Privy Council Appeal No. 36 of 1941

In the matter of the s.s. "Prins Knud" and her cargo

France Fenwick Tyne and Wear Company Limited – *Appellant*

v.

H.M. Procurator General – – – – – – *Respondent*

FROM

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

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5th AUGUST, 1942

Present at the Hearing:

THE LORD CHANCELLOR (VISCOUNT SIMON)
LORD THANKERTON
LORD WRIGHT
LORD PORTER
LORD JUSTICE MACKINNON

[*Delivered by* LORD WRIGHT]

The question which their Lordships have to decide is whether the appellants have a claim enforceable in prize in respect of the salvage services which they rendered to the "Prins Knud" before her arrest in prize. In the circumstances to be explained the question has been argued without technicalities, both parties desiring a decision of the fundamental question.

The "Prins Knud," a Danish vessel, registered at the Port of Copenhagen, ran aground in February, 1940, in the neighbourhood of Holy Island. Denmark was then neutral. The appellants, who are a British company carrying on their business at Newcastle-on-Tyne, are the owners of three tugs which rendered very meritorious salvage services, which ended successfully, with the result that on the 27th March, 1940, the vessel, which had been saved from the shoals, rocks and winter storms of that dangerous coast, was moored in safety in the Tyne, where she was placed in dry dock in the hands of ship repairers. The appellants as salvors never had exclusive possession; the vessel was never abandoned and never was a derelict; she had on board at all material times her Master, Chief Engineer and donkeyman.

The appellants entered into negotiations with the Danish owners for the settlement of their claim but before these could be concluded Denmark, on the 9th and 10th April, 1940, was invaded and completely occupied by our enemy Germany. On the 11th April, 1940 (the vessel being then in the the hands of the ship repairers), the appellants issued a writ *in rem* in the Admiralty Division of the High Court of Justice in its Instance jurisdiction against the vessel and her Danish owners, claiming remuneration for the salvage services which they had rendered. On the same day the writ was served on board and the vessel was arrested. Later in the day, while the

vessel was in the custody of the Admiralty Marshal, His Majesty's Collector of Customs and Excise, acting on behalf of the Crown, took possession of the vessel as enemy property. On the 12th April, 1940, a writ in prize was issued by the Procurator General addressed to the owners and parties interested in the ship " Prins Knud " and the goods laden therein for the condemnation of the said ship and goods as prize. The Crown decided to requisition the ship and on the 19th April, 1940, the Procurator General, acting under Order XXIX, Rule 5, of the Prize Court Rules, 1939, which applies to a requisition by the Crown under the Order, gave an undertaking in writing to pay into Court on behalf of the Crown such amount as might be fixed by the Court in respect of the value of the vessel, at such time or times as the Court should declare by order that the same or any part thereof was required for the purpose of payment out of Court. On the 20th April, 1940, the Registrar of the Admiralty Court ordered the " Prins Knud " to be forthwith released and delivered to the Crown without appraisement. The vessel was thereupon released and requisitioned by the Government. Under Rule 7 of Order XXIX proceedings in respect of a ship requisitioned are to continue notwithstanding the requisition. On the 26th April, 1940, the appellants entered an appearance in the Prize proceedings and also entered a caveat against release. This caveat is still in force. They also registered their claim in accordance with a notice issued by the Ministry of Shipping.

On the 8th July, 1940, judgment was given in the Admiralty Court for £6,500 and costs in the action for salvage initiated as before stated by the appellants, but it was directed that execution of the judgment should stand over until after the proceedings in prize. In those proceedings, on the 29th August, 1940, the Danish owners of the " Prins Knud " entered an appearance.

On the 4th November, 1940, the appellants filed their claim in the prize proceedings to be remunerated for their salvage services, and asked for an order that the Crown should pay into Court, in accordance with the undertaking given as stated above, a sum sufficient to satisfy their claim. On the 19th November, 1940, the appellants applied by summons that the Crown by its proper officer should proceed to adjudication or for such other order as would enable their claim to be adjudicated upon. On the 11th February, 1941, the President, having adjourned the summons into Court, refused to make any order. He gave a judgment, stating his reasons for so doing. He was influenced, he said, against making an order to compel the Crown to bring the case to adjudication, by a declaration made in Court by the Attorney General that considerations of high policy had induced the Government to decide that as at present advised they did not intend to seek a decree of condemnation of the ship or other Danish ships similarly situated. It was not suggested that the requisition of the vessel was not properly made in accordance with the principles laid down by the Privy Council in the *Zamora* [1916], 2 A.C. 77. He was of opinion that payment to the appellants would not be made in any event before the end of the war and that no advantage to them would be gained by having their rights determined, though he was prepared presently to decide their rights if they so desired. They however insisted on their application and appealed to His Majesty in Council.

