THE STARLENA
S. M. Seruya Ltd. v Owners of the M.V. Starlena

Supreme Court
Flaxman, C.J.
10 - 17 December 1958

Shipping — meaning of "unseaworthy" — lack of tonnage as unseaworthiness.
Shipping — duty of owners of vessel to show diligence to make her seaworthy.
Carriage of goods by sea — exempted perils — arrest or restraint of princes —
Carriage of Goods by Sea Ordinance, Sch. art IV (2).

The defendants accepted for carriage by sea in their motor yacht Starlena a cargo of 300 cases of cigarettes. The cargo was to be taken from Gibraltar to Mallorca for delivery to an Italian naval vessel. When the yacht arrived at Mallorca, the cargo was confiscated by the Spanish authorities on the ground that the regulations prohibited the carrying of tobacco by any ship of less than 100 tons. It was accepted that the Starlena was not of that tonnage.

The shippers (the plaintiff company) claimed damages on the grounds that the Starlena was unseaworthy and that they had been induced to enter into the contract of carriage by fraudulent misrepresentation.

Held: (i) The fact that the yacht's tonnage made it inevitable that the cargo would be confiscated meant that for the purpose of the contract the yacht was unseaworthy.

(ii) The defect was in the yacht, not in the cargo, and the defendants failed to show due diligence to make her seaworthy for the carriage of the cargo, as required by the Carriage of Goods by Sea Ordinance (Cap. 17, 1964 Ed.).

(iii) It had not been shown that the Spanish authorities acted illegally in seizing the cargo or that the seizure constituted "arrest or restraint of princes," etc.

(iv) The burden of proving fraud had not been discharged.

Note. The Carriage of Goods by Sea Ordinance (Cap. 17, 1964 Ed.) was repealed and replaced by the Carriage of Goods by Sea Ordinance, 1977 (Ord. 25 of 1977) Art. IV (2) of the Schedule is unchanged.

Cases referred to in the judgment

Derry v Peek, (1889) 14 App. Cas. 337.
Angus v Clifford, [1890] 2 Ch. 449.
Ciampa v British India Steam Navigation Co. Ltd., [1915] 2 K.B. 775.
Bradley (F.O.) and Sons Ltd. v Federal Steam Navigation Co. Ltd., (1927) 17 Asp. M.L.C. 265.
Perlak Petroleum Maatschappij v Deen, [1924] 1 K.B. 111.
Concha v Murrieta, (1889) 40 Ch. D. 543.
Miller v Law Assurance Insurance Co., [1902] 2 K.B. 694.
Dunn v Bucknall Bros., [1902] 2 K.B. 614.

Action

This was an action in rem by the shippers of cargo to recover damages from the ship for loss of the cargo.

J.J. Triay and J.E. Triay for the plaintiff.
P.J. Isola for the defendants.
Miss P. Benady on watching brief.

27 January 1959: The following judgment was read—

This is an unusual case, and is not without difficulty. The plaintiffs' claim is for damages occasioned by the loss of a cargo of 300 cases of American cigarettes which the defendants agreed to carry from Gibraltar to Palma in Mallorca for delivery to the plaintiffs' agents for delivery to the captain of the Italian naval vessel Bombarda. It is common ground that on the arrival of the carrying vessel, the defendants' yacht Starlena, the consignment was seized and confiscated by the Spanish customs authorities because of an alleged breach of a regulation prohibiting the arrival at a Spanish port of a ship of less than 100 tons nett carrying tobacco in transit.

The plaintiffs are a company carrying on business in Gibraltar as retail tobacconists and importers and exporters of tobacco, cigars and cigarettes, perfumery and other goods. I think it proper to emphasize at this early stage of my judgment that there was no intention on either side to attempt any evasion of the customs laws of Spain. The shipment was a perfectly open one, and in fact the plaintiffs arranged a similar shipment to a foreign warship lying in the port of Barcelona in 1957, without demur from the Spanish customs authorities. The sole reason for the action of the latter in this case was that the Starlena is a vessel of under 100 tons nett and this fact is at the heart of this dispute.

