Privy Council Appeal No. 97 of 1920.

In the matter of part cargoes ex steamship "Falk" and other vessels.

Aktiebolaget Frosts Hudaffar - - - - - *Appellants*

v.

H.M. 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 16TH MARCH 1921.

Present at the Hearing:

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

[*Delivered by* LORD SUMNER.]

In November, 1915, the claimants, old-established dealers in hides and tanning materials in Sweden, bought for the purposes of their trade 500 tons of quebracho extract and 1,000 tons of chestnut extract from James Meyer, of Copenhagen, which Meyer in his turn bought from Schmoll Fils et Compagnie, of Paris, Basle and New York.

The goods began to come forward almost at once, and eight vessels with parcels of them on board were brought into British ports between the end of that month and the early part of the following May. In due course writs were issued against them as having an ulterior enemy destination in Hamburg. They had been conditional contraband since 11th March, 1915, and became absolute contraband before the seizure. In the cases of the first five vessels to be detained and of the last but one, the shippers named in the bills of lading were Schmoll Fils et Compagnie, and in the other two the National Export and

Import Company, both of New York. In the cases of the first and second the consignee named in the bills of lading was Otto Zell, a forwarding agent at Gothenburg. The claimants themselves were named as consignees in the other cases and they duly appeared and claimed the goods in all.

An assiduous and intelligent agent was then employed, who made it his business to procure all documents relating to the matter and to put them at the disposal of the Procurator-General in numerous bundles and portfolios, and the Procurator-General devoted the Christmas holidays of 1916 to their perusal. Assuming them to have been the same as those again submitted shortly before the trial, they filled 34 volumes; even those printed in the record, though but a small part of the whole, occupy 450 printed pages.

Accordingly the Procurator-General decided to try to settle the case. At this time neither quebracho extract nor chestnut extract could be exported from the United Kingdom except by special licence, by virtue of a proclamation dated the 3rd February, 1915, and of an Order in Council dated the 18th March, 1915, issued under the Customs and Inland Revenue Acts of 1879, the Customs (Exportation Prohibition) Act of 1914 and other statutes. He informed the claimants' solicitors of these facts, of which they presumably were and certainly might have been already aware, and offered that the War Office should purchase the goods at the duly authorised price and that the proceedings for condemnation should be discontinued. The claimants insisted on their right to damages and stipulated that both the sale and the discontinuance should be without prejudice to their claims. This was agreed to in letters dated the 26th April and 1st October, 1917, and the Procurator-General discontinued his proceedings by leave on the 28th July, 1919. Thereafter the suit continued for the claimants' benefit only; they were the actors and the parties to take the conduct of it and to press it on. When their claims came to trial they failed. The President decided that, as regards both the original seizure and the subsequent proceedings, what had been done was done on reasonable grounds and was therefore excusable. Hence this appeal.

There can be no doubt that the appellants have suffered a loss, which is regrettable and large. Some four years elapsed between the seizure and the judgment. Their costs have been heavy and they allege that they have had to pay interest to Meyer, their vendor. Above all, the difference between the price which they obtained in England, and that obtainable if they had sold the goods in Sweden, as they meant to do, was on so large a quantity very great.

Their Lordships, however, do not wish it to be supposed that in their apprehension of the matter these large sums could in any case have been chargeable against the Procurator-General. Strictly speaking, only liability is in issue now. If that could be established, it would be for the Registrar and merchants to assess the damages payable for proceedings taken without sufficient grounds, which deprived the claimants of the possession and control

of their goods. So much, however, has been said of the commissions and omissions of the Procurator-General, as the occasion, if not the cause, of this great loss, that their Lordships think it would be misleading to pass over in silence the contention which has been raised.

No doubt the effect of sending the vessels in for further inquiry was to bring this cargo within the ambit of the prohibition of export of tanning materials, but it does not follow that all the claimants' loss thereby can be thrown on the captors. The same misfortune would have fallen on them if the vessels had come into a British port of refuge and had there discharged the goods. Further, under a proper licence export would have been permitted, but the claimants never applied for that licence or ascertained whether it could have been obtained or not. So far they are presumably the authors of their own injury. Besides, the measure of damage, applicable to conversion or detinue of their goods or to failure to deliver them under a contract of sale in an action brought in a municipal Court, may be no guide in a claim against captors, without proof of special circumstances. As for loss of interest the claimants' relations with Meyer are remote matters and it was in any case for them to take steps to minimise this and other losses. They seem to have done nothing.