When the appeal came on for hearing before their Lordships, an arrangement was arrived at between the Crown and the appellants which has rendered it unnecessary for their Lordships to express in this judgment any opinion on the course adopted by the President. He was exercising, as he indicated, a special discretion in the peculiar circumstances of the case. It is clear that he was not meaning to throw any doubt on the long established rule that the captor " is strictly enjoined both by his instructions and by the Prize Act to proceed immediately to adjudication." So the rule was stated by Sir William Scott and Sir John Nicholl in 1794, as quoted at p. 7 in Pratt's edition, published in 1854, of Mr. Justice Storey's authoritative summary of the principles of prize law which formed Note II to Wheaton's Admiralty Reports. In the last war the same rule was again restated by this Board in the *Zamora* (*supra*) at p. 108: " If the captors do not promptly

bring in the property seized for adjudication, the Court will at the instance of any party aggrieved compel them to do so." This duty of the Crown as captor attaches as soon as the vessel is seized as prize. Their Lordships have thought it desirable to enunciate this old principle clearly, though they are satisfied that the President was not casting any doubt upon it. Nor do they apprehend that he was shaping his decision in any way upon the particular policy of the Government, instead of upon the principles of international law to which the Court is bound to give effect. The very practical arrangement arrived at in the course of the present hearing by the parties with the approval of their Lordships renders any discussion of the President's actual order unnecessary.

The Attorney General suggested that their Lordships should hear and decide the question of law whether the appellants had a good claim in prize and undertook that if it were decided that they had a good claim, he would not oppose an order for payment into Court of the amount of the claim, which was not disputed, to be followed by an order for its payment out to the appellants. Mr. Pilcher, on behalf of the appellants, agreed to that course being taken. The parties also agreed, subject to their Lordships' approval and consent, that their Lordships should themselves hear the case without sending it back to the President. This had the effect of depriving their Lordships of the benefit of the President's opinion on the question of law, but in the war conditions prevailing, it was decided to forgo the advantage of the President's ruling. In that way the expense and delay of a double hearing of what was inevitably a lengthy discussion of a difficult question of law were avoided. The owners of the vessel were duly notified of the course proposed, and by their solicitors in this country have disclaimed any intention to intervene.

The substantial question thus comes for decision, whether civil salvage is recoverable in prize for meritorious services rendered by salvors before the seizure of the prize with the result that the vessel has been saved and the seizure effected. The appellants do not here claim a possessory lien, but they say that they have a maritime lien in virtue of which they arrested the ship and placed it in the custody of the Admiralty Court, in its Instance jurisdiction, before it was seized in Prize. They claim that the Prize Court (a term which is adopted in this judgment to describe the Admiralty Court while exercising its jurisdiction in prize as distinguished from the Admiralty Court while exercising its Instance jurisdiction) has jurisdiction to make awards or grant compensation to claimants in certain circumstances, that this jurisdiction extends to the salvage services here in question, and that if the exercise of the jurisdiction is discretionary, that discretion ought in the present case to be exercised in favour of the claimants. They do not rest their claim on the Crown's bounty, but on their legal status as persons entitled to claim before the Prize Court. Their claim as has been pointed out is not complicated by technical objections which might otherwise have had to be considered, but which the Crown has waived by the agreement already described.

The Crown in effect has relied on the principle baldly stated on one occasion in the Supreme Court of the United States by Nelson C.J., delivering the opinion of the Court in the *Battle*, 6 Wall. 498, to be too well settled to require examination—the principle, that is, that capture as prize of war *jure belli* overrides all previous liens. The Crown contended that the only exceptions or apparent exceptions to this rule are those cases in which the claimant has a possessory lien and is deprived of that possessory lien by the seizure, as for instance in the case of freight on enemy goods captured on a neutral vessel under international law as it operated before the Declaration of Paris, or on neutral goods released from an enemy ship which had been condemned as prize, or in the case of claims by a ship for general average contribution from cargo which had benefited by the sacrifice and in respect of which the ship had a possessory lien for the cargo's contribution. Thus, it was said, the appellants must fail here on any view because they had no possessory lien and could not set up in the Prize Court a maritime lien, even a lien of so high a rank in the hierarchy of liens as that which appertains to salvage.

