Privy Council Appeal No. 56 of 1917.

In the matter of the Steamship "Stigstad."

A. F. Klaveness and Company - - - - - - *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 DECEMBER, 1918.

Present at the Hearing:

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

[*Delivered by* LORD SUMNER.]

The appellants in this case were claimants below. They are a Norwegian company which manages the S.S. "*Stigstad*" for her owners, the Klaveness Dampskibsaktieselskab, a Norwegian corporation. While on a voyage, begun on April 10th, 1915, from Kirkenes, Sydvaranger, in Norway, to Rotterdam with iron-ore briquettes, the property of neutrals, she was stopped in Lat. 56° 9′ N. and Long. 6° 6′ E. about a day's sail from Rotterdam, by H.M.S. "Inconstant," and was ordered to Leith and thence to Middlesbrough to discharge. Their claim was for "(1) freight, (2) detention, and (3) expenses consequent upon" this seizure and the discharge at Middlesbrough afterwards. The detention was measured by the

number of days which elapsed between the expected date of completing discharge at Rotterdam and the actual date of completing discharge at Middlesbrough, calculated at the chartered rate for detention, viz., £130 per day; and as to the expenses, while willing to treat port dues and expenses at Middlesbrough as the equivalent of those which would have been incurred at Rotterdam, the owners claimed some port dues and expenses at Leith and a few guineas for special agency expenses at Middlesbrough. Eventually the cargo was sold by consent, and a sum, the amount of which was agreed between the parties, was ordered to be paid out of the proceeds to the claimants for freight; but the President, Sir Samuel Evans, dismissed the claims for detention and for the special expenses. It is against his decree that the claimants have now appealed. They have admitted throughout that, in fact, the cargo of iron-ore briquettes was to be discharged into Rhine barges at Rotterdam in order to be conveyed into Germany.

The cargo was shipped by the Aktieselskabet Sydvaranger of Kirkenes, and was to be delivered to V. V. W. Van Drich, Stoomboot en Transport on der Nemingen, both neutrals, but it is contended that Section 3 of the Order in Council, dated 11 March, 1915, warranted interference with the ship and her cargo by His Majesty's Navy on the voyage to Rotterdam. The President's directions as to freight were that "the fair freight must be paid to them, having regard to the work which they did," the principle, which he had laid down in the "*Juno*" (1 Trehern 151) being in his opinion applicable. The claim for detention is in truth a claim for damages for interfering with the completion of the chartered voyage, for it is admitted that delivery was taken at Middlesbrough with reasonable dispatch. That part of the claim which relates to the ship's being ordered to call at Leith, and the claim for expenses incurred there, are claims for damages for putting in force the above-named Order in Council, for it is not suggested that the order to call at Leith and thence to proceed to Middlesbrough was in itself an unreasonable way of exercising the powers given by the Order. The small claim for fees at Middlesbrough seems to relate to an outlay incident to the earning of the freight which has been paid, and was covered by it, but, if it is anything else, it also is a claim for damages of the same kind. "Damages" is the word used by the President in his judgment, and, although it was avoided and deprecated in argument before their Lordships, there can be no doubt that it and no other is the right word to describe the nature of the claims under appeal.

It is impossible to find in the express words of the Order any language which directs that such damages should be allowed, nor are the principles applicable which have been followed in the "*Anna Catharina*" (6 C. Rob. 10) and elsewhere, as to allowance of freight and expenses to neutral ships, whatever be the exact scope and application of those cases. Again, with the fullest recognition of the rights of neutral ships, it is impossible to say that owners of such ships can claim damages from a belligerent for putting into force such an Order in Council as that of 11 March,

1915, if the order be valid. The neutral exercising his trading rights on the high seas and the belligerent exercising on the high seas rights given him by Order in Council or equivalent procedure, are each in the enjoyment and exercise of equal rights, and, without an express provision in the Order to that effect, the belligerent does not exercise his rights subject to any overriding right in the neutral. The claimants' real contention is, and is only, that the Order in Council is contrary to international law and is invalid.

Upon this subject two passages in the "*Zamora*" (1916 2 A.C. 77) are in point. The first is at page 95, and relates to Sir William Scott's decision in the "*Fox*." (Edw. 311) "The decision proceeded upon the principle that, where there is just cause for retaliation, neutrals may by the law of nations be required to submit to inconvenience from the act of a belligerent power greater in degree than would be justified had no just cause for retaliation arisen, a principle which had been already laid down in the '*Lucy*.'"