The authorities may be referred to briefly. The foundation of the right, variously expressed in different cases, may be said to be the existence of reasonable suspicion, it may be of illegitimate traffic, it may be of enemy character, it may be of illegal action or service or what not, but there must be such suspicion as warrants inquiry into the facts and adjudication upon them by a properly constituted court. (See the judgment of Story, J., in the *George*, 1 Mason 24, quoted with approval in the *Ostsee*.) Even slight grounds of suspicion may suffice. In the *Elizabeth* (1 Acton 10) the reason given by the Lords of Appeal for condemning the captors in costs was that there appeared to be scarcely any ground for detaining the vessel. The Judicial Committee's judgment in the *Baron Stjernblad* (1918 A.C. 173) develops the matter. In a case where it has become apparent by statistical evidence or otherwise that a considerable proportion of the collective imports into a neighbouring neutral country of a particular commodity, which is in its nature contraband, does in fact proceed by a continuous transit into the enemy territory, any particular importer of such goods belongs to a class of importers some of whom at any rate must be obviously engaged in contraband trade. Suspicion then attaches to all and the question is one of the existence of reasonable suspicion, not of the possession of proof attaching that suspicion to a particular member of the class. The suspicion for example attaches to the particular goods by reason of the circumstance connected with the class of goods generally that it is in its nature contraband. Those who seize on the grounds of reasonable suspicion are entitled to the benefit of such evidence as other officers of the Crown may possess as to ulterior destination, and are not limited by the information, or the lack

of it, to be found in the ship's papers themselves. Neither at the actual time of seizure nor in the conduct of the proceedings is the officer responsible called upon to constitute himself judge or justified in doing so. The decision, if grounds for seizure existed, must in general rest with the Court, and the Court is also peculiarly the tribunal to determine any questions of suggested delay in the proceedings. The judgment in the *Ostsee* (9 Moore 150) is the standard authority on all these matters. It points out that the ship (and equally the cargo) " may be involved with little or no fault on her part in such suspicions as to make it the right or even the duty of a belligerent to seize her " ; nor is it possible to lay down by any exact definition what the circumstances are that will justify capture or excuse it if no condemnation follows. Even if the circumstances known by the captor at the time of the first detention are not so founded in fact as to serve as an excuse, he may still avail himself for this purpose of other grounds subsequently brought to his knowledge, as he could have done if he had proceeded and obtained condemnation. " It is not necessary," says Sir W. Scott in the *Maria Schroeder* (3 C.Rob. 152), " that the captor should have assigned any cause at the time of capture ; he takes at his peril and on his own responsibility," and from this it must follow that after-acquired knowledge is available for the one purpose or for the other. It is a fallacy to suppose that suspicion can only be reasonable in so far as there are facts before the mind of the person who suspects, and that accordingly no facts learnt subsequently are available to excuse a seizure. The present is not a case of arbitrary or capricious arrest, ventured on the hazard that a case for conviction may ultimately turn up. Nor can it be said of it that there were no " circumstances connected with the ship or cargo affording reasonable ground for belief that one or both or some part of the cargo might prove upon further inquiry to be lawful prize." (*Ostsee*, p. 162.)

The liability of the Procurator-General, if any, has been rightly presented under two heads: the first, liability for the original seizure ; the second liability in respect of the course taken in the legal proceedings. Somewhat different considerations no doubt arise in the two cases. The original seizure takes place before the particular circumstances have been inquired into ; the suit is prosecuted after materials have been collected and time has been allowed for their examination. The element of mere suspicion, so prominent when first the prize is brought in, diminishes as investigation proceeds and proof takes its place. The prospect of the discovery of substantial evidence is one that can be weighed by those in charge of the case for the Crown. It follows in their Lordships' opinion that a point must ultimately be reached, at which, without purporting to act as a Judge, the Procurator-General should decide for himself whether to go on or not. This obligation is all the more important because of the change of practice, necessitated by changed circumstances, which authorises the collection of material at large and its presentation by both sides instead of deciding the question of release or deten-

tion, in the first instance, only on evidence coming from the ship.

It was not contended at the bar that the liability under the first head was to be considered simply as at the time when the vessels were first diverted, or simply upon the information then present to the minds of the actual officers who ordered the diversion. Counsel recognised that, under the conditions imposed by modern warfare during the late war, the question should be considered in the light of the information available to the Procurator-General and his assistants at the time when the effective decision was taken to detain the goods for the purpose of condemnation in prize, that is, substantially, at the dates of the writs. At the trial evidence was given, in the usual form of information obtained and communications intercepted, with regard to the parties connected or apparently connected with these shipments. It is true that it was given in affidavits recently sworn, which did not in all cases specify the dates at which particular events relied upon had first become known to the authorities concerned. The President, however, gave attention to these points, for he discarded some matters on the ground that they were after-acquired information and assumed that others only were available at the critical time, and, as the claimants do not appear to have pressed that the Procurator-General should be more specific in the matter of dates, the objection has little weight now.