Such a conclusion seems to involve a reversal of the principles recognised and applied, whether in the maritime law or in the common law. But it is said to be justified, when due attention is given to the peculiar jurisdiction exercised by a Prize Court, in which the supreme question is " prize or not prize." A Prize Court is not concerned with the rights of individuals *inter se* like a Court of common law or maritime law. In Lord Stowell's words, referring to the captor in the *Tobago* 5 C. Rob. 218 at 223, " His rights of capture act upon the property without regard to secret liens, possessed by third parties." By " secret " Lord Stowell is not meaning concealed or disguised liens but merely (as he puts it a few lines earlier) that they are not interests, " directly and visibly residing in the substance of the thing itself," where the " *onus* is immediately and visibly incumbent on it," for instance, as he puts it, where the owner of the ship has the cargo in his possession, subject to his demand for freight by the general law independent of all contract. " But," he continues, " it is a proposition of a much wider extent which affirms that a mere right of action is entitled to the same favourable consideration in its transfer from the neutral to a captor." As Lord Mansfield said in his famous judgment in *Lindo* v. *Rodney*. reported in a note to *Le Caux* v. *Eden*, 2 Douglas, 594, at p. 613: " By the law of nations and treaties, every nation is answerable to the other for all injuries done by sea or land, or in fresh waters or in port. Mutual convenience, eternal principles of justice, the wisest regulations of policy and the consent of nations have established a system of procedure, a code of law and a Court for the trial of prize. Every country sues in the Courts of the others, which are all governed by one and the same law, equally known to each." The law administered in a Prize Court is thus not the law of the country in which it is situated but the law of nations, and furthermore the scope and object of Prize jurisdiction are different from those of civil jurisdiction. Prize is not a civil or marine cause. In Lord Mansfield's words at p. 614, " The whole system of litigation and jurisprudence in the Prize Court is peculiar to itself; it is no more like the Court of Admiralty than it is to any Court in Westminster Hall." On the same page he also observed that " the Court of Admiralty is called the Instance Court; the other the Prize Court." He pointed out that the manner of proceeding is entirely different according as the claim is made in one Court or the other. Lord Mansfield's historical survey is limited in the main to the records of the 17th century, but more recent research has gone further back. Reference may in particular be made to a learned article by Mr. R. G. Marsden in *The English Historical Review*, XXIV, 675, on Early Prize Jurisdiction and Prize Law in England and another article on the same subject in 15 L.Q.R. 353. That author observes that the Admirals' Court had no existence before the middle of the 14th century and that continuous records did not begin until nearly two centuries later, and that there was no distinction between Instance and Prize jurisdiction until the middle of the 17th century. The need for a Prize tribunal became urgent, he says, about the middle of the 15th century. Special tribunals had been established by treaties early in that century, to deal with piracy and Prize. It was directed that their procedure should be speedy and informal and judgment was to be given on the merits of each case. Thus was presaged the peculiar system of the practice of the Prize Court, which proceeds on the ship's papers and the preparatory examinations, and if further proof or plea and proof should be necessary, acts upon affidavit evidence, and only resorts to oral evidence if the Judge so orders. This is still the essential feature of the modern procedure in the Prize Court, even in the more complicated issues of fact which come for decision under the rules of contraband and the doctrine of continuous voyage. Affidavit evidence is still the normal method of proof as appears from the Prize Court Rules of 1939, in particular Order XV.

All this shows that in approaching questions of Prize law the principles of the common law or of the maritime law, which latter was founded upon the Civil Law, are not to be regarded as governing in the Prize Court. In particular, liens, even maritime liens, which bulk so largely, for obvious

reasons, in the maritime law, are no longer sacrosanct. As a rule, liens even though arising under the law merchant or sea law, will not as such be regarded in Prize unless they are treated as entitled to consideration not specifically as liens but because they indicate special claims to the sense of equity and fairness on which the Court acts. In the same way, liens or rights arising under municipal law or under contracts will not be enforced by the Prize Court. This is what Lord Stowell indicated in the *Recovery*, 6 C. Rob. 341, at 349, when he said: " It is to be recollected that this is a Court of the law of nations, sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own; and what foreigners have a right to demand from it is the administration of the *Law of Nations* simply, exclusively of the introduction of principles borrowed from our own municipal jurisprudence."

