a rational application of fair and equitable considerations". The quotation is from the judgment of Sir Samuel Evans P. in *The Juno* (1916—p. 169) where the learned President went on to say "The Prize Court has always claimed to exercise equitable jurisdiction, using that term in its broadest sense, and not in its more technical Chancery meaning". In a later judgment, viz., *The Iolo* (1916—p. 206), Sir Samuel Evans quoted Lord Stowell as saying in the case of *The Friends*[3] "If the incapacity of completing the voyage could be *exclusively*" (the italics are mine) "attributed to one of the parties, it would be proper that the loss would fall there; but the fact is that the calamity is common to both, for both ship and cargo were equally effected by the blockade . . . . I think therefore that the loss should be divided."

There is no evidence before me upon which I can assess the amount of freight which ought to be allowed in the present case. I have been given to understand that there will be little difficulty in the way of the parties arriving at an agreement on this point. I propose, therefore, to refer the matter to the Registrar and the parties in order that the appropriate amount may be ascertained. The report of the Registrar will then come before me for confirmation or such order as the circumstances may require.

I make no order as to costs.

[1] *(1921) A. C. 754 at 759.*

[2] *(1916) 2 K. B. D. 624.*

[3] *2 Eng. P. C. 48.*