It appears, then, that when the several proceedings were begun the following matters were available for consideration. The goods were contraband goods of a kind often and largely sent on a continuous transit from the United States through Sweden to Germany, where they were scarce and dear. They were going to Gothenburg, a place of import for goods intended for Swedish consumption, but convenient also and often used for this ulterior trade. The National Export and Import Company of New York had been concerned in it, and so had Otto Zell, who furthermore was a forwarding agent for others, and in fact had no interest in the claimants' goods, and an intercepted message had given ground for expecting large quantities of quebracho extract to be sent shortly from Schmoll Fils et Compagnie to Scandinavian ports for account of James Meyer, though it was not yet known, or is not shown to have been known at the time in question, that Meyer was the claimants' vendor in respect of these very consignments.

Under these circumstances their Lordships are of opinion that they cannot question the President's conclusion as to the existence of sufficient grounds for the detention. Although in the long run condemnation could not be hoped for, still, when the goods were placed in prize there was probable cause for a judicial inquiry with a view to their condemnation. It is not a case like the *Ostsee*, where the detention, though honestly made, was made on a ground which in fact had no existence. Nor is it such a case as is there mentioned as possible of a seizure "where not only is the ship in no fault, but she is not by any act of her own open to any fair ground of suspicion." In such cases (and the proposi-

tion applies equally to goods) the belligerent may seize at his peril and take the chance of something appearing on investigation to justify the capture, but failure is visited with the liability to pay damages and costs (p. 157). Nor was the case merely one of goods going to a geographical neighbour of Germany or of goods going to a port whence they could easily be sent on. Of all the goods, in their nature contraband, which went to that port, some, perhaps many, parcels certainly had Germany as their ultimate destination, and large profits awaited any neutral consignees who sent them there. As for the goods themselves, some came from and some went to persons known to be engaged in the trade. Their Lordships cannot doubt that, as regards all their consignments, the claimants were rightly brought into Court to explain where they were really going to.

As the second part of their case the appellants claim damages for the action or the inaction of the Procurator-General after they had disclosed their documents to him and had satisfied his requisitions. They say that it then became his duty to obtain the prompt and effective release of the cargo, and, if necessary, to apply for and to procure a licence to export it. They even aver, as a ground for claiming all damages consequent upon the detention of the goods, that if the prohibition so stood in the way of the fullest benefit being derived from a decree of release, the Prize Court was bound to restore the position in their favour by requiring the Procurator-General to pay compensation, because another, and the appropriate, department had failed to exercise its discretion in the manner desired.

Their Lordships think that in principle these contentions fail. The greater the mass of transactions to be inquired into, the more astute the schemes of contraband traders, the more enlarged the available sources of information and the means of making it subserve the discovery of truth, the more is it necessary that the Procurator-General should have all proper opportunity of preparing the case for submission to the Court, free from the insistent pressure of a liability in damages and costs, so long as he has not been guilty of delay for indirect objects or from mere neglect, and has materials which are proper to be examined judicially. It is not suggested against the Procurator-General that he protracted the proceedings in bad faith or maliciously, or in fact at all. His good faith is indeed conspicuous throughout. When he offered a settlement, the claimants, under advice, entertained it without protest and shortly accepted it. They reserved their existing claims, but they made no allegation of any fresh ground of complaint. The Procurator-General is not a Judge ; neither to the Crown, to the Court nor to the claimants does he owe any duty to decide questions, which are for the Court, nor is he entitled to proceed only when he has a persnoal conviction upon the question in suit. His duty is to act reasonably. Even where the paucity of the evidence for condemnation or the abundance of the evidence in reply would lead the Procurator-General, as a reasonable man, to abandon any further attempt to obtain a condemnation, there is no authority for saying that the ship or cargo will be detained thereafter at his expense in

damages, and that the application for release is merely a protective step for him to take in self-defence. It is equally a step which the claimant can take and ought to take to mitigate his damages. As to this the Procurator-General duly applied for a discontinuance of his own part of the proceedings. Before he did so the claimants had made no application to the Court, so far as the record shows, to accelerate their course, and after that discontinuance they were themselves *domini litis*. He was under no obligation towards them to apply for an export licence and, if none was forthcoming, he came under no liability in consequence. Instead of applying for a licence themselves, as they were free to do, the appellants preferred to sell the goods to the War Office and to take their chance of obtaining damages on some ground at the trial.

