

Privy Council Appeal No. 59 of 1917.

**In the Matter of Damaged Cargo *ex* Steamship
“Sudmark.”**

**Captain F. D. Gilpin Brown, R.N., and
Another - - - - -** *Appellants*

v.

**The Chartered Bank of India, Australia,
and China, and Others - - - - -** *Respondents.*

FROM

**HIS BRITANNIC MAJESTY'S SUPREME COURT FOR EGYPT
(IN PRIZE).**

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 1ST MARCH, 1918.

Present at the Hearing :

LORD PARKER OF WADDINGTON.
LORD SUMNER.
LORD PARMOOR.
LORD WRENBURY.
SIR SAMUEL EVANS.

[*Delivered by* LORD PARKER OF WADDINGTON.]

On the 15th August, 1914, the German steamship “Sudmark” was captured in the Red Sea by His Majesty’s ship “Black Prince,” under the command of the appellant, Captain Gilpin Brown. She had on board a general cargo, including a large quantity of copra consigned to Hamburg and 2,000 tons of barley consigned to Antwerp or Hamburg. Until the contrary was proved, the enemy character of the cargo would be presumed from the enemy character of the ship. After the capture Captain Gilpin Brown brought the ship with the cargo on board through the Suez Canal to the port of Alexandria, and there handed her over to the appellant, Lieutenant Grogan, who had been appointed by His Majesty’s military authorities in Egypt as detaining officer in respect of prizes brought to or captured in that port. Lieutenant Grogan caused the cargo to be unloaded and stored to his order in sheds belonging to the Egyptian Customs Administration. The unloading was com-

pleted early in October 1914. On the 17th October a fire occurred in the sheds where the cargo was stored, and a considerable part of the copra was burnt or damaged. What remained of the copra after the fire was, in the course of the proceedings for condemnation of the ship and cargo, released with the consent of the Procurator for Egypt to the respondents, who had entered a claim as owners, and the respondents thereafter brought an action in the Prize Court against Captain Gilpin Brown and Lieutenant Grogan to recover the loss occasioned by the fire. In this action Lieutenant Grogan has been held liable on the ground that he committed a breach of duty towards the respondents in causing the cargo to be unloaded and stored ashore. Captain Gilpin Brown has also been held liable on the ground that Lieutenant Grogan was his agent in causing the cargo to be landed, or alternatively that he was guilty of a breach of duty towards the respondents in handing over the ship and cargo to Lieutenant Grogan. Both Captain Gilpin Brown and Lieutenant Grogan are appealing from this decision. It will be convenient, in the first instance, to consider the duties of Captain Gilpin Brown as captor of the "Sudmark."

Seizures as prize are made by executive officers of the Crown in the exercise of the Crown's belligerent rights. The duties of these executive officers towards the owners of the property seized are the duties of the Sovereign and fall to be determined by international law. On the other hand, the duties of these executive officers towards the Crown must be determined by municipal law. As will presently appear, it is important to remember this distinction.

The title of the Crown to property seized as prize is not complete without adjudication in its favour by the Prize Court. The first duty of the Crown is therefore to preserve the property in order that it may be dealt with as the Prize Court may determine. If the property seized be a ship with cargo on board, the cargo should not (except under special circumstances) be disturbed until the ship be brought into a convenient port. The duty of the Crown to bring the ship into a convenient port without breaking bulk is generally discharged by the captors, and is sometimes referred to as the duty of the captors.* But it makes no difference to the owners of ship or cargo by whom the duty is discharged. For any loss occasioned by a breach of the duty the Crown may be made liable through the executive officer responsible for the breach or some other proper officer. As a matter of practice it is quite common for the captors, under the orders of their superior officer, to hand the prize to some other officer of the Crown to be taken into a convenient port, and it is impossible to hold that such practice is contrary to international law. On the prize being so handed over, the duties of the captors themselves with respect to it are at an end, though the duty of the Crown remains.

* Pratt's "Story," p. 37 to 39.

