Privy Council Appeal No. 50 of 1920.

In the matter of the Steamships "Elve" and "Bernisse."

His Majesty's Procurator-General and others - - - *Appellants*

v.

P. A. Van Es and Company, and others - - - - *Respondents*

FROM

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

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH DECEMBER, 1920.

Present at the Hearing:

LORD SUMNER.
LORD PARMOOR.
LORD WRENBURY.
SIR ARTHUR CHANNELL.

[*Delivered by* SIR ARTHUR CHANNELL.]

This is an appeal by the Procurator-General from a decree of Lord Sterndale dated the 25th July, 1919. in a consolidated action brought by the respondents, the owners of the s.s. "Elve" and of the s.s. "Bernisse" and of their cargoes, whereby the learned President decreed on the claim in respect of the s.s. "Elve" restitution in value, and gave damages in respect of the s.s. "Bernisse," which had already been released but in a damaged condition.

The steamships were owned by P. A. Van Es and Company, a Dutch firm at Rotterdam, and were chartered to a Dutch company in business at Delft for the carriage of cargoes of ground nuts from the Port of Rufisque, in the French colony of Senegal, to Rotterdam. The Dutch company had factories at various places in Holland, where the ground nuts were dealt with and oil was extracted from them. This importation had commenced before the war. It was for a time stopped on the outbreak of war, but the object of it having been explained to and looked

into by the French Government, it was permitted to proceed under agreed conditions and guarantees. Each consignment of ground nuts was to be accompanied by a document called an "acquit à caution," issued by the French colonial authorities at the port of loading and which was to be deposited on arrival in Holland with a representative of the French customs authorities at the port of discharge whose duty it was to take precautions to secure that the ground nuts were used at the factories and that the products did not go to an enemy destination.

On the 20th May, 1917, the two steamships sailing in company with cargoes of ground nuts in bulk were proceeding on the voyage from Rufisque to Rotterdam by the route then considered the safest, round the north of Scotland, and on that day they were stopped by H.M.S. "Patia," an auxiliary cruiser, at a point situate in latitude 62° 4′ N., and longitude 15° 10′ W. This spot is in the North Atlantic, approximately west of the Orkneys, and is outside the zone within which the Germans had announced their intention of sinking all neutral vessels. At the time the vessels were so stopped the Order in Council of the 16th February, 1917, was in force, and was being acted on by H.M. cruisers, and as it is necessary on this appeal to consider the words of that Order, it is well to set out the operative part.

> "1. A vessel which is encountered at sea on her way to or from a port in any neutral country affording means of access to the enemy territory without calling at a port in British or Allied territory shall, until the contrary is established, be deemed to be carrying goods with an enemy destination, or of enemy origin, and shall be brought in for examination, and, if necessary, for adjudication before the Prize Court.
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> "2. Any vessel carrying goods with an enemy destination, or of enemy origin, shall be liable to capture and condemnation in respect of the carriage of such goods; provided that, in the case of any vessel which calls at an appointed British or Allied port for the examination of her cargo, no sentence of condemnation shall be pronounced in respect only of the carriage of goods of enemy origin or destination, and no such presumption as is laid down in Article 1 shall arise.
>
> "3. Goods which are found on the examination of any vessel to be goods of enemy origin or of enemy destination shall be liable to condemnation.
>
> "4. Nothing in this Order shall be deemed to affect the liability of any vessel or goods to capture or condemnation independently of this Order."

It had become the practice to give to any vessel which started from a British port on a voyage to a port affording access to enemy territory or which when on such a voyage wherever commenced had, in order to comply with the Order in Council, called at a British port for the examination of her cargo, a clearance on a green card, which became known as a green clearance. When the two steamers were stopped, they were boarded by an officer from H.M.S. "Patia," who made the usual inquiries, and was told the port from which the vessels had come, and that to which they were bound, and was shown her French documents, including the "acquit à caution." The officer asked if they had a green clearance, and was of course told that they had not. He ascertained that the cargo was in bulk, and in his evidence at the trial he gave

