Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Our Sovereign Lady the Queen v. *Elliott and Others, from the High Court of Admiralty, ship "Gauntlet;" delivered 20th February*, 1872.

Present:

SIR JAMES W. COLVILE.
LORD JUSTICE JAMES.
LORD JUSTICE MELLISH.
SIR MONTAGUE SMITH.

IN this case the Crown sought the condemnation of the Respondent's ship the "Gauntlet," for a violation of the Foreign Enlistment Act. The learned Judge of the Court of Admiralty found that there was no such violation, and dismissed the petition of the Queen's Proctor with costs.

The Crown, by the present appeal, complains of the finding and dismissal; and further, that if the judgment and order in this respect were well founded, the Court of Admiralty had no jurisdiction to award costs against the Crown.

The facts of the case are not in dispute, and may be briefly summarized. The Respondent's steam-tug, under an agreement with the French Consul, made by one of her owners and the master, left its anchorage near the Ryde Pier to go to a vessel called the "Lord Brougham," lying a few miles off in British waters, for the purpose of towing her across to Dunkirk Roads, and did accordingly so tow her. The "Lord Brougham" was, and was (as their Lordships have no doubt) well known to all parties concerned to be a German merchant-ship, which had been captured by a

French cruizer, and then was French prize of war. She had on board a French officer and a French prize crew, with some of the original crew as prisoners. The Crown contends that sending an English steam-tug expressly for the purpose of towing a prize to the captor's waters is dispatching a ship from the United Kingdom for the purpose of taking part in the naval service of the belligerent Power, and is therefore within the words and plain meaning of the prohibition.

On the part of the Respondent it is urged that, at all events, there was no conscious violation of the law; that the ship engaged in the transaction in the ordinary course of business, just as it would have towed any other ship across, and for the ordinary remuneration for such service; and that, in truth, the immediate cause of the hiring of the tug was the pressure of an English authority who insisted on the prize no longer remaining in British waters. The Solicitor-General, on behalf of the Crown, did not contest what may be called the moral innocence of the Respondents, but insisted —and in their Lordships' opinion unanswerably— that parties knowing the facts constituting their act a legal offence, cannot be heard in a Court of Law to allege that they were ignorant of or had forgotten, or, what is more probable here, never thought of the law. These are matters for the indulgent consideration of the Crown, but not matters which the Court of Admiralty or this Board has any jurisdiction to deal with.

It was much pressed in the Court below, and again before their Lordships, that the Statute being a penal, or, as it was phrased, a highly penal one, it was to be construed strictly. It appears to their Lordships necessary to say a few words as to this topic, which is so often pressed in argument. No doubt, all penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing

charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed like any other instrument, according to the fair common-sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal Statute where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.

It was contended in the Court below, but without success, that the words in the prohibitory clause were to be restricted by the words in the definition clauses, and that contention has been repeated here. In the Court below that argument was used in support of a contention that "steam-tug" was not within the definition. Here, in support of the contention, that the uses are limited to the uses specifically mentioned in the definition. The words, however (as was pointed out by the learned Judge), are not "shall mean," but "shall include." In some of the clauses in the same part of the Act the other words "shall mean" are used, and in the other clauses in which the words "shall include" are used, the most absurd consequences would follow if the words "shall include" were construed as equivalent to "shall mean," *e.g.*, the clause as to what shall be included under the words "United Kingdom." Indeed, as to this particular clause itself, consequences no less absurd would follow if the things included were to be considered as an exhaustive enumeration, and so as to be the only things comprised. Their Lordships have therefore no hesitation in concurring with the learned Judge that the words in the definition can have no effect in restricting the meaning to be put on the words of the prohibitory section. And the whole question is really what is the meaning of the words in that section "naval service."

In the Court below a good deal of the argument appears to have turned on, and a good deal of the judgment deals with the question as to how far it is essential to the legal completion of a captor's title by formal judicial condemnation, that the prize should be brought *infra presidia* to give the Prize Court jurisdiction to pronounce such con-

demnation. It does not appear material to their Lordships to consider that question. It appears to have been considered that if it had been made out that it was essential, then the act of the steam-tug in going to tow the prize into French waters, and so *infra presidia,* would be an act done in the naval service of the captor Power.

But it appears to have been overlooked that that is not the only way in which, nor the only object for which, service can be rendered to a belligerent in connection with a prize. It would seem to be quite as important, to say the least, to complete a capture *de facto* by lodging it in a place of safety, as to complete it *de jure,* by bringing it within the jurisdiction of the captor's Prize Court.

What was the position of the "Lord Brougham" when the defendant's vessel undertook the towing of her to French waters. She had (subject to the possibility of escape or recapture) ceased to be a German merchantman. She certainly had not become a French merchantman. She was in the actual possession of the French Government. She was under the command of a French naval officer, with a crew of sailors of the French navy, temporarily detached from the French ship of war for that purpose. The officer and crew were still part of the ship's crew—entitled to share in any fresh prize made by the latter—bound to share any prizes which they themselves might have made, as they lawfully might, of any German ship coming in their way. They had in our waters the right of a French man-of-war, as against any action of our municipal law, in respect either of their prisoners or their booty. Their Lordships agree, therefore with the contention on the part of the Crown that it is impossible to distinguish such a ship, because it had been a prize, from the case of a tender, or a pinnace detached for any purpose from a ship of war, or any other vessel taken up by or for the belligerent Power in the course of its naval operations.

The Counsel of the Respondents contended that naval service must mean service in or directly connected with some warlike naval operation. In their Lordships' opinion the detaching a prize crew after capture to take charge of the prize, and to bring it and the prisoners safely home is essen-

tially a warlike naval operation—as much and as important a warlike operation as the chase before the capture.

Their Lordships, therefore, have no doubt that sending an English steam-tug for the express purpose of taking the detached prize crew, its prisoners and booty speedily and safely to French waters, where the prisoners, prize, and booty would be taken charge of by the French authorities, and the prize crew set free to rejoin and strengthen their own ship, was dispatching a ship for the purpose of taking part in the naval service of the belligerent, within the plain meaning, the words and the spirit of the Act of Parliament.

Their Lordships will, therefore, humbly recommend that the decision of the Court of Admiralty be reversed, and that, in lieu thereof, an order of condemnation be made as prayed by the Queen's Proctor.

On the subject of costs it is no longer the interest of the Respondent to contest the proposition of the Solicitor-General, who admits that his principle is to apply as well against as in favour of the Crown, and their Lordships have, therefore, not had the assistance of the arguments on the other side which they would have desired to hear if it had been necessary to pronounce any decision on the point.

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