The convenience of the port to which a prize is brought in for adjudication must be determined by all the circumstances of the case. Neutral ports are not convenient ports, for it is arguable that a neutral Power could not allow a prize to remain in its ports (except temporarily, and then only by reason of special circumstances such as stress of weather or want of provisions) without committing a breach of neutrality, and, further, it might be difficult to execute the order of the Prize Court of the captors over vessels in a neutral port. Other things being equal, the nearest available port should be preferred. A ship captured in the English Channel ought not as a rule to be taken to Gibraltar. It would be unreasonable to subject her to the risk of so long a voyage. But as between various home ports it would be quite proper to select the least congested port, or the port the voyage to which, though longer, would involve less danger from the risks incident to war. A convenient port must be such that the property can remain there in safety without being exposed to special risk from wind or tide. It should be capable of accommodating vessels of the draught of the captured ship. The real point to be considered is the safety of the prize, and the distance of the place where the Prize Court holds its sittings from the port selected is immaterial.

To the question whether Alexandria was a convenient port to which the "Sudmark" might properly be brought after her capture, their Lordships, without hesitation, return an affirmative answer. It was not a neutral port, Egypt being in the military occupation of this country. (See the "Gutenfels," 1916, 2 A.C. 112.) For all material purposes, it was a British port, and vessels detained there as prize would be subject to the orders of the appropriate British Prize Court. There was then no Court in Egypt exercising jurisdiction in matters of prize, but the Admiralty Division of the High Court in this country had jurisdiction over all such matters, and there would be no difficulty in executing its orders in the port of Alexandria. The suggestion that the "Sudmark" ought to have been taken to Malta, at considerable risk, merely because there was a Court having jurisdiction in prize which sits at Malta is, in their Lordships' opinion, untenable. It follows that Captain Gilpin Brown acted properly in bringing the "Sudmark" into the port of Alexandria; but there is the further question whether he was justified in handing her over to the custody of Lieutenant Grogan.

So far as their Lordships can discover, there is no generally accepted rule of international law as to the officer in whose custody prizes should be placed when brought into a convenient port pending adjudication by the Prize Court. Inasmuch as the duty of the Crown to preserve the captured property subsists as well after as before the ship is brought into port, the matter is of little importance to the owners of the captured ship or cargo, and may be reasonably determined by the

municipal law of the captors. In Germany prizes are handed over to the port authorities. In this country the persons to whom a prize should be handed over is in part regulated by statute. Section 16 of the Naval Prize Act, 1864, provides that every ship taken as prize and brought into port within the jurisdiction of a Prize Court shall forthwith and without bulk broken be delivered up to the marshal of the Court, but if there be no such marshal, then to the principal officer of Customs in the port. It should be noticed with regard to this section that it is one of a fasciculus of clauses dealing with procedure in Prize Courts, and procedure has always been recognised as a matter of municipal as opposed to international law. Further, the penalty for its breach is governed by section 37 and involves only the loss of prize money—in other words, the loss of an advantage secured by municipal and not by international law. It should be noticed also that the 16th section has no application unless there be a marshal or a principal officer of Customs to whom the prize can be delivered. If there be no such marshal or principal officer, the section is inapplicable and the person to whom the prize is to be delivered would, according to our municipal law, fall to be determined by the Crown in the exercise of its prerogative.

There was no marshal or deputy marshal and no principal officer of His Majesty's Customs in Alexandria to whom delivery could be made pursuant to section 16, and it was no doubt for this reason that Lieutenant Grogan had been appointed on behalf of the Crown as detaining officer in respect of prizes brought to or captured in that port. Their Lordships cannot accept the suggestion that the principal officer of Egyptian Customs was the principal officer of Customs within the meaning of that section. Under these circumstances, Captain Gilpin Brown was, in their Lordships' opinion, fully justified in delivering the "Sudmark" to Lieutenant Grogan. It is difficult to see how he could have acted otherwise. The suggestion that he constituted Lieutenant Grogan his agent for the future custody of the ship and cargo is, in their Lordships' opinion, based on a misconception of the true facts. It is supported only by the subsequent conduct of Lieutenant Grogan in handing the ship to Captain Borrett for delivery with other prizes to the Prize Court marshal appointed by His Britannic Majesty's Supreme Court in Egypt, which had then obtained jurisdiction in prize matters, by Order in Council of the 30th September, 1914, made under an Act of Parliament passed on the 18th September, 1914 (4 & 5 Geo. V, c. 79). This conduct constitutes no foundation for saying that he was agent for Captain Gilpin Brown.