A short citation of some of the decisions which illustrate these principles will explain their character. The citations may begin with the reports of Sir Christopher Robinson, afterwards a Judge of the High Court of Admiralty. A writer in the *Law Magazine* for August and November, 1833, after observing that Dr. Robinson had drawn back the veil of the Temple " from the oral traditions or secret writings of the Talmudists," went on to say that " the six volumes of Reports which he published have high intrinsic merits of their own, and contain the *ipsissima verba* of Sir William Scott. It is reported that he was most fastidious in the correction of his judgments, extending his revising care to the substitution of colons for semicolons, and to the nice poising of particles." There is then no justification for the suggestion made in argument that it is doubtful whether these reports represented what Lord Stowell had said or whether they merely represented what Christopher Robinson thought he had said.

The famous case of the *Tobago*, 5 C. Rob. 218, dealt with the claim of a British merchant upon a bottomry bond given fairly in time of peace to relieve a French vessel—which Lord Stowell said was a contract regarded with great attention and tenderness " by this Court," meaning, their Lordships think, the High Court of Admiralty. " But can the Court," he asked, " recognise bonds of this kind as titles of property so as to give persons a right to stand in judgment and demand restitution of such interests in a Court of Prize? . . . The person advancing money on bonds of this nature acquires by that act no property *in the vessel;* he acquires the *jus in rem* but not the *jus in re* until it has been converted and appropriated by the final process of a Court of Justice. . . . If there is no change of property, there can be no change of national character . . . A captor who takes the cargo of an enemy on board the ship of a friend, takes it liable to the freight due to the owner of the ship; because the owner of the ship has the cargo in his possession, subject to that demand by the general law independent of all contract. . . . These are all characters of the *jus in re*—of an interest directly and visibly residing in the substance of the thing itself." The nature of a bottomry bond given under pressure of necessity in a foreign port was later described by Lord Stowell, sitting in the Admiralty Court in the *Rhadamanthe*, 1 Dods 201, as a species of hypothecation which gives a maritime lien, but was held in the *Tobago* (*supra*) not to give any right in Prize. The doctrine of the *Tobago* (*supra*) has been followed and applied in a long series of decisions in Prize. It was applied by the Supreme Court of the United States in the *Frances* (*Irvines*) Claim) 8 Cranch. 418 to a claim for a lien for advances. The difficulty was there emphasised that the doctrine of lien depends chiefly upon the rules of jurisprudence established in different countries, and the Court quoted with approval the language of Lord Stowell in the *Tobago* (*supra*) that the right of the captor acted upon the property, without regard to secret liens possessed by third parties, " secret," that is, in the sense that they depended on the mere private contracts of individuals. In the *Ariel*, 11 Moo. P.C. 119, the Privy Council applied the same principles, and it was laid down in general terms that liens, whether in favour of a neutral on an enemy's ship or in favour of an enemy on a neutral ship, should equally be disregarded. The enemy interest in the neutral property cannot be condemned nor can the neutral interest in the enemy property

claim to be exempt from condemnation. In more recent times the most far-reaching illustration of these principles is afforded by the refusal of Prize Courts to recognise the special property or interest of British or neutral pledgees of bills of lading in respect of shipments of goods the general property in which was in the enemy. So it was held by the Supreme Court of the United States in the *Carlos F. Roses*, 177 U.S. 655, and in the British Prize Court by Sir Samuel Evans in the *Marie Glaeser* [1914], P. 218, and by the Privy Council in the *Odessa* [1916], 1 A.C. 145. It was there said that in " determining the national character of the thing seized the Courts in this country have taken ownership as the criterion, meaning by ownership the property or dominion as opposed to any special rights created by contracts or dealings between individuals, without considering whether these special rights are or are not, according to the municipal law, applicable to the case, proprietary rights or otherwise." The Board also rejected the argument that as the pledgees held the bills of lading they had an interest arising out of that possession which a Prize Court should recognise just as it recognises the carrier's possessory lien for freight. It was observed that the possession of the bills of lading or other documents of title was merely constructive or symbolical. The observation may here be interposed that on a similar line of reasoning, the appellants cannot be taken to have obtained possession, either constructive or actual, of the " Prins Knud " by securing the arrest of the vessel by the Admiralty Marshal. The vessel was thereupon in the custody of the Admiralty Court, not in the possession of the party merely because he procured the arrest.