Further, at page 98, are the words "An order authorising reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, and will have due weight as showing what, in the opinion of His Majesty's advisers, are the best or only means of meeting the emergency; but this will not preclude the right of any party aggrieved to contend, or the right of the Court to hold, that these means are unlawful as entailing on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case."

It is true that in the "*Zamora*" the validity of a retaliatory Order in Council was not directly in question, but these passages were carefully considered and advisedly introduced as cogent illustrations of the principle, which was the matter then in hand. Without ascribing to them the binding force of a prior decision on the same point, their Lordships must attach to them the greatest weight and, before thinking it right to depart from them, or even necessary to criticise them at any great length, they would at least expect it to be shown either that there are authoritative decisions to the contrary, or that they conflict with general principles of prize law or with the rules of common right in international affairs.

What is here in question is not the right of the belligerent to retaliate upon his enemy the same measure as has been meted out to him, or the propriety of justifying in one belligerent some departure from the regular rules of war on the ground of necessity arising from prior departures on the part of the other, but it is the claim of neutrals to be saved harmless under such circumstances from inconvenience or damage thereout arising. If the statement above quoted from the "*Zamora*" be correct, the recitals in the Order in Council sufficiently establish the existence of such breaches of law on the part of the German Government as justify retaliatory measures on the part of His Majesty, and, if so, the only question open to the neutral claimant for the purpose of

invalidating the order is whether or not it subjects neutrals to more inconvenience or prejudice than is reasonably necessary under the circumstances.

Their Lordships think that such a rule is sound and indeed inevitable. From the nature of the case the party who knows best whether or not there has been misconduct calling such a principle into operation, is a party, who is not before the Court, namely, the enemy himself. The neutral claimant can hardly have much information about it, and certainly cannot be expected to prove or disprove it. His Majesty's Government, also well aware of the facts, has already by the fact as well as by the recitals of the Order in Council solemnly declared the substance and effect of that knowledge, and an independent inquiry into the course of contemporary events, both naval and military, is one which a Court of Prize is but ill-qualified to undertake for itself. Still less would it be proper for such a Court to inquire into the reasons of policy, military or other, which have been the cause and are to be the justification for resorting to retaliation for that misconduct. Its function is, in protection of the rights of neutrals, to weigh on a proper occasion the measures of retaliation which have been adopted in fact, and to inquire whether they are in their nature or extent other than commensurate with the prior wrong done, and whether they inflict on neutrals, when they are looked at as a whole, inconvenience greater than is reasonable under all the circumstances. It follows that a Court of Prize, while bound to ascertain, from the terms of the Order itself, the origin and the occasion of the retaliatory measures for the purpose of weighing those measures with justice as they affect neutrals, nevertheless ought not to question, still less to dispute, that the warrant for passing the Order, which is set out in its recitals, has in truth arisen in the manner therein stated. Although the scope of this inquiry is thus limited in law, in fact their Lordships cannot be blind to what is notorious to all the world and is in the recollection of all men, the outrage namely committed by the enemy, upon law, humanity and the rights, alike of belligerents and neutrals, which led to and indeed compelled the adoption of some such policy as is embodied in this Order in Council. In considering whether more inconvenience is inflicted upon neutrals than the circumstances involve, the frequency and the enormity of the original wrongs are alike material, for the more gross and universal those wrongs are, the more are all nations concerned in their repression, and bound for their part to submit to such sacrifices as that repression involves. It is right to recall that, as neutral commerce suffered and was doomed to suffer gross prejudice from the illegal policy proclaimed and acted on by the German Government, so it profited by and obtained relief from retaliatory measures, if effective to restrain, to punish and to bring to an end such injurious conduct. Neutrals, whose principles or policy lead them to refrain from punitory or repressive action of their own, may well be called on to bear a passive part in the necessary suppression of courses, which are fatal to the freedom of all who use the seas.