The plaintiffs' claim for damages is based on the allegations that the Starlena was unseaworthy and unfit for the carriage of the cargo of cigarettes, and that their agreement to the shipment was induced by the fraudulent misrepresentation of the defendants' agents in Gibraltar, the Verano Steamship Co. Ltd. It is also asserted that before the beginning of the voyage the defendants failed to exercise due diligence to make the ship seaworthy or fit to carry the cargo, and that the loss was occasioned by this failure.

The defendants deny the allegations of fraud and lack of diligence. They claim that it was an express condition of the shipment that the plaintiffs should make all the necessary arrangements to enable the Starlena to deliver the cargo to the plaintiffs' agents in Palma in Mallorca, and that they failed in this obligation. They deny that the ship was unseaworthy or unfit for the carriage of the goods, and whilst admitting that the cargo was seized by the Spanish Customs, assert that this seizure was illegal; alternatively that the seizure was an arrest or restraint of princes, rulers or people, and that in either of these events they are not liable for the loss.

There is also a counter-claim for damages for loss incurred by the failure of the plaintiffs to make the necessary arrangements for the reception of the cargo at Palma, and for consequential loss arising from the arrest of the vessel in the course of the proceedings in rem instituted against her. The plaintiffs join issue on the counter-claim.

I think the four main issues calling for consideration are (a) was there fraudulent misrepresentation on the part of the defendant's agents, (b) was there a failure on the part of the defendants to exercise due diligence to ensure that the Starlena was seaworthy and fit to undertake the carriage of the cigarettes, (c) was the action of the Spanish customs authorities in seizing the cargo an unlawful one, or an arrest or restraint of princes, rulers or people, and (d) was the seizure due to any omission on the part of the plaintiffs.

The burden of the proof of the allegations of fraudulent representation and lack of due diligence rests with the plaintiffs. The evidence relating to these two issues necessarily overlaps to some extent, but I will deal first with the question of deceit. With regard to the law on this subject I have inevitably been referred to the House of Lords decision in *Derry v Peek* [1].

In that case, and in the course of a consideration of what amounts to fraud, Lord Herschell said [2]

> "fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it is true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief."

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[1] (1889) 14 App. Cas. 337. [2] At p. 374.

It also may be relevant to this present case to quote two later passages from the same judgment [1].

> "In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds. .....the whole current of authorities....shews to my mind conclusively that fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed."

> "At the same time I desire to say distinctly that when a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The grounds upon which an alleged belief was founded is a most important test of its reality. .....if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false."

Before endeavouring to apply these most authoritive statements of the law to the present case I think I should refer to the later case of *Angus v Clifford* [2], in the course of which Lindley L.J. stated [3], in referring to *Derry v Peek,*

> "when you read the whole of that part of the judgment you must take the observations on page 374 as to what is said about proof of fraud, as subject to this, that the matter to be inquired into is, fraud or carelessness. If it is fraud, it is actionable, if it is not fraud but merely carelessness — it is not. The passages about knowledge — knowingly making it, and making a statement without believing its truth, are based upon the supposition that the matter was really before the mind of the person making the statement, and, if the evidence is that he never really intended to mislead, that he did not see the effect, or dream that the effect of what he was saying could mislead, and that that particular part of what he was saying was not present to his mind at all, that I should say is proof of carelessness rather than of fraud.
> .....After *Derry v Peek* an action of this kind cannot be supported without proof of fraud, an intention to deceive, and that it is not sufficient that there is blundering carelessness, however gross, unless there is wilful recklessness, by which I mean wilfully shutting one's eyes, which is of course fraud."

With the above, and other authorities, in mind I now proceed to find on the facts relating to this part of the case. The plaintiffs' contention is that in answer to a specific inquiry by Mr. Solomon Seruya, a director of the company, he was verbally assured by Mr. Frederick Andlaw, managing director of Verano Steamship Co. Ltd., the defendants' agents, that the Starlena could carry the cargo of tobacco "without any snags or difficulties with the Spanish authorities". Mr. Seruya has given evidence to this effect, adding that it was agreed that Mr. Andlaw would arrange for the

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1 At pp. 375, 376.
2 [1890] 2 Ch. 449.
3 At pp. 466, 469.

necessary visa (to be issued by the Portuguese Vice Consul in the absence of Spanish Consular representation in Gibraltar) and for the preparation of the manifest, whilst his firm would prepare the bill of lading. These various documents were in fact arranged for as agreed, and there is no dispute as to that point. In fact it may fairly be said that as far as documentation was concerned there was no fault in the transaction.

