

Privy Council Appeal No. 30 of 1920.

In the matter of the Steamship "Loekken."

Waldemar Eckell (on behalf of the Norwegian Government and
Redereaktiebolget) - - - - - *Appellant*

v.

His Majesty's Procurator-General - - - - - *Respondent*

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 30TH NOVEMBER, 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 Consul-General for Norway on behalf of His Majesty the King of Norway from a decree of Sir Samuel Evans sitting in Prize pronouncing the s.s. "Loekken" to have been seized outside the territorial waters of the Kingdom of Norway, and condemning the said steamship as good and lawful prize. The "Loekken" was a Norwegian merchant ship, and at the time of her capture on the 10th May, 1916, by H.M.S. "Calliope" was engaged in carrying a full cargo of contraband of war, consisting of sulphur pyrites, from Norway to Germany, and the sole question on this appeal is whether the capture was made in violation of Norwegian territorial rights. The capture was effected off the part of the Norwegian coast lying between the Island of Rauna and the Naze, and the configuration of the coast is such that considerable difficulty might have arisen in determining the exact position of the territorial boundary,

but the parties to this appeal whilst reserving their right to contend in the future for a different line, have for the purpose of this appeal agreed to accept as the boundary of the territorial waters a line drawn parallel to, and three miles to seaward of, a line drawn from the headland on which the Rauna lighthouse stands and the headland on which the Naze lighthouse stands. The questions on the appeal are thus reduced to questions of fact. On a writ in prize being issued, the owners of the "Loekken" in the first instance entered an appearance in their own names, and put in a claim resting their case on the allegation that the capture had been effected in territorial waters; but the authorities are of course quite clear that this point was not open to them, and can only be raised by the Territorial Sovereign. At a later stage, the present appellant, the Consul-General for Norway, intervened on behalf of the King of Norway, and the case proceeded to a hearing on his claim. Witnesses for the ship were examined *viva voce* before Sir Samuel Evans at an early stage, and later, officers from the English warships were also examined *viva voce* before him, and one witness, an important one, was examined before an examiner of the Court. The learned President having arrived at his conclusions on the questions of fact after hearing witnesses, this Board would only differ from him if a very clear case were made out, and the appeal might be shortly disposed of on that ground, but as the matter affects the rights of a foreign and friendly Sovereign, and has been very fully argued on his behalf, and also carefully considered by their Lordships, they think it right to state more fully their reasons for agreeing with the learned President.

The story told by the witnesses from the s.s. "Loekken" was that at 2.35 a.m. middle European time (M.E.T.) equivalent to 3.35 Greenwich mean time (G.M.T.), they passed Lister light at a distance of $2\frac{3}{4}$ miles, and at 3.10 (M.E.T.) they passed Rauna light at a distance of 2 miles. The officer of the watch on the "Loekken" stated that he took these distances on each occasion by a 4-point bearing, and that he checked the latter position by a cross bearing of Lister and Rauna lights. If these observations were correctly taken they should of course show accurately the ship's position at those times, but it is noticeable that neither in the log nor in the scrap log, which of course is the more important of the two, are any details given by which the position can now be checked. Neither the times nor the readings of the patent log at the times when the lights bore 4 points on the port bow are given, nor are the cross bearings given, nor is the fact that 4-point bearings or cross bearings were taken recorded. The entries as to Rauna are also out of place in the scrap log. It may well be, as suggested by counsel, that it is not usual to enter all details in the log, when observations are taken for use at the time in directing the course of the vessel, but the fact remains that the taking of these observations depends on the oral evidence of Berthelson, the officer of the watch of the "Loekken" and assuming that the truthfulness of his evidence

is accepted there is still no means of checking the accuracy of what he did. This will be seen to be important when the observations taken on the men-of-war are compared with those on the "Loekken." After passing Rauna, the "Loekken" is said to have kept on a course of S.E. $\frac{1}{2}$ E. This course, although converging towards the territorial boundary as now agreed for the purpose of this case, is very nearly parallel to it, and would not have taken her over the line in the 50 minutes which elapsed before she sighted the warships at 4 a.m. (M.E.T.). As soon as she saw them she starboarded her helm and made for the shore. The "Calliope" first signalled to her to stop, and when she did not stop, signalled that she would fire on her if she did not. She then stopped, and reversed her engines. The time when this happened appears to be as nearly as it can be ascertained by the accounts of both vessels, 4.10 M.E.T. or 3.10 or 3.12 (G.M.T.). The officers of the "Loekken" took no observations or bearings when running in for the shore, or at any time after passing Rauna, but when boarded the Captain asserted that they were within territorial limits, which was denied by the boarding officer. The Captain did not, however, suggest taking any bearings to verify his assertion. The reason alleged for taking no bearings was that the weather was hazy, but the evidence is that there was haze in patches, and if that was all, sufficient points on the shore must have been visible for bearings to have been taken. The case for the "Loekken," therefore depends entirely on her having kept the course alleged S.E. $\frac{1}{2}$ E. for nearly an hour before sighting the "Calliope." A cargo of iron ore might easily affect her compass, and her compass had been adjusted for deviation on her previous voyage, but not since this cargo was on board.