With regard to Lieutenant Grogan, somewhat different considerations arise. His duty towards the cargo-owners was the duty of the Crown, that is to say, the duty of preserving the property pending adjudication by the Prize Court. Only if in discharging the cargo he committed a

breach of this duty can he be liable for any loss entailed thereby on the cargo-owners. The Prize Court is the proper tribunal to determine whether the circumstances did or did not, according to international law, justify the discharge. If Lieutenant Grogan had, as it is contended he should have done, applied to the Prize Court for leave to land the cargo, the same question would have arisen for determination. If the circumstances were such that the Court, if applied to, would have authorised the discharge of the cargo, the cargo-owners can have suffered no damage by reason of the fact that Lieutenant Grogan did not make any such application. Their Lordships cannot accept the contention that the necessity of an application to the Court before landing a prize cargo is so clearly a rule of international law that a neglect to make the application must in all cases render the officer responsible for the landing liable for a breach of duty. Such a rule would not be in the interests of the owners of the captured property. The circumstances may be such that prompt action is necessary in the interests of all concerned. In such cases the officer in charge of the property must act on his own responsibility. If there be no justification for landing the cargo, and the owner is prejudiced thereby, he has his remedy in the Prize Court. If the landing of the cargo is justified, the owner has no cause of complaint. The irregularity, if any, committed by the officer responsible for the landing, in not having first obtained the leave of the Court, is in that case a mere technical breach of duty.

In the present case there can, in their Lordships' opinion, be no reasonable doubt that if an application had been made to the Prize Court it would have authorised Lieutenant Grogan to do what he in fact did. The steamship "Sudmark" was undoubtedly a German vessel captured at sea, and therefore clearly liable to condemnation. The liability of the cargo to condemnation was in doubt. It depended upon whether its presumed enemy character could be displaced by evidence. But it was quite certain that it could never leave Alexandria on board the "Sudmark." It would have to be transhipped or landed. The captain, in the interests of the cargo-owners, was pressing for an immediate landing, on the ground that it would deteriorate if left on board. Under circumstances such as these it is the usual, if not the invariable, course for the Prize Court to order a cargo to be landed and stored on shore. Their Lordships cannot discover any circumstance which might have induced the Prize Court to depart from the usual practice. If applied to, it would have authorised Lieutenant Grogan to do what he in fact did.