But Mr. Andlaw, whose evidence was taken in hospital by the court whilst he was awaiting a serious operation, denies the alleged assurance. His version is that following an enquiry by one of the plaintiffs' employees he enquired of the master if he would take the cargo. The master was prepared to do so provided all was "above board", the necessary documents produced, and the owners agreed. He says that he saw Mr. Seruya on the next day and informed him of this, and that Mr. Seruya, who was very anxious for the cigarettes to arrive in Palma by a certain date, agreed. He denies, with as much emphasis as Mr. Seruya asserts, that he gave any assurance whatsoever, or that there was any word of possible "snags" in Gibraltar or with the Spanish authorities.

There is thus a complete conflict of evidence on a material point, and I am left with the question of credibility, and of such implications as may be drawn from the surrounding evidence.

Mr. Seruya impressed me favourably in the witness-box. I feel convinced that he sought and obtained an assurance from Mr. Andlaw, substantially in the terms he asserts. Reason supports this. He was not dealing with the agent of a vessel commonly calling at this port, but with an unknown quantity, and with an agent in whom, rightly or wrongly, he had not full confidence. As a tobacco exporter he was fully aware of the need for particular caution when making a shipment to a monopoly country. He had done this before, and on this occasion he followed his normal business procedure in preparing the bill of lading and in insuring the cargo against "all risks". He did his part, and it does not seem to be unreasonable or unlikely that he wished to ensure that the other party would do theirs, even though there was some urgency in the situation. His evidence as to the conversation with Mr. Andlaw is supported by his firm's accountant, Mr. Morello, who also impressed me favourably, and his conduct subsequent to the loss was quite consistent with his version of the affair.

I have not the same confidence in the evidence of Mr. Andlaw, although I make no suggestion that he deliberately failed to tell the truth. A good deal of time has elapsed since the interview, when of course the consequences were not foreseen, and the impression I have gained is that he was not particularly interested in the transaction. Certainly he stood to gain little except goodwill. He saw the master, and it seems that he passed on the substance of the conversation to Mr. Seruya, stating the requirements on the carrier's side. These requirements were in fact met by the plaintiffs, but this in no way precludes the possibility that Mr. Seruya on his part asked for assurances and obtained them. On the available information Mr. Andlaw may well have felt justified in giving them, for I think the one

obvious and sure fact in this case is that neither party for a moment considered the possibility of the seizure of the cargo by the Spanish authorities on the grounds of lack of tonnage in the vessel. Had they done so, the risk would not have been taken on either side, and the goods would not have been shipped in the Starlena, even with the demand of urgency.

I am not satisfied that the plaintiffs have discharged the burden of proof of fraud in the defendants' agent. Nothing appears in evidence to suggest that Mr. Andlaw thought that the Starlena was technically unseaworthy (a subject with which I must deal later) and gave his assurance with an intent to deceive, or with a reckless disregard to its truth or falsity. I believe him to have acted in good faith. The question of carelessness or lack of diligence remains to be dealt with, but after full consideration of the authorities dealing with this rather difficult subject of fraud or deceit I am not satisfied that his conduct amounted to fraudulent misrepresentation in law. There was no wilful shutting of the eyes to the facts, no wilful reckless assurance with an intent to deceive. Deceit could, and would, have availed him nothing, and given him no advantage.

I shall now pass to the issue of lack of due diligence on the part of the defendants to make the Starlena seaworthy or fit for the purpose of carrying the cargo in question. It is not suggested that the vessel was unseaworthy in the generally accepted sense of that term; it is said that it was what may be described as uncargoworthy, and therefore unfitted to carry this particular consignment.

The Certificate of British Registry shews that the Starlena is registered as a motor twin screw vessel at the Port of Plymouth, and is of 67.44 nett tonnage. It is in evidence that she is normally in part-time use for carrying passengers on pleasure cruises to Mediterranean ports, including Gibraltar and Palma in Mallorca. At the time of the shipment of the plaintiffs' cigarettes she was on such a cruise, with Palma as her destination.

