Privy Council Appeal No. 93 of 1920.

The Egyptian Bonded Warehouses Company, Limited - - *Appellants*

v.

Yeyasu Goshi Kaisha and The Marshal of His Britannic Majesty's Prize Court - - - - - - - *Respondents*

FROM

HIS BRITANNIC MAJESTY'S SUPREME COURT FOR EGYPT, VICE ADMIRALTY JURISDICTION (IN PRIZE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND NOVEMBER, 1921.

Present at the Hearing:

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

[*Delivered by* SIR ARTHUR CHANNELL.]

This is an appeal from His Britannic Majesty's Supreme Court in Egypt, exercising jurisdiction in prize. The appellants, the Egyptian Bonded Warehouse Company, Limited, are an Egyptian company who were employed by the Marshal of the Prize Court to warehouse goods which came into his charge as Marshal. The first respondents are a Japanese firm, who claimed, as owners, 171 cases of aniline dyes which had been part of the cargo of the German steamer "Lutzow," seized as prize within the district over which the Prize Court of Egypt had jurisdiction, and placed in charge of the Marshal of the Court, and by him warehoused with the appellants.

On the 4th October, 1915, the Japanese firm (the first respondents) obtained from the Prize Court an order for the release to them of the 171 cases which they had claimed. It will be necessary to state hereafter in greater detail what was done upon this order, but the result was that through the mistake of someone, 150 out

of the respondents' 171 cases got shipped to England instead of to Japan, as they had desired and directed. On the 27th December, 1916, the first respondents, by a writ issued out of the Supreme Court, and entitled "Vice Admiralty Jurisdiction in Prize," commenced proceedings to recover damages from the Marshal for alleged negligence in respect of the 150 cases. There was some delay in proceeding with the action owing, perhaps, to the fact that the then Marshal, Mr. Wallis, died, and on the 8th February, 1918, the writ was amended by striking out his name, leaving it as a writ against the Marshal of the Court, without naming the successor in the office. By this time the defence of the Marshal had been taken up by His Majesty's Procurator-General in Egypt, presumably for the reason that negligence being alleged against a public officer in the execution of his duty, it was right that the action should be defended at the public expense, and especially as the individual then holding the office could not be personally responsible for any default of his predecessor.

On the 8th March, 1918, the Procurator-General, acting on behalf of the Marshal defendant, issued from the Court, and procured to be served on the appellants, a third-party notice, stating that the defendant claimed to be indemnified by the appellants on the ground that the negligence complained of was committed by the appellants as his agents, and giving notice to the appellants to enter an appearance if they wished to dispute the plaintiffs' claim in the action, and that in default of appearance they would be deemed to admit the validity of any judgment, and their liability to indemnify. The appellants did not enter an appearance, taking the view that the Prize Court had no jurisdiction to issue the notice. Their main ground appears to have been that as Egyptian subjects they could only be sued by a foreigner in the Mixed Court, and they must have given some notice of these contentions, for the next proceeding was an argument, before Mr. Peter Grain, one of the Judges of the Court, on the point of jurisdiction. The appellants were not represented, but the plaintiffs in the action appeared by counsel, and the Procurator appeared for the Marshal. Both appeared to have argued in support of the jurisdiction.

On the 28th June, 1918, the Judge delivered judgment to the effect that the Prize Court had jurisdiction. On this the appellants (by leave, necessary owing to the time having expired) entered an appearance under protest, and the case was tried, with the result that judgment was given for the plaintiffs in the action for damages, the amount to be ascertained by an inquiry, which was directed; and for the Marshal, as against the third parties, that he was entitled to be indemnified by them. From this judgment the appellants appeal to this Board, on the ground that the Court had no jurisdiction to entertain and decide on the third-party notice, and also that even if it had, the decision was wrong on the merits. The Marshal also entered an appeal, but on petition by him to this Board he was, on the 7th February, 1921, struck out as appellant, and made a respondent on the terms

that his argument was to be restricted to his claim to be indemnified by the appellants.