The argument principally urged at the bar ignored these considerations and assumed an absolute right in neutral trade to proceed without interference or restriction, unless by the application of the rules heretofore established as to contraband traffic, unneutral service and blockade. The assumption was that a neutral, too pacific or too impotent to resent the aggressions and lawlessness of one belligerent, can require the other to refrain from his most effective or his only defence against it, by the assertion of an absolute inviolability for his own neutral trade, which would thereby become engaged in a passive complicity with the original offender. For this contention no authority at all was forthcoming. Reference was made to the Orders in Council of 1806 to 1812, which were framed by way of retaliation for the Berlin and Milan decrees. There has been much discussion of these celebrated instruments on one side or the other, though singularly little in decided cases or in treatises of repute, and, according to their nationality or their partisanship, writers have denounced the one policy or the other, or hav asserted their own superiority by an impartial censure of both. The present Order, however, does not involve for its justification a defence of the very terms of those Orders in Council. It must be judged on its merits and, if the principle is advanced against it that such retaliation is wrong in kind, no foundation in authority has been found on which to rest it. Nor is the principle itself sound. The seas are the highway of all, and it is incidental to the very nature of maritime war that neutrals in using that highway may suffer inconvenience from the exercise of their concurrent rights by those, who have to wage war upon it. Of this fundamental fact the right of blockade is only an example. It is true that contraband, blockade and unneutral service are branches of international law, which have their own history, their own illustrations and their own development. Their growth has been unsystematic and the assertion of right under these different heads has not been closely connected or simultaneous. Nevertheless, it would be illogical to regard them as being in themselves disconnected topics or as being the subject of rights and liabilities which have no common connexion. They may also be treated, as in fact they are, as illustrations of the broad rule that belligerency and neutrality are states so related to one another that the latter must accept some abatement of the full benefits of peace in order that the former may not be thwarted in war in the assertion and defence of what is the most precious of all the rights of nations, the right to security and independence. The categories of such cases are not closed. To deny to the belligerent under the head of retaliation any right to interfere with the trade of neutrals beyond that which, quite apart from circumstances which warrant retaliation, he enjoys already under the heads of contraband, blockade and unneutral service, would be to take away with one hand what has formally been conceded with the other. As between belligerents acts of retaliation are either the return of blow for blow in the course of combat, or are questions of the laws of war not imme-

diately falling under the cognizance of a Court of Prize. Little of this subject is left to Prize Law beyond its effect on neutrals and on the rights of belligerents against neutrals, and to say that retaliation is invalid as against neutrals, except within the old limits of blockade, contraband and unneutral service, is to reduce retaliation to a mere simulacrum, the title of an admitted right without practical application or effect.

Apart from the "*Zamora*" the decided cases on this subject, if not many, are at least not ambiguous. Of the "*Leonora*" (1918, *P.* 182), decided on the later Order in Council, their Lordships say nothing now, since they are informed that it is under appeal to their Lordships' Board, and they desire on the present occasion to say no more, which might affect the determination of that case, than is indispensable to the disposal of the present one.

Sir William Scott's decisions on the retaliatory Orders in Council were many, and many of them were affirmed on appeal. He repeatedly and in reasoned terms declared the nature of the right of retaliation and its entire consistency with the principles of international law. Since then discussion has turned on the measures by which effect was then given to that right, not on the foundation of the principle itself, and their Lordships regard it as being now too firmly established to be open to doubt.

Turning to the question which was little argued, if at all, though it is the real question in the case, whether the Order in Council of 11 March, 1915, inflicts hardship excessive either in kind or in degree upon neutral commerce, their Lordships think that no such hardship was shown. It might well be said that neutral commerce under this Order is treated with all practicable tenderness, but it is enough to negative the contention that there is avoidable hardship. Of the later Order in Council they say nothing now. If the neutral shipowner is paid a proper price for the service rendered by his ship, and the neutral cargo-owner a proper price according to the value of his goods, substantial cause of complaint can only arise if considerations are put forward which go beyond the ordinary motives of commerce and partake of a political character, from a desire either to embarass the one belligerent or to support the other. In the present case the agreement of the parties as to the amount to be allowed for freight, disposes of all question as to the claimants' rights to compensation for mere inconvenience caused by enforcing the Order in Council. Presumably that sum took into account the actual course and duration of the voyage and constituted a proper recompense alike for carrying and for discharging the cargo under the actual circumstances of that service. The further claims are in the nature of claims for damages for unlawful interference with the performance of the Rotterdam charterparty. They can be maintained only by supposing that a wrong was done to the claimants, because they were prevented from performing it, for in their nature these claims assume that the shipowners are to be put in the same position as if they had completed the voyage under that contract, and are

not merely to be remunerated on proper terms for the performance of the voyage, which was in fact accomplished. In other words they are a claim for damages, as for wrong done by the mere fact of putting in force the Order in Council. Such a claim cannot be sustained. Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

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[DELIVERED BY LORD SUMNER.]

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