The principles laid down in the authorities just cited seem to negative the idea that a maritime lien can in itself give a claim against the captor of a ship in the Prize Court. Maritime liens hold an honoured place in the maritime law, as enforced in the Admiralty Court. That form of remedy is particularly important in a Court like the Admiralty Court, which is largely concerned with foreign litigants. The maritime lien enables the *res* to be made available to enforce the liability, though it also impleads the owners personally. In modern times, questions relating to maritime liens have been fully discussed, particularly in the *Parlement Belge* 5 P.D. 197, the *Dictator* [1892], P. 304, and the *Cristina* [1938], A.C. 485. The true nature of a maritime lien, which differs from a common law or possessory lien in that it does not depend on possession but attaches to the property into whatsoever hands it goes (*Bold Buccleugh* 7 Moo. P.C. 267), was also well defined by that great lawyer Lord Gorell (then Gorell Barnes J.) in the *Ripon City* [1897], P. 226, at 242, as being " a privileged claim upon a vessel in respect of a service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another—a *jus in re alienâ*. It is, so to speak, a subtraction from the absolute property of the owner of the thing." Lord Gorell is here using the term " *jus in re* " in a different sense from that in which Lord Stowell used it in the passage cited above. The latter applied the term *jus in rem* to a right requiring to be carried into effect by legal process, whereas a *jus in re* was to him, primarily at least, a right depending on possession of the thing. In the Prize Court what is material is the absolute or general property which gives the thing its national character: a right subtracted from that property of the type which is often described as a special property, or more precisely a special interest, not visible or tangible, does not affect the captor's rights. Lord Stowell's opinion is categorical on this point and has been often repeated. Later judges have taken the same view. Thus the Supreme Court of the United States in the *Hampton*, 5 Wall. 372, stated the rule in reference to a mortgage. The material passage of that judgment is quoted by Sir Samuel Evans P. in the *Marie Glaeser* [1914], P. 218, at p. 234: " In proceedings in prize and under principles of international law, mortgages on vessels captured *jure belli* are to be treated only as liens, subject to being overridden by the capture, not as *jura in re*, capable of an enforcement superior to the claims of the captors." Miller J. in the *Hampton* (*supra*), in delivering the judgment of the Court, pointed out that any other rule would tend materially to destroy the right of Prize capture in time of war. In substance the reason is that

the captor could never know that the thing he was seizing was enemy property because if such liens or special interests were recognized the effect would be that enemy property in part or even in whole might be granted immunity in favour of mortgagees or lien holders, and the enemy or the neutral exposing his goods to the risk of capture under international law would *pro tanto* be saved from the risk of loss.

It does not, however, necessarily follow that maritime liens, such as liens for salvage, would be governed by the same principles as are applied in the case of mortgages, bottomry bonds and the like. The latter depend on the private contracts of individuals and their effect under the appropriate municipal laws, whereas the lien for salvage depends on the general maritime law. This distinction was emphasised in the *Tobago* (*supra*), the *Odessa* (*supra*) and elsewhere. Here again, however, a difference may be noted. The maritime lien for damage (established by the Privy Council in the *Bold Buccleugh* (*supra*) in 1851) would not, it seems, qualify for recognition in the Prize Court for any purpose, since apart from its being a modern lien, it is a claim *ex delicto* and the lien is merely a more convenient remedy for enforcing a cause of action which, though enforceable against the ship, is primarily personal.