The defendants, in accepting the contract of carriage covered by the bill of lading had an obligation in law, under the Carriage of Goods by Sea Ordinance in force in Gibraltar, to exercise due diligence to make the vessel seaworthy, having regard to the circumstances known, or reasonably to be expected, the nature of the voyage and the cargo to be carried. This obligation is personal to the owners, whether or not they entrust the performance of the duty to others. We are not dealing with common law liability in this case, but with a transaction governed by the terms of the Ordinance.

The plaintiffs claim that the Starlena was not seaworthy because she was a yacht and unauthorised by law and unfit to undertake the carriage of goods by sea, because the contract of carriage was undertaken in spite of the provisions of Art. 347 of the Spanish Customs Regulations, and because she was not in charge of a competent master. The defendants deny that the vessel was unseaworthy, and claim that, even if she was, they are entitled to rely on clause I (B) of the bill of lading to exempt them from liability.

I do not think it can successfully be argued that the owners of the Starlena were not in breach of several of the provisions of the Merchant Shipping Ordinance in permitting the carriage of cargo in her, and I do not propose to take time on this point. The master was not technically competent for this purpose, nor was the vessel registered as "a foreign-going ship". I do not think that it is any answer to say that the plaintiffs knew of the true status of the vessel, and acquiesced. The Starlena is a converted "Fairmile", physically capable of carrying cargo, and it would not be justifiable to accept an inference, that after a sight of the vessel by an agent of the plaintiffs, the plaintiffs were aware that the defendants, whose responsibility it was to comply with the Merchant Shipping Ordinance, intended to sail with a disregard for more than one of its provisions. Nor do I consider that a breach of law can in any way be condoned because the shipment was a "rush job", or that the issue of a permit by the local revenue authority for the export of the cargo overrode the regulations for the carriage of goods by sea.

I do not give the omissions too much weight in this case, because the unseaworthiness of the Starlena in this respect was not contributory to the loss. The loss was occasioned by the action of the Spanish authorities and I have particularly to consider whether or not the Starlena must be considered unseaworthy because the owners accepted to carry the cargo of tobacco in this vessel of under 100 tons nett. As Mr. Isola has observed, the tragedy of the case is that probably no one concerned knew of the existence of the regulation under which the Spanish authorities acted, it being one out of many regulations contained in the massive volume we have seen in this court. But the point is not, did they know, but ought they to have known with the exercise of due diligence. It seems a little surprising that Mr. Edwards, with a smuggling career behind him, and now based on Palma, the port of confiscation, was ignorant of its existence, but it appears that in the past his interests had been more concerned with the evasive powers of his vessels than with customs laws. Obviously had he known, or even suspected the existence of this regulation, he would not have carried his cargo into the open arms of the authorities in Mallorca.

The submission of the plaintiffs is that this disregard of Spanish Customs regulation 347 by the defendants made the Starlena unseaworthy for the carriage of the cargo. The material part of the regulation reads in translation as follows:—

> "In cases of transit by sea a breach will be committed and fines payable in the cases and in the amounts which are mentioned as follows:
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> 1. For arriving at a recognised port carrying in transit in a ship less than 100 tons measure sugar, cocoa, coffee, cinnamon, cloves, pepper, tea, textiles or tobacco the Captain will pay the prescribed duty as to the former goods and as to the tobacco it will be confiscated and there will be imposed additionally on the said Captain a fine from five hundred to twenty five thousand pesetas.
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> The aforesaid penalties will not be imposed in cases of involuntary putting into port, legally recognised and justified."

The Spanish authorities followed this regulation to the extent of confiscation of the tobacco and the master was fined 20,000 pesetas for carrying the cigarettes on board.