a decided opinion that it would have been impossible to examine the ships at sea in order to find out whether there was anything hidden under the cargo. He stated, however, that if there had been a green clearance, or in other words, if the cargoes had been examined at a British port, he would have been satisfied. Being in doubt what to do, he reported the facts by signal to the captain of the " Patia," and the captain being also puzzled, reported them by wireless to the admiral in command of the cruiser squadron, who directed that the vessels should be sent in to Kirkwall. They were accordingly ordered to go there, and an officer and three men were put on each steamer to see that they went. The captains remonstrated on the ground that they would have to go through the danger zone, but they were told that it did not make much difference, as there were German submarines about outside the zone as well as within it, and that they sank vessels wherever they met them, so that ships were nearly as likely to be torpedoed outside the zone as in. On this point the learned President, although he did not think it material, found that there was greater danger on the route the ships were directed to go than on that which they had intended to take, and their Lordships would not be inclined, and indeed have not been asked to differ from the learned President on this point. The vessels did when within the zone encounter a German submarine, which fired on them without previous warning, and sank the " Elve " by one torpedo, and seriously damaged the " Bernisse " with another. Fortunately a British cruiser appeared, which took on board the crews of the vessels, who had taken to their boats, and towed the " Bernisse " in her damaged condition into Kirkwall. The " Bernisse " was temporarily repaired, and ultimately was allowed to proceed on her voyage to Rotterdam, and it is in evidence that her cargo was never examined, although in the course of the repairs it probably became evident that there was no contraband on board. On these facts the learned President has held that there was no ground in fact for detaining the vessels and sending them into Kirkwall, and further that there was no such reasonable ground for thinking that there was as to relieve the Crown from paying the damages arising from sending them in, and it is on the latter point that the appeal has been brought.

It is necessary first to consider the construction of the Order in Council. It has been held by this Board that the Order is binding on neutrals. (" *The Stigstad,*" 1919 A.C. 279 ; *see also* " *The Leonora,*" 1919, A.C. 974) and the Order expressly directs that vessels which come within the first clause *shall* be brought in for examination. The Order is not very happily worded, but these vessels having started from an Allied port do not come within the Order at all, unless the words " without calling at " imposed on a vessel the obligation for a subsequent call even although her cargo has been duly examined and passed at the British or the Allied port from which she started. This is an impossible construction. Having regard to the fact that the object of requiring a call is to ensure that there shall be an

opportunity of examining the cargo, it seems clear that " calling at " must include " having been at " a British or Allied port when the port was the original port of departure on the voyage ; and as regards the want of a green clearance, that would only be given at a British Port, and it really is quite clear that throughout the Order an Allied port is put on the same footing as a British port. The President so held, and their Lordships agree with him.

As there was in this case no ground whatever proved on which either ships or cargo could have been condemned as prize, any more than any ground for detaining them under the Order in Council, the question remaining is merely that of reasonable ground for the action taken. To show such ground the Crown rely on two points. First they say that the detention was a legitimate exercise of the right of search. In this war it has been agreed that search at sea has been practically impossible, and sending in to port for search has been almost universal. In this case further there was evidence that the search at sea for contraband hidden under the ground nuts would have been impossible. The President, however, has disposed of this point by saying that even if the officers might have suspected that something contraband was hidden under the ground nuts, in fact they did not do so and have never said that they did. They really only sent the vessels in because there was no green clearance. This seems a sufficient answer, and it is unnecessary to go further, but counsel for the respondents do further argue that even for a search reasonable ground of suspicion must be shown, and that where everything is in order on the papers, and there is no circumstance suggesting hidden contraband, even a search on the spot would be unjustifiable. In strictness this is of course correct, but so little suspicion is required to justify a search that their Lordships are not prepared to say that if a boarding officer were to state that finding a cargo to be in bulk he thought something might be hidden under it, and there-fore directed a search, his conduct would be so unreasonable as to subject the Crown to a liability for damages. That case must be considered if it should arise. Here it does not appear to arise.