Passing now to the story as told by the witnesses from the British warships, a squadron of three light cruisers, the "Calliope," the "Constance" and the "Comus," was making in the early morning of the 10th for the Naze, in order to cruise up the coast of Norway. The squadron was in line ahead, the "Calliope" leading. At 2.20 (G.M.T.), the Naze light was sighted bearing N. 55° E., and at 2.28 it bore N. 30° E. The "Calliope" then altered course, and steered N. 30° E. towards the light. At 2.55 it appears from the signal log of the "Constance," which was put in evidence, that the "Calliope" signalled to the "Constance" and the "Comus": "Calliope will steer 4 miles off shore at 18 knots. Commence to spread when I D is hauled down, keep easy visual touch," and at 3.5 she signalled: "Spread for lookout duties on my port beam." In the meantime at 3.0 (G.M.T.), the navigating Lieutenant (Lieutenant Boyd) of the "Calliope" took a bearing of the Naze light N. 30° E., and by the rangefinder took the distance of the light as 8,000 yards, or 4 miles. He then starboarded to N. 15° W., and in a very short time further starboarded to N. 52° W. This course N. 15° W. only appears in Lieut. Boyd's note-book, "Calliope's" log entering "at 3.0, altered course to N. 52° W. and at the same time altered speed to 18 knots." This course N. 52° W. is practically parallel