As to the identification of unseaworthiness with uncargoworthiness I have been referred to the case of *Ciampa and others v British India Steam Navigation Co. Ltd.* [1]. I shall refer to this case again later in connection with the issue of restraint of princes, but its value at this point is that it contains an authoritive decision as to unseaworthiness in the cargo sense. The facts, very briefly, were that lemons belonging to the plaintiffs were shipped in one of the defendants' steamships at Naples for carriage to London. The ship having come earlier in the voyage from a contaminated port was, in accordance with an old-standing French decree subjected at Marseille to a process known as "dératisation", in consequence of which the lemons arrived at destination in a damaged condition. The defendants, although they had not carried lemons before, were aware of the existence of the decree, and that the process was inevitable; the plaintiffs were not, and in that respect the facts differ from the present case. Rowlett J., found for the plaintiffs, and in the course of his judgment the following passage appears:

> "I think the plaintiffs are also right in saying that the ship was unseaworthy when the lemons were shipped on board at Naples. They were carried on the 'tween deck, where they became saturated with the sulphurous fumes used in the proceeds of dératisation. .....The defendants therefore received the lemons on board their ship for carriage, the ship being at the time free from sulphurous fumes, but circumstances existing which rendered it inevitable that the ship and cargo would in the course of the voyage be subjected to them. The ship was therefore in my opinion unfit to receive and carry the cargo. That is what is meant by unseaworthiness, quite apart from the fitness of the ship to traverse the ocean. I think, therefore, that the plaintiffs are also entitled to succeed on the ground that the ship was unseaworthy."

This case seems to be the nearest authority that can be found to the question of unseaworthiness in the present case. No case relating lack of tonnage to unseaworthiness has been cited to me, and I do not know of one. Applying this decision to the present case I think it may fairly be said that if Spanish Customs regulation 347 was rightly applied, in the circumstances it was inevitable that the cargo would be lost on arrival at Palma, and this constituted unseaworthiness in the Starlena.

I now have to consider whether or not this state of unseaworthiness at the beginning of the voyage was due to lack of diligence on the part of the defendants. I think it only necessary to read the evidence of the master, for whose acts the defendants are responsible, to shew that he exercised little or no diligence at all. I think he gave his evidence frankly and fairly, and his general attitude is that his employment and obligations were those

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[1] [1915] 2 K.B. 775.

of the master of a passenger-carrying yacht, and that he properly discharged his responsibility in those respects. He admits only a casual acquaintance with international and local regulations for the carriage of goods by sea, and asserts that the duty to see that there were no "snags" attached to the carriage of the tobacco rested on the shippers, who in particular should have ascertained the requirements of Spanish customs shipping law relating to tonnage. He says that he had his owners' agreement to the carriage of the cargo, a fact confirmed in evidence by the Mediterranean agent of the owners and present charterers, and that he had clearance from Gibraltar and did his part in taking the cargo safely to port.

I am satisfied on this issue of diligence that if Spanish Customs regulation 347 applied to the shipment (a point to be determined later) the defendants failed to use due diligence to make the Starlena seaworthy for the carriage of the goods shipped by the plaintiffs. I fail to see in what circumstances a shipper could be responsible for a lack of seaworthiness in a ship, the owners of which had agreed to carry the shipper's cargo. If there was a defect here it was in the ship, not, as in *F.O. Bradley and Sons Ltd. v Federal Steam Navigation Co. Ltd.*, [1] to which I have been referred for the defendants, in the cargo.

This brings me to the important issue of the legality or otherwise of the seizure of the cargo of cigarettes by the Spanish customs authorities. The defendants assert its illegality and the burden of proof of this lies upon them. If the seizure was illegal the vessel was not unseaworthy and the defendants will be entitled to the protection afforded to carriers by the Carriage of Goods Ordinance. It is shewn in evidence that on the arrival of the Starlena in Palma on 27 June 1958, and after an examination of the ship's papers, the three hundred cases of cigarettes were unloaded on the orders of a customs official in the presence of the British Vice-Consul and the master was informed that they were confiscated. The tobacco was left in the custody of an official referred to as the Inspector of Wharfs, and, apparently on the authority of the Administrator of Customs in Mallorca, an order was made on 1 July 1958, the effect of which was to impose a fine of 20,000 pesetas on the master and for delivery of the confiscated tobacco to the Spanish Tobacco Monopoly. It seems that an appeal lies from such an executive act to a body known as the Arbitration Board, which consists of three customs representatives, including the Administrator, and one representative each from the Tobacco Monopoly and Chamber of Commerce. There is an appeal from this body to the Supreme Court in Madrid. It is a prerequisite to appeal that any fine imposed be paid, and this was done by the master on advice. It is in evidence that the plaintiffs' legal advisers gave notice of an intention to appeal to the Board, but after consultation decided that the decision taken by the Customs authority was unassailable in law, and the notice was withdrawn, a petition to the Director of Customs in Madrid

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[1] (1927) 17 Asp. M.L.C. 265.

being substituted. This proved unsuccessful, and the cargo of cigarettes seem irretrievably lost to the shippers.

