Privy Council Appeal No. 10 *of* 1917.

In the matter of Part Cargo *ex* Steamship "Stanton"

(Appeal of Messrs. Lindvall and Helmer)

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 22ND MARCH, 1917.

Present at the Hearing:

LORD PARKER OF WADDINGTON.
LORD SUMNER.
LORD PARMOOR.
SIR WALTER PHILLIMORE, BART.
SIR ARTHUR CHANNELL.

[*Delivered by* LORD PARKER OF WADDINGTON.]

THIS appeal turns entirely on the true meaning and effect of Rules 2 and 3 of Order XVIII of the Prize Court Rules, 1914. These rules govern the practice of the Court with regard to security for costs and no question is raised as to their validity. It should be noticed that by Order XLV, in cases not provided for by the rules, the old practice in prize proceedings is to be followed, and in considering the question at issue on this appeal it is both legitimate and useful to refer to the former practice.

The practice of the High Court of Admiralty in prize proceedings, with reference to security for costs, was from time to time prescribed or sanctioned by statute. The last statute dealing with the matter was "The Naval Prize Act, 1864." By section 23 of that Act all claimants in proceedings for condemnation were required to give security for costs in a sum of 60*l*. This is remarkable for two reasons. First, a claimant in condemnation proceedings was not as a general rule ordered to pay costs unless he had put forward a fraudulent or unjustifiable claim. Secondly, a claimant was at any rate, up to the preliminary hearing, in the position of a defendant rather than a plaintiff, the *onus probandi* till then at any rate resting with the captors. Nevertheless, he was required to give security.

The 23rd section of "The Naval Prize Act, 1864," was repealed by the 1st section of "The Prize Courts (Procedure) Act, 1914," as from the day on which the Prize Court Rules, 1914, came into operation. Under these circumstances, Rules 2 and 3 of Order XVIII must be looked upon as relaxing in favour of claimants the rights with regard to security for costs which the Crown, or the captors who represented the Crown, possessed under the earlier practice. Claimants ordinarily resident within the jurisdiction of the Court need no longer give security. Claimants ordinarily resident out of the jurisdiction of the Court may, even though temporarily resident within such jurisdiction, be ordered to give security in such manner and amount as the Judge may direct. Whatever be the precise meaning of the expression "within the jurisdiction of the Court," the present claimant certainly does not ordinarily reside within such jurisdiction, and therefore the President had power to make the order appealed from.

It is, however, contended that the discretion vested in the Judge under the rules in question is a judicial discretion, and that the President, if he can be said to have exercised any discretion at all, did not exercise it judicially but in complete disregard of all considerations by which a Judge in exercising such a discretion ought to be influenced. In particular, he is said to have entirely disregarded the fact that on the evidence before him the Crown had entirely failed to make out any case for condemnation of the goods the subject of the claim, and that the claimant on the other hand had fully made out a case for their release. The *onus probandi*, it was said, still rested with the Crown and the appellant being in the position of a defendant and not of a plaintiff should not have been ordered to give security at all.

Their Lordships entertain no doubt that the discretion conferred on the Prize Court Judge by the rules in question is a judicial discretion, but except to this extent they do not think the appellant's argument is sound. The rules to be interpreted are not rules to be followed by a Court which had not, according to its usual practice, ordered security against litigants who were not in the position of plaintiffs. On the contrary, they are rules to be followed by a Court in which, according to its former practice extending back for over a century, all claimants wherever they resided, and whether in the position of plaintiffs or otherwise, had been compelled to give security. If, according to the former practice of the High Court of Admiralty, claimants in prize proceedings had only been ordered to give security if they asked for and were granted further proof after the preliminary hearing, the case might have been different; but this was not the practice. Moreover, the second Rule of Order XVIII expressly places claimants in condemnation proceedings on the same footing as persons instituting proceedings other than proceedings for condemnation. In other words, it treats all claimants as it treats

plaintiffs. Their Lordships therefore are of opinion that neither the merits of the claim as they appear from the evidence already filed nor the *onus probandi* having regard to such evidence, are the determining factors in considering whether the discretion has been properly exercised.

The object of the rules appears to be this. Persons ordinarily resident within the jurisdiction usually have property within the jurisdiction against which process of execution will lie should they be ordered to pay costs. These, therefore, need not be required to give security. Persons ordinarily resident out of the jurisdiction have, as a rule, no property within the jurisdiction against which process will lie in a similar event. These, therefore, may be ordered to give security. The fact that they are ordinarily resident outside the jurisdiction, if nothing more be proved, will in an ordinary case justify the Judge in ordering security. But if something more be proved—for example, if it be established that the claimant has property within the jurisdiction against which process will lie—the Judge, in exercising his discretion, must take this into account. It would be in the highest degree inconvenient if the Judge were in every case bound to consider the *onus probandi* as it appears on the evidence already filed or the merits of the claim if it fell to be determined upon this evidence. He is, no doubt, entitled to look into both matters if he thinks fit—at any rate, on the question of the amount to which security should be ordered; but neither point affords the criterion as to whether security ought or ought not to be directed. The Judge is entitled, on the one hand, to bear in mind that when the claim is *bonâ fide* made costs are not as a rule ordered against an unsuccessful claimant. He is, on the other hand, entitled to be guided by his own experience as to the type or kind of claim which usually turns out to be fraudulent. While bearing in mind that the object of the rule is to safeguard the Crown in the event of unsuccessful claimants being ordered to pay costs, he should not, either in ordering security or fixing its amount, ignore the effect of the order he proposes to make in increasing the difficulty of enforcing *bonâ fide* rights.

Their Lordships are not satisfied that in making the order appealed from the President either ignored any matter which he ought to have considered, or took into account any matter which he ought to have ignored. In other words, they are not satisfied that he did not exercise the discretion conferred on him by the rules in a judicial manner and on proper grounds, both as to amount and otherwise. It follows that this appeal must be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

IN THE MATTER OF PART CARGO *ex* STEAMSHIP "STANTON."

DELIVERED BY
LORD PARKER OF WADDINGTON.

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