The second point on which the Crown rely is really the only one which gives rise to any difficulty. It is that there was a *bonâ fide* doubt on the part of the officers who gave the order for detention, as to the true construction of the Order in Council. The question as to what is sufficient to relieve a captor from paying damages in respect of a capture which is afterwards decided to be in fact wrongful was very fully considered in the case of the *Oostzee*, 9 Moore P.C. 150. It was there held that to exempt captors from costs and damages there must be some circumstances connected with the ship or cargo affording reasonable ground for belief that the ship or cargo might prove a lawful prize. That case arose during the Crimean War, and the cases down to that date were very fully dealt with. The only case which at all supports the contention put forward by the Crown in the present case is the *Luna*, Edwards, 190. There a neutral

vessel proceeding to St. Sebastian, in Spain, which had at the time been for two years in the occupation of the French, was seized for alleged breach of blockade by British captors who were in *bonâ fide* doubt whether or not an Order in Council of the 26th April, 1809, declaring a blockade of " ports and places under the government of France " extended to San Sebastian so temporarily in French occupation. Sir William Scott held that it did not so extend, and decreed simple restitution, and he not only refused the claimants costs and damages, but gave the captors their expenses. In giving judgment he said :—

> " It is impossible for the Court to throw out of its consideration that when these Orders in Council are issued it is the duty of the Officers of His Majesty's Navy to carry them into effect, and although they may be of a nature to require a great deal of attentive consideration, gentlemen of the Navy are called upon to act with promptitude and to construe them as well as they can under the circumstances of cases suddenly arising. With every wish, therefore, to make the greatest allowance for the difficulties which are at present imposed on the commerce of the world, I cannot in this instance refuse the captors their expenses, but in no future case arising on the same state of circumstances will the Court grant that indulgence."

In the " *Actæon*," 2 Dodson 48, five years later, Sir William Scott, without referring to his former decision in the " *Luna*," which does not appear to have been quoted to him, laid down what seems to be a different rule. He says at p. 52 :—

> " Neither does it make any difference whether the party inflicting the injury has acted from improper motives or otherwise. If the captor has been guilty of no wilful misconduct, but has acted from error and mistake only, the suffering party is still entitled to full compensation, provided, as I have before observed, that he has not by any conduct of his own contributed to the loss. The destruction of the property by the captor may have been a meritorious act towards his own Government, but still the person to whom the property belongs must not be a sufferer."

These cases are reviewed at length in the " *Oostzee*," and it is said in the judgment that in the " *Luna* " Lord Stowell must have felt that he was going to the very verge of the law. The headnote to the report of the " *Oostzee* " in Moore's Report states as part of the decision and not as a dictum that an honest mistake occasioned by an act of government will not relieve captors from liability to compensate a neutral ; but it should be noted that towards the end of the judgment delivered by Lord Kingsdown he points out that in the case then before the Board there was no point of law. In strictness, therefore, what was said as to the insufficiency of a mistake in point of law might be considered as *obiter*. Their Lordships, however, consider that the judgment in the " *Oostzee* " must be looked at as a whole, and that it really does decide the point stated in the headnote. It is not necessary to say that in order to relieve the captors from paying damages the neutral owner must be in some way in fault ; it may be only his misfortune ; but there must be something " connected with the ship or cargo " in order to give rise to the suspicion which will relieve.

Here the doubt which certainly was honestly entertained was not a doubt as to anything so connected, but merely a doubt as to the meaning of an Order in Council issued by the British Government. If the decision in the "*Luna*" proceeded entirely on the ground stated in the judgment as reported, it is contrary not only to the "*Oostzee*" but to the judgment of Lord Stowell himself in the "*Actæon*," and it cannot now be followed. It may well be that in addition to the point stated in the judgment in the "*Luna*" as reported, and which is, as Lord Stowell truly said, a point which ought not to be left out of consideration, there were also in the facts of that case circumstances connected with the ship which were in Lord Stowell's mind. It is clear on the face of the report that the whole judgment is not reported. Even if San Sebastian was not in strictness a blockaded port under the Order in Council, nevertheless a ship going there was obviously taking goods to the enemy, who were in actual occupation of it, and on that or some other ground, in addition to what appears in the judgment, the decision may have been justified. It has, however, been treated as a decision that the facts referred to in the judgment as matters to be taken into consideration would in themselves be sufficient, and so understood it is contrary to at least one decision binding on this Board. Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

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HIS MAJESTY'S PROCURATOR-GENERAL AND OTHERS

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DELIVERED BY SIR ARTHUR CHANNELL.

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