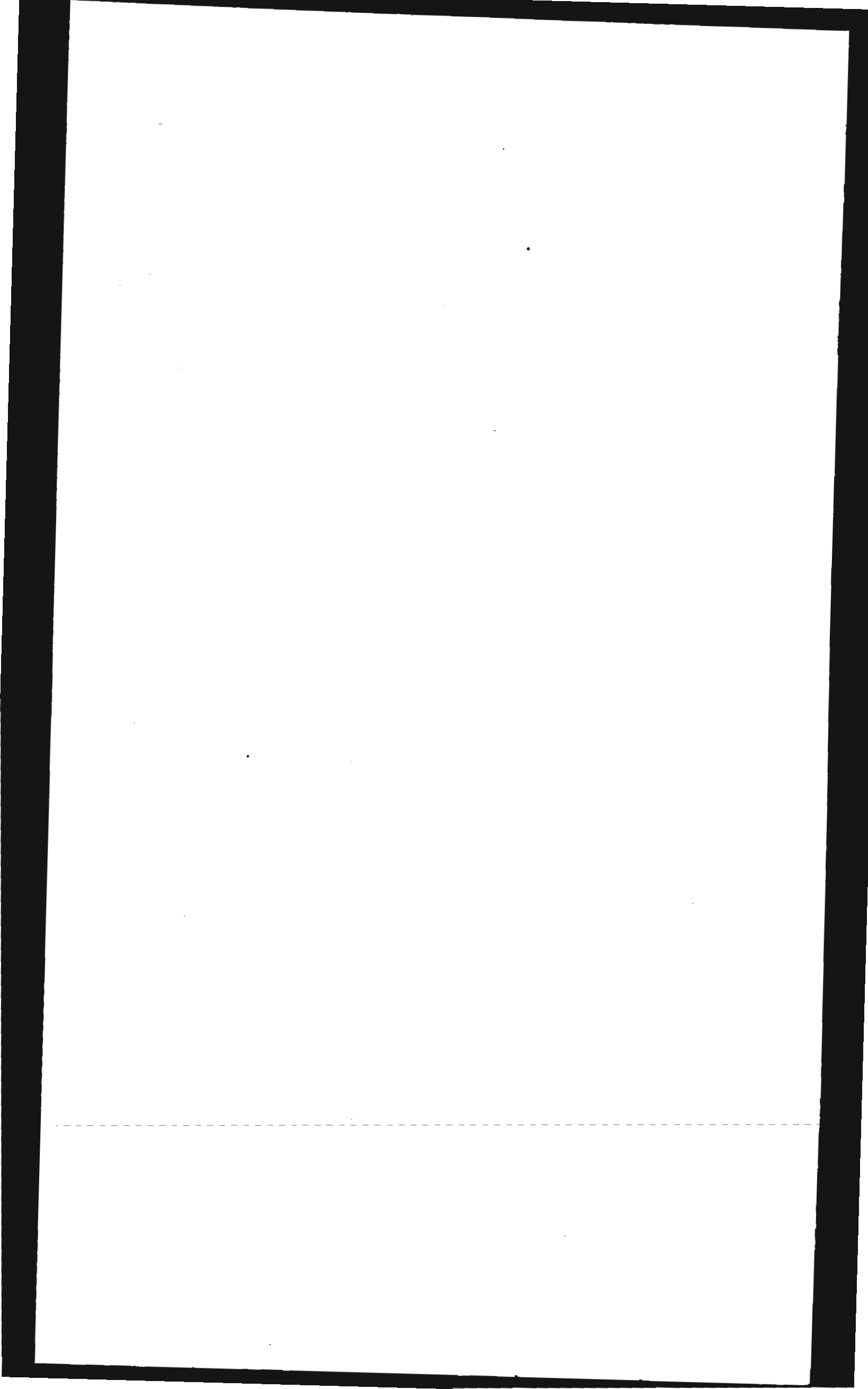
Further, their Lordships are of opinion that the delay, necessarily incident to an application to the High Court in this country, for leave to land the cargo was, under the circumstances, a sufficient justification for landing the cargo without obtaining such leave. But even if Lieutenant Grogan were guilty of a breach of duty in not obtaining the leave of the

Prize Court to discharge the cargo, it is difficult to see how the damage subsequently incurred by reason of the fire was in any way consequent on such breach. Captors or other executive officers of the Crown in possession of property seized as prize may properly be likened to bailees, if there be a question as to the amount of care they are bound to exercise, but the likeness cannot be extended beyond this point. Bailment is a matter of contract, and the measure of damage in the case of a breach of contract may be very different from the measure of damage in the case of a breach of duty which in no way arises out of contract. In their Lordships' opinion, *Lilley v. Doubleday* (7 Q.B.D. 510) cannot be relied on in the present case.

It was suggested that if an application had been made to the Prize Court the appellants would, in some way or other, have obtained the advantage of some insurance effected or to be effected by the Prize Court marshal. This may or may not be the case, but their Lordships are quite satisfied that there is no obligation on the part of the Crown or its executive officers, or the Prize Court marshal, to effect insurances against fire for the benefit of cargo-owners, whether the cargo be landed or kept on board a captured ship. The loss of some possible advantage arising out of insurance usually effected in the interest of the Crown cannot therefore be made an item of damage for the breach of duty which Lieutenant Grogan is said to have committed.

For the reasons above indicated, their Lordships are of opinion that the order appealed from was erroneous and ought to be discharged.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed, with costs here and below.



In the Privy Council.

CAPTAIN F. D. GILPIN BROWN, R.N.,
AND ANOTHER

vs.

THE CHARTERED BANK OF INDIA,
AUSTRALIA, AND CHINA, AND
OTHERS.

DELIVERED BY

LORD PARKER OF WADDINGTON.

PRINTED AT THE FOREIGN OFFICE BY G. R. MARSDEN.

1918.