There is conflict of evidence as to the legality or otherwise of the seizure, and the view taken by the carriers is that the regulations were wrongly applied, and that regulation 347, under which the seizure was made, was not applicable. The plaintiffs have called a qualified Spanish lawyer, expert in matters relating to administrative law and customs regulations, who considers that the act of the authorities was a lawful one; whilst the defendants have called two qualified practitioners, one of them a specialist in Customs regulations, who express the contrary view.

I must confess that I find it a matter of considerable difficulty, in the face of conflicting opinion, to determine an issue arising out of the intricacies of the customs law of Spain. I am asked by the defendants to say that an action of presumably qualified and capable customs officials was contrary to law. We have the authority of *Perlak Petroleum Maatschappij v Dean* [1], for the fact that questions of foreign law are to be treated in our courts as questions of fact to be proved by experts in such law, and *Concha v Murrieta* [2] rules that foreign law is a matter of fact to be decided on the evidence of advocates practising in the courts of the country whose law is to be ascertained, but (in the words of the headnote) —

> "if the witnesses in their evidence refer to any passages in the Code of their country, as containing the law applicable to the case, the court is at liberty to look at those passages and consider what is their proper meaning."

It may be observed that the decision now in question is not the final judgment of a foreign court, which would only be impeachable on certain grounds, but an administrative act, and I am asked by the defendants to consider the regulations under which the order for confiscation was made, and to say that they were wrongly applied

The confiscation was carried out under arts. 172 and 346. Part of the wording of the latter has already been quoted in this judgment. Article 172 enacts that:

> "There shall be permitted maritime transit with the conditions following:'
> . . . . . .
> 3. That the ships which carry colonial fruits, petroleum, textiles or tobacco shall measure by register at least 100 tons nett."

and it is argued for the plaintiffs that this is a prohibition of general application and that the articles relied on by the defendants do not carry any exemption from this rule.

As I understand the case for the carriers it is that the consignment should have been free from seizure because it was destined for a foreign warship, to

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[1] [1924] 1 K.B. 111.

[2] (1889) 40 Ch. D. 543.

which the transhipment of goods is regulated by art. 196, which opens as follows:

> "Transhipment of provisions to warships. Goods coming from abroad destined to the supply of foreign warships anchored in Spanish ports may be transhipped to same even if they have not been manifested with such an object ....."

and that this relaxation of the general rules relating to transhipment also waives the provisions of art. 172 as to tonnage. The defendants also assert that in any case art. 347 was not applicable, as the goods were not "in transit" within the meaning of the regulations.

It is not unusual to find expert opinion sharply divided, and this case is certainly no exception. The defendants have called two experts, one of whom has been acting for the master of the Starlena, independently of this case, and the other has previously acted for the owners, but was not available at the outset of this affair. Señor Marta is a specialist in customs and contraband law, and his view is that art. 196 not only permits transhipment without manifest but also allows by implication the carriage, even of tobacco, to be in a vessel of under 100 tons nett. He says that the intended transfer of goods from a foreign vessel to a foreign warship does not come within the definition of marine transit, as expressed in art. 171, which reads:

> "By maritime transit is understood the passage through territorial waters of foreign merchandise destined to other countries whose carrying ships put in at Spanish ports.",

and that art. 347 was inapplicable.

It may be noted that in cross-examination he admitted having held a contrary view when first consulted in this matter, but states, with reason, that he changed his view when all the facts came to his knowledge. He admitted that in an appeal to Madrid on behalf of the master he had referred to the cigarettes as "in transit".