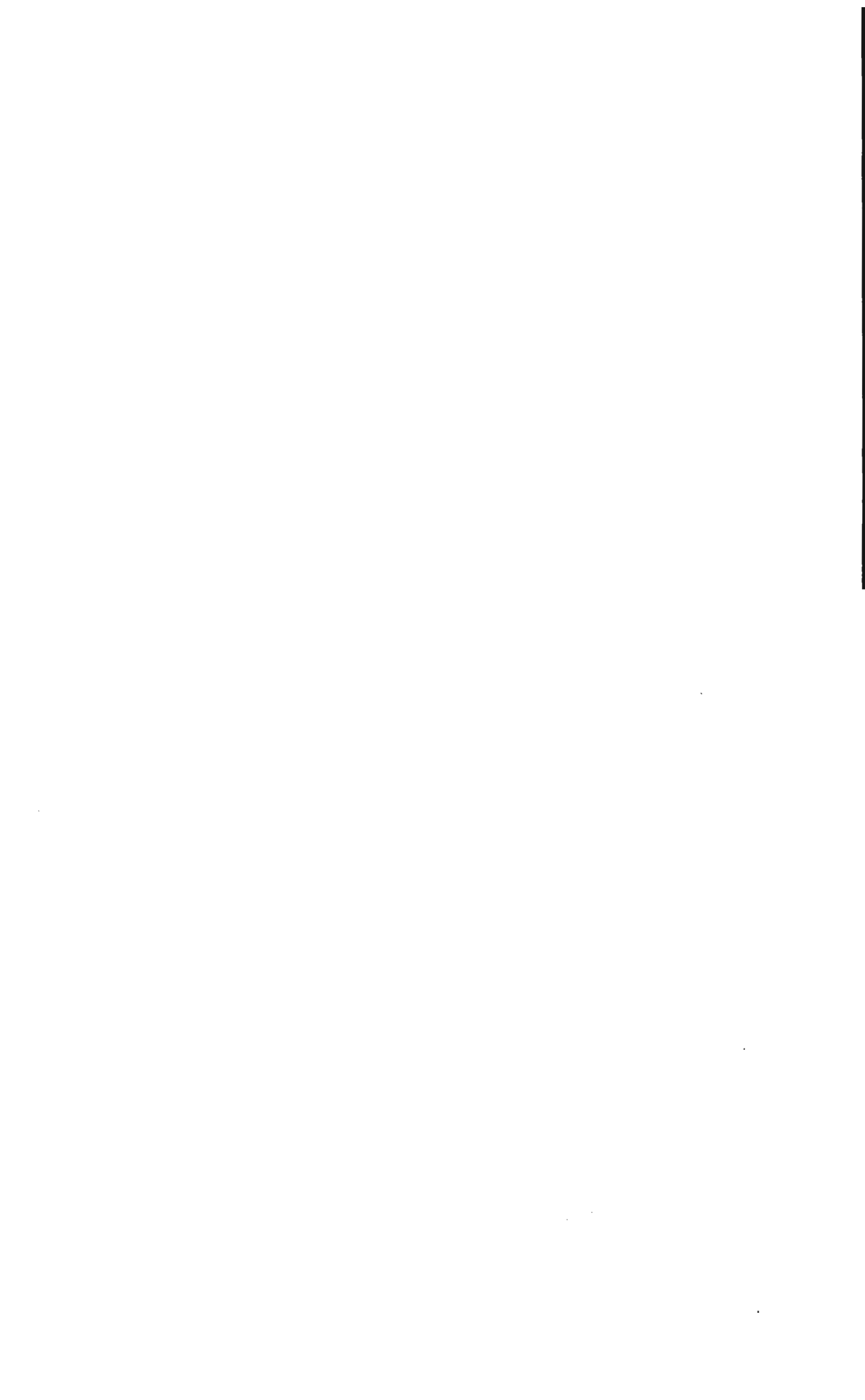
to the line of territorial limit as now agreed, but it must be borne in mind that the officers of the British warships had no such agreed line on their charts and had nothing to go by but the general configuration of a very irregular coast line. It is clear, however, that the manœuvre signalled to the "Constance" as intended was being carried out, and that a margin estimated at a mile was being allowed to ensure being outside the territorial limit. At 3.5 the "Loekken" was sighted. At 3.7 the navigating officer took another bearing of the Naze light, and by rangefinder took the distance from it at 6,175 yards. There is some difficulty in reconciling this distance with those taken before and afterwards which will be dealt with hereafter when the "Calliope's" position is further considered. By this time it had been seen that the "Loekken" was making for the shore, and she was being signalled to stop. It therefore became important to ascertain correctly the "Calliope's" position, and the navigating officer took at 3.15 cross-bearings of the three points the Naze light N. 75° E; Vaholm, N. 55° E.; Ullero, N. 15° E.; and at the same time by rangefinder took the distance of the Naze at 8,400 yards. This observation was taken almost coincidentally with the "Loekken" reversing her engines under the threat to fire, which it is not contested should be taken as the time of capture. At this time, according to all the evidence, the "Loekken" was to seaward of the "Calliope." The position of the "Calliope" as so taken, by three-points bearings, was close to the 3-mile line, but outside it, and the "Loekken" was therefore further outside it. The evidence of Lieut. Boyd is that there was no difficulty in selecting points for observation clear of haze, and their Lordships see nothing to throw doubt upon the correctness of this "fix" taken at the important time, and, contrasting it with the evidence of the Captain of the "Loekken," who had the same opportunity of taking observations, but appeared reluctant to avail himself of it, their Lordships without any hesitation agree with the view of the learned President that when the "Loekken" was captured, she and the "Calliope" were both outside territorial limits. A subsequent "fix" was taken by Lieut. Boyd at 4.05, and bearings were also taken by the navigating officer of the "Constance," which corroborate the position at 3.15, but this seems so clear that it is unnecessary to go into the details of these fixes. The fact that the actual capture was outside the territorial limit is however not quite conclusive to show that there was no violation of territorial rights. If the distance of 6,175 yards from the Naze at 3.7 was correct the "Calliope" was then slightly within the territorial line as now agreed for the purposes of the case, and the time practically coincides with the time when the "Calliope" commenced to try and cut off the "Loekken" from getting within territorial waters. This was a belligerent operation which would be wrongful if commenced within territorial limits. It is not quite clear what view the learned President took on this point, but he quotes authority which shows that even if the "Calliope" was at one