The only appeal now before the Board, therefore, is that of the Bonded Warehouses Company against the judgment, holding them liable to indemnify the Marshal against the claim of the Japanese firm, and the main question for consideration is whether the Prize Court has jurisdiction to decide any such matter. The interlocutory judgment delivered by Judge Peter Grain goes through and quotes the authorities which show that a Prize Court has jurisdiction over the incidents as well as the principal matter of Prize, but he does not refer to the facts of the present case, nor say why he considered they brought the case within the rule which he laid down. It is possible that the facts had not then been brought fully to his knowledge. It must, however, have been clear that the complaint was about matters which had arisen after the release of the goods. The communications which passed immediately after the release were proved at the subsequent trial and are summarised in the final judgment. They were in writing, except that there were a few telephonic communications, the effect of which appears by the letters which are set out in the record. The order of release, dated the 5th October, 1915, was formally drawn up, and was on the 6th October sent in a letter from the advocates acting for the claimants in prize to the appellants, the Warehouse Company. That company carried on business not only as warehousemen, but also as forwarding and shipping agents, and the letter of the 6th October gave directions to the company to take delivery of the goods released, and to arrange for their shipment to Japan.

Further letters passed as to further information which the appellants required in order to be able to ship the goods. The order of release was returned, in order that the advocates might get an addition to it which would prevent difficulties with the Customs authorities, and facilitate the shipping. The correspondence from the first shows that the appellants accepted the directions given to them, and agreed to hold for their owners the goods to which the release related, and which were described in a schedule to the order by the marks on them. The Bonded Company, however, kept no books distinguishing for whom they held goods, or even showing what they had in stock, and this the trial Judge very naturally held to be negligent. It seems to have been the practice for the Marshal to give to the Bonded Company documents called delivery orders, directing the company to hold to their own order goods in their warehouse then standing in his name. This seems to have been done when it was proposed to send goods away to show that the Marshal had no further claim, and as an authority to deal with the goods as forwarding agents. Such a document was given on the 18th October in reference to the 171 cases which had been released, but it does not mention the release, or the name of the plaintiffs, or of their advocate, to whom the order of release had been given. It was in precisely the same terms as a document which had been given on the 14th

October, intended to relate to goods which had been condemned, and which it was proposed to ship to England, and in respect of which the Bonded Company was to act as shipping agents for the Marshal himself. These documents appear to have been given at the request of the Bonded Company, when it was desired to deal with the goods, but it is clear that they were treated as mere matters of form, and that the Company did not wait for such orders to be given before they accepted directions for shipment. The document of the 14th October was the cause of the trouble, because the list attached to it included, as well as the marks of condemned goods, the marks of 150 out of the 171 cases which had been released to the plaintiffs. The case of the Marshal is that he employed the Company to make out this list, and merely put his signature to it when presented to him for signature. This is the basis of his claim for indemnity. The goods named on it were not shipped until the 27th October, but then they were, and no comparison of the lists having been made, the 150 cases were included in the shipment. On the 16th October, before the shipment, and when the goods were still in their warehouses, the Company had written to the advocate of the plaintiffs a letter distinctly accepting his orders as to the disposal of the 171 cases, but there was further delay in shipping the plaintiffs' goods, as there was a prohibition against exporting aniline dyes from Egypt, and it was necessary to get dispensation for these goods, and it was not until the 4th of December, when all these difficulties were removed, and the goods were about to be shipped, that the mistake was discovered.

On these facts their Lordships are clearly of opinion that before the cause of complaint of the plaintiffs arose, not only had the 171 cases been released to them by order of the Court, but the release had been acted on by attornment, if that last step was necessary to prevent their ceasing to be Prize goods. They had, in fact, in their Lordships' view, ceased to be Prize goods.

Passing now to the authorities on the jurisdiction of the Prize Court, the most important are referred to in the judgment of Judge Peter Grain. What they show is that the Prize Court has exclusive jurisdiction over the question of prize or no prize, and also over all questions which depend for their proper determination on the question of prize or no prize, the reason being that prizes are acquisitions *jure belli*, and that *jus belli* is to be determined by the law of nations, and not by the municipal law of any country. Thus in *Le Caux* v. *Eden*, 2 Douglas, 594, it was held that an action for false imprisonment for detention of a passenger on a ship alleged to have been wrongfully captured in war could not be entertained by a Common Law Court, because it could not decide the question of rightful or wrongful capture. In that case the whole question was discussed very fully, and with great learning. So the claim for freight on a voyage interrupted by capture, and continued to a different port by direction of the captors, can only be dealt with in the Prize Court, for the right to the freight contracted for for the intended voyage is lost by