Señor Joachim Morell, who also gave evidence, is a judge in Mallorca and also the legal adviser to the British Consulate. He does not set himself up as a specialist in customs regulations, but has had experience in that field. He agrees with Señor Marta that the provision of the last part of art. 172 does not apply to a ship carrying goods destined for a foreign warship, and asserts that the transaction was one of transhipment, and not of maritime transit, in spite of the wording of the bill of lading, prepared by the plaintiffs and signed by the master, which described the 300 cases as destined for Palma in transit to the warship Bombarda.

The expert witness called for the shippers takes a different view. He states that he specializes in matters relating to Spanish customs regulations, and he was concerned from the outset on behalf of the plaintiffs in the matter of the seizure from the Starlena. In his opinion the goods were conveyed to Palma for delivery to a foreign warship and were therefore in "maritime transit" within the meaning of art. 171, and that art. 196 definitely

does not exempt the necessity of compliance with arts. 172 and 347. He considers that vessels carrying goods for such warships must be vessels complying with Spanish regulations in respect of such cargo. In his opinion the customs authorities correctly applied art. 347, and the confiscation of the 300 cases of cigarettes was not only lawful but obligatory. He agrees that in all other respects the carriage of the tobacco was in order, and states that in fact shipments of a like nature are by no means infrequent, and are unobjectionable when the carrying vessel is not of under 100 tons nett.

I feel considerable diffidence, in spite of the assistance of the experts and the careful submissions of learned counsel, in arriving at a conclusion in matters relating to the customs regulations of a foreign country, particularly those of Spain, where the existence of state monopolies means that regulations relating to certain commodities, and particularly tobacco, are strictly and rigidly drawn and enforced. But it is necessary to do so in order to make a decision regarding the issue raised by the carriers of illegality in the seizure. I feel that there has been a slight tendency on the part of the experts to argue their own cases in their evidence, but at least I feel reasonably convinced that there is nothing in the wording of art. 196 which implies the exemption of vessels carrying tobacco for foreign warships from the 100 tons rule.

It seems clear from the existence of arts. 172 and 347 that the Spanish authorities will not tolerate the carriage of certain dutiable articles, including tobacco, in vessels of limited tonnage; no doubt for the good reason that such craft can be navigated in shallow waters, to the possible advantage of persons who wish to evade the customs laws. This prohibition, as may be seen from art. 347, even extends to the open arrival of such a vessel in a Spanish port. I do not think it is reasonable to read into art. 196 any relaxation of this attitude, and I am not prepared to find that the Starlena was lawfully entitled to exemption, because the 300 cases of cigarettes were destined for the Bombarda, and that the seizure was unlawful on that account.

In connection with the further submission that the goods were not "in transit" and that the carrying vessel was therefore not subject to art. 347 it seems material to recall the evidence of Mr. Seruya relating to the preparation of the bill of lading. This, as has already been noted, described the 3,000,000 cigarettes as in transit to the naval ship Bombarda. It appears that the plaintiffs had only once previously had occasion to ship merchandise by sea to a foreign warship in a Spanish port, but that they have frequently consigned goods to Palma by air for delivery to such vessels. Their practice in such cases has been to shew the goods on the bill of lading as in transit, and to mark the cases or packages accordingly. It seems that this practice has been accepted by the Spanish customs as a technical requirement without demur.

The defendants in disputing that the tobacco was "in transit" within the meaning of the customs regulations claim that in fact it was consigned to Palma for transhipment to the Bombarda and that art. 196 conveys an exception to the general rule contained in art. 193 which permits the

transhipment of any kind of merchandise except tobacco not consigned to the Monopoly. That the customs authorities permit even tobacco to be transhipped to foreign warships seems apparent from the earlier transhipment permitted in Barcelona, but it also seems implicit in the regulations that transhipment involves transit. Article 198, referred to by Señor Nicholas Morell, seems to confirm this view. It reads

> "Merchandise which appears in the manifest as in transit, may be transhipped to other ships which may take them to their destination abroad, so long as the established requirements have previously been complied with in respect of transit by sea. . . . . ."