On the other hand, the circumstance that the lien has been acquired for services rendered to the prize of so meritorious and so valuable a character that but for them the capture would never have been made, is not in itself necessarily a sufficient ground to secure recognition of the claim in the Prize Court. Thus in the *Hoffnung*, 6 C. Rob. 383, captors in right of the cargo, which had been condemned, claimed general average contribution against the ship in respect of part of the cargo sold in order to pay for the repair of the ship at an earlier stage of the voyage before the seizure. Lord Stowell dismissed the claim. He said at p. 384 " Cases of average on the part of the ship against the cargo are not infrequent, but a demand of the cargo against the ship is perfectly novel in this Court. The distinction is obvious. The right of war is a right *in re* and the Court only attends to the *res ipsa* and the *onera* on the property in right of possession. The ship has the possession of the cargo, which the master is not bound to deliver, till he has been satisfied for his demand of average, if he has such, in the same manner as for his demand of freight. He has the *res ipsa* in his possession and may legally detain it." He also took a further point which was that the goods sold had ceased to be cargo before the seizure " unless," he said, at p. 386, " it can be shown, that the hand of capture was employed on these goods in quality of cargo, the Court cannot go back to affect them in any other character." He concluded " that the debt, if it was to be so called, due from the vessel to the owner of the cargo is amongst those *onera* which the Prize Court does not notice." He rejected the idea that if the vessel had been seized the captors would have been liable even if the whole cargo had been disposed of in a foreign port to enable the ship to proceed, and thus the captors of the vessel would have had the benefit of the conversion of the cargo. Such benefit did not make the sacrifice an *onus* proper to receive effect and be recognised in the Prize Court. It was possession of the cargo which was thus taken to be the test of an *onus* visibly residing in the *res*. So in the case of freight. In the *Prosper*, Edw. 72, Lord Stowell dealing with the right of the captor of a ship to freight on the cargo on board, upheld that right under the international law prevailing in days before the Declaration of Paris. " The right to freight," he said at p. 77, " is not extrinsic. The master is not bound to establish his right by a proceeding at law; he has possession of the cargo and has a right to retain that possession till his demand is satisfied; and this forms a material distinction from those other rights, in which the intervention of a Court of Justice is required. It is just the same with respect to the obligations of the vessel; if one of these ships had been in a private dock, for the purpose of being repaired, the Crown could only have made that seizure, subject to the detainer for repairs." Such seems to have been the case of the *Vrow Sarah*, reported in a note to the *Belvidere*, 1 Dod. 353, at p. 355, though that case was also put on the bounty of the Crown, and the view both of the Government and the Court that not to give the repairers the expenses of the outfit of the vessel just before the seizure would be a harsh measure.

These and other cases which seem to place the whole emphasis on possession, might seem to support the Crown's contention that, since salvage does not necessarily involve a possessory lien, the Prize Court should disregard it, even though their lien ranks so highly that by maritime law it needs no support from possession (*Elenora Charlotta*, 1 Hagg. 156), and indeed may be prejudiced if a salvor improperly retains possession in order to maintain his lien The lien for salvage is a maritime lien of the highest rank and priority, postponed to other liens only in rare cases as, for instance, to liens for subsequent salvage or subsequent damage and a few others. It is a lien based on the benefit conferred on the owner of the property, but " Salvage is not governed merely by regard to the benefit received, but also on ground of public policy by a due regard to the interests of commerce and humanity," to quote Lord Gorell in the *Veritas* [1901] P. 304 at p. 313. It does not follow that because capture overrides all liens, the Prize Court has no jurisdiction to reward salvors. The Prize Court is a Court exercising an equitable jurisdiction. Lord Stowell, dealing with a case of freight on capture and recapture, where the voyage had not been completed because the port of destination was closed by blockade, so that there was what a modern lawyer would term a frustration of the adventure, observed that the Court had to provide as well as it could for the relation of interests which had unexpectedly taken place under a state of facts out of the contemplation of the parties and had to discover what was the relative equity between the parties. It may be that the true reason for the allowance of freight was not so much the technical reason that the owner had a right of possession as a sense of fairness and equity. The practice of captors of cargo paying freight to neutral shipowners was regularly established in the sixteenth century (Marsden, loc. cit.) and the main reason seems to have been to avoid bearing too heavily on neutrals by the enforcement of belligerent rights. This was clearly stated by Lord Stowell in the *Prosper* (*supra*): " 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 the cargoes and obliged to unload them, they shall have their freight upon the principle that the non-execution of the contract, arising from the inability 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 on neutrals." This is a more intelligible principle, as well as one justified by history, for the allowance of freight. Since the Declaration of Paris such questions are not likely to arise except in regard to carriage of contraband or in regard to enemy goods shipped before the outbreak of war on British ships as in the case of the *Juno*, 1916 P., 169, in which Evans P. ordered that such a sum should be allowed for freight as was fair and reasonable in all the circumstances. He observed, " While there are no rules of law or decision to bind or guide the Court, the problems can, I think, be solved without great difficulty by a rational application of fair and equitable principles. 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." A similar question came before the Privy Council in the *Prinz der Nederlanden* [1921], 1 A.C. 754. The freight which was claimed by the neutral shipowner in respect of contraband goods was there disallowed. Lord Sumner in delivering the judgment of the Board, after examining the authorities, held that the Court had jurisdiction to allow freight on contraband goods, but that it was a jurisdiction to do what was fair in the circumstances of a given case and was essentially a jurisdiction which was fair in its exercise. He said at p. 760 that " where freight is allowed, it is from the Court's view of fair dealing towards parties whose conduct is not open to blame, [the ' not ' is by mistake omitted from the Report] and it is refused in order to protect the effectual exercise of belligerent rights. Reasons of this kind seem founded rather on policy and discretion than on legal rule and legal right." These observations were directed to questions of the allowance of freight on contraband goods, the carriage of which, though it is within the rights of a neutral, is in a sense open to blame from