A passage in the judgment of Sir Samuel Evans in the *Kron Prinz Gustav Adolf* (2 Br. and Col. Prize Cases 418) is relied on as laying down a rule that the Procurator-General must within a reasonable time after getting full information into his hands decide whether he has a case for condemnation or not, so that if he has none he may apply for the release of the *res*, and that, if he fails to do so, he proceeds or delays to discontinue at his personal risk as to damages. The point does not seem to have been argued; the proposition intended to be laid down is by no means clearly expressed, and it has been doubted whether anything more was intended than to give interest in the particular case to mitigate exceptional hardship. (The *Hallingdal*, 1919, P. at page 227.) Their Lordships agree with the view expressed by Lord Sterndale in that case that, if the decision in question purported to lay down a general rule that "whenever the Crown had the benefit of the money they ought to pay interest to the claimant when an order of release was made," the decision so far cannot be supported.

It may be that there are cases so plain that to keep them up is patently unreasonable and some mulct, probably in costs, should be the consequence of undue tenacity. Deliberate procrastination or a scheme for delay would of course be a wholly different matter. Where however there is a real question of law, a conflict of testimony or a genuine doubt as to the inference to be drawn from ascertained facts, the Procurator-General is not to be visited with costs or damages merely on the ground that he submits it to the judgment of the Court, instead of taking the decision into his own hands. He is entitled to have genuine doubts cleared up by the claimant to the satisfaction of the Court. The duty of a neutral claimant to explain what is doubtful or obscure in his conduct or position for the enlightenment and decision of the Court has been laid down in the *Louisiana*, 1918, A.C., at p. 464:—

> "In the Prize Court a neutral trader is not in the position of a person charged with a criminal offence and presumed to be innocent unless his guilt is established beyond reasonable doubt. He comes before the Prize Court to show that there was no reasonable suspicion justifying the seizure or to displace such reasonable suspicion as in fact exists. The State of his captors is necessarily unable to investigate the relations between the neutral trader and his correspondents in enemy or neutral countries; but the neutral trader is, or ought to be, in a position to explain doubtful points."

It would be inconsistent to hold that the Procurator-General is bound to forestall that decision, or permitted to seek it in a genuinely doubtful case only at his own personal risk.

The settlement, into which the appellants entered, even though made without prejudice and accompanied by a reservation of their rights as to damages, took place before, or at any rate no later than, the earliest date at which it can be said that the Procurator-General ought to have concluded that he had no case to go upon, and it is from this settlement and sale that nearly all the damages incurred by the appellants have arisen. Further, it put them in no better position than they would have been in if they had received the goods themselves under a decree for their release instead of receiving the proceeds of their sale to the War Office. A decree for release does not warrant actual ability to remove the goods from the realm. This might be impossible for want of bunker coals or of labour or of repairs, and yet it could not be said that the redress given by the Prize Court was made inefficacious by reason of something of which that Court ought to take notice. As is assumed in the *Dusseldorf*, release means release out of the custody of the Marshal in this country, where the goods are, and it is for the owner of them to arrange to remove or dispose of them as he can. The Court of Prize cannot give itself a more extensive jurisdiction in cases where the neutral is unable to remove his property out of the realm, or award damages against the Procurator-General for consequences arising from matters to which he is a stranger, merely because he and the officers of the Customs are alike in the service of the Crown. As a matter of fact in this case the prohibition on export was duly made under statutory authority, and the question of granting a licence to export was not raised, but had it been otherwise the claimants should have sought their remedy, if any, against the officials actually concerned, in the ordinary Courts of the country. An imaginary case was put of sovereign power being used to thwart neutral claimants, to stultify the Prize Court and to defeat the benefit of adjudication in prize, by an executive prohibition of the export of any and every subject matter released. Their Lordships cannot entertain so far-fetched a case. Should it ever arise the Courts of the country concerned will be most fitted to pass upon it. The jurisdiction of the Court of Prize is to condemn or to release, not to override the executive after release has taken place. It is bound by the statutes of this country, in which it sits, and cannot interfere with acts done under Proclamations or Orders in Council validly issued by virtue of those statutes. If this is so, it cannot do indirectly what it has no power to do directly, and give damages against the Crown in prize because it had no power to give to the successful claimants permission to export.

Their Lordships are accordingly of opinion that neither in respect of the original detention of their goods nor of his subsequent conduct in the proceedings in prize can the Procurator-General be made liable in damages or costs, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

In the matter of part cargoes ex steamship "Falk" and other vessels.

AKTIEBOLAGET FROSTS HUDAFFAR

v.

H.M. PROCURATOR-GENERAL.

DELIVERED BY LORD SUMNER.

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