time within territorial limits but passed out before commencing any belligerent operation, it would be no violation of territorial rights. Probably, therefore, he took that view of the facts. The appellant throws doubt upon distances taken by rangefinder in all cases except this one distance of 6,175 yards, but he contends that that should be taken as conclusive that the "Calliope" was at 3.7 within territorial limits. It is said, and no doubt with truth, that in order that a rangefinder may be accurate, the object must have a clear cut vertical line, and that haze will interfere with this. An examination of the whole of the evidence leads their Lordships to the conclusion that there is a mistake as to this distance of 6,175 yards. The one thing which appears reliable is the position of the "Calliope" at 3.15, taken by three-points bearings. The course of the "Calliope" from the time of commencing to cut off the "Loekken" is stated clearly by the navigating officer, and also in the logs and notebook. The "Calliope" was on the course N. 52° W. when she sighted the "Loekken." She ported two points and continued on that course until 3.15. The course N. 52° W. was practically parallel to the boundary line. The porting two points would take her nearer to the line if she was already outside it, but away from the line if she was within it. On the course she was on, she never would have got to the place where she was at 3.15, unless she was outside the territorial boundary when she commenced to chase the "Loekken." The evidence of the Commodore when carefully read further emphatically states that there was in this interval no change from the course N. 52° W., excepting the porting two points. Some confusion is however introduced into his evidence by a mistake in converting, for the assistance apparently of the President, the course expressed in degrees to a course expressed in points of the compass. At question 12, on page 42 of the printed record, the Commodore is made to say that the course N. 52° W. was equivalent to being between W. and W. by N., which is clearly very incorrect. It is really between N.W. and N.W. by W. This is probably an error by the shorthand writer or by the printer, as it is hardly likely to have been made by the Commodore, and if made by him by some slip it would probably have been noticed at the time by Mr. Stephens or Mr. Balloch, which it was not. A little lower down, at question 19, the Commodore appears to state that after porting the two points he was heading N.N.W., which is very nearly but not quite in accordance with two points porting from N. 52° W., being an error of only $5\frac{1}{4}^{\circ}$ or less than half a point, and as the Commodore was answering a question of how the "Loekken" was heading the small difference was for that purpose quite immaterial.

When the distances taken by rangefinder of 8,000 yards at 3.0 and 6,175 at 3.7 are compared with the courses steered in the interval, it seems likely even without the evidence as to the actual position at 3.15, that there is an error in one or the other of the distances. On the course N. 52° W. the "Calliope" would have the Naze light abaft the beam, and would be getting

farther away from it, and on the course N. 15° W. would have the light very nearly abeam, although slightly ahead, and she would not be getting much nearer to it; she was only a very short time on that course. Of course a cruiser going 18 knots would not turn, as if on a pivot, when the helm was put over, but would go ahead to some extent on her original course before she was steadied on the altered course, but making every allowance for this, it seems impossible upon the course stated to have been steered for the "Calliope" to have been 1,825 yards nearer to the Naze light at 3.7 than she was at 3.0. All the evidence therefore goes to show that the "Calliope" was outside the territorial limits during the whole time that she was engaged in the capture of the "Loekken."

Much reliance was placed by the Captain of the "Loekken" on a message sent by the navigating officer of the "Calliope" to the boarding officer on the "Loekken," when the boat returned with her armed crew who were to take the prize to Kirkwall. Such a message was in fact sent for the purpose of giving the boarding officer his point of departure for the voyage to Kirkwall, and not for any other purpose. It is not clear what the figures of latitude and longitude on it were, and the navigating officer says that he cannot recollect and only took the position roughly. He has, however, in his notebook a position of latitude and longitude, taken about that time, which does not correspond exactly but does nearly with the figures given by the Captain of the "Loekken." This message was, however, sent quite an hour after the capture, and it may well be that both the "Loekken" and the "Calliope" may by this time have got over the line. The "Loekken" had been lying without her engines moving, and of course without any anchor down, and there is said to have been no tide, but she would certainly drift, and there was according to her log a light S.S.E. wind which would have taken her towards or over the line. The "Calliope" had been kept under way backwards and forwards in case a German submarine might have been about, and no doubt she would have kept on the land side of the "Loekken." There seems therefore to their Lordships nothing in this point to lead them to distrust the three-points bearing taken at 3.15, and their conclusions from that and from the courses steered as to the position shortly before that time. They will therefore humbly advise His Majesty that the appeal should be dismissed with costs.



In the Privy Council.

In the matter of the Steamship "Loekken,"
WALDEMAR ECKELL (ON BEHALF OF THE
NORWEGIAN GOVERNMENT AND REDEREK-
TIEBOLGET)

v.

HIS MAJESTY'S PROCURATOR-GENERAL.

DELIVERED BY SIR ARTHUR CHANNELL.

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