

Privy Council Appeal No. 50 of 1918.

In the matter of the Steamship "Turul."

His Majesty's Procurator-General - - - - - *Appellant*

v.

The Master and Owners of the Steamship "Turul" - - - - - *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES, ADMIRALTY JURISDICTION (IN PRIZE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH JANUARY, 1919.

Present at the Hearing :

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

[*Delivered by* LORD SUMNER.]

In this case His Majesty's Procurator-General moved the Court below—the Supreme Court of New South Wales (in Prize)—for a decree condemning the Hungarian ship "Turul," and that motion was refused. The Crown now appeals.

The "Turul" arrived at Port Jackson with cargo for Sydney and Newcastle on the 7th August, 1914. War was declared by His Majesty upon the Austro-Hungarian Empire on the 12th August and the "Turul" was seized in prize on the 13th. Her ship's papers were taken away, and she was also deprived of her charts. On the 15th a Proclamation was issued in order to fix those days of grace, which are declared by Article 1 of the Sixth Hague Convention to be desirable, and, by the terms of that Proclamation, the paragraphs of it which are now material came into effect if and when one of the Ministers of State was satisfied

of certain matters and had taken certain steps, of which publication in the Commonwealth Gazette was one. Though there is no evidence upon the subject, the whole case has proceeded upon the assumption that the Minister was duly satisfied, and that those formal steps were taken, and that thereupon the Articles in question came into full force and effect, and their Lordships think it unnecessary to pursue this point.

By the terms of the Proclamation, from and after its publication "no enemy merchant ship shall be allowed to depart, except in accordance with the provisions of this Order." Then, Articles 3 to 8 having come into force, Article 3 says that "Subject to the provisions of this Order, enemy merchant ships which— (i) At the date of the outbreak of hostilities were in any port in which this Order applies, . . . shall be allowed up till midnight on Saturday the 22nd day of August, 1914, for loading or unloading their cargoes, and for departing from such port." As a matter of fact the "Turul" was allowed to discharge, and when her discharge finished, which was on the 20th August, she was directed to be moved to another part of the harbour, and there a watchman was put on board either on behalf of the Marshal of the Prize Court or on behalf of the Customs Officers who had seized the ship; it appears to be immaterial to decide which was the case.

On the 22nd August at midnight the days of grace expired. Now the question is whether this ship "Par suite de circonstances de force majeure, n'aurait pu quitter le port ennemi pendant le délai visé à l'Article précédent" within the terms of Article II of the Convention. If that was so, then she could not be confiscated, and the order made by the Court below was right. It is clear that the vessel could not leave the enemy port within the period contemplated in the preceding Article unless, among other things, her ship's papers and charts were returned to her, and the watchman was removed. Acts had been done in exercise of the belligerent rights of the Crown, which in themselves perforce detained the vessel and which the vessel in herself was powerless to undo, and the only ground upon which it can be said that she was not subject to *force majeure* during the period down to midnight of the 22nd August is that the authorities had decided, and by virtue of the Proclamation had made known their decision, that these acts would be undone at the request of the Captain of the vessel, if he chose to avail himself of the opportunity given by the Proclamation, and to assert the conventional rights secured by the Hague Convention.

The view their Lordships take of the Proclamation is that the terms of it did not constitute an intimation to the Captain that upon his choosing to avail himself of the days of grace, to apply for a pass, and to intimate what his port of destination was, so that its name might, if approved, be inserted in the pass, he would then without difficulty, and without risk of refusal, have his charts and his ship's papers returned to him, and have the watchman withdrawn, so that he would be free to leave by

midnight of the 22nd. It is to be remembered that a Proclamation of this kind may operate in favour of the belligerent who publishes it, since it may be used to diminish, by limiting them, the advantages which the Convention was intended to secure to the enemy ship, for by its publication the belligerent Power defines the number of the days of grace—"délai de faveur suffisant"—and determines also some at any rate of the terms upon which the exercise of the privilege is to be enjoyed. Their Lordships think that the language in which the Crown exercises the right of defining this period of grace within the Article ought to be explicit and unambiguous, and explicit and unambiguous with reference to the party, whose opportunity of availing himself of the benefits of the Convention is to be affected by the operation of the Proclamation upon his particular case. It would ill-become a Sovereign Power, and would ill-become a Court of Prize adjudicating upon the rights of others as against the officers of that Sovereign Power, to seek to give effect to a Proclamation which was less than clear, in order to curtail the advantages which the Convention was intended to secure to a ship which finds itself in its enemy's port. There was, in their Lordships' view, nothing that sufficiently stated to the persons interested in this ship that the seizure, the removal of the papers and the charts, and the custody given to the watchman, were all matters which were intended to be covered by the general terms employed in the Proclamation, and that this ship, in spite of these particular circumstances, would be allowed to depart within the limited time merely by virtue of the general terms of the Proclamation. If the Captain of the vessel had had the opportunity of departing and had for reasons of his own decided not to avail himself of it, as, for example, because he could not sail without coals and could get no money to procure them, or that he was not sufficiently confident that a British passport would protect him from capture by vessels belonging to His Majesty's Allies, then it has been settled that in such a case it is his own choice—it may be also his own misfortune—that detains him in the port, but the ship is liable to be confiscated, because it cannot be truly said that *force majeure* is what has prevented his taking advantage of the opportunity. There was some evidence upon which such a finding might have been arrived at, but the learned Judge in the Court below did not act upon that evidence, and their Lordships do not see their way to any finding of fact at which he did not arrive. They therefore think that he rightly refused to confiscate the vessel.

As to the other point, that the matter was already decided by the decree dated 2nd November, 1914, their Lordships think that it is unnecessary to express any opinion, since, whatever the intention of that decree may have been, the result would only be to arrive at the same conclusion, namely, that the appeal fails.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

IN THE MATTER OF THE STEAMSHIP "TURUL."

HIS MAJESTY'S PROCURATOR-GENERAL

v.

THE MASTER AND OWNERS OF THE STEAMSHIP
"TURUL."

DELIVERED BY LORD SUMNER.

Printed by Harrison & Sons, St. Martin's Lane, W.C.

1919.