It seems to me that in this transaction the Bombarda was not to be the carrying ship, but was the destination of the goods. There is no evidence to suggest that the cigarettes were to be conveyed in the Bombarda as a transhipping vessel for a destination abroad. I am therefore the more inclined to accept the opinion of Señor Morell that the Bombarda, as a foreign warship, with extra-territorial rights in Spanish waters should be considered as an "other country" for the purpose of the destination of the goods.

I must admit that I do not arrive at my conclusions in these questions of the interpretation of the Spanish customs regulations with the confidence I should like to have, particularly in view of the divergent opinions of those whose business it is to explain them. After a great deal of consideration I have reached the conclusion that the defendants have not discharged the onus upon them of shewing by a preponderance of evidence that the Spanish Customs authorities acted illegally in holding these goods to be in transit, and in applying the 100 ton nett rule to the Starlena. It is a legal maxim of general application (Wharton) that

> "acts of an official nature, such as judgments, decrees, orders of court, and acts of public officials done by properly, or apparently properly, constituted authorities will be presumed to be rightly done, and the authorities rightly constituted until the contrary is proved".

and this presumption that such things are presumed to be correctly done has not been sufficiently rebutted by the evidence in this case.

As a further defence the carriers say that the seizure of the cargo at Palma was an arrest or restraint of princes, rulers or people or seizure under legal process within the meaning of the Carriage of Goods by Sea Ordinance, and as such an exempted peril for which, under art. IV (2) of the Schedule, they are not responsible.

It is at least arguable whether under the circumstances of this case the seizure can be considered as a "restraint" at all. There is authority, Bingham J. in *Miller v Law Assurance Insurance Co.* [1] for the proposition

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[1] [1902] 2 K.B. 694.

that the words "acts and restraints of princes etc." do not cover the operation of the ordinary law of the land, but relate only to some violent departure from the ordinary course of things, and it seems clear from *Ciampa v British India Steam Navigation Co. Ltd.* (already referred to) that the exemption does not operate when facts (known to the shipowner) existed before the beginning of the voyage which shewed that the cargo was inevitably doomed to become subject to a restraint. In this present case the facts may not have been known to the carriers, but for reasons given earlier, I think they had a responsibility to have known. Furthermore it seems clear from further authority that a carrier is not protected by the exemption if the operation of the restraint is brought about by a breach of the implied undertaking to provide a seaworthy ship. In *Dunn v Bucknall Bros.* [1] Collins M.R. stated

> "it is clear that they (defendants) cannot rely upon an exception to excuse them from the consequences of a peril which their own negligence has contributed to bring about. The principle is thus stated in Carver on Carriage by Sea, s. 16: A shipowner will not be exonerated from losses arising from any of these excepted causes when there has been any neglect on his part to take all reasonable steps to avoid them."

In my opinion the defendants cannot successfully rely upon "restraint of princes" to relieve them of responsibility in this case.

In the result I am satisfied that the plaintiffs carried out their part in this transaction in a proper manner, and that the loss arose from the failure of the defendants to ensure the seaworthiness, or "cargoworthiness" of the Starlena for the carriage of the goods. That they must suffer considerably is regrettable, for the loss might have been avoided had the Spanish customs authorities dealt with a technical breach of their regulations in a more equitable and reasonable manner. The result of my findings is that there will be judgment in favour the plaintiffs for the damages and expenses occasioned to them by the loss of the cargo of 300 cases of cigarettes, and taxed costs. The amount for which final judgment is to be entered to be ascertained by the Registrar.

There remains the counter-claim. The defendants state that they have suffered loss by reason of the failure of the plaintiffs to make the necessary arrangements for the reception of the cargo at Palma, and by reason of this action. This loss includes the fine imposed on the master, and loss consequential upon the proceedings "in rem", including a large sum of money for loss of earnings whilst the Starlena has been under arrest.

It follows from my decision as to the responsibility for the loss that the defendants cannot succeed here. The damage did not arise from any default on the part of the plaintiffs, and the arrest was lawfully made. The plaintiffs, in applying for and obtaining the warrant were exercising a proper right of preventing the vessel from being moved out of the jurisdiction, unless bail was given. No caveat was entered in respect of the seizure.

I must dismiss the counter-claim, with costs for the plaintiffs.

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[1] [1902] 2 K.B. 614.