the non-completion of that voyage, and the only freight which could be recoverable would be that which the Prize Court might award, applying its rules to the particular circumstances of the capture, on which it alone could adjudicate. This was held in the "*Corsican Prince*," 1916, Probate 195, and the decision on that point was approved by this Board in the "*St. Helena*," 2 Prize Cases 257, although there the appeal was allowed on other grounds. This doctrine as to Prize jurisdiction over what are called incidental matters, meaning matters which depend for their decision on prize or no prize, is well established, but it obviously has no application to the present case, where the claim for indemnity in no way required the consideration of any question of Prize Law or International Law for its determination. The Prize Court also has the incidental jurisdiction which is necessary to enable it to keep control over the captured ship or goods, pending the decision as to whether or not they are lawful prize, in order that the Court may be able to deliver them to whomsoever they may decide to be entitled. The learned Judge in this case quotes a passage from Storey (Pratts' Storey, edition 1854, pages 30 and 31) (also quoted by Sir Samuel Evans in the "*Corsican Prince*"), stating that the Prize Court will follow Prize proceeds into the hands of agents or other persons holding them for the captors, or by any other title. "It may proceed to enforce all rights and issue process, therefore, so long as anything remains to be done concerning the subject matter." In a note to Storey at the end of the passage quoted there is a reference to *Home* v. *Camden* (2 Hy. Blackstone, 533), where the House of Lords reversed a decision of the Common Pleas, granting a prohibition, in respect of an order made after sentence of condemnation by the Prize Court, but before an appeal from the sentence to the Commissioners of Appeal in Prize had been disposed of. In that case many points were argued, but on this point the judgment proceeded on the view that owing to the appeal the property had not finally vested, and therefore there was jurisdiction. If there had been no appeal (and there has been no appeal from the release in the case now before the Board) it would seem that there could have been no jurisdiction after sentence.

Judge Peter Grain concludes his judgment by saying that the Prize Court can follow Prize goods through all incidents or torts concerning them, and "its jurisdiction continues so long as anything remains to be done touching the subject matter." He must, therefore, have thought that the tort complained of in this case had been committed whilst something remained to be done in the matter, whereas the further investigation of the facts at the trial seems to their Lordships to show that that was not so. There are matters of form in the procedure of the Prize Court here which must not be lost sight of. If the decision of the Court against the Marshal is based on the disciplinary jurisdiction of the Court over its officer, the usual way of commencing proceedings would be for the party aggrieved to call on the Court by motion to exercise its jurisdiction, and not by issuing a writ for damages

against the Marshal. It was probably the issuing of the writ which led to the idea that a third-party notice might be issued, but there is no trace of any such practice in the Prize Court. There is nothing in the Prize Court rules here, which it is stated were adopted in the Court in Egypt, providing for the calling in of third parties against whom the right of indemnity is claimed, and as it is a new practice introduced by the Judicature Acts, it cannot be incorporated by Order XLV, providing for the old practice of the High Court of Admiralty in Prize being followed in cases not provided for by the new rules. Their Lordships, however, would not desire to base their decision in this case on any matter of form. They base it on the broad view that there is no jurisdiction in the Prize Court to decide as between parties, some of whom have not been parties to the Prize proceedings, disputes not involving the consideration of the *jus belli*, and arising on facts which have occurred after an effective release of the goods to a claimant. Their Lordships decide nothing as to the judgment against the Marshal, as there is no appeal against it, and of course nothing as to the right to indemnity, or as to the question of contribution between tort feasors which the appellants desired to raise on the appeal. Their Lordships will humbly advise His Majesty that the appeal should be allowed, and the judgment of the Prize Court against the third parties, including, of course, the order for costs, should be set aside, and that the appellants should have their costs of the appeal paid by the second respondent, and that the first respondents should bear their own costs of the appeal.

Their Lordships propose to make no order to give the appellants their costs in the Court below, as the costs there would mainly have been occasioned by the dispute as to the indemnity decided against the appellants on the facts, and it would involve a difficult taxation to apportion the costs in the Court below properly payable by each party.

In the Privy Council.

THE EGYPTIAN BONDED WAREHOUSES COMPANY, LIMITED,

v.

YEVASU GOSHI KAISHA AND THE MARSHAL OF HIS BRITANNIC MAJESTY'S PRIZE COURT.

DELIVERED BY SIR ARTHUR CHANNELL.

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