the point of view of the belligerent as contrary to his belligerent interests, but they state a general principle which can be applied with infinitely greater force to the allowance of salvage in a case like the "Prins Knud." Such a doctrine overrides the narrow test of mere possession which is proposed by the respondent, even if there were no authority to support it. Civil salvage has always been regarded with great favour in any Maritime Court. Some characteristics of salvage were stated by Lord Stowell in the *Two Friends*, 1 C. Rob. 271 at 279: "Salvage is a question of the *jus gentium* and materially different from the question of a mariner's contract, which is a creature of the particular institutions of each country, to be applied and construed and explained by its own particular rules." That was said, it is true, of military salvage but is equally appropriate to civil salvage. There can be in these cases no difficulty about "secret" contracts depending on the operation of municipal laws. In the *Louisa*, 1 Dods. 317, civil salvage was awarded by the Prize Court to recaptors in addition to military salvage for the rescue, because the recaptors had rendered salvage services to the vessel to rescue her from dangers of the seas. Lord Stowell at p. 318 said it was a case of civil combined with military salvage. "Under such circumstances, more particularly in cases where supposing no military salvage to be due, a claim for civil salvage alone might with justice have been made, the Court has thought itself at liberty to give an additional reward to the salvors for a separate service." That language, it is true, was used in that case also in reference to a claim by recaptors for additional remuneration for their services in preserving the property from the perils of the sea.

But there is a decision of Lord Stowell which shows that the Prize Court has jurisdiction to award salvage. That is the case of the *Aquila*, 1 C. Rob. 37. A ship and cargo had been found derelict at sea. The ship was Swedish and was restored because Sweden was neutral. The cargo had been shipped at Cadiz. The ship's papers showed Hamburg as the ostensible destination. There was reason to believe that an owner would appear, as there were papers on board describing the cargo to be the property of a neutral owner. But, as Lord Stowell says, "some suspicions occurred, however, that it was in fact the property of an enemy; and under these circumstances it became expedient to proceed against it as Prize, for the purpose of meeting the pretensions of the ostensible neutral, where alone it could be properly discussed, in the Prize Court. These measures, were highly necessary, and therefore no objection can be made against the mode of proceeding which has been pursued in this case on behalf of the Crown." The case of the *Aquila* was heard in November, 1798. It appeared that the destination was not Hamburg, but Amsterdam. Their Lordships have been able to examine the record of this case through the good offices of Mr. L. F. C. Darby, the Registrar of the Admiralty Court, and of the Record Office. The record shows that the proceedings were in prize. A minute of 9th March, 1798, recites that more than a year and a day having elapsed, the cargo was condemned as good and lawful prize and as droits and perquisites of His Majesty in his Office of Admiralty "reserving the question as to salvage." Rothery in his Report on the Droits of the Crown and of Admiralty in time of War reports the *Aquila* at p. 117, and at p. 124 adds a further touch to the story. He quotes the warrant which was issued giving a reward out of the fund to two persons for furnishing information which enabled the authorities to detect the fraudulent covering up of the enemy property. What was done in regard to salvage appears in the report in Robinson. In their Lordships' judgment the salvage which was allowed was allowed by the Prize Court in the exercise of its jurisdiction and the case is an authority that the Prize Court has the jurisdiction to make awards for civil salvage on enemy goods, as well as military salvage and civil salvage on recaptured goods.

It may seem strange that there is so little precedent for the exercise of that jurisdiction. In the last war civil salvage on enemy property seized by the Crown was awarded by the Prize Court in two cases as a matter of right, not of bounty. One was the *Chateaubriand*, 2 B. & C. Prize Cases, 69, where Evans P. held in 1916 that salvors of German ships should be

allowed salvage in respect of the ship which had been salved in the North Sea before it had been seized and condemned as Prize. Counsel for the parties who were claiming in Prize for the salvage remuneration contended that the same principles which the Prize Court applied to freight and general average should also be applied to salvage. Their Lordships apprehend that the principles referred to were to allow a fair and reasonable remuneration on grounds of equity. Counsel for the Crown left the matter to the Court and the Court ordered payment of the salvage reward. But it is impossible to credit that Evans P. would have made the order if he had not thought that sitting in the Prize Court he had jurisdiction to do so. A very similar course was adopted in the *Gothland*, 5 Lloyds Prize Cases, 39. It was stated in the argument of the present appeal by Counsel for the Crown that many claims for civil salvage on goods condemned as prize were dealt with out of Court by allowance of salvage by the Crown in exercise of its bounty, the exercise of which was held in the *Odessa* (*supra*) and *Zamora* (*supra*) not to be affected by modern legislation. Even in the present war a case was referred to of an Italian steamer, the *Amelia Lauro*, which was arrested and condemned as Prize, and in respect of which the Crown paid salvors their claim for salvage as an act of grace. There was however there a fund, the proceeds or value of the vessel, out of which the payment could be made. Counsel in argument stated that in practice bounty payments of this character were not made unless there was a fund available. The case of the *Amelia Lauro* differs in this respect from that of the " Prins Knud " as things stand.

There is undoubtedly a scarcity of authority on a matter which must often have called for decision. Apart from the practice of bounty payments, the scarcity of reported authority may well be due to the fact that such claims were dealt with as a matter of course by the Court in the exercise of its long established jurisdiction to deal with all accessorial matters in regard to property brought into Prize, or it may be that captors in the old days settled any salvage claims before the property was brought into Court, or perhaps all reasons may at one time or another have concurred. But however that may be, such authority as there is vindicates a general jurisdiction to award salvage. Their Lordships in coming to this conclusion may well quote the language of that great judge Mr. Justice Story in *U.S.* v. *James Wilder*, 3 Sumn. 308. That was a case of general average. He quoted observations of Lord Stowell in the *Waterloo*, 2 Dods 433, at p. 435, on the question of salvage which Lord Stowell described " as a right otherwise universally allowed, and highly favoured in the law for the protection of those who are subjected to it; for it is for their benefit that it exists under that favour of the law. It is what the law calls *jus liquidissimum*, the clearest general right that they who have saved lives and property at sea should be rewarded for such salutory exertions." Story J. then said of the right to general average: " If there ever was a case which ought to be settled by a Court of Justice upon principles of right and liberality, this is precisely that case. No Court of Justice ought to decline to enforce it unless there be some clear, definite and uncontrovertible prohibition against the exercise of it." He clearly meant that exactly the same might be said of salvage, rightly in their Lordships' judgment. These expressions are as applicable to the Prize as to the Instance jurisdiction of the Admiralty Court. They give the true justification for the allowance of salvage and general average in Prize.

In the result their Lordships are of opinion that this appeal should be allowed and the order of the Prize Court dated the 11th February, 1941, discharged with costs. It should be declared that if the " Prins Knud " were condemned as Prize, the appellants would be entitled to recover from the respondent remuneration for the salvage services rendered to the ship by the appellants before seizure. The respondent consenting, it ought to be ordered that the agreed sum of £6,675 2s. 7d. in respect of salvage services and the costs of the salvage proceedings ought to be paid into Court by the respondent for payment out to the appellants in satisfaction of their claim in these proceedings.

They will so humbly advise His Majesty.

The respondent will pay the costs of this appeal.

(20651) W. 8026—151 170 8/42 D.L. G. 338

In the Privy Council.

In the matter of the s.s. Prins Knud and her cargo

FRANCE FENWICK TYNE AND WEAR COMPANY LIMITED

v.

H.M. PROCURATOR GENERAL

DELIVERED BY LORD WRIGHT

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